

THERE IS NO LEGITIMACY CRISIS: SUPPORT FOR JUDICIAL INSTITUTIONS IN MODERN LATIN AMERICA

While important for every political institution, diffuse support—also called institutional legitimacy—is especially vital for courts. Conventional wisdom suggests that the U.S. Supreme Court enjoys a uniquely high level of public support; widespread pessimism colors existing assessments of high courts' legitimacy throughout the Americas. We show that not only is the U.S. Supreme Court not an anomaly, but the widespread assumption that Latin American courts are lacking in public legitimacy is fundamentally wrong. We conclude with a discussion of the implications of this research for future endeavors and make our case for more careful measurement and interpretation of these critical concepts in future research.

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All political institutions require the support of the public in order to be effective (Easton 1965). Scholars widely agree that the public’s diffuse support—otherwise known as legitimacy—is of unique importance for courts because these institutions cannot directly enforce their decisions. Reviewing a mature corpora of work on the institutional legitimacy of the U.S. Supreme Court, Gibson (2007) argues that “in comparison to other national high courts, the U.S. Supreme Court enjoys an extraordinarily wide and deep ‘reservoir of goodwill’—only a handful of institutions has support percentages approaching those of the American court” (522, see also Gibson, Caldeira, and Baird 1998).

Outside of the United States, widespread pessimism colors existing assessments of public support for national high courts in separation of powers systems. Seligson (2007), for example, reports that “nearly all surveys of Latin America have found that citizens hold their national legislatures and judiciaries in low regard” (89). Citing these low levels of public esteem for national high courts, scholars, politicians, and pundits make the leap from general *public support* to *institutional legitimacy*, suggesting that judicial institutions throughout the Americas are in a perpetual state of crisis, lacking in both political autonomy and institutional efficacy (Hammergren 1998; Prillaman 2000; Domingo 2004; Helmke 2005). This contention is not new. Verner (1984) notes the “often cited” assertion that Latin American “supreme courts do not have an effective, popular power base in the population” (473).

We challenge this conventional wisdom by cataloging variation in public support for courts throughout separation of powers systems in the Americas. We demonstrate that, contrary to common opinion, the assumption that Latin American courts are wholly lacking in legitimacy is generally misplaced. In fact, the public displays remarkable consensus in its institutional *loyalty* to its high courts, though public *trust* in high courts throughout the region is admittedly quite low. We attribute this to a misinterpretation of data that is widely available, but does not validly measure institutional legitimacy.

This descriptive result carries with it broad empirical and theoretical implications. The public's unwillingness to tolerate inter-branch aggression and non-compliance is a central mechanism in many prominent theoretical models of comparative judicial independence and power: the threat of public backlash for non-compliance or inter-branch assaults implies that incumbents should have no recourse but to respect the court and to comply with its decisions (Vanberg 2001; Clark 2009; Staton 2010). The centrality of this mechanism, coupled with the widespread assumption that Latin American courts are fundamentally lacking in public support, has fueled a consensus that Latin American courts are weak and ineffective, and that this lack of public legitimacy is ultimately to blame. Helmke (2010*a*), for example, argues that “low levels of legitimacy appear to have more explanatory power than several other intuitively plausible causes of judicial instability” (397). The empirical result reported here suggests there is much more to this puzzle than immediately meets the eye, and multiple empirical and theoretical assumptions deserve reconsideration in light of these findings.

MEASURING PUBLIC SUPPORT FOR JUDICIAL INSTITUTIONS

In his pioneering work on public support, Easton (1965) differentiates between two types of public support that institutions require. Easton identified *diffuse support* as “form[ing] a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants” (273). Other terms for diffuse support are institutional legitimacy, loyalty, or fealty. Legitimacy represents a willingness to accept the decisions and authority of an institution irrespective of one's disagreement with its decisions. Institutional legitimacy is often measured with a battery of survey questions that assess the extent to which individuals would tolerate fundamental changes to the institutional structure of a court. An unwillingness to support institutional changes reveals a profound commitment to the institution as it is. In contrast to diffuse support, *specific support* refers to performance satisfaction and approval

of institutional output. Easton (1965) described specific support as essentially “a *quid pro quo* for the fulfillment of demands”: specific support for an institution increases when an individual agrees with an institution’s outputs, and it declines in the face of disagreement with an institution’s decisions (268).

In spite of the centrality of these concepts for both pure theoretical and empirical work, Easton’s distinction between the multiple conceptual dimensions of institutional support—much less their empirical differentiation—is rarely considered directly outside the U.S. contexts (but see, Gibson, Caldeira, & Baird 1998 and Walker 2016). Constrained by a lack of available measures that adequately capture concepts of theoretical interest, analyses of institutional *confidence* measures are often interpreted as measures of institutional *legitimacy* (Kapiszewski 2012; Salzman and Ramsey 2013; Domingo 2004; Helmke 2005, 2010*b,a*). This interpretation is all the more troubling in light of the work of Gibson, Caldeira and Spence (2003), who document that the commonly used measures of institutional trust or confidence are more closely related to short-term performance satisfaction (specific support) than diffuse support.¹ They caution that “low levels of confidence should certainly *not* be interpreted as indicating low institutional legitimacy” (361), with other scholars raising similar precautions (Gibson, Caldeira and Baird 1998; Staton 2010; Kapiszewski 2012). Consequently, the inferences that have been drawn about the institutional legitimacy of

¹Gibson, Caldeira and Spence (2003) considered questions that differentiated short- (specific) and long-term (diffuse) measures of institutional support, finding that, while expressed confidence in the high court correlates weakly with diffuse support, it was strongly associated with short-term evaluations of the U.S. Supreme Court’s performance. They report that many respondents who appear wary or outright skeptical of the Supreme Court’s trustworthiness nevertheless displayed high levels of institutional fealty and were unwilling to accept or tolerate fundamental changes to the Supreme Court as an institution.

courts of the Americas are incomplete at best, and incorrect at worst.

PUBLIC SUPPORT FOR COURTS IN MODERN LATIN AMERICA

Our data come from the 2008 Americas Barometer surveys. While these surveys ask similar questions in other years, 2008 is the year with the best coverage across countries on our items of interest.² In Appendix A we show that the results are similar to other years in which similar questions were included in the core questionnaire.³ *Institutional Trust* is measured using the question “To what extent do you trust the Supreme Court?”⁴ We code respondents as trusting the court if they reported a 5, 6 or 7 on the 7-point Likert response scale. Our measure of diffuse support is based on respondents’ answers to the question “Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist?” This question taps abolition of the court, a concept similar to one identified by Gibson, Caldeira and Spence (2003) as a valid measure of Easton’s (1965) original concept of “diffuse support.” We discuss the validity of this measure in the next section.

Figure 1 lends additional credence to the assertion that the region’s high courts suffer a deficit of the public’s trust. The lighter-colored bars in the left-hand panel represent the percentage of respondents who said they trusted their national supreme court in 2008. Two conclusions are readily apparent. First, public trust in national high courts *is* generally

²The Americas Barometer has changed the wording of their diffuse support question over time. We assess the validity of both wordings below, and Appendix A demonstrates that our conclusion is robust to both question wordings.

³The data in Appendix A end in 2012; the Americas Barometer has not contemporaneously asked both questions in more recent surveys.

⁴Specifically, the question queries respondents’ “confianza,” which translates to either trust or confidence. We therefore use both terms interchangeably throughout.

lacking: the regional average is only 38%, with some cases that dip well below 20%. Second, the United States Supreme Court—the highest bar in the plot—far outpaces its institutional counterparts in terms of public trust, with more than 75% of U.S. respondents reporting trust in the U.S. Supreme Court.

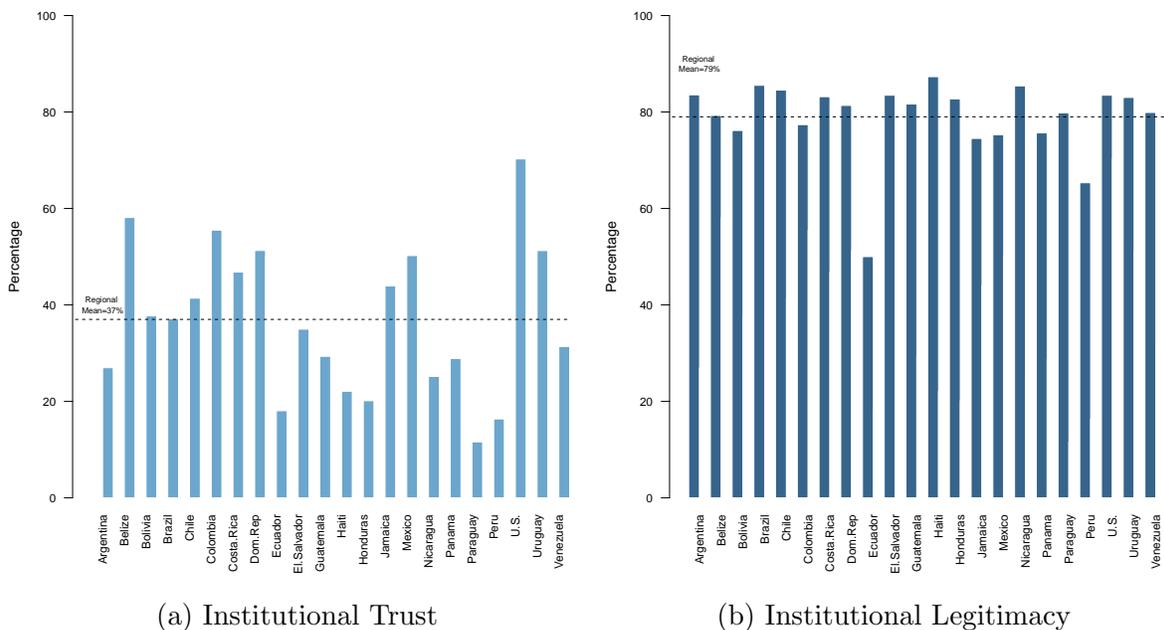


Figure 1: Darker-colored bars represent the percentage of respondents answering in the negative to the question “Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist?” Lighter-colored bars represent the percentage of respondents claiming a 5, 6 or 7 on that 7-point Likert scale, taken from the question “To what extent do you trust the Supreme Court?” The figures reported for the United States are taken from the 2006 AmericasBarometer.

Yet, turning to the right-hand panel of Figure 1, the difference between institutional *trust* and institutional *legitimacy* becomes readily apparent. Contrary to contemporary concerns about an overwhelming lack of institutional legitimacy, supreme courts throughout Latin America enjoy relatively high levels of institutional loyalty: a large percentage of all national populations profess an unwillingness to tolerate fundamental changes to their national high courts’ institutional integrity. Though the United States has long been as-

sumed to be unique in its “reservoir of goodwill,” Figure 1 suggests that it is neither unique nor an outlier. Relative to the other supreme courts of the Western Hemisphere, the U.S. stands only slightly above the hemispheric average of 79%. Far from implying widespread crises of legitimacy, these figures paint a picture of national high courts that, despite the public mistrust they inspire, are nevertheless broadly viewed by the public as a central component of the constitutional system. Taken together, these patterns suggest that we have more to learn about the origins of institutional trust and more profound institutional fealty for the high courts of Latin America.

MEASUREMENT VALIDITY

Some may question whether the question we consider adequately captures the concept of *diffuse support*. Caldeira and Gibson (1992) argue that measures of that concept should probe respondents’ “unwillingness to make or accept fundamental changes in the functions of the institution” (638). Moreover, Gibson, Caldeira, and Baird (1998) identify an item relating to the abolition of a court as “the clearest and most direct operationalization [of diffuse support]. If one agrees that it may be better to do away with the court... then obviously one is not supportive of the institution” (348). Similarly, Gibson, Caldeira and Spence (2003) contend that the “item about doing away with the Court has the highest face validity, given Easton’s original conceptualization” (363). Conceptually, then, the item accurately captures the concept of interest. Abolition is the ultimate “fundamental chang[e].”

Still, we acknowledge three ways that the question we evaluate is less than ideal. First, this question’s wording differs from the one explicitly advocated by Gibson, Caldeira and Spence (2003), leaving the respondent to imagine a hypothetical situation in which she would support an institutional change. Second, the question contains an explicit reference to “the President.” This phrasing might invite contamination. Priming respondents to consider the actions of a presidential incumbent may invoke responses that have more

to do with respondents' support for the incumbent rather than their commitment to the high court. Finally, the standard battery of questions commonly analyzed by Americanists includes a series of items querying respondents about their support for various institutional changes: removing high jurists from office, reducing the jurisdiction of a high court, making the court less independent, and doing away with the court altogether. Unfortunately, the full battery of questions was not asked in the Americas Barometer, and one might be concerned that only extremists are willing to abolish a supreme court. If true, the use of this item would artificially inflate our estimates of diffuse support. In the sections that follow, we probe the validity of this survey item.

Does the Item Scale with Widely-Used Measures of Diffuse Support?

The first two limitations relate to the wording of the Americas Barometer item. The wording differs from that suggested by Gibson, Caldeira and Spence (2003), and it mentions "the president," raising concerns of contamination. To evaluate the extent to which this question is a valid measure of the underlying concept of diffuse support, we included the two wordings used by the Americas Barometer question on a public opinion survey of 1000 respondents conducted on Amazon MTurk in December of 2017. We provide more information on the demographics of our sample in Appendix B.

The survey asked respondents the two Americas Barometer questions along with four questions suggested by Gibson, Caldeira and Spence (2003):

- If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether.
- The right of the U.S. Supreme Court to decide certain types of controversial issues should be reduced.
- Justices on the U.S. Supreme Court who consistently make decisions at odds with

what the majority wants should be removed from their position.

- The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want.
- Do you believe that there might be a time in which the president would have sufficient reason to dissolve the Supreme Court, or do you think that sufficient reason could never exist? (Americas Barometer 2006-2008)
- Do you believe that when the country is facing very difficult times it is justifiable for the President of the country to dissolve the Supreme Court and govern without the Supreme Court? (Americas Barometer 2010-2012)

This six-item scale has high reliability with a Cronbach's alpha is 0.80. Moreover, the item set is strongly unidimensional, with an eigenvalue of the first factor of 2.68 but a mere 0.39 for the second factor. The factor loading for the Americas Barometer question item is 0.51 for the Americas Barometer 2008 item and 0.58 for the 2010 wording. While these item loadings are lower the item loadings for the other measures of diffuse support in our scale (which range from 0.70-0.74), they are not out of the norm for other measures used in research on the U.S. Supreme Court, and are well in line with widely suggested cut offs.⁵ Thus, our Americas Barometer question appears to satisfy traditional metrics for factor loadings onto the same dimension as the gold-standard Gibson, Caldeira and Spence

⁵For example, Hair et al. (1998) write that "if the loadings are ± 0.50 or greater, they are considered practically significant" (111).

(2003) items.⁶ While the reference to the president or the hypothetical wording does seem to weaken the item’s connection to other, more widely-used measures of the concept, it does not appear to have wholly invalidated this question as a viable measure of legitimacy.

Is the “Do Away With” Item Too Extreme?

Eliminating an institution of the national government is a monumental change to the structure of a political system. We fully concede that this item may represent an outer bound of support. To this end, we are concerned with the likelihood that this measure artificially inflates our estimates of institutional support, yielding a meaningful difference between institutional trust and diffuse support only because our diffuse support item is unrealistically extreme. Empirically, would respondents who support the court on the question of abolition turn their back on the institution when given the opportunity to support other, less extreme measures of court curbing? Were this the case, it would suggest that the estimates in Figure 1 are falsely increased by the use of the abolition item.

Figure 2 provides some data on this point from our MTurk survey. The data for the figure is restricted to those “court-protective” respondents on the abolition question (in other words, they would *not* abolish the court), and the colors of the bars correspond to the three different question wordings for that concept. The height of the bars indicates the percentage of those respondents who gave court-protective responses on the remaining

⁶When the confidence item is added to the item set, it does not load well onto the same factor as the diffuse support items; its loading is a meager $-.38$. Moreover, a factor analysis of the Americas Barometer data suggest that respondents’ reported trust in the supreme court loads strongly on a common factor analytic dimension with their more general attitudes about the performance of the political system, as we would expect if that item captured performance satisfaction.

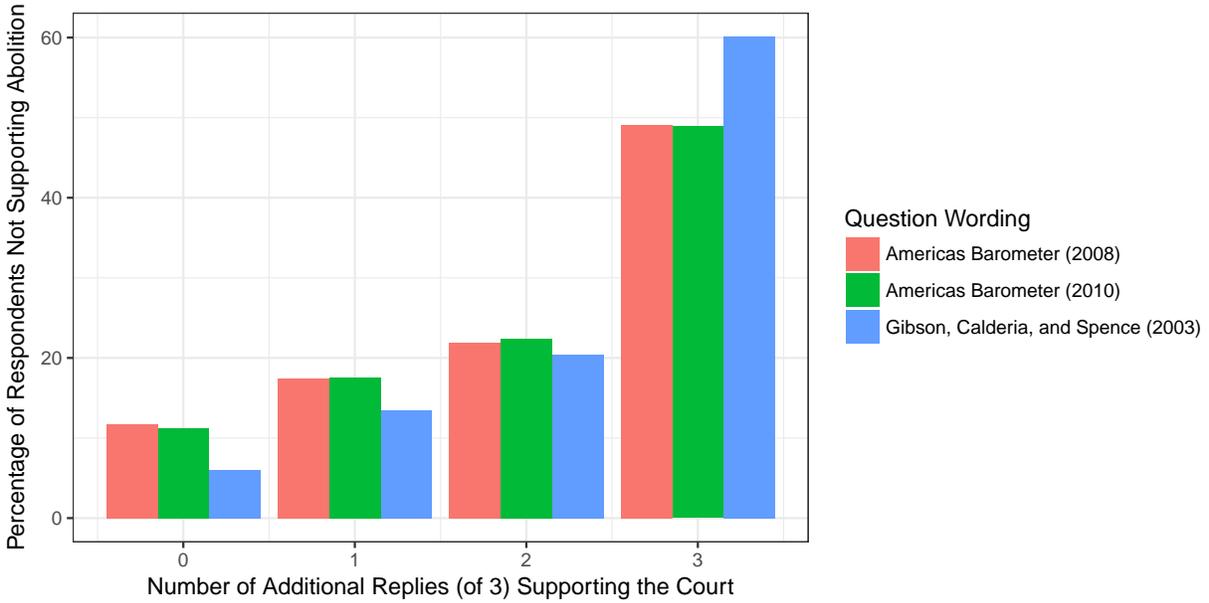


Figure 2: Diffuse Support for the Supreme Court Among Respondents Who Would *Not* Abolish the Court. The bars indicate the percentage of respondents who gave court-protective replies in response to other court curbing proposals.

three court curbing questions (regarding limiting independence, jurisdiction, or removing controversial judges). If it were the case that the “do away with” item was artificially inflating diffuse support, we should observe relatively high bars on the left-hand side of the figure: respondents are willing to support the Court against abolition but not against other types of attacks.

That is not the case. Irrespective of the wording of the question used to assess the proposal of Court abolition, the respondents who adopt a court-protective stance on the question of abolition are also court-protective on other, similar, items. Only a small number of respondents—less than 12%—appear to be extremists, supporting the Court on the question of abolition but not on any of the other institutional commitment items. While there is a good deal of variation across the number of supportive replies—a feature of such a scale, not a drawback—Figure 2 assuages our concerns that a large percentage of respondents support not only keeping the Court, but would protect it on all other fronts.

DISCUSSION

In this paper, we have evaluated institutional support for high courts across Latin America. Contrary to conventional wisdom, we suggest that these courts are not lacking in diffuse support; they are widely perceived as legitimate institutions. Our data suggest that Latin American supreme courts are just as legitimate as the U.S. Supreme Court, which has been widely regarded as the most legitimate constitutional court in the world.

The distinction we draw—between trust and institutional commitment—is one with a difference. This research serves as a call for more and ideally continuous systematic research on the micro-foundations of public support for high courts and political institutions writ large. As with many comparative researchers, we stand on the shoulders of the immensely important data gathering capabilities of those who run cross-national surveys. While some questions on these large-scale survey operations are ideal for some purposes, other concepts of interest are measured imprecisely (or sometimes not at all). Our analysis suggests that scholars must take care to only interpret measures as applying to specific concepts when the link between concept and measure is clear. Simply put, survey items about institutional trust or confidence *do not* measure legitimacy. And, of course, when scholars have the opportunity to design and implement their own surveys, they need to take care to design instruments that provide valid indicators of the concepts of interest.

This descriptive result calls into question existing conventional wisdom about the legitimacy of Latin American high courts, as well as related implications for assessments of their institutional integrity and potential efficacy. Institutional legitimacy is theorized to deter would-be institutional assailants and to promote compliance. The threat of backlash has been theorized as a critical mechanism for protecting high courts from incumbents, who would seek to influence or undermine high courts via court curbing attacks (Vanberg 2001; Clark 2009; Helmke 2010*a*). In the Latin American separation of powers systems, this threat of incumbent infringement and institutional assault is ever-present; a lack of

institutional legitimacy is commonly posited to be at fault (Kapiszewski 2012; Helmke 2010*a,b*). Our results suggest that there is more to the story here than meets the eye. If Latin American courts are more widely legitimate than previously believed, then it calls into question the benefits of court curbing attempts (c.f. Clark 2009), and the extent to which a lack of diffuse support is to blame for instability throughout the region (Helmke 2010*a*).

Second, but no less important, institutional legitimacy and the threat of public sanction is also a key mechanism for compliance with judicial decisions. This assumption has motivated a broad and compelling literature on strategic judicial behavior in high courts around the world (Kapiszewski and Taylor 2013), impacting everything from the decisions they craft (Vanberg 2001), interbranch relations (Clark 2009), and courts' procedural and publication decisions (Staton 2010; Krehbiel 2016). Consequently, it has been largely assumed that Latin American courts are generally impotent political actors and lacking in judicial power (Domingo 2004). Broadly speaking, our results suggest that Latin American high courts may have a reservoir of support that is deep enough to stand up to overreach by the other branches of government and to secure implementation of their decisions. Minimally, we have much more to understand.

REFERENCES

- Caldeira, Gregory A. and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36:635–664.
- Clark, Tom S. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science* 53(4):971–989.
- Domingo, Pilar. 2004. "Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America." *Democratization* 11(1):104–126.
- Easton, David. 1965. *A Systems Analysis of Political Life*. New York: Wiley.
- Gibson, James L. 2007. "The Legitimacy of the U.S. Supreme Court in a Polarized Polity." *Journal of Empirical Legal Studies* 4(3):507–538.
- Gibson, James L., Gregory A. Caldeira and Lester Kenyatta Spence. 2003. "Measuring Attitudes Toward the United States Supreme Court." *American Journal of Political Science* 47(2):354–367.
- Gibson, James L., Gregory A. Caldeira and Vanessa Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92(2):343–358.
- Hair, Joseph F., Ralph E. Anderson, Ronald L. Tatham and William C. Black. 1998. *Multivariate Data Analysis*. 5th ed. ed. Upper Saddle River, NJ: Prentice Hall.
- Hammergren, Linn A. 1998. *The politics of justice and justice reform in Latin America: The Peruvian Case in Comparative Perspective*. Westview Press.
- Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals and Presidents*. New York, NY: Cambridge University Press.
- Helmke, Gretchen. 2010a. "Public Support and Judicial Crises in Latin America." *University of Pennsylvania Journal of Constitutional Law* 13:397–411.
- Helmke, Gretchen. 2010b. "The Origins of Institutional Crises in Latin America." *American Journal of Political Science* 54(3):737–750.
- Kapiszewski, Diana. 2012. *High Courts and Economic Governance in Argentina and Brazil*.

New York, NY: Cambridge University Press.

- Kapiszewski, Diana and Matthew M. Taylor. 2013. "Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings." *Law & Social Inquiry* 38(4):803–835.
- Krehbiel, Jay N. 2016. "The Politics of Judicial Procedures: the Role of Public Oral Hearings in the German Constitutional Court." *American Journal of Political Science* 60(4):900–1005.
- Prillaman, William C. 2000. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Greenwood Publishing Group.
- Salzman, Ryan and Adam Ramsey. 2013. "Judging the Judiciary: Understanding Public Confidence in Latin American Courts." *Latin American Politics & Society* 55(1):73–95.
- Seligson, Mitchell A. 2007. "The Rise of Populism and the Left in Latin America." *Journal of Democracy* 18(3):81–95.
- Staton, Jeffery K. 2010. *Judicial Power and Strategic Communication in Mexico*. New York, NY: Cambridge University Press New York.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45(2):346–361.
- Verner, Joel G. 1984. "The Independence of Supreme Courts in Latin America: A Review of the Literature." *Journal of Latin American Studies* 16(2):463–506.
- Walker, Lee Demetrius. 2016. "A Multi-Level Explanation of Mass Support for the Judiciary." *Justice System Journal* 37(3):194–210.