

The Nature of Judicial Power

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Daniel M. Brinks & Abby Blass, **The DNA of Constitutional Justice in Latin America** (2018).

Scholarship on the exercise of judicial power often focuses on its *nurture*: how judges operate to protect their authority in a complex system of [personal incentives](#), [institutional constraints](#), and [political uncertainty](#). In their recent book, [The DNA of Constitutional Justice in Latin America](#) (2018), Dan Brinks and Abby Blass instead focus on the *nature* of judicial power, producing a magisterial analysis of judicial design. They argue that a court's formal institutional design can indicate the kind of political influence it was intended to exercise. And in so doing, they present a beautifully integrated theory complete with robust quantitative and qualitative empirical support.

The book aims to provide a "unifying political account of the origins of the different models of constitutional justice that have emerged in Latin America since the 1970s" (P. 2), and its conceptual contributions are limited to that set of countries. Nevertheless, Brinks and Blass develop a theory that has universal appeal, and scholars of global or regional constitutionalism in other geographic areas will benefit from reading and drawing on this work.

The theoretical heft of the book comes in the first three chapters, in which the authors outline the state of the literature on constitutional governance and judicial review, develop their own definition of judicial power, and elaborate their theory of the politics of judicial design. These chapters are required reading for senior scholars and neophytes alike, and will give social scientists and constitutional lawyers much to debate.

Building on foundational work by [Ginsburg](#), [Hirschl](#), and others, Brinks and Blass complicate the focus on the role of the "Ruling Coalition" in constitutional design. They argue for keeping distinct the various sets of actors involved in constitution-making, in regular politics, and in implementing constitutional justice (the sphere of activity subject to constitutional standards and judicial review). They thus identify three important groupings: the "Originating Coalition," or the "set of actors whose agreement is required in order to produce a binding initial pact" (P. 50); the "Ruling Coalition," or the "set of actors who are empowered to make binding decisions in ordinary politics" (P. 1); and the "Constitutional Governance Coalition," or the "set of actors whose consent is required to exercise control of over the system of constitution justice"(P. 8).

This disaggregation has immediate benefit, as Brinks and Blass are able to categorize and evaluate the existing theories of judicial review based on how those theories describe or assume the relationship of the Originating Coalition to the Ruling Coalition. In critiquing the existing theories, Brinks and Blass argue that they all "ask too much of courts" (P. 53) and fail to properly incorporate the politics of judicial behavior.

To fill this gap, the authors introduce their Constitutional Governance Coalition (CGC) as the mechanism that mediates between the court and politics. But before evaluating its role, Brinks and Blass first develop their understanding of judicial power, connecting it to various formal design elements. Setting aside the current scholarly focus on "judicial independence" as misguided, Brinks and Blass instead define judicial power along two dimensions: authority and autonomy.

A court's authority turns on the scope of the sphere of constitutional justice: What subjects are constitutionalized? How capacious is a court's jurisdiction? How accessible is it? What are its decision-making rules? Are its holdings universally applicable? Autonomy, by contrast, is constructed by the nature and identity of a court's ongoing control coalition, which may operate both *ex ante* (through appointments, etc.) and *ex post* (through removals, jurisdiction

stripping, etc.) controls. A court with strong autonomy would not be insulated from politics, but would be responsive to “a plural and inclusive control coalition that cannot easily be captured by a single outside interest or faction” (P. 24). And certain institutional arrangements will increase ex ante or ex post autonomy: Imagine many actors involved in an appointments process that leads to consensual choices, or a multiplicity of veto players making it more difficult to sanction or reward judges after issuing decisions. (Other aspects can include length of judicial tenure, court-packing, jurisdiction-stripping, monetary pressures, etc.)

Authority and autonomy interact, producing different models of constitutional justice. The authors provide a two-by-two matrix that includes in one corner a narrow authority/low autonomy court (“Sidelined”), and in the other, a broad authority/high autonomy court (“Major Policy Player”). Courts with broad authority/low autonomy are most likely to be “Regime Allies,” and those with narrow authority/high autonomy will be “Procedural Arbiters” limited to protecting narrow areas, usually of economic rights.

The CGC functions to influence as well as to protect the court and is made up of a court’s control coalition as well its “support coalition” (those with “access to the court for protection of their substantive interests” (P. 57)). The CGC will necessarily reflect the politics of the Originating Coalition (OC) and its relationship to the Ruling Coalition (RC). In some ways, the CGC acts as the “successors in interest” of the OC, and Brinks and Blass expect that this intent “will be reflected in the DNA of constitutional justice” (P. 60)—or, in other words, in formal elements of judicial design.

By recognizing that the system of constitutional justice is “accountable to a coalition that is conceptually (if not always empirically) distinct from the Ruling Coalition” (P. 9), Brinks and Blass open up a wide variety of inquiries about how, when, and why an OC might act to give the CGC control. Will the ideology of the OC (Left vs. Right) impact the scope of constitutional justice? How will that scope be affected by the role of the RC within the OC? Will the OC provide more ex ante or ex post tools to the CGC? Will levels of ex ante vs. ex post autonomy respond to different political dynamics? How might a history of violence affect constitutional justice and a court’s authority and autonomy?

In response to this wide range of questions, Brinks and Blass elaborate hypotheses based on principles derived from their theory, and the rest of the book tests their claims through both quantitative and qualitative analysis. Integrating quantitative and qualitative methodology in this way is both productive and persuasive; the book serves as an exemplar for the field of comparative constitutional law and policy.

For scholars of Latin America or those with interest in the region, or for empiricists who might like to build on (or challenge) the quantitative measures, these final chapters are rich and compelling. An appendix includes the authors’ work developing quantitative measures of authority and autonomy, and in Chapter 4, using those and other newly developed measures, they run regressions to assess whether their theories of design and constitutional justice have explanatory value in the region. Their results confirm the relevance of their overarching constitutional governance framework (and reaffirm gaps in other theories of judicial power), by indicating that the OC aims to design “a system for ongoing dynamic constitutional governance” rather than to protect “an immutable pact” (P. 88). Chapters 5, 6, and 7, in turn, provide qualitative evidence of the “logic of constitutional governance at work” through an in-depth examination of the Originating Coalitions and constitutional debates in Guatemala, Argentina, and Bolivia.

The project is a tour de force and will serve as a launch pad for more scholarship on judicial power and judicial design. For example, an often-stated element of judicial power is “effectiveness,” or a measure of the expected compliance with a court’s decisions. Brinks and Blass omit this element in their definition, perhaps because effectiveness can be theorized as part of institutional function rather than formal design. (David Landau has [argued](#), for example, that judges themselves can and do shape and create support structures to enhance effectiveness.) But effectiveness is sometimes addressed through formal design; some constitutions explicitly provide processes for enforcing judicial orders. And effectiveness might also be tied to formal measures of authority. A broader scope of authority that generates a broader support coalition able to impose costs on the Ruling Coalition might lead to a higher measure of compliance/effectiveness. Engaging with judicial effectiveness would require more detailed attention to the Constitutional Governance Coalition than given by the authors. Who are the actors that make up the coalitions of

control and of support, and how do those two groups function within the Constitutional Governance Coalition?

In a book of this ambition, there are bound to be unanswered questions. Brinks and Blass have consciously limited their project to institutional design, not institutional functioning. Therefore, they do not spend much time on the complications presented by nurture and do not assess whether courts actually turn out the way their designers intended. And indeed, that is another project. Some will be left wanting more, but there is plenty—indeed, lots!—to like in the great contributions made by the authors to our understanding of constitutional design and judicial power.

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