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NEW DIRECTIONS IN THE COMPARATIVE LAW AND POLITICS OF JUDICIAL REVIEW

David Landau*

DAVID M. BRINKS & ABBY BLASS, *THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA* (CAMBRIDGE UNIVERSITY PRESS 2018). Pp. 278. HARDCOVER \$110.00. PAPERBACK \$34.99.

THEUNIS ROUX, *THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS* (CAMBRIDGE UNIVERSITY PRESS 2018) Pp. 386. HARDCOVER \$120.00. PAPERBACK \$37.99.

The comparative constitutional politics of judicial review remain largely defined by important works that are now more than a decade old. Tom Ginsburg’s “insurance” theory¹ and Ran Hirschl’s “hegemonic preservation” thesis² both clarified the ways in which politics shape the design and functioning of constitutional courts. Ginsburg’s book showed how the presence of political competition in Asia incentivized politicians to create and maintain “independent” judiciaries; Hirschl recounted cases from several countries where embattled political elites empowered courts to insulate their policy preferences. At a higher level, the two books showed how the spread and strengthening of judicial review were inextricably bound up with national politics.

The two books reviewed here, Daniel Brinks and Abby Blass’s *The DNA of Constitutional Justice in Latin America*³ and Theunis Roux’s *The Politico-Legal Dynamics of Judicial Review*,⁴ help give us theoretical tools and empirical insights that further push on the intertwinement between law and politics on high national courts. They push towards fruitful new directions in research, particularly in fleshing out the causes and consequences of different “regimes” of judicial review. Both books build on classic works in the field, while challenging core concepts.

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1. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

2. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11 (2004).

3. DANIEL M. BRINKS & ABBY BLASS, *THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA: POLITICS, GOVERNANCE, AND JUDICIAL DESIGN* (2018).

4. THEUNIS ROUX, *THE POLITICO-LEGAL DYNAMICS OF JUDICIAL REVIEW: A COMPARATIVE ANALYSIS* (2018).

Brinks and Blass's aim is to illuminate the design of constitutional courts in recent Latin American history. They argue that high courts serve as a mechanism for "constitutional governance," with an originating "coalition" that designs a court to be responsive to its goals over time.⁵ They propose a useful division of judicial design into two parts: the scope of judicial authority, and mechanisms of judicial control and accountability.⁶ The first dimension deals with a court's ability to intervene in different kinds of policy matters; the second with the ways in which political actors (or others) can control a court with *ex ante* and *ex post* controls. The first dimension thus focuses on the thickness of constitutional rights themselves, the ability of both elites and citizens to access the courts in different ways, and the breadth of the effect of a judgment. The second is about appointment mechanisms (which kinds of actors appoint judges, and in what combination), the length and renewability of terms, and the ease and nature of removal.

Brinks and Blass create a set of measures for both dimensions and show that there are some general regional trends over time. For example, most courts designed more recently have a higher scope of authority than those designed in the past.⁷ This reflects the influence of the "new constitutionalism" in Latin America, which has led to a greater amount of constitutional rights and more comfort with judicial enforcement of those rights.⁸ But at the same time, they show that designs continue to show significant variance, with the two dimensions of judicial power grouped into four different kinds of courts. There are "sidelined courts" with little authority or autonomy, "procedural arbiters" that are fairly autonomous but can be accessed only on a narrow range of issues by elites, "regime allies" that lack autonomy but have a high scope of authority, and finally "major policy players" that are strong on both dimensions.⁹

The authors conduct quantitative tests, as well as case studies, that support the idea that each of these kinds of courts tend to be designed in different political contexts. The causal variables sweep beyond the emphasis on political competition in the classic works to also include more ideological factors. For example, a "procedural arbiter" might be created when the political coalition creating a court is pluralistic but also seeks to restrict access because it seeks an institution mainly to adjudicate disputes between elites (as in Mexico in 1994). "Major policy players" get formed where a pluralistic coalition includes members, often on the left, who are ideologically committed to more aggressive judicial enforcement of rights (as in Colombia in 1991). Finally, a "regime ally" court may be expected when the originating coalition designing a court is dominated by a single political force that expects to control appointments to the tribunal for the indefinite future; that force might thus seek a tribunal with a high scope of authority, but low autonomy, so that the tribunal will carry out a range of useful tasks for the regime (as in Venezuela in and after 1999). Brinks and Blass's concept of a regime ally dovetails well with other work showing how modern authoritarian or competitive authoritarian regimes sometimes rely on courts to carry out a range of tasks, and thus may imbue those courts with a great degree of

5. See BRINKS & BLASS, *supra* note 3, at 8–9.

6. See *id.* at 20–22.

7. See *id.* at 33.

8. See *id.* at 178.

9. See *id.* at 31.

authority even as they use *ex ante* and *ex post* mechanisms to tether the court tightly to regime preferences. As Dixon and I have recently argued, a political actor seeking to take over a court, but to use it for core regime tasks such as repressing opposition politicians or consolidating political power, may attack appointment mechanisms but leave the formal powers of a court intact or even expand them.¹⁰

Theunis Roux’s study of the political-legal dynamics of judicial review aims at the question of how judges and legal elites justify and talk about judicial review. He argues that there are different ways in which constitutional orders relate law and politics. Drawing off of classic sociological theory by Nonet and Selznick, he contrasts “legalistic” regimes of judicial review that clearly separate law and politics from “instrumental” regimes that see law and politics as unavoidably intertwined.¹¹ From this, and the question of whether a regime is authoritarian or democratic, he draws a four-part typology of judicial review regimes, which he examines primarily by doing three detailed case studies of Australia (democratic legalism), India (democratic instrumentalism), and Zimbabwe (authoritarian legalism, with an interlude of instrumentalism). He then examines the landscape of judicial review in ten other countries, as a check on the initial conclusions.

Roux is interested in the question of how regimes change—he argues that they are related to, but distinct from, both ordinary politics and formal constitutional replacement. Instead, they reflect a set of attitudes about constitutional law that are relatively durable, tend to revert to type, and are generally only changed through a significant exogenous shock. Attempted shifts without such a shock, such as the Mason Court’s challenge to legalism in Australia in the 1990s, will likely fail or be absorbed by the dominant legal culture.¹² Roux also finds that some kinds of regimes appear to be rare. For example, he finds few examples of democratic legalism outside of India and the United States, he argues because “[s]ituations in which judicial decision-making in a democracy is both clearly ideologically motivated and politically tolerated depend on an unusual combination of factors.”¹³

Roux also draws out some of the normative implications of his theory, suggesting that different regimes of judicial review raise different questions and have different weaknesses. Democratic legalism, for example, depends on the suspension of disbelief on the point that law can be separated from politics and may make a constitutional regime more rigid.¹⁴ Instrumentalism, however, may make the courts and constitution a partisan battleground (as Roux argues happened in the US) or a locus of complaints about democratic dysfunction (as he argued happened in India).¹⁵

Both books push beyond existing work in interesting ways. Brinks and Blass, for example, problematize the foundational concept of judicial independence. As they note, all courts are dependent in some sense on the support of certain groups.¹⁶ What really

10. See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313 (2020).

11. See ROUX, *supra* note 4, at 51.

12. See *id.* at 144–45.

13. *Id.* at 257.

14. See *id.* at 312.

15. See *id.* at 312–13.

16. See BRINKS & BLASS, *supra* note 3, at 20–21 (noting that existing theories of judicial independence “deny

varies, then, are the identities of the actors in this group, and tracking these differences can tell us a lot about how a court is likely to behave. In “regime ally” courts, those on the court will usually be dependent on the regime itself; in other kinds of courts, the political coalitions to which courts are accountable may be more complex or even include other actors such as judges, but there are still mechanisms of accountability. Often, then, asking how independent a court is will be less useful than asking to which actors its judges tend to be accountable. Roux’s work, in turn, is a valiant attempt to bring ideational concepts about law into judicial politics. Without question, as he argues, these conceptions matter greatly in the way judges, political elites, and citizens look at and use law, and they have very rarely been integrated into political theories of judicial review.¹⁷

While the broad typologies developed by both books are useful, both also suggest new questions and invitations to further—and perhaps even finer-grained—work. Roux may be right that broad shifts between legalism and instrumentalism are rare, but his own book points out many examples of shifts between subtypes of legalism and instrumentalism that are quite rich. Take Germany as an example. The dominant modern constitutional culture has retained an emphasis on formalism from its historical roots, in Michaela Hailbronner’s telling, but has shifted towards what she calls “value formalism,” a more substantive conception of formalism emphasizing the weighing of constitutional values.¹⁸ Something similar happened in Colombia when the new constitution and Constitutional Court were created in 1991: an older constitutional culture with a procedural variant of formalism gave way to substantive “value formalism” that has allowed for the emergence of one of the strongest and most creative high courts in the world.¹⁹ Roux is right to point to an element of continuity between these shifts, but they are nonetheless consequential.

A related point is that countries often have internal heterogeneity in their regimes of judicial review. Different judges, or legal elites, may have very different conceptions of what judicial review means. Take Colombia again as an example. The dominant legal culture has been “value formalist.” But some of the most influential judges on the Colombian Constitutional Court have carried a more instrumental vision of law. Justice Manuel Jose Cepeda Espinosa, for example, who was educated in the United States, helped design the Constitutional Court as a young legal adviser, and later served as one of its most influential judges, is a devotee of Nonet and Selznick’s conception of responsive law. I have argued that he was influential in part because he was a “jurisprudential outsider”—a savvy instrumentalist in a formalist world.²⁰

Similarly, there may be heterogeneity between elite and popular conceptions of constitutional law. Roux categorizes the United States as a paradigmatic case of legal

th[e] essential fact” that courts are “political institutions”).

17. See ROUX, *supra* note 4, at 85–89.

18. See MICHAELA HAILBRONNER, TRADITION AND TRANSFORMATIONS: THE RISE OF GERMAN CONSTITUTIONALISM 97 (2015).

19. See David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT’L L. REV. 687 (2005).

20. See DAVID LANDAU, A FUSION OF THE POLITICAL AND THE LEGAL: JUSTICE CEPEDA’S INSTITUTION BUILDING OF THE COLOMBIAN CONSTITUTIONAL COURT, IN TOWERING JUSTICES (Ido Porat & Rehan Abeyratne eds., forthcoming 2020).

instrumentalism. I am more skeptical. There are certainly significant elements of instrumentalism among US lawyers. But these views are by no means uncontested and seemingly formalist methods of constitutional interpretation like originalism in fact are increasingly strong. Regardless of views at the elite level, at any rate, *popular* views of constitutional law in the United States are probably best encapsulated by Justice Robert's analogy at his confirmation hearings that judges are mere umpires who do not get to make the rules.²¹

The typology between four types of courts constructed by Brinks and Blass seems to explain a good chunk of the logic of the design of high courts in Latin America. The obvious extension of the project is into questions that show the ways in which constitutional design interacts with the performance of the court over time, and the ways in which models can change. For the most part the authors—quite sensibly—leave these questions aside in their own project.

One way judicial design can change over time is through formal amendment. Take Mexico, where the Supreme Court was either a sidelined court or weak regime ally until 1994, when it was transformed into a procedural arbiter mainly tasked with adjudicating political disputes in the new multiparty political system.²² The rules were changed again in 2011, when the individual complaint or *amparo* was strengthened and an incorporation clause was added requiring construction of constitutional rights in light of human rights treaties.²³ This has likely made the Mexican Court into a major policy player, as shown by recent rulings on a range of topics including same-sex marriage and decriminalizing drug possession.

Courts themselves, once created, may also become participants in judicial design. The individual complaint mechanisms found in Latin America offer a good example. Constitutional and statutory texts on these mechanisms themselves vary widely within Latin America.²⁴ But judicial construction is also important in many countries. The Colombian *tutela* is a striking example. The text itself designs a powerful and simple instrument—decisions must be made within ten days at each level, and expressly do not need the assistance of a lawyer.²⁵ But the Court itself has settled textual ambiguities and created doctrine in ways that have massively increased its power. For example, the Court held that the *tutela* could be used to enforce socioeconomic rights as well as civil and political rights, review ordinary judicial decisions, and issue structural, as opposed to merely individual, remedies.²⁶ None of these points was clear in the text. One way of looking at what the Court did is that it was fleshing out the spirit of the constitutional

21. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing Before the Comm. on the Judiciary, United States Senate, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States Supreme Court) (“Judges are like umpires. Umpires don’t make the rules, they apply them.”).

22. ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 128 (2008).

23. See BRINKS & BLASS, *supra* note 3, at 42.

24. See BREWER-CARIAS, *supra* note 22, at 87–91.

25. David E. Landau, *Beyond Judicial Independence: The Construction of Judicial Power in Colombia* 88 (Oct. 2014) (unpublished Ph.D. dissertation, Harvard University) (available at <https://dash.harvard.edu/handle/1/14226088>).

26. See *id.* at 87–88.

project; a more radical take is that it seized the ability to create its own power.

In short, the books by Roux and Brinks and Blass do a great service to the field—they build off of, but move beyond, the traditional literature's focus. Both also point towards further questions, and complexities, that should preoccupy further work in the field, at the intersection of law and legal culture, as well as that between design, constitutional change, and judicial behavior.