Chapter 1

Courts and Public Policy Reform in Brazil

Courts are playing an increasingly important role in shaping public policy in contemporary Latin America. In Brazil, the judiciary has molded policy initiatives governing everything from political party representation to privatization; in Costa Rica, courts have shaped policies ranging from telecommunications competition to fishing regulations; and in Mexico, courts have had a hand in fashioning policies ranging from public sector pension reform to industrial expropriation. In short, from the Amazon to the Rio Grande, and in nations in between, courts' ability to influence the definition of policy alternatives (Schattschneider 1960, 68) is an increasingly prominent facet of political life.[1]

Correspondingly, scholars of Latin America are increasingly analyzing the role of courts in policymaking throughout the region.[2] This recognition of courts' policy relevance builds on four previous waves of political science research on courts in the region (Kapiszewski and Taylor 2006, 1–2): a first wave focused on judicial reforms (for example, Hammergren 1998, 2007; Prillaman 2000; Ungar 2002) and courts effects' on economic development (for example, Buscaglia and Ulen 1997); a second wave focused on the justice-related legacy of authoritarianism (for example, McAdams 1997; Barahona De Brito et al. 2001); a third wave focused on courts' contribution to social justice (for example, Méndez et al. 1999; O'Donnell 1994); and, finally, a wave focused on judicial politics (for example, Chavez 2004; Hilbink 2007) and the "judicialization" of politics (for example, Gloppen et al. 2004, Sieder et al. 2005).

Despite this growing interest, the policy role of the Brazilian judiciary remains underanalyzed in the comparative politics literature. This is surprising given the multiple justifications for tackling the Brazilian case. First, the Brazilian judiciary has been an especially consequential policy actor in Latin America's largest democracy. Three examples illustrate the active role Brazil's courts played in challenging many of the executive-driven policy reforms implemented between 1988 and 2004, the period covered in this volume:

- On April 29, 1997, Brazil's largest mining company, CVRD, was to be sold in an auction that was expected to garner over three billion dollars and kick off a round of major privatizations. A wave of lawsuits filed by opposition political parties and their allies, however, led to a nail-biting sequence of injunctions that repeatedly delayed and rescheduled the auction. Even though the sale was eventually concluded, a number of suits contesting the privatization process remained pending, some to this day.
- Agrarian reform has been a major issue in Brazil for several generations, but it became an increasingly contentious political subject during the 1990s, with land seizures by landless groups and violent police repression gripping public attention. Between 1993 and 2002, over three hundred people are believed to have died in conflicts in the countryside. Forced to address the issue, in 1999 the government adopted a new policy that streamlined expropriation procedures but also constrained the landless movement's tactic of land seizures. The policy seemed to be a successful attempt at reconciling interests on both sides. Successful, that is, until the national bar association successfully challenged the policy's limits on monetary claims in high court, thereby rendering the new policy largely ineffective.
- On September 30, 1999, Brazil's highest court made headlines when it suspended a tax on civil service pensions, in response to a suit by the bar association. The government was shaken by the defeat, which followed a fierce legislative battle for fiscal austerity in the wake of the catastrophic January 1999 currency devaluation, and generated a budget shortfall exceeding one billion dollars. Markets were even more unnerved: the Brazilian currency depreciated by 2 percent the following trading day, and strong capital outflows drove Central Bank foreign currency reserves down by 6.3 percent in the ensuing month. To compensate for the judicial decision and reverse deteriorating market sentiment, the Finance Ministry was forced to announce an emergency package of spending cuts and tax increases.

As these examples demonstrate, the policy effects of Brazil's federal court decisions can be significant. On numerous occasions, courts have been called upon to evaluate decisions made by Congress or the president, and on a fair number of such occasions, courts effectively halted policy implementation and sent policymakers back to the drawing board, with effects that reverberated across the entire body politic. Less dramatic, but nonetheless significant, were the thousands of daily interactions between government and society in the courts that, in an accretive fashion, have played a role in defining the options available to policymakers. In sum, the evidence suggests that over the past two decades, during Brazil's dual transition to market economics and democratic government, courts at all levels of the judiciary have helped to define the alternatives available to policymakers, legitimating or de-legitimating certain policy choices.

In this sense, Brazil's courts directly challenge the prevailing regional stereotype of pliant judiciaries—a vision kept alive by cases such as Argentina or Chile, where courts have had a much less significant effect on policy outcomes in the post-transition era. More broadly, the Brazilian case offers a significant Latin American complement to existing research focused specifically on courts and public policy, which has predominantly addressed the experiences of more consolidated North American and European democracies and, more recently, the European Union and its own supranational courts (for example, Jackson and Tate 1992; Stone Sweet 2000, 2005; Volcansek 1992).

The Brazilian courts' role in the policy process, however, teaches us about more than judicial politics and power in a crucial Latin American case. It also illustrates what motivated policy actors may be able to achieve in a propitious judicial environment. Policy reform is difficult in most contexts, but it has represented a particularly great challenge in Brazil's new democracy due to the confluence of several factors: the country's sheer scale, the depth of the economic crisis bequeathed by the military regime, the breadth of the 1988 Constitution, and the difficulty of finding the super-majoritarian support needed to approve many reforms. Under these conditions, political opposition was bound to occur. What was not anticipated—and has been insufficiently analyzed—is policy opponents' selection of the *judicial* route to achieve their policy objectives, and how this choice has increasingly thrust the Brazilian courts into the vortex of policy debate.

Brazil is also a fitting case study because of the country's prominent place within the broader comparative political science literature. Brazil is a leading developing nation, with the world's fifth largest population and an economy that accounts for more than a third of the Latin American regional

GDP. This book, building on in-depth empirical study and on a wealth of new material on the Brazilian judiciary produced in Brazil itself,[3] seeks to integrate the courts into the excellent body of existing research in comparative political science on political institutions and policy outcomes in Brazil.[4]

I use the case of the full Brazilian federal court system, including the high court *and* lower courts, to develop a framework for understanding how courts are drawn into the policy game and how policy players use courts to advance their strategic political objectives. In so doing, this book speaks to broader debates surrounding judicial politics and the role of the judiciary as a crucial component of the gamut of institutions used to explain policy choice in Latin America's new democracies.

Courts in the Policy Game

Skeptics have posited many reasons why courts may not have significant policy effects.[5] First, courts are inherently reactive.[6] It is rarely reasonable to assume that the courts are "veto players" in their own right, much less that judges can or do actively seek out policies to influence along the lines of their normative preferences. Moreover, for policy players with access to many different venues, courts are frequently last on the list of institutions that come to mind when one considers the tactical options available to shape the public policy "game" and influence policy outcomes.

Further, given their close ties to governing elites and their general reliance on the elected branches of government for funding and survival, courts may be naturally cautious (see, for example, Dahl 1957). Because judges generally rule on specific cases, rather than general rules; because they can only act when called upon; and because they act as an arbitrator only when a law leads to dispute, on the face of it judges have little power to selectively influence policy. Despite significant evidence to the contrary, the analytical waters are further muddied by an enduring conception of courts as "neutral" institutions whose rulings are founded in legal rules rather than normative preferences (Friedman 2005). Finally, a weighty body of research questions the degree to which courts can be effective producers of social change except under exceptional circumstances (for example, Epp 1998; Rosenberg 1991; Shapiro 2004).[7]

And yet, these concerns notwithstanding, the evidence of courts' policy relevance cannot be disregarded. The potential for courts to have any policy relevance has two foundations. The first is that in a majority of nations, judges are given the right to found decisions on broad constitutional grounds, potentially imbuing them with "immense political power" (Tocqueville 1969, 99–101). The second is that even when they are not based on constitutional

foundations, the results of court decisions build up over time in an accretive fashion: "Legal rules are never neutral. Every legal rule, or even principle, always prefers one interest, right, value, or group over another. . . . Thus, in the aggregate and over time, judicial decisions on such issues inevitably affect general public policy as well as economic development" (Murphy et al. 2002, 44). Partly as a result of these two foundations of judicial power, in U.S. academic circles by the 1960s there was an "open, childlike, acknowledgement of the obvious . . . courts were significant actors in American politics" (Shapiro and Stone Sweet 2002, 4). A similar epiphany has recently struck scholars of regions outside the more common European and North American case studies (for example, Gloppen et al. 2004), helped along in part by evidence of a growing "judicialization" of politics.[8]

That said, even if courts play a role in shaping the direction of policy possibilities, we do not really know much about how that role is determined. Why are some courts so much less relevant to policy outcomes than others? By contrast, when courts do play an important policy role, is their role essentially conservative, reinforcing the status quo, or are they effectively used to stake bold new claims?

The main reason to study the courts here, then, is to better understand how they are brought into the policymaking process, and the magnitude and direction of their effects. For those wondering how courts might gain policy importance in other new democracies, the evolution of the Brazilian judiciary over the past two decades offers an intriguing—but not unambiguous—case of judicial strengthening. For those interested in the policy role of courts, this book explores how it is that Brazilian courts are drawn into the policy game. More important, for skeptics who question the ability of courts to influence policy, it asks *why* they are drawn into the policy game, given that their expected impact is indeed only marginal in comparison to that of the elected branches. Finally, those who trust in the courts' potential as socially transformative institutions at the heart of new democracies will be interested in this book's discussion of the factors that shape policy actors' ability to achieve their policy objectives through the courts, the ways in which court structure influences the relative strength of different members of society, and hence, the types of social transformation courts permit.

The broad premise on which this book is founded is that the rules governing access to institutional venues for policy contestation matter significantly to final policy outcomes. The courts are no different in this regard from other political institutions, such as bureaucracies or legislative committees. Courts only act when they are called upon, but given that court decisions have an effect on policy because legal rules are never neutral, once courts are activated they can wield considerable policy influence. Hence, the question of

how they can be activated by different policy players is vital to understanding their importance in the policymaking process. For too long, analyses of judicial behavior have attempted to explain judicial behavior while ignoring the role and the motivations of those who trigger judicial intervention.

Engaging the judiciary to achieve one's policy ends is not a particularly difficult task for any group that can afford a lawyer. Organizing a legal challenge is certainly no more difficult, and on occasion considerably easier and less expensive, than attempting to shape the policymaking process in Congress or the executive branch. But much depends on how policy groups are organized internally, and how this organization shapes the groups' ability to implement coherent legal tactics that advance a broader political strategy. Much also depends on the broader conditions of "legal enfranchisement," that is, the types of legal instruments available (either by law or in practice) to any given plaintiff. Worldwide, it has long been a nostrum that not all groups are equal before the courts. In many civil code systems, these different levels of legal franchise are written into the formal legal structure, with some organizations, for example, given access to specific legal instruments or to privileged forms of standing that are not available to others. Such differences are frequently grounded in constitutional texts and other founding documents, and help to shape the tactics used to pursue policy outcomes in the courts.

Further, courts are not exempt from strategic "venue-seeking"—that is, policy actors' pursuit of the best possible institutional venue from which to influence policy outcomes.[9] The tactical opportunities afforded by the courts as a potential venue will vary based on formal institutional rules, such as those governing standing or precedent; informal rules, such as tacit attitudes within the legal community governing what types of appeals are permissible or appropriate; and the overall administrative performance of the courts, as reflected in judicial efficiency or practical access to judicial remedies.

The most significant impact courts can have on policy comes when a judge or court, especially a high court whose decision cannot be appealed and whose rulings may have effects that go far beyond the plaintiff and defendant at hand, issues a decision in a given case. Many studies have focused on the factors that may influence such a decision, including the ideologies or attitudes of judges (for example, Segal and Spaeth 1993); the strategic reactions of judges to the threats they perceive to themselves or to the court (for example, Epstein and Knight 2000; Helmke 2005); the degree of societal support for the courts (for example, Staton 2004; Vanberg 2001); and the trade-off judges and particularly high court justices face between making broad constitutional decisions that could bring significant change but might place the court in jeopardy, or smaller-scale, administrative decisions that

will bring little change in the short term but may build court power gradually over the long haul (for example, Roux 2004; Uprimny 2004).

As all of this research suggests, there can be little doubt that the study of judges' patterns of decision making is vital to understanding a given courts' effect on public policy. But academics worldwide have been so intent on explaining judicial decision making, especially by high courts, that they have often set aside the equally important, antecedent question of what policy issues the courts are in fact asked to decide, by whom, and why. Two core arguments may help remedy this situation; they are briefly presaged in the next sections.

ACTIVATING COURTS TO POLICY ENDS

Long before any judge makes a decision, several precursor factors play a crucial role in influencing the judiciary's overall effects on policy, by shaping litigants' views of whether the courts can and should be activated to policy ends. These dynamics are not unimportant, nor are they random. Without taking them into account, we cannot begin to understand how courts become relevant in the policy game.

My first argument is that three factors—policy salience, political environment, and the judicial institutional environment—have a significant effect in determining which public policies actually have their day in court (Figure 1.1). These factors influence policy contestation at several levels: they shape actors' strategies in the political system as a whole, drive the decision to activate the

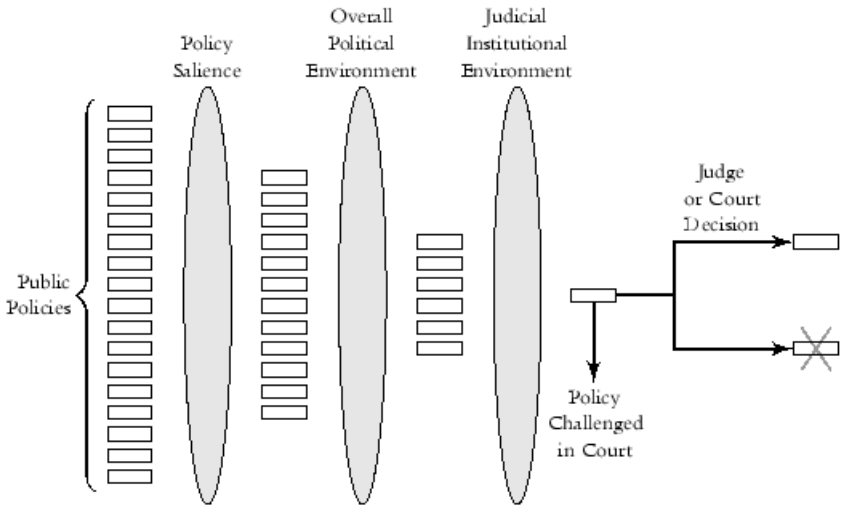

Figure 1.1. Key factors in the activation of courts on policy questions

courts as a venue for policy contestation, and mold the legal tactics policy actors employ within the judicial venue.

The first factor is the salience of policy. Not all public policies are equally salient, and some are more likely to lead to contestation than others. Whether policy is contested in the courts or in congressional committee hearings, the degree of contestation is highly influenced by how the costs and benefits of policy are distributed, and, especially, by how this distribution influences the likelihood of policy "losers" organizing to fight against policy change (for example, Lowi 1964, 1972; Wilson 1995). Ultimately, however, salience varies greatly across members of society, and the only type of salience that matters to the argument here is the salience of a given policy to potential plaintiffs. This is determined by the concrete costs and benefits of the policy to a potential plaintiff's interests, as well as the rather less quantifiable costs and benefits to that plaintiff's beliefs and mores, which I aggregate under the label "ideas." In the case of organized policy groups, the path between these subjective perceptions of policy and actual political tactics is further mediated by the group's internal institutional structure, and, in particular, how it influences the tactical decisions made by the group.

The second factor is the overall political environment, which includes both fleetingly contingent political conditions and rather more stable (but not immutable) institutional rules governing the political regime.[10] Regarding the former, it is possible, for example, that some policies may benefit from such broad popular support that challenging them could be politically perilous for potential plaintiffs. In terms of the latter, institutional rules in the overall political system—which include such unwritten constraints as societal consensus on the proper role of legal contestation in the political system, as well as formal rules such as those governing judicial intervention in ongoing legislative deliberations—shape the place of courts in plaintiffs' overall political strategies. As a result, these institutional rules help to determine whether some policies will be challenged at all in the courts, or whether policy players will prefer to engage alternative institutional venues, such as regulatory agencies, civil service bureaucracies, or congressional committees. A number of different tactics may also be simultaneously employed in the service of a broader political strategy, meaning that a court suit may be filed in conjunction with other tactical efforts, such as lobbying in Congress, efforts to undermine bureaucratic implementation, or a public relations blitz.

Finally, the third factor that helps to determine whether a given policy actually goes before a court or judge is the judicial institutional environment, within which three features are of particular interest from a policy perspective: the structure of judicial independence, the structure of judicial

review, and the administrative performance of the courts. Once a policy player decides to use legal tactics in the service of a larger political strategy, these tactics are shaped by the prevailing rules of the judicial system, which will in turn shape potential plaintiffs' analysis of whether policy contestation in the courts is a wise tactical option.

The first argument, to summarize, is that the use of the courts for policy ends is shaped by the salience of policy to specific policy actors and the way in which both the broader political environment and the specific judicial institutional framework shape the likely success of policy contestation in the courts, especially in contrast to (or in combination with) other potential venues of policy contestation. Court involvement in policy debates, in other words, cannot be studied in isolation from the broader strategies of political actors in the overall political system.

JUDICIAL TACTICS AND POLICY CONTESTATION

The second argument presented in this book is that the judicial institutional environment has a significant effect in shaping the legal tactics adopted by policy players. Once a policy has triggered opposition, in other words, the third factor in Figure 1.1 comes into play. Key to determining which actors are legally enfranchised to use the courts in strategically productive ways, and the tactics they use, are two sets of factors related to the judicial institutional structure: those governing judicial independence, as measured both in terms of the courts' independence from other branches and judges' independence from each other; and those governing the structure of judicial review, especially the accessibility of the courts and particular legal instruments to all potential policy players (Ríos-Figueroa and Taylor 2006). A court system dependent on the executive branch for its annual budget allocation, or a judiciary in which overtly political organizations have no special standing, will lead to very different patterns of policy contestation than those of budgetarily autonomous courts or courts in which political parties can contest policy directly in the high court. Such factors help to determine who the relevant policy players are within the court system; the location of veto points in the judicial structure; the array of possible tactics that may be used to challenge policy; and, as a result, the role of courts within the broader political system.

Again, not all opponents of policy will be motivated to contest policy in the courts. And those who are motivated may not be legally enfranchised to use the courts in productive ways. Furthermore, even among those policy actors who are legally enfranchised in ways that would allow them to productively contest policy in the courts, the legal tactics undertaken in pursuit

of a broader political strategy may vary considerably, depending on the ideas that undergird their basic political objectives.[11] Given its deep professional interest in preserving constitutionality and the legal framework, the national bar association, for example, may use the courts in ways that differ from those of other professional unions, such as industrial federations or commercial associations.

In pursuing their policy objectives, policy actors may turn to courts as veto points that enable them to delay or disable policy or, alternatively, as opportunities to discredit policy, or declare their opposition. These four tactical objectives (delay, disable, discredit, declare) can be carried forward in ways that are premised both on solid legal grounds (a firm belief that a given law is unconstitutional, for example), and on purely strategic foundations (for example, an effort to appeal a policy decision despite clear recognition that the legal grounds for appeal are weak).

This last point deserves some fleshing out: legal tactics are not always chosen solely in expectation of achieving a favorable judicial decision. Policy players may indeed use the courts as a last recourse: if all else fails, the cost of challenging policy through the courts is not always great, and plaintiffs may even reason that a last-ditch challenge could lead to a surprising legal victory. But actors on the losing end of policymaking may also use legal tactics even when they realistically see little hope of a legal win. Defeated policy players may litigate to cast doubts about policy, draw public attention to supposed procedural miscarriages, or otherwise discredit policies bearing majoritarian support. By contesting policy in court, in other words, it may be possible to secure a political victory without ever achieving a legal victory. Legal tactics are therefore far more complicated than we often assume, and getting the "right" legal decision is not always the ultimate goal. In sum, the courts may be strategically productive in the larger political scheme of things, even for those who do not win the underlying legal battle.

The Road Ahead

To reiterate, two central questions are addressed in this book. First, in what ways have Brazilian federal courts been activated in policy debates, and why? Second, how do the salience of policy, the overall political environment, and the judicial institutional environment influence the manner by which key policy players engage policy in the courts? The answers to these questions will provide broader lessons about courts' effects on policymaking in complex and vibrant policy environments, in which both the economic situation and the rules governing the democratic regime are in flux.

These questions are tackled from a number of different perspectives over the course of this book. Chapter 2 describes a framework of legal tactical choice and looks more closely at how judicial structure may shape the tactical opportunities afforded to various potential policy opponents. Drawing on a framework founded in new institutionalism, I focus not only on the direct effects of the structures of judicial independence and judicial review on policy contestation but also on their indirect effects, which play out through the administrative performance of the court system. In the process, Chapter 2 provides the local knowledge necessary for understanding how the Brazilian federal courts influence the identity of the groups that can effectively challenge policy and shape the broad panoply of legal tactics available to them.

Chapter 3 offers case studies of eight key policy debates undertaken during the two-term Cardoso administration (1995–2002), demonstrating the frequent recourse to the federal courts during a period of intense reform. In addition to providing locally grounded evidence of the various policy uses of the federal courts, especially by minorities shut out of the governing coalition, this chapter illustrates how the combination of policy salience and the overall political environment guide the use of courts by policy opponents.

Together, these first chapters address the factors that shape policy opponents' tactics and overall patterns of court activation in the policy game. But they do not explain the differences between individual plaintiffs' tactics, which may vary significantly, even under similar institutional conditions. By focusing on one particularly prominent mechanism of judicial review, Chapter 4 illustrates first how the judiciary fits into the broader political environment and, especially, how institutional rules produce "veto points" within the judiciary that enable some policy opponents to effectively delay or defeat policies in areas in which they might otherwise have little or no leverage. This chapter also illustrates why it is that poor legal performance is not necessarily a disadvantageous political strategy: courts are frequently used as a tactical venue for voicing opposition, even when the judicial environment is not conducive to successful legal contestation.

Chapters 5 and 6 illustrate how organized political groups' legal tactics may differ, even under similar institutional rules and political conditions. Potential plaintiffs' ideas and perceived group interests, as well as their own internal decision-making structures, help determine which tactics they will use, and hence, the manner by which courts will be pulled into the policy game. These paired chapters compare the strategies and motivations behind the tactics of legal contestation used by a weak legal veto player, opposition political parties, and a strong legal veto player, the Brazilian bar association (Ordem dos Advogados do Brasil, or OAB).

Chapter 7 adopts a cross-national comparative perspective and shows how, under differing institutional rules, even very similar policy opponents facing comparably salient policy changes may be forced to adopt strikingly different tactics and different institutional venues. Drawing on a comparative case study of pension reform in four Latin American nations, this chapter illustrates how different institutional structures can lead to distinct patterns of court activation even in highly comparable policy debates. In the process, I offer a preliminary example of how the conclusions of this study of Brazil might be carried over productively to the policy literature beyond Brazil. Chapter 8 concludes with an overview of this book's lessons in terms of the courts' role in interest representation and policy reform in Latin American democracies.