

# The Politics of Institutional Weakness in Latin America

Edited by

**DANIEL M. BRINKS**

*The University of Texas at Austin*

**STEVEN LEVITSKY**

*Harvard University*

**MARÍA VICTORIA MURILLO**

*Columbia University*



## CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781108489331](http://www.cambridge.org/9781108489331)

DOI: 10.1017/9781108776608

© Cambridge University Press 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2020

Printed in the United Kingdom by TJ International Ltd. Padstow Cornwall

*A catalogue record for this publication is available from the British Library.*

*Library of Congress Cataloging-in-Publication Data*

Names: Brinks, Daniel M., 1961- editor. | Levitsky, Steven, editor. |

Murillo, María Victoria, 1967- editor.

Title: The politics of institutional weakness in Latin America / edited by Daniel M. Brinks, Steven Levitsky, María Victoria Murillo.

Description: Cambridge, United Kingdom : New York, NY : Cambridge University Press, 2020. | Includes bibliographical references and index.

Identifiers: LCCN 2019058907 | ISBN 9781108489331 (hardback) | ISBN 9781108702331 (ebook)

Subjects: LCSH: Political culture--Latin America. | Government accountability--Latin America. | Administrative agencies--Latin America. | Latin America--Politics and government--21st century.

Classification: LCC JL966 .P636 2020 | DDC 306.2098--dc23

LC record available at <https://lcn.loc.gov/2019058907>

ISBN 978-1-108-48933-1 Hardback

ISBN 978-1-108-70233-1 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

## The Political Origins of Institutional Weakness

Daniel M. Brinks, Steven Levitsky,  
and María Victoria Murillo

The third wave of democratization transformed Latin America. Across the region, regime transitions triggered a plethora of institutional reforms aimed at enhancing the stability and quality of both the new and the few long-standing democracies. Most states adopted new constitutions. Many of them extended new rights to citizens, including unprecedented social rights, such as the right to health care, housing, and a clean environment (Klug 2000; Yashar 2005; Brinks and Blass 2018). Electoral systems were redesigned – at least once – in every Latin American country except Costa Rica;<sup>1</sup> judicial and central bank reforms spread across the region (Jácome and Vásquez 2008); and governments launched far-reaching decentralization initiatives and experimented with new institutions of direct or participatory democracy (Falletti 2010; Cameron, Hersherberg, and Sharpe 2012; Altman 2014; Mayka 2019).

Yet these new institutions often failed to generate the outcomes their designers expected or hoped for. Constitutional checks and balances did not always constrain presidents (O'Donnell 1994); nominally independent judiciaries and central banks often lacked teeth in practice;<sup>2</sup> electoral reforms failed to strengthen party systems (Remmer 2008); newly enshrined social rights were often not respected in fact (Gauri and Brinks 2008); presidential term limits were circumvented or overturned (Pérez-Liñán 2007; Helmke 2017); and civil service laws, tax laws, and labor and environmental regulations were enforced unevenly, if at all.<sup>3</sup> Put simply, political and economic institutions remained

<sup>1</sup> See Calvo and Negretto, this volume.

<sup>2</sup> See Cukierman, Web, and Neyapti (1992); Bill Chavez (2004); Helmke (2004); and Brinks and Blass (2017).

<sup>3</sup> See Bensúsán (2000); Piore and Schrank (2008); Bergman (2009); Ronconi (2010); Murillo, Ronconi, and Schrank (2011); Coslovsky (2011); Grindle (2012); Gingerich (2013); and Amengual (2014).

poorly enforced, unstable, or both. Even after more than three decades of democracy, formal institutions only weakly shape actors' behavior in much of Latin America, creating a sizeable gap between the parchment "rules of the game" and their expected, or at least stated, outcomes.

That gap is consequential. Institutional weakness narrows actors' time horizons in ways that can undermine both economic performance (Spiller and Tommasi 2007) and the stability and quality of democracy (O'Donnell 1994). Democracy requires that the rule of law be applied evenly, across territory and across diverse categories of citizens. That is, every citizen should be equal before the law in spite of inequalities created by markets and societies. Institutional weakness undermines that equality – and it hinders efforts to use laws and public policies to combat the multifaceted inequalities that continue to plague much of Latin America. Institutions, of course, are not uniformly positive. They may exclude, reinforce inequalities, or – as Albertus and Menaldo (2018, this volume) show – protect authoritarian elites. In some cases, democratization may require the dismantling of such institutions. In general, however, no democracy can function well without strong institutions.

Although the problem of institutional weakness has been widely recognized in the field of comparative politics, it has not been adequately conceptualized or theorized. Researchers tend to treat it as a feature of the landscape rather than as a variable—or, importantly, as a political strategy. To build theories about the causes and consequences of institutional weakness we need a clear conceptual framework that allows us to identify, measure, and compare different forms of institutional weakness. This volume takes an initial step toward such a framework.

The volume focuses on Latin America. It does so because the region contains both an important set of shared characteristics and useful variation. With few exceptions, Latin American countries possess at least minimally effective states and competitive electoral (if not always fully democratic) regimes. Thus, these are not cases in which political institutions can be dismissed as predictably and uniformly meaningless. Moreover, the region contains within it substantial variation on the dimension of institutional strength – across countries, across institutions, and over time. A focus on Latin America allows us to exploit this variation, while simultaneously benefiting from the insights generated by a close-knit community of scholars with a shared knowledge of the region's history and cases.

Issues of institutional strength are of great consequence in Latin America. Given the region's vast inequalities and state deficiencies, the potential impact of institutional reform *on paper* is often strikingly high. If laws aimed at eliminating corruption, clientelism, racial discrimination, or violence against women, or rules designed to redistribute income to the poor, enforce property rights against squatters, or protect the environment, were actually complied with over time, the social and distributional consequences would be enormous. So the stakes of institutional compliance and durability are high.

Struggles over whether and how the rules are enforced, and whether or not they remain on the books, have prominent winners and losers. Scholars must understand what drives these struggles – and what determines their outcomes.

Although this volume focuses on Latin America, its lessons clearly travel beyond the region. Incentives to create and sustain weak institutions are endemic across the Global South. Indeed, they may be found in industrialized democracies as well. Thus, understanding the causes and consequences of institutional weakness is critical for comparative politics more broadly.

#### WHY INSTITUTIONAL WEAKNESS MATTERS FOR COMPARATIVE POLITICS

Recent research highlights the need for scholars of comparative politics to take institutional weakness seriously. Take Gretchen Helmke's (2004) study of executive–judicial relations in Argentina. Established theories of judicial politics – which draw heavily on the case of the United States – tell us that lifetime tenure security for Supreme Court justices should enable justices to act with political independence. But when rules of tenure security are routinely violated, such that justices know that voting against the executive could trigger their removal, judicial behavior changes markedly. Helmke finds that when institutions of tenure security are weak, as in Argentina during much of the twentieth century, justices are more likely to vote with presidents during the early part of their term. As the president's term in office concludes, however, justices tend to engage in “strategic defection,” ruling in line with the party or politician they expect to succeed the outgoing president (Helmke 2004). Thus, Helmke identifies – and theorizes – a pattern of judicial behavior that diverges markedly from what would be expected in a strong institutional context.

Alisha Holland's (2017) research on forbearance and redistribution similarly highlights the importance of taking variation in enforcement seriously. Most analyses of redistributive politics in Latin America focus on formal social policies such as public pension and health-care spending. By such measures, redistributive efforts in the region are strikingly low: social expenditure as a percentage of gross domestic product (GDP) is barely half of the average for Organization for Economic Co-operation and Development (OECD) countries, and unlike most OECD countries, taxes and transfers only marginally reduce income inequality (Holland 2017: 69–70). In unequal democracies such as those in much of Latin America, the persistence of such small welfare states may seem puzzling. By adding the dimension of forbearance, or deliberate nonenforcement of the law, Holland offers insight into why such outcomes persist. The state's toleration of illegal activities such as squatting and street vending distributes considerable resources to the poor (Holland estimates that in Lima it amounts to around \$750 million a year [2017: 9]). Thus, whereas most Latin American states do little, in formal terms, to support housing and

employment for the poor, nonenforcement of laws against squatting and street vending creates an “informal welfare state,” in which “downward redistribution happens by the state’s leave, rather than through the state’s hand” (Holland 2017: 11).

Forbearance has powerfully shaped long-run welfare-state development in Latin America. Because forbearance entails less taxation than formal redistribution, governments and their nonpoor constituencies may come to prefer it; and when the poor organize to preserve forbearance, popular demands for formal redistribution are often dampened. This “forbearance trap” can lock in informal welfare states for decades (Holland 2017: 237–276). A central lesson from Holland’s work, then, is that understanding the politics of redistribution in unequal democracies requires a focus not only on policy design but also on enforcement.<sup>4</sup>

Alison Post’s (2014) research on foreign and domestic investment in infrastructure in Argentina offers another example of how variation in institutional strength shapes policy outcomes. Foreign multinationals – with their deep pockets and long time horizons – are widely expected to hold an advantage over domestic firms in winning favorable infrastructure contracts where institutional veto points constrain governments (Levy and Spiller 1996; Henisz 2002) or international third-party enforcement is included in contracts (Elkins, Guzman, and Simmons 2006; Büthe and Milner 2008). However, Post (2014) shows that in weak institutional environments, this is often not the case. In a context of economic and political volatility, where governments are able to alter the terms of contracts regardless of formal rules, domestic investors with extensive linkages to local economies and politicians are better positioned to sustain and, when necessary, renegotiate contracts.<sup>5</sup> Such “informal contractual supports” may be less important in an institutional environment with strong property rights. However, in a context of institutional instability, they help explain why domestic investments often prevail over foreign ones. Post (2014) thus shows how the behavior of both governments and investors changes in a weak institutional environment, producing investment outcomes that differ markedly from those predicted by the existing literature.

Attention to institutional instability has also reshaped our understanding of electoral design. Most comparative scholarship assumes that those who design the electoral rules do so with a self-interested goal: to maximize their electoral advantage. The most influential work in this area assumes that politicians engage in *far-sighted* institutional design. In other words, they design electoral rules in pursuit of relatively long-term goals (Rokkan 1970; Rogowski 1987; Boix 1999).

<sup>4</sup> Variation in enforcement should also influence individual preferences over social policy, in line with Mares’s (2005) finding that prior individual experience with state institutions affects policy preferences.

<sup>5</sup> Such renegotiation often entails cross-sectoral bargains that violate rules governing market concentration and conflict of interest (Post 2014; Post and Murillo 2016).

Boix (1999), for example, argues that conservative elites in much of early twentieth-century Europe replaced plurality electoral systems with proportional representation (PR) systems in an effort to minimize their losses in the face of the growing electoral strength of socialist parties. Such theories of far-sighted design hinge on some critical assumptions: for example, actors must believe that the rules they design will endure over time; and they must have some certainty that they themselves will continue to benefit from those rules. In other words, far-sighted designers of electoral rules must be able to “predict with some certainty the future structure of electoral competition” (Boix 1999: 622). Neither of these assumptions holds in weak institutional environments. Where electoral volatility is high, and where institutions are easily replaced, far-sighted institutional design is more difficult. In such a context, rule designers remain self-interested, but they are less likely to be far-sighted. Rather, as scholars such as Karen Remmer (2008) and Calvo and Negretto (this volume) argue, politicians will be more likely to design rules aimed at locking in short-term electoral advantages. Such short-sighted design may well have the effect of reinforcing institutional instability. Allowing for variation in rule designers’ time horizons should, therefore, enhance the external validity of theories of institutional design, facilitating their application across different national contexts.

Finally, attention to variation in institutional strength has yielded new insights into the dynamics of institutional change. Recent work in the historical institutionalist tradition focuses attention on forms of gradual institutional change emerging from the reinterpretation or slow redeployment of existing written rules (Thelen and Streeck 2005; Mahoney and Thelen 2010; Conran and Thelen 2016). This scholarship was a useful response to an earlier literature that emphasized discontinuous change – moments of dramatic and far-reaching change, followed by long periods of path-dependent stasis (Krasner 1988). Yet the patterns of layering, drift, conversion, and exhaustion identified by Kathleen Thelen and her collaborators operate in a context of strong formal institutions. As we have argued elsewhere (Levitsky and Murillo 2009, 2014), the dynamics of institutional change can be quite different in a weak institutional environment. Rather than being characterized by “stickiness,”<sup>6</sup> institutional change tends to be rapid and thoroughgoing, often following a pattern of serial replacement, in which rules and procedures are replaced wholesale – without ever settling into a stable equilibrium (Levitsky and Murillo 2014).

Second, actors in a weak institutional environment may achieve real substantive change by modifying enforcement or compliance levels rather than changing the rules. Mahoney and Thelen (2010) have shown how gaps in compliance can serve as a mechanism of hidden change via the subtle reinterpretation of institutional goals, even as formal institutional structures remain intact. Building on this insight, recent scholarship shows how the “activation”

<sup>6</sup> For example, Streeck and Thelen (2005: 18) explicitly assume the “stickiness of institutional structures” in their discussion of economic liberalization in the advanced democracies.

of previously dormant institutions can be an important source of change (see Levitsky and Murillo 2014). At the same time, noncompliance may also be a source of formal institutional *stability*, especially when it tempers an institution's distributive consequences (Levitsky and Murillo 2013).<sup>7</sup> During the 1990s, for example, Latin American governments seeking more flexible labor markets weakened enforcement of existing labor laws while keeping them on the books (Bensusán 2000; Cook 2007).

Recent research thus suggests the need for a more conscious focus on institutional weakness as an object of study; as a conscious political strategy rather than as “random error” that obstructs proper institutional analysis. That is what this volume seeks to do.

## DEFINING INSTITUTIONS

Before we conceptualize weak institutions, we must define institutions. Most institutionalists begin with North's (1990: 3, 4) definition of institutions as “the humanly devised constraints that shape human interaction ... [in ways that are] perfectly analogous to the rules of the game in a competitive team sport.”<sup>8</sup> In previous work (Brinks 2003; Helmke and Levitsky 2006), some of us have argued that institutions are made up of rules, and, in the context of defining informal institutions, sought to differentiate rules from purely descriptive statements or expectations about behavior. For this project, we adopt the same starting point – the notion that (formal) institutions are made up of (formal) rules. This allows us to focus on formal constraints that are “humanly devised” and recognized as compulsory within a polity. Many definitions stop there, but for our purposes we must push beyond the implicit equation of institutions with stand-alone rules. In all cases, we are concerned with the effectiveness of sets of rules, rather than with single rules in isolation, even though a single rule may sometimes stand in as shorthand for the institution as a whole.

We therefore define a formal institution as a set of officially sanctioned rules that structures human behavior and expectations around a particular activity or goal. Elinor Ostrom (1986: 5) defined institutions as

the result of implicit or explicit efforts by a set of individuals to achieve order and predictability within defined situations by: (1) creating positions; (2) stating how participants enter or leave positions; (3) stating which actions participants in these positions are required, permitted, or forbidden to take; and (4) stating which outcome participants are required, permitted, or forbidden to affect.

<sup>7</sup> For example, during the debate in 2018 over Argentina's abortion laws, supporters of the existing ban argued that reform was not necessary because no women were actually penalized for terminating their pregnancies ([www.lanacion.com.ar/2157341-aborto-no-faltar-a-la-verdad](http://www.lanacion.com.ar/2157341-aborto-no-faltar-a-la-verdad)).

<sup>8</sup> See also Peters (2011: 146).

She later added to this classification, arguing that institutions are further defined by rules that specify (5) the consequences of rule violation, which in most cases we expect to be associated with a specific sanction (Crawford and Ostrom 1995).<sup>9</sup> We simplify Crawford and Ostrom’s “grammar” somewhat, specifying a (formal) institution as a set of formal rules structuring human behavior and expectations around a statutory goal by (1) specifying actors and their roles; (2) requiring, permitting, or prohibiting certain behaviors; and (3) defining the consequences of complying or not complying with the remaining rules.

Our conceptual scheme relies on identifying the statutory goal of formal institutions – the second element in our definition, above. As we will see in the next section, a strong institution is one that sets a nontrivial goal and achieves it, whereas a weak institution achieves little or nothing, either because it fails to achieve an ambitious goal or because it never set out to accomplish anything. We set statutory goals as the benchmark rather than the (stated or implicit) policy objectives of institutional creators because we recognize that the ultimate policy aim of institutions – often a product of compromise among distinct and even competing interests – may well be ambiguous or contested (Moe 1990; Schickler 2001; Streeck and Thelen 2005; Mahoney and Thelen 2010). By taking the statutory goal itself as a starting point, we can more easily identify how the preferences and strategies of actors work to weaken or strengthen institutions. Whether the institution succeeds in achieving its policy objective or produces far-reaching unintended consequences can be analyzed separately under more conventional policy effectiveness rubrics.<sup>10</sup>

Institutions may be *transformative*, in that they seek to move outcomes away from the status quo, or *conservative*, in that they seek to preserve the status quo in the face of potential change. This volume focuses primarily on transformative institutions, both because they are more often the subject of political and policy debates in Latin America and because they are more often identified as being weak. Nevertheless, conservative or status quo–preserving institutions can be of great importance. Property laws are a clear example. Civil codes enshrining traditional gender roles and family structures are another. Albertus and Menaldo’s work (2018, this volume) on the persistence of authoritarian constitutions that protect wealthy elites from redistribution by constraining democratic governments shows that conservative institutions are widespread in Latin America. The conceptual scheme we propose works in either case. Whether conservative or transformative, institutions are meant to make it more likely that social,

<sup>9</sup> Similarly, definitions of “law” or “systems of social control” highlight the role of coordinated classes of rules that define not just required, proscribed or permitted behavior, but also mechanisms for enforcement, actors, consequences and the like (see, e.g., Hart 1961; Ellickson 1991).

<sup>10</sup> It is thus entirely possible, in this conceptual scheme, for a strong institution to nevertheless fail to achieve the policy objectives that prompted its creation.

economic, or political outcomes will be closer to a defined statutory goal than to some less preferred alternative outcome.

Weak formal institutions should not be confused with informal rules, or those that are “created and enforced outside officially sanctioned channels” (Helmke and Levitsky 2006: 5). Informal institutions may coexist with either strong or weak formal institutions. When they coexist with weak institutions, they may either reinforce them by providing a second mechanism that promotes the expected behavior (“substitutive”) or undermine them by promoting an alternative behavior (“competing”) (Helmke and Levitsky 2006: 14). Although we recognize (and discuss below) the importance of informal rules in generating institutional strength or weakness, our focus here is on formal institutions.

Finally, it is important to distinguish formal institutions, or rules, from the organizations that are either the targets of those rules (e.g., political parties, interest groups, firms) or dedicated to enforcing or implementing the rules (e.g., bureaucracies). By keeping rules and organizations conceptually distinct, we can evaluate whether strengthening state agencies – hiring more inspectors, spending more on training bureaucratic personnel, or establishing meritocratic criteria – actually enhances compliance with the institution, as do Ronconi (2010), Schrank (2011), and Amengual (2016) in their work on labor regulations and the civil service.

### The Concept of Institutional Weakness

We now turn to conceptualizing institutional weakness. We expect strong institutions to redistribute and refract power, authority, or expectations in order to produce an institutional outcome ( $io$ , in Figure 1.1) that diverges from what the preinstitutional outcome ( $po$ ) would have been.<sup>11</sup> An institution may be designed to produce an outcome (shown in Figure 1.1 as  $io'$ ) that is more ambitious than that which it actually produces. A strong institution, however, makes a difference because the distance between  $io$  and  $po$ , a parameter we call  $S$  (for strength), is greater than zero.  $S$ , of course, is a cost to those who prefer  $po$  and exactly the benefit sought by those who prefer  $io$  or  $io'$ .

We can use the following graph to illustrate this and set up a vocabulary to use as shorthand:

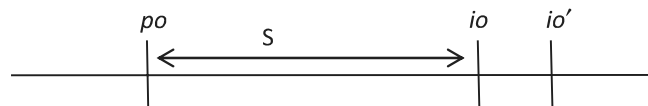


FIGURE 1.1. Strong institution –  $io - po > 0$ .

<sup>11</sup> We use “preinstitutional” here in the same sense in which people commonly use “prepolitical.” It is not meant to imply temporality, but rather simply what might happen in the absence of the institution.

It is important to note that the move from *po* to *io* is not a move from the state of nature to an institutionalized context. Indeed, *po* could be (in the case of a conservative institution) a feared future outcome the institution is designed to prevent, and *io* may be the status quo it seeks to preserve. The idea is that the institution of interest has been added to the array of interlocking institutions that impinge on any given social and political activity in hopes of producing a particular outcome that might not otherwise obtain, either presently or in the future. The comparison point is a counterfactual – our best estimate of what might happen if the institution were to disappear or be replaced.

Central to our understanding of institutional strength, then, is the institution's *ambition* – the degree to which institutions are designed to change outcomes relative to what they would otherwise be. In Figure 1.1, this is the distance between the statutory goal (*io'*) and the preinstitutional outcome (*po*). Some institutions seek to do more than others – raise more taxes, offer greater protection to workers or the environment, more narrowly constrain the executive, or more radically protect private property, for example. Any comparison of the strength of two different institutions must therefore assess not only whether they endure or generate compliance, but also how much work they are doing to generate or prevent change.

We might have adopted a relative, rather than an absolute, concept of institutional strength. In Figure 1.1, this would mean a focus on the proportion of the institutional goal that is achieved ( $S/(io' - po)$ ) rather than *S* itself. Although such an approach may be appropriate in some cases (e.g., when comparing identical institutions), it rewards institutions with meager levels of ambition. Institutions that propose to do little and achieve the little they propose would appear strong, while institutions that seek to produce or prevent radical transformations and accomplish much, but not all, of their goal would be scored as weaker – despite doing more work. Thus, an institution may still be relatively strong if it is consequential in terms of its goals, despite falling short of full compliance. Most of our analysis holds ambition constant and focuses on compliance with, and stability of, the formal rules. However, we also introduce (below) the concept of “insignificant” institutions to characterize formal rules with zero ambition, in that they do not alter the status quo (*po*) even when achieving perfect compliance.<sup>12</sup>

<sup>12</sup> This does not mean, of course, that the level of noncompliance (*io'-io*) is irrelevant. Even an institution that generates significant effects in the direction of its formal goals might pay an important price if compliance is low. The institution may lose legitimacy, and the consequent public cynicism may undermine support for the institution, leading to instability. Scholars have made this argument, for example, with respect to the inclusion of social rights in Latin American constitutions. Although by some measures these institutions have had important effects (Gauri and Brinks 2008; Brinks and Gauri 2014), their uneven application has generated strong critiques (Mota Ferraz 2010; Langford et al. 2011).

### **Social Norms and Institutional Strength**

This volume focuses on formal institutions. As noted above, however, formal rules always coexist with unwritten social norms and other informal institutions, and their effectiveness and stability may be powerfully affected by their interaction with those norms (North 1990; Helmke and Levitsky 2004; Levitsky and Ziblatt 2018). Social norms shape individual incentives to comply with laws or report violations, which, in turn, shape the behavioral effects of regulations (Acemoglu and Jackson 2017). Take dueling in the antebellum United States. Although antidueling laws “were on the books in all states” (Wells 2001: 1807), compliance with these laws varied by region: whereas dueling disappeared in northern states in the early nineteenth century, it remained widespread in the South. This variation has been attributed to differences in underlying social norms. In the North, public acceptance of dueling evaporated in the wake of the 1804 Hamilton–Burr affair, but in the South, strong social norms – which treated duels as “affairs of honor” – induced citizens and state officials to ignore the law (Wells 2001: 1818–1825). Thus, even though every southern state had adopted antidueling legislation by the 1820s, charges were rarely brought against duelists, and when they were, “[s]outhern judges and juries...were unwilling to enforce” the law (Wells 2001: 1830–1833). As Harwell Wells put it, enforcement “relied too heavily on men deeply embedded in the very social processes the laws sought to overturn” (2001: 1831). Ultimately, it was the Civil War – which weakened the social norms that sustained dueling – that led to the disappearance of dueling (and the enforcement of antidueling laws) in the South (Wells 2001: 1838–1840).

Understanding the strength of formal institutions thus requires attention to the normative bases of those institutions. This task is simplest in the case of transformative institutions that seek to move outcomes away from a status quo that is congruent with social norms – we can, for example, track movement toward the institutional goal over time. But norms often undergird formal institutions – especially conservative ones – in less discernible ways. For example, many formal institutions generate compliance because they are reinforced by congruent social norms (Levi 1988, 1997; North 1990). As is always the case when two potential independent variables are colinear, this complicates the empirical exercise of inferring institutional strength. In such a case, to be able to attribute causal efficacy to the formal institution rather than the informal norms, we would want to show some nontrivial likelihood that the outcome would be different absent the formal institution, in spite of congruent social norms – in other words, that *po* is distant from the social norms as well. We might find, for instance, that some powerful political, social, or economic actor would not be constrained by social norms but is constrained by the formal institution. Observers argue that this was the case with presidential term limits in Colombia in 2010. Broad public and

political support for Álvaro Uribe's pursuit of a third term suggests that the Constitutional Court's interpretation and enforcement of the constitutional prohibition on a second reelection was determinative (Posada-Carbó 2011).

Many institutions are designed in an effort to bring social norms in line with the institutional goal, effectively making the institution irrelevant over time. This introduces a temporal dimension into the analysis of institutional strength. Perhaps the strongest institutions are those that shape social norms and expectations to the point that they essentially put themselves almost out of business. Seat-belt laws and antilittering laws may have had this effect in some places, creating the possibility that, at least for the short term, the institution could be removed with no consequent change in behavior. Whether those social norms would erode over time without formal institutional reinforcement is an empirical question.

### **Insignificance**

If the strength of an institution is measured by how much difference it makes, then institutions without ambition – where  $S$  approaches zero despite full compliance – must be weak. We characterize such institutions as *insignificant*. An institution is insignificant when it simply blesses whatever equilibrium outcome the dominant actors would produce absent the institution. Under conditions of insignificance, everyone complies and the institution is stable, but behavior would be unlikely to change if the institution were taken away. In other words, the institution is superfluous, and plays no actual role in guiding the relevant actors' behavior. In 2014, for example, voters in the US state of Alabama adopted a resolution barring the adoption of foreign laws that were at odds with citizens' existing rights. The primary target was Sharia law, which was not exactly pervasive in Alabama at the time, nor is it likely that a rash of Sharia legislation was imminent and that the law was required to head it off. In short, the absence of Sharia in Alabama can hardly be attributed to the strength of the institution. Thus, although the law may have symbolic value for anti-Muslim constituents, it produces no behavioral effects. A more serious example is Peru's recent ban on mayoral, gubernatorial, and legislative reelection.<sup>13</sup> Given extreme party system fragmentation, electoral volatility, and low public trust, reelection rates were extraordinarily low in Peru during the 2000s (Weaver 2017). In practice, then, a formal prohibition of incumbent reelection produced little change in behavior or outcomes.

Although institutions sometimes drift into insignificance, many are purposely designed so that  $S$  is low. The courts Brinks and Blass (2013) call "Potemkin Courts" are designed to either reflect their creators' preferences, or to be unable to effectively express any meaningful disagreement with those

<sup>13</sup> Mayoral and gubernatorial reelection was banned via legislation in 2015. Legislative reelection was banned via referendum in 2018.

preferences. The executive may be able to appoint justices at will and remove them equally at will; or the court may need such a large super-majority to invalidate a statute or challenge an executive action that any one or two allies on the court can prevent a judicial challenge from succeeding. When this occurs, the court can be seen to be acting exactly as the law provides, without any extra-legal interference, but it will never function as a serious constraint on the other branches. In Peru, for example, President Alberto Fujimori sponsored a reform that ostensibly aimed to strengthen the courts. The 1993 constitution created a constitutional tribunal (TC) with attributes that would have made it a strong institutional check on power. But the legislature also passed a law specifying that the votes of six of seven justices – who were selected by the legislature – were required to strike down a law. In practice, then, any two of these seven justices could veto a judicial ruling, making it very unlikely that any measure the legislative majority truly cared about would be declared unconstitutional. With or without the TC, and without violating the formal rules of the TC, the Fujimori government's behavior would be essentially the same.

Some “prior consultation” laws in Latin America may also be characterized as insignificant. Most Latin American states adopted prior consultation laws in the 1990s and early 2000s under external and domestic pressure to implement ILO Convention 169, which calls for mechanisms to consult local indigenous communities prior to the initiation of natural resource extraction projects. In principle, such laws should give local indigenous communities meaningful influence over whether or not such projects go forward, and it is clear that some communities would prefer not to see extractive projects proceed in their territory (Hale 2005; Rodríguez Garavito 2011b). In practice, however, prior consultation laws in Mexico, Peru, and elsewhere included no provision that might allow “consulted” indigenous communities to actually stop the projects (Torres Wong 2018b: 254). As a result, the outcome of prior consultation in these countries is always the same: the projects go forward, albeit sometimes after negotiating some payment to the affected community.<sup>14</sup> This has led some observers to conclude that prior consultation laws are, in effect, insignificant. According to Torres Wong, for example, prior consultation laws “[do] not deter the advancement of extractive industries,” even when they are fully complied with (2018b: 246, 256–257).

The actual operation of prior consultation schemes in Latin America appears to run the gamut from insignificant to strong, thus usefully illustrating how institutional ambition can relate to institutional strength. When prior consultation institutions are insignificant, companies and governments go through meaningless pro forma exercises in consultation on projects that have been decided in advance. Full compliance leads to no discernible change in the outcomes for firms, the government, or the affected communities. In fact,

<sup>14</sup> According to Torres Wong, “all 66 prior consultation procedures conducted in Bolivia, Mexico, and Peru over hydrocarbon and mining projects resulted in indigenous approval” (2018b: 247).

by channeling conflict into empty, powerless forums and demobilizing communities, an ostensibly transformative institution can become a conservative one, making it easier to continue long-standing practices of simply extracting at will from indigenous territories and protecting governments and firms from less institutionalized forms of protest (Rodríguez Garavito 2011b: 298–301).<sup>15</sup> In a sense, such institutions produce a negative *S*, by disempowering their purported beneficiaries. In other cases, prior consultation schemes generate substantial side payments to affected communities, even when they do not give indigenous communities a meaningful say over whether and how an extractive project will go forward. Here the institution is weak but nevertheless does something positive for the intended beneficiaries, placing it at the midrange for strength. At the other end of the continuum lies the doctrine of prior consent developed by the Constitutional Court in Colombia, under which some communities have secured the right to veto certain projects. This occurred, for example, in the case of the expansion of a dam in Embera territory (Rodríguez Garavito 2011b: 297; also Thompson 2016: 91; Brinks 2019: 361).

Institutions that are originally insignificant may, of course, take on significance if changed circumstances increase *S*. Such a transformation would, in effect, mirror the process of institutional conversion described by Streeck and Thelen (2005) and Mahoney and Thelen (2010). Yet, unless circumstances happen to move *po* far from its original location, it will often require formal institutional change to make an insignificant institution substantive in terms of its behavioral effects. Falletti (this volume) argues this is exactly what happened with prior consultation on hydrocarbon projects in Bolivia.

It is difficult to know in advance whether an institution designed to be insignificant will endure and be enforced should the day come when actors begin to violate its terms. As Mark Twain once wrote, “the weakest of all weak things is a virtue which has not been tested in the fire.”<sup>16</sup> Because the behavior in question is overdetermined, the strength of an insignificant institution is unobservable until circumstances change so that key actors are confronted with a larger *S* – what if, for instance, Peru’s legislature had suddenly changed hands (causing *po* to shift) and found itself at odds with a constitutional tribunal appointed by the previous congress? Such changes often result in pressure for institutional reform. Argentina’s long-established (and long-insignificant) constitutional requirement that presidents be Catholic was eliminated once the non-Catholic population increased and became politically relevant.<sup>17</sup>

<sup>15</sup> Critics have made similar arguments about the ultimately disempowering effect of a range of indigenous rights, at least as currently practiced (Hale 2005).

<sup>16</sup> Twain (1905[1899]) puts these words in the mouth of the stranger in “The Man That Corrupted Hadleyburg,” a short story that first appeared in *Harper’s Monthly* in December of 1899.

<sup>17</sup> The reform was undertaken during the administration of President Carlos Menem, who had converted from Islam to Catholicism in order to further his political ambition. See [www.britannica.com/biography/Carlos-Menem](http://www.britannica.com/biography/Carlos-Menem).

Similarly, originally strong institutions can become insignificant over time by shaping preferences to match the institutional goal.<sup>18</sup> The strongest institutions are those that establish new societal norms and achieve compliance by modifying actors' preferences over time. When a rule is so effective that actors internalize it as a norm and compliance becomes taken for granted, its active enforcement may no longer be necessary to achieve behavioral change. In such cases, the formal institution no longer does much work, although this is hardly a sign that the institution was always weak. Rather, the rules have generated a normative change in society that has resulted in essentially voluntary compliance.<sup>19</sup> Here, the evaluation of weakness is a time-bounded one: we might say, then, that the institution was strong enough to produce the outcome and an associated normative change, to the point where it has become insignificant. In this case, however, the original institution was ambitious and designed to produce significant change. Its own success, rather than a strategic calculation of rule makers, made it insignificant.

#### TYPES OF INSTITUTIONAL WEAKNESS

Institutions that are significant on paper – that is, their statutory goals are ambitious, such that  $io' - po > 0$  – may nevertheless fail in distinct ways to achieve those goals. Take, for example, a constitutional amendment that limits presidents to one term. If, before the rule, many presidents enjoyed multiple terms in office and after the rule none do (and *ceteris* is reasonably *paribus*), we can be fairly confident that the institution is strong. There is a great distance between the expected outcome absent the institution, as evidenced by historical events, and the one with the institution. An institution is weak, by contrast, when *S* approaches zero because the rule is ignored. Following the same example, consider Latin American presidents (e.g., Daniel Ortega, Juan Orlando Hernández, Evo Morales) who overstay their term in office despite preexisting constitutional prohibitions. This is one type of weakness, which we will call *noncompliance*. Here there is no *S*: the preinstitutional outcome continues to obtain, despite the existence and persistence of the rule.

Now consider presidents constrained by term limits who enact a constitutional amendment permitting one or more reelections. When the rules change to suit the preferences of every new actor that comes along, we have another type of weakness – instability. Take for instance, the case of Ecuador, where the 2008 constitution – pushed by President Rafael Correa – replaced a ban on reelection with a two-term limit. Correa was reelected in 2009 and 2013. Facing the end of his final term, Correa orchestrated a 2015 referendum that ended term limits for all officials beginning in 2021 – a move that would allow him to run again in 2021.

<sup>18</sup> Alternatively, an institution may “drift” into “insignificance” by not adapting to the context, so that what was originally a demanding standard no longer has any bite (Hacker 2005; Streeck and Thelen 2005).

<sup>19</sup> We thank María Paula Saffon and Alisha Holland for bringing this point to our attention.

However, his successor – seeking to prevent Correa’s return to power – organized another referendum that reestablished term limits. Similarly, the Dominican Republic shifted from indefinite reelection to a ban on immediate reelection in 1994 to a two-term limit in 2002, back to a ban on immediate reelection in 2009, and then back to a two-term limit in 2015. In cases like these, the rules sequentially change to match the preferences of successive rule makers. Rather than forcing preferences to accommodate to the institutional outcome, the institution changes to ensure that the outcome matches the preferences of those who were meant to be constrained. In these cases, *S* disappears through rule changes that lead the institution to match the “preinstitutional” preferences of the key actors.

These two types of institutional weakness – noncompliance and instability – reduce the effective value of *S*, even for ambitious institutions. Insignificant institutions, by contrast, have a near-zero *S* despite high levels of compliance and stability. The distinction among these types of weakness is important because, although in each of them *S* approximates zero, the politics that produce each outcome are very different. In the section that follows, we discuss institutions that are significant on paper but are nevertheless weak in practice due to either noncompliance or instability.

### **Noncompliance**

Noncompliance occurs when *S* should be greater than zero given the rules established by the parchment institutions, but relevant actors are able to disregard the institution rather than either comply with or seek to replace it, effectively reducing *S* to zero. Noncompliance may be rooted in failures at two broad levels: (1) state officials’ decision not to enforce the rules; and (2) state officials’ incapacity to enforce or elicit societal cooperation with the rules.

#### **STATE NONENFORCEMENT**

We often assume that state officials seek to enforce the law. Frequently, however, noncompliance occurs because state actors choose not to enforce the rules. In these cases, the institution is formally designed to make a difference – it prescribes costly changes in behavior, and the penalties for noncompliance, if applied, are significant – but the relevant state actors simply fail to enforce the rules. An example is what Levitsky and Murillo (2009, 2014) call *window dressing institutions*, or institutions whose rules state actors create without any intention of enforcing. Take environmental laws in Brazil. Brazilian governments adopted an array of environmental regulations in the 1980s that, on paper, provided Brazil with “unusually strong foundations for environmental law” (Hochstetler and Keck 2007: 51). Through the early 1990s, however, many environmental regulations were not enforced, leading scholars to describe them as “simply a smokescreen for a general abdication of environmental governance” (Hochstetler and Keck 2007: 37). Another example is utility regulation.

When cash-strapped Latin American governments privatized public utilities during the 1990s, most of them created nominally independent regulatory agencies in order to enhance investors' confidence (Levi-Faur and Jordana 2005). In practice, however, most of these agencies lacked authority and routinely failed to enforce their by-laws (Murillo 2009; Post 2014).

In other cases, executives or legislatures adopt rules with the intention of producing real change, but the bureaucrats or local governments charged with actual enforcement refuse to carry these rules out. The result is what Alisha Holland (2017, this volume) calls *forbearance*. As Holland (2017) shows in her study of squatters and street vendors in Chile, Colombia, and Peru, local politicians and bureaucrats with low-income constituencies often deem the human and political costs of enforcing the law to be prohibitively high.

State officials may also engage in *selective* enforcement, applying the law to certain individuals or groups but not others. The bases for selective enforcement vary, ranging from personal ties to partisanship, class, ethnicity, and region. In the post-Reconstruction-era US South, for example, literacy tests and other suffrage restrictions were enforced rigorously on African American voters but not poor white voters (Keyssar 2000). For decades in Latin America, anticorruption laws tended to snare government rivals or former government officials rather than those currently in office. And Mexico's 1856 Lerdo Law, which ordered the breakup of all landholdings held by corporate entities in the name of individual property rights, was applied forcefully to Church lands but less rigorously to communally held indigenous lands (Saffón and González Bertomeu, this volume). Liberal governments used the law to harass the Church, a political adversary, but ignored it when it came to indigenous communities that were potential allies.

Noncompliance is not always rooted in a lack of enforcement. Some institutions establish what are, in effect, nonpunitive sanctions for violating what is otherwise a meaningful behavioral restriction. In these cases, state actors dutifully impose sanctions for noncompliance, but these sanctions (e.g., a minuscule fine) are so low relative to S as to be a meaningless incentive for actors to change their behavior. In effect, the formal rules ensure that the cost of complying significantly exceeds the trivial punishment for noncompliance. For instance, France's 2000 "parity law" required that parties field an equal number of male and female candidates. Parties that failed to comply with the new quotas were forced to pay a moderate-sized fine – one that the larger and wealthier parties were able and willing to pay (Murray 2007: 575). As one conservative party leader put it, "We prefer to pay fines than lose elections!" (quoted in Murray 2007: 571). Female quotas in El Salvador, Honduras, and Panama were similarly designed so that parties might simply pay fines and run male candidates.<sup>20</sup> Likewise, as Fernández Milmanda and

<sup>20</sup> See, e.g., Mariana Caminotti's discussion of the difficulties of increasing the political representation of women in Latin America, at <https://reformaspoliticas.org/reformas/genero-y-politica/mariana-caminotti/>.

Garay (this volume) note, some Argentine provincial governments use non-punitive fines as a means of enforcing antideforestation regulations without triggering resistance from big landowners. For all intents and purposes, then, *S* disappears in these cases, because actors behave as if the institution did not exist (except that they pay a trivial penalty). In such a situation, even if enforcement – in the sense of applying sanctions for violations – is 100 per cent, the relevant outcome is similar with or without the rule.

### *State (In)capacity and Societal Resistance*

A different sort of compliance failure occurs when governments possess the will to enforce but lack the capacity to do so. This is partly a question of the state's infrastructural power (Mann 1984; Soifer 2015). Some states lack the fiscal and administrative capacity to enforce certain laws – particularly ones that seek large-scale behavioral change and require extensive monitoring. For example, governments may not enforce labor, immigration, or environmental laws because the state lacks a sufficient number of trained inspectors, or because, due to low public-sector salaries or lack of equipment, orders to enforce are simply not carried out on the ground. In some cases, states simply lack the capacity to uphold the entire framework of the rule of law (O'Donnell 1993, 1999b). As Yashar (2018) shows, for example, the spread of illicit organizations and rising homicide rates in much of contemporary Latin America can be explained, in part, by the sheer weakness of state (i.e., police) monitoring capacities.

Long-run state enforcement capacities are shaped by political choices. As the chapters by Schrank and by Amengual and Dargent in this volume show, levels of enforcement capacity at time *t* reflect investments in capacity made at *t* minus *x*. However, because the development of state capacity takes time (Kurtz 2013; Soifer 2015), and because investments in state capacity may be matched by the growing strength of state challengers (Migdal 1988; Dargent, Feldmann, and Luna 2017), it is reasonable to suggest that in some instances, governments possess the will to enforce certain rules but simply lack the infrastructural wherewithal to do so.

We exclude from our analysis failed states that lack even minimal enforcement capacity, focusing on those with at least some infrastructural power but that nevertheless lack the capacity to systematically uphold the law in some areas. These are what Amengual and Dargent (this volume), following Slater and Kim (2015), describe as “standoffish” states – states that can and do enforce some of the rules some of the time but lack the resources to enforce all the rules all of the time. Enforcement is thus *intermittent*, in that it does not follow an identifiable pattern, or *selective*, in that resource-constrained states target some individuals or groups more than others. As O'Donnell (1993) noted in his classic discussion of “brown areas,” selective enforcement sometimes follows a territorial logic, with states enforcing the law at a higher rate in the metropolitan centers than in the hinterlands (see also Herbst 2000; Soifer 2015). Alternatively, it may follow a class-based logic, in which

the wealthier and better-connected members of society evade the reach of a standoffish state, leaving the poor more vulnerable (Méndez, O'Donnell, and Pinheiro 1999; Brinks 2008).<sup>21</sup>

In their analysis of regulatory enforcement in Argentina, Bolivia, and Peru, Amengual and Dargent (this volume) illustrate how enforcement outcomes can vary in standoffish states. In Lima's construction industry, where the local construction chamber actively supported enforcement, government officials cracked down on illegal activities. In Bolivia's gold mining sector, where cooperative miners were political allies of the governing Movement for Socialism (MAS), state officials looked the other way. In the Argentine province of Córdoba, state officials applied labor safety regulations in the construction industry, where union pressure was strong, but ignored flagrant violations in brickmaking, where workers were politically and organizationally weak.

As the above examples suggest, compliance depends crucially on the degree of societal cooperation or resistance. Societal responses to institutions vary widely, from active cooperation where rules align with social norms and underlying power distributions (e.g., property rights laws in the United States) to outright resistance where the rules contradict dominant social norms (e.g., antislavery laws in the antebellum US South) or are opposed by powerful societal actors (e.g., voting rights in the post-Reconstruction US South). The level of state enforcement effort required to produce compliance will, therefore, be a function of the degree of societal cooperation or resistance. Since enforcement is a costly endeavor for resource-constrained states (Amengual 2016), governments can be expected to tailor enforcement to the degree of expected resistance. Faced with sufficient resistance, officials may look the other way rather than enforce the law (Amengual and Dargent, this volume). As Hochstetler and Keck show, for example, Brazilian anti-deforestation law is "ample and often well formulated," and the Brazilian state possesses the capacity to enforce it (2007: 51, 151). Because enforcement requires confronting a powerful network of corrupt politicians and criminal organizations, however, governments often exhibit a "lack of desire to expend the necessary political capital and resources to enforce the law" (2007: 151–154). When governments find societal partners that seek and even cooperate with enforcement, states are more likely to enforce and will secure similar results with lower effort (Amengual 2016; Amengual and Dargent, this volume).

The state's enforcement capacity is thus relational.<sup>22</sup> On the one hand, the cost of enforcement can be reduced considerably when, due to the alignment

<sup>21</sup> The distinction between this and the politically motivated selective enforcement described earlier is not always clear cut. In principle, selectivity in these cases is simply a product of prioritizing resources. In practice, however, a degree of political calculus – state officials' desire to reward supporters, punish rivals, or avoid costly social resistance – invariably weighs in.

<sup>22</sup> See Migdal (1988); Amengual (2016); Dargent, Feldmann, and Luna (2017).

of underlying norms or interests with the institutional mandate, societal actors cooperate in ensuring compliance – a phenomenon that is sometimes called enforcement “coproduction.”<sup>23</sup> Where social norms reinforce the rules, “quasi-voluntary” compliance reduces the need for a heavy investment in state enforcement (save occasionally punishing deviant behavior) (Levi 1988: 72–70, 1997: 19–25);<sup>24</sup> indeed, compliance may be high even where state infrastructural power is limited.

On the other hand, when formal rules run up against competing social norms or resistance from powerful interests, compliance requires greater enforcement effort. Strong competing norms – sometimes enforced by nonstate actors such as traditional authorities or religious communities – may inhibit societal cooperation with enforcement (for instance, in reporting of noncompliance) and even create incentives for outright noncompliance (Migdal 1988; Helmke and Levitsky 2004; Acemoglu and Jackson 2017). Where state infrastructural power is limited, the result is almost invariably low compliance. Transformative laws created in pursuit of far-reaching behavioral change will, in such cases, be limited to “aspirational” status (Htun and Jensenius, this volume). Sometimes societal resistance is so pervasive that it can overcome almost any enforcement effort, resulting in low compliance despite high state capacity. A classic example is Prohibition in the United States, where a strong state and a substantial investment in enforcement still failed to eliminate the production and consumption of alcohol. Strong institutions, then, are those that produce actual compliance with a demanding standard of behavior. The level of state enforcement effort required to produce that compliance will depend on the degree of societal resistance or cooperation.

In sum, noncompliance is a product of the interplay between state enforcement efforts from above and societal responses from below. If institutions do not change behavior because the relevant state agencies will not or cannot act to compel individuals or firms to follow parchment rules, then *S* is small with the state’s complicity. But compliance may be low even where state will and capacity is high. The state may invest considerable resources into enforcing a particular institution, but if societal actors still find ways to continue their proscribed behavior, then the rule is clearly not producing its intended effect. Strong institutions, then, produce compliance with a demanding standard of behavior when there exists the will and capacity to enforce from above *and* they achieve compliance from below.

<sup>23</sup> We take this term from Amengual (2016). Our usage is similar to Levi’s concept of quasi-voluntary compliance, in which convergent social norms reduce the cost of monitoring and enforcement, thereby allowing state agents to focus on deviant cases. See also Ostrom (1996) and Sabet (2014).

<sup>24</sup> The model developed by Acemoglu and Jackson (2017) suggests that social norms explain coproduction of legal enforcement by shaping incentives to monitor and report deviant behavior.

## Instability

Most variants of institutionalism take a minimum of stability for granted, either because institutions reflect an equilibrium outcome or because they generate positive feedback effects. Indeed, nearly all of our theoretical expectations regarding their effects hinge on the assumption that institutions are minimally stable – that they do not change at each round of the game. And many institutions are designed not so much to produce change as to protect the status quo and extend the preferences of powerful actors into an uncertain future. Institutions can therefore most clearly be seen to “matter” – in the sense of constraining and enabling political actors – when they endure beyond the spell in office of those who create them. Otherwise they may be easily dismissed as epiphenomenal. Institutions must, moreover, endure for some time if political actors are to develop the shared expectations and consistent strategies that institutionalist theories lead us to expect.

As Levitsky and Murillo (2009, 2014) have argued, however, institutions vary widely in their “stickiness.” In Latin America, one observes instances of extreme institutional instability, or “serial replacement,” in which political and economic rules of the game are rewritten after virtually every change in government (Levitsky and Murillo 2014). For example, Bolivia, Ecuador, and the Dominican Republic have changed constitutions at an average rate of more than once a decade in the nearly two centuries since independence (Elkins, Ginsburg, and Melton 2009). Latin American electoral systems are also subject to serial replacement; the rate of change in much of the region is considerably higher than in advanced democracies (Remmer 2008; Calvo and Negretto, this volume). Venezuela employed thirteen different electoral laws between 1958 and 1998 (Crisp and Rey 2001: 176). Ecuador underwent fourteen major electoral reforms between 1980 and 2015 – nearly two major reforms per elected president (Calvo and Negretto, this volume). This pattern is not limited to the federal level. Argentina’s twenty-four provinces undertook thirty-four electoral reforms between 1983 and 2003 (Calvo and Micozzi 2005). Institutional stability, then, cannot be taken for granted. Rather, it should be treated as a variable – and another dimension of institutional strength.

We define institutional instability as an excessively high rate of institutional change that leaves political actors unable to develop stable expectations about how the rules work or clear strategies to pursue their interests through them. It seems obvious that institutions that change with every shift in the political winds cannot be called strong. The kind of instability that should be associated with institutional weakness is, however, harder to identify than noncompliance. The problem here is distinguishing instability – an *excessively* high rate of institutional change – from “normal” institutional reform. Sometimes change simply reflects the persistence of the original goals, which requires adaptation to new conditions, such as raising the minimum wage to match inflation. Or the aggregate institutional cost might eventually be revealed to be intolerably high, so that the healthy political response would be to amend

or replace the institution. Here, institutions are adapting to new information about environmental conditions. Alternatively, environmental conditions and societal power and preference distributions may change, generating pressure for reform in even the most institutionally stable environments. Few observers would consider suffrage extension, the design of civil service laws, or the adoption of laws legalizing gay marriage in established democracies to be signs of institutional weakness. Rather than institutional instability, these are better thought of as cases of adaptation to changing societal preferences.

Nor is an institution's persistence always a sign of its strength. If *S* is decreasing over time – say, because inflation is eating away at the minimum wage, as it does in the United States – formal stability could mask a growing weakness. Scholars have labeled this process of institutional change “drift” (Hacker 2005; Streeck and Thelen 2005). For an institution to remain strong in such a context, it must be able to adapt – to undertake reforms that preserve *S* in the face of changes that threaten the institutional goal. If it maintains *S* within acceptable and meaningful levels, adaptation may well be a sign of strength. Keeping *S* as the conceptual touchstone for institutional weakness helps us distinguish adaptation from instability.

Distinguishing between instability and adaptation poses an empirical challenge. The point at which change becomes excessive is frequently a context- and institution-dependent (perhaps even a normatively informed) judgment, which makes comparative analysis difficult. In many cases, measurement will require some kind of counterfactual exercise or the use of comparative benchmarks based on historical rates of institutional change within the country or average rates of change in other countries.

In most contexts, widespread institutional instability is costly, for it narrows time horizons and undermines cooperation in ways that hinder governance and leave democracies vulnerable to abuse, crisis, or both.<sup>25</sup> Yet democracies also contain “bad” institutions whose persistence produces harmful effects for important parts of society. Those who are concerned with some of the negative aspects of the United States' electoral system – such as the Electoral College, gerrymandered districts, and the many impediments to registration and suffrage – are understandably frustrated by that country's institutional stability. In some cases, durable institutions also create problems in Latin America. As Albertus and Menaldo (2018) show, many Latin American constitutions maintain key authoritarian features, some of which have proven difficult to replace. Rather than take a normative position with respect to institutional instability, then, we simply seek to identify it and understand how it affects actors' expectations.

Table 1.1 summarizes the types of weaknesses we have identified here:

<sup>25</sup> See Levitsky and Murillo (2005) and Spiller and Tommasi (2007). For instance, political instability has been associated with lower economic growth (Aisen and Veiga 2013), especially in developing countries (Berggren et al. 2009), as well as with lower investment in infrastructure (Henisz 2002).

TABLE I.I. *Types of institutional weakness*

Type	Description	Examples
Insignificance	Institution has zero ambition, in that it does not prescribe a meaningful change in actors' behavior even when fully enforced and complied with.	<i>Symbolic institutions</i> : designed to please an audience but without behavioral effects; for example, "Potemkin courts" (Brinks and Blass 2013).
Noncompliance	Type I: Nonenforcement  Institution prescribes significant behavioral change, but state officials choose not to enforce it systematically.	<i>Window dressing institutions</i> : created without intent to fully enforce (Levitsky and Murillo 2009); for example, early prior consultation laws (Falleri, this volume).  <i>Forbearance</i> : strategic neglect of enforcement, usually driven by political incentives; e.g., street vending restrictions (Holland 2017, this volume).  <i>Selective enforcement</i> : state officials vary in enforcement effort across territory ("brown areas," O'Donnell 1993) or across different societal groups (literacy tests in the American South, Keyssar 2000).
Instability	Type II: Nonpunitive enforcement  Rule is enforced and sanctions are applied, but the sanctions are too weak to change behavior.	<i>Unsanctioned institutions</i> : strategically designed to be enforced without effect due to trivial penalties; e.g., some antideforestation laws in the Argentine Chaco (Fernández Milmanda and Garay, this volume).
	Type III: Weak state capacity relative to societal resistance  Government officials seek compliance with the institution but lack sufficient state capacity or societal cooperation to systematically enforce it.	<i>Standoffish states and intermittent enforcement</i> : follow path of least societal resistance (Slater and Kim 2015); e.g., labor regulations (Amengual and Dargent, this volume).  <i>Aspirational laws</i> : created with expectation of low societal compliance but with goal of long-term change in social norms; gender equity laws (Htun and Jensenius, this volume).
	Rules change at an unusually high rate and in contradictory directions, preventing actors from developing stable expectations around them.	<i>Serial replacement</i> : rules and procedures are replaced wholesale, without ever becoming entrenched or settling into a stable equilibrium (Levitsky and Murillo 2014); e.g., electoral laws (Calvo and Negretto, this volume).

### **Judicial Interpretation as a Source of Noncompliance and Instability**

In closing this section, it is worth highlighting one more – often hidden – form of both noncompliance and instability: judicial (re)interpretation. The judicial power of interpretation is often viewed as a source of institutional strength. Elkins, Ginsburg, and Melton (2009), for example, find that, all other things being equal, including a constitutional court with the power of authoritative interpretation considerably extends the life of a constitution. Authoritative interpretation in response to unexpected contingencies and arising exigencies can add needed flexibility to an institutional framework. At the same time, however, judicial interpretations may merely provide “legal” cover and legitimacy for what is clearly a rule violation, or may be manipulated to produce frequent changes in response to changing preferences. Indeed, in contemporary Latin America, powerful actors increasingly use courts to legitimize noncompliance or instability. This is an important phenomenon, but because judicial interpretation is simply an alternative means of generating rule changes (i.e., instability) or noncompliance, we do not treat it as a separate category of institutional weakness.

We have seen weakness through judicial interpretation feature prominently in presidential efforts to circumvent constitutional term limits. Under Alberto Fujimori, for instance, Peru’s Congress passed an “authentic interpretation” of the two-term limit imposed by the 1993 constitution, allowing Fujimori to seek a third term in 2000 on the grounds that his first term began under the old constitution. Although most legal experts deemed that interpretation to be in blatant violation of the “true” meaning of the constitution, the Constitutional Tribunal – a Potemkin court – upheld it. Peru is not alone in this respect. In other cases, supreme courts (Nicaragua and Honduras) or constitutional tribunals (Bolivia) enabled efforts by powerful presidents to circumvent constitutional term limits via dubious rulings that interpreted term limits as a violation of a “higher” constitutional right to run for office. In these cases, then, judicial interpretations of the law by friendly (if not subordinate) courts allowed presidents to circumvent the law.

Whether interpretive claims by the courts are merely cover for noncompliance and instability on the one hand, or instances of legitimate adaptability and flexibility on the other, can, of course, be difficult to determine. As in the case of the impeachments examined by Helmke (2017, this volume), it is not always clear whether the use of a norm or interpretation to justify behavior is pretextual or legitimate. Nevertheless, we can identify some reliable indicators of weakness. These include (1) frequent flip-flops on the part of the court on the meaning of a provision, especially if they are clearly aligned with partisan sympathies; (2) a broad-based consensus on the part of disinterested legal or other experts that the interpretation lacks technical merit; (3) an all-too-evident pattern of interpretations that respond to the interests of powerful

actors; and (4) interpretations that do not outlive the tenures of the judges who produce them. Some cases will be more obvious than others, but in each case, it will be the researcher's task to persuade the audience that a court is complicit in the production of institutional weakness.

## EXPLAINING INSTITUTIONAL WEAKNESS

This section proposes some initial hypotheses to account for the different types of institutional weakness we have identified. In our characterization of institutional strength,  $S$  is the cost of the institution to the actors who prefer what we call the preinstitutional outcome ( $po$ , in Figure 1.1) – that is, the outcome absent the institution, or under a different preferred institutional arrangement. Although we have alluded to other factors – such as voluntary compliance rooted in social norms – in generating institutional strength, our theory is, at its core, a coalitional one, in that it centers on political support for the institution and its enforcement. For the sake of simplicity, we assume that for every institution there exists one coalition of actors that supports it and another coalition of actors that opposes it and prefers an alternative outcome. Actors who oppose a particular institution have three options: (1) comply at cost  $S$ , (2) avoid compliance and face the cost of a violation ( $V$ ),<sup>26</sup> or (3) change the institution at cost  $C$  to achieve a new  $S$ .

An institution is strong if the cost for opponents of either changing it ( $C$ ) or violating it ( $V$ ) exceeds  $S$ , the cost of the institutional outcome. Typically, this will depend on the capacity of institutional supporters to block change *and* produce enforcement. Institutions are weak, on the other hand, when the cost of either changing or violating them is lower than  $S$ , the cost of compliance, so that either or both options (2) and (3) are on the table. To explain institutional weakness, we need to understand what factors raise and lower the cost of  $V$  and  $C$  relative to  $S$  and relative to each other. That is, we expect institutions to be stable and regularly complied with when the cost of changing the institution ( $C$ ) is higher than the cost imposed by the institution ( $S$ ) or the cost of a violation ( $V$ ). Conversely, noncompliance should be high when the cost of violating ( $V$ ) is lower than the cost imposed by the institution ( $S$ ) or the cost of replacing it ( $C$ ). Instability should be high when replacing the rule ( $C$ ) is cheaper than accepting its cost ( $S$ ) or the cost of sanctions for violating it ( $V$ ). To identify the source of institutional weakness, then, we should examine the conditions that shape the value of complying with a particular institution ( $S$ ), vis-à-vis either changing it ( $C$ ) or violating it ( $V$ ).

### Sources of (Non)compliance

One important dimension of institutional weakness is noncompliance: institutions set out ambitious goals but fail to make a difference because actors do not comply with them. As a result, an  $S$  that is large on paper (what we have

<sup>26</sup>  $V$  is, of course, a function of both the magnitude of the penalty for a violation and the probability of facing the sanction.

denoted as *io'-po*) may be dramatically reduced in practice (to a much smaller *io-po*). We argued above that institutional compliance might be limited by a lack of meaningful enforcement effort or lack of enforcement capacity relative to societal resistance. Here we briefly examine the political origins of these failures.

### *Weakness by Design: The Role of Audience Value*

Some institutions are weak because state officials lack an interest in enforcing them. Why would politicians incur the cost (in terms of time and political capital) of designing institutions that generate no real-world effects? An answer lies in the potential audience value generated by institutional reforms. International norm diffusion, reinforced by the growth of powerful transnational advocacy networks (Keck and Sikkink 1998), and the promotion of institutional reform agendas by international organizations such as the World Bank, International Monetary Fund, and the United Nations, led many lower- and middle-income governments to perceive a high return on certain institutional reforms (Dobbins, Simmons, and Garrett 2007; Henisz, Zelner, and Guillen 2005). Governments often claim credit with international audiences for a substantive achievement when they have done nothing more than create window dressing institutions – i.e., institutions they have no intention of enforcing. Thus, the audience value, in terms of international prestige, external support, or sustaining the good will of religious establishments and other cultural elites, outweighs the cost of institutional design, turning C into a net benefit rather than a cost.

In short, window dressing institutions are created by governments seeking to secure the legitimacy gains of adopting an institutional reform without incurring more than a trivial S, the cost of compliance. In this scenario, rule writers do not seek to depart from the preinstitutional outcome, but nevertheless derive some benefit from the mere act of institutional creation. When audience value turns C into a net benefit, governments that prefer the status quo have an incentive to design rules in the expectation that they will lie dormant.<sup>27</sup> This is easiest when the primary audience – members of the international community, for example – lacks the monitoring capacity to reliably observe violations.

During the 1990s and early 2000s, for example, many Latin American governments responded to international pressure by adopting anticorruption laws or statutes to protect human rights, women's rights, or indigenous rights. In some of these cases, the costs of actual compliance would have been quite high – either for governments themselves (e.g., anticorruption laws) or for powerful private actors (e.g., environmental regulation). In reality, however, designers often had no intention of incurring the cost of enforcing or complying with

<sup>27</sup> Designers may, of course, be surprised later on, when these institutions are activated and begin to produce important effects. Indeed, as we will see below in the discussion of aspirational rules, this may be the intended strategy of proponents of the institutional goal.

them. An example is the prior consultation systems adopted following passage of ILO Convention 169. Fifteen Latin American governments adopted prior consultation laws during the 1990s (Falleti and Riofrancos 2018: 89), but at least initially, most of them were dormant. As Falleti (this volume) observes, Bolivia's first (1991) prior consultation law was "designed not to be complied with or enforced." Likewise, antidueling laws in the US South were often "sops to vocal minorities" (Wells 2001: 1827). For example, South Carolina passed its 1812 antidueling law in response to a public campaign by evangelical leader Philip Moser, even though the state's political elite "never intended it to be enforced" (Wells 2001: 1827).

Not all predictably weak institutions are the product of a cynical political exercise. Occasionally, political actors design rules that are unlikely to be complied with today in the hope that they will be complied with in the future. Rule writers may understand (or fear) that in the near term, institutional opponents will be able to avoid enforcement, perhaps because the institution competes with existing social norms or informal institutions. In these cases, the contemplated *S* may be substantial, but the cost of violation in the near term is limited by some combination of low enforcement capacity and limited societal coproduction. In effect, champions of the institutions bet on the future, hoping that changing conditions will permit increased enforcement, or "activation," of the rules in some future round. These are what Htun and Jensenius (this volume) call "aspirational" laws. Examples include many of the social rights included in recent Latin American constitutions and, as Htun and Jensenius show, laws against domestic violence in Mexico. According to Htun and Jensenius, aspirational laws are passed in full knowledge that they will not change behavior in the short term but nevertheless seek to establish "goal posts, stakes in future developments, and guides to the process of social change."

Aspirational laws may be activated – made effective through enforcement, rather than formal institutional change – when the coalition supporting the institution strengthens, such that it either gains control of enforcement or exerts greater influence over those who control it. Take the activation of individual property rights in Mexico, the subject of the chapter by Saffón and González Bertomeu (this volume). Mexico's Lerdo Law, which was passed under Benito Juárez's liberal government, was initially ignored by the courts, which deferred to long-established norms protecting collective property rights. This changed during the late nineteenth-century export boom, which increased the value of commercial land. As the distribution of power shifted toward agricultural exporters, the courts developed a preference for the once-dormant Juárez-era law. Thus, individual property rights laws that had been only selectively enforced for decades were activated via court rulings during the Porfiriato.

Activation of aspirational laws is frequently a product of social change and the emergence of political movements demanding enforcement. In the United States, for example, the right to vote regardless of race was enshrined in the Fifteenth Amendment to the Constitution in 1870 but was not enforced in

much of the country for nearly a century. This constitutional right was not activated until demographic and political changes in the African American community gave rise to a powerful civil rights movement that, acting in tandem with the courts, produced a coalition capable of generating compliance.

As the above examples suggest, institutional activation may be driven, in part, by judicial interpretation. Courts across Latin America have activated previously ignored social rights provisions in their constitutions (Gauri and Brinks 2008; Langford 2009). Colombia is probably the best example of the activation of constitutional rights through judicial interpretation. Colombia's Constitutional Court essentially rewrote that country's civil code to eliminate gender discriminatory provisions in line with prevailing norms of gender equality, first between men and women (Oquendo 2006), but eventually opening a path for the legalization of same-sex marriage (Landau and Cepeda 2017: 232–235).

### *Implementation Gaps: Disjunctures between Rule Writers and Power Holders*

A second source of weak enforcement is a disjuncture between rule writers, on the one hand, and those with the power to affect compliance on the ground, on the other. Whereas scholarship on bureaucracies in advanced democracies draws attention to the phenomenon of bureaucratic shirking when the preferences of rule writers and enforcers do not coincide, the degrees of freedom in this gap are usually constrained by the statutory goals of the parchment rule.<sup>28</sup> In a context of generalized institutional weakness, by contrast, rule writers do not necessarily constrain enforcers, even where parchment laws prescribe such control. The coalition in control of the rule-writing process (legislators, constituent assembly members, technocrats in the executive) may not control key agencies of enforcement, such as local governments, bureaucracies, courts, and the security forces, allowing these latter actors greater degrees of freedom in deciding even whether to enforce or not.

Diverging preferences over design and enforcement can often be especially pronounced in hybrid or transitional regimes in which elected officials do not fully control the state. Take, for example, hybrid regimes in which civilian governments exercise little control over the security forces. Governments may adopt human rights laws that the security forces do not comply with (e.g., Guatemala in the 1980s). Or consider cases in which nominally independent constituent assemblies or legislatures exercise little real power over executives (who, in most instances, control prosecutors, the police, and the armed forces) and thus design laws that they cannot make binding. For example, Mexico's 1917 constitution – drawn up by a relatively independent constitutional convention during the Mexican Revolution – was “one of the most radical of

<sup>28</sup> See Huber and Shipan (2002) and Carpenter (2001) for arguments in the rational choice and historical institutionalist traditions, respectively.

its time” (Knight 1986: 470), but the more moderate president Venustiano Carranza, who controlled the revolutionary armed forces, ignored its most radical clauses (Wilkie 1967: 56).

Even in relatively well-functioning democracies, decentralization and fragmented bureaucracies and security forces may hinder enforcement of laws and rules that national governments seek to enforce. Thus, where state capacity is uneven across the national territory (O’Donnell 1993, 1999b), decentralization may weaken some institutions. If enforcement is entrusted to multiple levels of government, each of which has different constituencies, certain institutions may be vulnerable to local-level forbearance – a dynamic that O’Donnell (1993, 1999b) highlighted in his discussion of “brown areas.”

Disjunctures between distinct levels of government may also occur when the designers of national-level institutions hold preferences that diverge from those of local officials charged with enforcing them. As Holland (this volume) points out, there is often a greater public appetite for rules that require some desired behavior than for the difficult work and painful choices involved in imposing sanctions for their violation. Whereas the general public may prefer a large *S*, at least in the abstract, state officials who are closer to the targets of a regulatory scheme may be deterred by the social or political cost of enforcement. Thus, national legislatures may pass broadly popular laws against squatting or street vending, but government officials operating at the site of noncompliance are often reluctant to impose the costs that are required to actually change behavior. Mayors whose constituents would lose their homes or livelihoods if regulations were enforced, or local bureaucrats charged with carrying out orders to enforce, may thus hold preferences over enforcement that diverge markedly from the national officials who design the laws. The result is a “coercion gap,” in which laws are written and passed by national officials but not enforced by local ones (Holland, this volume).

Fernández Milmanda and Garay’s analysis of deforestation in the Argentine Chaco (this volume) also highlights the role of divergent orientations toward enforcement across levels of government. The 2007 Native Forest Protection Regime was spearheaded by national legislators with an environmentalist bent whose urban constituents stood to lose very little under new laws restricting deforestation in the Chaco region. By contrast, governors from the region had to deal with powerful agricultural producers who had much to lose and were an important part of their constituencies. The governors, who were responsible for enforcing new environmental regulations, faced considerably higher costs of enforcement, and found various ways to reduce the impact of the law on their constituents.

A disjuncture between rule writers and power holders may also emerge in democracies with high socioeconomic inequality. Democracy shifts rule-writing power further down the socioeconomic ladder – the median voter is likely to be well below the mean income – and in cases of extreme inequality, the median income earner is poor. If the burden of a particular institution

lands primarily on the rich, wealthy individuals may well possess sufficient resources to lobby against enforcement structures, buy off the enforcers – for example, local mayors and judges – and otherwise prevent full enforcement. For such individuals, the real cost of V is reduced even though the rules on the books are nominally universal (Lieberman 2003; Brinks and Botero 2014). Additionally, inequality usually allows the rich to exert disproportionate influence at the design stage (in the executive branch or the legislature), leaving the poor with few options other than protesting at the site of implementation.

### *State Capacity and Societal Resistance*

Nonenforcement is often attributed to state weakness. Rules are violated because state officials lack the skills and resources necessary to enforce them. But this structuralist view – state capacity as a slow-moving variable rooted in long-term historical processes (Centeno 2002; O'Donnell 1999b; Soifer 2015) – obscures a more complex (and politically interesting) reality. Most Latin American states possess at least a modest capacity to enforce laws. Indeed, even seemingly weak state agencies have at times demonstrated striking enforcement capacity: Mexico's nineteenth-century state was capable of seizing and breaking up Church properties in the name of liberal property rights (Saffón and Gonzáles Bertomeu, this volume); the Dominican state proved capable of enforcing labor regulations (Schränk 2011, this volume); some Latin American mayors cracked down effectively on squatting and street vending (Holland 2017, this volume); and local governments in crime-ridden cities like Santa Tecla, El Salvador; Medellín, Colombia; Ciudad Juárez, Mexico; and Rio de Janeiro, Brazil have at times dramatically reduced violence (WOLA 2011; Moncada 2016). Hence, we view institutional enforcement efforts as driven as much by political choices as by underlying state capacity. Indeed, there is simply too much variation in enforcement in Latin America – within states over time, or across comparably weak states – to ignore the role of political decisions in shaping both short-term enforcement efforts and longer-term efforts to build state capacity.

It takes time to build state capacity (Soifer 2015), and states that fail to do the work of enforcing a certain regulatory framework over time often find it difficult to suddenly generate compliance when the government's preferences change. Yet enforcement capacity can be built – and sometimes quite rapidly. For example, Colombia's Constitutional Court was strong almost immediately after it was established in 1992 (Cepeda Espinoza 2004), defying both Colombia's reputation as a weak state and existing theoretical expectations about the requisite maturation time for new courts (Epstein, Knight and Shvetsova 2001; Carrubba 2009). Likewise, Peruvian technocrats – operating in a notoriously weak state – created effective economic policy-making institutions within the finance ministry under President Alberto Fujimori (Dargent 2015). And as Schränk (this volume) shows, the Dominican government introduced a set of Weberian administrative reforms that quickly gave rise to a more effective labor inspectorate during the 1990s.

But if enforcement is possible in weaker states, it is nevertheless costly. The sheer logistical requirements of monitoring consume vast resources; and enforcement may trigger resistance from powerful actors or electorally consequential constituencies. Where public sector resources and political capital are scarce, then, governments that possess the raw capacity to enforce laws may nevertheless opt for strategic forbearance or the selective use of enforcement, following what is, in effect, a path of least resistance. According to Amengual and Dargent (this volume), the latter strategy is followed by “standoffish states.” Standoffish states can – and sometimes do – enforce the law. But because enforcement requires costly investments of scarce resources and political capital, governments are only likely to take action when significant countervailing constituencies mobilize behind it (Amengual 2016; Dargent, Feldmann, and Luna 2017; Amengual and Dargent, this volume). Standoffish behavior is particularly likely in unequal democracies, where the rich (but also, as Holland shows, the poor) possess a range of tools with which to resist enforcement efforts. Sometimes opponents do not bother to mobilize to block the passage of particular laws, counting instead on being able to neutralize it at the time of application.

Standoffish states are widespread in Latin America. The region’s unequal democracies frequently give rise to ambitious institutional reforms aimed at regulating the powerful or protecting the vulnerable. These reforms are often designed by a handful of state actors operating without strong societal coalitions. Thus, efforts to generate compliance often confront fierce resistance on the ground. Without societal support, systematic enforcement requires a vast expenditure of human and financial resources, which are hardly abundant in most Latin American states.

Although the state’s default strategy is often nonenforcement (Amengual and Dargent, this volume), standoffish states may enforce the law when societal mobilization creates incentives for them to do so. In Bolivia, for example, social mobilization led to unprecedented enforcement of prior consultation laws in the 2000s (Falleti, this volume). Likewise, in Brazil, where extensive environmental regulation had been on the books since the 1960s but was largely unenforced, the mobilization of environmental activist networks led to greater state enforcement efforts in the 1980s and 1990s (Hochstetler and Keck 2007). International actors may strengthen pro-enforcement coalitions (Keck and Sikkink 1998; Hochstetler and Keck 2007). As Schrank’s (this volume) study of Dominican labor inspectors shows, the US government’s decision to allow unions and other nongovernmental organizations to petition the US trade representative on behalf of Dominican workers “externalized the costs” of monitoring the country’s new labor standards and, by raising the specter of a loss of trade preferences due to noncompliance, created powerful new incentives for the Dominican state to invest in enforcement capacity.

*Societal Sources of Compliance*

The state's enforcement capacity is thus relational. Some institutions fail to achieve widespread compliance even though governments possess both the will and what appears to be a reasonable capacity to enforce them. These are often institutions that compete with preexisting societal norms and/or are difficult to monitor. Examples include Prohibition laws in the United States, labor and environmental regulations in much of Latin America (Amengual 2016), and laws regulating violence against women in Mexico (Htun and Jensenius, this volume). In such cases, state enforcement requires societal cooperation. Without societal partners to engage in reporting or monitoring on the ground, and thus to "mobilize and push an indifferent bureaucracy to action" (Amengual and Dargent, this volume), compliance may remain low despite state officials' enforcement capacity. An example is the effort to regulate the Santa Clara plant in Rosario, Argentina (Amengual and Dargent, this volume). Rosario's environmental regulations were routinely unenforced during the early twenty-first century, allowing the Santa Clara plant to pollute the local air and water with impunity. However, mobilization by community organizations and their allies in the municipal government generated public pressure on provincial officials to enforce the law. Civic groups such as the Vecinal Santa Teresita worked with provincial regulators to beef up monitoring of Santa Clara. Local activists and city council members formed a committee that reinforced state monitoring efforts and served as a source of pressure on regulators and the firm.

Societal coproduction may yield high levels of compliance even where states are quite weak. In Colombia, for example, the cooperation of local business interests enabled mayors in cities like Bogotá and Medellín to successfully implement participatory policies aimed at reducing criminal violence (Moncada 2016).

Enforcement is often most challenging when institutions seek to change deeply ingrained social norms and behavior patterns. Thus, in their study of laws against domestic violence in Mexico, Htun and Jensenius (this volume) found that the law was resisted not only by its targets – the abusers – but also by its purported beneficiaries. Their analysis of survey results suggests that many women do not report domestic violence because doing so runs counter to existing norms that treat domestic violence as a private, family matter. Others opt not to report out of fear of the potential costs of reporting, including retaliation or even material privation, when the abusers, who often are the family breadwinners, are removed from the home. Thus, both competing social norms and material interests may reinforce the behavior that domestic violence laws seek to proscribe. Such bottom-up resistance on the part of beneficiaries clearly robs the institution of the potential for societal coproduction.

Relatedly, Falleti (this volume) argues that for new institutions to elicit compliance in a context of state weakness, they must gain broad legitimacy, which may be achieved through the political incorporation of the affected groups. When an institution's beneficiaries become an important part of the political ecosystem – through direct participation or as a support base for institutional designers – it is more likely that governments will invest in enforcement and that societal actors will cooperate. Thus, in her analysis of mechanisms of prior consultation with indigenous communities in Bolivia's hydrocarbons sector, Falleti argues that these institutions eventually gained strength because the MAS government endowed them with greater legitimacy. Because the MAS had politically incorporated indigenous communities, MAS-sponsored institutions of prior consultation were broadly accepted and complied with by all parties in the hydrocarbon sector.

### **Sources of Insignificance**

Institutions are insignificant when they require outcomes that simply mirror what would happen in the institution's absence. Insignificant institutions differ from window dressing institutions in that they actually appear to generate compliance, but their presence does little or nothing to change behavior on the ground. Why would rule makers design institutions that neither change the status quo nor address any significant challenges to it? As in the case of window dressing institutions, the incentive to create these institutions lies in audience values that turn C into a benefit rather than a cost. External or domestic actors may demand the adoption of laws or regulations resisted by rule makers or powerful stakeholders, leading rule makers to create purely symbolic responses with high audience value. But in these cases, the cost of a blatant violation is high, which precludes the adoption of window dressing institutions. As an alternative to noncompliance, state officials may design rules that, while maintaining an outward appearance of significance, render the institution toothless in its effects.

An example is the creation of "Potemkin courts" – constitutional arrangements that create seemingly independent constitutional courts to satisfy international donors but which include "poison pill" mechanisms that enable executives to control them or limit their effectiveness without actually violating the formal rules (Brinks and Blass 2013). Attacks on high courts are very visible, even to outside audiences, and they carry high reputational costs – the foreign audience, in a sense, is part of the enforcement regime. When the fine print of the rules themselves produces a weak or subservient court, however, it is much more difficult to muster the requisite outrage in the international community. In these cases, the courts do not impose a significant cost on incumbent governments, even when everyone plays by the rules, and they can actually legitimize behavior of dubious constitutionality. Thus, the cost of the institution is intentionally kept low by the designers because the cost of a violation is expected to be high.

### Sources of Instability: The Cost of Change

What accounts for institutional instability? As noted above, we expect institutional instability where, for those in a position to craft new institutions, the cost of change (C) is consistently lower than the cost of accepting the institutional outcome (S) and the cost of violating the institution (V). Endemic institutional instability in a given region, such as what we observe in much of Latin America, suggests that key actors must frequently find S to be very high, or they must routinely find the cost of replacement to be very low – or both.

#### *Economic Instability*

We expect to find institutional instability in regions afflicted by frequent economic shocks. Pressure for institutional change emerges when an environmental change alters S, which is more likely in regions that are more exposed to economic shocks. Thus, an economic crisis that erodes public support for existing policy arrangements (e.g., Argentina 2001–2002) may lead elected officials to conclude that the cost of leaving those arrangements intact (S) is unacceptably high. Or a prolonged commodities boom could both lead highly popular presidents to view the cost of constitutional term limits (S) as unacceptably high and generate political capital needed for institutional change. In short, whenever an exogenous change dramatically increases S, such that it exceeds the cost of replacement, we can expect pressure for institutional change.

For instance, in their analysis of the instability of electoral institutions in Latin America, Calvo and Negretto (this volume) argue that economic shocks increase public discontent with the status quo and create electoral constituencies for institutional reform. Where economic performance is poor or unstable, citizens will be less attached to existing rules of the game and thus less inclined to defend the institutional status quo. Likewise, Albertus and Menaldo (2018, this volume) find that economic crises increase the likelihood that authoritarian constitutions will be dismantled. Similarly, Henisz and Zelner (2005) point to the impact of negative economic shocks on the survival of regulatory agreements in the Argentine and Indonesian electricity sectors. Economic crisis often leads to discontent with incumbents, producing high electoral volatility and affecting the stability of the government coalitions that would otherwise support institutional arrangements, as discussed in the next section.<sup>29</sup>

#### *Unstable Coalitions*

Another source of institutional instability is what might be called actor volatility, or frequent change in the rule writers and the coalitions behind particular institutions. Institutions may be unstable because underlying power

<sup>29</sup> Campello and Zucco (2015) suggest that dependence on commodities and foreign capital increases political swings in presidential popularity, which, in turn, can generate electoral volatility. Likewise, Remmer (1991) and Murillo and Visconti (2017) find that, in Latin America, negative economic shocks increase electoral volatility and anti-incumbent votes.

distributions are fluid. Perhaps those who bear the cost of *S* (and who may have been the losers in the last round of institutional creation) are suddenly placed in a position to change the institution. In this case, instability is not so much a function of a change in outside circumstances, but rather of changes in the preferences of the institution makers.

Frequent turnovers in power – from soldiers to civilians, from leftists to rightists, from populists to antipopulists – should increase the frequency of institutional reform attempts, particularly when turnover yields substantial change in the preferences of rule-writing coalitions. So, too, should extreme electoral volatility, in which political actors rise and fall quickly, with outsiders often ascending quickly to power and incumbent “insiders” declining rapidly and even disappearing from the political scene. There is some evidence that outsider coalitions are more likely to try to rewrite the rules when they win power (Weyland 2002). And when the coalition behind the old rules collapses and disappears, fewer actors will remain to defend them, leaving the institutional status quo highly vulnerable.

Calvo and Negretto (this volume), for example, find that electoral volatility is a major determinant of electoral rule change. There appear to be two reasons for this. First, parties seek to rewrite the rules whenever doing so would improve their electoral standing. Where electoral volatility is low, such that each party’s share of the electorate remains relatively stable, parties will see fewer advantages in rule changes. By contrast, where parties’ electoral fortunes change quickly and dramatically, politicians will rethink the rules with greater frequency. According to Calvo and Negretto (this volume), the rate of electoral reform is higher in Latin American countries with historically high levels of electoral volatility (such as Ecuador) than in countries with low electoral volatility (such as Honduras and Paraguay).

Electoral volatility also encourages institutional instability by undermining the coalitions that create and sustain the rules. In a context of extreme volatility, the partisan composition of governments and legislatures often changes dramatically. Dominant parties decline rapidly and even disappear, while new ones emerge out of nowhere and become dominant (e.g., Peru and Venezuela in the 1990s). The collapse of the coalitions that designed the rules and the ascent of new actors with no stake in the existing ones increases the likelihood of rule changes. For example, Ecuador’s 1998 constitution was designed by a coalition that included established progressive parties and a then-powerful indigenous movement (De La Torre 2010). Soon after the constitution was approved, however, the established parties collapsed and the indigenous movement divided and weakened. This permitted the 2006 election of outsider Rafael Correa, who ran in opposition to the established parties and without the support of the indigenous movement. Correa called a new constitutional assembly in 2007, in which an entirely different balance of forces – in which Correa’s newly created party was dominant – produced a different constitution. In short, there is good reason to think that persistent political volatility

contributes to institutional instability. Short-term electoral gains result in the definition of new rules seeking to strengthen incumbent coalitions, which are then subject to replacement when challengers prevail.

### *Instability Traps*

Institutional instability may also be self-reinforcing. Repeated instances of institutional replacement may generate feedback effects that help to keep the cost of change (C) low. Institutions usually need time to take root. Their persistence over time – through crises and changes in government – often generates greater legitimacy and even “taken-for-grantedness.” Thus, a new institution’s “susceptibility to pressures for change is greatest early in its life and declines with time” (Henisz and Zelner 2005: 367). Older institutions are also more likely to be embedded in a complex set of layered institutions, formal and informal, and to generate elaborate networks of interconnected actors. This interconnectedness generates a mutually reinforcing effect: when removing one institution affects the functioning of others, the number of affected actors increases, thereby expanding the size of coalitions with a stake in preserving the institutional status quo (Pierson 1994, 2000; Hall 2016). Institutional stability also creates incentives for actors to invest in assets and strategies specific to that institution, including, in some cases, coproduction efforts. Such investments strengthen the coalition behind the institution, as actors who develop a stake in particular institutions are more likely to defend them (Pierson 2000).

Where institutions are replaced frequently, by contrast, no such self-reinforcing dynamic emerges. Newly created institutions lack the time to develop widespread public legitimacy and interdependencies with other layered institutions. Moreover, when institutions change repeatedly, actors develop expectations of instability. Because they do not expect new institutions to endure, they are less likely to invest in assets and strategies specific to that institution or engage in coproduction efforts. And because actors do not develop a stake in the institution, or even in institutional stability per se, the coalition in favor of the status quo tends to be weaker, thereby reducing the cost of change (Hall 2016). By contrast, institutional instability generates incentives to invest in extrainstitutional skills and technologies to cope with uncertainty. Those resources, in turn, reduce the cost of institutional replacement and further weaken incentives to keep the institution alive given comparative advantages generated by extrainstitutional investment. Finally, unstable institutions may generate feedback effects by undermining economic and government performance, which creates further pressure for institutional change (O’Donnell 1994; Spiller and Tommasi 2007). Early rounds of institutional change may thus give rise to what Helmke (2017, this volume) calls an “instability trap” – a vicious cycle in which early rounds of institutional change lower the cost of replacement in future rounds.<sup>30</sup>

<sup>30</sup> For a related discussion in the context of high courts, see Kapiszewski (2012).

Elkins (2017) and Helmke (2017, this volume) offer examples of how the low cost of institutional change may be self-reinforcing. Elkins argues that constitutions strengthen with age, as citizens come to know, understand, and value them. Older constitutions such as those of Mexico and the United States tend to possess greater legitimacy, which increases the cost of assaulting or replacing them. Thus, repeated constitutional replacement, as we see in countries like Bolivia and Ecuador, may trigger a “negative feedback loop,” in which constitutions are never able to develop the legitimacy and citizen attachments required to withstand executive assaults. Likewise, Helmke (2017: 155–160) suggests that polities may fall into an “instability trap,” in which repeated constitutional crises erode public trust in (and support for) existing institutional arrangements, which in turn lowers the cost of their replacement in the future.

There is good reason to think, therefore, that institutional instability begets institutional instability. For a particular institutional arrangement to take root, actors must adjust their expectations and behavior to the new rules and procedures. Such adjustments require time (Grzymala-Busse 2011; Pierson 2004). Given a sufficient period of time, actors will invest in strategies appropriate to existing institutional arrangements, and those who succeed under those arrangements will develop both a stake in defending them and the capacity to do so. Early rounds of institutional failure and replacement, however, foreclose such a path. Actors fail to develop stable expectations or strategies appropriate to the existing rules and are thus less likely to develop a stake in their defense. As a result, the cost of institutional replacement remains low.

#### COMPLIANCE AND STABILITY

Compliance and stability are often viewed as complementary. This makes intuitive sense. As the previous section suggests, rules that are widely violated often lack public legitimacy, which leaves them vulnerable to contestation and eventual change (see Helmke 2017: 155–160). In their important study of constitutional stability, Elkins, Ginsburg, and Melton find that “fealty to the dictates of the constitution ... and [constitutional] endurance are inextricably linked” (2009: 77). This is not always the case, however. Indeed, institutional stability is sometimes rooted in the *absence* of such fealty. Noncompliance lowers the stakes surrounding institutional outcomes, which can dampen opposition to those institutions. By shielding potential losers from an institution’s effects, forbearance may enhance institutional stability by convincing powerful actors to accept rules that they would otherwise push to overturn. In effect, low compliance can inhibit the emergence of reform coalitions.

The relationship between low compliance and stability can be seen in the case of labor regulations in Latin America. During the 1990s, Latin American governments faced strong pressure to flexibilize their labor markets as a means

of attracting investment. Although a few governments (e.g., Peru) dismantled existing labor laws (Murillo 2005), others, such as that of Mexico, opted to maintain the labor code intact while achieving de facto flexibility by instructing bureaucrats to reduce enforcement of labor regulations (Bensusán 2000; Cook 2007). Thus, a labor code established in the 1930s survived the pressures of the Washington Consensus because enforcement agencies could modify its application, permitting lower compliance. Similarly, Argentina's labor law, which enables industry-level collective bargaining, remained untouched in the 1990s. However, this stability was rooted in the labor ministry's decision not to call industry-wide collective bargaining and instead push for company-level agreements, which reduced private sector pressure for reform (Murillo 2005). When economic and political conditions changed during the 2000s, so too did enforcement, and the number of industry-level agreements increased (Etchemendy and Collier 2007; Etchemendy and Garay 2011).

The stability of weakly enforced institutions is often enhanced by the existence of parallel informal institutions that reduce uncertainty and stabilize actors' behavioral expectations (Helmke and Levitsky 2004). For instance, Mexico's 1917 constitution was both remarkably stable and weakly enforced. Throughout most of the twentieth century, clauses that threatened the vital interests of the ruling Institutional Revolutionary Party (PRI) and its allies – including free elections, limits on executive power, judicial tenure security, and various social rights – were routinely violated. This arrangement persisted, in part, because an array of informal institutions helped to stabilize politicians' expectations and guide their behavior. For example, the uncertainty generated by presidential succession in a context of noncompetitive elections and a ban on reelection (a rule that was strictly enforced) gave rise to an elaborate informal institution, called the *dedazo*, in which presidents unilaterally chose their successor from a select pool of candidates (cabinet members) who followed a set of clear rules (e.g., candidates would abstain from publicly seeking or campaigning for the nomination). Outgoing presidents would then retire from political life (Langston 2006). The *dedazo* structured leadership succession for half a century, contributing in an important way to the stability of a constitutional system that was formally democratic but weakly complied with.

Conversely, rules that are regularly enforced and fully complied with may be more vulnerable to instability. In democracies, for example, various aspects of the electoral system (e.g., timing of elections, district magnitude, electoral formulae) are, due to a combination of high visibility and technical necessity, almost always complied with. Losers, therefore, cannot be easily shielded from their effects, which means that they are likely to seek institutional change whenever they have the opportunity. Changes in political power distributions are thus likely to generate pressure for electoral reform. And because political power distributions changed frequently in much of third-wave Latin America, electoral institutional instability was quite high (Calvo and Negretto, this volume).

Finally, the activation of previously dormant institutions may permit substantive change – an increase in *S* – without actually changing the rules. Mexico’s democratization, for example, was achieved through greater compliance with the 1917 constitution rather than through its overhaul. Activation may also be seen in the enforcement of social rights in parts of Latin America. Although a wide range of social rights – for example, to health care, housing, and a clean environment – were incorporated into new constitutions across much of Latin America and the rest of the Global South during the 1980s and 1990s, these rights were, for the most part, aspirational (Klug 2000; Htun 2003: 126). Yet in a few cases, including Brazil, Colombia, and South Africa, civil society organizations mobilized effectively for enforcement, using the legal system to activate constitutional social rights.

Of course, activation may generate new pressure for change from losers who were once shielded from *S* by forbearance, thereby undermining institutional stability. Arguably, recent moves in Brazil to amend its constitution to limit social guarantees are one example of instability prompted by the unexpected strength of the existing institution. An attempt in Colombia in 2011 to force the Constitutional Court to take into account the fiscal impact of its rulings on social and economic rights is another example. This was quite explicitly a reaction to a court that made social and economic rights a centerpiece of its jurisprudence in a way that was perceived as too costly in fiscal and political terms (Sandoval Rojas and Brinks 2020).

## CONCLUSION

This introductory chapter has proposed a framework for studying institutional weakness. Rather than treat institutional weakness as an accidental or unintended outcome, we argue that it is often rooted in deliberate political decisions. The chapter conceptualizes institutional strength based on the actual effect of the institution – what we might call a causal notion of institutional strength. That is, our measure of institutional strength centers on the difference between what the institution actually produces and what would happen in its absence.

We classify institutional weakness into three types: insignificance, noncompliance, and instability. We then develop some initial, broad-strokes hypotheses about the conditions underlying the variation in institutional strength that we observe in Latin America. First, pressure by international donors and transnational activist coalitions generates high returns to institutional innovation per se, often with little attention to real-world effects. This encourages the adoption of formally ambitious but weakly enforced institutions. Institutions that seek to change dominant social norms face especially high challenges. Second, a disjuncture between rule designers and agents of enforcement may lead to low enforcement when the latter do not share the institution’s goals.

Third, compliance often increases dramatically – even where bureaucratic capacity is relatively low – where state officials elicit the cooperation of key societal actors. Fourth, political volatility – rooted in things like frequent regime change and economic crisis – weakens institutions’ coalitional foundations, which, in turn, limits their stability. Early instability, moreover, generates negative feedback, as institutions fail to develop strong constituencies of support. The result, in some cases, is a persistent politics of repeal and replace in which few actors have a stake in institutional preservation.

It is unclear whether Latin America is at a turning point in this respect. In some instances, changing social norms, increased political pluralism, and the growing autonomy of enforcement mechanisms have led to greater institutional compliance in contemporary Latin America. Moreover, increasing fragmentation of the political arena may well make it more difficult to muster the requisite majorities to change institutional arrangements as often as we have seen in the past. These changes may place a greater premium on the politics of design, as opponents cannot count on simply ignoring the institution. Instead, opponents will have to either lobby for less ambitious institutions or seek to place loopholes in the formal design.

The volume contains eleven chapters developing and illustrating the concepts presented in this introduction. Chapters 2 to 4 examine the causes and consequences of institutional instability. Chapter 2, by Calvo and Negretto, documents and seeks to explain the persistent instability of electoral institutions in Latin America. Variation in electoral institutional instability, Calvo and Negretto find, is associated with economic shocks, electoral volatility, and weak checks and balances. In Chapter 3, Albertus and Menaldo explore why some “bad” institutions – specifically, authoritarian constitutions – endure. Like Calvo and Negretto, their explanations point to the role of economic shocks and veto points, as well as the death of authoritarian elites. In Chapter 4, Helmke examines why interbranch conflict leads to interruptions of fixed presidential terms in Latin America. She finds that such outcomes are most likely when the executive possesses extensive constitutional power but lacks control over congress. Helmke’s chapter also explores the phenomenon of “instability traps,” in which early institutional crises lower the cost of institutional replacement in the future.

Chapters 5 through 10 focus on issues of compliance. Chapter 5, by Holland, explores the politics of forbearance, or nonenforcement of the law, toward the poor. She introduces the notion of a “coercion gap,” showing that whereas national legislatures – often following public opinion – often have an incentive to approve punitive laws against squatters and street vendors, the mayors and street-level bureaucrats who are responsible for implementing those laws often find the human and political costs of enforcement to be prohibitive. Thus, they have a strong incentive to engage in forbearance. Chapter 6, by Htun and Jensenius, analyzes the fate of a law seeking to prevent violence against women in Mexico. They show that compliance with the

law requires systematic coproduction – in the form of reporting violations – from below. In Mexico, social coproduction is limited by competing pre-existing norms and widespread economic insecurity, thereby relegating the law to aspirational status. Chapter 7, by Amengual and Dargent, examines the interaction between state capacity and societal cooperation in shaping enforcement outcomes. The chapter argues that in much of Latin America, resource-constrained states are indifferent toward enforcement, and that as a result, resistance or cooperation by relevant social actors is critical to determining whether laws and regulations are enforced.

Chapter 8, by Fernández and Garay, studies the design, implementation, and enforcement of federal deforestation laws in Argentina. The chapter shows how provincial governments influenced the design of federal legislation to secure discretion in implementing the law. Where big landowners were politically powerful, governments adopted nonpunitive sanctions and exercised higher discretion in classifying areas as protected, using a combination of noncompliance and insignificance strategies to weaken the institution. As a result, in those provinces, movement toward the overall goals of the legislation was minimal, whereas other provinces, in which environmental activists were stronger, made more progress. Chapter 9, by Saffón and González Bertomeu, examines the selective enforcement of Mexico's Lerdo Law, which established the primacy of individual over collective property rights. Initially, liberal governments enforced the law on the Church but not on indigenous pueblos. As Mexico's export boom increased land values, however, judges began to reinterpret the law to apply to indigenous communal lands (though often defending the individual property rights of indigenous peasants). Chapter 10, by Schrank, examines the conditions under which borrowed or imported institutions may succeed. Focusing on the establishment of a civil service regime for labor inspectors in the Dominican Republic, driven by the incentive to retain access to US markets, Schrank finds that borrowed institutions may well take root, essentially under the same conditions as domestic ones.

Finally, our conclusion first draws on the chapters to examine the principal mechanisms that reproduce institutional weakness in Latin America, and then discusses the possible relationship between increasing levels of the democracy and institutional weakness in the region. It also reviews the challenges involved in measuring institutional weakness. Finally, it goes partly beyond the lessons of this volume to speculate about the causes of the weakening of previously strong institutions.