RECONSIDERING CONSTITUTIONALISM: CONTEXT AND THE CONSEQUENCES OF JUDICIAL REVIEW

by

WILLIAM JAMES YOUNG

A dissertation submitted to the

School of Graduate Studies

Rutgers, The State University of New Jersey

In partial fulfillment of the requirements

For the degree of

Doctor of Philosophy

Graduate Program in Political Science

Written under the direction of

Lisa L. Miller and R. Daniel Kelemen

And approved by

_____

_____

_____

_____

_____

New Brunswick, NJ

October, 2019

ABSTRACT OF THE DISSERTATION

Reconsidering Constitutionalism: Context and the Consequences of Judicial Review

By WILLIAM JAMES YOUNG

Dissertation Directors: Lisa L. Miller and R. Daniel Kelemen

For decades, social scientists and legal academics have debated the desirability of strong courts in democratic systems of government. In these debates, however, sweeping claims about the impact of judicial intervention in politics frequently obscure the very different roles that judiciaries play cross-nationally. Moreover, these claims are seldom accompanied by rigorous empirical evidence. Taking these debates as my point of departure, I argue that the institutional context in which judiciaries operate conditions their impact on the democracies they serve. In particular, I distinguish between high courts whose judicial review merely constrains government action and high courts whose judicial review can also mandate the government provide material goods and services. Drawing on original survey experiments in Colombia and Chile, South America, elite interviews, and qualitative case comparisons of the two countries, I find that when courts practice judicial review that constrains government action, it negatively impacts the political participation of ordinary citizens and can lead to increased support for violations of democratic norms. I find no such ill effects when courts practice judicial review that mandates the government provide material goods and services. In neither case do I find evidence that judicial review leads to decreased

judicial legitimacy, contrary to the implications of arguments made by many skeptics of judicial power.

ACKNOWLEDGEMENTS

I owe a tremendous debt of gratitude to a number of individuals for their support and guidance, both while I was writing this dissertation and throughout graduate school in general.

First, many thanks to the members of my dissertation committee for their helpful advice and feedback at various stages of the project. I was lucky enough to have Lisa Miller and Dan Kelemen as co-chairs, and learning from them has been deeply rewarding. They read many, many drafts of this project and patiently guided me from muddled thoughts about what I wanted to research to the completion of a whole dissertation. For that, I am extremely thankful. Thanks also to Bob Kaufman for his willingness to serve on the committee, to Rick Lau who helped me think through and explain the experiment, and to Lisa Hilbink who, despite being my outside reader, was gracious with her time and offered useful feedback on multiple occasions.

Several other individuals had an important impact on this project. Milt Heumann has served as an informal advisor throughout graduate school, and he also read and offered feedback on parts of the dissertation. Likewise, Katie McCabe provided helpful guidance on the experiment on multiple occasions. Juliana Restrepo and Hector Bahamonde gave great advice on researching Colombia and Chile, respectively, and revised my Spanish translations of the survey instrument. Hector, his wife Nicole, and her aunt Mabel also graciously served as hosts during my fieldwork in Chile. Their hospitality made my time there quite pleasant.

The completion of graduate school is as much a testament to my family as it is to my own efforts. I was blessed with a mother and father who value education, who pushed me to pursue what I was interested in rather than just what would make money, and who taught me the value of a strong work ethic from the time I was small. Without their guidance and encouragement all these years, none of this would have come to fruition. Thanks also to my siblings, Zach and Annie, who have been a part of this journey and who do a great job of helping me not to take myself too seriously.

My most profound gratitude goes to my wife, Gabby. She has been a constant companion and my biggest source of support during graduate school. It is difficult to imagine trying to finish a project like this without her, because her company made even the longest, most frustrating days more enjoyable. I can't wait to see what is in store for us next!

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

Chapter 1. Introduction

I do not know whether the judges in Germany could have stopped Hitler from coming to power in the 1930s. But I do know that a lesson of the Holocaust and of World War II is the need to enact democratic constitutions and ensure that they are put into effect by judges whose main task is to protect democracy.

-Aharon Barak, former President of the Israeli Supreme Court, *The Judge in a Democracy*

I write separately to call attention to this Court's threat to American Democracy … The practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

-Antonin Scalia, United States Supreme Court, dissenting in *Obergefell v. Hodges*

In February of 2018, Fabricio Alvarado won the first round of Costa Rica's presidential elections with a quarter of the vote. It was a startling victory because, just a month before, Alvarado's support stood in the single digits. The candidate who took third place likely captured the sentiment of many when he said, "'Hand on heart, [speaking] frankly and openly, I did not see it coming that Fabricio would go from 3% to 26% in just three weeks'" (*BBC* 2018) [1] Even more surprising, Alvarado remained essentially tied with his competitor until just prior to the general election (*Associated Press* 2018),[2] which he lost decisively.

[1]2018. "Costa Rican Poll goes into runoff as evangelical leads." *BBC*. Available at: https://www.bbc.com/news/world-latin-america-42938510
[2]2018. "Gay marriage question could define Costa Rican election." *Associated Press*. Available at: https://www.apnews.com/35f59ca59a7d4e8892dc839a9674e863

What explained Alvarado's overnight rise to prominence? In January 2018, the Inter-American Court of Human Rights ruled in response to a motion from Costa Rica that signatories of the American Convention on Human Rights must recognize same-sex marriages and allow transgender individuals to change their names on official forms of identification. The ruling stoked the ire of Costa Rican conservatives, and Alvarado, an evangelical preacher, made opposition to same-sex marriage and the Court's ruling a central focus of his campaign, promising to withdraw the country from the Inter-American Court and restore Costa Rican sovereignty. In response, he quickly became the preferred candidate of the nation's many conservatives (Malkin 2018).[3,4]

Although likely unintentional, Alvarado's criticism of the Court's ruling as an attack on Costa Rican sovereignty echoes the work of some scholars who see courts as undemocratic, counter-majoritarian institutions whose decisions strip democratic majorities of the ability to determine the direction of their country. Indeed, in recent years there has been considerable worry among scholars about the quality of liberal democracy, and what some see as an outright democratic recession, around the globe (e.g., Zakaria 1997, Diamond 2015, Foa and Mounck 2016, Levitsky and Ziblatt 2018). As populist leaders have risen to power in a number of western democracies and these worries have intensified, a leading explanation that scholars offer for the democratic decline is the west's overemphasis on liberalism and its under emphasis on democracy (Mudde 2015, Berman 2017, Mounk 2016, Rodrik 2018). In this account, concern with protecting

[3] Malkin, Elisabteh. 2018. "In Costa Rica Election, Gay-Marriage Foe Takes First Round." *The New York Times*. Available at: https://www.nytimes.com/2018/02/05/world/americas/costa-rica-election-fabricio-alvarado.html

[4] Thanks to Kaitlen Cassell for pointing me to this story.

individual rights and freedoms has led countries to systematically limit "the people's" influence over important political outcomes, handing decision-making authority over to unelected, unaccountable institutions instead. Not least among such institutions are courts. As politics become judicialized, the story goes, people begin to believe that their elected officials either do not or cannot actually represent them. As citizens repeatedly hear that their elected officials' hands are tied, in large part because of courts, a crisis of trust in "the system"—of which unelected, "elite" judges are cast as an integral part—emerges. Populists then feed on this crisis, casting themselves as the only ones capable of correcting a broken system by carrying out the will of the people, those whose voices have been ignored, running roughshod over democratic norms in the process (see Fukuyama 2014, Müller 2016a, Müller 2016b, Berman 2017, Kelemen 2018, Mounk 2018).

This story is certainly compelling. As the Costa Rican example illustrates, it is not difficult to imagine that ordinary citizens become frustrated if their will is constantly thwarted by out of touch judges that they are powerless to hold accountable. It is also not difficult to imagine that this frustration leads to greater tolerance for violations of democratic norms in the name of "getting things done" or to outright political disengagement until an opportunistic populist mobilizes people on the basis of their discontentment. However compelling, though, this story has been asserted rather than tested empirically.

Complicating things further, scholars who generalize about the pernicious effects of courts must deal with the immense variation that exists in the design and function of judiciaries in democracies cross-nationally (Hilbink 2008, Schor 2008). The extent to

which judges are insulated from politics and unrepresentative of the broader populace, for example, varies widely from country to country. Moreover, national constitutions give judiciaries very different materials with which to work. Given these differences, what if some courts affect peoples' political behavior differently than others? What if some courts are more likely than others to uphold the will of democratic majorities, or even force other elites to yield to them, as they interpret and apply very different types of constitutions in very different political, economic, and social contexts?

We are left with a question, then. Does routine involvement of courts in policy and politics—what is often called the judicialization of politics—lead to increased frustration and disengagement, and to less support for democratic norms on the part of ordinary citizens? Moreover, how do important variations, of the sort listed in the last paragraph, condition whatever effects courts may have? As I will show, despite decades of debate among legal scholars and social scientists over the democratic credentials of courts, a lack of attention to the empirical realities in which courts operate, and a dearth of conceptual clarity about what it is that courts do when they intervene in politics, have contributed to considerable conceptual confusion and over generalizing. Resolving this will be an important first step in evaluating the impact(s) courts may have on the political behavior of ordinary people.

Courts and Democracy: The debate and the literature's expectations

Those who are critical of courts and the role they may have played in recent democratic recessions fall neatly on one side of a longstanding debate among legal scholars and social scientists over the democratic credentials of courts. Considering their

claims in light of this debate may prove fruitful in evaluating both. Along with the more recent critics, there are some in this debate who see courts as counter-majoritarian, anti-democratic institutions that cut short the democratic process when they block the actions of elected officials, a view represented by Justice Scalia's comment in the epigraph. Others, like Justice Barak, view courts as a source of the rule of law, an arena for citizen engagement, and a source of support for liberal democracy itself. The stakes for both sides in this debate are high: Powerful courts either represent serious threats to a nation's democracy or an important mechanism by which democracy is protected.

Whichever side of the debate one falls on, it is undeniable that in democracies around the globe judicial power has expanded exponentially in recent decades. Today, at least 83 percent of constitutions contain provisions for the constitutional review of legislation (Ginsburg and Versteeg 2013), a practice often called constitutionalism. At least initially, the impetus for the growth in constitutionalism may have been the end of the Cold War. The fall of the Soviet Union left the United States as the world's only superpower, and some scholars assert that soon thereafter many countries began imitating the United States' practice of allowing courts to review the constitutionality of government policies and actions. However, other models, especially the Kelsenian/German model, have since superseded the American in influence (Tate and Vallinder 1995, Ginsburg and Versteeg 2013). Whatever its causes, the sheer number of countries in which courts engage in the practice make constitutionalism a truly global phenomenon. Given its scope, it should come as no surprise that scholars do not agree on its merits.

Indeed, there are many well-respected experts on both sides of the debate over judicial power. Justice Barak, the one-time president of the Israeli Supreme Court, asserted that the role of a *Judge in a Democracy*, to borrow the title of his book, is to "protect the Constitution and democracy" (Barak 2006, xviii), and for him this included protecting even the uncodified values he believed a democracy was required to have. Writing in the late 1990s, Ackerman (1997) surveyed the rise of constitutionalism across the globe over the preceding 60 years and was also enthusiastic about the role judges could play in protecting human rights. Meanwhile, for Dworkin (1990), giving British courts judicial review meant that the country would become more democratic.

Some social scientists have also been positive about the democracy-enhancing capabilities of courts and judicial review. Zemans (1983) points out that citizens often use law to promote their own interests and concerns in an effort to regulate behavior, and argues that this legal mobilization should be considered a form of democratic participation. Not only that, she says, but courts are even more democratic than other institutions because they hear the complaints of individual citizens. The legislature, on the other hand, requires serious feats of collective action for citizens to accomplish much. In another argument-from-design, Kelemen (2012) asserts that the design of high courts is one source of their democratic legitimacy. Whereas legislatures (or at least certain chambers in them) are meant to reflect the will of the current majority, the judiciary is set up to reflect the combined will of several recent majorities—the ones that existed when a judiciary's members were appointed to the bench. Taking a different approach, Almendares and LeBihan (2015) argue on the basis of a game theoretic agency model

that judicial review is democracy-enhancing as it incentivizes elected officials to enact policies in line with voters' interests.

Many of the criticisms of courts in a democracy, on the other hand, center on the judicialization of politics. Motivating these criticisms is the conviction that in a democracy important questions ought to be decided by elected representatives of the people and not unelected judges, especially judges with an ideological axe to grind (Waldron 2006, Bork 2003). Moreover, some work shows that elites create strong judges in contexts of diffuse, hard to control politics because they believe judges will help to protect their interests or insulate the policy areas they care about from the control of the majority (Ginsburg 2003, Hirschl 2004).

Some extant work brings us closer to the sorts of concerns advanced recently by scholars of democratic recessions. For example, if it did not rely on the courts to determine the Constitution's meaning, says Mark Tushnet (1999), the United States could instead practice what he calls "populist constitutional law," which "rests on the idea that we all ought to participate in creating constitutional law through our actions in politics" (157). Clearly, the American people are prevented from this sort of engagement with the Constitution by the current, judge-dominated setup. It should be pointed out, however, that other scholars (e.g. Graber 1993, Frymer 2003, Whittington 2005) avoid constructing such stark dichotomies between democratically legitimate policies passed by elected officials and illegitimate, counter-majoritarian policies handed down by judges. In these accounts, the judiciary often acts when the legislature cannot or will not—an outcome favored by some legislators themselves, who would prefer not "to bear the responsibility

for resolving conflicts that divide the body politic" (Graber 1993, 37) or because they cannot achieve the outcomes they want legislatively (Whittington 2005).

What democratic outcomes, specifically, might judicial activity affect? A number of scholars examine the effect of courts on social policy, often finding that they are more limited in their capacity to effect change than many imagine (e.g., Horowitz 1977, Hirschl 2004, Rosenberg 2008). Moving beyond policy, however, to work more in line with my focus here, some earlier research hypothesizes about the negative behavioral effects of judicial involvement in politics. Rosenberg (2008) reviews some of the earliest literature from the American context on this point. For example, Thayer (1901) worried that the fact that individual Americans could bring cases to court and nullify the laws and actions of elected officials could "'dwarf the political capacity of the people'" (Rosenberg 2008, 12). Many years later, McCann (1986) found as much among activist groups who relied heavily upon the courts to advance their agendas: their focus on the courts seemed to lead to a substantially constrained view of what constituted political action. Relatedly, work by Handler (1978) suggests that when inherently political issues are cast as legal issues, they lose appeal for many people.

This brings us to the recent work which situates courts as important players in the political crises sweeping many parts of the world. How, exactly, have courts helped to bring about these crises? The argument boils down to the assertion that courts are one of a variety of mechanisms used to insulate important policy areas from the purview of ordinary democratic politics (Mudde 2015, Mounk 2016, Rodrik 2018). Indeed, even outside the context of democratic recessions, some social scientists have raised concerns

over the democratic deficits that can be created by veto points like judicial review (e.g., Miller 2016). "It is hardly surprising," says Mounk (2016), reflecting on such assertions,

> that citizens on both sides of the Atlantic feel that they are no longer masters of their political fate. For all intents and purposes, they now live under a regime that is liberal, yet undemocratic: a system in which their rights are mostly respected but their political preferences are routinely ignored … Alienated from an unresponsive political establishment, voters are flocking to populists who claim to embody the pure voice of the people. Like Trump, they promise to cast aside the institutional roadblocks – from critical media and independent courts to international institutions like the EU or the World Trade Organization – that stand in the way of the collective will.[5]

In a similar vein, Cas Mudde (2015) says that when institutions like courts and central banks are employed to "[exclude] controversial areas from the democratic process altogether … populism behaves like the drunken guest at a dinner party, who doesn't respect the rules of public contestation but spells out the painful but real problems of society."[6]

We are now in a position to posit some initial theoretical expectations based on the connection extant work has made between judicialization and people's political behavior. As I hope is clear by now, my goal with this project is to begin adjudicating between arguments offered by critics and proponents of powerful courts in democracies. To give some focus to my analysis, however, I will discuss the expectations that arise from the perspective of those who are most skeptical about the role that courts play. I do

---

[5] Mounk, Yascha. 2016. "Illiberal Democracy or Undemocratic Liberalism?" *Project-syndicate*. Available at: https://www.project-syndicate.org/commentary/trump-european-populism-technocracy-by-yascha-mounk-1-2016-06

[6] Mudde, Cas. 2015. "The Problem with Populism." *The Guardian*. Available at: https://www.theguardian.com/commentisfree/2015/feb/17/problem-populism-syriza-podemos-dark-side-europe

this because, while these arguments are the most provocative, they remain almost entirely untested empirically.

First, if courts essentially cut short the democratic process (Tushnet 2008) and if, as has been asserted of the United States, "there is the danger that litigation by the few will replace political action by the many and reduce the democratic nature of the … polity" (see Rosenberg 2008, 12), one observable implication should be that the more involved high courts become in politics, the less ordinary people engage in politics outside of the courts. In the absence of a decline in non-judicial political engagement, it would be difficult to sustain claims that courts make a polity less democratic or shut down the political process.

Second, some have asserted that the frustration generated by so-called undemocratic liberalism might lead people to mobilize around populist candidates as a form of backlash against a system that ignores their political preferences (Mounk 2016). A large literature exists on populism, and researchers have pointed to variables ranging from immigration to neoliberalism as drivers of support for the phenomenon (e.g., Norris and Inglehart 2019). How might courts contribute? Drawing on the Mounk and Mudde quotes above, if courts have a negative effect on democratic attitudes and behavior, we should expect to see that the more judicialized politics become, the more citizens will be willing to tolerate anti-democratic practices like disrespect for "the rules of public contestation" (Mudde 2015) and the undoing of "institutional roadblocks" (Mounk 2016) like a free press, courts, etc., (Levitsky and Ziblatt 2018) that supposedly block the majority will.

Finally, underlying both of the previous theoretical expectations is an attack on the democratic legitimacy of the judiciary. After all, an institution that short circuits the democratic process and foments tolerance for anti-democratic norms and behaviors is hardly democratically legitimate. Some scholars have explicitly connected judicialization and declining judicial legitimacy. Ferejohn (2002), for example, worried that as politics became judicialized, politicians would respond by politicizing the judiciary, which would in turn lead to waning levels of legitimacy for the institution. Judicial legitimacy has been studied extensively in the United States and refers to the psychological attachment that citizens have to the institution. It is the "reservoir of … goodwill" (Easton 1965, 273) that the judiciary enjoys among average people; their belief that the judiciary is fine as is and does not need to be changed (e.g., Gibson et al. 2005). Therefore, if the legitimacy of the institution is imperiled by judicialization, we would expect that citizens confer less legitimacy on courts the more judicialized that politics become. Of course, given that recent scholarship on law and politics has converged on the idea that judicial power is often politically constructed (e.g., Ginsburg 2003, Hirschl 2004; see Graber 2006 for a summary of this literature), it is also possible that ordinary citizens see little that is illegitimate when high courts do what their elected officials have empowered them to do. The empirical tests I employ in this project will help us to resolve this tension.

Variation as a Complicating Factor

The theoretical expectations I have just posited flow directly from claims scholars have made about the democracy-dampening impact judicialization has on political attitudes and behavior. When we try to square those expectations with the immense

variation in how courts actually operate, however, it becomes clear that there is reason to be suspicious of attempts to generalize about courts writ large. Much of the preceding literature review, like much of the law and politics literature in general, is based on the United States Supreme Court. Understanding what impact, if any, courts *as courts*, have on the political behavior of ordinary people first requires decentering the U.S. experience and paying heed to important differences in what these institutions do cross-nationally.

In an excellent article that in many ways served as the starting point for this project, Hilbink (2008) details some of the variation in both the design and function of courts in constitutionalist countries in an effort to push back against broad generalizations about their democratic credentials. Perhaps most importantly, while numerous variants of the criticism that courts are counter-majoritarian and therefore anti-democratic have been levied by scholars, Hilbink responds that many countries have taken steps to limit the power of their judges, such that in places like Canada, New Zealand, and South Africa, courts do not always have the ability to overrule legislatures on questions of constitutionality. If this is true, then it is hard to sustain criticisms implying that courts *as courts* are thwarters of the will of democratic majorities.

As we have already seen, however, there are numerous countries in which high court rulings retain "normative finality" (Tushnet 2008) on many of the most important questions facing the polity. Even if we assume that it is these sorts of courts to which scholars have been referring in their criticisms, there are still other potentially relevant sources of variation that must be considered. Where courts and judges have been criticized as being too insulated and unrepresentative, for example, Hilbink points out that countries utilize a host of different methods for selecting their judges and that how

long judges can serve varies from country to country. Life tenure for judges is not commonplace, and some countries such as Germany have a goal of "rough proportionality in partisan, religious, and geographic representation on the court" (230). Additionally, the argument that judicial review is always a mechanism that favors and protects elites seems odd when we consider that some countries have taken steps to make sure non-elites have access to the judiciary.

Just what all of this means for the practice of democracy is, of course, an open and empirical question. But that is the point. Before we understand whether each of these, and the many other institutional differences that exist in courts and democracies cross-nationally, lead to different outcomes, we ought to be cautious when making arguments that generalize about the (in)appropriateness of courts in democracies. It is probably beyond the scope of any one project to categorize all of that variation and analyze its effects, but we can begin the endeavor by focusing on one glaring distinction in the judicial role across countries: judicial output. That is, what do courts do when they engage in judicial review?

The sorts of things courts are given the power to rule on, their "models of constitutionalism," can hardly be separated from the models of democracy embraced by their country (Couso 2011), and it bears pointing out that not all countries have the sort of "liberal-individualist" constitution that the United States has (Hilbink 2008, 238). In much of Latin America, for instance, courts have stepped into the political process in order to mandate the provision of public goods and services that citizens are ensured in their constitutions (Hilbink 2008). Indeed, in that region judicialization is often about forcing the government to deliver rights promised in national constitutions rather than

keeping the government from infringing upon rights as it frequently is in the United States (see Sieder et al. 2005).

For now, the important question is why this distinction in judicial output complicates the theoretical expectations that come from existing literature. To answer that question, consider the following two cases which illustrate starkly different approaches to judicial review: In March of 1984, 4-year-old Joshua DeShaney was beaten so severely by his father that he suffered irreparable brain damage, likely guaranteeing that he "spend the rest of his life in an institution for the profoundly retarded" (*DeShaney v. Winnebago Cty. DSS*, 489).[7] Joshua's father was tried and convicted of child abuse, but his mother, who was divorced from his father and did not have custody of Joshua, sued the Winnebago County Department of Social Services for failing to protect the boy. She claimed that the county officials' "failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (*DeShaney v. Winnebago Cty. DSS*, 489). DSS officials had indeed been aware of accusations of child abuse against Joshua's father for more than two years prior to the incident in 1984. Acknowledging the tragedy of the case, the Supreme Court nonetheless found in favor of the Winnebago County DSS. A 6-3 majority held that the Due Process Clause

> is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. (*DeShaney v. Winnebago Cty. DSS*, 489).

[7] 489 U.S. 189 (1989)

Contrast *DeShaney* with a November 2016 case from the Constitutional Court of Colombia in Bogotá. In that case, "Irene" and "Alfredo"[8] sued their insurance company, *Salud EPS,* for ignoring their petition to give their thirteen-year-old son access to euthanasia, a right the Constitutional Court had granted adults two years prior. Their son, "Francisco," suffered severe cerebral palsy since birth, which led to debilitating health complications. His parents asserted that Francisco "'develops illnesses that each day make his existence more difficult, provoking great suffering' and he suffers 'smothering due to lack of oxygen, day and night, and under our social security system the treatments are not only late, they're ineffective'" (T-544/17).[9] After repeated conflicts with *Salud EPS,* which Alfredo and Irene alleged was negligent in its provision of the care and treatment their son needed, Francisco developed such grave complications that his parents petitioned the company to allow their son to be euthanized.

In their suit against *Salud EPS*, a private insurance company, Francisco's parents claimed that the company's silence violated their constitutionally-protected right to petition. Although Francisco had died by the time his case reached it, the Constitutional Court ruled on that issue as well as additional potential rights violations. It reasoned that the circumstances which lead to the parents' petition brought to light

> situations that involve other fundamental rights … it is important to remember that if a constitutional judge finds that rights not invoked by the petitioner are violated or threatened, 'not only can he refer to them in his ruling and decide as necessary, imparting the necessary orders for their full and thorough defense, he should do so.' In effect, the judge plays an active and independent role that involves the search for truth and the effective protection of the fundamental rights that are violated (T-544/17).

[8] The Colombian Constitutional Court protects the privacy of minors by changing any information that could be used to identify them, including the names of their parents.
[9] This and all subsequent quotations from the case are the author's translations.

In its "active and independent role" in this case, the Court decided it would determine the constitutionality of child euthanasia and whether Colombian children's rights were violated by the state's failure to facilitate access to euthanasia for minors. Ultimately, it ruled that with "human dignity as a founding principle" of the Colombian state and a defining constitutional principle, Colombian children have a constitutionally-protected right to euthanasia (T-544/17). It therefore ordered the state to issue, with urgency, regulations which would guarantee minors with terminal illnesses the right to seek euthanasia. In March of 2018, Colombia's Department of Health and Social Protection issued those regulations.

The facts of the U.S. and Colombian cases differ in obvious and important ways. The U.S. Supreme Court ruled on whether the government could be held responsible for failing to protect a child from his abusive father while the Colombian Court determined whether the state could be required to provide children access to a controversial medical procedure that would end their lives. Without trivializing these differences, however, I want to suggest that the cases are also similar in several regards. Both were brought by parents whose children faced terrible suffering at the hands of others. Both involved questions of whether the government's inaction—in the form of not removing Joshua from the home of his abusive father or facilitating the practice of child euthanasia—violated the children's constitutional rights. Importantly for our purposes here, when we consider how both courts responded to these similarities, we observe two very different approaches to the practice of judicial review.

In the U.S. case, the Supreme Court denied Joshua's mother a remedy because the Fourteenth Amendment imposes no positive obligations on government—no

requirements that it deliver the rights it is forbidden from violating. In the Colombian case, on the other hand, where the Constitution contains numerous guarantees of public goods and services, the Constitutional Court went out of its way to clarify that children with terminal illnesses not only have a right to euthanasia, but the Colombian government also had the responsibility to issue regulations facilitating the realization of that right. The U.S. and Colombian cases thus highlight two fundamentally distinct ways that courts can be involved in democratic government. Though the courts' actions in both cases constitute judicial review, it should be empirically tested, rather than assumed, that such different types of judicial output exert the same impact on peoples' political attitudes and behavior.

In *DeShaney*, the US Supreme Court reaffirmed its commitment to a form of constitutional review in which citizens take the government to court in order to restrain it from violating their rights; that is, to stop it from engaging in a certain activity or from implementing a piece of legislation. We can refer to this sort of judicial review as *constraint-seeking* because the litigants who ask the court to review the government's action want the government to stop that action. In Colombia, in addition to constraining the government, citizens can also take the government to court hoping for a mandate that it deliver the material goods and services they are promised in the Constitution, and the Court is prepared to issue such a mandate, as we saw above. This form of review we can call *mandate-seeking*. Even if both courts are highly effective at what they do, citizens' behavioral responses to constraint-seeking review may differ from their responses to mandate-seeking review.

Given the immense cross national variation in the constitutional entitlements that exist for courts to engage with, considering the output of courts is necessary for understanding any impact they might have on citizens' behavior and, thereby, the health of a country's democracy. This distinction in court outputs reflects a fundamental difference in the role that the institution is asked to play in society and is worthy of much more attention than it has been given by scholars to date. As such, the first substantive portion of this project will closely follow Gary Goertz' (2006) advice on building social science concepts in order to accurately conceptualize judicial review generally as well as the mandate-seeking and constraint-seeking subtypes of the concept. The mandate/constraint-seeking distinction also highlights the fundamentally political nature of law. Consider, for example, that by design constraint-seeking review will frequently concern individual rights while mandate-seeking review will often have as its focus the redistribution of resources. I explore this in greater detail in Chapter 2.

Based on the preceding discussion, in order to test the literature's negative theoretical expectations while staying true to institutional context, I field an experiment in Colombia and Chile, South America, that simulates judicialization by exposing subjects to a series of decisions by their Constitutional Court and then measures each of the outcomes stipulated in the theoretical expectations. This allows me to test whether increasing the salience of judicialization leads to outcomes that scholars critical of judicialization have asserted. Importantly, Colombia and Chile represent opposite "ideal types" when it comes to judicial power. Unlike the role we have already seen the Colombian Court play in mandating government action, the Chilean Court primarily issues constraint-seeking decisions. By observing the effects of judicialization within and

across these two countries, then, we can test both the literature's argument that judicialization negatively impacts political behavior as well as my argument that the effects of judicialization depend on whether particular decisions constrain government action or mandate it.

Final Considerations: Agreement with the Court and Learning about Decisions

Two final considerations are warranted. Aside from the type of judicial review that courts practice, we cannot ignore the reality that in most cases one party wins and another loses. It has been argued in the context of the United States Supreme Court that subjective perceptions of the Court's ideology matter to the legitimacy that individuals confer on the Court. "When individuals perceive they are in ideological disagreement with the Court's policymaking, they ascribe lower legitimacy to the Court compared to individuals who perceive that they are in agreement with the Court" (Bartels and Johnston 2013, 197). It could be, then, that individuals who consistently agree with what their Court does—at least in salient political cases—are happier with things in their country and therefore exhibit greater levels of political engagement, higher support for democratic norms, and confer greater legitimacy on their Court, than those who normally disagree with its rulings. This is important because even in the context of a high court that is regularly counter-majoritarian—the sort of court assumed by some critics—it cannot be taken for granted that the same individuals are always on the losing end of the court's decisions. Moving forward, it will be crucial to look for evidence that what really matters to the outcomes I am interested in is whether individuals routinely find themselves on the winning or losing end of decisions, regardless of the other variables I have been exploring.

Finally, I recognize that if courts' decisions indeed impact peoples' political behavior, much of that impact will depend on whether, and perhaps how, they learn about those decisions. This is a point I return to in Chapter 3.

Definitions and the focus of this project

Before proceeding, a word about some of the concepts I've been referring to is in order. By any minimum standard, democracy involves regular competition for the legislature and executive in free and fair elections among a citizenry with universal adult suffrage. While scholars have broadened this definition considerably on occasions, these minimalist criteria are sufficient given that my purpose here is to test claims about the negative effects of judicial involvement in politics on people's political behavior. A system of representation that is based on regular elections is certainly compromised if the people who are supposed to take part in those elections choose not to engage, or engage at the bare minimum required, or they no longer support the norms required for the system to function optimally.

Judicial review can refer to a number of judicial practices in which courts determine the appropriateness of some form of governmental behavior. Today, scholars routinely treat judicial review as synonymous with constitutional review, in which the appropriateness of the aforementioned behavior is determined on the basis of a written constitution (e.g., Tushnet 2008, Almendares and Le Bihan 2015). Throughout the dissertation, I follow this practice, using the terms interchangeably.

I also refer to courts and their involvement in politics as the judicialization of politics. Hirschl (2008, 94) defines the judicialization of politics as "the ever-accelerating

reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies." For the purposes of this project, I will follow the vast majority of the literature and restrict my discussion of judicialization to the highest national courts with constitutional jurisdiction. In modern democracies, when courts intervene in politics in high profile cases, it is almost always via the process of constitutional interpretation during judicial review.[10] The highest courts with constitutional jurisdiction, usually called supreme or constitutional courts, often have "normative finality" (Tushnet 2008) in interpreting the constitution. One of the reasons for this is that when courts interpret ordinary statutes, legislatures can easily undo unpopular decisions. When high courts interpret constitutions, however, their interpretations are often, though not always, more difficult to overcome (see Tushnet 2008 for a more complete discussion). While the ease with which a constitution can be amended varies widely across countries, that doing so is more difficult than amending a statute makes high courts a logical focal point for this project. I acknowledge, however, that in systems in which constitutional review is diffuse and access to the highest court is restricted (e.g., the United States) such a focus may be unduly narrow since lower-level courts often exercise the final instance of constitutional review. Given that what follows is already a cross-national comparison involving variation at the highest level of the judiciary, how the results might differ with an expanded focus will have to be a topic for future research.

[10] Constitutional interpretation is far from the only way in which courts impact politics, however. See, for example, Kelemen (2011).

Organization of the Dissertation

The remainder of the dissertation is organized as follows. Chapter 2 expands on my discussion above of the need for an accurate conceptualization of judicial review. It fully explicates the constraint-seeking and mandate-seeking subtypes of judicial review, addresses the objection that this conceptualization simply distinguishes between countries with positive rights and those without them, and demonstrates that inaccurate conceptualizations have negative analytical consequences that extend beyond debates over the appropriate role of courts in democracies.

Chapter 3 begins with an expanded qualitative case comparison of Colombia and Chile, the cases I will use to test the theoretical expectations outlined in this chapter, and defends them as "ideal types" of different approaches to constitutionalism and thus ideal settings for testing whether the effect of judicialization vary across countries. It then outlines how I will test the impact of the different subtypes of judicial review on ordinary peoples' engagement in politics, their support for violations of democratic norms, and the legitimacy they award their high court. Here I present a basic model of what must happen if judicial review, and the judicialzation of politics more broadly, impact political behavior, and I detail the survey experiment used to test the theoretical expectations I outline here in Chapter 1. In brief, I field two versions of the experiment. The first exposes citizens living in Colombia, whose Court regularly mandates the governmental provision of goods and services, to a series of actual mandate-seeking decisions by that Court. The second exposes citizens living in Chile, a constraint-seeking context, to a series of constraint-seeking decisions by their Court. By comparing the citizens in each country who were exposed to the rulings and those who were not, and by comparing

treatment effects across countries, I measure the impact of judicialization as well as how that impact varies across contexts.

The model in Chapter 3 stipulates that for judicial review to affect peoples' behavior, individuals have to react to what their Court does. While extant literature—based almost entirely on the United States—tells us about when and why people accept even rulings with which they disagree, we know very little about how well these findings travel to other contexts or the cognitive processes behind them. To remedy this, Chapter 4 presents both quantitative and qualitative evidence on reactions to the rulings in my experiments. By giving them the ability to respond to their Court's decisions in an open-ended fashion, this chapter seeks to understand what factors drive citizens to accept or reject those decisions and whether those factors differ across the Chilean and Colombian contexts.

Finally, in Chapter 5 I present the findings of the survey experiment, which tests the extent to which exposure to salient political decisions results in the attitudinal changes the literature leads us to expect. Throughout the chapter, I make careful comparisons between the results in Colombia and Chile to explore the ways in which the contexts offered by these countries might lead to different outcomes. Chapter 6 concludes by summarizing the results and detailing their implications for discussions on the role that courts should play in democracy.

Chapter 2. Conceptualizing Judicial Review (and why it Matters)

Chapter 1 explored the vastly different positions that scholars have staked out regarding the role of the judiciary in a democracy. It showed that their opinions range from praise for the practice of judicial review as democracy-enhancing to outright rejection of judges with the power to overrule the people's elected representatives as undemocratic. Chapter 1 also introduced an important source of variation in the context in which judiciaries operate, the output of the institution itself. Specifically, I introduced the distinction between *mandate-seeking* and *constraint-seeking* rulings by high courts as potentially relevant variables when it comes to peoples' political attitudes and behavior. In light of such variation, I argued that U.S.-centric notions of judiciaries whose main task is constraining government action do not adequately capture the empirical realities in which judiciaries operate cross-nationally and therefore risk hampering our ability to theorize about the effects of these institutions.

An important first step in evaluating the role of courts in democracies, then, is a conceptualization of judicial review that accurately reflects the distinction in the sorts of decisions high courts may issue. This chapter seeks to provide that conceptualization. Section two briefly reviews the debate over the role of courts in a democracy, highlighting the need for greater clarity in the concept of judicial review. Section three contains my conceptualization of judicial review as a general concept as well as the mandate-seeking and constraint-seeking subtypes of the concept. The fourth section then considers the objection that these subtypes simply distinguish between cases concerning what many refer to as positive or negative rights. It draws on a number of examples to argue that the guiding principle for differentiating between subtypes should be whether

the court is asked to constrain the government or mandate that it act, rather than whether the case is based on a positive or negative right. The fifth section demonstrates that the mandate-seeking and constraint-seeking review subtypes constitute distinct dimensions of the general concept of judicial review, and the final section concludes with a brief discussion of the implications of my conceptualization for research on, and debates about, judicial review. Methodologically, the aim of this chapter is to build on calls by some scholars to pay greater heed to important sources of variation in the independent variable before discussing the impact courts have on the practice of democracy (e.g., Hilbink 2008, Schor 2008). In doing so, I hope to provide a means for strengthening the quality of normative debates about the same.

Courts and Democracy: Complicating the debate

Recall that in the debate over the appropriateness of powerful courts in democracies, some scholars portray courts as counter-majoritarian, anti-democratic institutions (e.g., Waldron 2006, Tushnet 2008) while others paint them as a source of the rule of law and a vital pillar of support for liberal democracy (e.g., Zemans 1983, Kelemen 2012, Almendares and LeBihan 2015). We also saw that courts with the power of judicial review have been praised as protectors of human rights and purveyors of democracy (Dworkin 1990, Ackerman 1997) and that recently they have also been given a share of the blame for fostering the "undemocratic liberalism" that has paved the way for illiberal populist politicians across the western world (Mudde 2015, Mounk 2016, Rodrik 2018). Even outside the context of democratic recessions, some social scientists

have raised concerns over the democratic deficits that can be created by veto points like judicial review (e.g., Waldron 2006, Bellamy 2007, Miller 2016).

The two cases I review at the end of the previous chapter, however, illustrate the potential problems inherent in such generalizations. Writing for the majority in *DeShaney*, in which the Court denied relief to a mother who sued the Department of Social Services for failing to protect her son, Chief Justice Rehnquist asserted that U.S. constitutional history could not support a reading of the Constitution that imposed affirmative obligations on the state. As *DeShaney* makes clear, U.S. federal courts practice a form of judicial review intended to constrain the government; that is, in constitutional cases the government is taken to court to keep it from engaging in actions that violate the Constitution. Indeed, in the U.S. the view that the government only has negative obligations has long been "conventional wisdom" in the jurisprudence of federal courts (Bandes 1990). As Bandes (1990, 2273) observes, assertions like, "'Government inaction is not actionable" and "'The Constitution is a charter of negative liberties'" have a "powerful talismanic quality" that puts an end to all discussion when judges use them in their opinions.

The Colombian Constitutional Court, by contrast, declared in the child euthanasia case that judges have "active and independent" roles to play in protecting fundamental rights, and that it fell to them to force the state to act because the legislature had failed to do so (T-544/17). To be clear, the child euthanasia case was no aberration, nor is the active role Colombian Constitutional Court justices believe they should play a secret. In February of 2018, the new president of the Constitutional Court, Alejandro Linares, explained in an interview with a national newspaper that his Court is "a pioneer in this

part of the continent of what is called transformative constitutionalism, and that is, obviously, putting fundamental rights into practice."[11] When he was asked whether the Court would clarify confusion that had arisen because of its past rulings regarding mining, Linares responded, "we are going to make the best decision for the country. This is a decision that, in my humble opinion, the Congress of the Republic should make, but as Congress won't do so, it will fall to us to do it."[12] In contrast to federal courts in the United States, then, in Colombia the Constitutional Court frequently engages in a form of judicial review that forces the government to deliver *material* goods and services, and it does so while explicitly noting that its actions are legislative in nature—and probably better left to the legislature in the first place. It is far from clear that courts seeking to play such different roles in national politics should be treated similarly when scholars theorize the impact of the judiciary on democratic politics.

Colombia is not the only setting in which, on the basis of the constitution, the government can be taken to court to force some form of government action, rather than to block the government from engaging in a particular behavior. In fact, the "transformative constitutionalism" Alejandro Linares refers to above is practiced from South Africa to Europe to other countries in Latin America. In these nations, constitutions generally contain guarantees that governments will provide citizens with tangible, material benefits, often referred to as positive, social, or second-generation rights (Hailbronner 2017). This form of constitutionalism is often portrayed as the Global South's answer to the North's—and especially the United States'—brand of constitutionalism (Hailbronner

---

[11] "'La Corte ya no se divide en blancos y negros': Linares," Semana, 16 February 2018, available at https://www.semana.com/nacion/articulo/entrevista-con-alejandro-linares-presidente-de-la-corte-constitucional/557450

[12] Quotations are the author's translations.

2017).[13] However, even some state constitutions in the United States contain positive rights, which means courts in those states are empowered to demand the provision of constitutional goods (Zackin 2013). Along with lower courts in the state, the New Jersey Supreme Court, for example, has recently declared that local governments are required to provide affordable housing (Pugliese 2018).[14] Social scientists, though, have long highlighted the gulf between law "on the books" and law "on the ground" (e.g., Rosenberg 2008), and the point here is not that nations with one sort of judicial review are better at translating law on the books into law on the ground than those with another. Rather, the point is that in countries in which high courts are asked to force the government to deliver goods and services, and regularly do, the relationship between ordinary citizens and those courts—and consequently the role those courts play in the democratic process—may be substantially different than in countries where courts primarily constrain the government.

Such stark differences in the practice of judicial review have analytical implications beyond normative debates about courts in democracy. Today at least 83 percent of the world's constitutions provide for the constitutional review of legislation (Ginsburg and Versteeg 2013), and this has led some scholars to employ dichotomous measures of judicial review in quantitative models predicting the protection of constitutional rights. Chilton and Versteeg (2018), for example, explore the impact of judicial review by independent courts on a number of de facto rights measures. They

[13] The validity of this North-South distinction is contested. Some argue that countries in the Global North such as Germany also practice transformative constitutionalism (see discussion in Hailbronner 2017).
[14] Pugliese, Nicholas. 2018. "Judge Says NJ Towns Must Allow Affordable Housing, Maybe More than 150,000 New Units." northjersey.com, March 8, 2018, available at: https://www.northjersey.com/story/news/new-jersey/2018/03/08/judge-says-nj-towns-must-allow-affordable-housing-maybe-more-than-150-000-new-units/408766002/

code each of the world's constitutions between 1946 and 2010 for whether they allow judicial review (adding Israel and the U.S., where there is clearly judicial review without an explicit constitutional provision permitting it) and interact the variable with a measure of judicial independence. On the basis of this analysis, they argue that judicial review likely does not further the protection of constitutional rights.

This sort of analysis is important because it provides an estimate of the average effect of judicial review on the protection of constitutional rights. As the authors note in their conclusion, however, "It is possible that some subset of courts may be better able to protect rights … one important task for future research is to discover under what conditions independent courts are most impactful and the possible drivers of their success" (Chilton and Versteeg 2018, 324-325). One such condition may be the types of decisions that courts hand down. If certain courts act upon a mandate to ensure the fulfillment of rights while others believe their job is simply to keep the government from violating those rights, knowing the average effect of judicial review may not get us far enough.

Clearly, then, there is a considerable amount at stake in accurately conceptualizing judicial review so that we can understand its consequences on the ground. A dearth of conceptual clarity about what it is that courts actually do when they engage in judicial review leaves us in danger of considerable over generalizing about the impact that courts have (or do not have). In light of this danger, the next section explicitly conceptualizes these distinct forms of judicial review so as to provide scholars greater analytical leverage.

Conceptualizing Judicial Review

I am hardly the first to note the difference between positive and negative governmental responsibilities (though, as I will argue later, courts' use of judicial review to enforce these responsibilities goes beyond the presence of negative or positive constitutional rights).[15] As I state above, however, my aim is to show that these very different sorts of governmental responsibilities entail different roles for judges and, by extension, courts, in the democracies they serve. To continue this endeavor, in this section I follow Gary Goertz (2006) on concept formation in the social sciences to make the case that, while it is not inaccurate to speak of a general concept of judicial review, to be analytically useful scholars need to distinguish between different subtypes of the concept which can be treated as either distinct concepts or separate dimensions of the general concept of judicial review, depending on the judicial activity in question.

Goertz (2006, 4-5) argues that, while many scholars operate as though there is no difference between a word's definition and the analysis of a concept, social scientists should view conceptualization as a process that "involves ascertaining the constitutive characteristics of a phenomenon that have central causal powers." As we have seen, one can make important distinctions in the constitutive characteristics of the practices generally referred to as judicial review; that is, in what is actually happening when courts in different contexts engage in judicial review. Sometimes courts are asked to stop

[15] I am also not the first to note that there are differences in the ways that courts engage in judicial review cross-nationally. Mark Tushnet (2008) distinguishes between what he calls weak-form and strong-form judicial review. In the former, courts do not necessarily exercise the final say when it comes to constitutional interpretation, while in the latter court rulings indeed possess "normative finality" in determining the constitution's meaning. This distinction, while important, is not central to my argument here. Most, if not all, critics of the role of courts in democracies assume courts whose rulings are normatively final.

governmental actors from doing something to the party that filed suit (and, often by extension, to all individuals), while other times they are asked to mandate that the government act by providing tangible goods and services. And, as I will show, at times, to accomplish one of these they engage in a combination of both. We could push these distinctions even further: Occasionally, a country's citizens are not even involved in judicial review, and the court is simply asked to arbitrate conflicts between branches of government (see discussion in Helmke and Rios-Figueroa 2011). An accurate conceptualization of judicial review must therefore consider whether these different characteristics of the practices we have been calling judicial review have different causal powers. Only after doing so can we hope to build an empirically-informed understanding of the relationship of courts to democracy.

To summarize his approach, Goertz proposes that we think of concepts as having three levels: the basic level, the secondary level, and the indicator/data level. The basic level is "cognitively central … It is the noun to which we attach adjectives … The basic level is what we use in theoretical propositions" (Goertz 2006, 6). The secondary level contains the characteristics, or the "constitutive dimensions," of the basic level. These characteristics permit the ontological examination of a concept; in fact, "we often attribute causal powers to secondary-level dimensions when we make hypotheses using the basic level concept" (Goertz 2006, 28). At the indicator/data (third) level, the secondary level characteristics are operationalized and "we get specific enough that data can be gathered, which permits us to categorize—either dichotomously or on a more fine-grained scale—whether or not a specific phenomenon, individual, or event falls under the concept" (Goertz 2006, 6).

When we apply these principles to the various practices of constitutional review in which courts engage, it becomes clear that scholars are not wrong to refer to all of the examples described above as judicial review. However, it also becomes clear that treating all of these practices as the same is of little use analytically, and scholars will often be better off referring to subtypes of judicial review that can be treated as separate concepts. Accordingly, I begin by analyzing the general concept of judicial review and then turn to its subtypes.

A. Judicial review

At the basic level, we have "judicial review." Perhaps obviously, this is what is cognitively central; it is the noun to which we might attach adjectives (and will shortly). At this level it is imperative to clearly theorize a concept's negative pole: that is, to specify what the concept is not. In practical terms, a concept's negative pole has a score of "zero" on all of its secondary-level dimensions (Goertz 2006). The secondary-level dimensions also permit us to classify a concept as dichotomous or continuous. Given the importance of the secondary-level for theorizing the basic level, I turn to a discussion of it before more fully theorizing the basic level.

Key to determining whether a certain judicial behavior constitutes judicial review is *the presence of a constitutional challenge to governmental action or inaction by either citizens or another part of the government itself.* From this observation, at the secondary-level we can specify two dimensions of judicial review that are *individually necessary and jointly sufficient* for judicial behavior to be considered judicial review. First, the activity must concern some action or inaction by the government and, second, a judge,

justice, or court must be asked to make an explicit decision about whether that action/inaction violates the constitution. Without both, whatever a court may be doing, it is not judicial review.

Given these criteria, we can return to the basic level. If judicial review consists of a judge or justice examining some governmental action/inaction in order to determine whether it violates the constitution, it means there are many judicial behaviors that are not judicial review. Indeed, courts' role in tripartite dispute resolution extends far beyond judicial review (e.g., Shapiro 1981). For example, when a judge interprets a statute or, in a civil trial in the United States, lowers the damages awarded to a plaintiff by the jury, she is not engaging in judicial review. Recall that, in addition to not explicitly concerning constitutional questions, such decisions are usually easier for the legislature to undo than are constitutional interpretations.[16] The secondary-level dimensions also imply that judicial review is dichotomous rather than continuous: either a judge evaluates the government's behavior, or lack thereof, in light of the constitution, or he does not. This does not imply, though, that only explicitly constitutional cases involve judicial review. For example, when the judge in a criminal trial in the United States decides whether the exclusionary rule applies to a piece of evidence obtained by the police, she is indeed practicing judicial review by determining whether the search that lead to that evidence was permissible under the Fourth Amendment.

How, then, might we operationalize the secondary-level dimensions at the indicator level? Most obviously, it will be useful to consider the basis for lawsuits and the

[16] While the requirements for a legislature to amend the constitution are generally stricter than they are to amend a statute, those requirements themselves vary greatly across countries.

court opinions those suits produce, with the latter being of particular utility. In the case in which a governmental action is questioned, a judge (or justice or court) might rule that:

(1) the government *cannot* do something or, conversely,

(2) that the government *can* do something.

In the case of governmental inaction, the ruling may be that:

(3) the government *has to* do or provide something or, conversely,

(4) that the government *does not have to* do or provide something.

Importantly, these four possible outcomes constitute discrete manifestations of judicial review. As such, they are substitutable: Unlike the secondary-level dimensions which are both necessary for judicial activity to constitute judicial review, any one of these outcomes could be present and we would consider the activity judicial review.[17]

Obviously, the concept of judicial review is multi-dimensional and covers a large amount of variation in actual judicial practices. The secondary-level dimension that stipulates that judicial review concern either governmental action or inaction, coupled with the fact that particular countries may practice more of one than the other, means that treating the basic level concept of judicial review as an explanatory variable will be of little analytical use to those who are concerned with its democratic effects. Indeed, in light of the operationalizations I outline above, when a judge determines whether the executive branch inappropriately exercised a power reserved to the legislature, it is judicial review. When a judge determines whether a public university's restrictions on

[17] In operationalizing judicial review, it bears keeping in mind that cross-nationally there are considerable differences in which institutions within the judiciary are permitted to engage in judicial review. The practice can be "diffuse" as it is in the United States, where all federal courts have the power, or it can be concentrated in one specialized "constitutional court," as it often is outside of the United States (Schor 2008).

hate speech are constitutional, it is judicial review. And court rulings that the executive branch must provide free access to education, healthcare or euthanasia because the constitution mandates it, are also judicial review.

Given such variation, it will be useful to inquire into how judicial review might be divided into sub-concepts. Consider that the four operationalizations I have just outlined only make sense if we juxtapose them with their opposite. That is, while (1) and (2) are clearly one another's opposites, (1) and (4) are clearly not. These distinctions are possible because of the secondary-level dimension which stipulates that judicial review can concern either governmental action or inaction. In light of this, I propose that scholars think of two subtypes, or sub-concepts, of judicial review. When some governmental action is at issue, we can speak of *constraint-seeking* judicial review because the parties challenging that action want the court to tell the government it must stop. On the other hand, when governmental inaction is at issue, we can speak of *mandate-seeking* judicial review because what the parties bringing those cases want is for the government to be told it must do or provide something. Conceiving of judicial review in this way allows us to make important distinctions at the level of the individual case without requiring rigid categories at the level of the court itself. That is, courts can sometimes be mandate-seeking in their decisions and other times constraint-seeking. While a country's constitutional provisions will, to some (perhaps a large) degree, shape whether a high court is primarily mandate or constraint-seeking, there is no reason to expect many courts not to do some of both. I now turn to a conceptualization of each of these subtypes.

B. Constraint-seeking judicial review

As it is a subtype of the general concept of judicial review, there are a number of judicial behaviors to which the basic level concept of constraint-seeking judicial review does not apply: namely, any cases in which constitutional questions involving the government are not at issue. Given that we have narrowed our focus to a single subtype of judicial review, we can add to this list of exclusions instances in which the constitutional question involves governmental inaction. That is, constraint-seeking review does not consider the government's failure to act; in these instances, the government is, in some sense, constraining itself.

Unlike the general concept of judicial review, which is clearly dichotomous, it is easy to imagine that in some instances it will be unclear whether a case is primarily an example of constraint-seeking or mandate-seeking review. *Brown v. Board of Education* (347 U.S. 483 (1954)), for example, was clearly a case of constraint-seeking review because the Court was asked to determine whether the state of Kansas' forced segregation of public schools was in violation of the Equal Protection clause of the Fourteenth Amendment. The Supreme Court ruled that it was and that state and local governments could not therefore continue segregating schools. However, a year later when the Court handed down a remedy in *Brown II* (349 US 294 (1955)), it clearly mandated government action. *Brown II* not only mandated that state and local governments had to stop segregating schools, but also that they take active measures to de-segregate. It may be best, then, to think in terms of the degrees of constraint and/or mandate that a particular decision entails, a point to which I return in the next section.

At the secondary level we can once again stipulate two criteria that are individually necessary and jointly sufficient for judicial review to be considered constraint-seeking. First, for review to be constraint-seeking it must concern governmental action (as opposed to inaction) and, second, it must involve a court determining whether that action violates the constitution.

We have already discussed that instances of constraint-seeking review will culminate in the court telling the government that either (1) it can (continue to) do the action in question or (2) that it cannot (continue to) do the action in question, which tells us what to look for in lawsuits or court opinions when we move to the indicator level. When the U.S. Supreme Court ruled in *Tinker v. Des Moines* (393 US 503 (1969)) that a public school violated the First Amendment by prohibiting students from wearing armbands to protest the Vietnam War, for example, it meant that the school could not continue to prohibit the armbands, and we would therefore classify that decision as constraint-seeking. Similarly, when Chile's Constitutional Tribunal ruled that President Michelle Bachelet could not award the country's labor unions a monopoly over representing workers in negotiations with their employers, it was constraint-seeking review because the ruling stopped her government from engaging in a particular action (see decision in Rol 3016-16).

C. Mandate-seeking review

Having conceptualized both the general concept of judicial review and the subtype of constraint-seeking review, we can now conceptualize the subtype of mandate-seeking review. As a subtype of judicial review generally, any judicial activity that does

not fall into the category of judicial review cannot be mandate-seeking review. Given that here we are treating the subtypes of judicial review as separate concepts, we can further exclude from the concept of mandate-seeking review any instance of judicial review that has constraining the government as its aim.

The key feature for determining whether judicial behavior falls under the basic-level concept of mandate-seeking review, then, is whether the constitutional question at issue concerns governmental inaction. That is, the litigant in a case of mandate-seeking review asks the court to command the executive or the legislature to act in order to deliver some good, service, or outcome, often on the basis of a concrete constitutional provision. Once again, however, some cases will inevitably blur the lines between whether the court is asked to tell the government to stop doing something or to tell it that it must start doing something, so at times it will be useful to think in terms of the degree of constraint or mandate imposed on the government by a particular decision.

Once more, we have two individually necessary and jointly sufficient conditions at the secondary-level. Mandate-seeking judicial review must concern some form of governmental inaction (as opposed to governmental action), and it must involve a court determining whether that inaction violates the constitution. While the specifics of individual cases can vary substantially at the indicator level, the lawsuits or rulings in cases of mandate-seeking review will either allege or pronounce that (1) the government has to do or provide something in accordance with the constitution or (2) the government does not have to do or provide something. Litigants asking the court to rule that the government's failure to provide housing, healthcare, or unemployment benefits

constitutes a violation of the constitution, for example, are beginning the process of mandate-seeking review.

Table 2.1 summarizes the concepts of constraint-seeking and mandate-seeking judicial review. Here it is worth returning to a point I raised initially in Chapter 1. Reviewing Table 2.1, the political nature of the differences between constraint-seeking and mandate-seeking review is inescapable. Constraint-seeking decisions can, at most, tell the government to leave individuals alone. By their very nature, they limit the power of the government. Perhaps this is even more so the case when they are the product of a court's commitment to principles such as "'Government inaction is not actionable" and "'The Constitution is a charter of negative liberties'" (Bandes 1990, 2273) because the decisions of such a court are unlikely to be balanced out by subsequent mandate-seeking rulings. On the other hand, when mandate-seeking decisions order the provision of a material public good or service, the effect will inherently be a redistribution of resources aimed at achieving the court's mandate. This makes it even clearer that scholars appraising the impact of the judiciary on any number of outcomes must take into account the sorts of decisions the institution makes. The next section, however, answers an obvious objection to my particular conceptualization of judicial review.

Table 2.1 Constraint-seeking vs. Mandate-seeking Judicial Review

Basic level	"Constraint-seeking Review"	"Mandate-seeking Review"
Secondary level	1. Review concerns governmental action 2. Court must determine whether that action violates the constitution *1 and 2 are individually necessary and jointly sufficient for a ruling to be constraint-seeking	1. Review concerns governmental inaction 2. Court must determine whether that inaction violates the constitution *1 and 2 are individually necessary and jointly sufficient for a ruling to be mandate-seeking
Indicator level	Lawsuits ask that the Court tell the government it cannot (continue to) do something Judicial decisions will tell the government that it can or cannot (continue to) do something.	Lawsuits ask that the Court tell the government it has to do or provide something Judicial decisions will tell the government that it does or does not have to do or provide something

Beyond Positive and Negative Rights

It may be argued that the distinction I have drawn between mandate-seeking and constraint-seeking forms of judicial review essentially boils down to a distinction between positive and negative rights: Cases that are mandate-seeking are based on positive guarantees of goods and services while cases that are constraint-seeking are based on the view that government cannot violate rights, but does not have to guarantee them. While this distinction may provide considerable leverage in understanding the types of judicial review I have laid out, it will not get us far enough.[18]

[18] Even drawing distinctions between nations that practice transformative constitutionalism and those that do not is likely to be unsatisfactory. Scholars do not agree on what exactly constitutes transformative constitutionalism and there are important differences in the states that are said to practice it (Hailbronner 2017).

Writing in 1992, Scott and Macklem provide a useful framework for understanding why mandate-seeking and constraint-seeking review are not simply a matter of positive or negative rights. In their article, they describe the United Nation's then-ongoing efforts to establish "a multilayered obligations structure that may potentially be generated for any right" (Scott and Macklem 1992, 73). These layers referred to a state's duty to respect, protect, and fulfill rights. The final two layers can reasonably be said to lead to mandate-seeking review. For the state to protect a right, it has to keep that right from being violated by private actors. While this doesn't require a material good, it does require concrete government action. For example, writing in the context of South Africa the authors explain that if the state did not provide sufficient police or use its resources to attempt to prevent violence it would violate South Africans' rights to life and security by failing to protect those rights. On the other hand, the fulfillment of a right is the material delivery of that right: the provision of healthcare or housing, for example. States that do not provide such goods when their constitutions mandate they must violate the constitution by failing to fulfill those rights.

The first layer, however—a state's duty to respect a right—cannot lead to mandate-seeking review even when a positive right is at issue. This is because respecting a right refers simply to a state's obligation to keep from violating that right (Scott and Macklem 1992). To illustrate, consider a recent case from Chile. In a decision on April 26, 2018, the Chilean Constitutional Tribunal struck down a prohibition declaring that individuals or companies that operate for profit could not own or operate universities. The Court took this action in part because the law violated the Constitution's *guarantee* of a right to education and specific provisions that went along with it. In this case, then,

the Court took a positive guarantee found in the Constitution and used it as the basis for constraining the government from prohibiting certain individuals and companies from owning and operating universities.[19]

Just as positive rights can lead a court to constrain the government, traditionally considered negative rights can lead a court to mandate governmental action. As Curie (1986) explains, despite a Constitution with "negative" liberties similar to its American counterpart, the then-West German Constitutional Court used those provisions to mandate government action. Among other decisions, the Court ruled that the right to life implied a mandate that the government *punish* abortion, and that Germans' right to elect "'their place of training'" meant that the government *had to provide* public education (Curie 1986, 871). Clearly, then, we must look beyond whether or not a case is based on constitutional provisions of specific goods and services when deciding if it constitutes mandate-seeking or constraint-seeking review. Instead, as I indicate above, the deciding factor should be whether the Court is asked to (or eventually does) mandate that the government act or constrain it from acting.

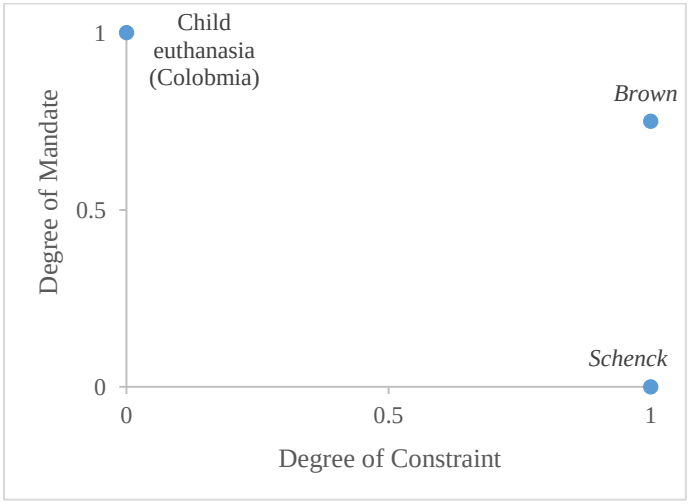
Judicial review as a two-dimensional concept

If I have succeeded in distinguishing between the subtypes of constraint-seeking and mandate-seeking judicial review, it should be apparent that there will be times when the outcome of a particular case is a combination of both. When this happens, it will still be useful to think of an individual case as constraint-seeking or mandate-seeking generally (what was the basis of the litigants' claims against the government?).

[19] A copy of the decision (in Spanish) can be found online at: https://www.tribunalconstitucional.cl/ver2.php?id=3701

However, when the remedy in a constraint-seeking case, for example, involves some form of mandated government action, it can be instructive to think of the subtypes of judicial review as separate dimensions of the general judicial review concept, as illustrated in Figure 2.1 below. After all, one secondary-level dimension of judicial review stipulated that judicial behaviors concerning the constitutionality of governmental action or inaction constituted judicial review, and it was on this basis that we developed the concepts of mandate-seeking and constraint-seeking review. When both mandate and constraint are present in a single case, therefore, it causes no conceptual difficulties to treat them as separate dimensions of the same concept.

Figure 2.1: Judicial Review in Particular Cases



It will be up to the individual researcher, of course, to decide what degree of mandate and constraint are present in specific cases, but scholars may find it helpful to employ the language of fuzzy-set logic to do so, as fuzzy sets allow researchers to work with concepts that do not have explicit membership boundaries (Ragin and Pennings

2005). As opposed to dichotomous concepts, fuzzy sets allow scholars to classify phenomena for membership in a set using a 0-1 scale, where a score of 1 equates to full membership in the set, and 0 equates to complete non-membership in the set. A value of .5 corresponds to "the point of maximum ambiguity (fuzziness) in the assessment of whether a case is more 'in' or 'out' of a set" (Ragin and Pennings 2005, 424).

To illustrate the two-dimensional nature of the concept, we can consider several cases. We saw above that the Colombian Constitutional Court not only ruled that minors with terminal illnesses have a constitutional right to euthanasia, it also mandated that the country's government quickly issue regulations facilitating their access to the practice. The Court went further, giving the government a list of the "general stages of a procedure to exercise the right to a dignified death" (T-544/17). This detailed list of the steps that minors would go through in order to access euthanasia even included the role to be played by an "interdisciplinary scientific committee" which the Court mandated the agency issuing the regulations to include. The regulating agency, the Court said, "should consider the participation of experts on children in all of the disciplines involved: medicine, law, psychology" (T-544/17).

Working backwards, at the indicator level this case is a clear instance of a court mandating that the government provide a good or service—access to euthanasia for children with terminal illnesses. At the secondary-level, we see that the question the Court answered concerned governmental inaction; specifically, it had to determine whether the fact that the government had failed to provide regulations facilitating access to euthanasia for minors violated the rights of those minors. As illustrated in Figure 2.1, very little, if any, constraint is involved (0.0). Judicial review in the child euthanasia case

belongs "fully in" (1.0) the set (concept) of mandate-seeking review. As such, analytically it is more appropriate to treat this case as mandate-seeking review rather than judicial review generally.

Above we discussed the fact that *Brown v. Board of Education* is primarily an example of constraint-seeking review. The parents of the children represented in that case alleged that a governmental *action* violated their children's rights, and they therefore wanted the Court to make the government stop engaging in that action. After ruling in *Brown I* that segregated schools did indeed violate the Constitution, the Court in *Brown II* remanded the cases to the localities from which they had arisen, noting that the solution for desegregating schools would probably be different from one jurisdiction to the next. Local courts would then issue decrees for local governments to follow so that schools could desegregate. Far from the specificity we see in the Colombian case, however, the Court simply ordered that local courts "will be guided by equitable principles" and that they should begin the process of desegregation "with all deliberate speed" (*Brown v. Board of Education II*, 349).

Working backwards again, at the indicator level we see that while the ruling in *Brown I* told the government it had to stop doing something—namely, denying black children access to white schools—in the second part of that case the Court *mandated* desegregation, though with far less urgency and specificity than we saw in the Colombian case. At the secondary level, however, the question the Court considered only concerned whether a governmental *action* violated the Constitution: specifically, whether the government's segregating of schools violated the Fourteenth Amendment. While we can refer to this case as an example of the basic level concept of constraint-seeking review,

then, the Court's decision certainly involved a degree of mandate, as Figure 2.1 illustrates. Taken together, we might therefore classify the *Brown* decisions as "fully in" (1.0) the concept of constraint-seeking review and "mostly in" (.75) that of mandate-seeking review. Considered separately, *Brown I* is still constraint-seeking, while *Brown II* contains a clear mandate—though as a means of constraining the government from further segregating schools.

Many constraint-seeking cases that at first glance are difficult to classify because they appear to also mandate government action follow a logic similar to the *Brown* decisions. *Shapiro v. Thompson* (394 U.S. 618 (1969)) and *Obergefell v. Hodges* (576 U.S. _ (2015)) from the United States illustrate this point nicely. In *Shapiro*, the Court considered whether a state could make the provision of welfare contingent on recipients having resided in the state for a certain period of time. It held that such contingencies violated the Equal Protection Clause of the Fourteenth Amendment and that residents who would have otherwise qualified to receive welfare were entitled to it regardless of how long they had lived in the state. In *Obergefell*, the Court ruled that states that denied same-sex couples the right to marry or refused to recognize same-sex marriages performed in other states violated the Fourteenth Amendment. It therefore held that the Fourteenth Amendment *required* a state to do both. Like black children living in the US after *Brown*, poor individuals who recently moved to a new state after *Shapiro* and same-sex couples in all states after *Obergefell* were entitled to a tangible government service.

In each of these cases, however, petitioners approached the Court claiming that being denied access to an *already existing* good or service violated their constitutional rights. The government was therefore told it could not continue to deny certain

individuals access to goods and services that others already enjoyed—equal schooling, welfare, legally recognized marriages. The government was not told that it must start providing schooling when it was not already doing so, that it must give welfare when it had never done so previously, or that it must get into the business of licensing marriages when it had never issued marriage licenses before. Rather, the Court expanded the classes of individuals with access to these goods and services by constraining the government's ability to legally exclude those groups. This is very different than, for example, mandating that the government start providing physician-assisted suicide to minors when the government had never done so previously. For these reasons, we can consider such rulings as "mostly in" (.75) the mandate-seeking concept but "fully in" (1.0) the constraint-seeking concept.

Finally, an obvious question arises as to how cases that side with the government rather than litigants should be classified. Recall from above, however, that constraint and mandate-seeking review cases determine *whether* to constrain the government or mandate it act; it is not necessary that they actually constrain or mandate. The position of litigants, and therefore the role the court is asked to play in politics, is the same regardless of which party prevails. Consider, for example, the famous case *Schenck v. United States* (249 U.S. 47 (1919)). In that case, Schenck and a colleague were charged and convicted for distributing leaflets advocating peaceful resistance of the draft. They appealed, arguing that the Espionage Act under which they had been convicted violated the First Amendment's protection of the freedom of speech. The Court ruled against Schenck, saying Congress could prohibit speech creating a "clear and present danger." Though the Court's ruling did not restrain the government, this case is still "fully in" (1.0) the

concept of constraint-seeking review, as the Court was asked to reign in the government's attempts at prohibiting certain types of anti-war speech.

Conclusion

This chapter has argued that scholars concerned with the democratic effects of courts need to pay greater attention to the ways in which courts actually intervene in politics. It also illustrated why assertions about the effects of judicial review that assume a U.S.-like judiciary which primarily constrains government action fall short of representing the empirical realities in which courts operate cross-nationally. To that end, it offered a conceptualization of judicial review and its subtypes of mandate-seeking and constraint-seeking review, arguing that these can sometimes usefully be thought of as two dimensions of the general concept when cases combine both governmental mandates and constraints. It is, of course, an open and empirical question what difference, if any, it makes when a court engages in one type of review over the other. Ex-ante, however, scholars should not simply assume that such different practices have similar effects. At the very least, ignoring these distinctions impedes our ability to accurately debate the role courts are playing in democracies around the globe and, perhaps more importantly, the role that they should be playing.

One question arising from the discussion in this chapter is what scholars should do with the conceptualizations of judicial review that I have outlined. A primary step will be figuring out what sort of review characterizes a nation's courts or whether they frequently engage in a combination of both types of review. To do this, scholars will need deep knowledge of the jurisprudence of the courts that they are interested in. Only by

classifying individual decisions according to the typology I have listed above can scholars then determine where courts themselves lie in the typology. Then, they can begin to assess what empirical differences these classifications make to the outcomes they care about.

Finally, it may be that constitutional scholars deeply acquainted with their country's jurisprudence identify additional types of review that need similar conceptualizing. As the motivation for this chapter is the idea that greater conceptual clarity allows us to engage in better analysis, such an endeavor would surely bring us even closer to understanding the democratic effects of courts.

Chapter 3. Grounding the Study: Case selection and methods

We have now seen that there exists enough variation in the practice of judicial review to be suspicious of attempts to make general claims about its effects. Recall that my aim in this project is to test the *negative* theoretical expectations that some scholars have raised regarding judicial review and the judicialization of politics. In particular, my focus here is on testing claims that the judicialization of politics can weaken the political participation of ordinary citizens, lead to an increased tolerance for the violations of democratic norms associated with populism, and undermine judicial legitimacy. I have argued, however, that the effect judicialization exerts on these outcomes may vary based on the context in which it occurs. Specifically, whether particular decisions constrain government action or mandate the provision of material goods and services, as we saw in Chapter 2, may be an important factor affecting the institution's impact.

Moving forward, I will test the literature's claims while staying true to institutional context by selecting two countries representing opposite "ideal types" when it comes the sorts of constitutionalism they embrace, and thus to the sorts of rulings their courts are empowered to make, but that are otherwise similar in a number of important regards. In particular, I will select one case in which rulings by the court tend to represent constraint-seeking review as I conceptualize it in the previous chapter. The other case will feature a high court whose decisions, in addition to constraining the government's violations of the constitution, also routinely mandate that the government provide citizens with concrete benefits.

The Constitutional Court in Colombia is known around the world for its mandate-seeking judicial review and well represents the latter approach. A good Latin American

comparison case is Chile, whose Constitutional Tribunal very often issues constraint-seeking rulings and almost never issues mandate-seeking decisions. Both countries are South American, both home to unitary systems of government, and in both voting is voluntary rather than compulsory as it is in much of South America. This will allow me to observe any meaningful variation in citizens' intention to vote which may be due to judicialization.

Working with two South American cases allows me to hold several important variables (roughly) constant as I seek to isolate the causal impact of judicialization on their citizens' behavior. As a region, Latin America is also an ideal setting for this study because it has been home to no shortage of judicialization (Sieder et al. 2005) or populist movements (see, for example, Mudde and Kaltwasser 2013). However, no work that I am aware of has sought to explicitly connect judicialization in the region to these movements. Hence, working with Latin American cases allows me to test the argument we saw in Chapter 1 that courts are one cause of populism. If we find that judicialization does not lead to greater support for populism in either Chile or Colombia, then at the very least this will constitute evidence that scholars need to restrict their claims about the relationship between courts and populism to the activity of particular courts. Finding that judicialization in both countries leads to greater support for populism, on the other hand, would bolster the arguments made by these researchers. Finally, if we see greater support for populism in the wake of judicialization in only one of the two countries, it may be support for my argument that specific judicial contexts condition the impact of judicial intervention in politics.

Background on the Courts

The Chilean Constitutional Tribunal has existed since 1970, but Couso (2011) identifies three periods in the institution's history that are so distinct they can nearly be thought of as representing separate institutions altogether. The first period spanned just three years, ending when a coup ushered in a military dictatorship that lasted nearly two decades. During those three years, the Tribunal's role was limited to that of mediator between the elected branches; it did not even attempt to adjudicate constitutional rights.

The second period, ironically, began almost half-way through the Pinochet dictatorship, when the military regime promulgated a new Constitution and re-activated the Court. It lasted until 2005, thereby covering the first fifteen years of the country's return to democracy. Because the authoritarian regime assumed Chile would eventually return to democracy, its goal was a Court that would arbitrate inter-branch conflict, declaring unconstitutional legislative actions which might upend the system it established with the Constitution. Through 2005, however, the Court exercised extreme deference to the legislature, contrary to what the regime had hoped.

The third period in the Tribunal's history began with several constitutional amendments in 2005 and continues through the present. The amendments increased the Court's powers of judicial review and altered the makeup of the justices that comprise it. Multiple sources point to these changes as the catalyst for an "impressive shift from deference to activism" (Couso and Hilbink 2011, 117; see also Couso 2011). Today we continue to see "an unprecedented willingness by the Constitutional Court to actively strike down legislation deemed contrary to the Constitution" (Couso 2011, 1535). Judging from existing scholarship, this constraint-seeking review represents the bulk of

what has been referred to as the Court's activism (see discussion in Couso and Hilbink 2011), a point to which I return shortly.

Contrast the Chilean Court with its Colombian counterpart. As should already be clear from the previous chapter, the Colombian Constitutional Court differs in a number of important ways from the constraint-oriented high courts assumed in many of the debates over the appropriate role of courts in democracies: When the institution was created with the promulgation of a new Constitution in 1991, "Colombia fashioned a Constitutional Court whose task is to deepen the social bases of democracy by constructing rights" (Schor 2009, 176), and accordingly the country placed "questions surrounding the distribution of resources at the heart of the constitutional enterprise" (Bilchitz 2013). Along with its counterparts in India and South Africa, the Colombian Constitutional Court has been labeled an activist tribunal which has pursued nothing less than the structural transformation of its country (Bonilla 2013).

Colombia's 1991 Constitution and the Constitutional Court it empowered grew out of a period of political turmoil that led to the creation of an inclusive constituent assembly which represented a broad array of social interests. According to a former justice on the Constitutional Court, the assembly that crafted the new Constitution "was composed of 72 individual members from all political backgrounds—including four guerrilla groups and several previously excluded social sectors, such as indigenous peoples and religious minorities" (Espinosa 2005). Indeed, nearly a third of the seats at the constituent assembly belonged to a former guerrilla movement, the left-wing M-19. Another third of the seats belonged to the Liberal Party, a group that splintered off from the Conservative party known as the MSN had 16 percent of the seats, while the

Conservative Party itself held 7 percent of the seats. Numerous other minority parties were present as well. This heterogeneity made it impossible for the assembly to be controlled by particular interests, and the result was an assembly that was quite open to demands for reform from many sectors of Colombian society (García-Herreros 2012, Espinosa and Landau 2017).

The document produced by this group guarantees that the government will provide a number of goods and services to Colombia's citizens. Going even further, Article 13 of the Constitution requires affirmative action, stating, "The state shall promote the conditions so that equality may be real and effective and shall adopt measures in favor of groups which are discriminated against or marginalized" (see discussion in Espinosa and Landau 2017). After the assembly, as more conservative political elements took control of the government, the Court has continued to issue mandates to the elected branches, ruling on behalf of ethnic minorities, sexual minorities, women, and labor unions to name a few, often on the basis of Article 13 (García-Herreros 2012, see also Espinosa 2005 and Espinosa and Landau 2017).

Access to the Courts

Access to the Chilean Constitutional Tribunal is more limited than it is to the Constitutional Court in Colombia. The Tribunal can hear concrete and abstract a posteriori cases as well as abstract a priori cases. While all of the Court's rulings in abstract cases have *erga omnes* effects, its rulings in concrete, a posteriori cases have only *inter partes* effects (Ríos-Figueroa 2011). Importantly, only the latter, known as *recursos de inaplicabilidad*, can be brought by ordinary citizens. To put this differently,

the Chilean Tribunal can hear constitutional disputes involving bills that have already been enacted into law or before they become law. After a bill has been enacted, it can hear challenges involving an actual controversy, in which case its ruling applies only to the parties in the case, or in the absence of an actual controversy, in which case the ruling has a general effect. It can also hear disputes over a law before it is promulgated. In these instances, the ruling applies generally as well. Ordinary, lower-level judges can also appeal directly to the Constitutional Court using the *recurso de inaplicabilidad* if they believe that a law they are asked to apply is unconstitutional (Couso and Hilbink 2011).

Though not a perfect proxy for access, searching the Constitutional Tribunal's website for the number of decisions it has handed down each year allows us to understand how active it has been since its powers were broadened in 2005.[20] The results of this search appear in Table 3.1. In 2005, the Court handed down a total of 30 rulings, but in subsequent years that number rose quickly. Between 2005 and 2018, it decided an average of about 200 cases per year, with that number peaking at 469 in 2018.

[20] https://www.tribunalconstitucional.cl/sentencias/busqueda-por-ano

Table 3.1: Number of Decisions by Chilean Constitutional Tribunal, by Year

Year	Number of rulings
2005	30
2006	99
2007	206
2008	280
2009	188
2010	217
2011	254
2012	194
2013	183
2014	121
2015	142
2016	158
2017	255
2018	469
Total	**2796**

In Colombia, we can also get an idea of the broad access that citizens have to the judiciary by considering the different ways Colombians are permitted to interact with their courts, including the Constitutional Court. The country is home to a variety of types of constitutional review. The most common is the *acción de tutela*, which is available to all citizens. The *tutela* is a decentralized, concrete, a posteriori form of review with *inter partes* effects. That is, multiple courts can hear *tutela* cases, which deal with an actual constitutional conflict after some law has been adopted, and the ruling applies only to the parties in the case. In addition to hearing *tutela* cases on appeal (to which it sometimes gives a general, rather than *inter partes* effect), the Constitutional Court can hear both a priori and a posteriori abstract challenges to laws, both of which also have *erga omnes* effects. That is, the Court can hear constitutional challenges to a law either before or

after it is promulgated in the absence of an actual controversy, and its rulings in these cases have a general effect rather than applying just to the parties in the case. The former can only be triggered by public officials, while access to the latter is open to all citizens (Ríos-Figueroa 2011). Another tool available to the Court is the declaration of an "unconstitutional state of affairs" when it determines, in the course of constitutional review, that a public policy or regulation is out of step with the Constitution. In such circumstances the Court itself actually "fixes" those policies (Espinosa 2005). As part of this process, the Court has issued rulings compelling "local and national authorities to pay the social security benefits of public teachers," and it ordered "national authorities to design (within three months) and implement (within four years) a prison plan, in order to reduce overcrowding and dignify prison inmates' living conditions and thereby protect their fundamental rights" (Espinosa 2005, 95), among others.

Given the tools at its disposal, it is unsurprising that the Court has been extraordinarily active. According to its own statistics,[21] which I have reproduced in Table 3.2 below, between 1992 and 2018 the Constitutional Court has issued rulings in 19,086 *tutela* cases and 6,411 abstract constitutional cases. To put this differently, the Court has issued an average of about 944 decisions per year. That number was 1,736 in the year 2000. Obviously, the 200 cases the Chilean Court hears in a given year pale in comparison with these numbers, and we can safely say Colombians enjoy greater access to their Court than do Chileans.

[21] http://www.corteconstitucional.gov.co/relatoria/estadisticas.php

Table 3.2: Number of Decisions by Colombian Constitutional Court, by Year

Year	Tutela	Abstract Constitutional Cases
1992	182	52
1993	394	204
1994	360	222
1995	403	227
1996	370	347
1997	376	305
1998	565	240
1999	705	288
2000	1340	396
2001	976	368
2002	784	340
2003	868	338
2004	898	327
2005	1061	261
2006	845	248
2007	903	204
2008	997	260
2009	760	209
2010	872	182
2011	784	197
2012	877	216
2013	764	198
2014	789	194
2015	616	149
2016	546	180
2017	586	150
2018	465	109
Total	**19086**	**6411**

Political Context

The politics surrounding the Chilean and Colombian Courts also underscore how different these institutions are from one another. In Chile, for example, it is worth

exploring how a number of experts view the influence of the Pinochet dictatorship on their Court and Constitution. For many, the topic is controversial. During my fieldwork in the country, one of the most impactful conversations I had was with a professor of constitutional law who explained the ties that several current and former justices on the Tribunal have to the dictatorship, including a recently retired justice who had been head of the dictatorship's censorship regime. In his estimation, the Tribunal today plays exactly the role the dictatorship designed it to play, thereby helping to maintain the dictatorship's legacy in Chilean politics. Unfortunately, this was one of my final interviews, and I did not have the opportunity to follow up on this point with many other experts. One professor of constitutional law I did discuss this with, however, vehemently rejected the idea. Pointing to a book in his office by Justice Scalia, he said, "it isn't Pinochet's Constitution because in Chile we don't have this type of judge. In Chile we don't have originalists … The Constitution is a living document, and it has changed. It has been formally amended more than 40 times, and its interpretation has been amended on numerous occasions."[22] For Chileans who know their Court, its role in their democracy today is clearly contested.

This politicization has reached the highest levels of popular politics. One professor explained it to me this way: "Today the role of the Constitutional Tribunal is very controversial, very controversial. …You know that the left's presidential candidate

[22] *"…no es la constitución de Pinochet porque en Chile no tenemos a este tipo de jueces [pointing to book by Scalia]. En Chile no tenemos originalistas. … La constitución es un cuerpo vivo, y ha cambiado. Ha sido reformada formalmente más de 40 veces. Y ha sido reformada en su interpretación en numerosas ocasiones."*

in the last election, Alejandro Guillier, proposed eliminating the Constitutional Tribunal in his platform?"[23] When I expressed my surprise, he continued,

> Yes, the platform of Alejandro Guillier, who was the presidential candidate last year in 2017, proposed eliminating the Constitutional Tribunal, and it did so because the left has decided that the Tribunal is illegitimate. And academia has contributed to that. … Certain members of the [academic] left in Chile do not support, do not endorse, and are very critical of this counter-majoritarian body, following primarily the reasoning of Jeremy Waldron, I think. … Politicians have embraced that discussion very quickly and with little reflection.[24]

Indeed, during the 2017 presidential campaign, Iván Aróstica was announced as the Constitutional Tribunal's new president. Aróstica had previously served in the administration of Sebastián Piñera, Guillier's conservative opponent in the ongoing presidential contest and the former president of the country. Moreover, this announcement came on the heels of the decision of *Chile Vamos*, a conservative party, to raise a constitutional challenge to a bill that proposed decriminalizing abortion under certain circumstances. It was in this context, and almost certainly remembering the Court's constant thwarting of his socialist predecessor's agenda, that Guillier announced he would be "reformulating" the institution if he won the presidency. "'The way it is,'" he said, the Constitutional Tribunal "'is not sustainable because it isn't fulfilling its

---

[23] *"hoy día en Chile el rol del TC está muy discutido, muy discutido. ¿Tú sabes que el candidato presidencial de la izquierda en la última elección, Alejandro Guiller, propuso en su programa eliminar el Tribunal Constitucional?"*

[24] *"Sí, el programa de Alejandro Guiller, que era el candidato presidencial el año pasado, el 2017, propuso eliminar el Tribunal Constitucional, y lo propuso porque la izquierda ha considerado que el Tribunal es ilegítimo. Y en eso, ha contribuido la academia. … cierta izquierda en Chile no apoya, no suscribe, y son muy críticos de este órgano contra-mayoritario. Siguiendo las tesis principalmente creo yo de Jeremy Waldron. … Los políticos han acogido muy rápidamente con poca reflexión esa discusión."*

function, which is to think about the country and not one political segment'" (Marín 2017).[25]

While the constraint-seeking decisions of the Chilean Tribunal have raised the ire of that country's progressives, the mandate-seeking rulings of Colombia's Constitutional Court have made the institution a target of conservatives. In particular, conservative anger has frequently focused on the *tutela*, the tool that allows individual Colombians to approach judges, without counsel, asking that they determine whether a situation they face represents a violation of their fundamental rights (Landau 2015, Taylor 2018).[26] If the judge determines it does, he can order a remedy, often in the form of mandating state action when a social right is at issue. Rulings on social rights specifically have been a source of criticism, as *tutela* judges have been faulted for failing to consider the economics of their decisions. President Alvaro Uribe's administration engaged in direct attacks on the institution on this basis, with his minister of the interior ridiculing "'judicial stupidity, which through ignorance of everything becomes an essential factor in the economy'" (Landau 2015, 304). He also presented a proposal that would have drastically changed judicial power in Colombia, including the power of the Constitutional Court. Among other changes, the proposal would have prohibited the use of the *tutela* for social rights and required that judges take financial concerns into consideration when

[25] Marín, Verónica. 2017. "Guillier anuncia que reformulará el TC si llega a La Moneda: 'Se pone en riesgo la institucionalidad.'" *Emol*. Available at https://www.emol.com/noticias/Nacional/2017/07/19/867556/Guillier-asegura-que-disolvera-el-Tribunal-Constitucional-si-llega-a-la-presidencia-tras-anuncio-de-Chile-Vamos.html

[26] One president from the liberal party, Ernesto Samper, also attacked the *tutela*, but his proposed reforms to the institution went nowhere in Congress, even among his own party (Landau 2015).

deciding these cases. These changes, however, were met with near universal criticism in Congress and failed to pass (Landau 2015).

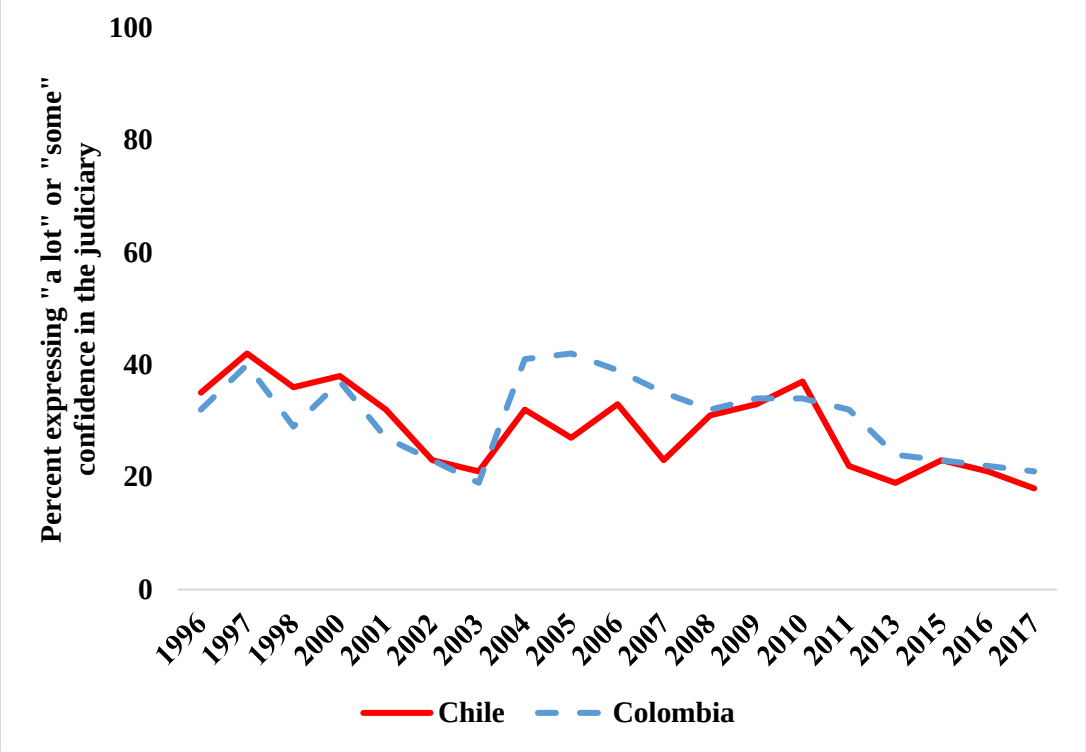
Public Confidence

We can also compare the institutional contexts in Chile and Colombia by exploring the levels of confidence that the public places in the judiciary. For more than a decade the LatinoBarometer has asked respondents how much confidence they place in the judiciary in general. Although a broad measure, comparing the two countries on this variable can nonetheless give us a rough idea of the public sentiment surrounding both Courts. To begin, Figure 3.1 plots the percentage of individuals who have reported having "some" or "a lot" of confidence in the judiciary over time in both countries. While the Colombian judiciary tends to enjoy greater public confidence than its counterpart in Chile, the trend lines for both countries never stray far from one another, and support rarely crosses the 40 percent threshold in either country.

Examining support for the judiciary in isolation, however, risks obscuring the broader political context in which the institution operates, inasmuch as a judiciary with relatively low levels of absolute support might still enjoy more support than other national institutions (Kelemen 2012b). Fortunately, the LatinoBarometer also asks its respondents to report their level of confidence in Congress as well as the government more generally. Accordingly, in Figures 3.2 and 3.3, I plot the relative levels of confidence that the judiciaries in each country enjoy, first by subtracting the percentage of those with "some" or "a lot" of confidence in Congress from those who say the same about the judiciary (Figure 3.2) and then repeating the procedure utilizing the confidence

in government item (Figure 3.3). Doing so, a more complicated picture of the context in which these institutions operate emerges.

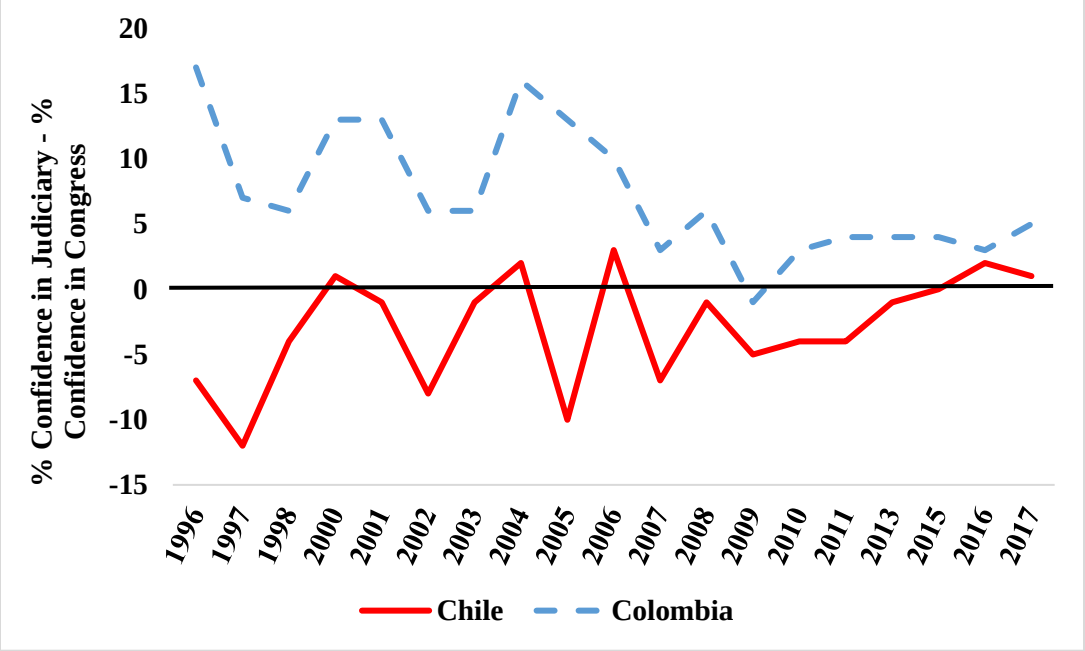
Figure 3.1: Confidence in the Judiciary over Time



Let us first examine confidence in the judiciary relative to Congress in Figure 3.2. Because we are subtracting confidence in Congress from confidence in the judiciary, negative numbers indicate greater support for Congress while positive numbers indicate greater support for the judiciary. Here, the differences between Colombia and Chile are striking. Despite enjoying relatively similar levels of public confidence generally, the Colombian judiciary enjoys far greater levels of confidence than the Chilean, relative to the legislatures in their respective countries. Indeed, while the trend line for Colombia is consistently above zero, the opposite is true for Chile. In other words, while Colombians

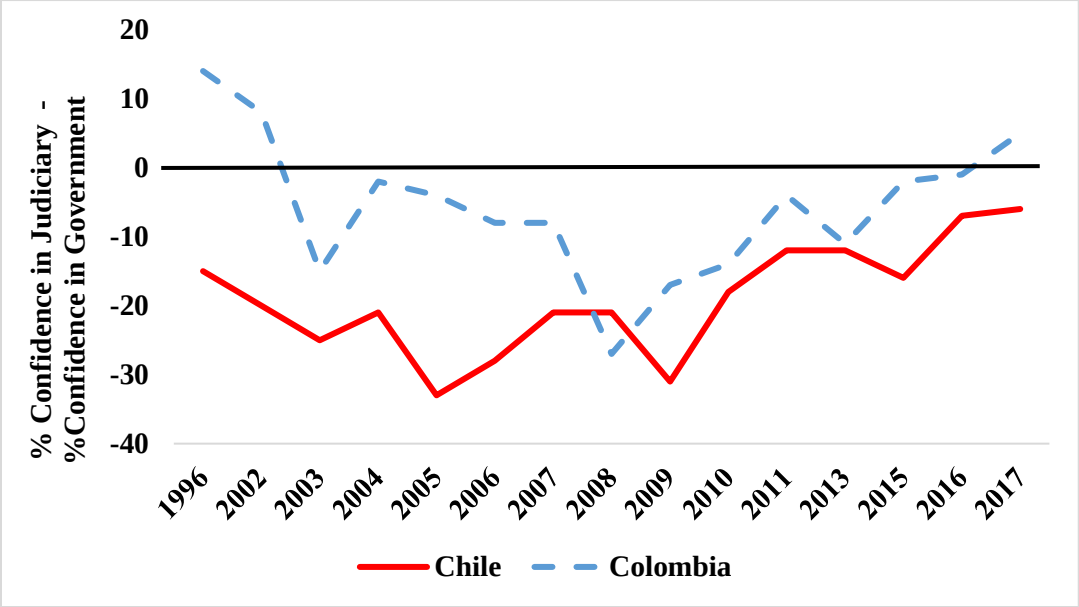
express greater confidence in their judiciary than their legislature, Chileans have consistently been more confident in their legislature than their judiciary.

Figure 3.2: Confidence in Judiciary Relative to Congress



Turning to confidence in the judiciary relative to the government in Figure 3.3, it appears that the judiciaries in both countries are routinely held in less confidence than the government. This is true for every year for which we have data from Chile. Even on this metric, however, the Colombian judiciary comes out ahead of the Chilean. Despite frequently being less trusted than the government in Colombia, in only one year, 2008, does "net trust" in the judiciary (support for the judiciary – support for the government) dip below that in Chile. In both real terms (Figure 3.1) and relative terms (Figures 3.2 and 3.3), then, the Colombian judiciary consistently operates from a more advantaged position than the Chilean when it comes to the public's confidence.

Figure 3.3: Confidence in Judiciary Relative to the Government



Type of Judicial Review

Given this background, it should be clear that I have selected two cases whose judiciaries are distinct from one another. I have argued, however, that whether judicial decisions mandate the government provide concrete goods and services or simply constrain government action may be important factors to consider when testing the literature's theoretical expectations. After all, it is most often for their decisions that high courts come to the public's attention. We can get an idea of the different types of judicial output in Chile and Colombia by considering the rights their respective Constitutions contain as well as by considering a sample of high profile rulings from the Constitutional Courts in both countries. Doing so makes abundantly clear that while both Courts can and do practice constraint-seeking judicial review, the Colombian Court routinely also practices mandate-seeking review. This again highlights that the two countries represent opposite ideal types when it comes to the sorts of constitutionalism that they practice.

In Chapter 2, I argued that to determine whether a particular decision constitutes mandate-seeking review we need to do more than consider simply whether or not it concerns a positive right. As they will frequently be the basis for mandate-seeking review, however, the number of these "social rights" in the Chilean and Colombian Constitutions is an instructive, if conservative, metric to utilize to understand what sort of output the Courts in those countries might produce. The Comparative Constitutions Project allows us to compare the world's constitutions for the presence of 20 different social rights.[27] Comparing the Chilean and Colombian documents, the difference between the countries is unmistakable. Table 3.3 contains the results of this endeavor. While the Chilean Constitution contains only six social rights (four if we exclude limits on the employment of children and the right to join trade unions, given that it is difficult to see how these could be the direct basis for mandate-seeking review), the Colombian contains 17. On this basis alone, Colombia offers much more fertile ground for mandate-seeking review than Chile.

[27] https://www.constituteproject.org/search?lang=en

Table 3.3: Social Rights in the Chilean and Colombian Constitutions

Social Right	Chile	Colombia
Access to higher education	No	Yes
Compulsory education	Yes	Yes
Free education	Yes	Yes
Limits on employment of children	Yes	Yes
Protection of consumers	No	Yes
Protection of environment	Yes	Yes
Right to enjoy the benefits of science	No	No
Right to equal pay for work	No	Yes
Right to health care	Yes	Yes
Right to join trade unions	Yes	Yes
Right to reasonable standard of living	No	Yes
Rights to rest and leisure	No	Yes
Right to safe work environment	No	No
Right to shelter	No	Yes
Right to strike	No	Yes
Right to work	No	Yes
State support for children	No	Yes
State support for the disabled	No	Yes
State support for the elderly	No	Yes
State support for the unemployed	No	No
Total	**6**	**17**

As I acknowledged previously, for some time now social scientists have noted striking differences between law "on the books" and law "in action." One way to verify whether the differences in *de jure* rights that we see in Table 3.3 amount to *de facto* differences in the output of the Chilean and Colombian Constitutional Courts is to examine high profile rulings by these institutions. After all, if rulings by these Courts are directly affecting the political behavior of ordinary people, it is most likely via salient decisions—the ones people have actually heard of—that this is taking place. If indeed the texts of these nations' Constitutions are leading to different sorts of judicial output, we

should see that the Chilean Court primarily practices constraint-seeking judicial review while the Colombian Court engages in a mixture of both constraint-seeking and mandate-seeking review. To gain an understanding of the Courts' most high profile rulings, I examined the websites of the top universities in Chile and Colombia and wrote to 25 law professors, asking if they could offer the four or five decisions from the past decade they considered the most salient. By "salient" I told them I was interested in rulings that had garnered the attention of not just the academy, but the public as well.

In Chile, seven professors responded to my inquiry, recommending a total of 12 rulings by the Constitutional Tribunal, which I list in Table 3.4. *All* of them concern the constitutionality of a government action and are therefore constraint-seeking cases. The decisions that the Colombian constitutional law professors recommended appear in Table 3.5. Out of the 10 decisions they recommended, 4 were mandate-seeking. Unfortunately, in Colombia only two professors responded with recommendations, despite my repeated attempts to contact many more. Moreover, some of the recommendations did not adhere to my request that the decisions be from the previous decade. Nevertheless, when we consider what has been said about the Colombian Court's mandate-seeking jurisprudence by multiple scholars (see above), the broad access citizens enjoy to the Court and their ability to use *tutelas* to pursue social rights, and the fact that nearly half of the cases recommended to me were mandate-seeking decisions, it is very likely that the Colombian Court frequently decides, and comes to the public's attention for, mandate-seeking cases while the Chilean Court is almost entirely known for its constraint-seeking rulings.

While much less has been written about the Chilean judiciary than the Colombian in comparative law scholarship, the evidence I have presented of the Chilean judiciary as

a primarily constraint-seeking institution certainly coincides with my experience doing fieldwork in the country during the summer of 2018. During my interview with a justice on the Constitutional Tribunal, I asked about a particular constraint-seeking decision by the Court that I explore in greater detail later in this chapter. This decision was handed down before he began as a justice, but he reflected on the fact that some people thought that the legislature had gotten it right and that the Constitutional Tribunal shouldn't have intervened. "But that is kind of the role of the Tribunal," he said, "to be contrary. Otherwise it wouldn't exist, right?"[28]

I also went to a book launch at the Tribunal which was attended by several current justices. The author's work was praised highly by the esteemed constitutional law professor who had been asked to provide commentary. Intrigued, I purchased the book. To my surprise, on the very first page of the prologue of the manuscript is the following sentence: "But what is certain is that constitutionalism is born out of … visions that converge on the idea that power ought to be limited, and the way to do this is with law" (Peredo Rojas 2018).[29] Clearly, the idea that the Constitutional Court is to practice constraint-seeking judicial review is embraced in Chile, while the Colombian approach to constitutionalism differs greatly, featuring a Court whose task is to create and deepen rights.

[28] *"Que, bueno, es el rol un poco del Tribunal, cierto, estar a contrario. Porque si no, no existiría, ¿no?"*
[29] Author's translation

Table 3.4: High Profile Decisions by the Chilean Constitutional Tribunal

Recommended case	Description	Type of Judicial Review
Rol 3729	Tribunal considers the constitutionality of abortion under three circumstances	Constraint-seeking
Rol 2935	Tribunal considers the constitutionality of a law giving free university education to low income individuals	Constraint-seeking
Rol 3016	Tribunal considers the constitutionality of a law which gave labor unions the sole power to negotiate on behalf of workers	Constraint-seeking
Rol 2776 and 2777	Tribunal considers the constitutionality of a bill that would have changed the electoral system of Chile	Constraint-seeking
Rol 1710	Tribunal considers the constitutionality of article 38 of Chile's ISAPRES law	Constraint-seeking
Rol 4012	Tribunal considers the constitutionality of a bill greatly amplifying the powers of the Chilean consumer agency	Constraint-seeking
Rol 2787	Tribunal considers the constitutionality of a bill concerning higher education which regulated university admissions and profit in state-supported institutions	Constraint-seeking
Rol 2897 and 2983	Tribunal considers the constitutionality of a law requiring that drunk drivers who kill or injure someone spend a year in prison	Constraint-seeking
Rol 976	Tribunal considers the constitutionality of a law listing various factors that may be used to determine the cost of private health insurance	Constraint-seeking
Rol 4317	Tribunal considers the constitutionality of Chile’s "Law of Higher Education"	Constraint-seeking
Rol 740	Tribunal considers the constitutionality of the "morning after" pill	Constraint-seeking
Rol 2541	Tribunal considers the constitutionality of a bill introducing digital television	Constraint-seeking

Table 3.5: High Profile Decisions by the Colombian Constitutional Court

Recommended case	Description	Type of Judicial Review
C-141/2010	Court considers the constitutionality of a referendum that sought to allow president Álvaro Uribe to serve a third term	Constraint-seeking
C-579/2013 and C-577/2014	Court considers the constitutionality of one part of the peace negotiations with the FARC	Constraint-seeking
T-970/2014	"The Court ensured the right to die with dignity and it ordered the Ministry of Health to work out all the necessary arrangements…"	Mandate-seeking
C-035/2016	Court considers the constitutionality of two laws that it thought endangered some Colombian eco-systems	Constraint-seeking
C-221/1994	Court considers the constitutionality of criminalizing personal drug use	Constraint-seeking
C-239/1997	Court considers the constitutionality of criminalizing euthanasia	Constraint-seeking
SU-337/1999	The Court ordered an interdisciplinary team be formed to handle the case of an inter-sex child and to give her "all the social and psychological support that she and her mother need to understand properly the situation faced by them."	Mandate-seeking
T-025/2004	The Court mandated "the minimum rights that should be ensured for the internally displaced population by the State"	Mandate-seeking
C-355/2006	Court considers the constitutionality of criminalizing abortion	Constraint-seeking
T-760/2008	Court issued various mandates "to deal with the lack of appropriate access to health services"	Mandate-seeking

*Quotations from Constitutional Court's own English-language summaries of the decisions. See http://english.corteconstitucional.gov.co/

Constitutional Courts in Action

In the next section I will lay out a rigorous approach for testing the negative theoretical expectations in the literature regarding the impact of judicialization on the political behavior and attitudes of ordinary people utilizing an original survey with an embedded experiment. First, though, it will be useful to see if we can uncover any evidence that the Courts in Chile and Colombia are affecting the attitudes and behavior of citizens in those countries. Though anecdotal, this "plausibility probe" will provide helpful grounding for subsequent analyses. After all, if I am unable to point to examples of these courts actually affecting people in the real world, it will be unclear how we should understand any results of the survey and experimental analyses that indicate they do.

In Chile, one example of the Constitutional Tribunal affecting citizens' attitudes and behaviors can be found in its 2016 decision in Rol 2983-16, and others like it, in which it declared inapplicable a portion of "Emilia's Law." This law aimed to reduce injuries and deaths caused by drunk drivers by requiring that those drivers spend at least a year in prison after harming someone behind the wheel. This particular case concerned Aldo Rojas, who had been found guilty of ignoring a red light and causing a crash which resulted in the death of one individual. Rojas refused to submit to an exam to determine whether he was drunk and was subject to the year in prison imposed by Emilia's Law. Upon appeal before the Constitutional Court, however, the Court ruled that the law's suspension of alternative forms of punishment for at least a year was unconstitutional because it was disproportionate and contradicted the rehabilitative purpose of the state's

power to enact punishments.[30] The ruling is obviously constraint-seeking, as the Court told the government that its law could not be applied.

Most, if not all, of the experts in constitutional law that I interviewed in Chile described Emilia's Law as "penal populism," and they considered the Court's constraining of the government in this case correct. In fact, one constitutional law professor told me that various members of the legislature acknowledge "off the record" that before voting for the law everyone knew it had constitutional issues, but that they voted for it because of public sentiment. "In fact," he said, one representative that had voted for the law told him, "I knew that what I was voting for was aberrant from the perspective of penal law, but I was seeing the public forums and didn't dare vote [against it]." This background, he said, meant that politicians did not have much to say about the ruling, given that with it "the Tribunal solves a problem that when they had the chance they didn't want to confront."[31]

What the Court actually "said" to the government in this case is important. This was a concrete ruling, meaning it concerned an actual legal dispute, and it occurred after the law had been promulgated. As such, the Court's ruling only applies to the parties in this specific case rather than to all Chileans in general. A number of my interviewees let me know that many similar cases have arisen in which the Court has ruled the same way,

[30] See also the summary by Aróstica et al. (2016). Available at http://www.iconnectblog.com/2017/12/developments-in-chilean-constitutional-law-the-year-2016-in-review/

[31] "Yo sabía que lo que estaba votando desde el punto de vista de los principios del derecho penal era aberrante pero yo veía las tribunas y no me atrevía votar en [contra]" … el Tribunal les viene a resolver un problema que en su minuto ellos no quisieron enfrentar.

but it remains to be seen if the Court will finally declare, in general terms, that this part of the law is unconstitutional.

How does the public understand and react to such rulings? The president of the foundation behind Emilia's Law publically attacked the legitimacy of the Constitutional Tribunal, accusing it of acting like a third chamber of the legislature. "Emilia's Law is falling," she added, because the Constitutional Tribunal is "making inapplicable" the part of the law requiring a prison sentence (Salgado Núñez 2017).[32] Such statements certainly imply that the effect of the Court's rulings goes beyond single cases, and indeed at least some of the experts I spoke with indicated that many officials are finding ways to avoid applying Emilia's Law given the Court's numerous rulings in these concrete cases. It seems the rulings are also affecting Chileans' behavior, driving some citizens to take public action against them. Articles in the press about the Court's decisions in these cases, for example, are sometimes accompanied by photos of public demonstrations in which individuals hold posters featuring pictures of people that have died at the hands of drunk drivers[33] or that appeal directly to the judges who decide these cases.[34] There is also some evidence that rulings like this can lead individuals to contemplate the role of their elected officials. In an emotional letter published online by national newspaper *El Mercurio,* a mother whose daughter was killed by a drunk driver says that Emilia's Law had given her hope. That hope, however, was dashed with the Constitutional Tribunal's

---

[32] Salgado Núñez, José. 2017. "Tribunal Constitucional declaró admisible la inaplicabilidad de la Ley Emilia en 21 recursos por caso de San Antonio." Available at: https://www.soychile.cl/San-Antonio/Sociedad/2017/05/29/466795/Tribunal-Constitucional-declaro-admisible-la-inaplicabilidad-de-la-Ley-Emilia-en-21-recursos-por-caso-de-San-Antonio.aspx

[33] For example, http://www.emol.com/noticias/Nacional/2017/07/05/865541/Tribunal-Constitucional-rechaza-recurso-de-mujer-que-impugnaba-Ley-Emilia-para-evitar-prision-efectiva.html

[34] For example, http://www.emol.com/noticias/Nacional/2017/05/31/860758/Ley-Emilia-Senado-aprueba-observaciones-a-recursos-de-inaplicabilidad-presentados-ante-el-Tribunal-Constitucional.html

ruling. She ends her letter with a poignant plea to various officials, including her personal senator, that they defend the law.[35]

In the wake of the Court's Emilia's Law rulings, then, we have anecdotal evidence that constraint-seeking decisions can undermine judicial legitimacy, and, perhaps, dampen ordinary forms of political participation like voting. It is not difficult to imagine, after all, that individuals who are compelled to demonstrate publically against the Court's decisions or to write a letter begging elected officials for action feel that their desires are not being adequately represented. This sentiment is once again evident in the mother's letter I reference above. Her exasperation is clear when she exclaims, "What are we even talking about? A law was passed and now it can't be applied?"

In Colombia, evidence of the impact of the Court's mandate-seeking decisions on the behavior of the general population is more complicated. In Chapter 1, for example, I introduced decision T-544/17, the ruling in which the Constitutional Court ordered the Ministry of Health to begin regulating the practice of euthanasia for children. It seems that the most vigorous objections to the ruling came from the Catholic Church and not from the general public.[36] Several online sources, however, reference vigorous opposition to legalized euthanasia,[37] but it is difficult to document exactly what this opposition looks like among ordinary Colombians, as often the opposition these sources actually cite ends up being from the Church.[38]

---

[35] http://www.elmercurio.com/blogs/2017/04/19/50437/Ley-Emilia-por-que-no-se-aplica.aspx
[36] See, for example, https://www.eltiempo.com/vida/conferencia-episcopal-rechaza-eutanasia-infantil-145404
[37] For example, https://www.elespectador.com/opinion/lapulla-eutanasia-asesinato-columna-802463
[38] For example, https://www.eltiempo.com/justicia/cortes/eutanasia-para-ninos-un-derecho-que-genera-polemica-145888

When the public was given the opportunity to respond to the initial draft of the regulations the Ministry of Health developed, its primary concerns were with strengthening the document's protections for 6-12 year-olds, the youngest age group allowed to seek euthanasia under some circumstances.[39] We cannot ignore that this could reflect a general discomfort with the idea of euthanizing children: Given that the Court had already ordered the government to facilitate the practice, perhaps those who opposed it felt their best option was to make the regulations surrounding it as strict as possible. Moreover, as a group, doctors in Colombia have been reluctant to practice euthanasia for ethical reasons, and some expect that they will be even more resistant to applying the practice to children.[40] However, based on the material that appears in all of the articles I read, this decision does not seem to have widely impacted the behavior of Colombians.

On the basis of the preceding discussion, it is difficult to imagine that the Colombian Court's mandate to the government would have a similar impact on people's behavior as it seems the Chilean Constitutional Tribunal's decision did in the Emilia's Law case. Whether or not the differences in the Chilean and Colombian public's reactions to these rulings can be attributed to the constraint-seeking versus mandate-seeking nature of the decisions is a question I will try to answer throughout the remainder of the project. Indeed, while the foregoing observations are helpful for grounding us in the realities in which the Chilean and Colombian Courts operate, we must move beyond anecdotes if we are to rigorously establish the causal impact these sorts of decisions have

[39] https://www.eltiempo.com/vida/salud/resolucion-sobre-eutanasia-para-ninos-en-colombia-192074
[40] https://www.eltiempo.com/justicia/cortes/eutanasia-para-ninos-un-derecho-que-genera-polemica-145888

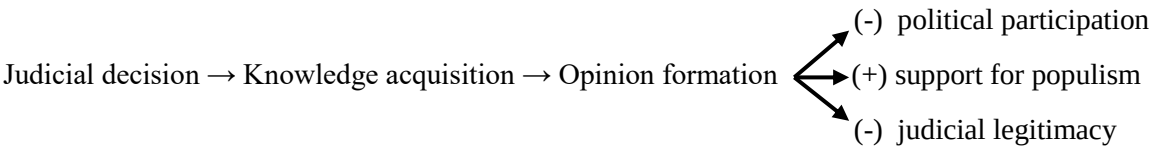
on the political behavior of the citizens they govern. In the next section, I outline a plan for doing just that.

Testing the Impact of Judicialization on Political Behavior

Having described the cases with which I will work for the remainder of the project and presented anecdotal evidence that constraint-seeking decisions can have a different effect than mandate-seeking decisions in these contexts, we can set about testing the literature's theoretical expectations regarding the impact the judicialization of politics should have on people's political behavior. Remember that the aim of this project is to test several negative expectations that are found in extant literature. Specifically, I will test claims that judicialization contributes to a weakening of political engagement, an increase in support for the violations of democratic norms often associated with populism, and a decrease in judicial legitimacy.

If these claims are true, then there must be a process by which judicial review affects people's attitudes and behaviors. As with empirical tests of these claims, however, theory about such a process is conspicuously absent from the literature. One contribution of the current project, then, is an initial attempt to provide such a theory. In this vein, it seems to me that the most obvious process by which judicialization could impact the three outcomes in which we are interested contains four steps, as illustrated in Figure 3.4.

Figure 3.4: From High Court Rulings to Attitudes and Behavior



First, and most obviously, a high court must issue decisions. Without this step, there is nothing to affect individuals' behavior. Second, people have to acquire knowledge about those rulings. This learning might occur through a variety of mechanisms such as the media, politicians, or other elites, but if citizens are unaware of what their court has done, it seems strange to think they could change their behavior in response to its activity. Third, those same people have to form an opinion about the court's rulings. Without some sort of reaction to the decisions, it is not clear why, or how, citizens' behavior might change. Fourth, citizens disengage from politics outside of the court, they express greater tolerance, or even support for, violations of democratic norms that are associated with populism, and they lower the amount of legitimacy they award their court.

To test this process in Colombia and Chile, and thereby test the impact of judicialization on people's attitudes and behaviors, I rely on an experiment embedded within a survey that I fielded in both countries.[41] The experiment randomly exposes some subjects to a series of rulings by their Court and then measures each of the outcomes I am exploring in this project. Experiments in the social sciences, and in political science in particular, have rapidly increased in popularity in recent years (Morton and Williams

[41] The survey experiment was pre-registered on Dataverse: https://doi.org/10.7910/DVN/ELKP9Y

2008), and this is especially true in the study of law and politics (e.g., Gibson and Caldeira 2009, Bartels and Johnston 2013, Johnston, Hillygus, and Bartels 2014, Gibson and Nelson 2018). Because high court rulings are often issued "under the radar" and there is seldom public opinion data on them, especially outside of the United States, experiments are often the best means for rigorously testing behavioral hypotheses related to judicial politics.

In the context of the current project, an experiment offers additional advantages as well. Because the theoretical expectations I am examining concern the impact of judicialization on specific attitudes and behavior, it is important that I be able to isolate the effect of judicialization apart from other variables which might affect the outcomes. Experiments allow researchers complete control over explanatory variables and thus eliminate concerns about competing explanations and reverse causality which would normally complicate findings in the context of observational research. As far as I am aware, this project represents the first attempt to experimentally evaluate the impact of judicialization on political engagement and support for populism. Moreover, while others have used experiments to measure the impact of judicialization on judicial legitimacy in the United States (see Egan and Citrin 2009), it has never been done in Latin America.

The Chilean survey was active January 14-16, 2019, and the Colombian survey was active January 15-17, 2019. Both were programmed in Qualtrics and administered online by the firm Netquest. After dropping subjects who withdrew their consent upon being debriefed about the experiment and those who took longer than an hour to complete the study, a total of 591 participants completed the experiment during the period it was

active in Chile, and 597 did so in Colombia.[42] For a full description of the sample, see Appendix A. The samples in both countries were convenience samples, and while they therefore deviate from the national population in several respects, they have good variance on potential moderating variables and do not harm our ability to make causal inferences (Druckman and Kam 2011).

Following, in part, Egan and Citrin (2009), subjects began the survey by giving their opinions on a number of issues, several of them "distractors," but three of which were the issues considered by their country's Constitutional Court in the cases whose impact I am testing. At this point in the survey, participants were not told anything about the Constitutional Court; asking their opinions on these issues allowed me to establish which of the Court's rulings subjects were in agreement with, a key piece of information for testing the alternate hypothesis that what matters is agreement with the Court, not the constraint or mandate-seeking nature of its decisions.

A third of subjects, the control group, was then randomly assigned to answer the dependent variable items measuring their willingness to engage in politics, their support for the violation of democratic norms, and the legitimacy they award their Constitutional Court. Another third of the sample read brief vignettes, which they saw in random order, describing the Constitutional Court's decisions in three cases before answering the dependent variable items. The vignettes roughly mimic what subjects might read in the first few sentences of a news article reporting the Court's ruling (Egan and Citrin 2009).

[42] I failed to anticipate needing to drop subjects from the sample who took a very long time to complete the survey, so this does not appear in the pre-analysis plan. However, this is extremely common practice in survey experimental research (e.g., Gibson and Nelson 2016), on the theory that too much time may have passed between when some individuals received the treatment and when they answered the dependent variable items.

The final third of the sample read the same vignettes about the same rulings, but to evaluate step 3 in the model, "Opinion Formation," subjects in this group were given the opportunity to respond directly to each decision. After reading a vignette, they were asked to rate the extent to which they accepted the Court's ruling using a standard measure from the study of judicial politics in the United States (Gibson et al. 2005). Following this quantitative measure, they were asked to explain their acceptance of the decision, or lack thereof, in an open-ended manner before also answering the dependent variable items. Table 3.6 contains a summary of the experimental design.

Table 3.6. Experimental Design

	Chile	Colombia
Treatment 1	Respondents primed with three constraint-seeking decision vignettes. N=185	Respondents primed with three mandate-seeking decision vignettes. N=212
Treatment 2	Respondents primed with three constraint-seeking decision vignettes, to which they gave open ended responses. N=193	Respondents primed with three mandate-seeking decision vignettes, to which they gave open ended responses. N=189
Control	No Court decisions made salient. Proceed to outcomes. N=213	No Court decisions made salient. Proceed to outcomes. N=196
Institutional Context	Constraint-seeking rulings	Mandate-seeking rulings

Importantly, subjects read vignettes describing rulings by *their country's* Court: that is, Colombians in the treatment groups read about three mandate-seeking decisions by their Constitutional Court while Chileans in the treatment groups read about three constraint-seeking decisions by their Court. This part of the research design contributes to

experimental realism, inasmuch as these are actual rulings not unlike many others handed down by the high courts in these countries. It also allows me to evaluate the impact of judicial review while staying true to the variations in institutional context represented by each country. I am therefore not manipulating institutional context explicitly, but rather exploiting the differences in institutional context offered by these two countries to test whether judicialization *necessarily* exerts a negative effect on peoples' attitudes and behaviors. If the results reveal that Colombians exposed to a series of decisions by their Court react differently than Chileans who are exposed to their Court's decisions, it may be evidence that scholars of judicial politics need to pay greater attention to institutional context when arguing about the democratic role of courts. On the other hand, if the results in each country are the same, this may be evidence of the impact that courts *as courts* have on the political behavior of ordinary citizens.

My approach allows me to follow each step in the model of how court activity could lead to a change in the behavior and attitudes of ordinary citizens (Figure 3.4). I ensure that steps 1 and 2, in which judicial decisions are handed down and people acquire knowledge about those decisions, take place during the survey because I inform my subjects about the rulings. We have already seen that the open-ended question allows me to evaluate people's reactions to the rulings in step 3 of the model, and comparing the treatment and control groups' scores on the dependent variables within countries permits evaluation of step 4. Finally, comparing treatment effects across the two countries will allow me to test the argument that context matters to the impact of judicialization on political behavior.

As Seawright (2016) noted of his use of an experiment to test an individual step in his process-tracing endeavor, such experiments cannot confirm what happened in the past; my experiment, therefore, will not tell us for sure what the combined effect of the three cases was in each country. What the experiment does, though, is offer evidence of whether citizens "from the same culture and political system" in which the decisions were handed down "at least sometimes exhibit the hypothesized causal effect. Thus, the experiment provides a kind of evidence in support of the case-study argument that would be far more difficult to replicate through purely qualitative efforts" (Seawright 2016, 199).

Internal and External Validity

Experiments are prized for their internal validity. That is, because experiments randomly assign subjects to treatment and control conditions, any variables besides the treatment that might otherwise affect subjects' scores on the dependent variable are balanced between conditions. We can therefore be certain that any differences between the mean scores of the treatment and control conditions are due solely to the presence or absence of the treatment. For my experiment, this means that in each country we can be sure that any differences we observe between treatments and control are indeed due to the fact subjects did or did not read about the three decisions handed down by their Court.

External validity, on the other hand, refers to our ability to generalize the findings of the experiment to the broader population. For several reasons, this study is also high in external validity. First, the nature of the treatments themselves is similar to how individuals might learn about Court rulings in the real world—by reading a sentence or

two that broadly summarizes what the Court did. Additionally, as I explain in Chapter 5, each dependent variable is operationalized in more than one way, which allows us to trust that findings are not dependent on a single item measure of the concept (Mutz 2011).

A Closer Look at the Rulings

Before moving on to the results, it will be helpful to explore the rulings by the Chilean and Colombian Constitutional Courts which form the basis of the treatments in the survey experiment. I have already discussed in detail several of the decisions to which I exposed subjects, while others I have not. I begin with the Chilean Court's constraint-seeking rulings before moving on to the Colombian Court's mandate-seeking decisions. These rulings were selected for the experiment using a combination of the expert recommendations I discuss earlier in this chapter and online searches of national newspapers to locate salient decisions. The bottom-line criteria for all cases was that the Chilean decisions had to constrain government action while the Colombian decisions had to mandate it.

Chile: constraint-seeking decisions

In one vignette that subjects in the treatment conditions in Chile received, they read the following:

> In 2016 the Chilean Constitutional Tribunal ruled that **the government could not require** a mandatory prison sentence for individuals that kill or injure another person while driving drunk.[43]

[43] In Spanish the vignette read, "En 2016, el Tribunal Constitucional de Chile **falló que el gobierno no podía obligar** que los individuos que matan o causan lesiones graves a otras personas, mientras manejan en estado de ebriedad, tengan que pasar un período en la cárcel."

This summary corresponds to the Tribunal's decision in Rol 2983-16, in which, as we discussed above, it declared inapplicable a portion of "Emilia's Law," which aimed to reduce injuries and deaths caused by drunk drivers by requiring that those drivers spend at least a year in prison after harming someone behind the wheel. The ruling is obviously constraint-seeking, as the Court told the government that its law could not be applied.

Moving on, in another vignette participants in the Chilean treatments read the following statement:

> In 2016 the Constitutional Tribunal ruled that **the government could not give unions** the sole power to negotiate on behalf of workers or prevent workers from forming other groups to represent themselves in negotiations.[44]

This description references Rol 3016-16, in which the Court declared unconstitutional the government's attempt to give labor unions the sole capacity to represent workers in collective negotiations. Once more, this case is a clear example of constraint-seeking judicial review, inasmuch as the government's attempt at labor reform was declared null and void.

That this decision would have appeared constraint-seeking to Chileans when it was handed down seems highly likely. Several of the experts that I spoke with in Chile related to me the politicized nature of this case. In fact, labor reform was one of the principle components of left-leaning President Michelle Bachelet's presidential campaign. One of the constitutional law professors referred to her reforms as the outgrowth of Chile's version of the Occupy Wallstreet movement, and apparently those reforms were fairly popular, at least initially, as Bachelet was elected with more than 60

---

[44] In Spanish the vignette read, "En 2016 el Tribunal Constitucional **falló que el gobierno no podía ordenar** que los sindicatos sean las únicas organizaciones con derecho a representar a los trabajadores durante las negociaciones, y que **el gobierno no podía impedir** que los trabajadores formen otros grupos no sindicalizados para negociar."

percent of the vote. That the Court struck down a core component of her reformist platform, then, would have been a clear example of constraint-seeking behavior by the institution.

Finally, the vignette describing a third ruling to participants in the Chilean treatment groups read as follows:

> In 2018, the Constitutional Tribunal **ruled that the government could not prohibit** for-profit entities from running universities or other institutions of higher education.[45]

This vignette describes the Tribunal's decision in Rol 4317-18, in which it ruled unconstitutional the government's attempt to legally keep for-profit entities from running institutions of higher education. Here we see that the government is once more clearly being constrained by the Court as it strikes down another portion of a law the government wanted to enact.

For much the same reason as the previous case, when it was decided this ruling should have been a loud and clear signal of constraint-seeking behavior by the Court. Education reform was another pillar of President Bachelet's platform, and this particular attempt at reform enjoyed the support of a number of new representatives in the legislature who had been leaders in the massive student mobilization movement that took place for nearly a decade prior to the ruling. Once more, then, the politicized nature of the Court's decision to strike down this portion of education reform is unmistakable.

[45] In Spanish, the vignette read, "En 2018, el Tribunal Constitucional falló **que el gobierno no podía prohibir** que personas o instituciones con fines de lucro sean controladoras de universidades u otras instituciones de educación superior."

Colombia: mandate-seeking decisions

For one of the Colombian decisions, respondents in the treatment groups read the following vignette:

> In 2017 the Colombian Constitutional Court ruled that terminally ill children have a right to euthanasia and **ordered that the government issue the necessary regulations to make child euthanasia possible**.[46]

This description corresponds to case T-544/17, which we have discussed at length already, and is clearly an instance of mandate-seeking review because the government is ordered to provide Colombians access to a service the justices determined is required by the Constitution.

For another case, subjects in the treatment groups in Colombia read the following vignette:

> In 2016 the Colombian Constitutional Court ruled that the Atrato River has legal rights and **ordered that the government form a "Commission of Guardians" that is responsible for protecting it**.[47]

This summary corresponds to the Court's decision in case T-622/16, in which it took the surprising (to many) step of granting legal rights to an important body of water threatened by pollution from illegal mining. Once again, this decision is clearly mandate-seeking as the government is ordered to engage in activity, this time delivering a service to Colombians by protecting their water.

---

[46] In Spanish, the vignette read, "En 2017, la Corte Constitucional de Colombia falló que los menores de edad que tienen enfermedades terminales tienen derecho a la eutanasia y **ordenó al gobierno reglamentar la práctica de eutanasia infantil**."

[47] In Spanish, this vignette read, "En 2016, la Corte Constitucional de Colombia falló que el río Atrato tiene derechos legales y **ordenó al gobierno formar una comisión de guardianes que lo proteja.**"

The Colombian media made unmistakable the mandate-seeking nature of the ruling, connecting the formation of the commission to the Court's decision. One piece begins, "After the Constitutional Court declared for the first time in the history of the country that the Atrato River possesses rights and ordered the state to protect its basin and tributaries, governmental institutions proposed creating five expert committees in order to comply with the different orders" (El Tiempo 2017).[48] Another describes the signing of the resolution which officially created the commission. "The commission, which was ordered by the Constitutional Court," it reads, "is comprised of the Ministry of the Environment and Sustainable Development as legal representative of the rights of the Atrato River, and 14 community representatives" (Medioambiente 2018).[49]

Finally, a third vignette that subjects in the treatment groups in Colombia received read,

> In 2018, the Constitutional Court ruled that Venezuelans who come to Colombia illegally have a right to medical treatments and ordered **the Colombian government to pay for the treatments if the migrants cannot pay for it themselves.**[50]

This vignette summarizes decision T-210/18, which the Court released in the midst of the country's ongoing Venezuelan migrant crisis. An article in *El Tiempo* in June of 2018 reported the results of a recent census which revealed that nearly half a million

---

[48] El Tiempo. 2017. "Proponen comités para implementar sentencia del río Atrato, en Chocó." Available at: https://www.eltiempo.com/vida/medio-ambiente/comites-para-implementar-sentencia-del-rio-atrato-119452

[49] Medioambiente. 2018. "El río Atrato cuenta oficialmente con una comisión que lo proteja." Available at: https://www.eltiempo.com/vida/medio-ambiente/el-rio-atrato-cuenta-con-una-comision-de-guardianes-que-lo-proteja-223924

[50] In Spanish, the vignette read, "En 2018, la Corte Constitucional falló que los venezolanos que vinieron a Colombia ilegalmente tienen derecho a tratamientos médicos y **ordenó al gobierno de Colombia pagar por los tratamientos médicos si los venezolanos no los pueden pagar.**

Venezuelans were in the country illegally (Nación 2018).[51] Once more the decision is clearly mandate-seeking inasmuch as the government is ordered to provide a service in the form of healthcare for Venezuelan migrants.

We will see in Chapter 4 that this decision is extremely unpopular among many Colombians. While the press once again made the mandate-seeking nature of the ruling clear, this critical perspective also made its way into the news surrounding the decision. In one article written before the full reach of the Court's decision was even known, the director of the Departmental Institute of Health, which operates in the region of the country's border with Venezuela, says, "Our judges keep ruling in favor of this population that doesn't even live in national territory. We are familiar with the fundamental right to health and to life, but this is going to cause a huge detriment to the medical services we provide in this part of the country" (Cúcuta 2018).[52]

Manipulation Checks

To ensure that subjects were paying attention to the vignettes and were therefore exposed to the mandate-seeking or constraint-seeking nature of the rulings, after reading each vignette subjects answered a question asking that they select from among two descriptions the one which described the Court's ruling they had just read about. These manipulation checks therefore had the added benefit of re-exposing subjects to the decision, and hence reinforcing its content. In Chile, no fewer than 88 percent of subjects

[51] Nación. 2018. "El 89% de los venezolanos censados se quieren quedar en Colombia." Available at: https://www.eltiempo.com/colombia/otras-ciudades/resultados-del-censo-de-venezolanos-en-colombia-229716

[52] Cúcuta. 2018. "Autoridades sanitarias preocupadas por costos en la frontera." Available at: https://www.eltiempo.com/colombia/otras-ciudades/tutelas-a-favor-de-migrantes-estarian-desangrando-la-salud-en-frontera-229836

passed each manipulation check and in Colombia no fewer than 90 percent did (see Appendix B). At such high passage rates, we can be sure that the vast majority of subjects adequately received the treatment.

Conclusion

We are now in a position to consider the empirical results of the survey and its embedded experiment. The next chapter will walk readers through participants' reactions to the three rulings, paying close attention to how well these reactions conform to the expectations we find in existing literature. It also reveals novel findings that support the notion that the institutional context in which courts operate impacts the way citizens behave and think about law and politics. Chapter 5 then discusses how each of the theoretical expectations fared in the experiment.

Chapter 4. Forming Opinions about Judicial Decisions

When people learn about court rulings, how do they react? What is most salient in the minds of ordinary citizens when they form opinions about these rulings, and can it provide any clues as to whether the theoretical expectations I am investigating will be borne out? This chapter aims to answer those questions by allowing people to speak for themselves. As far as I am aware, existing work on this topic has been entirely quantitative and almost entirely American in focus. As such, we now possess a number of important insights into the predictors of the American public's willingness to accept specific judicial decisions, especially decisions with which they disagree (e.g, Gibson et al. 2005, Woodson 2015). By pairing a common quantitative measure of individuals' willingness to accept a judicial decision with an open-ended question that allows them to explain their reasoning, this chapter complements earlier work by delving deeper into peoples' cognitive processes than purely quantitative analyses can. As I consider the responses of Colombian and Chilean individuals, I also expand the scope of the literature by exploring the very different institutional contexts offered by these countries. We saw in Chapter 3 that the Constitutional Courts in these countries were designed with very different purposes in mind and that the manner in which they intervene in national politics can differ considerably as a consequence. While the Chilean Court, like its counterpart in the United States, almost always constrains government action, the Colombian Court frequently mandates the government provide material goods and services in addition to issuing constraint-seeking rulings. Investigating these questions cross-nationally, then, we should not start with the assumption that high courts always, or even primarily, act counter to the will of democratic majorities.

Investigating reactions to rulings

Recall that subjects in the treatment groups in my experiment read a series of three short vignettes describing recent rulings by their country's Constitutional Court. After each vignette, subjects in one treatment group were asked the following question, "Do you accept the decision made by the Court? That is, do you think the decision ought to be accepted and considered the final word on the matter?" Respondents then answered this question using a 4-point scale.[53] The item comes from Gibson, Lodge, and Woodson (2014).[54] Extant scholarship defines acceptance as what happens when citizens respect the court's ruling, "cease opposition, and get on with politics" (Gibson et al. 2005, 194), and this item strongly reflects the sentiment behind that definition.

Following the quantitative measure, respondents in this treatment group were asked to explain their answers in an open-ended fashion using a "stop and reflect" task. Specifically, they were asked, "Thinking about the question you just answered, exactly what things went through your mind? Please type your response below." (Ericsson and Simon 1980, see also Kam and Burge 2017). This method allows "a glimpse into 'the way in which a person views the world' (Cacioppo et al. 1997, 928) but should not be assumed to be a veritable explanation of attitudes or behaviors" (Kam and Burge 2018, 315). As such, examining subjects' answers will allow me to explore, at least partially,

[53] The answer choices are: Strongly believe the decision ought to be accepted and considered the final word on the matter. Somewhat believe the decision ought to be accepted and considered the final word on the matter. Somewhat believe there ought to be an effort to challenge the decision and get it changed. Strongly believe there ought to be an effort to challenge the decision and get it changed.

[54] This question is often part of a 4-item battery measuring acceptance of court decisions. Because I ask respondents to explain their thought process behind answering the question the way they did, I needed to use only one of the four items. This is the item that most closely matches the description of acceptance from Gibson, Caldeira, and Spence (2005).

the things that pass through peoples' thoughts when they learn about decisions by their high courts.

In total, 193 Chilean respondents and 189 Colombian respondents were in the treatment group that requested they provide open-ended responses explaining their acceptance or rejection of each decision. In accordance with IRB requirements, subjects were not forced to answer any questions to which they did not wish to respond, and consequently some individuals did not provide responses to all three rulings. Most did, however, and the result was a total of 877 open-ended reactions to the vignettes. Importantly, while far from even, the distribution of agreement with the Court's decisions will permit analysis of comments from both those who agreed with the rulings and those who did not. Based on items respondents answered at the beginning of the survey before reading the vignettes, 30 percent of the comments from Chilean respondents were from individuals who agreed with the Court's rulings while the same is true of 60 percent of the comments from Colombian respondents.

These comments were coded both inductively and deductively. That is, because the American literature points us to several variables that make individuals more likely to accept judicial decisions, each comment was coded for the presence of these variables. Upon reading through the responses, it was clear that more was going on in my respondents' heads than what could be captured by these initial variables, however, so I developed a coding scheme that included broad themes that emerged during my initial reading of the comments.[55]

[55] Thanks to Beth Leech for her helpful advice on coding this type of data.

The rest of the chapter contains the results of my analysis of the open-ended comments. I begin by explaining the ways in which my subjects' responses did, and did not, reflect the variables the American literature tells us make people more likely to accept judicial decisions. Because this literature is primarily concerned with citizens' acceptance of disagreeable rulings, throughout the chapter I consider the comments of those who agree with the rulings separately from those who disagree with them. Next, I explore the specific reactions of individuals who disagreed but still indicated they accepted a particular ruling. I then describe the facets of my subjects' reactions that go beyond what is contained in the existing literature, considering two new variables in the process. As this is the first analysis I am aware of that takes such an approach to understanding individuals' responses to high court behavior, it should be considered almost entirely exploratory. However, some of the results that emerge are provocative and point to exciting questions for future research.

Exploring the predictors of acceptance

The literature on accepting Court decisions is concerned with the judiciary's ability to get its decisions accepted even when people disagree with the policy outcomes of those decisions (e.g., Gibson et al. 2005, Woodson 2015, Gibson and Nelson 2018). Because the institution lacks the ability to enforce its own decisions, understanding the circumstances in which people acquiesce to rulings they find disagreeable is clearly important. If our aim is to understand people's reactions to judicialization more broadly, however, we must consider everyone's reactions and not just those of people who disagree with what the Court does. Analyzing the responses of nearly 400 individuals to

three different rulings by their High Court allows me to explore responses to both agreeable and disagreeable rulings and to compare their content.

Extant scholarship points to six factors that may influence individuals' willingness to accept a decision with which they disagree. Investigating the acceptance of U.S. Supreme Court rulings, Gibson et al. (2005) examine the impact of the Court's *legitimacy* and conclude that, in general, people who view the Court as more legitimate are more likely to accept adverse decisions. They also investigate the role that perceived *partisanship* on the part of judges might play, thought they conclude that whether a decision was reached by consensus or not is of little consequence. Third, they also interrogate whether a decision viewed as *fair* is more likely to be accepted than one perceived to be legal, but less fair. In doing so, they find that decisions grounded in legality over and above fairness are more likely to be accepted. Finally, they look for evidence of *instrumentalism* and find that, compared to decisions that are judged to be inconsequential, people are less likely to accept decisions when the stakes are perceived to be high.

Woodson (2015) complements this list with two additional variables. He looks for *politicization* among citizens: that is, he looks for evidence that citizens are accepting or rejecting decisions based solely on their policy preferences. He also looks for evidence of acceptance when judges are deemed to be *principled* in their decision making. For him, citizens holding this view would consider that judges base their decisions on abstract principles, though these principles are not necessarily legalistic in nature. In short, he finds that when individuals believe that judges are principled, the legitimacy they award the Court predicts their acceptance of the decision. If they believe

that judges themselves are politicized ("partisan" in the language of Gibson et al. (2005)), then their policy preferences predict their acceptance.

Coding the Responses

In light of the above, I undertook the following considerations when coding responses to each decision. As will be clear, a single response could be coded as indicative of multiple predictors of acceptance.

According to Tyler (2006, 375), "Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decisions and rules…" On this basis legitimacy has also been referred to as loyalty to a particular institution (Gibson and Nelson 2018). Accordingly, I determined that a comment indicated a subject was considering judicial legitimacy in their acceptance or rejection of a decision if it mentioned something about it being appropriate (or not) for the Court to make that decision or it mentioned the respondent's loyalty, or lack thereof, to the Court. For example, one comment from a Chilean subject read, "The Constitutional Tribunal is there to decide law. Otherwise it wouldn't exist."[56] Similarly, one Colombian participant responding to the child euthanasia case wrote, "I believe the Court has the last word. It's as though they had to study more than us citizens so they could have the last word."[57] Both comments indicate a willingness to defer to the Courts'

[56] *El Tribunal Constitucional está para decidir en derecho. De otra manera no existiría.*
[57] *Considero que la corte tiene la última palabra, es como si ellos tuvieran que estudiar más que nosotros los ciudadanos para que ellos tengan la última palabra.*

rulings because the respondents believe it appropriate for the Courts to be making those rulings. As such, both are coded as references to judicial legitimacy.

I coded a response as indicating that the subject was considering judicial partisanship if it mentioned the impartiality/objectivity with which a decision was made, and this could of course include a respondent's view that the justices on the Court were advancing their own policy preferences. As we will see, this concern was barely on respondents' minds, but to get an idea of what such responses looked like, consider one comment from a Colombian subject that read, in part, "unfortunately courts are politicized entities that worry more about fulfilling political obligations than constitutional obligations."[58] Obviously, this respondent believes that politics, not the law, is behind the justices' decision, and as such the comment is coded as indicating judicial partisanship.

If a respondent's comment showed she made the decision to accept or reject a ruling based on how fair she perceived it, as opposed to the legality of the decision, then I coded the response as indicating a concern for "fairness vs. legality." For example, someone responding to the drunk driving case in Chile wrote, "One way or another, those that cause pain to the family members [of the victims] have to pay."[59] One Colombian who was unhappy with the Court's decision to allow undocumented Venezuelans access to free healthcare said, "If healthcare for citizens is a complete mess, if hospitals complain because they don't receive sufficient money, why are we taking responsibility

[58] *"…lamentablemente las cortes son entes politizados que se preocupan más por cumplir obligaciones políticas que las constitucionales."*
[59] *De alguna forma tienen que pagar los que causaron dolor a los familiares*

for foreigners!!!!"[60] Both comments reveal that these participants were concerned with a lack of fairness in the decisions, not the legal principles on which the decisions might have been made.

Responses were coded as exhibiting instrumentalism if it was clear that the participant was concerned with what was at stake in the decision. These sorts of comments are inherently future-oriented. One Colombian subject responding to the ruling in which the Court granted legal rights to a river, for example, wrote, "The government should make laws, and be sure they're followed, that protect rivers, parks, … natural resources for future generations."[61]

A comment was coded as indicative of citizen politicization if the respondent made explicit their own policy preferences, including making clear his agreement or disagreement with the decision. To illustrate, one respondent in Chile expressed a policy preference in response to the drunk driving case by saying, "I definitely think causing an accident because of driving drunk should be punished with prison…"[62] Similarly, a participant from Colombia responding to the Venezuelan healthcare case wrote, "We're all people, and no matter where we are we should have a right to good medical treatment or good medicine…"[63]

---

[60] *Si para los nacionales la salud es toda una angustia, si los hospitales se quejan porque no reciben el dinero necesario, por qué hacernos cargo de los extranjeros!!!!*
[61] *El gobierno debe crear y hacer cumplir leyes para proteger los ríos, parques, etc, de recursos naturales, para las generaciones futuras.*
[62] *Considero que efectivamente se debe penalizar con cárcel el provocar un accidente cuyo origen tenga el manejar con presencia de alcohol…*
[63] *Todos somos personas, y estemos donde estemos, debemos de tener derecho a un buen tratamiento medico o unas medicinas…*

Finally, I considered responses that indicated a decision was based on adherence to principles (whether or not those were legal principles) rather than policy implications as reflecting a concern with "principled judges." One participant in Colombia wrote in response to one of the decisions, for example, "I would hope that the Constitutional Court seriously studied the issue and received the necessary counsel to make that decision."[64] Table 4.1 summarizes my coding scheme.

Table 4.1. Coding the Six Predictors of Acceptance

Legitimacy	Respondent mentions something about the fact it was (in)appropriate for *the Court* to make the decision. It was the right/wrong institution to make the decision. Comment could also indicate respondent is or is not loyal to the Court.
Judicial partisanship	Respondent mentions the decision is or is not impartial or objective. This can include the view that judges' are advancing their own policy preferences.
Fairness vs. legality	Respondent's answer indicates the decision is being evaluated based on its perceived fairness/justice rather than its legality.
Instrumentalism	Comment indicates that respondent is concerned with the consequences/stakes of a decision; it specifically mentions such consequences/stakes.
Citizen politicization	Respondent mentions their own policy preferences, including agreement/disagreement with the decision.
Principled judges	Respondent indicates they believe the decision was made based on abstract principles rather than policy implications.

[64] *Esperaría que la Corte Constitucional haya realizado un estudio serio y recibido la asesoría necesaria para tomar esa decisión.*

Results

In this section I present the results of my analyses of the coded responses to each decision vignette in the experiment. Throughout, I display the results in tables and make comparisons both within and across countries. To do this, I calculate and report the p-value associated with the chi-square statistic for each comparison. However, as we will see, several of the predictors of acceptance were basically non-existent in my sample. Moreover, when we disaggregate the responses by other variables there are frequently low Ns for individual predictors. Findings of statistical significance or insignificance may therefore be unreliable when the total observations in individual cells are small.

Table 4.2 below presents the frequency distributions, by country, for each of the six predictors of acceptance. It displays these frequencies in three ways: first, it presents the percentage of all comments that were coded as including a particular predictor. Then, it does the same for comments only from individuals who agreed with the decisions, and last from those who disagreed with the decisions. Tables 4.3 and 4.4 present the same information broken down by ruling in each country. Below, I explore these findings in greater detail. As hardly any comments refer to judges as either partisan or principled, exploration of responses coded as referencing either will only occur if they were coded to contain one of the other four variables.

Table 4.2. Overall results: Variables the literature says leads to acceptance of disagreeable rulings

	Chile			Colombia		
	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Court legitimacy	47 (11%)	15 (12%)	32 (11%)	14 (3%)	8 (3%)	6 (3%)
Judicial partisanship	4 (1%)	3 (2%)	1 (.3%)	3 (1%)	3 (1%)	0 (0%)
Citizen politicization	216 (50%)	69 (53%)	147 (48%)	241 (54%)	172 (64%)	69 (39%)
Principled-judges	5 (1%)	1 (1%)	4 (1%)	2 (.5%)	1 (0%)	1 (1%)
Fairness vs. legality	40 (9%)	4 (3%)	36 (12%)	78 (18%)	4 (1%)	74 (42%)
Instrumentalism	34 (8%)	6 (5%)	28 (9%)	60 (14%)	27 (10%)	33 (19%)
N=	433	129	304	444	268	176
		*Agree vs. disagree significant at p=.01			*Agree vs. disagree significant at p<.001	

*Overall differences across countries significant at p<.001

Table 4.3: Chile: Variables the literature says leads to acceptance of disagreeable rulings

	Emilia's Law			Unions			Education		
	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Court legitimacy	14 (9%)	0 (0%)	14 (10%)	15 (11%)	9 (10%)	6 (13%)	18 (12%)	6 (17%)	12 (11%)
Judicial partisanship	1 (1%)	0 (0%)	1 (1%)	3 (2%)	3 (3%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Citizen politicization	76 (51%)	1 (33%)	75 (51%)	72 (52%)	52 (57%)	20 (43%)	68 (47%)	16 (46%)	52 (47%)
Principled-judges	4 (3%)	0 (0%)	4 (3%)	0 (0%)	0 (0%)	0 (0%)	1 (1%)	1 (3%)	0 (0%)
Fairness vs. legality	27 (18%)	0 (0%)	27 (19%)	4 (3%)	3 (3%)	1 (2%)	9 (6%)	1 (3%)	8 (7%)
Instrumentalism	14 (9%)	0 (0%)	14 (10%)	7 (5%)	4 (4%)	3 (6%)	13 (9%)	2 (6%)	11 (10%)
N=	149	3	146	138	91	47	146	35	111
	*Agree vs. disagree not significant, p=.98			*Agree vs. disagree not significant, p=.60 (excluding rows totaling 0)			*Agree vs. disagree not significant, p=.25 (excluding rows totaling 0)		

*Overall differences across cases significant at p<.01

Table 4.4: Colombia: Variables the literature says leads to acceptance of disagreeable rulings

	Child Euthanasia			Atrato River			Healthcare		
	Overall	Agree only	Disagree Only	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Court legitimacy	2 (1%)	1 (1%)	1 (2%)	8 (5%)	6 (5%)	2 (8%)	4 (3%)	1 (2%)	3 (3%)
Judicial partisanship	0 (0%)	0 (0%)	0 (0%)	3 (2%)	3 (2%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Citizen politicization	95 (64%)	57 (59%)	38 (73%)	110 (75%)	90 (74%)	20 (77%)	36 (24%)	25 (49%)	11 (11%)
Principled-judges	2 (1%)	1 (1%)	1 (2%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Fairness vs. legality	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	78 (52%)	4 (8%)	74 (76%)
Instrumentalism	0 (0%)	0 (0%)	0 (0%)	29 (20%)	24 (20%)	5 (19%)	31 (21%)	3 (6%)	28 (29%)
N=	148	96	52	147	121	26	149	51	98
	*Agree vs disagree not significant, p=.92 (excluding rows that total 0)			*Agree vs disagree not significant, p=.82 (excluding rows that total 0)			*Agree vs disagree significant at p<.001 (excluding rows that total 0)		

*Differences in overall results across cases significant at p<.001

One of the most salient results in Table 4.2 is how few responses contained references to any of the six predictors of acceptance the American literature has highlighted as important. Looking at the "overall" columns for each country, only mentions of respondents' policy preferences ("citizen politicization") show up in a majority of responses, and a bare majority at that. Otherwise, the next most common response concerned the fairness of the decisions, and this sort of response only showed up in 18 percent of the comments in Colombia. In line with the American literature, however, there is variance across those who agreed with the decisions and those who did not, and overall differences across countries are significant as well, so I examine the predictors of acceptance individually below.

Legitimacy

A significantly higher percentage of respondents mentioned the Court's legitimacy in Chile (11 percent) than in Colombia (3 percent), but the results were strikingly consistent within each country. That is, whether subjects agreed or disagreed with the rulings, about 11 percent of Chilean comments and 3 percent of Colombian comments have something to say about legitimacy. Even when we consider references to legitimacy across individual cases in each country, there is noticeably little variance in how often the topic was referenced overall or broken down by those who agree and those who disagree with the rulings.[65] Looking across cases in each country, the small number of responses that mentioned legitimacy results in differences that are statistically

[65] In a few instances, breaking down comments on individual rulings into responses from those who agree/disagree results in a very small N. Only 3 individuals in Chile agreed with the Court's ruling in the Emilia's Law case, for example. While the aims of this chapter are largely exploratory, in these instances especially it should be noted that no effort is made to generalize findings to the broader populations of Colombia and Chile.

insignificant in all but one instance (the healthcare ruling in Colombia). In short, though the literature posits judicial legitimacy as a major factor determining the acceptance of American judicial decisions, and especially decisions with which individuals disagree, subjects in both Chile and Colombia rarely mentioned it in their explanations of why they accepted or rejected the rulings. Moreover, aside from a one percent difference in the healthcare ruling in Colombia, there is no evidence in either country that the legitimacy of the Constitutional Court was of greater concern to those who disagreed with the decisions.

The difference in the frequency of references to legitimacy from Colombian and Chilean respondents is also intriguing. Why might Chileans have mentioned legitimacy more often than their Colombian counterparts? The difference could be an artifact of the particular cases I chose for the vignettes in each country. However, one clear feature of those decisions is their mandate-seeking nature in Colombia and their constraint-seeking nature in Chile. It is within the realm of possibility, then, that the difference in the amount of references to legitimacy across countries stems from the distinct forms of judicial review practiced in each. That is, perhaps something about a judiciary's constraint of the elected branches of government makes the institution's legitimacy more salient in the minds of ordinary citizens than when it mandates those branches act.

In Chile a surprising number of the comments that have something to say about the Court's legitimacy are negative, even when they come from individuals who agree with the policy implications of a particular decision. To be sure, there are comments from subjects that are positive with regard to the Constitutional Court's legitimacy as well. One respondent who agreed with the Court's decision to allow for-profit entities to

operate universities, for example, said, "The Constitutional Tribunal is there to decide law. Otherwise it wouldn't exist."[66] Another who disagreed with the Court's ruling in the Emilia's Law case said, "I think that the law should be equal for everyone, that's why courts are there … the government can't interfere."[67] Such positive legitimacy-related comments were a minority, however. One person who *agreed* with the education ruling opined, "The Constitutional Tribunal is an embarrassing inheritance left over from the dictatorship."[68]

Some responses that attacked the Chilean Court's legitimacy did so out of what we might call broad, democratic concerns. Some of these even give us clues as to what we might expect when we test the first theoretical expectation outlined earlier, the willingness of citizens to engage in politics. One respondent, for example, wrote,

> Once again the Constitutional Tribunal overlooks the will of Congress, and having a majority in both houses or winning the presidency becomes irrelevant for making profound changes to the system in Chile. A lot of discontentment builds up and is not resolved, which is dangerous.[69]

Another writing in the same vein said,

> I think the Constitutional Tribunal has stepped forward to make decisions that overlook what a majority of Chileans think, because our legislators are elected in our pseudo-democracy by a majority one would think, and this blessed Tribunal overlooks them. So what are our legislators there for? Better to leave it to the Constitutional Tribunal…[70]

---

[66] *El Tribunal Constitucional está para decidir en derecho. De otra manera no existiría.*
[67] *Consideró [sic] que la ley debe ser para todos iguales, para eso están los tribunales … el gobierno no puede interferir.*
[68] *El Tribunal Constitucional es una herencia que da vergüenza dejada por la dictadura.*
[69] *Nuevamente el TC pasa por sobre ka [sic] voluntad del congreso y tener mayoría en ambas cámaras o ganar la presidencia resultan irrelevantes para hacer cambios profundos al sistema en Chile. Mucho descontento se acumula y no se resuelve, es peligroso.*
[70] *Creo q el TC se ha prestado para determinar decisiones q van por sobre lo que piensa la mayoría d los chilenos, porque los srs parlamentarios son elegidos por nuestra pseudo democracia con una mayoría se supone, y este bendito tribunal pasa por sobre estos. Entonces para q están nuestros parlamentarios mejor dejar al TC…*

Aside from being fewer in number, the Colombian responses that mention anything related to the legitimacy of their Constitutional Court are notably more positive than their Chilean counterparts, regardless of whether they come from individuals who disagreed with the rulings or not. One individual who disagreed with the Court's ruling in the Atrato River case, for example, noted, "Considering things to be persons with rights is groundless, but as the decision has been made by the authorities, it must be accepted."[71] Another comment from someone who agreed with the Court's decision in that case read, "Well, one thinks that the Court is an honorable Court and that one should trust them [and] their decisions."[72]

The handful of negative legitimacy-related comments that respondents gave seem to be concerned with the politicization of the Court. Recall the comment from above in response to the Atrato River ruling which explained, "There are a lot of topics in this country that need to be legalized, but unfortunately the courts are politicized bodies that worry more about fulfilling political obligations than constitutional obligations."[73] At least one respondent was worried about the legitimacy of the Court making a decision that could have been made democratically instead. Commenting on the Court's decision to force the government to provide medical treatments to undocumented Venezuelans, this person wrote,

> There is no reason that we Colombians should have to solve the problems of citizens of another country. If they have obligations and rights in their country,

---

[71] *Considerar a las cosas como personas con derecho no tiene asidero, pero tomada la decisión por la autoridad hay que acatarla.*
[72] *Pues uno cree que la corte en [sic] una honorable corte y uno debe confiar en ellos en sus decisiones.*
[73] *Hay muchos temas en este país que requieren regularizarse, lamentablemente las cortes son entes politizados que se preocupan más por cumplir obligaciones políticas que las constitucionales.*

> they should fight to see those fulfilled there and not here. And that decision should be made by all the Colombian people and not the Constitutional Court.[74]

Citizen Politicization

Perhaps unsurprisingly, respondents referenced their policy preferences in a large percentage of their comments, though comments from Colombians were slightly more likely to do so than comments from Chileans, 54 percent to 50 percent. That is, these subjects made it clear that they personally liked or disliked the ruling to which they were responding. As Table 4.2 makes clear, in most of the categories across countries (overall/agree/disagree) roughly half of all of the responses indicated a policy preference, though there was greater variance in Colombia. Curiously, that percentage is significantly smaller among comments from those who disagreed with rulings in both countries, and substantially smaller in Colombia (39 percent from subjects that disagreed and 64 percent from those that agreed). At first glance, this is puzzling: why would a *smaller* percentage of individuals in a country where the Court regularly mandates the government provide goods and services reference their policy preferences when they disagree with a decision than when they agree with it?

Perhaps the answer lies in the preceding discussion of legitimacy in Colombia. Recall Woodson's (2015) argument that when people believe judges' decision-making process is politicized, they are more likely to accept or reject a decision on the basis of their own policy preferences, but when they believe judges have made a decision based on principle, the level of legitimacy they award the court predicts their acceptance. We

---

[74] *Que los colombianos no tenemos por qué resolverles los problemas a los ciudadanos de otro país. Que si ellos en su país tienen obligaciones y derechos, deben luchar para que se les cumpla allá y no aquí. Y que esa decisión debería tomarla todo el pueblo colombiano y no la Corte Constitucional.*

have just seen that when Colombian subjects talk about the legitimacy of their Constitutional Court, it is largely positive, while in Chile a large number of individuals attacked the Constitutional Tribunal's legitimacy. It could be, then, that the legitimacy these individuals confer on the Court makes their policy preferences less cognitively salient. However, even in Chile significantly fewer subjects who disagreed with the rulings mentioned their policy preferences than did subjects who agreed, though the percentages are much closer to one another (53 percent among those who agreed, 48 percent among those who did not). The relationship between policy preferences and the acceptance of judicial decisions, as well as what role judicial legitimacy might play in predicting that relationship, are enticing areas for future comparative research.

When we consider overall references to citizen politicization across cases in Tables 4.3 and 4.4, we see that in Chile there is little substantive variation, as the percentage of comments in which respondents reveal their policy preferences across the cases has a range of only 5 percent, consistently hovering around the 50 percent mark. In Colombia, though, we see massive differences across the three rulings. While a low of 24 percent of responses mentioned subjects' policy preferences in reaction to the healthcare ruling, more than three times that amount (75 percent) did so when it came to the Atrato River decision. In the child euthanasia case that number was 64 percent. This is perhaps evidence that the specifics of individual decisions make particular concerns more or less salient in peoples' minds as they process whether to accept or reject those rulings, a point to which I return later.

In Chile, many of the comments in which participants made clear their policy preferences look as one might expect. Consider, for example, a series of comments from

individuals who disagreed with the Court's ruling in the Emilia's Law case. "An individual that causes an incident should have to go to jail,"[75] said one response. "They should pay for their offenses,"[76] said another. A third went a little further, explaining, "Punishment isn't a synonym for justice. On top of jail, rehabilitation and reparation through forgiveness are necessary."[77]

Similarly, in Colombia a number of responses indicated that subjects were thinking about their policy preferences. "Euthanasia should not be practiced under any circumstance,"[78] said one individual who disagreed with the Court's ruling in the child euthanasia case. "It is the obligation of the government and everyone else to protect our rivers"[79] explained one person responding to the Rio Atrato ruling, while another opined, "The protection of rivers should be an initiative organized by citizens and not ordered by any governmental body."[80]

Fairness vs. Legality

A number of comments evidence concern over the fairness of the decisions. As a proportion of total responses, fairness-related comments occurred with greater frequency in Colombia than in Chile (18 percent to 9 percent, see Table 4.2). However, when we consider the distribution of these comments across cases in Table 4.4, we see that in Colombia this result is due entirely to subjects' responses to a single case: the decision

---

[75] *Debe cumplir cárcel un individuo que provoque algún incidente.*
[76] *Deben pagar por sus faltas.*
[77] *El castigo no es sinónimo de justicia, a demás [sic] de cárcel es necesaria la rehabilitación y la reparación por el perdón.*
[78] *No se debe practicar la atanasia [sic] bajo ninguna circunstancia.*
[79] *Es obligación del gobierno y de todos proteger nuestros ríos.*
[80] *La protección de los ríos debe ser iniciativa y de organización ciudadana no ordenada por ningún ente gubernamental.*

mandating healthcare for Venezuelan migrants. In fact, in every other Colombian case, comments referencing the fairness of the decision amounted to 0 percent of the total responses. In Chile, on the other hand, these comments showed up in every case, though far more frequently in the Emilia's Law case (see Table 4.3). At 18 percent, the proportion of comments containing references to fairness in that case is three times the size it is in the education ruling and six times the size it is in the labor union ruling. Clearly, and perhaps obviously, not all decisions evoke fairness concerns equally: A ruling mandating that your government pay for healthcare for undocumented migrants or telling the government it cannot require jailtime for a drunk driver who has killed someone are more likely to raise such concerns than decisions about the rights of rivers or labor unions. As we saw with references to citizen politicization in Colombia, the specifics of decisions matter for how people form their opinions of a particular case and, consequently, whether they accept or reject the ruling.

It also bears pointing out that, in general, fairness comments were much more common from people on the losing end of decisions than from those who agreed with the outcomes of the rulings. Table 4.2 shows that, in Chile, the percentage of comments referencing fairness was four times greater among those who disagreed with decisions (12 percent) than it was among those who agreed with decisions (3 percent). In Colombia, keeping in mind that all such comments occurred in reaction to a single ruling, the proportion was forty-two times greater among those who disagreed. This raises interesting questions for moving forward. Gibson et al. (2005) found that when it came to acquiescing to disagreeable rulings, American citizens were less concerned about the fairness of a decision than the legal basis for it. In these two countries, and Colombia in

particular, however, it appears that at times fairness concerns are indeed important to ordinary people as they learn about decisions. Future research should therefore further test the implications of perceptions of unfairness for accepting a disagreeable decision outside of the United States.

Chileans who remarked on the (un)fairness of a particular decision often did so in the midst of a critique of the fairness of the broader legal/justice system. One commenter responding to the drunk driving ruling had this to say:

> The different laws in Chile are applied according to your economic situation, so it is clear that someone from a well-to-do social class isn't obligated to go to jail regardless of what his crime may have been. Not so for a member of the middle or poor classes. A sentence that depicts the situation in Chile very well is, "In jail only the poor pay."[81]

There were also those whose fairness concerns were more specific to the ruling itself. One individual wrote, "It isn't fair that a person who has committed a crime doesn't have to spend time in jail. If he hurts others, and it is a crime, he SHOULD face consequences."[82] Expressing a similar sentiment, another said, "It's a crime to kill someone, and even more so if it is due to the irresponsibility of driving drunk. It is very fair to pay with jail."[83]

In Colombia, on the other hand, most of the fairness-related responses had to do with the specifics of mandating free healthcare for undocumented Venezuelans that

---

[81] *Las diversas leyes en Chile son aplicadas de acuerdo a tu situación económica, entonces es claro que alguien de una clase social acomodada no este en la obligación de cumplir con cárcel sea cual fuese su delito, no así aquel sujeto de clase media o pobre. Una oración que retrata muy bien la situación en Chile es "en la cárcel solo pagan los pobres".*

[82] *No es justo que una persona que haya cometido un delito no pase un período en cárcel. Si hace daño a otras personas, y es un delito, DEBE tener consecuencias*

[83] *Esbun [sic] crimen matar a alguien, más sí es por la irresponsabilidad de manejar ebrio, es muu [sic] justo pagar en cárcel.*

otherwise cannot afford it. However, the unfairness that many of the respondents perceived in that ruling had its roots in the country's broader social situation: namely, in the poor quality of healthcare services that Colombians themselves receive. One subject said, "Currently the health situation in the country isn't the best. Many Colombians die waiting for the necessary medical attention. It isn't fair that people who don't meet the minimum standards to enter Colombian territory enjoy benefits for which we Colombians pay taxes."[84] Another respondent put it even more bluntly, saying, "The rights of nationals should take precedent. There are many Colombians who die for lack of treatment because they don't have resources. Colombians, not foreigners, are the priority of the courts and the government."[85]

Instrumentalism

In both Chile and Colombia, some respondents were concerned with what was at stake in the decisions that they were responding to. In both countries, greater proportions of individuals on the losing end of decisions tended to bring up the stakes of those rulings than those who agreed with the outcomes (see Table 4.2). However, comparing the "overall" columns in Table 4.2, we can see that nearly double the percentage of Colombian subjects mentioned the stakes of the rulings.

---

[84] *Actualmente la situación de salud del país no es la mejor, muchos Colombianos mueren esperando la atención médica necesaria, no es justo que personas que no cumplen las condiciones mínimas para ingresar al territorio Colombiano disfruten de beneficios por los que los Colombianos pagamos impuestoa [sic].*

[85] *Deben primar los derechos de los nacionales, hay muchos colombianos que mueren por falta de tratamientos por no tener los recursos, la prioridad de las cortes y el gobierno son los colombianos, no los extranjeros.*

There is some variance in the proportion of instrumentalist responses at the level of the individual cases in Colombia, but very little in Chile. Table 4.4 shows that while no comment regarding the child euthanasia case evidenced concern for what was at stake in the decision, about one in five did when it came to the other two rulings. That number was closer to three in ten (29 percent) among those who disagreed with the healthcare ruling. Given what we saw in the last section, this is unsurprising. Recall that many Colombians who commented on the fairness of the decision did so because of the poor quality of healthcare that Colombian citizens receive and that many worried that the ruling would deteriorate that quality even further, which is a clear example of instrumentalism.

In Chile, a number of responses offered clear predictions about what would, or sometimes would not, occur because of the Court's decision alongside evaluations of whether this was good or bad. One person who disagreed with the Emilia's Law ruling, for example, wrote, "I think this is a horrible decision because the individuals that cause these accidents are a danger to society and not obligating them to go to jail gives them more reasons to keep drinking and causing more accidents because there aren't serious punishments."[86] Meanwhile, someone on the losing end of the education ruling explained,

> When education becomes commercialized it is the first step in cementing a nation's poverty. Sooner or later, only those with money will have the opportunity to study. Therefore, society will polarize even more into rich and educated castes

[86] *Opino que es una pésima decisión debido a que los individuos que realizan tales acciones son un peligro para la sociedad y al no obligarlos a ir a prisión tienen más razones para seguir bebiendo y causando más accidentes porque no hay castigos graves.*

> in relation to poor and ignorant castes. Universities can support themselves, they don't need businessmen to generate income and new dirty business.[87]

In Colombia many of the comments evidencing instrumentalism were similar in nature to their counterparts in Chile: These individuals were clearly thinking about the stakes of the ruling, what it meant for the future. One respondent who agreed with the Constitutional Court's ruling in the Atrato River case, for example, said, "We are a hydrologically rich country. It is our duty, all of our duty, to protect our rivers. They form part of our present and part of our children's future. Rivers are a part of the planet's future."[88] Other comments, while clearly still instrumentalist in nature, showed concern for the consequences of the ruling beyond the specifics of the decision itself. Another person who agreed with the decision in the Atrato River case, for example, wrote,

> Upon giving rights to our rivers, some money should be invested to pay the people that are going to apply [them]. This means that there will be a lot of people behind these contracts hoping to benefit personally and who don't care about the real point of this. In short, this lends itself to there being more corruption.[89]

Losing but accepting

We have explored the extent to which responses from subjects who agreed as well as from those who disagreed with the rulings exhibit the characteristics the literature says

---

[87] *Cuando la educación se mercantiliza, es el primer paso para cimentar la pobreza de una nación. Tarde o temprano solo el que tiene dinero, tendrá oportunidad de estudiar. Ergo, la sociedad se polarizará aún más en castas ricas y educadas con relación a castas pobres e ignorantes. Las Ues se pueden financiar por si solas, y no requieren de empresarios para generar un nuevo ingreso y un nuevo negociado.*

[88] *Somos un país rico hídricamente, es nuestro deber, el de todos, proteger nuestros ríos. Hacen parte de nuestro presente y parte del futuro de nuestros hijos. Los ríos son parte del futuro del planeta.*

[89] *Al darle derechos a nuestros ríos, se debe invertir algún dinero para el pago a las personas que lo van a aplicar, esto significa que habrán muchos detrás de estos coontratos [sic] para beneficiarse de forma personal sin importarles el verdadero fin de este, en pocas palabras se presta para que haya más corrupción.*

are important predictors of acceptance, especially when it comes to disagreeable decisions. It is possible to further analyze this data by considering just the relationship between agreement with the decisions and willingness to accept those decisions as the final word on the matter.

Recall that at the beginning of the survey subjects were asked to give their opinions on the issues being decided in each case and that before each open-ended response they were asked to report the extent to which they were willing to accept the Court's ruling as the final word on the matter. In Chile, the relationship between agreeing with the ruling and accepting it as final is fairly moderate (r=.36) while in Colombia it is a good deal stronger (r=.51). We thus have some evidence that Colombians are more likely than their Chilean counterparts to base their decision to accept a ruling by the Constitutional Court on whether or not they agree with its outcome.

In neither instance, however, is the correlation anywhere near perfect, indicating that there are times when those who find themselves on the losing end of decisions are willing to accept them anyway. It is therefore helpful to consider what is on the minds of these individuals: What do they say they were thinking about when they made the decision to accept a ruling they disagreed with? Table 4.5 reproduces the information from Table 4.2, this time exchanging the "overall" column for a column indicating the frequency of the different predictors among responses from only those who disagreed with the rulings but still accepted them. It should be noted that breaking responses down so specifically leads to small Ns: Only 61 responses in Chile and 38 in Colombia are from those who lost but still accepted the rulings. Especially here, then, the exploratory nature of these results should be kept in mind.

One obvious finding in Table 4.5 confirms findings by Gibson and his colleagues in the United States. In each country, higher percentages of responses from those who lost, but still accepted, the ruling mentioned the Court's legitimacy than in the other categories we have considered. It would appear that granting the Court higher legitimacy indeed provides a "buffer" against disagreeable rulings, leading people to accept them despite their disagreement. Consider, for example, this response from a Chilean subject who disagreed with the Court's ruling in the Emilia's Law case but still accepted it:

> Because it is a national institution that governs us, the people that make it up are selected meticulously, and we should therefore trust that this country's institutions work, with the certainty that they will make the best decisions, and with the promise that things will work in our nation.[90]

Similarly, a Colombian subject that did not agree with the Court's decision in the case mandating healthcare for Venezuelan migrants wrote, "The Court's decisions should be complied with, even if one does not agree."[91]

Here, though, a significantly higher percentage of responses from Chileans that lost but still accepted the rulings mentioned judicial legitimacy, 21 percent to 11 percent. Though neither percentage is especially impressive given the amount of attention that legitimacy has received as a predictor of acceptance of disagreeable rulings in the American literature, this finding again confirms the greater importance of legitimacy in Chile relative to Colombia. On the other hand, much higher percentages of Colombians who lost but still accepted the rulings mentioned their personal policy preferences (58

---

[90] *Que al ser una institución nacional que nos rige, entonces quienes la componen son escogidos de manera minuciosa y por eso mismo debiéramos confiar en que las instituciones de este país funcionan, con la certeza de que tomarán las mejores decisiones y con la promesa de que las cosas funcionen en nuestra nación.*

[91] *Las desiciones [sic] de la corte se deben cxumplir [sic] así no este uno de acuerdo.*

percent to 39 percent), the fairness of the decision (11 percent to 3 percent), and the stakes of the decision (21 percent to 2 percent). Once again, we see that the nature of judicial review could be determinative of the considerations by which judicial rulings are accepted or rejected.

Table 4.5 Losing but accepting

	Chile			Colombia		
	Agree only	Disagree only	Disagree, accept	Agree only	Disagree only	Disagree, accept
Court legitimacy	15 (12%)	32 (11%)	13 (21%)	8 (3%)	6 (3%)	4 (11%)
Judicial partisanship	3 (2%)	1 (.3%)	0 (0%)	3 (1%)	0 (0%)	0 (0%)
Citizen politicization	69 (53%)	147 (48%)	24 (39%)	172 (64%)	69 (39%)	22 (58%)
Principled-judges	1 (1%)	4 (1%)	2 (3%)	1 (0%)	1 (1%)	1 (3%)
Fairness vs. legality	4 (3%)	36 (12%)	2 (3%)	4 (1%)	74 (42%)	4 (11%)
Instrumentalism	6 (5%)	28 (9%)	1 (2%)	27 (10%)	33 (19%)	8 (21%)
N=	129	304	61	268	176	38

*Differences within Chile significant at p<.001

*Differences within Colombia significant at p<.001

*Differences in disagree, accept across countries significant at p<.05 (excluding judicial partisanship)

Other important variables: Morality and Rights Talk

We have now covered the variables the literature says are important when it comes to citizens accepting rulings they disagree with in principle. Coding the responses, however, it was clear that at least two other themes were quite common across subjects, whether or not they agreed with the decisions, indicating that they are salient in

individuals' minds when they form opinions on rulings by their Constitutional Court. The first is morality. To be more specific, respondents frequently offered moral reasons for accepting or rejecting a decision. Reading through the comments, it was striking how often subjects argued that a particular decision was morally right or just or, conversely, that the decision it was morally repugnant. These responses often contained normative statements about the way the world, and particular policies, *should* be. Far from single-minded pursuers of self-interest, these responses paint a picture of individuals concerned about weightier matters when they accept or reject a decision. The second is rights-talk. In many responses from both Chile and Colombia, subjects evidenced strong concern for rights, both theirs and others', in reacting to rulings.

Table 4.6 below shows the frequency of these two themes in both countries. Comparing the "overall" columns in that table to the same columns in Table 4.2, comparatively higher percentages of responses mentioned morality or rights talk in both countries than almost any of the predictors of acceptance that extant literature identifies. In Colombia, however, responses mentioned both themes to a significantly greater extent than in Chile. This was especially true when it came to morality, with Colombians nearly three times as likely as Chileans to mention moral considerations in their explanations of why they accepted or rejected the rulings (63 percent to 23 percent). Interesting differences between those on the winning and losing end of decisions are also present in the responses. While rights talk was more than twice as prevalent among those in agreement with the Court's decisions in Chile (20 percent to 9 percent), it was equally likely (18 percent) to show up in comments from both groups in Colombia. Meanwhile, the morality of a decision was of far greater concern for those who disagreed with rulings

in both countries (27 percent to 12 percent in Chile, 71 percent to 58 percent in Colombia), though in Colombia the difference did not rise to the level of statistical significance.

Table 4.6. Morality and Rights-talk in Chile and Colombia.

	Chile			Colombia		
	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Rights talk	54 (12%)	27 (20%)	27 (9%)	81 (18%)	49 (18%)	32 (18%)
Morality	98 (23%)	16 (12%)	82 (27%)	280 (63%)	155 (58%)	125 (71%)
N=	433	129	304	444	268	176
	*Agree vs disagree significant at p<.001			*Agree vs disagree not significant, p=.41		

*Overall differences across countries significant at p<.01

Morality

Within countries there is of course variance across reactions to individual cases, as Table 4.7 and Table 4.8 make clear. In Chile, 38 percent of responses to the Emilia's Law ruling contained moral reasoning, while only 18 percent of responses to the education ruling and 12 percent of responses to the labor union ruling did. This, of course, makes sense. A ruling that says a defendant needn't go to jail for killing or injuring someone while driving drunk seems, on its face, more likely to stoke moral indignation than one which says labor unions cannot be granted a monopoly over representing workers or even one that says for-profit entities cannot be prohibited from running universities.

Meanwhile in Colombia, just under six in ten (59 percent) responses to the child euthanasia case had something to say about morality, as did 50 percent of responses to the Atrato River case and an incredible 79 percent of reactions to the ruling mandating healthcare for Venezuelans (likely driven in part by the moral indignation of many respondents at what they considered an unfair ruling, as we saw above). Clearly, as we have seen with other predictors of acceptance, the content of a ruling affects the salience of moral reasoning for subjects.

In both Chile and Colombia, comments that contained moral reasoning were often very explicit about it: that is, respondents' beliefs about the moral rightness/wrongness of a decision were front-and-center in many instances. For example, one Chilean subject reacting to the Emilia's Law ruling wrote, "An individual who drives drunk and on top of it all KILLS another human being because of this shouldn't just go to jail for a period of time, he should spend years paying for the crime he committed."[92] Another who disagreed with the education ruling wrote, "It is fine to want to earn money, but there are people who profit excessively from education, which is something totally necessary for young people mainly. Taking advantage of this is an abuse, and it should be regulated better."[93]

---

[92] *Un individuo que conduce en estado de ebriedad y encima de todo MATA a otro ser humano por esto, no debe pasar solo un período en la cárcel, debe pasar años pagando por el crimen que cometió.*

[93] *Está bien querer ganar dinero pero hay personas que lucran excesivamente con la educación que es algo complemetamente [sic] necesaria para los jóvenes mayoritariamente, aprovecharse de esto es un abuso, se debería regular de mejor maneria [sic].*

Table 4.7. Rights Talk and Morality in Responses to the Chilean Rulings

	Emilia's Law			Unions			Education		
	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Rights talk	5 (3%)	0 (0%)	5 (3%)	36 (26%)	24 (26%)	12 (26%)	13 (9%)	3 (9%)	10 (9%)
Morality	56 (38%)	0 (0%)	56 (38%)	16 (12%)	14 (15%)	2 (4%)	26 (18%)	2 (6%)	24 (22%)
N=	149	3	146	138	91	47	146	35	111
	*Cannot compute chi-square when column totals zero			*Agree vs. disagree not significant, p=.12			*Agree vs. disagree not significant, p=.18		

*Overall differences across cases significant at p<.001

Table 4.8. Rights Talk and Morality in Responses to the Colombian Rulings

	Child Euthanasia			Atrato River			Healthcare		
	Overall	Agree only	Disagree Only	Overall	Agree only	Disagree only	Overall	Agree only	Disagree only
Rights talk	41 (28%)	33 (34%)	8 (15%)	10 (7%)	6 (5%)	4 (15%)	30 (20%)	10 (20%)	20 (20%)
Morality	88 (59%)	53 (55%)	35 (67%)	74 (50%)	66 (55%)	8 (31%)	118 (79%)	36 (71%)	82 (84%)
N=	148	96	52	147	121	26	149	51	98
	*Agree vs. disagree significant at p<.05			*Agree vs. disagree significant at p<.05			*Agree vs. disagree not significant, p=.77		

*Overall differences across cases significant at p<.01

In Colombia, reactions to the cases were similarly explicit about the morality of the decisions. One respondent who disagreed with the child euthanasia ruling wrote, "No child has the maturity to make that decision, and no third party should make decisions about the life or death of another human being."[94] As one might expect, negative moral reactions to this ruling were often based on respondents' religious beliefs. "In accordance with my beliefs," said one person, "in no circumstance should life be interrupted. Only God has that power."[95] Moral reasoning from those who agreed with the decision was no less forceful, however. "If there is no hope of recuperation," said one respondent, "it is not necessary to let a person suffer."[96] "If we have compassion for a little animal that suffers," said another, "why not for a human being?"[97]

Rights Talk

Tables 4.7 and 4.8 also reveal considerable variation across cases when it comes to the prevalence of rights talk. 12 percent of all comments from Chile bring up the subject of rights (Table 4.6), but that number is only 3 percent in the Emilia's Law ruling, 9 percent in the education ruling, and a much higher 26 percent in the labor union decision. In general, these percentages were higher in responses from Colombia. Though only 7 percent of responses to the Atrato River ruling bring up rights, 20 percent of comments about the healthcare decision do, as do 28 percent of responses to the child euthanasia case.

---

[94] *Ningún niño tiene la madurez para tomar esa decisión y ningún tercero debrria [sic] tomar decisiones sobre vida o muerte de otro ser humano.*
[95] *Consecuente con mis creencias, en ninguna circunstancia se debe interrumpir la vida, esa potestad solo la tiene Dios.*
[96] *Si igual no hay esperanzas de recuperación, no es necesario dejar sufrir a una persona*.
[97] *Si tenemos compasión por un animalito que sufre, porque no hacerlo con un ser humano.*

On one hand, it seems logical that a higher percentage of Colombian respondents would talk about rights. After all, we have seen that the country's Constitution as well as its Constitutional Court prioritize the provision of many goods and services, elevating that provision to the status of constitutional right. It is not odd, therefore, that the topic of rights readily comes to Colombians' minds when they react to decisions by the Constitutional Court. On the other hand, the variance in the prevalence of rights talk across responses to the three cases in each country points once again to the importance of the content of individual decisions in rendering the variables we are considering more or less salient in respondents' minds. In this vein, it is also logical that a larger percentage of Colombians talk about rights when it comes to euthanasia and healthcare than when it comes to protecting a river, as the former more obviously concern the direct provision of material services or goods, something Colombians are very familiar with. Similarly, that the greatest prevalence of rights talk in Chile came in reaction to the labor union ruling makes sense when we consider that that case concerned the freedom of association, one of the most traditional "negative" rights.

In the comments from both countries, rights talk usually took the form of a respondent asserting a particular right, complaining that the right was not being honored, and/or explaining how that right applied to the case at hand. A subject who agreed with the Court's labor union ruling in Chile, for example, said, "Not all workers want to unionize, and it's absurd to try to obligate them to in order to have the right to defend their interests. Other organizations should exist for this."[98] A Colombian subject

[98] *No todos los trabajadores quieren sindicalizarse y es absurdo pretender obligarlos a ello para tener derecho a defender sus intereses. Deben existir otras instancias para ello.*

responding to the Court's healthcare ruling wrote, "[The decision] should not be accepted. Those of us who are unemployed should have the same right."[99] Another put it this way, "It isn't fair that Colombians of low means don't have the right to a dignified health service but foreign Venezuelans, that on top of it all are illegal, do."[100]

Conclusion

When subjects in this survey reacted to rulings by their Constitutional Court, they did consider criteria that the American literature leads us to expect, but not all that often. The most obvious exception is mentions of court legitimacy in comments from those who disagreed with the outcome of a particular case but still accepted the ruling as final. This finding is in line with work that has been done in the United States, which points to legitimacy as an important predictor of the acceptance of disagreeable rulings. As one would imagine, there is a great deal of variance in what sorts of reactions people have to different types of decisions. One interesting finding from this chapter, however, is that frequently whether subjects agreed with the rulings or not made almost no difference to the sorts of explanations they offered in their responses. Indeed, comparing those who agreed with the decisions and those who did not, there was very little substantive difference in the proportion of comments making reference to at least half of the predictors of acceptance in each country, as we can see in Table 4.2. In Chile, the difference between comments from "winners" and "losers" in the rulings is never more than 9 percent for any predictor. Table 4.2 also reveals that the biggest differences

[99] *No debe ser aceptada, los que no tenemos empleo debemos tener el mismo derecho.*
[100] *No es justo que los colombianos con bajos recursos no tienen derecho a un servicio de salud digno y si se lo den a extranjeros venezolanos que además son ilegales.*

between winners and losers occurred in Colombia. There, we saw sizeable differences in the content of responses from those who agreed and those who disagreed when it came to mention of policy preferences, the fairness of the decision, and the stakes of the decision.

We also saw some hints of what we might uncover when we test the theoretical expectation that citizen engagement in politics is harmed by judicialization. Recall that some Chileans explicitly described particular rulings as cutting short the democratic process. If these comments reflect a broader sentiment in Chilean society, then we might anticipate that judicialization in Chile leads to less engagement in the political process by ordinary citizens. The next chapter will test that expectation alongside the expectation that judicialization has a negative impact on support for the violation of democratic norms and judicial legitimacy.

Chapter 5. The Effects of Judicialization

The last chapter took a detailed look at the opinions people form about rulings by their high courts. After their opinions have been formed and they accept or reject those rulings, what happens? Is there any evidence that a series of decisions by these courts engenders the negative attitudinal and behavioral consequences the literature leads us to expect? In this chapter, I present the results of the experiment I described in Chapter 3 to attempt to answer these questions. To preview my most important findings, exposure to a series of constraint-seeking rulings in Chile lowers the likelihood that subjects will vote in an upcoming legislative election and their political efficacy. It also increases their support for a particular violation of democratic norms. The same is not true of exposure to mandate-seeking decisions in Colombia. Importantly, I uncover no evidence that any form of judicial intervention leads to a decrease in the amount of legitimacy subjects award their high courts.

I begin this chapter with a few comments on the modeling strategy that I employ in my analyses. I then consider each of the literature's theoretical expectations in turn: First, I examine the extent to which judicialization impacts the political engagement of my subjects. Next, I consider its effects on their tolerance for the violation of democratic norms that are frequently associated with populism, and finally on the legitimacy they confer on their Constitutional Court. The last section concludes.

Modeling Strategy

To test the effects of the experimental manipulations themselves, I employ analyses of variance (ANOVAs). Two additional analyses are required. Recall that the alternate hypothesis is that what actually affects each of the dependent variables is how

often subjects agree, or not, with the outcomes of the decisions, rather than the context in which the judiciary acted. Because I do not experimentally manipulate agreement with the Court, to test this *agreement hypothesis* I estimate OLS regression models in which I include a dummy variable indicating whether or not a subject received the treatment alongside a variable measuring how many of the rulings a subject agreed with. I also interact the two variables on the theory that agreement with the Court should affect members of the treatment differently than members of the control, given that only members of the former were told anything about the Court's decisions.

In survey experiments it is important to compare treatment effects based on pre-treatment factors (Linos and Twist 2018). In this case, one such factor is attention to the Court. The theory here is that the experimental manipulations could have less of an impact on those participants who were already aware of the Court's decisions and who had therefore, in effect, already received the judicialization treatment. If this took place, it would likely lead to a misestimation of the treatment effect that I present with the ANOVA results initially (Linos and Twist 2018). To avoid this, in a separate model I include as a covariate an item that asked subjects the frequency with which they read about or hear news relating to their Constitutional Court and interact it with the dummy variable indicating whether or not a subject received the treatment. Of course, estimating separate models for the alternate *agreement hypothesis* and attempting to uncover pre-treatment effects assumes the variables in these equations do not interact with one another. Rather than leave this assumption untested, I estimate a model containing the two and three-way interactions between these variables as well.[101] In short, after the

[101] I failed to include all of these interactions in the pre-analysis plan.

ANOVAs testing the effect of the treatment on a dependent variable in both countries, I present the results of three models: one which tests the *agreement hypothesis* alone, one which tests for the presence of pre-treatment effects alone, and a third that tests for both. To facilitate interpretation and comparison across analyses, all variables have been rescaled to range from 0 to 1.

To establish baseline comparisons of the two contexts in this study, Table 5.1 presents the average pre-treatment agreement and attention scores. On both measures, Colombians score higher than their Chilean counterparts. Of special importance, Colombians on average agreed with twice the number of decisions by their Court as Chileans. The stark differences between the two countries makes them ideal settings for this experiment: If the context in which judicialization occurs impacts the effect it has on our three outcomes, we should observe different effects in the two settings. In light of the differences in Table 5.1, when comparing the effects of the treatments across countries I will control for both agreement with the Court and attention to it.[102]

Table 5.1. Baseline Comparisons

	Mean number of agreements w/decisions	Mean attention to Constitutional Court
Chile	.32	.54
Colombia	.60	.67

*Note that all variables have been rescaled from 0-1.
N in Chile=213; N in Colombia=196

[102] Specifically, I will estimate a model interacting a dummy variable indicating whether a subject received the treatment with a dummy country variable. Along with the individual components of that interaction, the model will include controls for how often the subject agreed with the Court's rulings and how frequently she pays attention to the Court.

Theoretical Expectation 1: Does judicialization lead to less engagement in democratic politics?

To measure the impact of the treatment on engagement in politics, subjects answered a series of three items, each of which measured a different form of political engagement. Consequently, a common factor analysis and reliability analysis revealed it was best to analyze the items separately.

First, subjects were asked, "If the next elections for [name of country's legislature] were this Sunday, how likely would you be to vote?" and could respond using a five-point likelihood scale. This question should be of obvious importance. If judicial involvement in politics really does cut short the democratic process, it will often do so by overruling laws passed by the legislature. If citizens begin to believe that their elected officials in Congress are irrelevant because of the court, then we might expect that they would be less willing to turn out to vote for them. The next question tests less "traditional" forms of political engagement. Subjects were asked, using the same scale, "Many people participate in politics in other ways besides voting. How likely are you to support a candidate, a political party, or a political issue by attending a meeting, rally, or speech?" The third question taps political efficacy (e.g, Campbell, Gurin, and Miller 1954), which we might consider a pre-condition for meaningful political engagement. It asked, using a five-point scale, the extent to which participants agreed with the statement, "I believe that by participating in politics I can make a difference." Table 5.2 below contains these questions and their response categories in English, and Table 5.3 presents the raw means on the dependent variables for the control groups in each country. Once again, on every measure Colombian subjects score higher than Chilean subjects.

Table 5.2. Political Engagement Dependent Variable Items

If the next elections for [name of country's legislature] were this Sunday, how likely would you be to vote? Would you be …?	1. Very unlikely 2. Somewhat unlikely 3. Neither likely nor unlikely 4. Somewhat likely 5. Very likely
Many people participate in politics in other ways besides voting. How likely are you to support a candidate, political party, or political issue by attending a meeting, rally, or speech? Are you …?	1. Very unlikely 2. Somewhat unlikely 3. Neither likely nor unlikely 4. Somewhat likely 5. Very likely
Please indicate whether you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the following statement: I believe that by participating in politics I can make a difference. Do you …?	1. Strongly agree 2. Somewhat agree 3. Neither agree nor disagree 4. Somewhat disagree 5. Strongly disagree

Table 5.3. Raw Means among Control Groups for Political Engagement DVs

	Mean likelihood of voting (control)	Mean likelihood of alternative participation (control)	Mean political efficacy (control)
Chile	.80	.48	.62
Colombia	.84	.57	.65

*Note that all variables have been rescaled from 0-1.
N in Chile=213; N in Colombia=196

Likelihood of Voting

In Chile, subjects in the control group reported a mean likelihood of voting in an upcoming congressional election of .80, while subjects who were exposed to the three

constraint-seeking rulings reported a mean of nearly .74 (p=.02).[103] Recall that all variables in these analyses have been rescaled to range from 0 to 1, which means that the simple act of reading three *very* brief summaries of decisions that constrained the government resulted in a 6 percent lower willingness to vote among subjects in the treatment group. This is consistent with the hypothesis that judicialization leads to a decline in democratic engagement.

Moving to Colombia, the results are different. There, subjects in the treatment reported a mean likelihood of voting in an upcoming congressional election of .80 compared to a likelihood of .84 among subjects in the control. The difference between the treatment and control was not statistically significant (p=.18). Unlike in Chile, then, in the mandate-seeking context of Colombia there is little compelling evidence that being exposed to judicial activity in the form of a series of mandate-seeking rulings leads to less likelihood of voting, running counter to the literature's expectations. The difference in treatment effects across countries, controlling for agreement with the rulings and attention to the Courts, was not statistically significant (p=.65).

Turning now from the average treatment effects in both countries, I examine whether the treatment effects differed along two important variables: agreement with the Courts' decisions and attention to the Court prior to the experiment. Table 5.4 contains these results for Chile. As a reminder, in the regression models I present throughout this chapter, the important coefficients to watch are those on the interaction terms. If these are

[103] Note: treatment group means do not appear in tables.

significant, it will indicate that the treatment effects differed significantly by agreement with the Courts' decisions, prior exposure to the Court, or both.

In column 1 testing the alternate *agreement hypothesis*, the main effect of the treatment variable is significant. Subjects in the treatment group who disagreed with all three of the Court's rulings were 13 percent less likely to vote than those in the control ($p \leq .01$). However, while exposure to the judicialization treatment has a positive interaction with the number of times subjects agreed with the Court, the interaction is not significant, indicating that the treatment effect did not differ according to how often subjects agreed with the Court, counter to the agreement hypothesis.

In the model testing for pre-treatment attention to the Court alone (Column 2), the treatment variable and its interaction with subjects' level of attention to the Court are not significant, indicating that the treatment effect did not differ according to subjects' frequency of attention to the Court. The attention variable alone is significant, indicating that being in the control group and paying regular attention to the Court is associated with a massive, nearly 26 percent greater likelihood of voting. No variable is significant in the model testing the two and three-way interactions, shown in the third column.

Table 5.4. Agreement hypothesis and pre-treatment effects in Chile

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.850*** (.043)	.656*** (.058)	.698*** (.099)
Treatment	-.130** (.052)	-.042 (.069)	-.142 (.118)
Agreement with Court	-.154 (.110)		-.164 (.259)
Agreement with Court*treatment	.219 (.132)		.357 (.299)
Attention to Court		.256** (.092)	.267 (.163)
Attention to Court*Treatment		-.024 (.112)	.029 (.194)
Agreement*Attention			.004 (.434)
Agreement*Attention*Treatment			-.216 (.502)
Adj. R^2	.006	.038	.036
σ_{est}	.346	.342	.341

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Likelihood of voting in legislative elections

Table 5.5 presents results of the same regression equations in Colombia. These interactive results are similar to findings from Chile. In the model that tests the agreement hypothesis alone in column one, the interaction of agreement with the Court and being in the treatment is positive but not significant. This indicates once more that the effect of being in the treatment did not differ according to how many of the rulings subjects' disagreed with, counter to the agreement hypothesis. However, the treatment variable

alone is significant, and shows that being in the treatment was associated with a nearly 15 percent decline in the likelihood of voting when agreement with the Court is held at 0.

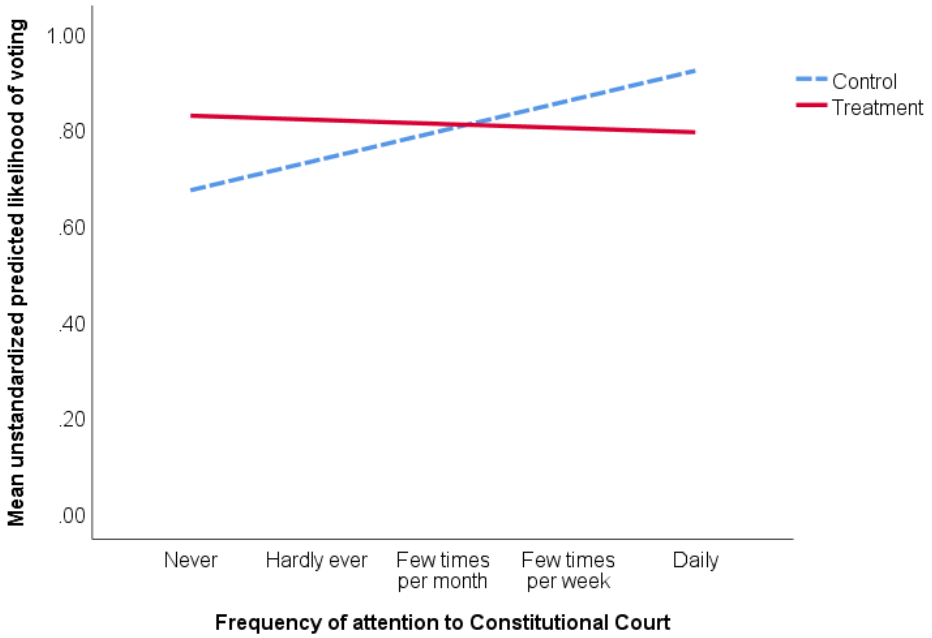
In the next two models, the coefficient on the treatment variable is positive but insignificant. In the model testing for pre-treatment effects in column two, the interaction of attention to the Court and the treatment variable is negative and significant, so I graph the interaction in Figure 5.1 below. As is clear in that figure, for members of the control, paying frequent attention to the Court was associated with a nearly 25 percent greater likelihood of voting over those who never pay attention. This is nearly identical to the effect we saw for this group in Chile. For members of the treatment, however, the line is slightly negative. That is, as the amount of attention subjects in the treatment reported paying to the Court increased, the less likely they were to vote after receiving the treatment. For those subjects in Colombia who had conceivably already heard about the Court's rulings before participating in the experiment, then, being reminded of those rulings when they received the treatment had the negative effect that the literature would lead us to expect. However, none of the two or three-way interactions in the combined model in column three are significant.

Table 5.5. Agreement hypothesis and pre-treatment effects in Colombia

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.867*** (.061)	.671*** (.066)	.667*** (.173)
Treatment	-.147* (.075)	.155^{+} (.082)	.049 (.216)
Agreement with Court	-.041 (.094)		.012 (.280)
Agreement with Court*treatment	.184 (.115)		.185 (.347)
Attention to Court		.249** (.091)	.311 (.238)
Attention to Court*Treatment		-.283** (.113)	-.308 (.294)
Agreement*Attention			-.105 (.379)
Agreement*Attention*Treatment			.030 (.467)
Adj. R^2	.006	.011	.013
σ_{est}	.326	.326	.325

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test $^{+}$ p=.058.
N in Colombia= 597. DV: Likelihood of voting in legislative elections

Figure 5.1 Treatment effects by attention to the Court, Colombia: Likelihood of voting.



To summarize the results thus far, the average treatment effects in Chile revealed support for the literature's expectation that judicialization hinders the democratic process, in the form of citizens' willingness to vote. Exposure to judicialization also significantly discouraged voting among those who disagreed with all of the Court's decisions. In Chile, this was an incredible 156 subjects. However, the insignificant interaction in table 5.5 indicates that these effects do not differ significantly from those who disagreed with fewer of the rulings. There is also no evidence that the treatment effects differed among those who pay frequent attention to the Court and might therefore have been previously exposed to the Court's decisions.

In Colombia, on the other hand, exposure to the Courts' mandate-seeking decisions did not have a significant average effect on subjects' willingness to vote. As in

Chile, these results did not differ significantly by how frequently subjects agreed with the rulings, though those who disagreed with all of them were significantly less likely to vote. Unlike in Chile, however, in Colombia the treatment effects differed by prior exposure to the Court: members of the treatment became slightly less likely to vote the more frequently they reported paying attention to the Court.

Alternative forms of participation

Reading about the Constitutional Court's constraint-seeking decisions did not have a significant effect on Chilean subjects' reported average likelihood of participating in politics outside of the voting booth. There, subjects in the treatment condition reported a mean likelihood of participating in alternative forms of politics of .44 compared to those in the control group, who reported a mean of .48. The difference between the groups was not statistically significant (p=.21). We see a similar set of null results in Colombia. In fact, participants in both the treatment and control groups reported a mean likelihood of engaging in activities like attending meetings, rallies, and speeches of .57 (p=.86). The treatment effects do not differ significantly by country (p=.49).

When we test the *agreement hypothesis* and look for pre-treatment effects in Chile in Table 5.6, none of the interactions are significant, indicating that the treatment effects did not differ by how many of the rulings subjects agreed with or by prior exposure to the Court. In only the model testing the agreement hypothesis alone is the main effect of being in the treatment significant. There, after controlling for agreement with the Court and its interaction with the treatment variable, being in the treatment is associated with a 10 percent lower likelihood of participating in alternative forms of politics. In the model

testing for effects of pre-treatment attention to the Court in column two, attention to the Court exerts a significant effect on the dependent variable among subjects in the control. This time, paying the most attention to the Court is associated with about a 22 percent increase in the likelihood of participating in non-electoral forms of politics over those who pay no attention.

As illustrated in Table 5.7, neither the treatment nor its interaction with agreement with the Court or attention to it are significant in any of the models in Colombia. This again indicates that the effect of the treatment did not differ by either variable. Attention to the Court alone is significant in the pre-treatment model in the second column. There, subjects in the control who pay the most attention to the Court are about 25 percent more likely to participate in alternative forms of politics than those who pay no attention at all. When we consider the results of this variable in Table 5.6 and 5.7, alongside the results in the models predicting the likelihood of voting above, it appears that paying attention to the Court is a strong indicator of political participation more generally. The results from both Chile and Colombia indicate that neither mandate-seeking contexts nor constraint-seeking contexts have an impact on alternative forms of political engagement.

Table 5.6. Agreement hypothesis and pre-treatment effects in Chile.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.538*** (.042)	.354*** (.056)	.367*** (.097)
Treatment	-.103* (.051)	-.079 (.067)	-.021 (.115)
Agreement with Court	-.197 (.109)		-.046 (.253)
Agreement with Court*treatment	.219 (.132)		-.154 (.292)
Attention to Court		.218* (.090)	.302 (.159)
Attention to Court*Treatment		.099 (.109)	-.146 (.190)
Agreement*Attention			-.276 (.425)
Agreement*Attention*Treatment			.753 (.492)
Adj. R^2	.003	.050	.054
σ_{est}	.341	.333	.333

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Likelihood of alternative forms of participation

Table 5.7. Agreement hypothesis and pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.543*** (.063)	.395*** (.068)	.422* (.179)
Treatment	-.026 (.077)	.038 (.084)	-.148 (.223)
Agreement with Court	.043 (.097)		-.036 (.288)
Agreement with Court*treatment	.049 (.119)		.302 (.358)
Attention to Court		.253** (.093)	.194 (.245)
Attention to Court*Treatment		-.046 (.116)	.161 (.303)
Agreement*Attention			.086 (.389)
Agreement*Attention*Treatment			-.333 (.480)
Adj. R^2	-.002	.022	.020
σ_{est}	.337	.332	.333

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Likelihood of alternative forms of participation

Political Efficacy

The analyses reveal a series of interesting findings when it comes to political efficacy. In Chile the subjects who read summaries of three constraint-seeking decisions were 8 percentage points less likely to agree that they could make a difference by

participating in politics (treatment, .54; control, .62; p=.003).[104] In Colombia, on the other hand, subjects who read about three mandate-seeking decisions did not differ significantly from those in the control condition. Both groups reported a mean political efficacy of .65 (p=.89). This time, the treatment effects in Colombia differ significantly from those in Chile (p=.05). This is in line with the hypothesis that constraint-seeking judicialization exerts a different effect on political attitudes than mandate-seeking judicialization.

In the regression models for Chile, no variable is significant, as we can see in Table 5.8. Once more, the treatment effects did not differ by agreement with the Court or prior exposure to it. In Colombia, neither the interaction of agreement with the treatment variable, the interaction of attention with the treatment, nor the individual components of the interaction are significant, as we can see in the first two columns of Table 5.9. Most importantly here, in the third model every variable is significant. Given that this equation contains both two and three-way interactions, I graph the three-way interaction in Figure 5.2. Originally a 5-point measure, only 10 subjects reported never paying attention to the Court, so for the graph I trichotomize the attention variable to facilitate interpretation. Even so, only an additional 81 individuals reported "hardly ever" paying attention, so at the lower end of attention in the graphs the error bars are quite large.

[104] In Chile the difference between the treatment group that was given the opportunity to respond in an open-ended fashion and the treatment group that was not given this opportunity barely reaches statistical significance (p=.05) with respect to this dependent variable. Consequently, here I present the results of the combined treatment groups, and in Appendix C I present the results of this analysis considering the two groups separately.

Table 5.8. Agreement hypothesis and pre-treatment effects in Chile.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.630*** (.039)	.573*** (.054)	.572*** (.093)
Treatment	-.075 (.048)	-.091 (.065)	-.101 (.111)
Agreement with Court	-.041 (.102)		-.009 (.245)
Agreement with Court*treatment	-.016 (.122)		.059 (.283)
Attention to Court		.073 (.086)	.107 (.152)
Attention to Court*Treatment		.030 (.104)	.048 (.182)
Agreement*Attention			-.086 (.408)
Agreement*Attention*Treatment			-.105 (.472)
Adj. R^2	.011	.015	.010
σ_{est}	.319	.312	.318

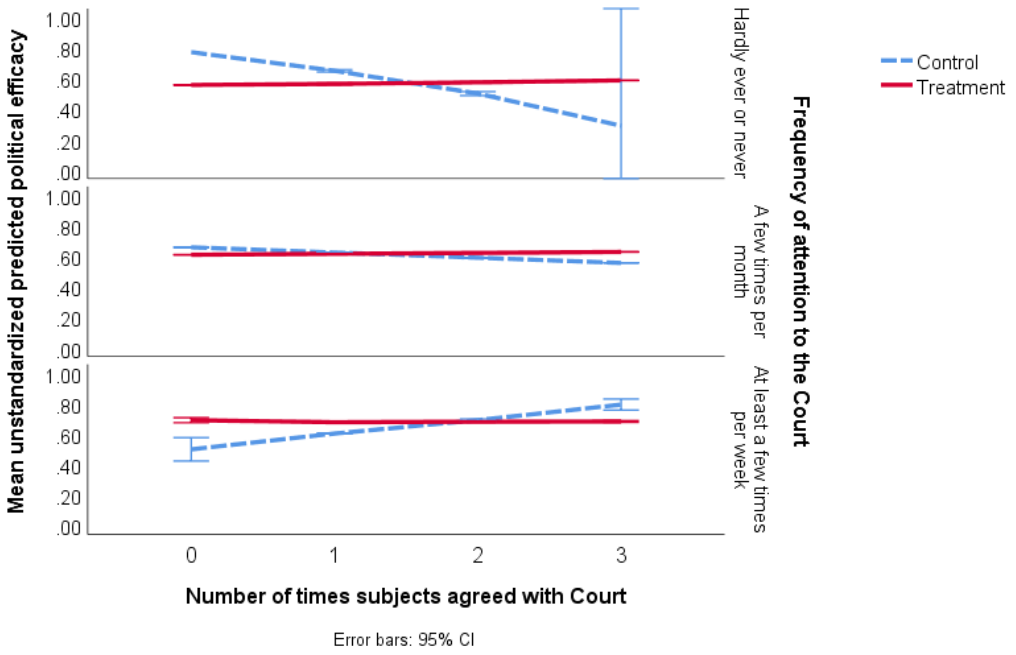
Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Political efficacy

Table 5.9. Agreement hypothesis and pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.560*** (.056)	.474*** (.061)	.883*** (.157)
Treatment	.085 (.069)	.051 (.074)	-.380* (.195)
Agreement with Court	.145 (.086)		-.683** (.253)
Agreement with Court*treatment	-.134 (.106)		.724* (.314)
Attention to Court		.253** (.084)	-.450* (.216)
Attention to Court*Treatment		-.067 (.104)	.662** (.267)
Agreement*Attention			1.16*** (.343)
Agreement*Attention*Treatment			-1.21** (.423)
Adj. R^2	.000	.026	.040
σ_{est}	.299	.300	.293

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Political efficacy

Figure 5.2. Interaction between treatment, agreement, and attention in Colombia



Interestingly, subjects in the treatment who reported hardly ever or never paying attention to the Court as well as subjects who only hear about the Court a few times per month became significantly more politically efficacious the more often they agreed with the Court. The trend is essentially flat among those who pay frequent attention to the Court. Though the effects are substantively quite small at the middle and highest levels of attention, they are significant. The results among those who do not pay frequent attention are surprising: that judicialization can at times make people better democrats certainly contradicts the literature's negative theoretical expectations. These findings warrant further research.

To summarize the main findings from this section, when it comes to political participation exposure to constraint-seeking rulings in Chile leads to a decline in

willingness to vote and political efficacy. This is in line with the literature's expectations. However, we do not see the same negative results when Colombian subjects are exposed to mandate-seeking rulings by their Court. Clearly, the sorts of things courts are empowered to do when they intervene in politics matters, at least when it comes to their impact on political participation.

Expectation 2: Does judicialization lead to greater support for the violation of democratic norms?

We saw in Chapter 1 that a number of scholars place blame, at least partially, for the rise of populism in democracies around the globe on judicial intervention in politics. This contention led to our second theoretical expectation: If judicial activity really has contributed to the current wave of support for populism, we should see that in the wake of exposure to rulings by their Constitutional Court subjects become more tolerant of the violations of democratic norms that populist politicians often advocate.

To measure this sort of tolerance, I rely on a series of well-tested items from the AmericasBarometer.[105] These questions allowed respondents to use a 7-point scale to indicate their level of agreement with a particular statement, with higher numbers indicating greater agreement. Finally, I included another question from the AmericasBarometer that asked subjects to indicate their approval of government censorship. Though not part of the support for populism battery, censorship is common in

[105] I thank the Latin American Public Opinion Project (LAPOP) and its major supporters (the United States Agency for International Development, the Inter-American Bank, and Vanderbilt University) for making its questionnaires publicly available.

populist regimes and hence the item is worthy of analysis here. The statements subjects were asked to respond to appear in Table 5.10.

Table 5.10. Measuring Support for Violations of Democratic Norms

It is necessary for the progress of this country that our presidents/prime ministers limit the voice and vote of opposition parties.
When the Congress hinders the work of our government, our presidents/prime ministers should govern without the Congress.
When the Constitutional Court (Tribunal) hinders the work of our government, it should not be paid attention to by our presidents/prime ministers.
The biggest obstacle to progress in our country is the dominant class or oligarchy that takes advantage of the people.
Those who disagree with the majority represent a threat to the interests of the country.
To what degree would you approve or disapprove if the government censored any media outlets that criticized it?

A common factor analysis and reliability analysis revealed that the fourth question and final question above should not be combined with the other items into a single measure, so here they are analyzed separately. The other four items, however, can be usefully combined and the resulting measure has strong psychometric properties. The items are unidimensional, as all load onto the first factor with at least a .4 (and two load at above a .8) in Colombia and at least a .55 in Chile (where two of the items load at above a .7). The combined measure is also reliable, with a Cronbach's alpha of .74 in Colombia and .78 in Chile. In each country, then, these four items were combined into a

summated index. Table 5.11 Reports the raw means on each of the dependent variables among the control groups in both countries.

Table 5.11 Raw Means among Control Groups for Support for Populism DV

	Mean, index of support for populism (control)	Mean approval of gov't censorship (control)	Mean agreement that oligarchy represents obstacle (control)
Chile	.28	.07	.65
Colombia	.26	.10	.73

*Note that all variables have been rescaled from 0-1. N in Chile=213; N in Colombia=196

Index of support for the violation of democratic norms

In Chile, the manipulation itself was not significant when it came to the index of support for the violation of democratic norms. The mean for the control group was .28 while the mean for the treatment condition was a slightly higher .31 (p=.07). Likewise in Colombia, the difference between the treatment and control groups was not significant. The mean of the treatment group was .27 while the mean of the control was .26 (p=.69). Here too the difference in treatment effects across countries was insignificant (p=.27). In neither context, then, do the average treatment effects indicate support for the expectation that judicialization leads to an increase in support for the violations of democratic norms that we often associate with populism.

In Chile when we turn to the regression models testing for hetergenous effects by agreement with the Court's rulings and attention to the institution in Table 5.12, the model testing the agreement hypothesis along with pre-treatment effects yields a number of significant results (column 3). As the model contains significant two and three-way

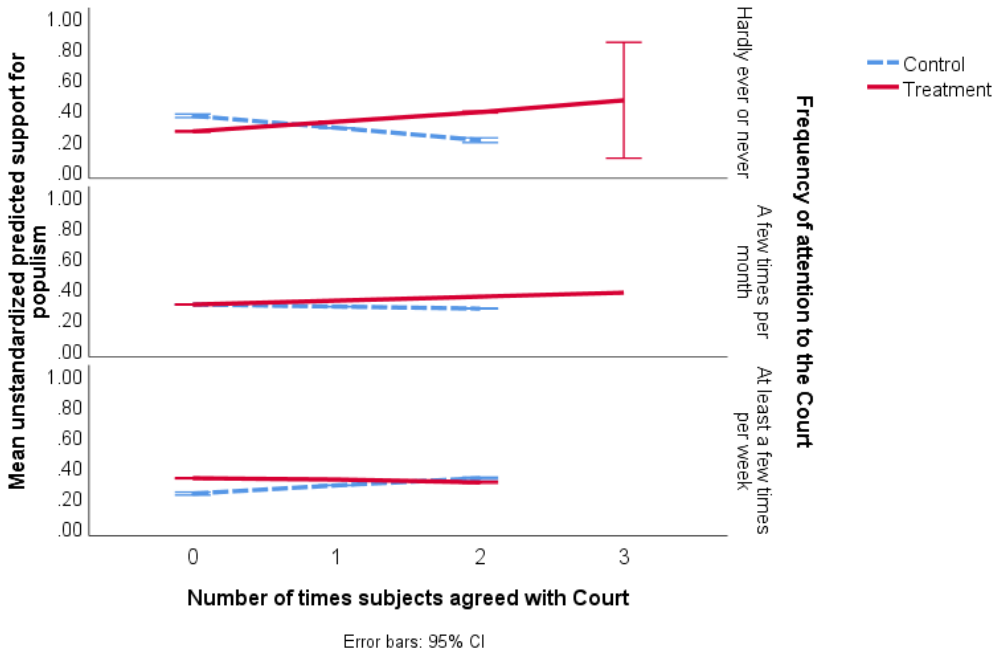
interactions, it is best to interpret the results using the predicted values produced by this model. I do this in Figure 5.3.

Table 5.12 Agreement hypothesis, pre-treatment effects in Chile.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.273*** (.029)	.281*** (.040)	.401*** (.069)
Treatment	.017 (.035)	.039 (.048)	-.171* (.082)
Agreement with Court	.003 (.075)		-.381* (.178)
Agreement with Court*treatment	.069 (.090)		.634** (.206)
Attention to Court		-.010 (.063)	-.229* (.113)
Attention to Court*Treatment		-.003 (.077)	.341** (.134)
Agreement*Attention			.682* (.298)
Agreement*Attention*Treatment			-1.032** (.345)
Adj. R^2	.005	.001	.015
σ_{est}	.231	.231	.229

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Index of support for the violation of democratic norms

Figure 5.3. Interaction between treatment, agreement, and attention in Chile



The graph reveals an interesting finding. Among subjects who hardly ever or never pay attention to the Court as well as those who pay attention only a few times per month, those in the treatment become *more* supportive of the violation of democratic norms the more often that they agree with the Court's rulings. Puzzling at first glance, this finding may not be surprising if we consider the items that comprise the dependent variable. Two of the four items pit the political majority against the minority. In particular, one item stated, "Those who disagree with the majority represent a threat to the interests of the country," and the other was, "It is necessary for the progress of this country that our presidents/prime ministers limit the voice and vote of opposition parties." Respondents who always agreed with the rulings had just been told on three separate occasions that the highest Court in the land had given its stamp of approval to their preferred policy outcomes. Perhaps it makes sense, then, that these individuals

would display greater anti-minority sentiment in the wake of having their views supported by the Court. If this is the case, scholars may need to reconsider the mechanism by which courts affect populist sentiment. Perhaps it is not (always) by stirring up discontentment among those who disagree with the Court, but rather by fomenting anti-minority bias among those who routinely agree with the Court. Once again, we see a very slight reversal of this trend among subjects that frequently pay attention to the Court, but the line is essentially flat. This also makes sense, inasmuch as these subjects likely already knew of the Courts' rulings and therefore the treatment effect was weakest on them, regardless of how many of the rulings they agreed with. Pairing these findings with the three-way interaction for political efficacy in Colombia, we have evidence from both countries that frequent attention to the Court exerts the opposite effect on subjects' behavior as lower levels of attention.

In Colombia, none of the coefficients are significant in the regression models testing the agreement hypothesis and accounting for pre-treatment effects, as seen in Table 5.13. Once more, the effects of the treatment did not differ according to how frequently subjects agreed with the Court or their level of attention to it. Most intriguing here is the fact that we do not see evidence of the same anti-minority bias in Colombia that we saw in Chile. Whether the nature of mandate-seeking review played a role in this difference is a question ripe for further research.

Table 5.13. Agreement hypothesis, pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.305*** (.041)	.220*** (.045)	.188 (.117)
Treatment	.007 (.051)	.078 (.056)	.043 (.150)
Agreement with Court	-.074 (.063)		.044 (.189)
Agreement with Court*treatment	.003 (.078)		.070 (.239)
Attention to Court		.061 (.062)	.175 (.161)
Attention to Court*Treatment		.061 (.062)	-.065 (.202)
Agreement*Attention			-.177 (.255)
Agreement*Attention*Treatment			-.079 (.320)
Adj. R^2	.002	-.002	.002
σ_{est}	.219	.219	.219

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Index of support for the violation of democratic norms

Support for Government Censorship

Next we turn to the item that asked subjects their approval of the government censoring media outlets critical of it. In Chile, the manipulation was significant. There, overall levels of support for government censorship were quite low, but while those in the control expressed a mean level of support of .07, the mean for the treatment condition

was .11 (p=.01). In other words, exposure to the three constraint-seeking rulings made subjects 4 percentage points more supportive of government censorship. This is consistent with the hypothesis that judicialization leads to an increase in support for the violation of democratic norms. Turning to Colombia, the level of support for censorship was also extremely low in both the treatment (.08) and control (.10) conditions, but here the difference between the two was insignificant. (p=.26). This time, however, the difference in treatment effects across countries, again controlling for agreement with the decisions and attention to the Court, was significant (p=.02). This finding is further support for my argument that the context in which judicialization takes place matters: Exposure to constraint-seeking judicial review in Chile led to significantly greater support for censorship than did exposure to mandate-seeking judicial review in Colombia.

We see no support for the agreement hypothesis or evidence of pre-treatment effects in the regression models for either country, as seen in Table 5.14 and Table 5.15. In neither country did the treatment exert a different effect on subjects according to the number of rulings they agreed with or how frequently they pay attention to the Court.

Table 5.14. Agreement hypothesis and pre-treatment effects in Chile

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.039 (.025)	.097** (.034)	.094 (.064)
Treatment	.058 (.031)	.050 (.041)	.064 (.071)
Agreement with Court	.105 (.065)		.016 (.155)
Agreement with Court*treatment	-.052 (.078)		-.059 (.179)
Attention to Court		-.044 (.055)	-.100 (.098)
Attention to Court*Treatment		-.019 (.067)	-.014 (.116)
Agreement*Attention			.171 (.260)
Agreement*Attention*Treatment			.006 (.301)
Adj. R^2	.011	.010	.012
σ_{est}	.205	.204	.204

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Support for government censorship

Table 5.15. Agreement hypothesis and pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.084* (.037)	.088* (.040)	.131 (.105)
Treatment	.040 (.045)	.001 (.049)	-.022 (.130)
Agreement with Court	.022 (.056)		-.068 (.169)
Agreement with Court*treatment	-.101 (.069)		.025 (.210)
Attention to Court		.013 (.055)	-.068 (.144)
Attention to Court*Treatment		-.030 (.068)	.088 (.177)
Agreement*Attention			.128 (.228)
Agreement*Attention*Treatment			-.178 (.281)
Adj. R^2	.004	-.003	-.002
σ_{est}	.195	.195	.196

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Support for government censorship

Attacking the Oligarchy

When we turn to our final measure of tolerance for the violation of democratic norms, subjects' agreement that "The biggest obstacle to progress in our country is the dominant class or oligarchy that takes advantage of the people," the story changes little. In Chile, the manipulation was again insignificant, with the treatment yielding a mean

level of agreement of .66 compared to a mean of .65 in the control (p=.70). The manipulation was insignificant in Colombia as well, with both the treatment and control groups expressing a very high mean level of agreement of .73 (p=.95). Once again, the difference in treatment effects across Chile and Colombia was insignificant (p=.86).

Tables 5.16 and 5.17 display the regression models for Chile and Colombia, respectively. In Chile, the agreement variable in the model that tests the agreement hypothesis (column 1) is the only significant variable in any of the equations. There, agreeing all three times with the Court is associated with about a 37 percent decline in antipathy towards the oligarchy compared to those who never agree with the Court. Clearly, being on the winning end of the Court's decisions does not always lead to undemocratic attitudes. However, none of the interactions are significant. Accordingly, we can conclude that the treatment did not differ according to agreement with the decisions or attention to the Court.

When we turn to the model testing the agreement hypothesis with pre-treatment effects for Colombia in column 3 of Table 5.17, the only variable that is statistically *insignificant* is the interaction of agreement with the Court and the treatment variable. Because the three-way interaction between agreement, attention, and the treatment is significant, I graph it in Figure 5.4.

Table 5.16. Agreement hypothesis and pre-treatment effects in Chile.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.777*** (.040)	.658*** (.056)	.730*** (.096)
Treatment	-.040 (.049)	.002 (.067)	-.003 (.114)
Agreement with Court	-.372*** (.103)		-.211 (.249)
Agreement with Court*treatment	.143 (.124)		.026 (.287)
Attention to Court		-.009 (.089)	.087 (.156)
Attention to Court*Treatment		.017 (.108)	-.068 (.186)
Agreement*Attention			-.306 (.414)
Agreement*Attention*Treatment			.218 (.479)
Adj. R^2	.035	-.005	.030
σ_{est}	.323	.330	.324

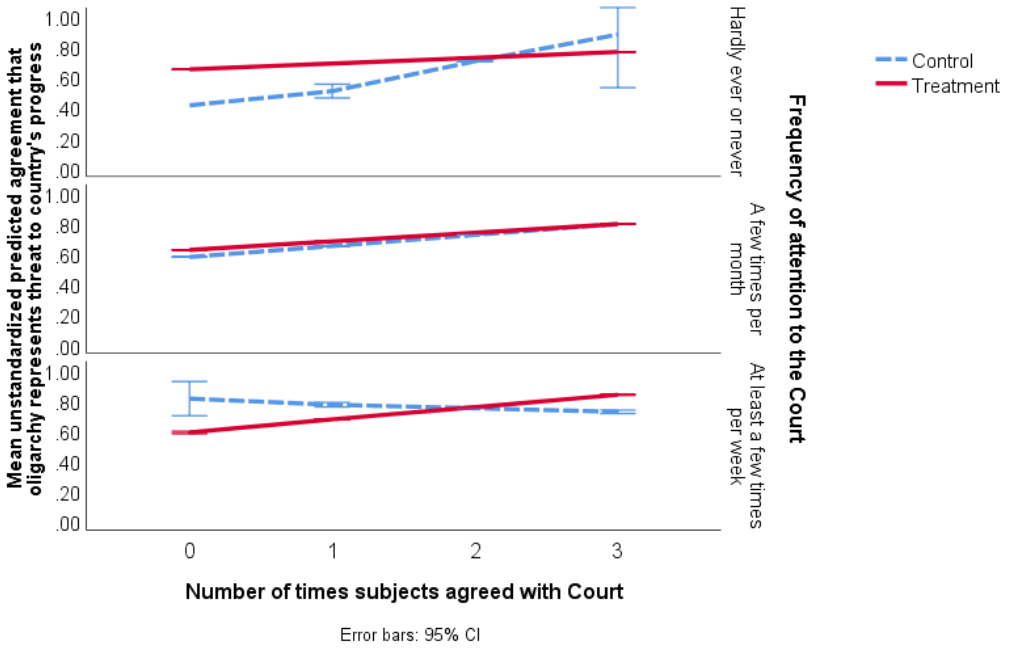
Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Oligarchy as obstacle

Table 5.17. Agreement hypothesis and pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.695*** (.058)	.633*** (.064)	.247 (.165)
Treatment	-.092 (.071)	.072 (.079)	.426* (.206)
Agreement with Court	.056 (.090)		.658** (.267)
Agreement with Court*treatment	.161 (.110)		-.599 (.332)
Attention to Court		.142 (.088)	.661** (.227)
Attention to Court*Treatment		-.109 (.110)	-.759** (.281)
Agreement*Attention			-.881* (.361)
Agreement*Attention*Treatment			1.101** (.446)
Adj. R^2	.015	.000	.025
σ_{est}	.311	.315	.310

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Oligarchy as obstacle

Figure 5.4. Interaction between treatment, agreement, and attention in Colombia.



Here the relationship is similar to the interaction that we observed in Chile when it came to the index of support for populism, but this time the trend is the same at every level of attention to the Court: Subjects in the treatment group become more likely to agree with the populist sentiment that the oligarchy/dominant class represent a threat to their country's progress the more they agree with the Court's rulings. However, among those who hardly ever or never pay attention to the Court as well as those who do so a few times per month, the confidence intervals overlap among members of the treatment and control groups who agreed with the Court on two or three occasions. Among those who pay attention to the Court at least a few times per week, only those subjects who agreed with all of the rulings were significantly more supportive of the populist sentiment than members of the control. This constitutes further evidence that individuals who consistently agree with the Court are at times more likely to display the undemocratic

attitudes associated with populism than those who do not, independent of the type of judicial review practiced by the Court.

When it comes to the effect of judicialization on support for populism, we see little direct evidence that courts are having the impact that some in the literature hypothesize. Only when it comes to support for government censorship did the treatment have a significant average effect—an effect of only 4 percent, and only in Chile, at that. Several of the interactions revealed further interesting findings, however. Agreement with the Court can increase support for populist sentiments, in both countries, especially among those subjects who were likely learning about the Courts' rulings for the first time because they rarely pay attention to the Court.

Theoretical Expectation 3: Does judicialization lead to a decline in Constitutional Court legitimacy?

The legitimacy citizens confer on their high court underlies, in a sense, the two previous theoretical expectations. Does judicial review, in either its mandate-seeking or constraint-seeking subtypes, lead citizens to view their constitutional courts as less democratically legitimate? To measure the legitimacy that my subjects confer on their Courts, I employ a series of four questions that have been used numerous times in the judicial politics literature (e.g, Gibson and Nelson 2018). Subjects registered their level of agreement with each item using a five-point scale. The items appear in Table 5.18.

Table 5.18. Judicial Legitimacy Battery

If the Colombian (Chilean) Constitutional Court (Tribunal) started making a lot of decisions that most people disagree with, it might be better to do away with the Constitutional Court (Tribunal) altogether.
It is inevitable that the Colombian (Chilean) Constitutional Court (Tribunal) gets mixed up in politics; therefore, we ought to have stronger means of controlling the actions of the Constitutional Court (Tribunal).
The Colombian (Chilean) Constitutional Court (Tribunal) ought to be made less independent so that it listens a lot more to what the people want.
Judges on the Colombian (Chilean) Constitutional Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge.

The scale that results from combining these items is both valid and reliable. In the Colombian sample, three of the items load onto a single factor in a common factor analysis at values of about .7, while the item asking about the inevitability of the Court getting mixed up in politics does so at about a .6. The Cronbach's alpha is .75. Similarly in Chile, the lowest factor loading among the four items is about .6, and the Cronbach's alpha is also .75. Consequently, the dependent variable in the analyses below is a summated index of responses to all of the legitimacy items, with higher values representing greater legitimacy. Table 5.19 reports the mean legitimacy score among the control groups in Chile and Colombia.

Table 5.19 Raw Means among the Control Groups for Judicial Legitimacy DV

	Mean Constitutional Court legitimacy (control)
Chile	.33
Colombia	.35

N in Chile=213; N in Colombia=196

Legitimacy results

In Chile, the treatment in which subjects were given the opportunity to respond to the rulings in an open-ended fashion differed significantly and substantively from the treatment in which subjects were not given this option (p=.003), so I report the results of both conditions separately here. Neither treatment differed significantly from the control. The treatment in which subjects gave open-ended responses produced a mean legitimacy of .38, while the treatment in which they did not produced a mean legitimacy score of .30. For some reason, Chilean subjects who were given the opportunity to stop and reflect about the rulings they read gave the Court about 8 percentage-points higher legitimacy than those who only read about the rulings. The control yielded a mean of .33. Again, neither treatment group differed significantly from the control group that was not exposed to the constraint-seeking decisions.

Turning to the results in Colombia, the manipulation did not produce significant differences among the treatment and control groups. The mean legitimacy in the treatment condition was .31 compared to .35 in the control (p=.12), and the difference in treatment effects across countries did not reach conventional levels of statistical significance (p=.17).

The regression models in Chile produce one significant result, as we see in Table 5.20, but none of the interactions are significant. Likewise, Table 5.21 shows that in Colombia none of the regression models yielded significant findings. This means once more that in both countries the treatment effect was the same regardless of how often subjects agreed with the Court and how frequently they pay attention to it. In all, then, we have uncovered no evidence that either mandate-seeking or constraint-seeking judicial review is capable of damaging (or, for that matter, strengthening) the legitimacy of the court that practices it.

Table 5.20. Agreement hypothesis and pre-treatment effects in Chile

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.262*** (.029)	.336*** (.041)	.243*** (.070)
Treatment w/o OEs	-.028 (.041)	-.060 (.057)	.001 (.094)
Treatment w/ OEs	.069 (.041)	.060 (.055)	.138 (.095)
Agreement with Court	.202** (.074)		.308 (.180)
Agreement with Court*treatment w/o OEs	-.009 (.103)		-.210 (.232)
Agreement with Court*treatment w/ OEs	-.068 (.104)		-.314 (.236)
Attention to Court		-.013 (.065)	.035 (.114)
Attention to Court* treatment w/o OEs		.047 (.095)	-.057 (.157)
Attention to Court* treatment w/ OEs		-.022 (.090)	-.128 (.155)
Agreement*Attention			-.186 (.300)
Agreement*Attention*Treatment w/o OEs			.376 (.391)
Agreement*Attention*Treatment w/ OEs			.454 (.396)
Adj. R^2	.040	.011	.035
σ_{est}	.234	.240	.235

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Chile=591. DV: Constitutional Court legitimacy

Table 5.21. Agreement hypothesis and pre-treatment effects in Colombia.

Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.312*** (.047)	.371*** (.050)	.390** (.131)
Treatment	.013 (.057)	-.078 (.061)	.015 (.163)
Agreement with Court	.056 (.072)		-.029 (.211)
Agreement with Court*treatment	-.076 (.088)		-.165 (.262)
Attention to Court		-.036 (.068)	-.116 (.178)
Attention to Court*Treatment		.062 (.085)	.004 (.221)
Agreement*Attention			.126 (.283)
Agreement*Attention*Treatment			.118 (.350)
Adj. R^2	.000	.001	-.003
σ_{est}	.240	.241	.240

Coefficients are unstandardized with standard error in parentheses
*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test. N in Colombia=597. DV: Constitutional Court legitimacy

Conclusion

Table 5.22 summarizes the average effects of the judicialization treatment that I have presented throughout this chapter. In short, I have uncovered some evidence that judicialization can have the negative impact on political behavior that scholars have worried it might. My investigations have also revealed that this impact is not inevitable. In particular, while exposure to judicialization in Chile led subjects to express a lower

likelihood of voting in an upcoming election, lower political efficacy, and greater support for governmental censorship, it did not have these effects in Colombia. The distinct treatment effects we see in the very different judicial contexts of Chile and Colombia bolster this project's initial claim: The impact of judicialization depends upon the context in which it occurs. Of special importance was the finding that agreeing with the Court may lead to greater support for the violation of democratic norms, especially among subjects who are learning of the court's rulings for the first time. Importantly, despite frequent scholarly attacks on the legitimacy of judicial intervention in politics, in neither country did subjects exposed to judicialization lower the legitimacy that they awarded their Court.

Table 5.22. Summary of Investigation of Theoretical Expectations: Effect of Judicialization

	Chile	**Colombia**	**Cross-country differences in treatment effects?**
Political engagement	6% lower willingness to vote and 8% lower political efficacy.	Not statistically significant.	Significantly lower political efficacy in Chile than Colombia.
Support for populism	4% increase in support for government censorship of critical media.	Not statistically significant.	Significantly greater support for censorship in Chile than in Colombia.
Judicial legitimacy	Not statistically significant.	Not statistically significant.	No cross-country differences in treatment effects.

In Chapter 1 I posited the importance of distinguishing between whether a particular decision constrains government action or mandates the government provide

material goods and services. Comparing the treatment effects across Chile and Colombia supports the hypothesis that constraint-seeking judicial review can affect political behavior differently than mandate-seeking judicial review. In particular, when it came to political efficacy and support for governmental censorship, the treatment effects in Chile and Colombia differed significantly from one another, which is support for my argument that the constraint-seeking versus mandate-seeking nature of judicial review can condition the impact of judicialization on people's political behavior and attitudes.

When it comes to citizens' willingness to vote in an upcoming legislative election, the treatment effects did not differ significantly across countries. What might explain why judicialization had an effect on Chileans' willingness to vote but not Colombians'? In the conclusion, I return to this point and hypothesize about additional variables that may have contributed to within-country differences in Chile but not cross-country differences.

Chapter 6. Conclusion

Social scientists and legal academics have long been discussing the effects of judicial review and the judicialization of politics on the societies in which they take place. This is understandable given the incredibly active role the judiciary, and especially high courts, have come to play in democracies across the globe. However, this study began by showing that the literature on judicial review and the judicialization of politics frequently makes generalizations about the effects of these phenomena, often based on the experience of the United States Supreme Court, without regard for the immense variation in the institutional contexts within which judiciaries operate cross-nationally. Especially concerning is the literature's tendency to treat all constitutional review as the same, despite the monumental differences in the sorts of rulings judiciaries make. Moreover, when it comes to the impact courts have on the political behavior and attitudes of ordinary people, the literature is full of scattered assertions about the effects of judicial review. These assertions, however, are almost never accompanied by empirical tests or even theorizing about the process by which courts could conceivably have the impact they are asserted to have. The central tasks of this project and, I hope, its main contributions, have therefore been to conceptualize judicial review in a way that accounts for judicial output, to theorize a process by which courts could come to affect peoples' political behavior, and to use that process as the basis for empirically testing some of the theoretical expectations in the literature about the impact of judicial review.

My empirical tests relied on a survey experiment that was fielded in the very different institutional contexts of Chile and Colombia, South America, in order to draw causal inferences about the effects of these contexts. The motivation undergirding my

research design was to give the negative expectations I outline in Chapter 1 the best chance at succeeding. It seemed most efficient to do this with a controlled experiment in two countries representing "ideal types" of different approaches to constitutionalism—Chile's liberal individualist approach, wherein the Court primarily constrains government action, and Colombia's more expansive approach, wherein the Court not only can constrain the government, but also frequently forces it to deliver material goods and services.

Of course, all research designs involve tradeoffs, and experiments are no different. While experiments offer researchers unparalleled internal validity, we cannot be certain of their external validity. Do people in the real world respond to judicialzation in the same way as my subjects? Because my subjects learned about a series of rulings as part of an online survey rather than as they might have otherwise, it is possible the effect of judicialization differs somewhat in the population. However, to maximize external validity the rulings in the experiments were actual decisions by the Chilean and Colombian Constitutional Courts, and the vignettes that described those decisions roughly mimic the short descriptions of the cases that people might have read in news articles about the rulings.

How Judicialization Affects Political Behavior and Attitudes

Before testing several “theoretical expectations” from existing literature about the impact of judicial review on individuals’ political behavior and attitudes, I took the initial step of exploring how people form opinions about rulings by their high courts. I allowed a subset of participants to write open-ended responses about their decisions to accept as

final, or not, the judicial decisions they were exposed to during the experiment. Only literature from the American context could provide any insight into what factors predict the acceptance of particular decisions, and this literature focuses specifically on the acceptance of rulings whose policy implications individuals disagree with. Overall, these factors provided little insight into my Latin American subjects' thoughts, regardless of whether the decisions they were exposed to constrained government action or mandated it. Among the factors the American literature highlighted as important, only subjects' policy preferences showed up frequently in responses across Chile and Colombia. To a much lesser extent, the legitimacy of the Chilean Constitutional Court was important in responses from that country, as was the fairness of the decisions and the stakes of those decisions in Colombia. Interestingly, in both countries whether or not subjects agreed with the rulings made little difference to the sorts of reasons they gave for accepting or rejecting them.

Two themes that are not present in the American literature showed up quite often in responses from both countries. The first was morality. When asked to explain why they accepted or rejected a decision, respondents in Chile and Colombia often made moral arguments about the policy outcomes of the rulings. Beyond self-interested agreement or disagreement with the rulings, these responses gave normative arguments for the rightness or wrongness of the decisions. The second was rights-talk. Again in both countries, but in Colombia especially, a number of comments referenced a deep concern for the realization of rights, and often this concern was for other people (e.g., workers, students, terminally ill children and their families) and not just respondents themselves.

As I note earlier in the project, however, we cannot reject the possibility that reactions to these rulings were largely a product of the rulings themselves rather than reflective of Colombians' and Chileans' general reasoning about judicial decisions. While I chose actual decisions for the experiment that were clearly mandate-seeking in Colombia and constraint-seeking in Chile, at this stage these findings should be considered exploratory and theory-generating. However, even at this early stage, the differences in responses across Chile and Colombia, and the fact that responses from both countries differ significantly from what the U.S. literature would lead us to expect, bolsters my claim about the differing impact of judicial intervention in politics across countries.

We can now turn to the theoretical expectations I tested regarding the impact of judicial review on specific forms of political behavior. Each of these expectations was negative—in other words, the literature behind the expectations implied that judicial review should, in the aggregate, exert a democracy-dampening effect. Specifically, I examined the effect of judicialization on the political engagement of my subjects, their support for the violation of democratic norms often associated with populism, and the legitimacy they confer on their Constitutional Court.

My findings made clear that the scholars who have worried about the negative effects of judicial review, and judicialization more broadly, have not necessarily been wrong to do so. In the form of a series of constraint-seeking rulings in Chile, judicialization can indeed cut short the democratic process by weakening citizens' willingness to vote in an upcoming election and their sense of political efficacy. It can also increase their support for government censorship of critical media, one indicator of

support for populism. I found no such ill effects in Colombia, however, where judicialization was represented by exposing subjects to a series of mandate-seeking rulings. These findings, then, support the context-dependent nature of the effect of judicialization, and moving forward scholars must pay greater attention to differences in judicial context when debating the appropriate role of the judiciary in a democracy.

We can carry our discussion of the populism findings a bit further. While the judicialization treatment in Chile produced one instance of greater support for the behavior of populist politicians, when I interacted agreement with the Court's decisions with the treatment variable and frequency of attention to the Court, I found in both countries that frequently *agreeing* with the Court's rulings can increase support for populism. This was especially true among subjects who rarely pay attention to their Court and were therefore likely learning about the rulings in the experiment for the first time. While these findings are concerning, it is worth noting that scholars must exercise caution in establishing them outside of the context of a controlled experiment. This is because in the "real world" populism could cause judicialization. Consider that populism might cause the government to do unlawful things, which in turn leads to more lawsuits against the government and therefore to greater judicialization of politics. This is not difficult to imagine when we remember that in Chile many members of Congress knew the "Emilia's Law" drunk driving statute they passed was unconstitutional, but they did it anyway given the high levels of public support for the law. This led many of my interviewees to refer to the law as "penal populism." In such instances, if courts intervene it is hardly fair to blame them for the populism they are responding to. In order to avoid endogeneity issues, then, scholars who further investigate the relationship between judicialization and

populism will need to pay close attention to the role courts played prior to the advent of populism in the countries they are studying.

It is also worth saying a few words about the null findings in both countries when it came to judicial legitimacy. At the heart of many critiques of judicial review and the judicialization of politics is the notion that it is democratically illegitimate for unelected judges to have the final say over matters of public policy. In a democracy, according to these critiques, such matters are better left to the people and their elected officials. In neither Chile nor Colombia, however, did "the people" in my experiment see anything illegitimate about their Court after being exposed to judicialization. This is particularly surprising in Chile, where on average subjects disagreed with 2 of the 3 decisions in the experiment. While the implications of unelected judges making policy decisions will surely continue to concern some academics, I have uncovered no evidence that the people affected by those decisions react in ways that justify that concern.

Finally, it is worth discussing the size of the average treatment effects that the experiment produced. Recall that these effects were moderate, at best: an 8 percent decline in political efficacy was the largest of the significant findings. Here those scholars who are optimistic about the role of courts in democratic politics may be tempted to write off my results. Surely such small effects under the best possible circumstances—a controlled experiment in countries representing the ideal types of two different approaches to constitutionalism—mean that in reality courts aren't doing much damage? This may be true, but consider that the opposite could be true just as well. In my experiment, subjects were taught about the ruling in a *very* neutral setting. Nothing about the vignettes was the least bit politically charged. How might subjects react if, say, a

family member or friend, or their favorite pundit, is the one to teach them about a disagreeable ruling? Certainly we might expect that these experiences would be much more explicitly political than my vignettes, and it is not clear that the effects in such circumstances would be smaller than those produced by my experiment in Chapter 5.

Moving Forward

This project has broken new ground conceptually, theoretically, methodologically, and empirically, but at this point it is too early to make concrete recommendations regarding the design of judiciaries on the basis of my findings. For example, it is not unreasonable to expect that many high courts issue both mandate-seeking and constraint-seeking decisions, and it is not clear what we might expect the net effect of such courts to be on the political behavior of the people they serve. The findings in this project, then, point to exciting avenues for future research, both as extensions of the current work and new work altogether.

An obvious first step is to alter the experimental design, swapping the treatment that allowed subjects to give open-ended responses to the rulings for a treatment that exposes them to the opposite type of judicial review. This would entail randomly assigning both Chilean and Colombian subjects to see either a series of mandate-seeking decisions or a series of constraint-seeking decisions. If we were to find, for example, that Chileans exposed to decisions that force the government to deliver material goods and services respond differently than their Colombian counterparts this would be further evidence that the context in which decisions are issued has strong implications for their effects on political behavior.

Replicating the Chilean experiment with at least one different decision could also provide a useful extension to the current work. If anything, the experiment in this project may have *underestimated* the effects of constraint-seeking review. Recall that the drunk driving decision featured in the experiment was a concrete ruling, and as such it only applies to the parties in the case. As I discussed, many similar cases have been decided by the Court, and experts seem to agree that Emilia's Law is falling and is not readily applied. Nevertheless, some subjects in the open-ended responses reported that they did not believe the vignette, and that killing or injuring someone while driving drunk does require going to prison. Perhaps with a different constraint-seeking ruling, one that unarguably applies to all citizens, we would see an even greater effect.

Building off of the research here, there are a number of opportunities for completely new work. We saw in Chapter 4, for example, that there was little evidence that the predictors of acceptance of judicial rulings from the American literature apply in either Colombia or Chile. Why might this be, and, more importantly, what *does* lead people living in these countries to accept or reject particular rulings?

When it comes to citizens' willingness to vote in an upcoming legislative election, we saw in Chapter 5 that the treatment effects did not differ significantly across countries. So, while subjects in Chile who were exposed to judicialization were less likely to vote than those in the control, and subjects in Colombia exposed to judicialization did not differ from those in the control, participants exposed to judicialization in either country did not differ significantly from one another. What might explain why the treatment had an effect within Chile, but not across the two countries? Consider that out of the three decisions to which Chilean subjects were exposed, on

average they agreed with only about one of them. In Colombia the number was double that. Moreover, in several of the regression models not agreeing with the Courts' rulings was associated with less participation, in line with the agreement hypothesis. However, as I do not experimentally manipulate agreement with the rulings, the findings regarding agreement with the Court need to be replicated with either explicit experimental manipulation or on nationally-representative samples.

It could also be that the low access nature of the judiciary in Chile is at least partially responsible, independent of the type of judicial review represented by particular decisions. Further research should pursue whether people with little access to the judiciary are more likely to feel as though they are being ruled by an out-of-touch elite that they are powerless to sway one way or another, which one might imagine leads naturally to a decline in political participation. It is certainly easier to imagine that low access courts represent attempts by elites "to insulate their policy preferences from the vicissitudes of democratic politics" (Hirschl 2004, 16) than it is to imagine that high access courts do.

As I reference above, I also found in both countries that subjects who consistently agreed with rulings by their Court were more supportive of violations of democratic norms, specifically norms associated with the rights of minorities and opposition parties. Future research must investigate this relationship further. The potential for Courts to spur anti-minority bias, not among the disaffected who consistently find themselves on the losing ends of decisions, but rather among those who always "win" is a new and concerning finding, especially as it relates to countries whose selection methods for justices allow particular ideologies to dominate the bench.

Finally, here I have focused exclusively on judicial intervention in politics via constitutional review. While constitutional cases make up a majority of the salient, controversial cases courts decide, and therefore seem the most likely to affect the attitudes and behavior of ordinary people, it is certainly true that courts influence politics in non-constitutional cases as well. Research into the effects of law on political behavior should inquire into the ways in which, for example, administrative review influences the outcomes we have examined here. It could be that in less salient cases, such as administrative decisions, courts have less of a direct effect than we saw here. One resounding lesson of this project, after all, is that the context in which judicial decisions are made is of great importance to their effects on people's behavior, and that those effects must be empirically established rather than merely asserted. Clearly, much work remains to be done.

Appendix A: Sample Description

Chile:

The survey took place online and was distributed by Netquest to members of their online panel in Chile.

A total of 630 participants completed the survey. 9 participants withdrew their consent to use their data after being debriefed at the end. The mean length of completion was 18.5 minutes and the median length of completion was 11.6 minutes. 25 participants took longer than an hour to complete the survey and were dropped from the analysis.* In total, then, the analyses that appear in the preceding chapters are based on **596 Chilean participants**.

Colombia:

The survey took place online and was distributed by Netquest to members of their online panel in Colombia.

A total of 615 participants completed the survey. 4 participants withdrew their consent to use their data after being debriefed at the end. The mean length of completion was 20 minutes, and the median length of completion was 12.8 minutes. 14 participants took longer than an hour to complete the survey and were dropped from the analysis.* In total, then, the analyses that appear in the preceding chapters are based on **597 Colombian participants**.

*I failed to include the step of excluding those who took longer than an hour to complete the survey in the pre-analysis plan for this project. However, dropping participants who take significantly longer than the rest of the sample to complete a survey is common practice in survey experiments, where it is important that too much time has not passed between when subjects may have read the treatment and when they answer the dependent variable items.

Sample Frequencies:

*Note: Categories may not add to 100% due to rounding

	Gender		Age				Left-Right Scale						
	Male	Female	18-34	35-49	50-64	65+	Left	2	3	4	5	6	Right
Chile	42%	58%	51%	31%	16%	2%	9%	10%	16%	37%	13%	7%	8%
Colombia	46%	54%	42%	35%	20%	3%	7%	6%	17%	44%	10%	5%	11%

	Children?		Education				Religion				
	Yes	No	Primary	Secondary	Non-university higher-ed	University	Catholic	Protestant	Evangelical/ Pentecostal	Other	None
Chile	60%	40%	.3%	21%	20%	60%	43%	2%	9%	7%	39%
Colombia	60%	40%	1%	17%	14%	70%	63%	4%	7%	7%	19%

	Marital Status						Employment Status				
	Single	Married	Divorced	Separated	Widowed	Other	Employed	Unemployed	Student	Home-maker	Other
Chile	51%	35%	6%	4%	1%	5%	70%	9%	11%	7%	4%
Colombia	39%	43%	2%	5%	2%	9%	65%	14%	9%	6%	6%

	Race						Income Quartile			
	White	Mixed	Indigenous	Mulatto	Black	Other	1st	2nd	3rd	4th
Chile	50%	42%	4%	1%	N/A	4%	4%	12%	9%	75%
Colombia	42%	50%	1%	2%	3%	3%	5%	3%	21%	71%

*Note: 1st income quartile includes those who reported no income

Appendix B: Manipulation Checks

In each country, subjects in both treatment groups answered questions following each vignette that they read to ensure they understood the mandate-seeking nature of the decision (in Colombia) or the constraint-seeking nature of the decision (in Chile). Overall, subjects passed these manipulation checks at extremely high rates.

Chile

Manipulation Check 1: Were you paying attention? Which of the following describes the ruling you just read about?

1. The Constitutional Tribunal ruled that the government could not require a mandatory prison sentence for individuals that kill or injure another person while driving drunk. [Correct answer]

   Treatment 1: 88%
   Treatment 2: 92%

2. The Constitutional Tribunal did not say whether the government could require a mandatory prison sentence for individuals who harm others while driving drunk.

   Treatment 1: 12%
   Treatment 2: 8%

Manipulation Check 2: Were you paying attention? Which of the following describes the ruling you just read about?

1. The Constitutional Tribunal did not say whether the government could give unions the sole power to negotiate on behalf of workers.

   Treatment 1: 12%
   Treatment 2: 7%

2. The Constitutional Tribunal ruled that the government could not give unions the sole power to negotiate on behalf of workers. [Correct answer]

   Treatment 1: 88%
   Treatment 2: 93%

Manipulation Check 3: Were you paying attention? Which of the following describes the ruling you just read about?

1. The Constitutional Tribunal ruled that the government could not prohibit for-profit entities from running institutions of higher education. [Correct answer]

   Treatment 1: 91%
   Treatment 2: 89%

2. The Constitutional Tribunal did not say whether the government could prohibit for-profit entities from running institutions of higher education.

   Treatment 1: 9%
   Treatment 2: 12%

Colombia

Manipulation Check 1: Were you paying attention? Which of the following describes the ruling you just read about?

1. The Constitutional Court ordered that the government issue regulations making child euthanasia possible. [Correct answer]

   Treatment 1: 90%
   Treatment 2: 96%

2. The Constitutional Court did not order the government to do anything about child euthanasia.

   Treatment 1: 10%
   Treatment 2: 4%

Manipulation Check 2: Were you paying attention? Which of the following describes the ruling you just read about?

1. The Constitutional Court did not order the government to do anything to protect the Atrato River.

   Treatment 1: 3%
   Treatment 2: 5%

2. The Constitutional Court ordered that the government form a commission to protect the Atrato River. [Correct answer]

    Treatment 1: 97%
    Treatment 2: 95%

Manipulation Check 3: Were you paying attention? Which of the following describes the ruling you just read about?

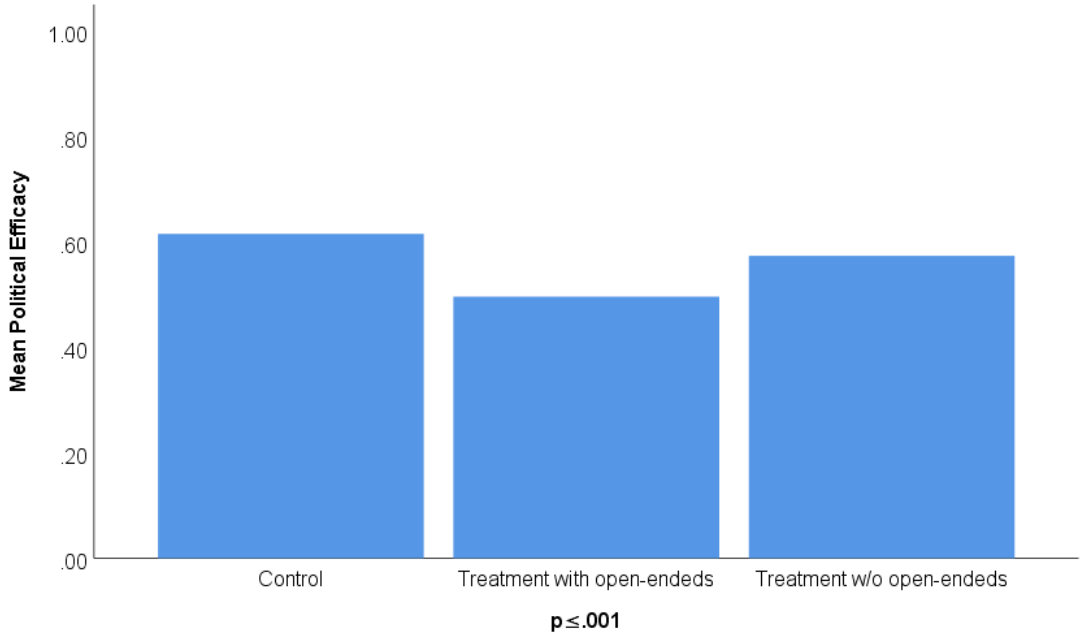
1. The Constitutional Court forced the government to provide medical treatments to Venezuelan migrants who came to this country illegally and who cannot pay for them themselves. [Correct answer]

    Treatment 1: 95%
    Treatment 2: 93%

2. The Constitutional Court did not force the government to provide medical treatments to Venezuelan migrants who came to this country illegally.

    Treatment 1: 5%
    Treatment 2: 7%

Appendix C. Political efficacy DV in Chile, disaggregating treatment groups



Variable	Agreement Hypothesis	Pre-treatment effects	Ag. hyp. w/pre-treatment
Constant	.630*** (.039)	.573*** (.054)	.572*** (.093)
Treatment w OEs	-.105 (.055)	-.140* (.072)	-.126 (.126)
Treatment w/o OEs	-.042 (.055)	-.042 (.075)	-.082 (.127)
Agreement with Court	-.041 (.101)		-.009 (.245)
Agreement with Court*Treatment w OEs	-.036 (.140)		.006 (.317)
Agreement with Court*Treatment w/o OEs	.001 (.140)		.123 (.314)
Attention to Court		.073 (.085)	.107 (.152)
Attention*Treatment w OEs		.051 (.117)	.034 (.204)
Attention*Treatment w/o OEs		.011 (.123)	.079 (.211)
Agreement*Attention			-.086 (.408)
Agrmt*Attnt*Trtmt w OEs			-.031 (.529)
Agrmt*Attnt*Trtmt wo OEs			-.209 (.528)
Adj. R^2	.016	.021	.012
σ_{est}	.318	.317	.318

Coefficients are unstandardized with standard error in parentheses

*Significant at p≤.05 **Significant at p≤.01 ***Significant at p≤.001, two tailed test

N in Chile=591

Methodological Appendix: Interviewees in Chile

I am extremely grateful to the following individuals who allowed me to interview them for this project and who consented to being identified as interviewees:

Ignacio Covarrubias Cuevas – Constitutional law professor

Alberto Vergara Arteaga – Constitutional law professor

José Francisco García – Constitutional law professor

Domingo Lovera Parmo – Constitutional law professor

Javier Couso – Constitutional law professor

Diego Pardow – Constitutional law professor

Sebastian Soto – Constitutional law professor

Miguel Angel Fernández González – Constitutional Court Justice and law professor

References

Ackerman, Bruce. 1997. “The Rise of World Constitutionalism.” *Virginia Law Review*, 83(4):771-797.

Almendares, Nicholas and Patrick Le Bihan. 2015. “Increasing Leverage: Judicial Review as a Democracy-Enhancing Institution.” *Quarterly Journal of Political Science*, 10(3): 357-390.

Bandes, Susan. 1990. “The Negative Constitution: A Critique.” *Michigan Law Review*, 88 (8): 2271-2347.

Barak, Aharon. 2006. *The Judge in a Democracy*. Princeton: Princeton University Press.

Bartels, Brandon L. and Christopher D. Johnston. 2013. “On the Ideological Foundations of Supreme Court Legitimacy in the American Public.” *American Journal of Political Science*, 57(1): 184-199.

Bellamy, Richard. 2007. *Political Constitutionalism*. Cambridge: Cambridge University Press.

Berman, Sheri. 2017. “The Pipe Dream of Undemocratic Liberalism.” *Journal of Democracy* 28(3): 29-38.

Bilchitz, David. 2013. “Constitutionalism, the Global South, and Economic Justice.” In *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, edited by Daniel Bonilla Maldonado. New York: Cambridge University Press.

Bonilla Maldonado, Daniel. 2013. “Introduction: Toward a Constitutionalism of the Global South.” In *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, edited by Daniel Bonilla Maldonado. New York: Cambridge University Press.

Bork, Robert H. 2003. *Coercing Virtue: The Worldwide Rule of Judges*. Washington: The AEI Press.

Cacioppo, John T., William von Hippel, and John M. Ernst. 1997.“Mapping Cognitive Structures and Processes through Verbal Content: The Thought-Listing Technique.” *Journal of Consulting and Clinical Psychology*, 65:928–40.

Chilton, Adam S. and Mila Versteeg. 2018. “Courts’ Limited Ability to Protect Constitutional Rights.” *University of Chicago Law Review*, 85(2): 293-335.

Couso, Javier A. 2011. “Models of Democracy and Models of Constitutionalism: The Case of Chile’s Constitutional Court, 1970-2010.” *Texas Law Review*, 89(7): 1517-1536.

Curie, David P. 1986. “Positive and Negative Constitutional Rights.” *The University of Chicago Law Review*, 53(3): 864-890.

Diamond, Larry. 2015. “Facing Up to the Democratic Recession.” *Journal of Democracy*, 26(1): 141-155.

Druckman, Jamie N. and Cindy D. Kam. 2011. “Students as Experimental Participants: A Defense of the ‘Narrow Data Base.’” In *Cambridge Handbook of Experimental Political Science*, Jamie N. Druckman, Donald P. Green, James H. Kuklinski, and Arthur Lupia. New York: Cambridge University Press.

Dworkin, Ronald. 1990. *A Bill of Rights for Britain*. London: Chatto and Windus Ltd.

Easton, David. 1965. *A Systems Analysis of Political Life*. New York: Wiley.

Ericsson, K. Anders, and Herbert A. Simon. 1980. “Verbal Reports as Data.” *Psychological Review*, 87:215–51.

Espinosa, Manuel José Cepeda. 2005. “The Judicialization of Politics in Colombia: The Old and the New.” In *The Judicialization of Politics in Latin America*, edited by Rachel Sieder, Line Schjolden, and Alan Angell. New York: Palgrave Macmillan.

Espinosa, Manuel José Cepeda and David Landau. 2017. *Colombian Constitutional Law: Leading Cases*. New York: Oxford University Press.

Ferejohn, John A. 2002. “Judicializing Politics, Politicizing Law.” *Law and Contemporary Problems*, 65(3): 41-68.

Foa, Roberto Stefan and Yascha Mounk. 2016. “The Danger of Deconsolidation: The Democratic Disconnect.” *Journal of Democracy*, 27(3): 5-17.

Frymer, Paul. 2003. “Acting when Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85.” *American Political Science Review*, 97(3): 483-499.

Fukuyama, Francis. 2014. “America in Decay: The Sources of Political Dysfunction.” *Foreign Affairs*, September/October. Online: https://www.foreignaffairs.com/articles/united-states/2014-08-18/america-decay.

García-Herreros, Nicolás Figueroa. 2012. “Counter-Hegemonic Constitutionalism: The Case of Colombia.” *Constellations*, 19(2): 235-247.

Gibson, James L., Gregory A. Caldeira, and Lester Kenyatta Spence. 2005. “Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment.” *Political Research Quarterly*, 58(2): 187-201.

Gibson, James L., and Gregory a. Caldeira. 2009. “Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination.” *American Journal of Political Science* 53(1): 139–55.

Gibson, James L. and Michael J. Nelson. 2018. *Black and Blue: How African Americans Judge the U.S. Legal System*. New York: Oxford University Press.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases.* Cambridge: Cambridge University Press.

Ginsburg, Tom and Mila Versteeg. 2013. "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics, and Organization*, 30: 587 –

Goertz, Gary. 2006. *Social Science Concepts: A User's Guide*. Princeton: Princeton University Press.

Graber, Mark. 1993. "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development*, 7(1): 35-73.

Graber, Mark A. 2006. *The Maryland/Georgetown Constitutional Law Schmooze – Forward: from the Counter-majoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*. Maryland Law Review, 65(1): 1-14.

Hailbronner, Michaela. 2017. "Transformative Constitutionalism: Not Only in the Global South." *American Journal of Comparative Law*, 65: 527-566.

Handler, Joel F. 1978. *Social Movements and the Legal System: A Theory of Law Reform and Social Change*. New York: Academic Press.

Helmke, Gretchen and Julio Ríos-Figueroa. 2011. "Introduction: Courts in Latin America." In *Courts in Latin America,* edited by Gretchen Helmke and Julio Ríos-Figueroa. Cambridge: Cambridge University Press.

Hilbink, Lisa. 2008. "Assessing the New Constitutionalism." *Comparative Politics,* 40(2): 227-245.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.

Hirschl, Ran. 2008. "The Judicialization of Mega-Politics and the Rise of Political Courts." *Annual Review of Political Science*, 11: 93-118.

Horowitz, Donald L. 1977. *The Courts and Social Policy*. Washington: The Brookings Institution.

Johnston, Christopher, D. Sunshine Hillygus, and Brandon L. Bartels. 2014. "Ideology, the Affordable Care Act Ruling, and Supreme Court Legitimacy." *Public Opinion Quarterly* 78(4): 963–73.

Kam, Cindy D. and Camille D. Burge. 2017. "Uncovering Reactions to the Racial Resentment Scale across the Racial Divide." *The Journal of Politics*, 80(1): 314-320.

Kelemen, R. Daniel. 2011. *Eurolegalism: The Transformation of Law and Regulation in the European Union*. Boston: Harvard University Press.

Kelemen, R. Daniel. 2012. "Eurolegalism and Democracy." *Journal of Common Market Studies*, 50(1): 55-71.

Kelemen, R. Daniel. 2012b. "The Political Foundations of Judicial Independence in the European Union." Journal of European Public Policy, 19(1): 43-58.

Kelemen, R. Daniel. 2018. "Commitment for Cowards: Why the Judicialization of Austerity is Bad Policy and Even Worse Politics." In *Liberal Constitutionalism in Times of Financial Crisis*, edited by Tom Ginsburg, Georg Vanberg and Pedro Magalhães. Cambridge: Cambridge University Press.

Landau, David. 2015. *Beyond Judicial Independence: The Construction of Judicial Power in Colombia*. Unpublished dissertation.

Levitsky, Steven and Daniel Ziblatt. 2018. *How Democracies Die*. New York: Crown.

Linos, Katerina and Kimberly Twist. 2018. "Diverse Pre-Treatment Effects in Survey Experiments." *Journal of Experimental Political Science*, 5(2): 148-158.

McCann, Michael. 1986. *Taking Reform Seriously: Perspectives on Public Interest Liberalism*. Ithica: Cornell University Press.

Miller, Lisa L. 2016. *The Myth of Mob Rule: Violent Crime and Democratic Politics*. Oxford: Oxford University Press.

Morton, Rebecca B, and Kenneth C Williams. 2008. "Experimentation in Political Science." In *Oxford Handbook of Political Methodology*, eds. Jannet M Box-Steffensmeier, Henry E. Brady, and David Collier. New York: Oxford University Press.

Mounk, Yascha. 2016. "Illiberal Democracy or Undemocratic Liberalism?" *Project-syndicate*. Available at: https://www.project-syndicate.org/commentary/trump-european-populism- technocracy-by-yascha-mounk-1-2016-06

Mounk, Yascha. 2018. *The People vs. Democracy: Why our Freedom is in Danger, and How to Save It*. Cambridge: Harvard University Press.

Mudde, Cas and Cristóbal Rovira Kaltwasser. 2013. *Populism in Europe and the Americas: Threat or Corrective for Democracy?* New York: Cambridge University Press.

Mudde, Cas. 2015. "The Problem with Populism." *The Guardian*. Available at: https://www.theguardian.com/commentisfree/2015/feb/17/problem-populism-syriza- podemos-dark-side-europe

Müller, Jan Werner. 2016a. "Genuine political choice serves as the best antidote to populism - What are described as populists are often protest parties which can play a constructive role." *Financial Times*, October 4. Available at: https://www.ft.com/content/54240580-75db-11e6-bf48-b372cdb1043a

Müller, Jan-Werner. 2016b. "Populists and Technocrats in Europe's Fragmented Democracies. World." World Politics Review, March 31. Available at: http://worldpoliticsreview.com/authors/1426/jan-werner-muller

Mutz, Diana C. 2011. *Population-Based Survey Experiments*. Princeton: Princeton University Press.

Norris, Pippa and Ronald Inglehart. 2019. *Cultural Backlash: Trump, Brexit, and Authoritarian Populism*. New York: Cambridge University Press.

Peredo Rojas, Marcel Inés. 2018. *El Margin de Apreciación del Legislador y el Test de Margen Proporcionado: Ley versus Tribunal Constitucional.* Santiago: Thomas Reuters.

Ragin, Charles C. and Paul Pennings. 2005. "Fuzzy Sets and Social Research." *Sociological Methods and Research*, 33(4): 423-430.

Rodrik, Dani. 2018. "The Double Threat to Liberal Democracy." *Project Syndicate*: https://www.project-syndicate.org/commentary/double-threat-to-liberal-democracy-by-dani-rodrik-2018-02

Rosenberg, Gerald N. 2008. *The Hollow Hope: Can Courts Bring About Social Change? (2nd ed).* Chicago: University of Chicago Press.

Schor, Miguel. 2008. "Mapping Comparative Judicial Review." *Washington University Global Studies Law Review*, 7(2): 257-287.

Scott, Craig and Patrick Macklem. 1992. "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution." *University of Pennsylvania Law Review*, 141(1): 1-148.

Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. Chicago: Chicago University Press.

Sieder, Rachel, Line Schjolden, and Alan Angell. 2005. "Introduction." In *The Judicialization of Politics in Latin America*, edited by Rachel Sieder, Line Schjolden, and Alan Angell. New York: Palgrave Macmillan.

Tate, C. Neal and Torbjorn Vallinder. 1995. "Introduction" In *The Global Expansion of Judicial Power*, edited by C. Neal Tate and Torbjorn Vallinder New York: New York University Press.

Taylor, Whitney K. 2018. "Ambivalent Legal Mobilization: Perceptions of Justice and Use of the Tutela in Colombia." *Law and Society Review*, 52(2): 337-367.

Thayer, James Bradley. 1901. *John Marshall*. Boston: Houghton, Mifflin and Company.

Tushnet, Mark. 1999. *Taking the Constitution Away from the Courts*. Princeton: Princeton University Press.

Tushnet, Mark. 2008. *Weak Courts, Strong Rights*. Princeton: Princeton University Press.

Tyler, Tom. 2006. “Psychological Perspectives on Legitimacy and Legitimation.” *Annual Review of Psychology* 57: 375-400.

Waldron, Jeremy. 2006. “The Case against Judicial Review.” *The Yale Law Journal,* 115(6): 1346-1406.

Whittington, Keith E. 2005. “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court.” *American Political Science Review,* 99(4): 583-596.

Woodson, Benjamin. 2015. “Politicization and the Two Modes of Evaluating Judicial Decisions.” *Journal of Law and Courts*: 193-221.

Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights.* Princeton: Princeton University Press.

Zakaria, Fareed. 1997. “The Rise of Illiberal Democracy.” *Foreign Affairs*, 76(6): 22-43.

Zemans, Frances Kahn. 1983. “Legal Moblization: The Neglected Role of the Law in the Political System.” *American Political Science Review*, 77(3): 690-703.