



PROJECT MUSE®

How Latin America's Judges are Defending Democracy

Diego A. Zambrano, Ludmilla Martins da Silva, Rolando Garcia Miron,
Santiago P. Rodríguez

Journal of Democracy, Volume 35, Number 1, January 2024, pp. 118-133
(Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/jod.2024.a915353>



➔ *For additional information about this article*

<https://muse.jhu.edu/article/915353>

HOW LATIN AMERICA'S JUDGES ARE DEFENDING DEMOCRACY

*Diego A. Zambrano, Ludmilla Martins da Silva,
Rolando Garcia Miron, and Santiago P. Rodríguez*

Diego A. Zambrano is associate professor of law at Stanford Law School. Ludmilla Martins da Silva is a Brazilian attorney pursuing her Doctor of the Science of Law degree at Stanford Law School. Rolando Garcia Miron is currently a Doctor of the Science of Law candidate at Stanford Law School. Santiago P. Rodríguez is currently clerking for Justice Natalia Ángel Cabo of the Colombian Constitutional Court.

For decades, common wisdom held that an independent high court, empowered with judicial review and tenure protections, was an essential part of democratization and necessary to prevent authoritarian takeovers. But subsequent developments have weakened this view. Hungary, Poland, Venezuela, and Turkey suffered democratic backsliding despite robust and apparently independent courts. It took only a few reforms for ruling authoritarian parties to destroy those judicial systems. Judicial review appears rarely sufficient to prevent an authoritarian takeover and, indeed, can itself be an instrument of backsliding.¹ In countries such as Bolivia and Venezuela, courts have served as an instrument of authoritarian oppression, not a check against it.²

And yet, this common wisdom is making a comeback in Latin America—in a dramatic succession of recent court cases, the Supreme Courts of Brazil and Mexico have aggressively fought back against authoritarian attacks on democracy. On 22 June 2023, the Mexican Supreme Court denied the government's attempt to defund the independent electoral branch, the crown jewel of Mexico's young democracy. Observers saw the executive's move against the judicial branch as a blatant attack on democracy by an autocratic president, Andrés Manuel López Obrador. In a similar turn of events, across several cases in the past year, the Brazilian Supreme Court has investigated potential coups d'état planned by Jair Bolsonaro's cronies, and the Superior Electoral Court took proactive measures such as issuing press releases attesting to the safety of the electoral process. The Electoral Court went as far as to disqualify Bolsonaro from running for office.

In their forceful defense of democratic institutions, these courts have joined the efforts of Colombia's Constitutional Court. Since 2010, the Colombian court has enjoyed a high degree of independence and legitimacy, sufficient to beat back Álvaro Uribe's attempt to run for a third term. In several lesser-known cases, the Colombian Constitutional Court has rebuffed authoritarian actions by Colombian presidents. And it has also extended its power to confront other illegal acts by current president Gustavo Petro's administration. All three judiciaries—in Brazil, Mexico, and Colombia—have innovated, acted with broad autonomy, and demonstrated legitimate interest in defending democratic norms and institutions.

All of this is profoundly surprising. In the late 1980s and 1990s, many countries, Brazil, Mexico, and Colombia among them, set out to redesign their judiciaries as potential bulwarks against authoritarianism. But many of those reforms failed—in countries such as Venezuela and Bolivia, supreme courts folded in the face of authoritarian challenges. And even in countries that initially looked successful, including Poland and Hungary, elected authoritarian governments eventually defeated or cowed the independence of their court systems. There is little to no track record of independent Latin American judiciaries that stand in the way of authoritarian governments. Nor is there an extensive record of successful judicial attempts to prevent democratic backsliding. Even more surprising, courts in Brazil, Mexico, and Colombia have occasionally acted independently in the face of violent threats by authoritarian presidents, and this comes at a time when democratic activists increasingly distrust judicial power. At least for now, it appears as if Brazil, Mexico, and Colombia have pulled it off—they may have actually built independent, robust, and democratic courts.

Here, we explore the roots of this recent judicial independence in Latin America. We disentangle the institutional choices made in Brazil, Mexico, and Colombia, and argue that there are two ways to examine these recent successes: with external accounts that focus on changes in culture, media, and the unpopularity of authoritarian governments; and with internal accounts that hone in on the courts' appointment processes, personnel, and structural protections of judicial tenure. As authoritarian movements in Brazil and Mexico set the stage to attack and destroy the independence of the courts, the judiciaries find themselves at a critical juncture. But the remarkable resilience of the courts is undeniable. While the efforts of judicial reformers in the late 1980s and 1990s may have yielded mixed results, the cases of Brazil, Mexico, and Colombia demonstrate at least partial success.

Latin American Near Misses?

Brazil. Like every other Latin American country, Brazil has a recent history of dictatorship. Prior to its modern democratic era, it endured

two tumultuous decades under the grip of a violent military regime. When the military dictatorship collapsed in 1985, democratic reformers set out to adopt a new antiauthoritarian constitution. The 1988 Constitution built a robust supreme court, empowered with broad-reaching and multiple judicial review mechanisms, including direct requests to state the unconstitutionality of a federal or state statute and challenges against government violations of a fundamental right or duty. The combination of these tools turned the Brazilian Supreme Court into a powerful institution in the political landscape and a potential guardian of democratic integrity.

Yet during the 1990s and 2000s, the Brazilian Supreme Court did not appear as a fundamental player in Brazil's new democracy. Several politically charged cases presented exceptions to the rule. One decision related to the *mensalão* scandal, a major congressional-corruption scheme involving the ruling Workers' Party. Other cases involved the prohibition of nepotism within the three federal branches, the approval of embryonic stem cell research, the right to abortion in the cases of anencephalic fetus, and same-sex union rights. But these cases did not establish the Supreme Court as a protagonist in the struggle against authoritarianism in Brazilian democracy.

The election of Jair Bolsonaro as Brazil's president in 2018 put the institutional framework and democratic strength of the nation to the test. During his presidential campaign, Bolsonaro threatened the Supreme Court's independence and safety, hinting at his intent to manipulate the composition of the Court to enhance his influence. Following his electoral victory, Bolsonaro participated in marches seemingly in favor of a military takeover, suggested he would not comply with the Supreme Court's decisions, and questioned the Brazilian electoral system. His supporters also resorted to alarming tactics, such as placing explosives near the house of a Supreme Court justice and issuing violent threats against the justices and their families. Some Brazilian scholars have called these low-level incursions against democracy a kind of "authoritarian infralegalism," because they occurred through decrees, appointments, and bureaucratic actions rather than new laws.³

In response, most of the Brazilian judiciary, and especially the Supreme Court and the Superior Electoral Court, engaged in a series of aggressive actions to counter Bolsonaro's attacks on democracy. The first and most significant instance of judicial resistance occurred in the context of the "fake news investigation." By the end of Bolsonaro's first year, the Supreme Court had launched an unprecedented investigation into a range of practices, including the spread of false information by government officials, as well as defamatory accusations, threats, and slander directed at the Supreme Court and justices. The Supreme Court had never before ruled that it could unilaterally start investigations, which made the decision particularly innovative. When questioned

about the constitutionality of such investigatory tactics, the full court affirmed its power to investigate threats to judicial safety.

The Supreme Court followed that investigation with multiple interventions to counter Bolsonaro's actions against federalism and other institutions. Take, for instance, the Supreme Court's clash with the executive over the covid-19 pandemic. Amid the pandemic, Bolsonaro embraced conspiracy theories about the virus and publicly criticized João Doria, the former governor of São Paulo State, over his embrace of lockdowns and restrictive measures. In an effort to curb Doria's influence, Bolsonaro sought to impede state-imposed lockdowns by centralizing authority with the minister of health. The Supreme Court declared the maneuver unconstitutional because it contravened principles of federalism and power allocation.⁴

Bolsonaro's administration also undermined bureaucratic independence by appointing loyalists and cronies to important positions. Bolsonaro once attempted to replace the head of the Federal Police with a close acquaintance. This prompted a response from former justice minister Sergio Moro, which led to the disclosure of private conversations that revealed Bolsonaro's interest in controlling the Federal Police. Facing another legal challenge to this maneuver in the Supreme Court, Justice Alexandre de Moraes suspended the appointment of Bolsonaro's ally, stressing the need to preserve the integrity and purpose of the Federal Police. Again, while the Supreme Court recognized the president's power to nominate the Federal Police director, it also reaffirmed broader constitutional checks on the executive.

Perhaps the most important clash between the courts and Bolsonaro pertained to the 2022 election. Leading up to the vote, Bolsonaro repeatedly attacked basic democratic principles by questioning the electoral system and the judicial process for validating election results. The Supreme Court and the Superior Electoral Court are inextricably linked, with three justices of the former also sitting in the latter. Among those justices is Moraes, who faced intense attacks by Bolsonaro and his cronies because of his decisions against Bolsonaro and his role as president of the Superior Electoral Court. Bolsonaro cast doubt on the reliability of Brazil's voting system, baselessly suggesting that electronic ballots were unsafe. In response, the Superior Electoral Court did not wait for a judicial ruling to make its views known: It issued press releases attesting to the safety of the ballots and collaborated with social-media platforms to combat misinformation.

After Luiz Inácio Lula da Silva defeated Bolsonaro in the 2022 election, challenges to Brazilian democracy persisted. On January 8, Bolsonaro supporters invaded and damaged several government buildings in the Brazilian capital, including the Supreme Court. In reaction to the invasion, the Supreme Court initiated investigations and accepted complaints against more than 245 individuals involved in the incident.⁵

Later, the Superior Electoral Court disqualified Bolsonaro from running for office again for abuse of his political power and misuse of the media.

The courts' actions are not without criticism. Opponents have highlighted instances of abuse of power by both courts. A noteworthy example is the *Jovem Pan* case, in which the Superior Electoral Court prohibited a news outlet from running a story about Lula. Critics argue this was clear overreach and an intervention into a legitimate political dispute. The Court's regulation of speech is also a matter of legitimate concern. In a rule to regulate the spread of false news, the Court attempted to distinguish freedom of speech from the spread of falsehoods. In the wrong hands, this ruling could haunt Brazil's democracy.

Going forward, the courts will be threatened by authoritarian reforms and mired in politics. Opponents have proposed constitutional amendments to curtail the Supreme Court's powers and jurisdiction. Some critics continue to propose structural reforms to reconfigure the Court's nomination process, alter impeachment procedures, increase the number of vacant positions, and modify tenure length. Others have proposed political review of the Court's decisions and limits on syndicates and political parties' standing to file petitions with the Court. Congress is currently reviewing two proposals that seek to reduce the justices' power and tenure. But so far, despite the threats that they face, the Brazilian courts have remained surprisingly consistent in their independence from the executive and apparent efforts to protect democracy.

Mexico. Andrés Manuel López Obrador, commonly known as AMLO, has been a popular president since he took office in 2018. He built a reputation as an autocratic and populist mayor and party leader decades before becoming president. And AMLO has displayed all those qualities since winning Mexico's highest office, engaging in open attacks on the country's electoral authority, forging a close alliance with the military, showing open contempt for courts and democratic institutions, and threatening media outlets and critics. Given AMLO's popularity and increasing dominance of institutions, it is surprising that in 2023, the Mexican Supreme Court invalidated AMLO's signature reform to the electoral authority, with two AMLO-appointed justices voting against him.

The story is only slightly less surprising in the context of Mexico's efforts in the 1990s to create an independent Supreme Court. In 1994, a major constitutional reform granted the Mexican Supreme Court the power of constitutional review, radically changing the role of the institution. The reform transformed the composition of the Supreme Court, diminished its previous administrative workload, and granted it with most of the powers of a modern constitutional court. After several decades of political irrelevance, the Supreme Court received the tools and responsibility to become a central piece of Mexico's nascent constitutional democratic system. The 1994 reform was one of many changes

that progressively transformed the country's constitution, incorporating elements of third-wave democratization.

The politicians behind the reform understood that as the country continued its transition to democracy, political fragmentation would increase and, with it, the probability of conflict. In order to provide Mexico's nascent democracy with a reliable forum to resolve political disputes, reformers gave the Supreme Court the role of final arbiter of those disputes. Through two new constitutional procedures—constitutional controversies and constitutional actions—the reform allowed political actors to take their disputes directly to the Court. Both new procedures gave the Supreme Court the power to adjudicate disputes between the different branches and levels of government and annul, with general effect, laws that are contrary to the constitution. In the years after the 1994 reform, the Supreme Court consolidated as an effective and legitimate forum for resolving political disputes.

AMLO's arrival to the presidency in 2018 placed the entire Mexican federal judiciary, particularly the Supreme Court, in an unprecedented situation. For the first time since 1997, the president's political party also controlled Congress. And AMLO received more than 50 percent of the vote, which no other presidential candidate had achieved in decades. From the beginning of his administration, AMLO made clear his determination to use his legislative majority and public support to advance an autocratic agenda. AMLO's actions were structured around three main reforms: significant cuts throughout the entire budget to allegedly fund major infrastructure projects and social programs; increasing reliance on the country's armed forces for public-security tasks and regular government functions; and weakening the constitutional system of checks and balances.

As part of his confrontation with other institutions, AMLO attacked and criticized the federal judiciary and the Supreme Court. He used his daily morning press conference to baselessly accuse the justices of receiving high salaries, tolerating corruption, and forming alliances with the country's elite. Supreme Court president Arturo Zaldívar, however, proved supportive of AMLO's political project and even receptive to his criticisms. Zaldívar convinced his colleagues to agree to a 25 percent salary reduction and to a plan that made some important cuts to the Court's budget. During his tenure, Zaldívar had significant power to influence the direction of the Court since the Court's president controls the case docket and moderates discussions. In most controversial political cases, a majority of the Court sided with the administration, and some cases remained dormant in the Court's docket without explanation.

In January 2023, the relationship between López Obrador and the Supreme Court radically changed when the justices elected Justice Norma Piña as Zaldívar's successor. Justice Piña, a longtime career judge, became president of the Court after revelations regarding serious academ-

ic misconduct derailed AMLO's preferred candidate. In contrast with Zaldívar's presidency, during the first months of Piña's term, the Court discussed some of the highest-profile cases in its docket. In many of these cases, the Court ruled against the administration's interests.

As authoritarian movements in Brazil and Mexico set the stage to attack and destroy the independence of the courts, the judiciaries find themselves at a critical juncture. But the remarkable resilience of the courts is undeniable.

The major clash and democratic near miss began in mid-2022 when AMLO proposed a constitutional amendment to overhaul the electoral system. This was a particularly galling move because Mexico's electoral authority—the National Electoral Institute (INE)—is widely seen as independent, competent, and perhaps even the crown jewel of Mexican democracy. While AMLO justified the plan on the basis of fiscal responsibility, international observers and

democratic activists saw it as a blunt attempt to dismantle the INE. At first, AMLO's major constitutional reform failed to reach the necessary two-thirds majority in Congress. But then AMLO's party pushed a scaled-down version of the project as ordinary legislation, which it had the votes to pass. This generated widespread public opposition, including several massive demonstrations that received national and international coverage. As critics argued, the statute significantly reduced the INE's powers to oversee the electoral process. And by mandating a reduction of around 85 percent of its personnel, it severely compromised the INE's capacity to organize the presidential election of 2024.

In June 2023, in one of the most important cases in decades, the Supreme Court heard a challenge against AMLO's legislation. The case attracted global attention because there was general agreement that if the reform proceeded, the INE could not guarantee free and fair presidential elections. Given the clash between the statute and the constitution's text, a failure by the Court to intervene would have signaled a further erosion of checks on the administration. After an intense national debate, the Court declared AMLO's electoral reform unconstitutional in a nine to two vote, with only the two most AMLO-aligned justices, both of whom were AMLO appointees, dissenting. In short, the Court held that it did not need to analyze the substance of the reform because the legislature had violated the legislative process when it rushed the reform through Congress, preventing the democratic deliberation that the constitution requires.

The Supreme Court's decision was inarguably groundbreaking and one of its most important yet. First, it prevented the dismantling of the country's electoral authority, which would have seriously endangered

the organization of free and fair elections in 2024. Second, it signaled to the president and his political allies that a majority in Congress did not exempt them from following the legislative process. This gave the opposition a chance to meaningfully participate in the deliberation process for major statutes. Lastly, it signaled to the president and the country in general that, at least for now, a supermajority of justices are willing to enforce the constitution in the face of sustained attacks.

As expected, in response to the ruling, AMLO escalated his attacks on the Supreme Court and individual justices. He announced that despite the decision, he will again propose a constitutional-reform project to transform the electoral system. Additionally, he announced a separate reform project to institute popular elections for Supreme Court justices instead of the current process that involves presidential nomination and Senate confirmation. His allies in Congress have announced that they will carefully review the Court's budget for potential cuts. As AMLO enters the last year of his administration, it is clear that he will continue his attacks on the Supreme Court in an attempt to subdue one of the few institutions that has been able to check his political power. Whether he will succeed remains to be seen.

Colombia. The Colombian Constitutional Court has earned global recognition for its independence, innovative defense of human rights, and high legitimacy among the Colombian populace. Much of this fame dates back to a decision in 2010, in which the Court declared then-president Uribe's attempt to run for a third term unconstitutional. Scholars and democratic activists agree that this was a near miss for democracy and a surprising demonstration of judicial power as an effective check on authoritarianism. Yet many are unaware that, since then, the Court has continued to exercise a role as a check on the executive.

The Constitutional Court's long-lasting power is rooted in Colombia's 1991 Constitution. The constitution adopted the default centralized model of a separate constitutional court that is vested with the ultimate power to decide constitutional questions.⁶ The new constitution also adopted two key features for this new constitutional court. First, it includes an appointment model that relies on several institutions to jointly select a relatively small number of justices. In contrast to the 23 justices on the Colombian Supreme Court of Justice, the Constitutional Court is only composed of nine justices serving nonrenewable eight-year tenures.

In addition to creating a new institution in charge of constitutional claims, the constitution also broadened the types and forms of claims that have access to constitutional review, including the Public Constitutional Action (PCA) and the *tutela* action. Under the PCA, any citizen of Colombia can present a constitutional challenge against any law or presidential action. Similarly, the *tutela* is a constitutional complaint that protects citizens' fundamental rights against the government.⁷

With its newly designed structural independence and constitutional vehicles, the Constitutional Court quickly developed a strong reputation for innovative recognition of human rights. Through the PCAs, the Court has decriminalized abortion and euthanasia, limited the emergency powers of presidents, and protected the civil rights of minorities. Repeatedly, the Court has declared presidential actions unconstitutional, even though the majority of justices were appointed by the sitting president. As mentioned previously, the Court rejected the possibility of a third term for then-President Álvaro Uribe.

In 2023, the Court again expanded its powers to check unconstitutional acts by the president. While the constitution gives the Court the power of constitutional review of statutes, there is no explicit provision that allows the Court to temporarily suspend an act of Congress pending a full decision. In 1994, the Court explicitly rejected this possibility when it declared unconstitutional a statutory provision that allowed it to temporarily suspend certain presidential acts. However, in March 2023, the Court unanimously reversed its decision and recognized that it does have the power to suspend laws when there is an “evident unconstitutional act” or when there is a “clear and present danger” that an act of Congress will produce irreparable damage to the constitutional order. The Court has not yet published a full decision, but the move already represents a major development.

The Court’s decision responded to more than a decade of congressional and presidential attempts to dodge constitutional limits by enacting clearly unconstitutional laws under the expectation that the Court could not review them in time. In 2022, Congress reformed a statutory provision that froze public hiring during elections. But instead of going through the regular legislative process, Congress snuck the amendment into a budgetary bill. The Colombian Constitution, however, clearly prohibits this, providing that any budget package approved by Congress can only include provisions directly related to the budget. Several congressmen knew their electoral reform was unconstitutional and would not survive scrutiny at the Constitutional Court. However, many expected that the new provision would apply in the forthcoming election prior to any Court decision.

The 2022 electoral reform and similar acts prompted the Constitutional Court to innovate, recognizing its powers to preliminarily suspend laws. The specific case involved a bill that gave the president broad power to negotiate peace with guerrillas and criminal groups. Popularly known as the *Ley de Paz Total* (Total Peace Bill), the bill was immediately challenged in court. Among other things, the plaintiff claimed that the bill produced irreparable damage because it put in place a system that allowed the president to unilaterally offer impunity to criminals. Faced again with an attempt to dodge its constitutional review powers, the court recognized that it has the power to preliminarily suspend

laws enacted by Congress. But, in an unexpected twist, the Court also declared that, in this case, the Total Peace Bill did not represent a clear and present danger to the Constitutional order. The Court thus created a new power but refused to apply it.

Critics have argued that the Court's newfound power is not rooted in any particular clause of the constitution. This may be concerning in the civil law context, where courts are not supposed to innovate in this manner. Some critics worried that, in the long run, recognizing extratextual powers could weaken the Court's legitimacy and increase its involvement in political disputes. The decision could also make the Court a target of reform efforts to weaken its independence. Even defenders of the Court worry that Congress could appoint more conservative judges with a restrictive approach to judicial power, as the Court faces a potential turnover of five out of nine justices in the next few years. This could present an opportunity for a coalition of politicians who wish to weaken the Court.

In Colombia, Brazil, and Mexico, the rapid and aggressive assertion of judicial power in a region that did not have a history of judicial independence demands an explanation. There are two potential sources of the courts' recent success: a series of external accounts that focus on changes in culture, media, and the unpopularity of some authoritarian governments; and internal accounts that hone in on the courts' appointment processes, personnel, and tenure protections.

Explanations from the Outside

Popular support. One account of judicial power argues that supreme courts are rarely countermajoritarian and that, indeed, canonical decisions are often explained by underlying popular support.⁸ Under this view, courts will assert judicial independence when they are backed up by popular support or when a particular decision aligns with popular views.

This could partly explain recent decisions in Mexico and Brazil as unsurprising because they align with popular opposition to authoritarian leaders. In Mexico, this explanation has some superficial appeal. At first, the Supreme Court's deference to AMLO matches his high rates of popularity and the particular popularity of his policy choices. On average, the Court upheld policies that had significant public support, including decisions on the expansion of the role of the military during Zaldívar's presidency. The telling also matches the Court's decision on electoral reform—although AMLO enjoys high support, his electoral reform faced significant public backlash. Civil society mobilized to protect the INE, leading to massive demonstrations in Mexico City that put pressure on the Court.⁹

The story is similar but more complicated in Brazil. As an initial mat-

ter, there was no single decision that we can analyze side-to-side with public polling. Rather, the judiciary clashed with Bolsonaro over many years, from 2018 to 2022. However, Bolsonaro lost popularity during his tenure, and especially after the pandemic in 2020 and 2021. During the Supreme Court's intervention against Bolsonaro's unpopular covid policies, surveys show that 60 percent of Brazilians favored more restrictive policies.¹⁰ Similarly, surveys indicate that most Brazilians were concerned with disinformation and supported additional regulations.¹¹ And popular support for democracy and a rejection of authoritarian policies reached record highs during key moments around the 2022 elections.¹² In Brazil, it appears that the Court's interventions were aligned with popular views.

Colombia's story does not neatly align with this account. The Constitutional Court has enjoyed high rates of popular legitimacy and support for the past two decades, which has given it institutional space to decide difficult cases. But the 2010 decision to disallow Uribe's third term was indeed countermajoritarian. Uribe and his proposed reelection reform enjoyed high popularity rates when the Court's decision came down.¹³ By contrast, during the recent 2023 decision, the Court recognized its power to preliminarily enjoin laws at a time of low popularity for Petro's regime. The Constitutional Court has repeatedly recognized countermajoritarian rights, including a decision on same-sex marriage at a time when 62 percent of the population rejected it.¹⁴ In this sense, Colombia's Court is an outlier.

Elite cohesion. Much of the literature on democratic near misses emphasizes the importance not just of popular support for democracy but also of elite consensus around democratic norms. In this view, it is the economic, political, and institutional elites who can negotiate around political demands for power.¹⁵ For instance, David Landau and Rosalind Dixon argue that "courts are most likely to be successful when . . . political parties or civil society are sufficiently strong to support implementation of court decisions."¹⁶ This explanation would point out that Supreme Courts in Mexico and Brazil represented a bastion of traditional elites who were united around a rejection of authoritarians, AMLO and Bolsonaro. In this view, the interventions by the Supreme Court of both countries are not strictly about growing judicial independence but rather about elite cohesion around democracy and a rejection of outsider populists.

In Brazil, Bolsonaro positioned himself as an extreme antiestablishment figure and a right-wing populist, even the nemesis of traditional political parties, mostly those of the left. A recent empirical study found that the Supreme Court became more active as Bolsonaro continued to deny the severity of the pandemic and attacked the court and other branches of government.¹⁷ When the Court began to oppose Bolsonaro, his supporters

used the fact that traditional parties, particularly the Workers' Party, had appointed most of the justices to attack the Court. Superficially, the elite-cohesion story seems to have some purchase because Bolsonaro faced opposition from important economic and political elites in Brazil.

Mexico had a similar structure of Supreme Court justices mostly appointed by establishment political parties and an outsider populist. The complication, however, is that two AMLO appointees were in the critical majority that opposed his electoral reform. In other words, the Supreme Court was not entirely dominated by traditional elites. And those elites were themselves somewhat divided by the massively popular president. Still, two of AMLO's appointments arguably came from the traditional elite, even if AMLO calculated that they would be friendly to his agenda. And the other two AMLO appointments—who supported his authoritarian attempt—were not part of the traditional elite. One of these appointees is the wife of a construction magnate with close personal ties to AMLO, and the other appointee was a long-time AMLO political ally. The elite cohesion account, then, could partly explain why two AMLO-appointed elite justices voted against him while two personal and political allies who were aligned with his populist ambitions voted with him.

Colombia, again, stands on both sides of this account. The Uribe decision came despite elite consensus in support of Uribe, while the 2023 decision arrived at a time when traditional elites opposed Petro's presidency. In the 2010 decision that opposed Uribe's third reelection, the Constitutional Court stood alone against a reform package that had already passed in Congress and, again, enjoyed broad popular support. By contrast, in the 2023 case, the Court's assertion of power came at a time when President Petro was growing unpopular and faced wide opposition by traditional elites. Like in Brazil, Petro's political coalition was fraying in early 2023 and completely collapsed in April when traditional political parties abandoned him. In the midst of this political collapse, the Court quietly asserted new powers to check the executive.

Media. A broader structural account is that Brazil, Mexico, and Colombia's media and culture have become much more democratic since the 1990s. For various reasons, media figures, popular culture, and influential actors are more committed to democratic norms than they used to be. And this culture could influence court decisions as well. In Brazil, most media outlets, including major newspapers *Folha de S.Paulo*, *O Globo*, and *Estadão*, and influential figures came out strongly against Bolsonaro's authoritarian attacks. In Mexico, too, from the moment AMLO became president, major media outlets such as *Reforma*, *El Universal*, and *Milenio* devoted attention to the Supreme Court and raised alarm about threats to democracy. The electoral reform arguably received the most domestic and international press coverage in the Court's recent history. This level of attention may have reduced the

Court's margin of action and pressured it to declare AMLO's reform unconstitutional. In Colombia, in contrast, the preliminary injunction decision did not face media scrutiny because it was seen as a technical and procedural matter, and media coverage of the government's Total Peace plan was politically polarized.

Explanations from the Inside

The Appointment Process and Tenure Protections. Another potential difference that could explain the countries' newfound judicial independence is that courts in Mexico and Brazil enjoy more robust appointment processes and tenure protections. This is especially true in Mexico, where the president sends a list of three names to the Senate for confirmation. However, there are reasons to doubt that the appointment process explains increased independence. Scholars have argued that the Senate does not serve as an independent check on the presidency because there is no tradition of senatorial review of judicial candidates. The Senate's role appears to be *pro forma*. The process also continues to be heavily politicized. Setting aside the appointment process, however, the 1994 reform provided significant tenure protections for justices. Justices enjoy a fifteen-year term and can only be removed through an impeachment process. Since the constitutional reform of 1994, no justice has been impeached. While one justice recently resigned under pressure, by most media and scholarly accounts, the other justices appear insulated from AMLO's pressure.

In Brazil, the appointment process and tenure protections did not change during the 1988 reforms, and so structural protections are unlikely to be a satisfactory explanation. As in Mexico, the president in Brazil appoints justices who are then subject to Senate confirmation. Historically, only five candidates have been rejected by the Senate. The process is highly political. Still, evolving norms around tenure guarantees may have played a role in insulating justices from political intervention. Since 2018, the Senate has received dozens of impeachment requests against all Supreme Court justices except those appointed by Bolsonaro. However, the Senate has yet to adjudicate any of them and Congress has only ever impeached one justice.¹⁸ The Court's budgetary power may also contribute to its independence. The Supreme Court has the autonomy to define the judiciary's budget, subject to congressional review, ensuring some independence from the executive.

The appointment-process account may have the most purchase in Colombia. Constitutional Court justices enjoy a high degree of independence and tenure protection. The composition of the Constitutional Court is determined by a complicated process in which the Senate appoints the justices from a list of three members chosen in a collaboration between the president, Supreme Court, and Council of State. Magistrates serve for eight-year terms, and only one justice has ever

been impeached. Colombia has developed a robust conception of judicial independence and its Constitutional Court magistrates conceive of themselves as defenders of democratic norms and institutions. With this power, the Court has opposed both Uribe and Petro.

Personnel. Brazilian, Mexican, and Colombian justices have increasingly been outsider elite lawyers not affiliated with traditional career judicial or political networks, with backgrounds instead rooted in elite academia, public prosecutorial roles, or private law firms. By this definition, Brazil's Supreme Court is composed of three traditional insiders and eight outsiders. In Mexico, the Supreme Court is currently composed of four insiders and seven outsiders. Colombia's Constitutional Court is even more dominated by outsiders, with arguably only one insider magistrate out of nine. Moreover, Constitutional Court magistrates are perceived to be highly competent, often come from academia, and are respected thinkers. The apparent high rate of outsider influence could explain these courts' distance from inward-looking judicial passivity and an embrace of judicial activism in defense of democracy. Traditional insider career judges are concerned mostly with the judiciary's standing and tend to abhor judicial activism or involvement in major political debates. By contrast, outsider elite lawyers are more likely to favor judicial activism.

But this account cannot explain the rejection of populists in Mexico and Brazil. Insider and outsider justices have been on both sides of political disputes. AMLO's four appointments to the Supreme Court, too, have been outsiders. Two were part of the traditional elite of government lawyers before being appointed to the Court but were not part of career judicial networks. The other two AMLO appointees are outsiders but are not part of the traditional lawyers' elite because they have close personal connections. In the electoral case, both insiders and traditional outsiders voted together against AMLO's electoral reform, and only AMLO's loyalists defended it.

Self-preservation. One final explanation is that justices and courts in the three countries have developed institutional identities and are preserving their courts from potentially existential attacks. In the Brazilian case, justices may have been motivated by self-preservation not only of their institution but also of their personal safety. When the attorney general failed to investigate death threats against Brazilian justices, the Supreme Court finally expanded its powers to launch an inquiry into those threats.

In Mexico, the Supreme Court also acted when it appeared that AMLO threatened the institutions of democracy, but not before. During AMLO's first years, the Court did not meaningfully oppose him. In order to protect themselves from AMLO's attacks, the justices agreed to a reduced budget and salaries. Perhaps the Court's self-preservation

instincts then provided reason to avoid clashes with the president. But the electoral-reform case represented an existential attack on Mexico's democratic institutions. There was every reason to believe that after destroying the INE, AMLO would have been emboldened and likely targeted the Court next. Declaring the reform unconstitutional served the Court's self-preservation interests.

The Colombian case again diverges. The Constitutional Court justified its 2010 decision against Uribe as a way to preserve the democratic character of the constitution. The Court reasoned that a three-term president could dominate other institutions, including the Constitutional Court. In the case of the 2023 decision, however, there was no apparent imminent threat to democracy.

Lessons for the Future?

The conditions that support democratic resilience in the judiciary remain unclear. Popular support for democracy is the most significant factor in some cases, while elite consensus is likely more significant in others. But whatever explains the emergence and consolidation of judicial power, one thing is clear: It is possible for independent judiciaries to serve as checks on populist authoritarians, even in notoriously weak democracies like those in Latin America.

Brazil and Mexico also indicate that the creation of independent institutions may simply take time. The aggressive judicial actions against populist authoritarians come thirty years after significant institutional reforms that sought to create powerful courts. It took decades for these courts to build popular support, to amass personnel unrelated to political insiders, and to develop innovative legal doctrines that allowed them to intervene at the right time. Even more, it took a confluence of events, including unpopular actions by autocrats and massive civil society pressure.

It may be too early to judge the judicial interventions in Mexico and Brazil. And it is undoubtedly too early to tell whether democracy will persevere and strengthen. AMLO's party may win the next Mexican election and cripple the Supreme Court. Bolsonaro could eventually return to power in Brazil. It is, however, late enough to judge the 1990s reforms. The democratic activists and elite politicians of that era were at least partly successful in building robust supreme courts. If nothing else, this teaches us that reformers should not give up on judicial power as a guarantor of democracy.

NOTES

1. David Landau, "A Dynamic Theory of Judicial Role," *Boston College Law Review* 55 (2014): 1501; Robert L. Tsai, "Why Judges Can't Save Democracy," *Syracuse Law Review* 72 (2022): 1542.

2. David Landau and Rosalind Dixon, “Abusive Judicial Review: Courts Against Democracy,” *UC Davis Law Review* 53 (January 2020): 1313.

3. Oscar Vilhena Vieira, Rubens Glezer, and Ana Laura Pereira Barbosa, “Supremocracia e Infralegalismo Autoritário. O Comportamento Do Supremo Tribunal Federal Durante o Governo Bolsonaro,” [Supremocracy and authoritarian infralegalism: the behavior of the Supreme Court during the Bolsonaro administration], *Novos Estudos CEBRAP* 41 (September–December 2022), <https://www.scielo.br/j/necl/a/MhZGQpCF7MTNjVF5BFsvrnv/#>.

4. Referendum on the Injunction Request in the Direct Action for Unconstitutionality No. 6,341, Supremo Tribunal Electoral, 23 March 2023, <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5880765>.

5. “Atos antidemocráticos: STF aceita denúncias contra mais 245 pessoas envolvidas,” Supreme Court, 16 May 2023, <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?iConteudo=507298andori=1>.

6. Miguel Schor, “An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia,” *Indiana Journal of Global Legal Studies* 16 (Winter 2009): 12.

7. Political Constitution of Colombia, art. 86.

8. William Mishler and Reginald S. Sheehan, “The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions,” *American Political Science Review* 87 (March 1993): 87–101.

9. “Mexico protests: Huge crowds rally against electoral reform,” BBC News, 27 February 2023, <https://www.bbc.com/news/world-latin-america-64781306>.

10. See “60 percent dos brasileiros apoiam ‘lockdown’, diz Datafolha,” G1, 27 May 2020, <https://g1.globo.com/politica/noticia/2020/05/27/60percent-dos-brasileiros-apoiam-lockdown-diz-datafolha.ghtml>.

11. See Noeli Menezes, “Pesquisa revela que 84 percent dos brasileiros apoiam lei contra fake news,” CNN Brasil, 18 June 2020, <https://www.cnnbrasil.com.br/tecnologia/pesquisa-revela-que-84-dos-brasileiros-apoiam-lei-contrafake-news/>.

12. Datafolha Instituto de Pesquisas, “Eleições 2020,” August 2022, <https://media.folha.uol.com.br/datafolha/2022/08/23/democraci378459812945fasfhj08.pdf>.

13. Rosalind Dixon and David Landau, “Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,” *International Journal of Constitutional Law* 13 (July 2015): 606.

14. “Mayoría de colombianos se opone a matrimonio gay: encuesta,” *El Tiempo*, 4 March 2015, <https://www.eltiempo.com/archivo/documento/CMS-15340079>.

15. Jeffrey K. Staton, Christopher Reenock, and Jordan Holsinger, *Can Courts be Bulwarks of Democracy?: Judges and the Politics of Prudence* (New York: Cambridge University Press, 2022).

16. Landau and Dixon, “Abusive Judicial Review,” 1313.

17. Vieira, Glezer, and Barbosa, “Supremocracia e Infralegalismo Autoritário.”

18. Isabella Alonso Panho, “Alexandre de Moraes Tem 40 Pedidos de Impeachment; Maioria é de Apoiadores de Jair Bolsonaro,” [Alexandre de Moraes Has 40 Calls for Impeachment; Most Are from Jair Bolsonaro Supporters], *Estadão*, 25 July 2023, <https://www.estadao.com.br/politica/ministro-stf-alexandre-de-moraes-pedidos-impeachment-senado-autores-apoiadores-jair-bolsonaro-nprp/>.