# Constitutions and Public Policies

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## Abstract and Keywords

This chapter considers two big models of constitutions with a number of possible empirical variations. The first model, termed as classic, is that of the constitution that limits itself to structuring fundamental aspects of the polity, that is, the four orders of norms and principles in liberal democratic regimes, which include not only conventional liberal democratic provisions, but also socially-oriented material rights. The second model, called policy-oriented, concerns those constitutions that go beyond such structural parameters and into the policy realm, determining specific tasks for governments, establishing programmatic goals and budgetary percentages, detailing ordinary actions, and anticipating the design of public policies.

Keywords: constitution, public policy, Latin America, liberal democratic regime, material rights

# 28.1 Definitions and Distinctions

The legal and decision-making structure of different political regimes—notably, that of democracies—comprises distinct legal and decision-making dimensions. A comprehension of these different dimensions helps us understand both the broader context in which each one is embedded and the meaning of each of them. Constitutions and public policies correspond to two theoretically distinct dimensions of the legal framework and of the decision-making process of different political regimes, yet it makes sense to discuss them jointly, as what occurs in one dimension is relevant to understanding what occurs in the other.

However, it is necessary firstly to clearly define what is understood by one and the other dimension. Strictly, a constitution can be understood as a formal set of norms, established in a text or set of texts, that corresponds to the higher structure of the legal ordering of a state-related political entity (whether it be a country or a subnational entity). They are not exclusive to democratic regimes, as they can provide a framework for authoritarian regimes, yet it is in democracies that constitutions produce the greatest effect on the

functioning of the State, on political competition and on the making and implementation of public policies. These, in turn, are defined as decisions made by public agents that are designed to address concrete and specific governmental problems, whether they are stipulated by legal norms or by administrative acts.

In liberal democratic regimes, constitutions encompass four orders of norms and principles, with clauses that stipulate: (1) State, nation and nationality; (2) civil and political rights; (3) rules of the institutional game, fundamental structures and procedures of the political system; and (4) well-being-oriented material rights. As constitutions set the higher legal framework of a state-related political entity, thus demarcating the way the other norms are drafted and their content, in ideal-typical terms constitutions are endowed with three fundamental formal characteristics: (1) their provisions tend to be more generic than those establishing all other norms (after all, they will shape these other norms); (2) they tend to more clearly reflect certain social and political consensuses (after all, they stipulate the common ground on which political controversies will develop); and (3) they tend to be (p. 497) safeguarded against frequent changes by means of institutional barriers that make it formally more difficult to alter constitutional provisions as compared with sub-constitutional ones.

Two of these ideal-typical characteristics—generality and consensus—prompt constitutional determinations neither to go down into details nor to seek the path of controversy. Thus, it is to be expected that, in a constitutional text, the constitutional provisions setting forth the ordinance of State and nationality, and of rights and of procedures should be stipulated in a synthetic way, without detailing the goals, tools, or parameters geared to their more specific setting in place.[1] Yet, real constitutions can move away from this ideal-type and affect the political process in a particular way, moving ahead and setting in advance a government's agenda by establishing government obligations that will ultimately develop into public policies.

In comparison with typical constitutional norms, those that frame public policies distinguish themselves for their greater specificity—necessary so that governments may address the concrete issues of everyday politics—and are potentially more controversial—as different governments and parliamentary majorities tend to opt for their own partisan-tailored public policies. Laws and administrative acts are the key tools for shaping public policies, which may be directly related to constitutional norms, in that they are—in terms of juridical logic—their specific and controversial outcome. Thereby, constitutional provisions, in order to materialize themselves, require such development. Still, public policies can exist that are not directly derived from express constitutional norms and can be construed as *pure public policies*. These, even as they do not stem from what is typically constitutional, do not collide with what is either—as they merely have a bearing on those issues not encompassed by the four orders of typically constitutional norms and principles mentioned above.

A distinction must be made, however, between typically constitutional norms and the principles and provisions of a constitutional text proper. A constitutional text can include

several provisions that would not fit the characterization established herein concerning what is *typically constitutional*, i.e. public policies that become *formally constitutional* when enshrined in a constitution, even if not *materially constitutional*,[2] to use a distinction that is common to constitutionalists. Once they are included in the provisions of a constitutional text, norms demarcating public policies acquire a different status, for they obtain greater formal protection than that of public policies shaped legally only in the form of laws and administrative acts. Such formal protection assumes two related forms, the legislative and the judicial. In the legislative sphere, formally constitutional norms usually require more complex and stringent conditions to be modified or suspended,[3] such that constitutionalized public policies tend to be more difficult to change. In the judicial sphere it is possible to ensure protection by judicially controlling the constitutionality of public policies embedded in the text of a constitution, a mechanism that may be used both to annul laws and administrative acts (or, at least, their effects) that happen to contradict what has been set in the constitutional text and even to compel parliaments and governments to abide by (p. 498) constitutional determinations in the law-making process and in the implementation of governmental actions.

With these points clarified, we may now consider two big models of constitutions with a number of possible empirical variations. The first model, which we have termed *classic*, is that of the constitution that limits itself to structuring fundamental aspects of the polity, that is, the four orders of norms and principles enumerated above, which include not only conventional liberal democratic provisions, but also socially-oriented material rights. The second model, which we shall call *policy-oriented*, concerns those constitutions that go beyond such structural parameters and into the policy realm, determining specific tasks for governments, establishing programmatic goals and budgetary percentages, detailing ordinary actions and anticipating the design of public policies.

Constitutionalized public policies of policy-oriented constitutions must not be mistaken for norms that stipulate ‘aspirational rights’, which are an integral part of a host of new constitutions, in particular those of the new Latin American constitutionalism.[4] They are also different from the ‘programmatic norms’ of the so-called ‘directive constitutions’, which stipulate broad and generic long-term goals.[5] Both concern goals that are not immediately palpable and whose attainment—in the absence of governments and lawmakers willing to put them into effect—will depend primarily on judicial decisions, such that their embedding in a constitutional text tends to trigger both the judicialization of politics, by resort to courts to ensure compliance with constitutionalized aspirational and programmatic norms, and judicial activism, with justice system actors, notably judges, determining the execution of public policies or even specifically stipulating them.[6] Therefore, though aspirational rights and programmatic constitutional norms might prompt the production of public policies on the basis of judicial rulings, they cannot in themselves be equated with policies.

Moreover, there is a second dimension of the relation between constitution and public policies that is worthy of note: in the absence of laws and administrative acts that are to determine certain government actions designed to ensure constitutional principles and

rights, the judiciary can act in order to fill this gap, at times constraining the lawmaker to legislate, at others by anticipating the concrete solution to be adopted by the executive in the form of administrative measures—that is, particular policies to be implemented. In this last case, the judiciary assumes an even greater role, as it uses the constitution not just as the legal basis upon which the agendas of the legislative and the executive will be built as outcomes contingent upon the democratic political contest; instead, it wields the constitution as a tool to constrain the other two branches to comply with a judicial review. That is, the constitution becomes a mechanism designed to transform the judiciary itself into policymaker, backed by definitions set forth in the constitutional text itself. More than that, courts have based themselves on the interpretation of fundamental norms that have not even been written in the constitution—a possibility that has become more frequent with the spread of (p. 499) neo-constitutionalism among judges,[7] a particularly significant phenomenon in Latin America, in that a concern for filling legal gaps becomes an opportunity for transforming judges into policymakers.

Unlike these situations, constitutionalized public policies, as they specify certain governmental actions in the constitutional text itself and, therefore, eliminate legal gaps, can engender not greater discretion by judges but, rather, even lesser discretion, since the scope of the judicial decision is constrained by that which the constitution specifies. From that follows that constitutions that contain only fundamental norms and principles will have a much different impact on the political game than those that contain public policies. After all, public policies are an integral part of the everyday of the political game, are susceptible to context-bound changes and tend to be a permanent object of controversy and dispute in the partisan political realm. The very alternation of groups in power, a basic principle of democracy, is associated with demands for changes in the status quo of public policies. If the status quo is regulated by ordinary laws, simple majorities (or, at best, absolute majorities) alternating in government can affect the agendas; however, if the status quo of public policies is raised to the constitutional level, this will be the level aimed at by the ambitions and conflicts of the actors, who will need to make supermajorities capable of altering the constitution should they wish to meet their policy agendas.

The main indicator of the impact of a constitution on the everyday political process is the magnitude of its own amendment. Habitually, however, the studies developed on the subject are based on the *classic* constitution model and do not focus on the *policy-oriented* model. In the classic perspective, constitutional amendments would reflect structural shifts of power, that is, the winning and losing of strategic positions as a result of major conflicts between key political actors. As for the *policy-oriented* constitutions, the political struggle over constitutional changes will not necessarily have to do with those major shifts, and may simply reflect changes in the governmental agenda and in public policies. In either case, being successful in changing the constitution is something that will largely depend on the level of difficulty imposed by the rules for amendment.

Indeed, in the constitutional census Elkins et al conducted to collect data going back to 1789, they noted that over 90 per cent of the constitutional texts contained some amendment rule and, therefore, a formal provision and implicit authorization for changes while

they were in effect.[8] However, the diversity of formulas and requirements for altering constitutions is a ubiquitous aspect in the political regimes studied. There are countries that require the legislature to meet a given minimum quorum or two voting sessions, often by more than one legislative house; there are cases that require the participation of other decision-making spheres (such as states in federative regimes) or direct consultation of the people in the form of referendums and plebiscites, among other modalities. No wonder the first systematic studies of constitutional amending posited hypotheses hinged on these rules and exploited this diversity to conduct comparative analyses. Lutz was a pioneer in (p. 500) this sense, handing down not only interesting findings, but also a book of codes widely used to classify different amending formulas rated according to their level of difficulty.[9] Even though his conclusions have been reviewed and called into question,[10] Lutz's propositions remain as references for anyone researching the subject.

The amendment rule is a key variable, yet it is not that which drives key political actors towards changing the constitution. At most, such rule sets the thresholds to be observed by those with any reason to engage in constitutional change. In keeping with the two models of constitution outlined above, motivations for change may also be of two orders: key actors may have an interest in changing polity structures—more often than not, the classic object of this kind of study—or policy-related provisions—as can be expected from *policy-oriented* constitutions, barely studied from this point of view. The lesser attention to policy-driven constitutional changes is understandable, as it is not customary to distinguish, in a constitutional text, polity from policy-related provisions. In previous studies,[11] we developed a methodology for constitutional analysis capable of establishing such distinction and applied it to the study of some selected constitutions, the Brazilian in particular. In the next section, we present an overall picture of Latin American constitutionalism and, based on our methodology for analysing constitutions, we examine the interaction between types of constitutions and their effects on a government's public policy agenda.

# 28.2 Polity and Policy in Latin American Constitutions

Latin America—a region known for its political instability, its frequent constitutional changes being a key indicator thereof—is marked by intense constitutional experimentalism not only regarding the doctrines guiding judicial action (as is the more recent case of neo-constitutionalism), but also to the drafting of the texts. Constitutions were drafted to enshrine nineteenth-century independence processes, to introduce or ratify regime changes and to set democracies in motion, but also to provide legal contours to dictatorships; they varied as instruments of centralization and decentralization and, more recently, have (p. 501) become rights-laden charters, re-founded States, ushered in plurinational political orders, dramatically sophisticated the separation and balance between branches of government in some places, and, in others, reactivated popular power and direct forms of participation.

The constitutionalism of the independent Latin American countries began with the constitution of Haiti in 1805. The independence processes of the nineteenth century were followed by the promulgation of constitutional texts, but the instability of these regimes led to successive constitutional replacements in many countries of the region.

Table 28.1, which builds on the data collected by Elkins, Ginsburg, and Melton,[12] shows that, from 1805 to 2010, the average life span of constitutions per country was 11.5 years. (p. 502) At the extremes of this average are countries with few constitutions throughout their history, as Argentina and Mexico, and prolific cases, with twenty constitutions, cases of Haiti, Venezuela, Ecuador, or the Dominican Republic—a country where a profusion of charters has prompted changes every five years on average. Nonetheless, the present situation of the constitutions in effect justifies some optimism, since, with the exception of the constitutions of Paraguay and Bolivia, all the others have exceeded (or are very close to doing that, as is the case of Ecuador) the average age of the constitutions in these countries. And if we just consider the period starting in the twentieth century, optimism with the endurance of the present charters, in comparison with the respective national averages, can be even greater (save for the same exceptions of Paraguay, Bolivia, and Ecuador, which have not exceeded their averages).

Table 28.1 Constitutionalism in Latin America (1805–2010)[13]

| | Current Constitution | | | Number of constitutions | | | Average endurance | |
|---|---|---|---|---|---|---|---|---|
| **Country** | **Year** | **Duration** | **First constitution** | **Total** | **19th century only** | **First in 20th century** | **Total for period** | **20th century only** |
| Argentina | 1853 | 163 | 1819 | 3 | 3 | – | 65.7 | – |
| Mexico | 1917 | 99 | 1822 | 6 | 5 | 1917 | 32.3 | 99.0 |
| Costa Rica | 1949 | 67 | 1825 | 9 | 7 | 1917 | 21.2 | 49.5 |
| Uruguay | 1966 | 50 | 1830 | 5 | 1 | 1918 | 37.2 | 24.5 |
| Panama | 1972 | 44 | 1904 | 4 | 0 | 1904 | 28.0 | 28.0 |
| Cuba | 1976 | 40 | 1901 | 7 | 7 | 1901 | 16.4 | 16.4 |
| Chile | 1980 | 36 | 1822 | 6 | 4 | 1925 | 32.3 | 45.5 |
| Honduras | 1982 | 34 | 1848 | 12 | 7 | 1904 | 14.0 | 22.4 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| El Salvador | 1983 | 33 | 1840 | 12 | 3 | 1939 | 14.7 | 8.6 |
| Guatemala | 1985 | 31 | 1845 | 7 | 4 | 1945 | 24.4 | 23.7 |
| Haiti | 1987 | 29 | 1805 | 21 | 8 | 1902 | 10.0 | 8.8 |
| Nicaragua | 1987 | 29 | 1848 | 12 | 4 | 1905 | 14.0 | 13.9 |
| Brazil | 1988 | 28 | 1824 | 7 | 2 | 1934 | 27.4 | 16.4 |
| Colombia | 1991 | 25 | 1830 | 8 | 7 | 1991 | 23.3 | 25 |
| Paraguay | 1992 | 24 | 1813 | 6 | 3 | 1940 | 33.8 | 25.3 |
| Peru | 1993 | 23 | 1826 | 11 | 7 | 1920 | 17.3 | 24.0 |
| Venezuela | 1999 | 17 | 1830 | 22 | 8 | 1901 | 8.5 | 8.2 |
| Ecuador | 2008 | 8 | 1830 | 23 | 12 | 1906 | 8.1 | 10 |
| Bolivia | 2009 | 7 | 1826 | 17 | 12 | 1938 | 11.2 | 15.6 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Dominican Republic | 2010 | 6 | 1844 | 32 | 15 | 1907 | 5.4 | 6.4 |

*Source*: Prepared by the authors; based on Elkins, Ginsburg, and Melton, 2014.

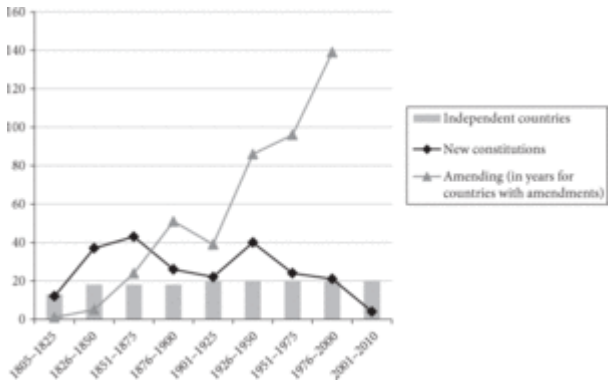


*Figure 28.1* Constitutions and Constitutional Amending in Latin America (1805–2010)

Figure 28.1 brings the 229 constitutional systems that existed in Latin America between 1805 and 2010.[14] Introduction of new constitutions dropped slightly in the end of the nineteenth century and early twentieth century, but constitutional instability once again prompted a number of replacements between 1930 and 1950. As of the third wave of democratization, begun in 1978, at least fourteen countries adopted new constitutions, in a constitutional endeavour that is proving much more stable now, considering the remarkable (p. 503) decline in the number of replacements in recent decades, as already noted by other authors.[15] Conversely, the same Figure 28.1 shows that text replacement has given place to rising constitutional amending in the more recent period. Though one cannot be sure these trends will remain, never before in the history of Latin America was the region so close to the idealized model of an enduring constitution—and the more enduring, the more amended, or the more amended, the more enduring.

Latin American constitutionalism has also evolved in the setting of rights, even if just in aspirational form. During the nineteenth century, the sections dedicated to the setting forth of rights had approximately 1,000 words. In the first half of the twentieth century, this number tripled, and in the texts promulgated over the last decades these sections reached 9,000 words on average. Substantive rights oriented to the well-being, not only political and freedom rights, also started to appear in the more recent constitutional texts. Nearly every contemporary constitution establishes the ‘right to an adequate or reasonable standard of living’,[16] and a number of them confront inequality and discrimination, and promote traditional rights such as education and health, or even the protection of biodiversity and the commitment to scientific development.

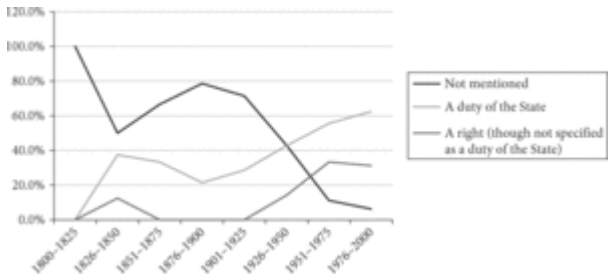


*Figure 28.2* Provide Employment (in %, N = 109)

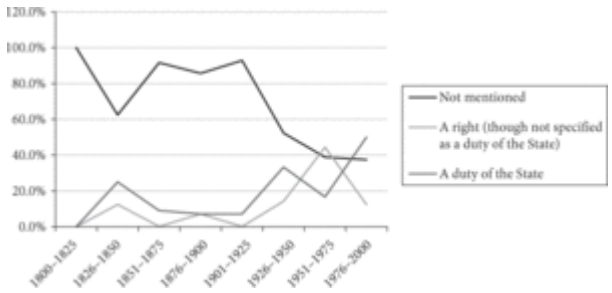


*Figure 28.3* Provide Healthcare (in %, N = 109)

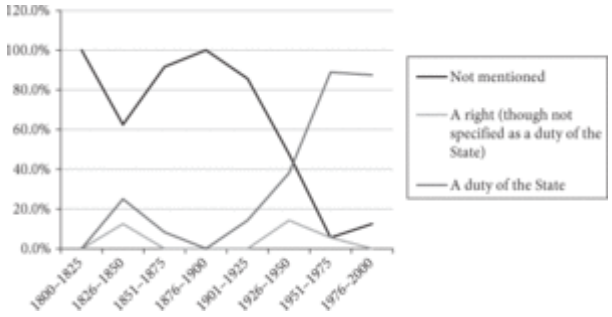


*Figure 28.4* Protect or Promote Culture (in %, N = 109)

Figures 28.2–28.4 show that this is not just about a growing declaration of rights. In many countries of the region, recent constitutions have come to address rights as obligations of the State, some overlapping with the realm of public policies. There are few constitutions in effect in Latin America that do not give special attention to areas like labour, health, and culture, and there is a high percentage of texts that go beyond just being merely declaratory by establishing as a State obligation the provision of these goods and rights to its citizens.

(p. 504) By examining, for example, the Brazilian 1988 Constitution with the use of a methodology that enables distinguishing between polity- and policy-oriented provisions,[17] not only do we find the existence of a good number of constitutionalized public policies (30 per cent of its provisions were rated as policy), but we have also found that the ongo-

ing process of constitutional amending to which it has been submitted is mostly related to the fact that it contains a plethora of public policies. Considering 995 amending provisions analysed covering up to 2010, 66 per cent were policy-oriented and just 33.4 per cent were polity-oriented. Since the first change made to the charter in 1992, the Brazilian constitution has already been amended 101 times, or an average of four amendments a year (since 1992), surely one of the highest rates in the world. Broken down on the basis of our methodology, (p. 505) these amendments totalled no fewer than 1,272 provisions, an average of fifty a year. Considering that amendments can modify, suppress or add provisions, the balance of these interventions was the addition of 786 new provisions to the charter. In other terms, in twenty-two years, the constitution grew by 42.4 per cent in relation to its original size (1,855 provisions, including the Transitory Constitutional Provisions Act) and grew mainly through the constitutionalization of more public policies.

An observer not very familiar with the Brazilian scene would be amazed by the number of times the constitution was altered and could come to the conclusion that the polity set in place in 1988 was deeply modified by successive power shifts. Upon close examination of the phenomenon, however, the observer would find that the institutions that define the Brazilian presidential system, the separation of powers, the electoral contests, the shape of the multi-partisan system and the federation have barely changed; moreover, no civil, political or social right enshrined in the constitutional text was touched over these nearly thirty years—actually, new rights were enshrined.[18] That observer would find out that the succeeding governments formed legislative supermajorities to actually change constitutionalized public policies in several areas—social policies, the social security and pension policy, the fiscal policy, privatizations, etc. And she would also find that this became a trend that was repeated over time, such that new policies—most of which were proposed by the executive—were also regulated by means of amendments to the constitution when they could have been regulated through ordinary legislation. The causes for such constitutionalization of new public policies, by amendment, are partly related to Brazil's federalism and to the existence of a supreme court with the capacity to control legal acts of the other branches of government. In order to shield public policy design from subnational entities and the constitutional court, more than one government (here meaning the presidents and their partisan coalitions in Congress) preferred to enshrine them in the constitution instead of introducing them through ordinary laws. It is worth stressing that, despite the alternation in power between different parties over the last decades, the tendency towards constitutionalization of public policies continued and amendments have been a frequent practice in every government.[19]

The Brazilian case provides a good starting point for reviewing the literature available on the subject, as the literature tends to overlook the effect of policy-oriented constitutionalization on the governmental process and, conversely, of governmental action on the constitution. We posit that an explanatory model focused on these relations should include three sets of variables: (1) the degree of difficulty imposed by constitutional amendment procedures, calculated not only on the basis of the rule pure and simple, but also considering the power of initiative of the various political actors as well as the broader institutional context (separation of powers, partisan fragmentation and veto points); (2) the

amount of policy within the constitution; and (3) the existence and strength of the control over the constitutionality of the laws by the judiciary or by constitutional courts. A comparative analysis of national cases, based on these three sets of variables, would render it possible to understand how, in each country, the constitution affects the government's public policy agenda and how the former is affected and reformed by governmental action. Table 28.2, a modified (p. 506) (p. 507) version of what was originally published in Arantes and Couto,[20] summarizes the possible combinations.

Table 28.2 Types of constitution and of constitutional control and their influence on governmental agendas

| | | Type of Constitution | | | |
|---|---|---|---|---|---|
| | | Easily amendable | | Difficult to amend | |
| | | Lean (classic) | Policy-oriented | Lean (classic) | Policy-oriented |
| **CONSTITUTIONAL CONTROL OF LAWS** | **Inexistent or moderate** | Barely amended constitution and few attempts to amend it | Heavily-amended constitution | Barely amended constitution and few attempts to amend it | Barely amended constitution and several attempts to amend it |
| | | Public policies decided by *elective powers* at *subconstitutional* level<br>TYPE I | Public policies decided by *elective powers* at *constitutional* and *subconstitutional* level<br>**TYPE II** | Public policies decided by *elective powers* at *subconstitutional* level<br>**TYPE III** | Tendency to *paralysis* in the production of constitutionalized public policies<br>**TYPE IV** |

| | | | | | |
|---|---|---|---|---|---|
| | **Extant and activist** | Moderately amended constitution in response to judicial review | Heavily-amended constitution, not only in response to judicial review, but also as a consequence of ordinary *governmental agenda* | Barely amended constitution and few attempts to amend it | Barely amended constitution and *moderate* attempts to amend it |
| | | Public policies decided by *elective powers* at *subconstitutional* level<br>**TYPE V** | Public policies decided by *elective powers* and by the *judiciary* both at the *constitutional* and *subconstitutional* levels<br>**TYPE VI** | Public policies decided by the *judiciary* at the *constitutional* level and by the *elected powers* and the *judiciary* at the *subconstitutional* level<br>**TYPE VII** | Tendency toward policy production by *judiciary* at *constitutional* level and by *elective powers* and the *judiciary* at the *subconstitutional* level<br>**TYPE VIII** |

In the study of constitutional politics and the interaction between institutions in the production of constitutional reforms in Latin American countries, Negretto showed that the greater stability of the constitutions of the third democratic wave is due to a virtuous combination of 'power-sharing institutions, more flexible amendment procedures, and strong mechanisms for constitutional adjudication'.[21] To a certain extent, his conclusions do not differ so much from those reached by the studies conducted by Lutz and Elkins et al,[22] especially as regards the relation between a certain degree of flexibility of the amendment rule, the engagement of various political and judicial actors in constitutional politics, and the stability of the constitutions themselves. What these analyses fail to explain is what drives these actors to engage in constitutional amending and why the volume and content of the amendments vary so widely from country to country.

Drawing on the combinations presented in Table 28.2 and on examination of six selected Latin American countries, we can demonstrate how types of constitutions, rules and institutions interact in the dynamics of *constitutional politics*. By constitutional politics we mean any activity of the political system that results in constitutional change (but under the aegis of a same constitution, without its suspension), either by amendment of by judicial review. Our contribution to constitutional politics rests specifically on two points: (1) In order to understand how constitutions affect governmental processes and how the former are affected by the latter, we should look at the contents of their original texts and amendments in order to distinguish between policy- and polity-oriented provisions, as these regard quite different dimensions of constitutional politics and generate very distinct impacts too on democratic dynamics and a government's public policy agenda; (2) As concerns the amendment rule, it is imperative not only to consider the criteria for approval, but also who the political and institutional actors wielding power of initiative are, that is, those actors with enough power to submit amendment propositions and, thus, lead polity-related and/or constitutionalized policy changes.

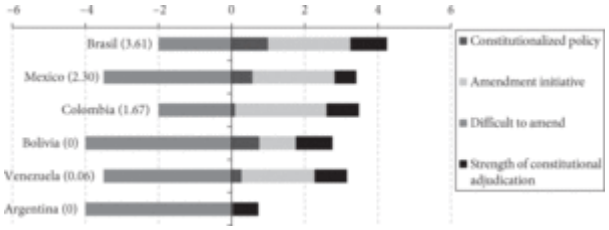


*Figure 28.5* Constitutional Politics - Rules and Institutional Incentives

Figure 28.5 illustrates how four sets of variables interact in constitutional politics, building on the examples of six selected countries. From our perspective, constitutional politics will be positively influenced by (a) the rate of constitutionalized policy; (b) the number of actors legitimized to propose amendments to the constitution; (c) inputs emanating from constitutional courts; and will be negatively affected by (d) the rigidity of the constitutional amendment rule. We have operationalized variables as follows. We computed the number of polity- and policy-related provisions for the six constitutions. The Brazilian,

which yielded the highest constitutionalized policy rate, was assigned a baseline value of '1' to normalize the values found for the other countries.[23] In estimating the power of initiative and the degree of difficulty, we have adopted, respectively, the number of institutionalized (p. 508) actors authorized to propose amendments and the number of those whose consent is necessary for their approval. This is, except for some modifications, the same minimalist strategy adopted by Negretto in measuring constitutional rigidity, though that author left out the initiative dimension, which we have included in our model.[24]

As for the inputs emanating from constitutional courts, this issue calls for some additional remarks. For one, interactions involving this variable can be much more complex. Weak constitutional courts are unlikely to produce important effects on constitutional politics, yet strong courts may achieve such effect in more than one direction. The first one is by contributing to the text's stability, rather than its change. That is what courts do when they control the constitutionality of laws and legal acts of the other powers and their rulings are fully abided by. However, the strength of court adjudication will be mediated by constitutional amendment initiative and approval rules. If these favour the legislature or the executive, the path towards a political review of a judicial ruling becomes promising, opening up the possibility of modifying the constitution. If the rules do not favour the political actors, the tendency is that judicial rulings will be more stable, as will the constitution itself. To this combination of factors should be added the existence of entrenched clauses, which might protect judicial review from constitutional amendment, as is the case of the Brazilian constitution. A serious problem will arise if, in such a context, policies are constitutionalized, shielded against a strong constitutional court and placed out of the reach of a powerless lawmaker. The likelihood that policies might need to be changed or updated might give room for a constitutional crisis and constitution replacement.

Another possibility of interaction, exemplified by the well-known American case, is that of a constitution that is very difficult to be amended by the lawmaker, yet is updated in its sense from time to time by a strong constitutional court. As the text is lean and nearly devoid of any constitutionalized policy, pressure for amendment is less frequent and only occurs in circumstances whereby polity-related principles are at stake. Still, in these same circumstances the supreme court of that country may act to undo the knot, unburdening the political system from the task of reforming the constitution.

Strong courts can also act through constitutional activism. Not content with protecting the constitution from political actors, courts can seek to address loopholes in the law and points overlooked by lawmakers, taking the path of quasi-judicial policy-making. Such a situation yields yet another kind of interaction with the legislature, as the public policy will be triggered by the constitutional court itself, thus altering the status quo. Constitutional decision-making by the judiciary fills in for the legislature's omission and creates a new constitutional hurdle in the government's way, prompting the government to amend the constitution should it wish to modify the policy ruled by the court.

(p. 509) Hence, in our analytical model, strong constitutional courts can provide different kinds of input for activating constitutional politics. As we lack the means to measure these forms of input, we will adopt the strength of the institution accounting for the constitutional adjudication as a proxy. The index proposed by Rios-Figueroa combines the degree of independence of the courts with their decision-making power.[25] As for independence, this is gauged on the basis of the rules establishing the form of appointment and the length of tenure (and the relation between the two) of the justices, as well as the level of difficulty to remove them from office and if the number of court members is provided for in the constitution. Concerning the decision-making power, this is measured on the basis of the level of court openness to demands by external actors and the breadth of the decision's effects (*erga omnes* or *inter partes*). Added together, independence and power equate to the strength of the courts.[26] In Figure 28.5, the scores achieved by the countries were normalized with reference to the Brazilian and Bolivian courts, which received —albeit from different combinations of power and independence—the highest score for the index.[27]

Thus, Figure 28.5 shows on the right side of the zero point the potential of the variables in prompting a constitutional policy, especially by amendment, and on the left side the weight of the rule establishing the constitution's level of rigidity. In our perspective, the bigger the number of constitutionalized public policies, the greater the incentive for political actors to attempt to amend the constitution. The better distributed the power to initiate the process is, the greater the likelihood of amendment events. The Brazilian case, as already mentioned, stands out for the high number of constitutionalized public policies. Add to that a good number of institutional actors with power of initiative [2.25]—including, and especially, the President—a somewhat flexible amendment rule [–2], and a court with high (p. 510) power of constitutional adjudication [1], and one will understand why the Brazilian constitution is the most amended of them all (3.61 amendments a year since 1988) and the most amended in the continent. Mexico is the country that is closest to Brazil's profile, with 2.3 amendments a year (since 1917), as it combines a constitution with a sizable number of constitutionalized public policies [0.6], a good distribution of initiative to amend it [2.25], including that of the President, yet a rule for approval that is somewhat more rigid than the Brazilian [–3.5] because, besides approval by the two federal houses, the Mexican amending process requires ratification by a majority of state legislatures. Among the six countries, the Mexican court is the weakest, thus with the lowest power to drive constitutional politics. Both in Brazil and in Mexico, the public-policy governmental agenda is highly constitutionalized. The interaction between rules and actors in these two cases has resulted in ongoing constitutional amending with a significant growth of the original text itself. While in Brazil the constitution grew by 42.4 per cent (in number of provisions) in two decades, in Mexico the constitution grew by 145 per cent (in number of words) from 1917 to 2010.[28] In Brazil, there were those who argued that constitutional amending was the result of a time (that of the State Reform by the 1995–1998 presidential government of Fernando Henrique Cardoso),[29] yet this continued to happen by force of the aforementioned factors, and even after a change in government in the following years. In Mexico, it was found that the country's ongoing constitutional

amendment process was the result of the hegemony of the Institutional Revolutionary Party (PRI) during most of the twentieth century, but the phenomenon continued to occur and even grew in volume as of 1988, when the PRI lost its qualified majority in the legislature and multi-partisanship began in the country.[30]

Our theoretical and comparative framework suggests, by another token, that cases such as that of Argentina call for analytical review. Strictly, the 1853 Constitution, formally in effect in the country even after regime changes, does not provide for amendments, for its Article 30 establishes that Congress can declare the need for a reform, yet any full or partial change in the constitution shall only be made by a convention exclusively elected to that end. We find the Argentinean case to distinguish itself from all the others on account of this factor and, although the 1853 constitution has undergone several reforms (between 1860 and 1994),[31] we do not consider them to be amendments but, rather, results of another call for a constituent power by means of an ad hoc convention elected solely for that purpose (something that the constitutions currently in effect in Bolivia, Colombia, and Venezuela also provide for, yet never actually used). Hence, in Figure 28.5 Argentina is represented as a case of superrigidity and zero amending, but as it is a lean constitution, containing just 229 original provisions and barely any constitutionalized policy, pressures to modify it only occur against a backdrop of crisis, a renegotiated institutional covenant (as occurred in 1994) or a regime transition; that is, when the need to modify its polity-oriented provisions becomes too pressing. The fact that the Argentinean supreme court is comparatively weaker also helps to account for that country's constitutional politics being less intense.

(p. 511) The Colombian 1991 constitution also distinguishes itself for its low level of constitutionalized policy (0.1, as shown in Figure 28.5), yet has a significant number of approved constitutional amendments (forty amendments in a little over two decades, or 1.67 a year, according to Figure 28.5). It is also a lengthy charter, with 1,082 provisions for the whole of the original text; moreover, it is the one distributing the most amendment initiative power [2.5] and presents, along with the Brazilian, the lowest level of difficulty for approval [–2]. Given its size and increasing amending, the Colombian constitution has already been labelled by local critics as a case of *Boterismo* (a reference to the paintings by Fernando Botero).[32] However, in line with the profile of the original text, Peterlevitz showed that 92 per cent of the amendment provisions passed by 2010 concerned polity and only 8 per cent were related to policies. Amendments thereto were passed in every administration, but it was during the presidential terms of Álvaro Uribe (2002–2010) that they became lengthier, as with the Legislative Acts 1 of 2003 and 1 of 2009, which carried out a sweeping reform of the Colombian political system. Another factor that contributes to its length is the role of its constitutional court—an innovation introduced in the 1991 Charter—nearly as strong as the Brazilian and the Bolivian. Although Colombia has a long-standing tradition of judicial review, the key innovation of the 1991 constitution was the creation of a European-style constitutional court, though destined to rule on the constitutionality of laws and legal acts not only in abstract terms, but also in concrete terms. In just a few years, the court has become a leading actor in the Colombian political system, contributing towards the judicialization of economic, social, political and public

order- and national security-related issues, always threatened by the serious guerrilla and drug-trafficking problems,[33] in addition to being rather activist in the provision of social rights by means of public policies, as is made particularly clear in the area of public health.[34]

Though distinct from each other, the Venezuelan and Bolivian constitutions share features that have been shown to be less favourable to constitutional amending, as can be seen in Figure 28.5. Venezuela has a lengthy constitution (with 1,111 provisions), yet presenting only 8.4 per cent of constitutionalized policy. The power to initiate an amendment does show a good distribution, as shown in Figure 28.5 [2], but two of the three legitimized actors are collective (15 per cent of voters and 30 per cent of members of the National Assembly). What distinguishes Venezuela from Brazil or Colombia is the rule for passage of amendments, much more difficult there than in its neighbours, in spite of the Venezuelan unicameral system. The 1999 constitution was promulgated in the wake of Hugo Chávez's rise to power and was drafted by an assembly overwhelmingly controlled by him and in the midst of a process of refoundation of the State.[35] From the point of view of the polity, it featured greater concentration of power in the executive, while simultaneously introducing new (p. 512) forms of direct participation and legitimization by the people.[36] As regards the Judiciary, which had never enjoyed much power and prestige throughout Venezuelan history, the 1999 constitution introduced some major changes, including the creation of a new supreme court of justice that, as per the criteria set by Ríos-Figueroa, appears as one of the strongest in our Figure 28.5. However, immediately after its creation, its twenty new members were chosen all at once by the government's ruling party in the legislature and, according to Pérez Perdomo,[37] their performance under *Chavismo* has become known for a lack of fairness and a blockade against the political opposition. The refoundation of the State and the establishment of a *Bolivarian* republic actually gave place to an autocratic government that set out to change public policies by executive order, though also by means of popular consultation. However, when in 2007, President Hugo Chávez proposed a set of constitutional reforms for the purpose of building what he termed 'Socialism of the 21st century', he saw the bill pass in the national legislature (albeit reformulated), only to be ultimately rejected by a referendum. Since its approval in 1999, the constitution was amended only once—in 2009—to allow unlimited re-election to public offices, especially the presidential office.

Although presented as representatives of the 'new Latin American constitutionalism', the constitutions of Venezuela and Bolivia are very different. Also stemming from the rise of a new political leadership to the presidency of the country, the new constitution, sponsored by the government of Evo Morales, an Aymara *cocalero* and unionist, did not result from a national assembly controlled by a single, hegemonic political force and had to be negotiated much more than the Venezuelan Bolivarian constitution sponsored by Chávez. Approved in 2009, the new constitution did indeed re-found the bases of the Bolivian state by establishing through 1,411 provisions a 'Social Unitary State of Plurinational Communitarian Law'.[38] The polity—in terms of the organization of the state, nationality, civil and political rights, political and judicial institutions—was deeply reformulated by the new constitution, gaining unprecedented and striking complexity. In this constituent process,

the text came to constitutionalise a good number of public policies that were part of the Evo Morales's government agenda, encompassing no less than 23.3 per cent of the constitution, the second highest rate in Figure 28.5, above Mexico and below the Brazilian. Though exhibiting a host of constitutionalized public policies, the new constitution has never been amended. In our view, this is due to the fact that constitutionalized policies reflect the preferences of the group that is still in the government and only alternation of parties might stimulate constitutional politics, that is, the attempt to change constitutionalized policies. Should this alternation of power occur, this will be a tough test for the 2009 constitution, since, as the comparison in Figure 28.5 shows, it distributes the least power to initiate an amendment and makes approval the most difficult. Unlike the other constitutions, in Bolivia the president does not directly have power to present proposals. As regards the approval process, besides other requisites, Bolivia is the only country to require a preliminary ruling by the constitutional court whose compliance by the legislature is mandatory. From what can be seen (p. 513) in Figure 28.5, this court is as strong as the Brazilian, not so much as regards independence, but in the openness and effects of its decisions. In the eventuality of alternation in power, the new government will most likely try to change the status quo of constitutionalized policies, but will face the difficulty represented by the amendment rules and, in all likelihood, the power of veto of the constitutional court, which might lead the country to the undesirable situation of decision-making paralysis.

# 28.3 Conclusions

Traditionally, the relation between constitutions and public policies was taken for granted, so that the former only shaped the big institutional framework within which decisions regarding the latter would be taken by elected rulers, politicians appointed by them or bureaucrats at their service. In this perspective, constitutional texts would have very little to say about public policies proper and it would be incumbent upon the courts, at best, to reject public policies that violated constitutional principles and fundamental rights set forth by a Magna Carta. Definitely, the situation has changed dramatically.

On the one hand, constitutions increasingly started to include in their body norms that set public policies, specifically aspects of the political life that had hitherto been decided upon as they appeared and contingent upon the alternation of rulers. Before that, the endurance of policies was the result of their concrete effects and the surrounding political game, their institutionalisation varying widely; today, in some democracies, public policies are also constitutionally protected, producing effects on the government agenda and on the action of the courts. Still, as even constitutional dams are not strong enough to immortalize policies whose time or circumstances have lapsed, their entrenching in constitutional texts has prompted an ever more frenzied amendment pace in certain democracies—as shown by the Brazilian and Mexican experiences.

By another token, the new constitutions, *pari passu* with the new constitutionalism and other manifestations of activism by the courts, brought about increasing interventionism

by the judiciary in the policy-making process. The proclamation of aspirational rights and programmatic norms made it possible for judges to urge lawmakers and members of the public administration to formulate and implement policies that would, otherwise, arise only from their will. In this case, the constitutions were no longer merely the broader framework guiding governments, but also became the pretext for agents of the judicial system to control the governments' decision-making agenda—as shown, among others, by the Brazilian and the Colombian experiences.

In short, one way or another, the relation between constitutions and public policies has become much more complex over the last decades, making it necessary for analysts to adopt an approach that takes into account, on one hand, the constitutional dimension of the policy and, on the other, the policy dimension of the constitutions. Hence, it has become increasingly more indispensable to cast a look at constitutional texts that may overcome the traditional approach, which only seeks in them the conventional norms relative to the definitions of State, the rules of the game and fundamental rights. It is imperative to identify not only the norms that transcend this basic stipulation, detailing government actions, but also the norms that give way to judicial activism. For this reason, we must go beyond the (p. 514) text and observe constitutional politics in motion, that is, the political game surrounding the constitution, translated both in amendment process and in judicial policy-making.

Lastly, a more difficult question and one that would require more research is if the incorporation of public policies in the scope of constitutional politics is a positive or negative factor for democracy and the development of societies. Tsebelis and Nardi associate lengthier constitutions to lower economic development and greater corruption.[39] Moreover, they show that lengthier texts tend to be the most difficult to change, something that would reflect the will of the constituent majority to make them harder to modify by future majorities. As longer constitutions tend to contain more public policies or, at least, to favour somehow their judicialization, we might have there an indication that the rise of public policies to the constitutional sphere is indeed a problem. These authors, however, do not establish the causal nexus between longer constitutions and poor results in terms of the economy and corruption. In the last case, for example, they consider two possible pathways: (i) because the country is afflicted by corruption, the constituent has decided for a new and more detailed constitution to fight against that problem; or (ii) because the political elite are corrupt, they have opted for a longer constitution to preserve their own interests. At any rate, these authors argue that constitutions that are longer and more difficult to change impose transaction costs that, in contexts marked by corruption, will lead, by good or bad intentions, to the worsening of this phenomenon.

In summary, it is difficult to draw a definitive conclusion about the possible relations between constitutions and public policies. The present article has sought to overcome conventional wisdom, as it presents these dimensions in hierarchically separated realms, in an attempt to show that detailed constitutional texts, laden with public policies or in

favour of their production by judges, bring about problems of a new order and require new approaches from political science.

## Notes:

([1]) Peter Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25(3) *Comparative Politics* 275, 278.

([2]) Gustavo Zagrebelsky, *El Derecho Dúctil: ley, derechos, justicia* (Editorial Trotta 1995) 114–15.

([3]) Donald Lutz, 'Toward a Theory of Constitutional Amendment' (1994) 88(2) *The American Political Science Review* 355; Astrid Lorenz, 'How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives' (2005) 17(3) *Journal of Theoretical Politics* 339.

([4]) Detlef Nolte and Almut Schilling-Vacaflor, *New Constitutionalism in Latin America: Promises and Practices* (Ashgate 2012).

([5]) José Joaquim Gomes Canotilho, *Constituição Dirigente e Vinculação do Legisla-dor: Contributo para a Compreensão das Normas Constitucionais Programáticas* (Coimbra Editora 1994).

([6]) Rodrigo M Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health' (2010) 52(3) *Latin American Politics and Society* 67.

([7]) Zagrebelsky (n 2); Luís Roberto Barroso, 'Neoconstitucionalismo e Constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)' (2005) 240 *Revista de Direito Administrativo, Rio de Janeiro* 1; Miguel Carbonell, 'Neoconstitucionalismo y derechos fundamentales en América Latina: apuntes para una discusión' (2010) 14(14) *Pensamiento Constitucional* 11.

([8]) Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (CUP 2009).

([9]) Lutz, 'Toward a Theory' (n 3); Donald S Lutz, 'Toward a Theory of Constitutional Amendment' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) 355–70.

([10]) Dag Anckar and Lauri Karvonen, 'Constitutional Amendment Methods in the Democracies of the World' (The XIII Nordic Political Science Congress, Aalborg, Denmark, 15–17 August 2002); Lorenz (n 3).

([11]) Cláudio G Couto and Rogério B Arantes, '¿Constitución o políticas públicas? Una evaluación de los años FHC' in Vicente Palermo, *Política brasileña contemporánea: de Collor a Lula en años de transformación* (Siglo Veintiuno Editores 2003) 95–154; Cláudio G Couto and Rogério B Arantes, 'Constitution, Government and Democracy in Brazil' (2008) 4(2) *World Political Science Review* 1; Rogério B Arantes and Cláudio G Couto, 'A consti-

tuição sem fim' in DINIZ, Simone Diniz and Sérgio Praça (eds), *Vinte anos de constituição* (Paulus 2008) 31–60; Rogério B Arantes and Cláudio G Couto, 'Uma constituição incomum' in MAR Carvalho, C Araujo, and JA Simões (eds), *A constituição de 1988. Passado e future* (Anpocs 2009) 17–51; Rogério B Arantes and Cláudio G Couto, 'Constitutionalizing Policy: The Brazilian Constitution of 1988 and Its Impact On Governance' in Nolte and Schilling-Vacaflor, *New Constitutionalism* (n 4).

([12]) Zachary Elkins, Tom Ginsburg, and James Melton, 'Characteristics of National Constitutions, Version 2.0' (2014) Comparative Constitutions Project, last modified 18 April 2014 <www.comparativeconstitutionsproject.org>.

([13]) The present text considers twenty Latin American countries, excluding the cases of Belize and the French Guiana, as follows: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela.

([14]) For ease of visualization of the data, we have divided the period in 25-year intervals. As the last period encompasses only ten years, this must be given consideration when analysing the lines in the graph, as they can be underestimated in the last interval. For this reason, we did not even represent the amendment rate in the period from 2001 to 2010, so as not to mislead the reader. The amendment rate for this period was sixty-four, about half of that of the penultimate interval, though for a ten-year period only.

([15]) Nolte and Schilling-Vacaflor, *New Constitutionalism* (n 4); Gabriel L Negretto, 'Toward a Theory of Formal Constitutional Change: Mechanisms of Constitutional Adaptation in Latin America' in Nolte and Schilling-Vacaflor, *New Constitutionalism* (n 4).

([16]) Elkins and others, 'Characteristics' (n 12).

([17]) Couto and Arantes, '¿Constitución o políticas públicas?' (n 11); 'Constitution, Government and Democracy' (n 8); Arantes and Couto, 'A constituição sem fim' (n 11); 'Uma constituição incomum' (n 11); 'Constitutionalizing Policy' (n 11).

([18]) Originally, among the social rights (set forth by art 6), the Brazilian 1988 Constitution listed: 'education, health, labour, safety, social security, maternity and childhood protection, assistance to the needy'. This article was the object of three constitutional amendments with the addition of the right to housing (2000), to food (2010), and to transportation (2015).

([19]) Arantes and Couto, 'Uma constituição incomum' (n 11); 'Constitutionalizing Policy' (n 11).

([20]) Arantes and Couto, 'Constitutionalizing Policy' (n 11).

([21]) Negretto (n 14) 51. Even though the author also points out that constitutional crises still represent incentives for constitutional replacements.

([22]) Lutz, ‘Toward a Theory (n 3); ‘Toward a Theory’ (n 9); Elkins and others, *Endurance* (n 8).

([23]) Original constitutional texts were considered. The values found for each country were, in the format *country year of constitution (total: policy/polity=%)*: Brazil 1988 (1627: 500/1127=30.7%); Mexico 1917 (607: 107/500=17.6%); Colombia 1991 (1082: 32/1050=3.0%); Bolivia 2009 (1411:329/1082=23.3%); Venezuela 1999 (1111:93/1018=8.4%); and Argentina 1853 (229: 4/225=1.7%).

([24]) Negretto (n 14). In addition to including the dimension regarding the amendment proposition initiative, we adjusted Negretto’s scale of values, assigning the value of ‘1’ to individual institutional actors and ‘0.5’ to collective actors. The idea is that the former finds it easier to effect their will than the latter. Values are positive for the amendment initiative variable and negative for difficulty of approval. In the case where subnational legislatures participate, we have assigned a value of ‘0.25’ when the constitution vests them with the power of initiative (the lower value being attributed due to the fact that they must build majorities, building on majorities in each legislature, which is not so simple) and ‘–1.5’ when the consent of the majority, within and across legislatures, is required for the approval of amendments (for the same reason). Lastly, we posit that referendums are instruments that further challenge political co-ordination and, because of that, are assigned a –2 score when integrating the amendment approval rule.

([25]) Julio Rios-Figueroa, ‘Institutions for Constitutional Justice in Latin America’ in Julio Rios-Figueroa and Gretchen Helmke (eds), *Courts in Latin America* (CUP 2011) 27–54.

([26]) Ibid.

([27]) The values found for each country were, in the format *country year of constitution (independence+power=total)*: Brazil 1988 (5+4=9); Mexico 1917 (3+2.3=5.3); Colombia 1991 (4+4=8); Bolivia 2009 (3+6=9); Venezuela 1999 (4+4=8); and Argentina 1853 (5.1+1=6.1). Non-whole numbers seen for Mexico and Argentina stem from the fact that, in these countries, the power of the courts was altered during the constitution’s life span and such numbers indicate the score’s average value over the period.

([28]) Jorge Carpizo, ‘La reforma constitucional en México. Procedimiento y realidad’ (2011) 44(131) *Boletín Mexicano de Derecho Comparado* 543.

([29]) Marcus A Melo, ‘Hiperconstitucionalização e qualidade da democracia: mito e realidade’ in Carlos Ranulfo Melo and Manuel Alcántara Sáez (eds), *A democracia brasileira: balanço e perspectivas para o século 21*. (UFMG Humanitas 2007); Celina Souza, ‘Regras e contexto: as reformas da Constituição de 1988’ (2008) 51(4) *Dados, Revista de Ciências Sociais, Rio de Janeiro* 791.

([30]) Carpizo (n 27).

([31]) Elkins and others, ‘Characteristics’ (n 12).

([32]) Tiago Peterlevitz, '¿Boterismo constitucional en Colombia? Un análisis de la constitución de 1991 y de sus reformas' (Second Congress of Political Science, Colombian Association of Political Science, 21–24 July 2010).

([33]) Manuel José Cepeda Espinosa, 'The Judicialization of Politics in Colombia: The Old and the New' in Rachel Sieder, Line Schjolden, and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2005) 67–103.

([34]) Nunes (n 6).

([35]) Gerardo L Munck, 'Repensando la cuestión democrática: la Región Andina en el nuevo siglo' (2010) 30(1) *Revista de Ciencia Política* 149.

([36]) Heliatrice Marques, 'Constitucionalismo e Democracia em Perspectiva Comparada: A dinâmica política dos processos de mudança nas Constituições de Venezuela, Bolívia e Equador (2008) Paper (mimeo).

([37]) Rogélio Pérez Perdomo, 'Judicialization and Regime Transformation: The Venezuelan Supreme Court' in Sieder, Schjolden, and Angell, *The Judicialization of Politics* (n 32) 131–59.

([38]) Marques (n 35).

([39]) George Tsebelis and Dominic J Nardi, 'A Long Constitution is a (Positively) Bad Constitution: Evidence from the OECD Countries' (2014) *British Journal of Political Science* 1.

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