Who wants an independent court? Political competition and Supreme Court instability in the Argentine provinces (1984-2008) *

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1. Introduction

The problem of establishing and maintaining independent courts has merited the attention of a wealth of studies in contemporary political science. In their most abstract and general expression, their findings coincide with classical teaching, although they are couched in somewhat different terms: independent courts solve commitment problems. Commitment problems derive from the inter-temporal nature of social interaction and the fact that the wish to honor promises may dissipate over time. If taking back the authority delegated to courts is no more difficult than reneging on particular promises, courts inherit the very instability that they are expected to reduce. The solution works as long as the person who wants to commit limits her will, transferring parts of it, so to speak, to another person. The recovery of the power so transferred is more difficult, and thus the commitment more credible, if additional commitments or, more probably, the intervention of other people, may be trusted to prevent it. Constitutions can be thought of as systems of mutually reinforcing commitments (Holmes 1995) and the forceful intervention of people with goals opposite to those of rulers is more frequent under competitive systems of government. This is why constitutions (Weingast 1997) and democracy (Helmke & Rosenbluth 2009) make the rule of law more likely.\(^1\)

The conceptual affinity between democracy and the rule of law is strong (O'Donnell 2001). So is the affinity between democracy and judicial independence, which is a necessary condition for the rule of law. Yet the mechanisms through which this relationship works require theoretical elucidation and empirical confirmation. For this reason, theorists,\(^2\) students of American politics\(^3\) and comparativists\(^4\) have tried to identify the specific attributes of democracy that foster or hinder the autonomy of courts.

Among these attributes, political competition stands out. Theoretical analyses consistently find that intense political competition should protect judicial independence. A host of empirical studies produce

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\(^1\) Although the establishment of effective legal checks is also possible under authoritarian rule (Barros 2003; Moustafa 2007).


\(^3\) (Figueiredo & Emerson 1996; Cameron 2002; Jennings Peretti 2002; Whittington 2003; Whittington 2005).

evidence that is consistent with this expectation. The literature proposes two basic mechanisms through which political competition influences judicial independence: fragmentation and turn-over. Political fragmentation refers to the fact that authority is divided among agents with different preferences. It reduces the capacity of rulers to intervene on the judiciary because the dispersion of power makes more difficult to garner enough political support to curtail the autonomy of judges and easier to resist attempts at court curbing. Turn-over refers to the fact that members of different organizations rotate in the exercise of the executive power or in the control of legislative majorities. It does not affect the capacity of political actors but debilitates the incentive to constrain judges. Independent courts may rule against incumbents and thus reduce the present value of holding office. For the same reason, they increase the value of being in the opposition. Thus when rulers expect to remain in the political game for a long time but cannot ascertain which position they will occupy at any particular moment, respecting the independence of courts may increase their expected payoff. This logic has led some scholars to think of judicial independence as a form of political insurance that incumbents buy to reduce the cost of being out of office.

The case for political competition as a determinant of judicial independence is theoretically sound and consistent with the empirical evidence. However, the mechanisms proposed to account for it are different and not equivalent. Moreover, the potential effect of political competition on judicial independence is neither unique nor inexorable: it only obtains under specific circumstances. The most convincing theoretical discussions identify these circumstances with reasonable precision (Ramseyer 1994; Stephenson 2003). Yet most empirical studies of judicial politics in new democracies, particularly those about Latin American cases, tend to treat the different dimensions of political competition as equivalent and to overlook the conditionality of its effect on judicial independence. As a consequence these works lose much of the analytic richness and precision of theoretical discussions, overestimate the general validity of extant theory and produce inaccurate, incomplete or inconsistent portraits of empirical cases.

Our study aims at remedying these shortcomings in three ways. First, we discuss the mechanisms through which political competition may affect judicial independence, highlight the conditions under which they are expected to operate and offer a preliminary exploration of their possible interactions. Second, we explain why in certain circumstances and contradicting conventional wisdom, political competition may also be expected to reduce judicial independence. From this theoretical exercise we
derive a set of hypotheses whose explanatory power we test using an original data set comprising the supreme courts of 20 Argentine provinces between 1984 and 2008.  

Our central goal is to bring empirical studies of judicial politics into closer contact with theory development in the field. Since we focus on provinces and considering that judicial independence is a significant component of democratic government, we are also able to contribute to a dynamic research agenda on democratization at the sub-national level (Gibson 2004; Gibson 2005; Beer 2006; Gervasoni 2008; Gibson 2008; Ingram 2008; Giraudy 2009) and to produce a more complete and accurate portrayal of the Argentine case, which has been the object of several previous contributions.

The remainder of the paper is organized as follows. Section two justifies a definition and proposes an operationalization of judicial independence. Section three discusses the usages of theoretical models in empirical accounts of judicial politics in new democracies, considers the different rationales underlying explanations based on either fragmentation or turn-over as indicators of political competition, specifies the conditions under which these rationales are expected to operate and explores their possible interactions. Section four describes the statistical techniques, the hypotheses, the indicators and the sample used in our analysis. Section five presents and discusses our results. Section six concludes.

2. Judicial independence and supreme court instability

As it happens with many concepts that try to designate wide-ranging, complex and consequential political phenomena, the notion of judicial independence is far from uncontroversial. We cannot offer here a full discussion of the descriptive utility and normative validity of this notion. We do need to say, however, what do we mean by it and how will we go about describing its evolution.

Judges and courts do not count as political actors when they suffer incapacitating interferences. Incapacitating interferences are those that effectively annul the will of the actor who experiences them. Threats, bribes and physical violence are examples of such interferences. A judge that changes a ruling

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5 As several recent studies of Latin American judicial politics do (Bill Chavez 2003; Beer 2006; Ingram 2007; Ingram 2008) we compare provinces of the same country to control for the potential influence of unobserved background factors (Snyder 2001). Working with a larger sample, we are able to take fuller advantage of the variability in levels of political competition and institutional settings.

6 For a more general discussion of this topic, see the excellent essays compiled in Burbank & Friedman (2002) some of which we will refer to later on.
after receiving a threat and a judge that adjusts a decision according to the preference she imputes to a legislative majority are both behaving strategically. But these situations are not equivalent from a descriptive point of view and have different normative consequences. For this reason, we would like to distinguish between them.

The notion of judicial autonomy is intended to produce such distinction. It simply requires that judges do not suffer incapacitating interferences when they adjudicate cases. It is therefore not a sufficient condition for the rule of law, but it is a necessary one.\(^7\) The existence of laws has no practical effect; it does not solve commitment or any other type of problems, if there are no judges capable of deciding according to their interpretation of laws and freed from the irrelevant pressures that the parties to a case can bring to bear.

**Accounting for judicial autonomy.** Even in its “thin” version, judicial autonomy is a multidimensional concept.\(^8\) Our study deals with one dimension of this complex phenomenon: the stability of judges in their offices. It represents judicial autonomy imperfectly, for the permanence of judges in their positions does not imply that they are not suffering undue interference. Indeed, interfering executives and legislative majorities may choose to keep acquiescent judges precisely because they are acquiescent and likely to bend under pressure. However, judicial instability as a generalized and frequent phenomenon does imply lack of autonomy. We define judicial instability as the difference between the legally established and actually effective lengths of tenure attributable to external pressures. It could result from impeachments, trial by judicial councils or forced resignations. Thus defined, it represents the ultimate interference on the autonomy of individual judges and the most eloquent, if crude, tool to

\(^7\) Helmke and Rosenbluth (2009, 147) discuss this assertion. They contend that the relationship between judicial independence and the rule of law is conditional upon the type of regime and conclude that the former is neither necessary nor sufficient for the latter under democracies. We agree that in democracies the rule of law may ultimately rest on public opinion pressure or political fragmentation. Yet, typically these two fundamental forces sustain the rule of law insofar as they safeguard the ability of judges to adjudicate cases without fear of retaliation. We believe that in this less demanding, mediating sense, judicial independence remains a necessary condition for the rule of law.

\(^8\) Scholars have distinguished between the *de jure* and *de facto* (Rios-Figueroa & Staton 2009), individual and collective (Ferejohn 1999), internal and external (Rios-Figueroa 2006) aspects of it. A complete understanding of the phenomenon includes: a) the rules according to which judges are selected and confirmed in their positions (Epstein, Knight et al. 2002), their personal income is protected and their authority and responsibilities are delimited; and b) the extent to which these prescriptions are respected. Additionally, this more or less effective set of prescriptions shapes, c) the behavior of judges considered individually as well as the institutional position of the judiciary as a whole, and d) the relationships between judges and other public officials as well as the authority of higher over lower courts.
impose constraints on the judiciary as a whole.\textsuperscript{9} Therefore, we may not necessarily witness judicial autonomy when we observe judicial stability but judicial heteronomy is the most likely state of the world if instability obtains.

We study this particular dimension of judicial autonomy in a singular set of cases: provincial supreme courts. In our sample, they represent the highest echelon of the judiciary. In all cases, their authority is established in the provincial constitutions. Although the extension of their jurisdiction varies across provinces,\textsuperscript{10} they can be considered as the most relevant judicial actor in each province. If institutional protections are not strong enough and political dynamics not propitious enough to safeguard the stability of supreme court justices, it is unlikely that they would function more favorably to ensure the autonomy of lower tribunals.

In sum, our analysis proposes a distinctively elementary test of judicial autonomy. If autonomy does not work as expected in this fundamental dimension and for this relatively powerful actor, it cannot be hoped to work in more subtle aspects or at other levels.

3. The roots of judicial autonomy: the case for political competition

Several arguments have been advanced to account for different levels of judicial autonomy. In a recent review, Vanberg proposes a useful, simple notation to organize them (2008, 103-105; the notation is adapted from Whittington 2003). Elected officials derive a benefit $B$ from the existence of autonomous courts. The benefit may represent the utility derived from enacting credible policies (Landes & Posner 1975), limiting the range within which policy may oscillate, shifting blame to the judiciary from the adoption of controversial measures or reducing the uncertainty associated with the adoption of long term policies.\textsuperscript{11} However, rulings unfavorable to incumbent governments entail a cost $C$. Declarations of unconstitutionality or decisions that have a strong, immediate fiscal impact exemplify this cost. Faced with $C$, executives or legislative majorities may decide to reverse the judicial decision or punish the

\textsuperscript{9} Helmke (2002) interestingly observes that judges who are certain that they are going to be sacked may feel more and no less encouraged to defy executives and legislative majorities. This possibility implies that judges value those particular rulings more than the benefits and powers attached to their offices, including the power of continuing to decide over cases. This is a plausible though probably rare order of preferences.

\textsuperscript{10} As the authority of national courts varies across Latin American countries (Navia & Rios-Figueroa 2005).

\textsuperscript{11} Not all of these interpretations are plausible as Stephenson (2003) and Ferejohn, Rosenbluth and Shipan (2007) indicate. It seems nevertheless reasonable to postulate the existence of such a benefit.
court. These reactions entail an additional cost \( D \), which, for example, may be associated with the transactions costs of enacting new legislation or the electoral costs that may result from an attack of the court that the public rejects. Therefore, judicial independence obtains in cases

i) \( B - C \geq 0 \); or

ii) \( B - C < 0 \) and \( D \geq C - B \).

In case i the benefits of judicial independence outweigh the costs of unfavorable rulings. In case ii unfavorable rulings make net damage but retaliating on the courts is unfeasible or would only make things worse.

Among the factors that may determine the magnitude of these three attributes the literature stresses two: public support for the courts (Staton 2002; Vanberg 2005; Gibson & Caldeira 2009) and political competition (Ramseyer 1994; Stephenson 2003; McNollgast 2006; Ferejohn, Rosenbluth et al. 2007). Political competition may affect the magnitude of \( B \), it may make judicial autonomy intrinsically valuable. Alternatively, political competition may raise \( D \), it may make judicial autonomy more difficult to redress. Public support affects \( D \), it binds as long as a threat to judicial autonomy is perceived and becomes electorally relevant.

The case for the protective role of public support is simple and straightforward: the electorate values an independent judiciary andpunishes incumbents who infringe upon it. As we will see, the case for political competition is more complex and open to different interpretations. Additionally, it figures more prominently in accounts of Latin American judicial politics. For these two reasons, we focus on political competition, in the hope of achieving theoretical clarity for a relevant argument and contributing to a more accurate understanding of this region.

**Two dimensions of political competition.** Two aspects of political competition could affect judicial autonomy: fragmentation and turn-over. Fragmentation depends on legal prescriptions that indicate who is to decide on several aspects relevant for the functioning of the judiciary and could derive from

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12 Accounting for different levels of support for the courts, is not.
“separation of purposes” (Cox & McCubbins 2001) associated with, for example, different electoral rules or electoral calendars for executive and legislative offices or partisan fragmentation. Different electoral calendars or electoral rules make it more likely that legislative majorities and executives do not belong to the same party. If for some other reason the vote is widely dispersed, in general it is more likely that legislatures will seat members of a wide variety of parties. If any form of divided government obtains, impeaching judges, packing courts or replacing incumbent judges with others more closely aligned with the executive is less likely and, when it happens, it entails higher transaction costs. For this reason, fragmentation should protect the stability of courts.

Summarizing a reasoning largely influential in the literature, Ferejohn, Rosenbluth and Shipan (2007) explain the effect of political fragmentation in the following terms:

“Elected politicians have a variety of tools they can use to influence the actions of courts, such as appointing justices to their liking, passing legislation that overrides court rulings, or possibly even amending the constitution. But politicians are only able to undertake those measures to the extent that they are sufficiently coherent as a group to amass the legislative votes needed in each case. This line of argument points to political fragmentation as a crucial factor for predicting judicial independence, or to its converse, political cohesion, for predicting a weak judiciary.”

Turn-over refers to the fact that members of different political organizations rotate in the exercise of the executive power or in the control of legislative majorities. Turn-over may increase the intrinsic value of having an autonomous, and thus a stable, judiciary. The logic is the following. Incumbents and oppositions differ in their preferences over policy and outcomes. Policies and outcomes that increase the utility of incumbents decrease the utility of oppositions. When there is no judicial autonomy incumbents are expected to set policy at their ideal points or to renege on previous commitments. When there is judicial autonomy only constitutionally valid policies are accepted. These are likely to stand somewhat further from the incumbent’s ideal point. Also, when there is judicial autonomy previous commitments bind. Incumbents would increase their utility in any period if they are able to choose freely where to set policy and whether to fulfill their promises. However, if turn-over is frequent, the probability that they are in the opposition increases. Therefore the value attached to being in the opposition weighs more heavily in their calculations. Under these conditions, to accept a somewhat lower value to being in office in exchange for a higher value to being in the opposition increases
expected utility in the long run. Judicial independence affects these values and then it is more likely when turnover is frequent.\(^{13}\)

This other highly influential line of reasoning is thus summarized by Whittington:

> “A legislature may well be willing to maintain the independence of the judiciary as an insurance policy against future electoral defeat. Although a generally friendly but independent court armed with the power of judicial review may impose some unwanted restrictions on the current legislature, those costs may be worth bearing in the expectation that the same court would impose even greater restrictions on future legislatures controlled by a divergent party. Entrenching a convergent court can mitigate the consequences of future electoral defeat.” (2003, 454)

As the previous exposition shows, these are two different mechanisms through which political competition affects judicial autonomy. In the case of fragmentation, judicial autonomy obtains because incumbents do not have enough power to curtail it. In the case of turnover, there is judicial autonomy because politicians find more advantageous to grant it even though they could do otherwise.

The mechanisms are also independent. Parties may rotate frequently in office but muster significant majorities, particularly when the majoritarian bias of electoral rules is strong. This would be a case of high turnover and low fragmentation. The alternation between Labor and Tories in Britain is a good example of this combination. It has also obtained in Argentine provinces such as Chubut and Entre Rios since 1983. Alternatively, parties may win elections consistently but with narrow majorities or controlling only a plurality of votes in the legislature. This scenario combines high fragmentation with low turnover. It is more likely when electoral rules are relatively permissive or when opposition voters fail to rally behind a single opposition alternative. The Argentine province of Rio Negro, where the UCR has won all provincial elections since 1983, is representative of this combination. Of course, high turnover with high-fragmentation and low turnover with low fragmentation are also possible combinations. We do not deny these possibilities. But in order to clearly understand the effect of political competition on judicial independence we believe it is important to keep in mind that they are not the only feasible alternatives.

\(^{13}\) This explanation summarizes Stephenson’s model of judicial independence (2003). We shall return to it later.
**Political competition and judicial politics in Latin America.** Most Latin American judges spend relatively short periods in office, so inquiring who wants an independent court may evoke distinctively Latin American ironic overtones. A significant number of Latin Americanists have developed a rich literature on judicial politics in the region which, among other things, explores the roots of judicial autonomy. A significant portion of these studies explores the causes and consequences of judicial instability in Argentina, and closer to our provincial focus, a number of these studies explore the particular manifestations of this problem at the sub-national level (Bill Chavez 2003; Beer 2006; Ingram 2009).

Some of these influential works recognize the distinction between dimensions of political competition, but downplay its interpretive relevance. For example, fragmentation and turn-over are clearly identified as separate variants of one of the types of explanations that Beer (2006) considers in her study of judicial performance in the Mexican states. But in the interpretation of the empirical evidence, their effects are conflated. Beer writes: “just as opposition parties were making important gains in the legislature and state governments, a fragmented polity and a new electoral uncertainty converged, making leaders of the ruling Institutional Revolutionary Party (PRI) increasingly aware that they might need some kind of ‘insurance policy for the future.’ In a more general sense, increasing political competition led to greater judicial independence by influencing the behavior of members of the judiciary, as well as elected leaders in the legislature and executive” (Beer 2006, 47-48). In the same vein, contrasting levels of judicial autonomy in the Argentine provinces of Mendoza and San Luis, Bill Chavez (2003, 424) observes that “under divided government the executive cannot eliminate agencies that check its power. With rotation of the party in power the executive does not want to eliminate them.” A few pages before, however, the author had written:

> “Monolithic party control, a prolonged period of unified government under a highly disciplined party, stands in the way of the rule of law. Where significant interparty competition does not exist and party discipline is high, the executive branch faces incentives to concentrate power and is able to do so. Monolithic party control allows the executive to push through legislation that strips control organs of their capacity to check executive power. Intparty competition, in contrast, provides incentives for politicians to develop a meaningful system of checks and

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balances, a requisite element of the rule of law. A ruling party that foresees its displacement needs the protection of control agencies when it becomes the opposition.” (Bill Chavez 2003, 418).

The effects of fragmentation and turn-over on judicial autonomy obey different logics, they are conceptually distinguishable and unless we explore their interaction, we cannot assume that they are mutually reinforcing in practice. If this is correct, when we use both claims simultaneously in an interpretation of empirical evidence, we are compromising our ability to identify the relevant causal effect.

Interactions between fragmentation and turn-over. A brief consideration of the potential interactions between fragmentation and turn-over reinforces our previous remarks. There is reason to believe that the fragmentation and turn-over effects may not run simultaneously.

The effect of turn-over, conceived as an incentive to buy judicial insurance, should only be high when fragmentation is sufficiently low; that is, when a future incumbent majority is expected to be powerful enough to redress present policies or to otherwise harm current incumbents. If fragmentation is so high as to render future incumbents incapable of manipulating the judiciary, granting judicial independence today buys nothing in the future.

Alternatively, the effect of fragmentation does not seem to be conditional on the frequency of turn-over. If the protection of judicial autonomy derives from the fact that power is divided among actors with different preferences, it does not matter much with which probability they will occupy different positions. Insofar as they are authorized to decide over the fate of judges, they are all “incumbents,” regardless of the party or faction that occupies the executive office. Then, the effect of fragmentation on judicial independence should be similar across different levels of turn-over.

If this is correct, it cannot be the case that judiciaries gain autonomy both because fragmentation is high and because the probability that different parties rotate in power increases. Either incumbent majorities respect the autonomy of judges because they prefer to do so or because they cannot do otherwise.

Conditions of validity of the turn-over effect. The argument about judicial autonomy as an insurance policy may be found in several sources and has been expressed with varying levels of formality. The
most convincing theoretical expositions are Ramseyer’s (1994) and Stephenson’s (2003). In the context of studies of judicial politics in new democracies, it has been cited, for example, to explain the increasing autonomy of judiciaries in some Eastern European countries (Magalhães 1999) or judicial reform in Argentina, Peru and Mexico (Finkel 2001; Finkel 2004). Most of these empirical studies fail to stress the conditions under which the turn-over mechanism can be expected to operate. These conditions are specific and unless we deal with them explicitly we could be misled into believing that rotation of parties in office is a sufficient condition for judicial autonomy. We would rely on a brief presentation of Stephenson’s model (2003) to show why it is not.

Stephenson’s model defines judicial Independence as a decision of an incumbent party to adopt only policies that the judiciary deems legal. The model presents two parties with opposing preferences over policy. Incumbents set a policy, the judiciary decides over its legality and incumbents then decide whether to respect or ignore the judicial decision. Opposition parties wait and face the same choice about judicial decisions when they become incumbents. The model estimates five parameters and discusses their effects on judicial autonomy. Three of them define the behavior of parties: their aversion to risk, the rate at which they discount future outcomes and the probability they assign to winning elections. Two parameters affect the behavior of courts: one represents their partisan or ideological slant and another one, their deference to political authorities. Partisanship and deference define the size of the segment of policies that judges are likely to declare “legal” and so represents the magnitude of the policy impact of courts.

Among the various insights we could derive from Stephenson’s analysis, three are particularly relevant to our purposes. First, indeed, as the parties face similar probabilities of winning elections, the value derived from respecting judicial decisions increases. This suggests that more frequent turn-over should lead parties to respect judicial autonomy and, among the conditions consistent with it, the stability of judges in office. This result lends credence to the studies that attribute changes in judicial autonomy to variations in party turn-over.

Second, as it has been frequently pointed out (Ramseyer 1994; Helmke & Rosenbluth 2009) if a game such as this is repeated indefinitely, the equilibrium in which judicial decisions are respected is not unique. The author considers three equilibrium profiles. One in which judicial decisions are never respected, a second in which parties ignore judicial decisions as a way of punishing and inducing the
other party to adopt more cooperative behavior and a third, which the author analyzes in further detail, in which judicial independence obtains. The analysis does not establish the probability that we encounter each of these equilibria in practice. Empirical studies that account for judicial autonomy by reference to the turn-over argument seldom discuss the possibility that rotation in office may lead to any other result than increased judicial autonomy. According to Stephenson’s analysis, this would be a mistake.

Finally, as it happens with many models based on repeated games, results depend on the rate at which players discount future pay-offs. This is recognized in Ramseyer’s seminal contribution: “rational politicians in competitive electoral markets do not necessarily maintain independent courts” (1994, 740, emphasis in the original). This is not necessarily the case because, in his comparison of the US and Japan, decisions about the judiciary depend on two conditions: expectations about long term electoral dominance (the equivalent of turn-over) and the long term likelihood of democratic elections. When players do not expect to participate in future rounds of the game, the incentive to accept lower pay-offs in the present decreases.

Therefore, the effect of party turn-over on judicial autonomy should be conditional on all the factors that affect discount rates. Two of them are particularly relevant to analyze the Argentine provinces and also new democracies in general: the stability of institutional settings and party factionalism.

When electoral rules, party regulations or constitutions change frequently, the fundamental parameters of political competition are transformed. These transformations are likely to have significant distributive consequences among political competitors. Indeed, for the case of the Argentine provinces it has been shown that they were intended to have these consequences (Calvo & Micozzi 2005). Under these circumstances, even if democratic elections may be safely regarded as the only game in town for the foreseeable future, the set of players may change dramatically. Then, players should discount heavily future pay-offs and, as a consequence, the prospects of turn-over would not affect positively decisions about the autonomy of courts.

Something similar occurs when we consider party factionalism. If factions rotate frequently in the control of provincial party organizations it becomes uncertain who will reap the benefits of outcomes distant in the future. Cohesive and disciplined parties are the organizational devices that help individual
politicians internalize present costs in pursuit of future benefits. The prevalence of factionalism should debilitate any positive influence that party turn-over may exercise on the stability of courts. It should therefore be considered in any explanation that includes these two factors.

**Effects of political competition of judicial autonomy.** From this discussion we conclude the following: there are strong theoretical reasons to expect that levels of political competition affect the autonomy of courts; but the effect operates through different mechanisms. These mechanisms are conceptually distinguishable, point to politician’s different motivations and are unlikely to operate simultaneously in practice. One of them, turn-over, does not necessarily increase or safeguard judicial autonomy and it does so only under particular circumstances that influence the dispositions of political actors—especially, the institutional and political factors that affect their discount rates. Significantly, if discount rates are high the expectation of turn-over could lead incumbents in the opposite direction: they could try to reap all the benefits of office before they leave. This motivation may lead them to pose restrictions on judicial autonomy, including the replacement of judges. Our study of the Argentine provinces tests the explanatory power of these insights.

4. **Supreme court instability in the Argentine provinces**

Argentina is a federal republic with three levels of government: federal, provincial and local. There are 24 governments at the intermediate level. Argentine provinces dictate their own constitutions and electoral rules. In all provinces government is divided in three branches: a directly elected executive (governor), an elective legislature and a judiciary. Electoral formulas, apportionment rules, legislative structures and the composition of the judiciary vary significantly across provinces and, in some of them, have changed frequently over time. However, there is a supreme court in every province. Provincial supreme courts (PSCs) are the highest appellate court in each province and they are all entrusted with review powers. They can decide against provincial states in cases potentially onerous for incumbents and may suspend implementation of laws that they find unconstitutional. Every provincial constitution offers some form of *de jure* protection to the autonomy of the PSC and in every province court members are proposed by the executive and approved or rejected by a legislative majority. As we explain below,

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16 23 provinces and the autonomous city of Buenos Aires whose government does not have the exact same constitutional status as the other provinces but which, for the purposes of the present exposition, can be considered as another province. However, as we explain below, the city of Buenos Aires has been excluded from this version of our study.

17 The names of the highest tribunals also vary. For simplicity and familiarity we use the generic “supreme courts.”
the strength of \textit{de jure} protections and the details of appointment procedures vary both across provinces and over time.

Several studies have identified wide variance in the structure and dynamics of political competition across Argentine provinces since 1983 (Leiras 2006; Ardanaz, Leiras et al. 2008; Gervasoni 2008; Giraudy 2009). One frequently cited work focuses on contrasts between levels of competition in two of them to account for markedly different levels of judicial autonomy (Bill Chavez 2004). As this cursory introduction suggests, the Argentine federation offers then a propitious setting to test the validity of the theoretical arguments we have previously discussed.

\textbf{The model.} As indicated, our dependent variable is the relative stability of PSC justices. In this exercise, we test the influence of three groups of factors: turn over variables, fragmentation variables and institutional protection variables. The analysis also includes a set of controls.\footnote{In future revisions of this paper we intend to include a set of indicators of public support for the courts and to enlarge the set of controls including measures of the extent of review powers and jurisdiction of the courts.}

\textbf{The measure of the dependent variable.} Our purpose is to calculate the relative stability of PSCs as collective bodies. We also believe that elected officials should be concerned about the formation of friendly majorities and not the particular fate of individual justices. For this reason, we define the indicator of our dependent variable as a collective attribute of each PSC. It seems natural to calculate average tenure to capture this feature. All provinces replaced their SCs after the return to democracy. For this reason, any yearly measure of tenure will have a minimum of 1 in our sample. The sample spans the 1984-2008 period. It would be misleading to compare simple means at different points in time, for they are likely to be smaller immediately after the return to democracy. Thus, our measure weighs the average tenure of PSC justices by the age of the regime since 1984, according to the following formula,

\[ \overline{T}_{ij} = \frac{1}{n} \sum_{m=1}^{n} \frac{\text{tenure}_m}{\text{Age}_{ij}} \]

where \( \overline{T}_{ij} \) represents the mean tenure of PSC judges at year \( j \) in province \( i \); \( \text{tenure}_m \) represents the number of years each member \( m \) of the PSC with \( n \) members has been in office and \( \text{Age}_{ij} \) stands for the number of years elapsed since 1984 in province \( i \) at year \( j \). Calculated as a proportion, \( 0 < \overline{T} < 1 \).
sample includes values of \( \bar{T} \) for all Argentine provinces except for Ciudad de Buenos Aires, Tierra del Fuego, Catamarca and Chaco.¹⁹

High values of \( \bar{T} \) do not always represent high levels of judicial autonomy. However, low values may be interpreted as signs of heteronomy and therefore, factors that have a negative impact on the dependent variables may be read as limitations on PSCs. This caveat somewhat complicates the more general interpretation of estimates with positive signs. They could not be safely portrayed as guarantees of judicial autonomy. However, it would be odd to find a factor that favors other aspects of judicial autonomy but hinders judicial stability. Therefore, identifying factors that contribute positively to judicial stability, the design may capture at least a subset of positive determinants of judicial autonomy.

Some drawbacks of this measure should also be noted. First, all provinces start with a value of 1. If judicial stability rules were respected, provinces should deviate from this value by narrow margins and only for natural reasons.²⁰ However, given the details of the operationalization, the measure trends downwards and thus is likely to be correlated with estimates that increase over time. Second, since the denominator is the age of the regime, changes of the same magnitude may be expected to have a higher impact on \( \bar{T} \) if they occur later in the period.²¹ The significance of the problem depends on other attributes of the composition of the court. In the numerical analysis we performed the effect does not seem to lead to large biases. However, interpretations should also take this factor into consideration.

**Turn-over variables.** This group includes three variables: *years incumbent party, executive turn over* and *lemas*.

*Years incumbent party* (YIP) measures the number of years of that the incumbent party (the party of the governor) has spent in office in each province at any particular year. As a party spends more time in office it finds more opportunities to fill the PSC with friendly and trustworthy judges. Yet, the confidence that a long time in power inspires may encourage the replacement of judges should they unexpectedly

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¹⁹ Ciudad de Buenos Aires and Tierra del Fuego have not been included in the database because these two districts acquired ‘provincial status’ in the 1990s. Catamarca and Chaco were excluded from the dataset because data for the dependent variable could not be obtained.

²⁰ Our measure does not distinguish among reasons that led judges to abandon their posts. Judges could be forced to resign, but they could also choose to resign or die while in office. Our analysis implicitly assumes that the non-political causes of resignation are distributed evenly among provinces. Although this assumption seems reasonable, we are working on a different specification of the dependent variable which we will use in future revisions of this paper.

²¹ We thank Jason Seawright for pointing out this problem.
behave in a less amicable way. As the literature suggests, longer periods in office means that parties face weaker incentives to “buy” judicial insurance. Additionally, if for some reason the party in office changes after a long period of incumbent domination, judges appointed by the previous administration are more likely to be replaced or the structure of the court is more likely to be modified. For these reasons, we expect that higher values of $Y_{IP}$ decrease average tenure of justices.

Executive turn over measures the number of times a different individual has been elected to occupy the governorship. The fact that different individuals rotate in the governorship is an indicator of open political competition. Given the highly personalistic tendencies of some Argentine provincial regimes and the notoriously intense factional division of Argentine parties (Føhrig 2004), we found it convenient to include an indicator or personal turn-over to complement our measure of party turn over. If faction leaders assign a high probability to being out of power, the insurance argument suggests that judicial protection should become more valuable. Then, in line with the literature, we expect that as executive turn over increases the incentive to buy judicial insurance by granting the judges stability also increases.

Notice, however, that in a context of intense factional confrontation the future benefits of stability to parties should be discounted at a higher rate. We use the dummy variable $Lemas$ to represent factional divisions. It adopts a value of 1 when elections for executive or legislative provincial offices are held using double simultaneous vote rules and 0 otherwise. The adoption of this rule is generally interpreted as a means to prevent splits in highly factionalized parties (Calvo & Micozzi 2005) and to exploit the mobilization efforts of competing internal factions in favor of dominant candidates for governor (Leiras 2007). When a Ley de Lemas is in place we expect to find weaker incentives to buy political insurance through the courts. $Lemas$ should then have a negative impact on judicial stability.

**Fragmentation variables.** Two indicators are included in this set. One of them, $margin$, captures electoral fragmentation. The other, $majority$, represents fragmentation in office.

$Margin$ is simply the difference between the vote share of the party that won the governorship and the runner up. It is calculated for each electoral year and repeated for each subsequent year until the next election. Laakso and Taagepera’s (1979) effective number of parties is the most common indicator of electoral fragmentation. However, given the strong majoritarian bent of most provincial electoral regimes in Argentina (Calvo & Escolar 2005) electoral fragmentation would offer a distorted reflection of

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22 Based on Przeworski et al.’s (2000) coding. If a person spends a term out of office before being reelected to the governorship he is coded as a different individual.
the actual dispersion of political influence. When voters face coordination problems to adjust their behavior to the incentives of the electoral system (Cox 1997) electoral fragmentation reinforces the majoritarian bias and further concentrates power. Margins of victory could not be expected to always correlate strongly with electoral fragmentation. However, they seem to provide an indicator that is adequate to the contemporary situation in Argentina and the purposes of this study. Higher margins represent party dominance, low political fragmentation and then should decrease the average tenure of justices.

**Majority** is a dummy variable. It adopts a value of one when the size of the incumbent party block in the chamber of the legislature that decides on supreme court appointments\(^{23}\) is equal to or larger than the number of votes required by the appointment rule that is in place at the time. Otherwise, it is 0. Incumbent party sizes were compiled from the “Base de Legislaturas Provinciales en Argentina: 1983-2008” (Giraudy & Lodola 2008). Appointment rules were obtained from the authors’ coding of all provincial constitutions (including their amendments and reforms) between 1983 and 2008. Gathering enough votes to alter the appointment rule should facilitate court packing attempts. Therefore, we expect lower values of \(\tilde{T}\) when incumbent majorities of the required size are in place.

**Institutional variables.** As noted earlier, the size of PSCs as well as the procedures to appoint their members vary both across provinces and over time. The relative legal flexibility in the number of judges that must integrate the court is particularly relevant to this study. Some provincial constitutions, such as Córdoba’s and Ciudad de Buenos Aires’, establish a fixed number of members, thus limiting to a great extent the capacity of rulers to engage in court packing or to omit or delay nominations due to strategic considerations. In these cases, governors have virtually no room of maneuver to alter the size of PSCs’, unless they embark in a process of constitutional reform or amendment or are otherwise willing to pay the high cost of impeaching sitting justices. Other provincial constitutions establish a fixed number of justices in the constitution but stipulate that the size of PSCs can be either augmented or diminished by statutory law. These laws, in turn, differ regarding the type of majority (i.e., 1/2 or a 2/3 majority) needed for passage. Consequently, different constitutions as well as legislative procedures shape to a very large extent governors’ legal capacity to alter the size of provincial courts. These “mixed rules” (i.e., rules that combine constitutional provisions and statutory law stipulations) are found in Chaco, Tierra

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\(^{23}\) Provinces in Argentina have different constitutional structures. Before the first wave of provincial constitutional reforms, which took place during the mid 1980s, 9 of provinces had bicameral systems, whereas 13 were unicameral. Subsequent constitutional reforms altered these numbers, and as of today 8 provinces are bicameral, whereas 16 have a single legislative chamber.
del Fuego, Chubut, Río Negro, Mendoza, and La Rioja (since 2002), among others. Finally, there are some other provinces where court size is determined by statutory law. Such is the case of the provinces of Buenos Aires, Salta, Corrientes, and Misiones. In these latter provinces, governors have a more ample room of maneuver to modify the size of higher tribunals.

Cross-provincial disparities also exist in the regulation of justices’ tenures. In some provinces, such as Salta, PSCJs serve for a (fixed) 6 year term, whereas in others they serve for 10 years. Alternatively, some constitutions stipulate an age cap for PSCJs, as occurs in Santa Fe, where justices can stay in office until the age of 65. They are expected to retire at 75 in La Rioja and at 70 in Chaco. The rest of the provinces, though, grant PSCJs life tenure.

Different combinations of these rules should be systematically related to judicial stability. We use four variables to explore this relationship: *term limit, court size, rigidity in court size and change in court size rule*.

*Term limit* is a dummy variable that adopts a value of 1 every year that a fixed term or age cap rule is in place in a province and 0 otherwise. Term limits should lead to the more frequent replacement of justices and then to lower average tenures. Rules like these have been interpreted to constrain the autonomy of judges, particularly when reappointment is permitted. Reappointment promises or threats should be credible and thus effectively discipline judges. However, as long as they are stable and clear they need not be understood as a restriction on judicial autonomy. In any case, as there are strong reasons to believe term limits must have some effect, they must be included in our analysis.

*Court size* measures, simply, the number of members that should partake of the Court in each year according to the rules in place. As it happens with term limits, court size need not unduly restrict judicial autonomy. Yet, every single change should have a stronger decreasing impact on court average tenure in smaller courts. Therefore, we expect *court size* to be positively associated with $\bar{T}$.

*Rigidity court size* captures the relative difficulty that a change in this basic attribute of PSCs would entail. It considers the status of the rule and the size of the majority required to modify it. Provinces where the number of PSCJs is fixed in the constitution score 6; provinces where the number of PSCJs is fixed in the constitution but can be increased up to a given maximum (with a 2/3 majority) score 5; provinces where the number of PSCJs is fixed in the constitution but can be increased without a limit (with a 2/3 majority) score 4; if a minimum number of PSCJs is fixed in the constitution but can be augmented (with a 1/2 majority) the score is 3; provinces where the number of PSCJs is fixed in the
constitution but can be increased without a cap (with a 1/2 majority) score 2; provinces where the number of judges is not established in the constitution score 1. Data for these two variables were obtained from the authors’ coding of all provincial constitutions (including their amendments and reforms) since 1983 to 2008. More rigid rules should make court packing more difficult. We then expect this variable to have a positive impact on $\bar{T}$.

*Change in court size rule* is a dummy variable with value 1 for each year in which a law, a constitutional reform or a constitutional amendment alters the size of the Supreme Court. Otherwise, it is 0. If a reduction in size coincides with the replacement of court members with shorter tenure, we would observe a positive impact of this variable on judicial stability. However, this is an unlikely event. More typically, we expect to find court enlargements, which obviously imply the nomination of new members and therefore a reduction of $\bar{T}$.

**Control variables.** We would feel more confident about our results with a set of controls that includes other variables that the literature has found relevant; particularly, measures of public support for the courts or judicial legitimacy. However, due to data availability constraints, our set of controls includes only factors that are expected to have a relevant impact in our sample according to previous studies of the Argentine case.

The first one, *federal intervention*, is a dummy variable that scores 1 during the years in which the federal government intervened in a given province.²⁴ This variable was included because federal interventions are known to entail the wholesale replacement of all PSCJs. It is expected to have a negative impact on judicial stability.

The second control variable is *Peronist party*. Both folk opinion and some specialized studies postulate that Peronist governors have less respect for republican norms and formality in general than members of other parties. The theoretical underpinnings of this argument are rather unpersuasive. However, the persistent influence of this claim on a large proportion of students of Argentine politics merits a statistical test. The variable is coded 1 when a Peronist governor is in office and 0 otherwise.

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²⁴ The Argentine constitution authorizes the federal government to intervene provinces to remove provincial incumbents from office under conditions of civil disorder and threats to provincial governability. Despite the fact that federal interventions do not necessarily entail the removal of all elected and appointed officials, justices, and judges, in every federal interventions occurred between 1983 and 2008, both chief executives and PSCJs have been removed from office.
**Statistical specification.** We use a balanced panel data set with 500 observations for all Argentine provinces except four. There is a minimum of 19 and a maximum of 24 observations per province in the 1984-2008 period.

When data are pooled across time and units, several of the ordinary least squares (OLS) standard assumptions are violated, and as a result the usual procedures for hypothesis testing are no longer appropriate (Long & Ervin 2000). Several authors have provided alternative solutions to deal with these violations, including fixed-effects and random-effects models (FEM and REM, respectively), panel-corrected standard errors (PCSE), lagged dependent variable (LDV), autoregressive models with corrections for first-order auto-regression (AR1), among others (Beck & Katz 1995; Achen 2000; Huber & Stephens 2001; Plümper, Manow et al. 2005).

Here we follow Beck and Katz's (1995) recommended procedure and use panel-corrected standard errors, with corrections for first-order auto-regression, and imposition of a common rho for all cross-sections. Yet, we do not use a lagged dependent variable (LDV) on the right hand side of the equation. Such a procedure, as Achen, Huber and Stephens and Plümper et al. 2005, have demonstrated, inappropriately absorbs the significance of other explanatory variables. Instead, we follow Plümper et al.'s (2005) recommended analytic technique, and use a combination of panel-corrected standard errors with Prais-Winsten transformation (AR1).

We have both statistical and theoretical reasons to employ this analytic technique. First, in our data, the inclusion of LDV explains 74% of the variation in the dependent variables, thus confirming that a LDV does in fact suppress the explanatory power of other independent variables. Second, the inclusion of a LDV turns the analysis, both conceptually and theoretically speaking, into an analysis of change instead of one of level. This is problematic because, as we have noted in our theoretical discussion, many of our hypotheses as well as the some of the independent variables (such as the institutional and electoral variables) we use to test them, are time invariant –that is, they do not experience annual changes, but instead change, at most, every four years.25 Robust-clusters estimators of the standard errors and results of a REM model did not alter our Prais-Winsten estimations in any substantial way. Yet, in our discussion below we note what variables were not robust.

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25 This is also the reason for not employing unit dummies, as recommended by Beck and Katz (1995). Given that unit dummies, as Plümper et al. (2005) demonstrate, “completely absorb differences in the level of the independent variables across units” (331, their emphasis).
Results. To test our hypotheses we run three models. All of them include institutional and control variables. Table 1 reports their results. Model 1 tests turn-over variables. Model 2 tests fragmentation variables and Model 3 tests all.

The direction of most effects identified in model 1 confirms extant theory and our expectations. As parties spend longer periods in office, average tenure decreases. Changes in the court size rule lead to reductions in the stability of courts and the same happens when the federal government decides to intervene in a province. Also confirming our expectations, party factionalism, as represented by the election of legislators or governors according to a Ley de lemas reduces the stability of PSCJs. Predictably refuting the biased conventional wisdom, PJ governors are no more likely to reduce the tenure of supreme court judges than governors affiliated with other parties.

Some negative results are also interesting. The effects of term limits and court size are statistically indistinguishable from 0. More surprisingly, more rigid court size rules show a positive sign, but the magnitude of the coefficient is rather small and not statistically significant.
Table 1

Results of Prais-Winsten regressions with AR1 corrections

Dependent Variable: Average Supreme Court Tenure

<table>
<thead>
<tr>
<th>Variables</th>
<th>Model 1</th>
<th>Model 2</th>
<th>Model 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Years incumbent party</td>
<td>-0.007 ***</td>
<td>-0.006 **</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.002)</td>
<td>(.002)</td>
<td></td>
</tr>
<tr>
<td>Executive Turn Overs</td>
<td>-0.07 ***</td>
<td>-0.074 ***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(.01)</td>
<td>(.011)</td>
<td></td>
</tr>
<tr>
<td>Lemas</td>
<td>-0.064 **</td>
<td></td>
<td>-0.059 **</td>
</tr>
<tr>
<td></td>
<td>(.022)</td>
<td></td>
<td>(.02)</td>
</tr>
<tr>
<td>Margin of Victory</td>
<td></td>
<td>-0.002 **</td>
<td>-0.002 **</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(.00)</td>
<td>(.00)</td>
</tr>
<tr>
<td>Majority</td>
<td></td>
<td>-0.034</td>
<td>-0.042 *</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(.02)</td>
<td>(.02)</td>
</tr>
<tr>
<td>Term Limits</td>
<td>0.025</td>
<td>0.11 *</td>
<td>0.028</td>
</tr>
<tr>
<td></td>
<td>(.051)</td>
<td>(.06)</td>
<td>(.051)</td>
</tr>
<tr>
<td>Court Size</td>
<td>-0.011</td>
<td>-0.01</td>
<td>-0.004</td>
</tr>
<tr>
<td></td>
<td>(.008)</td>
<td>(.01)</td>
<td>(.007)</td>
</tr>
<tr>
<td>Rigidity Court Size</td>
<td>0.004</td>
<td>0.004</td>
<td>-0.003</td>
</tr>
<tr>
<td></td>
<td>(.012)</td>
<td>(.014)</td>
<td>(.012)</td>
</tr>
<tr>
<td>Change Court Size Rule</td>
<td>-0.17 ***</td>
<td>-0.18 ***</td>
<td>-0.18 ***</td>
</tr>
<tr>
<td></td>
<td>(.03)</td>
<td>(.02)</td>
<td>(.03)</td>
</tr>
<tr>
<td>Federal Intervention</td>
<td>-0.13 **</td>
<td>-0.09 *</td>
<td>-0.13 **</td>
</tr>
<tr>
<td></td>
<td>(.05)</td>
<td>(.05)</td>
<td>(.05)</td>
</tr>
<tr>
<td>PJ Governor</td>
<td>0.02</td>
<td>-0.003</td>
<td>-0.03</td>
</tr>
<tr>
<td></td>
<td>(.02)</td>
<td>(.02)</td>
<td>(.02)</td>
</tr>
<tr>
<td>Constant</td>
<td>0.82 ***</td>
<td>0.68 ***</td>
<td>0.86 ***</td>
</tr>
<tr>
<td></td>
<td>(.07)</td>
<td>(.08)</td>
<td>(.07)</td>
</tr>
<tr>
<td>Prais Winsten $R^2$</td>
<td>0.45</td>
<td>0.36</td>
<td>0.46</td>
</tr>
<tr>
<td>N</td>
<td>483</td>
<td>499</td>
<td>486</td>
</tr>
</tbody>
</table>

Significance levels: < 0.001: ***; < 0.05 **; < 0.1 *
Defying our initial expectation, the sign of *executive turn-over* is negative, the magnitude of the effect is large and highly significant. Controlling for other institutional and turn-over indicators, every election of an additional individual to the governorship is expected to reduce average tenure in the PSC in 7 percentage points. *Lemas, federal intervention* and *change court size rule* show also noticeable effects. *Years incumbent party* on the other hand, reduces average court tenure in less than one percentage point. These initial results suggest that the insurance mechanism is not a powerful motivation to protect the stability of judicial high tribunals. The certainty associated with electoral predominance does not seem to be the force driving efforts at curbing judicial autonomy, not, at least, when party domination is coupled with party factionalism and an unstable institutional environment. More significantly, the uncertainty resulting from frequent personal turn-over appears to motivate governors to fill PSCs with friendly justices. The large and highly significant effect of *change court size* seems to indicate that court-packing is the tool of choice to carry out this purpose.

Effects tested in model 2 also run in the hypothesized direction. Institutional and control variables behave as in model 1 and, except for term limits which shows an intriguing positive sign and a large effect which is statistically distinguishable from 0 at the .1 level. Contrasts between these results and those of the other two models suggest that this effect is not robust and therefore does not pose a serious interpretive challenge.

The effect of the institutional instability associated with *federal intervention* and *change in the regulation of court size* remains strong and statistically significant. As expected, *margin of victory* and *majority* have negative effects. However, to our surprise, the magnitude of the estimated effects is rather small (less than half and three percentage points, respectively) and the coefficient for *majority* is not statistically significant. This suggests that in the Argentine provinces political fragmentation makes somewhat more difficult to compromise the stability of PSCJs but not as difficult as our theoretical discussion led us to expect.

Some descriptive statistics help us make sense of this result. As table 2 reports, in the average election comfortable majorities carry governors into office (the average margin of victory is larger than 17 points). Predictably, governors are able to gather majorities large enough to alter the regulation of PSCs sizes a remarkable 84% of the time. Under these conditions, other determinants of judicial stability would need to have no effect in order for us to identify a more significant impact of fragmentation indicators in this sample.
Model 3 allows us to check the robustness of our previous findings. It yields effects whose direction, magnitude and significance coincides with previous models. There are two minor exceptions. Majority shows now a significant effect and term limits loses significance. Party predominance, as represented by years incumbent party and fragmentation variables still have small incidence on the dependent variable. The instability of Argentine PSCJs seems to be strongly associated with executive turn-overs, party factionalism, federal interventions and changes in the regulations of courts.

Table 2

Indicators related to Supreme Court Stability in the Argentine Provinces, 1984-2008

<table>
<thead>
<tr>
<th>Basic Descriptive Statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variable</td>
</tr>
<tr>
<td>Average Tenure</td>
</tr>
<tr>
<td>Years Incumbent Party</td>
</tr>
<tr>
<td>Executive Turn Overs</td>
</tr>
<tr>
<td>Lemas</td>
</tr>
<tr>
<td>Margin of Victory</td>
</tr>
<tr>
<td>Majority</td>
</tr>
<tr>
<td>Term Limits</td>
</tr>
<tr>
<td>Court Size</td>
</tr>
<tr>
<td>Rigidity Court Size</td>
</tr>
<tr>
<td>Change in Court Size Rule</td>
</tr>
<tr>
<td>Federal Intervention</td>
</tr>
<tr>
<td>PJ governor</td>
</tr>
</tbody>
</table>

5. Discussion

Dimensions of political competition and judicial instability. A first look at the results casts doubts on the argument in favor of turn-over. Predominant parties are in a somewhat better position to curb PSCs than parties facing more intense competition. However, the difference is not as significant as extant theory holds. Notice that if provincial executives are expected to control large majorities, as they
commonly are in the Argentine provinces, the prospect of being in the opposition is more worrisome and thus the incentive to buy insurance should be stronger. Our results are not consistent with this prediction.

Insurance is the price we pay to reduce risk and risk is the inability to assign a probability to a given event. Rules that are known to change frequently, provinces that are vulnerable to federal intervention and party factionalism increase risk. Yet, in our case, they seem to encourage politicians to seek a rather different and perhaps more reliable kind of shelter. It is not to grant autonomy to the judiciary to increase the payoff to being out of office but to appoint friendly justices both to increase the value and reduce the risk of being in office. Executive turn-over makes PSCs less stable, not more.

As mentioned, previous works contemplate this possibility (Helmke & Rosenbluth 2009). Additionally, we believe the results are consistent with Stephenson’s insightful model (2003), one of the most convincing versions of the argument for turn-over. In that case, shorter time horizons could debilitate the incentive to protect judicial autonomy. We understand the deleterious incidence of party factionalism as a sign of short time horizons. However, the argument in favor of judicial autonomy as political insurance is not always carefully specified and often used with a degree of certainty that our results or standard game theory would not justify. It merits insistence: cooperative outcomes in repeated prisoner’s dilemmas are not unique equilibria. Judicial autonomy may function as a mechanism of political insurance. It appears to do so under fairly restrictive conditions.

The persuasiveness of the insurance argument seems to be related to a privileged sensitivity to the concerns of oppositions, especially if they represent a minority. This focus seems justified in contexts of high institutional stability, where the instruments of government are rather effective and thus justifiably fearsome. But in highly volatile and factionalized environments, risk affects incumbents as well. They are probably less vulnerable than oppositions but far from invulnerable. Under these circumstances, Argentine provincial politicians seem not to be able to afford cooperative strategies. Thus each new governor is both willing and able to alter the composition of the PSC. The prospect of turn-over, far from leading them in the opposite direction, seems to encourage incumbents to do so, thus reinforcing a recurrent pattern of judicial instability.

The results offer somewhat stronger support to the fragmentation hypothesis. Both indicators of fragmentation show the expected sign. However, their magnitude is small. We attribute this finding to the relatively low variance at low levels of fragmentation registered in our sample. Most Argentine
provinces most of the time are rather concentrated political systems; they are institutional environments with few veto points. Under these circumstances we understand both that rules change frequently and that PSCJs face threats to their stability in office when they do.

Turn over does not protect judicial stability and fragmentation does not offer reliable warranties. What is the practical implication of this analysis? Would this finding mean that intense political competition has a deleterious effect on this aspect of democratic governance? It would not. Ours is not a case for elite pacts. In our view, the results suggest that the risk associated with low fragmentation and highly unstable institutions turns intense political competition into a threat to judicial stability. Reducing the majoritarian bias of electoral systems and reducing party factionalism could in turn reduce the risk associated with losing as well as winning elections.

**De jure measures of judicial autonomy.** As the consensus in the literature suggests, *de jure* constitutional protections do not prevent justices from being replaced. We are particularly confident in our results because we have measured carefully the relative strength of the offered protections. It is not enough to register the size of the majority needed to alter a particular rule but it is also necessary to take into consideration its constitutional standing. In this respect, our measure is more sensitive than other ones proposed in the literature. Our results confirm previous findings. However, some studies still measure judicial autonomy using *de jure* indicators. They should not. Constitutional prescriptions regarding the appointment and tenure of high court members are but declarations of intention which may or may not represent actual levels of autonomy depending on the evolution of the political context.

6. Conclusions

Judicial independence is a component of the rule of law conceptually and empirically, though not inexorably, associated with effective constitutional democratic governance. It is also a rather complex phenomenon, difficult to analyze theoretically and to capture empirically. We have proposed to conceive it as judicial autonomy and to gauge it according to an imperfect but still valid and comparatively reliable measure: judicial instability.

Extant theories of judicial politics hold that political competition reduces political instability. We share this conviction but believe that in order to understand more fully the dynamics of this relationship a distinction should be made between the turn over and the fragmentation dimensions of political
competition. As we have shown, these are conceptually independent dimensions. Yet there are reasons to believe their empirical effects should be reciprocally conditional. Further theoretical elaboration should bear in mind this distinction and try to further clarify its consequences.

Rich, well argued and convincing arguments --both formal and informal-- support the case for political competition as a condition of judicial stability. However we consider that these theses are not general nor are the equilibria they identify unique. This is particularly true of arguments that portray turn-over as a protection of judicial autonomy. The validity of this argument seems to be subject to rather restrictive conditions which should be understood more clearly and specified more precisely.

This warning should be of particular concern for students of judicial politics in new democracies. Most studies in this sub-field rely on case studies or small-n cross sectional comparisons. We do not have general theories to test but theoretically informed conjectures about the explanatory potential of several alternative and mutually compatible mechanisms. Therefore, small-n designs do not constitute a problem per se but could lead to misleading conclusions when they are performed, as they have been in several studies of Latin American judicial politics, as if they were testing or specifying general theories.

Finally, regarding the Argentine case, it has been argued that it is party hegemony that explains the singular instability of PSCs (Bill Chavez 2004). Our study shows that the opposite of hegemony, turn over, does not protect judicial stability either. The problem seems to be the concentration of power, not the fact that parties do not rotate in office. When all the relevant decisions are concentrated in the same places those decisions are likely to face few restrictions even if different people occupy those places at different times.
References


