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BOOK REVIEW ESSAY

Of Strategies, Ideas, and Deliberation: Judges, Courts, and Constitutions in Latin America

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This essay reviews the following works:

Constitutional Courts and Deliberative Democracy. By Conrado Hübner Mendes. New York: Oxford University Press, 2015. Pp. viii + 272. $42.50 paper. ISBN: 9780198759454.

Crafting Courts in New Democracies: The Politics of Subnational Judicial Reform in Brazil and Mexico. By Matthew C. Ingram. New York: Cambridge University Press, 2015. Pp. xxv + 365. $110.00 cloth. ISBN: 9781107117327.

Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America. By Gabriel L. Negretto. New York: Cambridge University Press, 2013. Pp. xxii + 283. $44.99 paper. ISBN: 9781107670983.

Primer Informe Estado de la Justicia. By Programa Estado de la Nación en Desarrollo Humano Sostenible (Costa Rica). San Jose, Costa Rica: PEN, 2015. www.estadonacion.or.cr/justicia.

Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America. By Julio Ríos-Figueroa. New York: Cambridge University Press, 2016. Pp. xv + 238. $110.00 cloth. ISBN: 9781107079786.

Analyses of actors that engage in judicial politics—courts, judges, and constitution makers—always oscillate between what they are expected to do and what they actually are doing. The foundational reason, as Conrado Hübner Mendes eloquently states in *Constitutional Courts and Deliberative Democracy*, is that we charge institutions such as the legislature with rather mundane expectations of representing interests, while "we load the judicial shoulder with a more mysterious political ideal" of upholding the rule of law and not of men (1). For close to two decades, Latin American courts and constitutions have become a most fertile ground to inspect judicial and constitutional politics operating in the tension between what is and what ought to be. The five works reviewed here provide novel insights and innovative hypotheses for our understanding of constitutional politics. Three of the books are written by political scientists (Ingram 2016; Ríos-Figueroa 2016; Negretto 2013), one is a normative exploration of how constitutional courts ideally ought to function (Hübner Mendes 2015), and one is a report on advances and shortcomings of Costa Rica's judiciary (*Primer Informe Estado de la Justicia*, 2015).

What links these works together is that each of them presumes a discursive interaction taking place in the realm of judicial politics. Matthew C. Ingram identifies the importance of ideas in buttressing courts at the subnational level, Julio Ríos-Figueroa borrows from deliberative theory to conceptualize his ideal-type courts, and Gabriel L. Negretto identifies the conditions necessary for ethical reasoning to take place in constituent processes. I want to suggest that the works reviewed here push us to incorporate the often-complex argumentative interactions taking place in the genesis of institutions and their evolution. What is more, they can be productively utilized to generate new questions and hypotheses in future explorations of judicial politics in Latin America.

Brazilian constitutionalist Conrado Hübner Mendes develops the connection between deliberative democracy and constitutional courts. He asks: When is a court deliberative and when is it nondeliberative?

Comparative politics, not least those works that focus on Latin American countries, disclose institutional conditions for effective constitutional courts. Hübner Mendes holds that more effective courts must also be deliberative. His work is a first attempt to turn inward, disaggregate the process of deliberation inside courts, and peel away more layers of the institutional set-up of effective and deliberative courts.

The need for such a well-grounded theory of deliberation in constitutional courts arises from courts' peculiar democratic deficit dilemma: as unelected bodies, they decide consequential questions. Hübner Mendes does not pretend that legal deliberation is apolitical. He accepts the "co-legislative" nature of constitutional scrutiny but stresses that it is not identical to parliamentary debate. Proper legal reasoning is situated between the poles of law making and law application and therefore always involves deliberation. Since collegiate adjudication involves group decision making, judges' work, too, can benefit from deliberative modes of interaction, he argues. Yet, though current theories accept the importance of constitutional courts as deliberative forums, they lack "a comprehensive view of what a deliberative court looks like" and, above all, do not provide an evaluative standard to gauge the different degrees of deliberative performance (221).

To fill that void, Hübner Mendes first defines legal deliberation as a "variant of practical reasoning applied to collective decision-making processes" in which "participants are open to transform their preferences in the light of well-articulated arguments" (18). This definition contains seven caveats that carry important normative implications (14–16):

1. It recognizes the need to come to a collective decision, since we are concerned with a political exercise that involves questions of authority.
2. Decision making does not end with the decision but only temporarily arrests developments, because continuity, for deliberative theorists, is an integral part of legitimate politics.
3. Deliberation combines reason-giving as the grounds for a decision.
4. Reasons can have many different origins but share that they are (plausibly) directed at the common good, attempting to conform to some form of impartiality.
5. The intersubjective engagement to persuade each other requires three conditions of its own: the willingness by participants to review their position, the presence of an ethics of conversation, and the absence of coercion.
6. Deliberation assumes an ethics of respect that is based on the mutual recognition of equals.
7. Deliberators' attitudes reflect a morality of inclusiveness, empathy, and responsiveness to demonstrate that they are fellow members of a political community.

How do constitutional courts live up to that standard? Hübner Mendes's core contribution is to flesh out the meaning of deliberative performance by breaking it down into three phases: pre-decisional, decisional, and post-decisional. He defines them by the activity courts undertake in each phase: public consultation, collegial interaction and deliberation, and the production of the written decision, respectively. Disaggregating the courts' actions in the process of deliberation enables Hübner Mendes to draw a differentiated picture of the normative caveats deliberation can achieve in each phase and associate it with specific virtues. Public contestation has weak epistemic values but strong psychological, educative, and intrinsic values, while collegial engagement has strong epistemic and (internal) communitarian promises, yet weaker psychological, educative, and intrinsic values. The written decision has strong epistemic ramifications as well as communitarian promises for the entire community that lives under a specific constitution, as well as strong psychological, educative, and intrinsic values.

Comparativists will learn a lot from Hübner Mendes's treatment of deliberation in constitutional courts because it provides fodder to develop new hypotheses. In the second part of the book, he reviews a number of institutional devices and how they can affect each phase of a deliberative court: the number of judges on the court, their appointment procedure, and tenure affect the pre-decisional phase; face-to-face or written interaction between judges, open or secret interaction with the public, and majority or unanimity decision making shape the decisional phase; per curiam or seriatim publication of the written decision shape the post-decisional phase. The normative baseline is that the deliberative court is respectfully curious as opposed to passive and ritualistic, collegial as opposed to individualistic and pedantic, modest and susceptible to persuasion (the key part of the deliberative court), ambitious as well as empathetic. In short, the deliberative court is open to persuasion, while the nondeliberative court is stubborn and confrontational (140), and it is up to "hard-core institutionalist" studies to specify the conditions that help foster a more deliberative posture of courts in each phase of the decision-making process.

Making Constitutions by Gabriel L. Negretto is such a hard-core institutionalist study. Negretto examines the replacement or amendment of constitutions in Latin America between 1900 and 2008. He finds that the choices are "endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers" (2). In the best of Weberian traditions, Negretto takes an external approach to law and begins with two assertions. First, constitutions structure political competition and processes of representation in the provision of public goods, and secure citizens' acquiescence, setting incentives for cooperative behavior. Second, constitutions also are power structures that create winners and losers, setting clear strategic incentives for constitution makers. Therefore, a plausible theory of constitutional politics must be able to account for both aspects.

Crucially, these two rationales are not to be understood as mutually exclusive but complementary. In the realm of setting general goals and broad organizational principles for the constitutional order, all political actors share efficiency concerns that lead to more cooperative behavior; yet designing specific mechanisms that allocate decision power sows conflict (53). This leads Negretto to develop two predictions: under conditions of political uncertainty a Rawlsian veil of ignorance cloaks deliberation, which results in more cooperation in the assembly, while political certainty in the form of one-party dominance yields the opposite.

Electoral institutions and presidential powers are the testing grounds for these hypotheses. Negretto first develops a regression analysis that consists of all major constitutional changes (amendments by popularly elected civilian parties and constitutional replacements) in eighteen Latin American countries between 1900 and 2008. From a total of sixty-eight observation points, he chooses fifty-six to contrast the selection of electoral rules, and fifty-five to compare decision rules. He demonstrates that as "the number of parties necessary to change or amend the constitution increases, constitution makers opt for inclusive rules of presidential election" (89). The expansiveness of legislative powers, too, is contingent on the reform coalition: constitution makers increase legislative powers of the president with a higher number of parties making up the reform coalition. Economic crisis during or prior to the constituent process further augments the tendency toward assigning more expansive legislative powers to the executive as it helps the reform coalition to justify constitutional choices (96–97). In conclusion, the presence of more than one party in the reform coalition coupled with low expectations of a cohesive congressional majority aligns incentives to expand legislative powers in the executive.

Negretto shifts to case studies in the second part of his book to unearth the influence of political crises and electoral uncertainty on the choices of constitution makers. Moving from analyzing causal effects to causal relations, he focuses on four constitutional reform processes: two from Argentina (1949 under Perón and 1994 under Menem), and one each from Colombia (1991) and Ecuador (1998). These carefully designed case studies disclose the conditions for constitution makers to engage in collaborative action. In Argentina, electoral results signaled a persistent shift in the distribution of power, which motivated constitution makers to reallocate (more) power to the executive. The Colombian and Ecuadorian examples show that profound institutional and electoral uncertainty motivated constitution makers to collectively engage in institution building. In Colombia, the consequences of almost complete institutional meltdown and the formation of a new party from the ranks of demobilized guerrillas led constitution makers to agree on a more consensual power-sharing design of electoral and (executive) decision-making rules, constraining the vast emergency powers the president held under the old regime.

Constitutionalist Alexander Somek writes that making constitutions requiring "anything other than practical reason or rationality simply eludes us. . . . [Constituent power] is the equivalent in public law of the 'thing itself' in metaphysics."[1] Negretto places constitution making back in the realm of human interaction; his work is therefore a tremendous contribution to lifting the veil of metaphysics from constituent power. He makes evident that constitution makers face constraints and delegate resources not dissimilar to those of regular politicians: they have interests and bargain over the future path of politics to the best of their abilities. Moreover, they, too, have to provide good arguments for their selection of specific institutions, as the presence of economic crisis as a justificatory vehicle for more expansive presidential powers suggests.

Negretto attributes instances of Rawlsian types of reasoning to uncertainty, echoing the electoral competition argument; yet he overlooks that another important factor inducing a collaborative logic into collective decision-making processes is the publicness of deliberations. It is much more difficult to agree on universally valid norms without appealing to generally held beliefs when deliberation takes place in

[1] Alexander Somek, "The Constituent Power in a National and Transnational Context," *University of Iowa Legal Studies Research Paper* no. 12–35 (2012), 1–2.

open forums. This was the case in Colombia, where unentrenched actors affected the course of deliberation at every stage of the constituent process: a heterogeneous student movement decisively paved the path to establishing the constituent assembly in the first place, citizens could submit particular grievances at workshops held prior to the negotiations, and negotiations were not held behind closed doors but in televised debates. The importance of the public sphere and how it facilitates an argumentative logic into constitution making is one aspect that deserves more attention in the future.[2]

While Negretto examines constitutional reforms, Matthew C. Ingram analyzes judicial reforms. Equally as skilled as Negretto in the application of mixed methods, Ingram tackles the question of why some courts exit stronger from reform processes than their counterparts in different places within the same country. *Crafting Courts in New Democracies* measures court strength through judicial spending. To show the centrality of ideas in judicial reforms in new democracies, Ingram compares two countries, Brazil and Mexico, and then explores the subnational level of state courts in Brazil and Mexico, combining cross-country and within case comparisons. This allows him to isolate cases (states in each country) based on their judicial strength, and attain significant cross-country variation. Both countries feature different party systems and different styles of judicial federalism. Their historical trajectories varied in terms of the style of the authoritarian regime (military regime in Brazil, and one-party dominance in Mexico), the temporal span of authoritarian regimes in each country (uneven patterns in Brazil and seven decades of uninterrupted PRI rule in Mexico), and post-authoritarian development (Brazil moving steadily from rightward dictatorship to the left, and Mexico shifting from the center under the PRI as the ruling party to center-right administrations under Fox and Calderón). The theoretical scope of the book is then accordingly broad, making contributions to the study of courts, comparative law, and the amplification of court strength while also addressing the literature that closed in on phenomena of uneven development across subnational units.

Ingram does not simply argue that ideas matter—something akin to a truism in politics—but that specific ideas (or ideals) about organizing a polity have specific causal effects on the outcome in judicial reforms. He understands the ideas operating in each case as "programmatic commitments" in order to capture the consistency and coherence of specific policy ideas without abstracting to the level of ideology or worldview (61). To distinguish between left- and right-wing ideas, he argues that the former espouse "democracy-oriented" commitments aimed at consolidating and deepening individual and civic rights, while the latter seek "market-oriented" commitments aimed at the creation of stable economic conditions suitable for commercial and investment developments. Observing programmatic commitments consists not only in identifying discursive action but in detecting programmatic consistency despite shifts in material conditions, or shifts in policy goals despite similar material conditions. Above all, however, evidence of idea-based behavior is when actors engage in costly behavior despite other options. He contrasts his narrative with the arguments summarized under the electoral competition logic.

Ingram presents a state-of-the-art nested analysis, dissects each country econometrically, and then turns to specific cases inside each country to process-trace the trajectory of judicial strength (or the lack thereof). His data builds on the "state-year" as a unit and covers the time period from 1985 to 2006 in Brazil and 1993 to 2009 in Mexico, resulting in 502 observations from Brazil across all twenty-six states and 426 observations from Mexico across all thirty-one states (excluding the federal districts). Thus the time periods cover authoritarian, transition, and post-authoritarian periods in each country. An unbalanced panel structure in the data leads Ingram to apply a population-averaged panel data model with a forward-lagged dependent variable (113–114).

The findings from the large-N analysis suggest that leftist politicians in Mexico increase spending of courts and thereby strengthen judiciaries. The small-N analysis of the three states showed that court strength improved most dramatically in leftist-controlled (PRD, (Partido de la Revolución Democrática) Michoacán and remained most stagnant in PRI (Partido Revolucionario Institucional) controlled—that is, centrist-controlled—Hidalgo. Aguascalientes, which turned to the PAN (Partido Acción Nacional) after transition from the PRI, took some careful measures to improve court strength, but then reversed course somewhat after PAN elders, aligned with traditional elites, took control in the state.

In Brazil, the clearest evidence showed that leftist parties opposed to the military regime "*as a group exert the strongest upward pressure on court budgets*" (283; italics in the original), while right-wing successor parties affiliated with the military ARENA regime (Aliança Renovadora Nacional) reduce court budgets. Importantly for the Brazilian case, while center-left parties such as the PDT (Partido Democrático Trabalhista) and PSDB

[2] Jan Boesten, "Between Democratic Security and Democratic Legality: Discursive Institutionalism and Colombia's Constitutional Court" (PhD diss., University of British Columbia, 2016), DOI: https://doi.org/10.14288/1.0224798.

(Partido da Social Democracia Brasileira) have a positive influence on court budgets, the party furthest to the left, the PT (Partido dos Trabalhadores), does not have such a detectable effect. The case studies reveal that the PT's actions were a reaction to an already strengthened judiciary rather than an attempt to prevent a weak court system from becoming more robust. In Acre, the PT did improve court budgets, because the local governor had a personal friendship and ideological affinity with the court president. As in Hidalgo, the judiciary's development in Maranhão remained weak and opaque because of patronage-preserving conservative elites in the state.

Ingram's study presents a new logic for our understanding of institutional development in new democracies: judicial reform as "power-preserving" and "patronage-preserving" action. New democracies are populated by elites that have affiliations with the preceding authoritarian regime. Evidently, these elites want to maintain their positions and receive the spoils of power, but at the same time they feel pressure to fully democratize. Ingram shows that judicial reform is a useful tool for "window dressing," which provides elites with the opportunity to seemingly engage in democratic deepening without relinquishing their positions at the top of the patronage system. Without policy commitment and minimum electoral competition, such structures perpetuate themselves.

Ingram's research design, like Negretto's, is mixed. It uses quantitative and qualitative methods at both the macro and micro levels. To be sure, Ingram clearly identifies the importance of politics in judicial politics, but his finding that left-leaning ideas exert upward pressure on judicial spending shows that "we cannot tell the differential effect between different factions within the opposition movement without recourse to the content of ideas" (54). In light of the tension between fact and norm in modern positivist law, it is interesting that his conceptualization of the content of ideas appears static, differentiating between broad "left-wing" and "right-wing" ideals of the rule of law. However, the discussion of subnational cases demonstrates that ideas, and specifically the content of ideas, are far from static in his study. On the contrary, the analysis of the far-left party in Rio Grande do Sul and Acre highlights that the content of ideas and their application shifts given the institutional context. In the end, it is not a purely positivistic argumentation implying that more left-wing parties in a given unit of analyses lead to stronger courts. Rather, Ingram's analysis emphasizes that it is agents and their context that matter in political analyses, because arguments shift in different contexts and, with that shift, result in different outcomes.

Julio Ríos-Figueroa narrows in on one of the most pertinent issues of Latin American politics: civil-military relations in democracies. He begins his analysis with a paradox: the apparently incompatible goal of simultaneously having an efficacious but also rule-bound military (bound by democratic rule of law, that is). Complete submission to civilian and democratic supervision can clash with the *Korpsgeist* of the military, which seeks autonomy from judicial oversight to induce efficacy in operations. Complete autonomy, of course, violates the democratic imperative that all public institutions, especially coercive ones, are bound by the rule of law. The question, then, is this: What type of apex court best deals with military justice?

Ríos-Figueroa examines democratic countries that have experienced civil war. Internal strife exacerbates the tension between civilians and their military personnel because it creates three types of legal uncertainty: (1) the legal consequences of specific actions, such as deaths in combat; (2) the boundaries of exceptions such as the jurisdiction of military courts; (3) balancing contradicting constitutional principles in respect to due process rights in military tribunals.

To explore what kind of court can best achieve both the security of the rule of law and efficacious armed forces, Ríos-Figueroa draws on deliberative theories that "emphasize the fact that constitutional judges are able to weigh in and mix different points of views into constitutional interpretation" (20). He then constructs a spectrum of ideal-type conflict resolution mechanisms ranging from negotiation, where actors self-direct the solution to a conflict, and litigation, where the solution is eventually resolved by a third party (and thus imposed). Central to the inquiry is not whether courts intervene at all, but how they do so.

He focuses on three cases—Colombia, Peru, and Mexico—to better understand the utility of independent courts for democracies. In each case the government has faced an insurgency, but only one case (Colombia) differs in terms of access to courts, providing variation for a most-similar research design across case. Moreover, each case displays internal variation as they have experienced some form of constitutional replacement or amendment in the time periods covered (1958–2013 in Colombia, 1979–2013 in Peru, and 1917–2013 in Mexico). This changed institutional incentives on independence, access, and judicial review powers.

Methodologically, Ríos-Figueroa dissects each case quantitatively, with constitutional jurisprudence on military autonomy being the dependent variable. He builds a data set for each country that covers the respective time periods and includes all cases reaching the constitutional court involving the military as an

institution, or an officer as either plaintiff or defendant. Furthermore, cases are divided into two subcategories: those pertaining to questions of whether previous decisions by military institutions are upheld, and those pertaining to the scope of military jurisdiction. Evidently, these categories are not mutually exclusive but can have an effect on one another. This makes it all the more important to process-trace and qualitatively analyze the evolution of jurisprudence in each case, and then conduct a most-similar investigation across all three cases. Colombia (after 1991), Peru (since 2002), and Mexico (since 2000) all qualify as competitive democracies facing an internal security crisis and claim a de jure commitment to international human rights law, but only Colombia's jurisprudence features a judicial regulation of the use of force.

Constitutional Courts as Mediators demonstrates that powerful, independent, and accessible apex courts (as in Colombia) help solve collective action problems arising in the tripartite relation between civilian governments, militaries, and citizens. Independence hinges on at least two different parts of government (with different incentives) making court appointments, tenure length exceeding the time in office of the appointee, and removal being outside the control of a single legislative party. Along with expansive review powers, these conditions give teeth to courts' actions and help them to disseminate information to actors involved, while easy access for claimants provides courts with the necessary information to come to well-informed decisions. Mediator-like jurisprudence is not case-circumscribed and nonshaming but creative, forward looking, and transparent in its argumentation. It "should be robustly grounded on constitutional principles and norms" (34). If a court fulfills only the independence condition but lacks wide access and ample review powers, it acts like an arbitrator, and if it lacks all conditions it simply delegates in the interest of other actors.

The theory of the constitutional court as a mediator is a functionalist theory in that it focuses on the outcome of information processing in a context of uncertainty, but also a deliberative one, because it incorporates notions of mutual understanding and argumentative processes. Recently, two pioneering scholars of the strategic paradigm of judicial behavior, Jack Knight and Lee Epstein, have confessed that law does indeed matter for judges (and not only policy goal preferences). Legal arguments must therefore play a bigger role in political analyses of judicial behavior.[3] It appears that Ríos-Figueroa listened closely to their pleas and incorporated the content of jurisprudence into his analysis. This helps him to make an argument situating constitutional courts in democratic theory: they are problem solvers that ideally help political actors to engage with each other and overcome collective action problems. At times, however, the adherence to strategic explanations for court behavior let them appear a bit passive. For example, the careful treading of the Colombian Constitutional Court that Ríos-Figueroa traces in its jurisprudence on the use of force need not result from prudent strategizing but can be a consequence of institutional learning—a trial and error mechanism of achieving normatively appealing outcomes.

To finalize this thematic review, it is prudent to look at one judiciary that has received praise for its independence. Costa Rican courts are an often-cited example of an intriguingly powerful and independent court system; yet contentions over the judicialization of politics do remain. The report *Primer Informe Estado de la Justicia* tries to understand two phenomena associated with the increased importance of judicial institutions in the county: the encroaching of judicial institutions into legislative territory; and the politicization of judicial institutions. Thus it asks if and how the famous Sala IV, the constitutional chamber, acts like a legislator and to what degree the selection of magistrates has become the subject of party politics. The results are ambivalent. The authors find that the chamber has detected vices in 62 percent of facultative consultations and in 13.6 percent of obligatory consultations between 1989 and 2013. The authors conclude that constitutionality consultations do not significantly affect the efficiency of the law-making process, increasing the length by only 3.6 percent. It is a constitutional tool that opposition parties utilize most frequently (in more than 70 percent of the submitted consultations). Here, the chamber does not so much act as a legislator but as a facilitator for opposition parties. However, when it comes to establishing and defining boundaries in parliamentary procedure, the legislature has criticized the chamber for its activism and for encroaching on legislative autonomy (77–79).

It is intuitive that the increased importance of the Supreme Court and its constitutional chamber provides incentives for the politicization of the judiciary. Indeed, the selection of magistrates has become an important date in the political calendar of Congress. The report, however, identifies a qualitative shift in the politicization after the implementation of the 2003 reform of the selection process, which increased the

[3] Lee Epstein and Jack Knight, "Reconsidering Judicial Preference," *Annual Review of Political Science* 16 (2013): 12. DOI: https://doi.org/10.1146/annurev-polisci-032211-214229.

required majority to a qualified one. First, the average length of the selection process has increased; second, and most importantly, the selected candidates are now career judges with at least twenty years of experience in the judiciary (82–83). Thus judicial reform assuaged the politicization of judge selection.

The 2003 reforms were part of three waves of institutional reforms initiated since 1993. They spanned a time when Costa Rica underwent significant sociopolitical transformations. In this period, diversification of the party system is an important part of the context of judicial reforms. Between 1994 and 2014, the effective number of parties in the Legislative Assembly increased from 2.3 to 4.9 (42). A diversification of the party system also meant that parties in Congress had more difficulty finding political agreements over public policy, which in turn led to political abstentionism in a country that had very high electoral turnouts for the second half of the twentieth century. Increasingly, popular political participation moved to the streets as social protests increased.

The report is full with data, clearly defined concepts, and rich detail. Beyond the findings briefly presented here, the authors also report on the status of rights protection through the *amparo* application in criminal law, labor law, and the right to minimum health care. Moreover, it specifies the origins of judicial reformism after the implementation of the 1989 constitutional reform, and the progress (and shortcomings) of three waves of reforms. It does not, however, make substantial causal claims about various phenomena. Nevertheless, and possibly for that reason, it will be a source from which researchers can draw data and consider new hypotheses.

Conclusion

Every analysis of judicial institutions, courts, and constitutions treads the difficult line between power and norm, which is implicit to every positivist rule. As Jürgen Habermas poignantly phrased it, "Law inherently claims normative validity regardless of its positivity, [while] power is at the disposition of a political will as a means for achieving collective goals, regardless of the normative constraints that authorize it."[4] Each of the reviewed books here responded to this basic confrontation between structured power relations and the corresponding normative claim to constrain power. Each, at least implicitly, embraced an evidently normatively informed ideal; collaborative deliberation under the veil of ignorance (Negretto), strong and autonomous municipal courts (Ingram), mediating constitutional courts assuaging tensions between civilian oversight and military autonomy in times of internal strife (Riós-Figueroa), and the deliberating constitutional court (Hübner Mendes). It is not surprising that Negretto, Ríos-Figueroa, and Ingram—all three political scientists—focus on the political side of legal politics, but Hübner Mendes's theoretical exploration of the ideal deliberator, too, is painfully aware that political structures intervene in normative ideals.

The institutionalist literature, which has traditionally been focused on how power structures are generated and how they persist over time, has moved toward more discursive understanding of institutions. The contentious issue concerning the importance of ideas, deliberation, and deliberative interaction is that these factors often fly under the radar of positivist research. However, the books under review suggest that judicial politics are not immune to the discursive trend in the analysis of institutions, nor is it impossible to detect the importance of ideas and deliberation for specific outcomes in political analyses. Ingram's thesis is that ideas make a crucial difference in the trajectory of post-reform municipal courts, and "hard-core institutionalist" analyses, such as those developed by Negretto and Riós-Figueroa, have not neglected the importance of arguments in human interaction either. One of the most important contributions these works make for our understanding—not only of Latin American courts, constitutions, and judges—is that taking into account the argumentative content of ideas pays off, as it helps us to better understand contradictory outcomes, such as that constitution makers constrain the powers of presidents in some areas (emergency powers), while expanding powers in other areas at the same time (legislative powers concerning economic policies). Moreover, given the transformations and contractions Latin American democracies are currently undergoing, the region undoubtedly will remain a fertile testing ground for deepening our understanding of judicial institutions. Not least, Hübner Mendes's normative work on the work of deliberative constitutional courts has shown that the tension between what is and what ought to be—the normative tension of positivist law—still harbors questions that require scientific analysis.

[4] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996), 136.

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