Courts in Latin America

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7

Legalist versus Interpretativist

The Supreme Court and the Democratic Transition in Mexico

Arianna Sánchez, Beatriz Magaloni, and Eric Magar

What renders courts powerful? Is the expansion of court policy-making powers solely driven by changes in the balance of power between the elected branches? Or do justices' philosophies about judicial interpretation and their visions about the role of the court in managing the constitutional order also play a role? We answer these questions by analyzing the role the Mexican Supreme Court has played during and after the transition to democracy.

Breaking with a long tradition of judicial subservience, the 1994 constitutional reform transformed the supreme court, in paper at least, into a constitutional tribunal. By establishing *constitutional controversies* and *constitutional actions*, the reform significantly expanded the court's power. Through constitutional controversies, the court can adjudicate disputes between different branches and levels of government. Through constitutional actions, the court can annul laws and acts deemed unconstitutional. We study court rulings on such actions and controversies from 1994 to 2007 to uncover the political factors that led the Mexican court to significantly expand its policy-making role in the system of checks and balances and serve as an arbiter of federalism.

The 1994 reform that preceded the transition to democracy had as its principal objective to provide an institutional channel for the resolution of political conflicts among subnational governments and government organs controlled by different political parties (Magaloni and Sánchez 2001, 2006; B. Magaloni 2008). During the authoritarian era, these conflicts were solved through informal mechanisms within the hegemonic Institutional Revolutionary Party (PRI) and the president, who also served as party leader during his term. With the advent of multipartism in the 1990s, this form of presidential arbitration of political conflicts became ineffective, and politicians turned to the court.

The 1994 constitutional reform left unchanged the institutions for the adjudication and interpretation of fundamental rights that had prevailed during the authoritarian era –most notably the *amparo* trial. According to Ana Laura Magaloni (2007, 1),

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"since the constitutional reform of 1994, the Supreme Court of Justice has been able to pacify political conflicts. Nevertheless, the second great task of constitutional jurisdiction, and maybe the most important – the protection of the rights and constitutional liberties of the citizen – has been practically forgotten in the last thirteen years." Thus, in this classification and also in the one set forth by Helmke and Ríos Figueroa in the introduction to this volume, the Mexican court has significantly expanded its powers in the resolution of political conflicts among elected branches and subnational governments but has played a minor role in the expansion and interpretation of fundamental rights.[1] Citizens have very limited access to the court, which can attract *amparo* trials through its right of certiorari. Although a few important cases related to human rights have painstakingly arrived at the court through this path, the main function of the court during and after the transition to democracy relates to resolution of political conflicts, which is the focus of our chapter.

We propose a spatial model of court activism that draws heavily from existing separation of powers theories (see Chapter 8) specifying the conditions that would render the Mexican court more powerful and prone to engage in policy making. We then complicate this model by adding a second dimension that motivates justices' decisions, namely, their *judicial philosophy*, the extent to which they believe that courts should make laws *a la par* of other branches of government versus refraining from ruling based on a strict interpretation of the constitution and the laws. Our model presupposes that the court is divided along a left-right ideological cleavage ranging from state intervention in the economy to more laissez-faire economic policies. It also presupposes a second line of division within the court that is based on judicial philosophy. Justices who favor what we call legal *interpretativism* – a belief that courts ought to expand their jurisdiction by overturning precedent that limits the role of the judiciary, including a strict interpretation of standing requirements, and to take into account the political, social, or economic consequences of their rulings – stand at one end of this second line of division within the court. On the other are justices who favor judicial *legalism*, giving primary weight to a limited interpretation of both the court's jurisdiction and the rules for standing, and who are skeptical of the ability of judges to base their decisions on nonlegal reasoning.

The theory produces several predictions about the Mexican court's behavior and its role in the system of checks and balances. Fragmentation of political power in office is likely to lead to court activism only if (1) there is ideological dispersion between the president and congress and (2) the court is positioned between both branches. If the court is positioned on the right (left) next to the president or to the left (right) next to congress, we should not expect significant expansion of court powers even under divided government.

[1] See Ana Laura Magaloni (2007) for the earliest and most incisive analysis of why the Mexican Supreme Court has not played a role in the defense of fundamental rights. See also Ana Laura Magaloni and Ana María Ibarra Olguín (2007) for a clear analysis of the absence of a tradition of rights-based interpretation in Mexico.

The second prediction of our theory relates to the degree to which the court's expansion of powers might go beyond what elected officials would be willing to endorse. Separation of powers models predict no conflict between elected officials and the court. In these models, the court is presumed to move policies to a centrist position that is invariably preferred to the status quo by one of the branches. Our model predicts that the court will set policies in this unproblematic manner only if the median justice favors a legalist philosophy of judicial interpretation. But if the court is interpretativist, driven by a legal philosophy that advocates lawmaking powers for the judiciary, the court's constitutional space becomes significantly larger, causing utility losses among elected officials who do not want the court to expand its lawmaking powers beyond a threshold.

We proceed in three steps to evaluate our argument empirically. First, we assess whether alternation of political power in 2000 effectively increased the court's policymaking powers. Next, we assess the empirical plausibility of our spatial analysis by looking at the ideological cleavages within the court. Through an examination of the voting record of all justices, we estimate the dimensions that underlie the supreme court rulings using Bayesian Markov chain Monte Carlo techniques. We end with analytical narratives of several key rulings to get a sense of the dimensionality of the court's policy space.

We find strong empirical support for our theoretical approach. Our results reveal that the Mexican court became significantly more prone to strike down legislation after 2000; this propensity to expand the court's lawmaking powers is present mostly in constitutional actions, not in constitutional controversies. Ideal point estimation further reveals that the court can be characterized within a two-dimensional issue space – interpretativist versus legalist and left versus right. Our results suggest that for most of the time, and especially in constitutional controversies, a legalist bloc has dominated the court. In the realm of federalism, most relevant in constitutional controversies, as in the classic Vallarta-Iglesias debates of the late nineteenth century, this line of division defines the extent to which the federation can intervene in the states.

The court's rulings on constitutional actions are a more complex matter. Here the court is being asked to rule on a broader range of issues such as economic regulation, fundamental rights, or abortion. Our results reveal that the expansion of the court's policy-making powers comes precisely in these rulings wherein there is a higher propensity by the court to strike down legislation and set policies.

The remainder of the chapter proceeds as follows. The first section discusses the 1994 constitutional reform that transformed the Mexican Supreme Court into a constitutional tribunal. The second section presents our model of the court. The third section performs an econometric analysis of the court's rulings, assessing whether alternation of political power increased the court's propensity to make policy. The fourth section analyzes the voting records of all justices spanning two partially different courts. This allows us to make relatively precise inferences about justices'

ideal points in two-dimensional policy space. The fifth section studies court rulings. Section 6 concludes the chapter.

THE 1994 CONSTITUTIONAL REFORM

During the long years of autocratic rule by the PRI, power holders ruled unconstrained by a malleable constitution and subservient courts (B. Magaloni 2003, 2008). The authoritarian political system during the era of hegemonic party rule by the PRI was characterized by a strong *presidencialismo*, a strong dominance of the president over other branches of government deriving from sources beyond the constitution (Carpizo 1978; Weldon 1997; Casar 2002). *Presidencialismo* also implied a lack of judicial checks on the executive (Domingo 2000; B. Magaloni 2003). The president exercised a strong control over nominations and dismissals, and many justices tended to have partisan careers before or after leaving the court.

Prior to the 1994 constitutional reform, the supreme court had very limited powers of judicial review. The federal judiciary could interpret the constitution through the *amparo* trial against violations by the state of citizens' rights or the application of laws that went against the constitution. The official discourse was that the Mexican constitution thus established the necessary conditions for limited government and that federal courts would be in charge of enforcing it. In practice, those who confronted the regime or who had to deal with the police and state bureaucracies often found themselves at the mercy of courts that, for the most part, served the interests of those officials. Courts predominantly followed a legalist criterion of judicial interpretation that condoned state abuse rather than expanding or protecting citizens' rights.

The 1994 reform transformed the supreme court into a constitutional tribunal. It reduced the number of justices from twenty-five to eleven. Life appointments were changed to fifteen-year terms. By establishing constitutional controversies and constitutional actions, the reform significantly expanded the power of the supreme court, which can now adjudicate on all sorts of political-constitutional issues.

Through constitutional controversies, the court adjudicates disputes between different branches and levels of government with respect to the constitutionality of their acts. The court can now hear conflicts among the executive and legislative branches; subnational governments and the federation; and municipalities and governors. Constitutional actions are a form of judicial review. A constitutional action can be promoted by one-third of the members of the chamber of deputies or the senate against federal laws or international treaties; by one-third of the members of the local assemblies against state laws; by the solicitor general (*procurador general*) against federal and state laws or international treaties; and by the leadership of any political party registered with the Federal Electoral Institute against federal election laws. Local political parties can also promote a constitutional action against local electoral laws. The PRI originally refused to give the court jurisdiction on electoral issues. Justices would not acquire the right to review the decisions of the

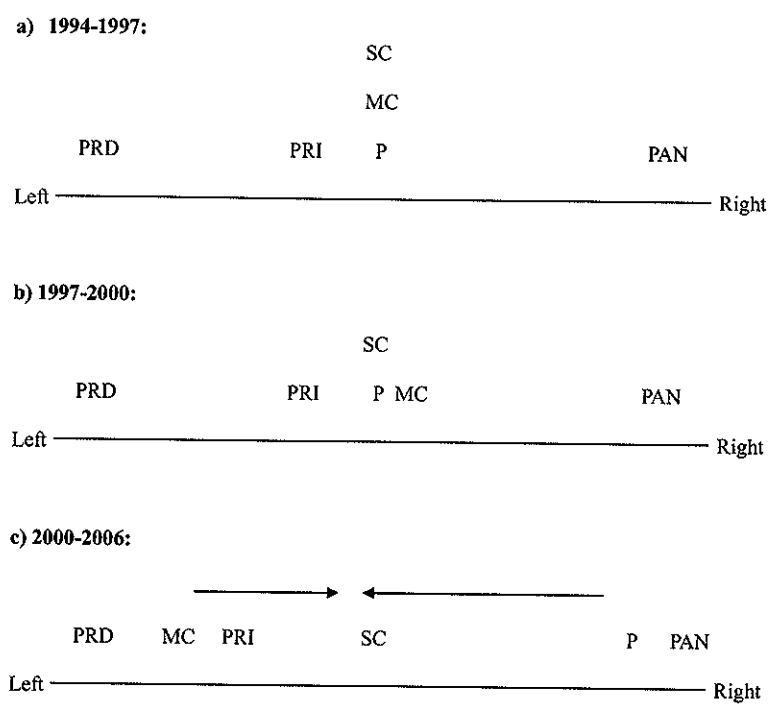

FIGURE 7.1. Expansion of the Court's Constitutional Space, 1994–2007.

federal electoral tribunal and to rule on the constitutionality of electoral laws until 1996.

The reform established that the court's rulings on constitutional actions would not have the effect of annulling legislation unless at least eight of the eleven justices voted against the constitutionality of a law. The reform also established that the constitutionality of laws must be appealed within thirty days of the enactment of the law or the first act of application. The reform further reduced the stakes of constitutional controversies by establishing that supreme court decisions on constitutional controversies would only have effects *inter partes* (suspending the action only among the parties) when a lower-level government acts as plaintiff against a higher-level one; in controversies between two states; and in controversies between two municipalities from different states.

A MODEL OF THE COURT'S EXPANSION OF POLICY-MAKING POWERS

Drawing from separation of powers models (Spiller and Gely 1990; Ferejohn 1999; Ferejohn and Kramer 2002; Bednar et al. 2001; Ferejohn and Weingast 1992; Epstein and Knight 1998; Epstein et al. 2001; Iaryczower et al. 2002; Ríos Figueroa 2007; see also Chapter 8), in Figure 7.1, we employ a spatial model to show our expectations

of how the court powers should expand in response to the changing balance of power between the president and the legislative branches in the period 1994–2007. The model assumes that the court cannot act against the policy wishes of both the president and congress because the decision would be overturned or justices might get sanctioned in some other way (the court can be packed, justices' salaries cut, etc.).

A ruling is overturned when politicians are all willing to ignore it or to amend the law or the constitution to remove the ambiguity that gave justices room for interpretation. As in other models, the court can only influence policy when the president and congress differ over policy. The model assumes a one-dimensional policy space along an axis that represents shifts in preferences from state intervention in the economy (left) to more laissez-faire economic policies (right). It identifies the ideal point of the president as P, of the median legislator in congress as MC, and of the supreme court as SC. The figure also identifies the ideal policy position of the three major political parties. These players are also relevant because, as said earlier, they can promote constitutional actions through their national leadership or can promote constitutional controversies through their control of subnational office. A way of interpreting this figure is that there should be more room for court activism in constitutional actions when there is ideological dispersion between P and MC and room for court activism in constitutional controversies when there is fragmentation of power at the subnational level, which should translate into ideological dispersion between the Partido Acción Nacional (PAN, right-of-center), the Partido de la Revolución Democrática (PRD, left-of-center), and the Partido Revolucionario Institucional (PRI).

To simplify, in this model, we assume that the court is a unitary actor. In 1995, the PRI had the necessary two-thirds supermajority in the senate to appoint the entire court on its own. Although President Zedillo opted to negotiate the appointment of some justices with the PAN to bestow legitimacy to the new court, we assume that the court is to the center right and very near President Zedillo's policy preferences. After the PRI lost the presidency in 2000, President Vicente Fox (2000–2006) of the PAN was forced to negotiate all the new appointments with the PRI and the left-wing PRD, which we believe has entailed a slight movement to the Left for the court.[2]

As illustrated in Figure 7.1a, the configuration prevailing in Mexico during the authoritarian era and until 1997, when the PRI lost for the first time in its history the majority in the chamber of deputies, had the preferences of the president, congress, and the court close together. Had the court been willing to influence policy through legal interpretation, as could have been the case when solving constitutional controversies between subnational governments controlled by different parties in the

[2] In 1994, when the reform was approved and the new court appointed, 74% of the senate seats were controlled by the Institutional Revolutionary Party (PRI), 20% by the PAN, and 6% by the PRD. The PRI saw its contingent shrink to 60% in the 1997 midterm election, but even after losing the presidency to the PAN in 2000, it still controlled 45% of the senate.

1994–1997 period, it should have remained cautious because of the alignment of the other branches. Concentration of political power across the branches of government forces judges to defer to power holders and behave subserviently to avoid having their decisions overturned. But in national matters, the court itself was in line with the other branches, so it was additionally unwilling to change the policy of elected officials.

Only when national political power is fragmented, and assuming that judges have policy preferences that diverge sufficiently from the government's, antigovernment decisions are likely to occur, and the court is expected to engage in policy making. Although the 1997 midterm election brought divided government in Mexico, Figure 7.1b shows that the room for court activism in constitutional actions remained limited in the period 1997–2000 because the preferences of the president, the court, and the majority in congress did not differ considerably. The PRI lost the majority in the lower chamber of deputies, but the opposition remained fragmented, which meant that legislation almost invariably counted with the support of the president's party and the right-wing PAN. Thus, even though the PRI lacked a legislative majority after 1997, it continued to pass laws together with the PAN, and this shifted the MC only slightly to the right of the president, marginally increasing the constitutional space for the court. The story for this period is different for constitutional controversies; there was more room for court activism in solving disputes among subnational governments controlled by different political parties. The most important role for the court in this period was thus to serve as an arbiter of federalism.

The real change enhancing court activism in constitutional actions came after 2000, when the PRI lost the presidency to the PAN while power remained fragmented in the chamber of deputies because no party controlled the majority of seats. After losing the presidency, the PRI moved to the Left, to a large extent because its legislators were now free to vote according to their true ideological preferences rather than, as during the era of party hegemony and unified government control, having to follow the president's line (Weldon 1997; Casar 2002). We denote the change in the balance of forces in Figure 7.1c by shifting the P to the right and the PRI and MC to the left. The arrows indicate the constitutional policy region for the court – the interval between P and MC toward which it is likely to issue a ruling changing status quo policies and challenging the other branches.

The spatial model thus predicts a significant expansion of the court's policy-making powers in constitutional actions after 2000 but not after 1997. The change in the court's behavior results from both fragmentation of political power in office at the national level and from a shift in the policy preferences of the president relative to the congress and the court. Increased polarization between the executive and legislative branches, and among the majority and minority factions in congress, under conditions of political fragmentation is what has led politicians to take their disagreements to the court and hence to the expansion of court policy-making powers (Gates 1987; MacDonald and Rabinowitz 1987).

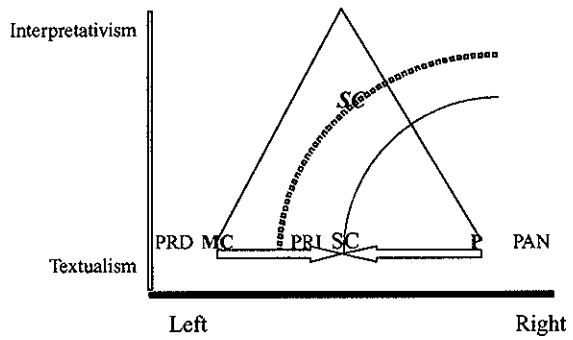

FIGURE 7.2. Court Policy-Making Powers in a Two-Dimensional Space.

One limitation of this spatial model is that it presupposes that the increase in the court's activism will not result in decisions that will shift policies in unpredictable ways. The model predicts that the court will make conciliatory decisions that will shift policies to the center, between P and MC. However, as our review of the Mexican court in this chapter makes explicit, there is far more ex ante unpredictability in the court's behavior than presupposed in the model. Furthermore, as is clear in Chapter 11, there are often far more confrontations between the elected branches of government and the court, and separation of powers models cannot explain these.

A common limitation of separation of powers models is that they disregard that judges' choices might be influenced by considerations other than policy and holding on to their seats, including a desire to expand the court's power and to play a role in managing a state's constitutional order (Ginsburg 2003; see also Chapter 11). These motivations might make a court's relationships with the elected branches of government more conflictual than what these spatial models presuppose. To incorporate some of these critiques into the separation of powers models, we allow justices to be motivated both by an ideology that commonly divides political parties, and hence the elected branches of government, and by a *judicial philosophy* or *legal theory of interpretation* that is unique to the judicial branch. Justices who favor what we call legal interpretativism believe that courts ought to make laws and that the role of the judicial power is to serve the political community by giving substantial weight to the political, social, and economic consequences of alternative interpretations of the law. Justices who favor judicial legalism give primary weight to the text and structure of the constitution and are skeptical of the ability of judges to make laws and to base their decisions on nonjuridical reasoning.

In Figure 7.2, we incorporate judicial philosophy into the spatial model by adding a second dimension to the policy space that relates to judicial philosophy. Justices who favor legalism are at the origin of the vertical axis, and those who favor interpretativism are farther away from the origin. Our assumption is that the president and the legislative branches both have a strong preference for appointing justices

who favor legalism, although this assumption is not necessary. Elected officials, we believe, are likely to prefer to have courts that follow the letter of the law these players enact rather than having courts make these laws. This means that any movement away from the origin along the vertical axis generates disutility for P and MC.

Figure 7.2 shows the constitutional policy space for two types of courts, a legalist court and an interpretativist court, denoted as SC and $\widetilde{SC}$, respectively. As in the period 2000–2006 in Figure 7.1c, P is to the right, MC is to the left, and the court is in the center of the policy space along the left-right dimension. The figure shows that if the court is interpretativist, it will challenge the other branches by choosing its ideal point, $\widetilde{SC}$. The figure shows that the policy $\widetilde{SC}$ makes P and MC worse off than the policy SC, which is the policy choice of the legalist court. The disutility of having an interpretativist court for one of the players, say, P, can be measured by drawing indifference curves for this player through SC and $\widetilde{SC}$ – the area between the dotted and the straight indifference curves is what P loses for having an interpretativist court.

An interpretativist court would be able to expand its powers up to an "acceptability threshold" (the tip of the triangle in Figure 7.2), where both P and MC would prefer to disregard the court's decision (or simply not to appeal to the court). It is clear from this analysis that both P and MC are made worse off if justices are interpretativist rather than legalist. We believe that allowing for judicial philosophy to play a role in formal and empirical analyses of courts is a promising avenue for research. A key difficulty power holders confront when they consider delegating powers to a court or when they appeal to it is that the type of judicial philosophy that is likely to prevail is uncertain, particularly in transition periods or where courts are created anew. Ex ante politicians might willingly delegate powers to the court or appeal to this body to solve a conflict, yet ex post, they might end up confronting this court. The famous electricity decision we explore subsequently illustrates the logic of this dilemma.

AN EMPIRICAL ANALYSIS OF THE COURT'S RULINGS, 1994–2007

We assess our theoretical expectations through the analysis of the entirety of the publicized decisions of the supreme court on constitutional controversies and constitutional actions until August 2007.[3] The data come from Sánchez (2008). Out of the 1,358 court decisions, 75 percent were constitutional controversies and 25 percent were constitutional actions (Figure 7.3). Almost half of these decisions were made prior to the PRI's loss of the presidency in 2000, while the rest of the cases were ruled afterward.

Through constitutional controversies, the court is defining and policing the boundaries of other actors' political powers. Decisions on constitutional battles between municipalities and states and between subnational governments and the

[3] This section draws from Sánchez (2008).

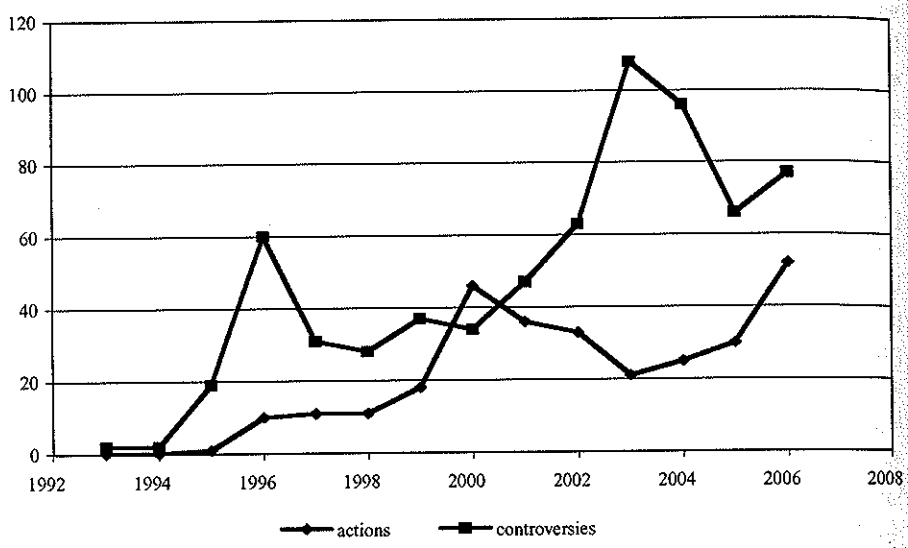

FIGURE 7.3. Number of Filed Constitutional Actions and Constitutional Controversies. *Note:* Does not include the indigenous rights controversies. *Source:* Sánchez (2008).

federation most often have effects *inter partes*, given that municipal governments act as plaintiffs in close to 70 percent of these trials. In resolving controversies between lower and upper levels of government, not only has the court become the new arbiter of federalism but Magaloni (2008) argues that solving these types of conflicts through institutional channels rather than through costly political bargaining, and sometimes violence, was a central objective of the 1994 constitutional reform.

We classify constitutional controversies into three broad categories, which are subdivided into several subgroups. *Municipalism* controversies represent 74.4 percent of cases. These comprise, among others, controversies over responsibility of office holders, including impeachment of municipal presidents; conflicts over economic resources; and conflicts over the establishment of intermediate authorities between the municipality and the state. *Separation of powers* controversies represent 17 percent of the cases, and these include conflicts between the powers of a state or the powers of the federation. The most common separation of powers controversies at the local level are encroachments against a state's supreme court, and at the federal level, presidential lawsuits against the majority in congress predominate. *Federalism* controversies represent 8.6 percent of cases. These include conflicts over the distribution of revenue-sharing funds between the federation and the states; the interstate commerce clause; misuse of federal resources in local elections; decentralization of public schools to the states; and conflicts over federal legislation, including the federal budget and the indigenous rights amendment, among other issues. We will discuss some of these cases in more detail later.

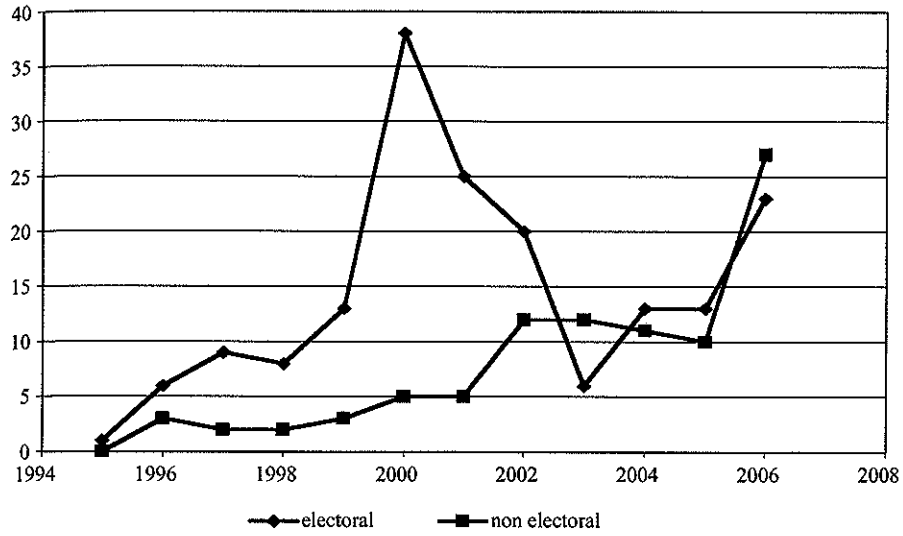

FIGURE 7.4. Type of Constitutional Actions. *Source:* Sánchez (2008).

The court exercises its power of abstract constitutional interpretation most clearly in constitutional actions. Prior to the democratic transition of 2000, 83 percent of the constitutional actions were related to election laws. However, as Figure 7.4 shows, after the PRI lost the 2000 presidential elections, political players began increasingly to challenge laws with nonelectoral content.

We classify constitutional actions into three broad categories. *Electoral* actions represent 58.5 percent of the cases. The most common of these were campaign financing, electoral thresholds, redistricting, distribution of proportional representation legislative seats, and due process violations in the enactment of local electoral reforms. *Fundamental rights and law enforcement* actions represent 20 percent of the cases. These comprise, among other things, controversies over tobacco, labor law, and defamation laws; and criminal issues such as presumption of accomplice liability, domestic violence, excessive fines, and lifetime sentencing. *Economic resources and public services* actions represent 21 percent of the cases and include conflicts over the distribution of revenue-sharing funds between the federation and the states as well as conflicts over the provision of public services such as water, notary law, and the basis for public sector tenders, among other things.

The first hypotheses emerging from our theoretical discussion are that alternation of political power in 2000 caused an important expansion in the court's policy-making powers in constitutional actions and that alternation should not significantly affect the behavior of the court in constitutional controversies. To assess these hypotheses empirically, we ask if alternation of political power in office increased the court's propensity to rule against the constitutionality of laws or state acts. We model the

court's rulings on constitutional controversies and constitutional actions separately. Our dependent variable is coded as 1 for cases in which the court ruled the law or act to be unconstitutional, and 0 otherwise (excluding dismissals from the analysis). To assess if the court changed its behavior after alternation of political power in office, we include a dummy variable indicating cases decided after the defeat of the PRI in the 2000 presidential elections (alternation). Our expectation is that the court should become more prone to strike down legislation in constitutional actions after 2000, and hence the variable alternation should have a positive sign for these cases. A second independent variable of interest is PRI-defendant, a dummy for cases in which the defendant was a state organ controlled by the former ruling party. If this variable is positive, it would mean that the court rules more often in favor of the former ruling party (Magaloni and Sánchez 2001, 2006, 2007; Ríos Figueroa 2007). To rule out the possibility that there is a pro-defendant bias in the court irrespective of partisanship, we also add a dummy for PAN-defendant. If both PRI-defendant and PAN-defendant were negative and statistically significant, it would reveal a pro-defendant bias irrespective of party. To test if there was a change in the court's propensity to rule in favor of the PRI after alternation of political power in office, we multiply PRI-defendant and PAN-defendant by the variable alternation. If the sign of the coefficients changes, it would indicate that the propensity to favor the PRI or the PAN changed after 2000.

We add a series of controls. For constitutional controversies, we add a dummy variable indicating if the plaintiff was a municipality (municipality), which acted as plaintiffs in the overwhelming majority of the constitutional controversies. We also include dummy variables for conflicts in which a lower-level government (municipality or state) filed a lawsuit against the federal government (municipal vs. federal and state vs. federal). Our model for constitutional actions controls for constitutional actions that relate to electoral laws (electoral). Table 7.1 displays the results.

The results of the models reveal differing patterns of court behavior in constitutional actions and controversies. As expected, after 2000, the court's propensity to strike down laws increases, but this only happens for actions, not controversies. A second important finding of our empirical analyses is that the court tends to side in favor of the PRI but only in controversies. In constitutional actions, the models reveal a pro-defendant bias irrespective of party (both PAN-defendant and PRI-defendant are negative and statistically significant). Third, our results indicate that alternation of political power in office in 2000 brought no statistically discernible change in the court's pro-PRI bias in constitutional controversies. Although the variable PRI-defendant × alternation is positive, this is not statistically significant. We can thus conclude that the court has tended to side in favor of the former ruling party – particularly its governors – and that this tendency has remained unchanged after this party lost the presidency. Our results thus partly disconfirm Ríos Figueroa (2007) in that the court continued to favor the PRI even after power became fragmented – but this only happens in constitutional controversies.

TABLE 7.1. *Court's unconstitutionality decisions*

	Constitutional controversies				Constitutional actions			
	Model I		Model II		Model I		Model II	
	Coeff.	SE	Coeff.	SE	Coeff.	SE	Coeff.	SE
Alternation (2000–2006)	0.32	0.23	−0.53	0.63	0.76***	0.22	1.48**	0.70
PRI-defendant	−0.98***	0.32	−1.77***	0.61	−1.18***	0.27	−0.44	0.70
PAN-defendant	0.17	0.31	−0.53	0.65	−0.80**	0.32	−0.20	0.75
Alternation × PRI-defendant			1.05	0.69	Alternation × PRI-defendant		−0.93	0.77
Alternation × PAN-defendant			0.85	0.58	Alternation × PAN-defendant		−0.63	0.85
Controls					Controls			
Municipality	1.85***	0.26	1.80***	0.26	Electoral	1.90***	0.27	1.86***	0.27
State vs. federal	1.10*	0.68	0.95	0.70				
Municipal vs. federal	−1.32*	0.75	−1.27*	0.77				
Constant	−1.60***	0.31	−0.86*	0.58	Constant	−0.93***	0.31	−1.56**	0.66
	$n = 500$ Pseudo $R^2 = .11$		$n = 500$ Pseudo $R^2 = .11$		$n = 500$ Pseudo $R^2 = .13$		$n = 500$ Pseudo $R^2 = .14$	

* Significant at the 90% level. ** Significant at the 95% level. *** Significant at the 99% level.

TABLE 7.2. *Dissent in the court*

	Coeff.	SE
Alternation (2000–2006)	1.21***	0.17
Constitutional controversies	−0.93***	0.16
Controls		
Fundamental rights	1.17**	0.57
Constant	−1.08***	0.16
	$n = 811$	
	Pseudo $R^2 = .09$	

* Significant at the 90% level. ** Significant at the 95% level. *** Significant at the 99% level.

The differing results for constitutional actions and controversies, we claim, are driven by the types of conflicts that get to the court through each of these procedures. Constitutional actions entail controversies over which there are more serious substantive ideological disagreements. As seen in Figure 7.1, alternation of political power in office directly affected the way in which these ideological disagreements got translated into the system of checks and balances by shifting the presidency to the right and the legislative branch to the left. Constitutional controversies mostly relate to conflicts between different levels of government – municipalities, states, and the federation – and many of these deal with issues of boundaries of states' powers. Driven mostly by fragmentation of political power at the subnational level, most of these conflicts should not be directly affected by alternation of political power in the presidency. Moreover, as we discuss further subsequently, we believe that the pro-PRI bias in constitutional controversies is the consequence of a judicial philosophy rather than some supposed partisanship on the part of the supreme court justices; that is, when the court decides a case in favor of a PRI governor, comprising the overwhelming majority of the defendants, it does so primordially because of the way in which it interprets the constitution and the laws. More specifically, the prevalence of a legalist bloc – which, as we explain further later, favors a strict interpretation of legal standing and the autonomy of the states' constitutions over the federation – has tended to favor the states' governors over the municipalities and the federation.

Table 7.2 supports our contention that constitutional actions involve conflict over which there is more serious ideological disagreement by presenting a model of dissent within the supreme court. The dependent variable is coded as 1 for cases where at least one justice voted against the majority decision, and 0 otherwise. We include

the following independent variables: alternation, coded as before, and constitutional controversies, coded as 1 for controversies and as 0 for actions. We control for conflicts over fundamental rights and law enforcement, which are constitutional actions that, broadly speaking, raise issues of rights interpretation. Results in Table 7.2 confirm a significant rise in court dissent after alternation of political power in office in constitutional actions and in fundamental rights cases. In the following, we investigate further these lines of dissent within the court.

IDEOLOGICAL CLEAVAGES WITHIN THE COURT

There are several reasons why we should find ideological differences among justices. First, even if the PRI selected most of them, it must have been difficult for this party to predict their future behavior by looking only at their previous careers; this could be more difficult for some appointees than others. Second, as said earlier, when the constitutional reform was approved, President Zedillo was in the position to appoint all the court's justices because his party still controlled two-thirds of the senate, but he opted to negotiate with the opposition, particularly with PAN, in the nomination of some of the justices (Sánchez 2003). Third, the PRI is an ideologically heterogeneous coalition, and it probably sought to represent some of its different shades with its appointments. Finally, four justices have been appointed after the alternation of political power, and their selection is the product of a broader political compromise. We first explore the nomination process for each of the justices and then proceed to assess the underlying cleavages within the court.

Nomination Processes[4]

President Zedillo submitted, on January 19, 1994, a list with eighteen candidates among whom the senate would choose eleven to form the new court. Three of the president's nominees were women, and four had belonged to the recently disbanded supreme court. Though the opposition to reappoint the former justices was significant, President Zedillo was able to negotiate with PAN the ratification of two of the former members, Justices Azuela and Díaz. One repeating candidate got no votes, and the other retired his candidacy prior to the election.

Table 7.3 shows the number of votes each candidate received. It also shows the political party that voted for each of the candidates and their lengths of tenure. The PRI and PAN agreed on seven of the eleven justices. From these numbers alone, we cannot identify the justices the PAN most strongly supported. However, we can infer that justices elected only by the PRI were the ones this party thought would better represent its interests: Ortiz, Silva, Sánchez, and Román. It is important to note that these were four justices, precisely the number needed to block any decision of the

[4] This section draws from Sánchez (2003, 2008).

TABLE 7.3. *Political support for Zedillo's candidates to the Supreme Court*

			Ballots per year of retirement					
Justices	Parties		2003	2006	2009	2012	2015	Total
Juventino Castro	PRI	PAN	112					112
Genaro Góngora	PRI	PAN			112			112
Sergio Aguirre	PRI	PAN				112		112
José de Jesús Gudiño	PRI	PAN					112	112
José Aguinaco	PRI	PAN	111					111
Guillermo Ortiz	PRI					89		89
Juan Silva	PRI						89	89
Olga Sánchez	PRI						89	89
Humberto Román	PRI			89				89
Juan Díaz	PRI	PAN		89	23			112
Mariano Azuela	PRI	PAN		24	86			110

Note: Although selection was by secret ballot, knowledge of the list of senators present during the voting, the number of deposited ballots, and the number of senators from each party made it possible to infer the minimum party coalition necessary to approve each nomination. Underlying this assumption rests the extensive literature on cohesion and party discipline characteristics of the Mexican political parties (see Weldon 1997; Casar 2002).

court, the rule being eight out of eleven votes. Note also that three of these four would occupy a supreme court seat for seventeen years.

Since 2003, four new justices have joined the Mexican Supreme Court. Castro and Aguinaco were the first to leave the court in 2003. Díaz and Román followed in 2006, thus giving President Fox the opportunity to fill four vacancies before the end of his term. In November 2003, Fox sent to the senate a list with six candidates to replace Justices Aguinaco and Castro. Four of the six candidates were women, expressing the presidential preference to have at least a second woman join the court. The candidates to replace Justice Aguinaco were José Ramón Cossío, María Teresa Martínez, and Teresita Rendón. In November 27, 2003, Cossío was elected to replace Justice Aguinaco by a majority of eighty-four votes out of ninety-two. Justice Cossío was able to gain the support of all the political forces (PRI, PAN, and PRD) to appoint him until 2019. His election was a very smooth process, while the

opposite was true for the election of Justice Castro's replacement. Margarita Luna was appointed almost three months after Justice Cossío (in February 19, 2004) with a majority of eighty-two votes, barely enough to reach the two-thirds majority. She will also leave the court in 2019.

In June 16, 2004, Justice Román passed away in office, giving Fox an unexpected opportunity to appoint another justice. Surprisingly, the three candidates included on the list he submitted were in one way or another previously linked to the PRI. The candidates were Felipe Borrego, Bernardo Sepúlveda, and Sergio Valls. Valls, a former PRI legislator and member of the Council of the Federal Judiciary (Consejo Federal de la Judicatura), was able to achieve the required majority (eighty-five votes) to replace Justice Román. He will also leave the court in 2019.

In November 2006, Justice Díaz retired, and Fox sent his last list of nominees. The three candidates this time were José Fernando Franco, Rafael Estrada Sámano, and María Herrera Tello. The latter was by far the closest candidate to President Fox included in any list; in addition to having strong credentials, such as being the first woman to preside over a state supreme court in Nuevo León, she was also the former secretary of agrarian reform under the Fox administration. Despite all her credentials, she did not get the appointment, which went instead to Franco Guzmán, who had occupied high-level positions under both PRI and PAN administrations. Franco won by a striking majority of ninety-four votes. His appointment probably was negotiated weeks earlier since Herrera Tello withdrew her candidacy two weeks before the vote. She accepted the nomination again that same week after negotiations. Herrera Tello and Estrada Sámano together only received five votes (see Table 7.4).

We highlight three issues from the nomination processes: (1) every candidate who was ultimately appointed to the court had the support of the PRI; (2) of the original eleven justices, only four were chosen with the exclusive support of the PRI; and (3) after alternation of political power in office, all justices appointed to the court have been the product of consensus among the major political parties.

Even if some justices appear to have closer affinities with certain political parties, we cannot really tell how these would translate into the legal realm and shape justices' decisions. For example, are justices appointed only by the PRI more pro–status quo, whereas those appointed by consensus are more pro-change? And if so, how does this line of cleavage manifest in specific legal reasoning? Is the Mexican Supreme Court also characterized by a liberal-conservative (left-right) division, as the U.S. Supreme Court is? To answer these questions, we need to analyze the justices' votes.

Ideological Cleavages in the Court

Scaling techniques to infer ideology rely on a standard spatial model of voting. The approach assumes that policy and ideology can be mapped in the same space

TABLE 7.4. *Political support for replacing candidates (2003, 2006)*

Candidate	Coalition	Votes	Coalition	Votes	Elected
Seat 1 (2003)	**First Round**				
José Ramón Cossío	PRI PAN PRD	84			Yes
María Martínez		6			
Teresita Rendón		2			
Seat 2 (2003)	**First Round**		**Second Round**		
List (1)					
Margarita Luna	PRI	37	PRI PRD	72	No
José L. De la Peza	PAN PRD	42	PAN	6	
Elvia Díaz de León	PAN	12	PAN	43	
List (2)					
Margarita Luna	PRI PAN PRD	82			Yes
María Arroyo	PAN	15			
Gloria Tello		5			
Seat 3 (2004)	**First Round**				
Sergio Valls	PRI PAN PRD	85			Yes
Bernardo Sepúlveda	PAN	20			
Felipe Borrego		9			
Seat 4 (2006)	**First Round**				
José F. Franco	PRI PAN PRD	94			Yes
María H. Tello	PAN	3			
Rafael Estrada		2			

Source: Senate of Mexico (1995; transcipts form November 27, 2003; December 2, 2003; February 19, 2004; October 2004; December 2006).

and that distance determines utility and voting. Justices in this context differ from one another in their locations in the policy space, with each presumed to vote for the alternative closer to his or her ideal point. The aim of the analysis is to use justices' observed votes to estimate their ideal points and other parameters of interest.

Unanimous rulings, quite common in the court, offer no information and therefore had to be dropped from analysis. There were 161 divided votes between 1995 and 2007 (i.e., at least one justice present on the panel voted contrary to the rest): 15 percent of all the rulings. There was some variance in the propensity of the court

TABLE 7.5. *Dissenting votes by presidency*

Presidency	Unanimity	Dissent	% Dissent	Total
Aguinaco (1995–1998)	97	16	14	113
Góngora (1999–2002)	192	36	16	228
Azuela (2003–2006)	306	90	23	396
Ortiz (2007–2010)	276	19	7	295
TOTAL	871	161	16	1,032

to have a divided vote (Table 7.5). The first two periods, presided over by Justice Aguinaco and then Justice Góngora, are close to the overall average; the third, when Justice Azuela became president, and the first year of the fourth, with Justice Ortiz presiding, were above or below the average, respectively. The court has also become much more active over time.

We specified one- and two-dimensional versions of the model, reporting only the latter because justices manifested differences in both the left-right and judicial philosophy dimension. The key assumption of the spatial approach is that voting aye ($y = 1$) or nay ($y = 0$) on an issue depends on the relative locations of policy outcomes vis-à-vis justice j's ideal point in space. If $A, N \in \mathbf{R}$ (we later discuss the two-dimensional version) denote the outcomes of the aye and nay votes in space, respectively, it is their midpoint $m = (A + N)/2$ that matters for analysis. The justice will prefer the alternative falling on the same side of m as his or her ideal point (for a review, see Rosenthal [1990]). Formally, justice j's vote propensity is $y_j^* = x_j - m +$ error, where x_j is j's ideal point and the voting rule is $y_j = 1$ if and only if $y_j^* \geq 0$; otherwise $y_j = 0$. We multiply the utility differential by a weight $d \in \mathbf{R}$, leaving the equation as $y_j^* = d(x_j - m) +$ error. A larger d (in absolute value) indicates a more polarizing issue, an item discriminating the justices' ideology better. In the extreme, where $d = 0$, the utility differential plays no role, and voting is entirely determined by the random disturbance. A negative d reverses aye and nay votes, letting analysis proceed without requiring an a priori judgment about which vote falls to the left and which to the right of the policy space.

The two-dimensional extension is straightforward. Justice j's ideal point $x_j \in \mathbf{R}^2$ now has two coordinates in space: $x_{j,1}$ and $x_{j,2}$. The same goes for policy. What now matters for voting is the line $x_2 = ax_1 + b$ bisecting space on two sides, with all those with ideal points on one side voting aye and the rest nay. This bisector passes through midpoint m and is orthogonal to the line connecting A and N. Thus defined, all points on one side are closer to A than to N and therefore vote aye, whereas the rest

vote nay. The vote propensity in two dimensions becomes $y_j^* = d(ax_{j,1} + b - x_{j,2}) +$ error, where $x_{j,1}$ and $x_{j,2}$ are the coordinates of j's ideal point and a and b are issue parameters that we need to estimate along ideal points.

We rely on Bayesian estimation, suitable for small committees such as courts (Martin and Quinn 2002; Clinton et al. 2004; Estévez et al. 2008). We gave arbitrary starting locations (priors) to four justices' ideal points to give the arbitrary scale on which ideology estimates are mapped and a sense of what right, left, up, and down actually mean. Justices Góngora and Gudiño were located in the south and north, respectively, anchoring the vertical dimension; Justices Silva and Aguirre were situated in the west and east extremes, respectively, anchoring the horizontal dimension. The choice of these extremists was an inductive exercise: they were present in all four periods but also always outflanked other justices chosen as possible extremists in preliminary runs of the model. Though we are quite certain that the four anchors chosen are extremists for the two dimensions, analysis of cases in the next section will give substantive meaning to our understanding of the court's vertical and horizontal axes.[5]

Results

Two-dimensional ideal point estimates for the four periods appear in Figure 7.5. The figures show the estimated voting scores (solid points) for all the justices who have served on the Mexican Supreme Court from 1995 to 2007 by chief justice, along with a 95 percent margin of error for each voting score (horizontal and vertical bars). We find two primary cleavages that explain the supreme court's voting, a vertical line of interpretativism-legalism and a horizontal left-right division. Interpretativism, as used here, tries to expand the supreme court's jurisdiction in three ways: by (1) overturning judicial precedent that limits the extent of the judicial power; (2) expanding the court's jurisdiction, often engaging in a nonliteral interpretation of the constitution and the law; and (3) ruling against a limited interpretation of standing. Legalism, on the other hand, calls for judicial restraint and for a limited interpretation of both the court's jurisdiction and the rules for standing. Legalism is also related to textualism or a literal interpretation of the law (see Bailey and Maltzman 2008).

The left-right division relates to classic differences with respect to the role of the state in the economy that get conventionally translated into the party system. As in the realm of partisan politics, we expect to find a strong correlation between left-right

[5] Formally, the priors used for estimation were $x_{\text{Congora}} \sim N([0,-2],[.25,.25])$; $x_{\text{Gudino}} \sim N([0,2],[.25,.25])$; $x_{\text{Silva}} \sim N([-2,0],[.25,.25])$; and $x_{\text{Aguirre}} \sim N([2,0],[.25,.25])$. Noninformative priors were assigned to all other parameters: $x_j \sim N([0,0],[1,1])$; $d_i \sim N(0,4)$; $m_i \sim N(0,4)$; $a_i \sim$ unif$(-\infty,\infty)$; and $b_i \sim N(0,4)$. Three chains were updated one hundred thousand times each. The first fifty thousand burn-in scans for each chain were dropped, retaining every fiftieth simulation of the remainder. This produced a sample of $3 \times 1{,}000 = 3{,}000$ posterior simulations. Gelman and Hill's R-hat approximates 1, hinting that the chains had converged to a steady state.

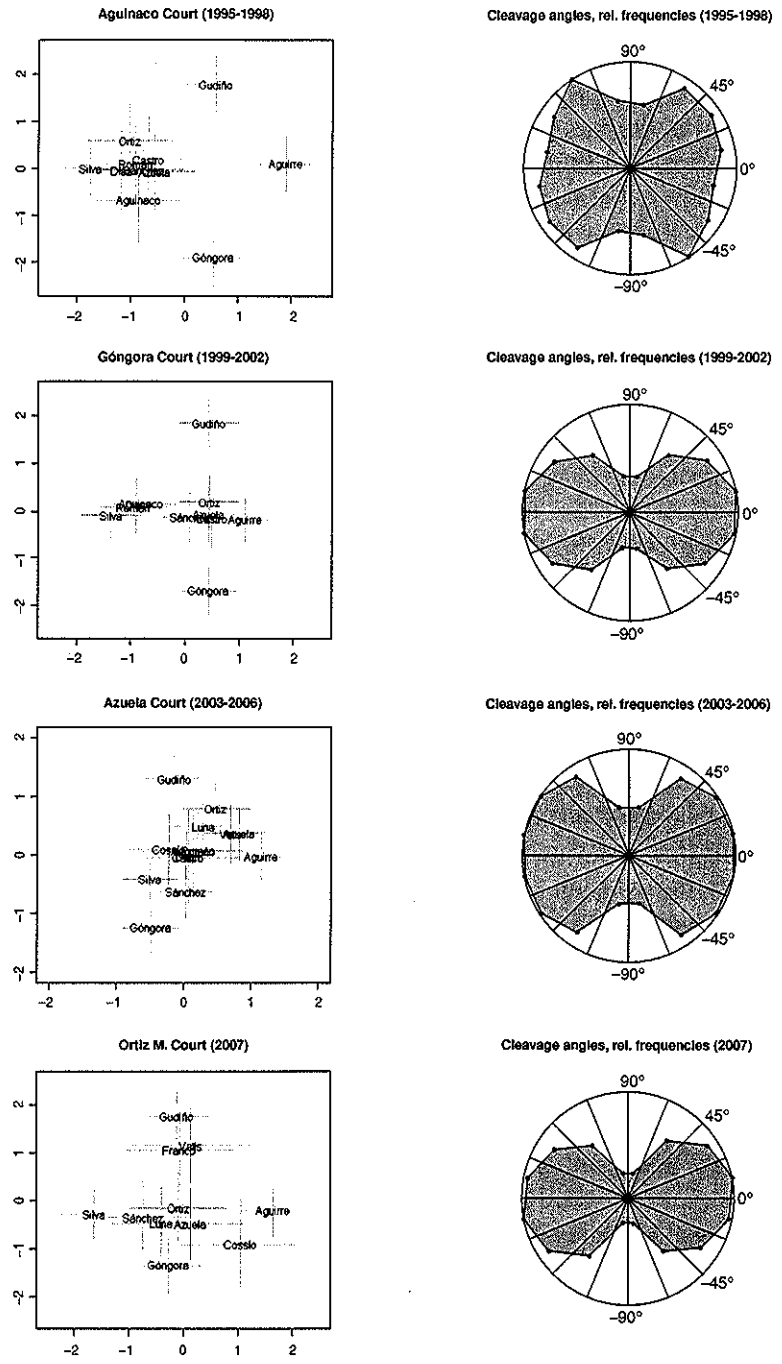

FIGURE 7.5. Ideal Point Estimates and Cutline Angles by Court Presidency.

and liberalism-conservatism as related to social issues such as abortion and minority rights. Thus a left position, as used here, can be narrowly defined as one or more of two possible things: support for state intervention in the economy and/or a narrow interpretation of Articles 25, 26, and 27 of the constitution, that is, being in favor of the state's monopoly (economic Left) and progressive positioning on social issues (moral Left). A right position, on the other hand, means a more liberal interpretation of the constitution, allowing for a more flexible interpretation of Articles 25, 26, and 27 and a more conservative approach to the analysis of social and individual rights. The left-right cleavage should be particularly present after the alternation of political power in office in 2000, which, as we have seen, brought different types of disputes to the supreme court (Sánchez 2008).

Chief Justice Aguinaco's period in 1995–1998 had a solid bloc of eight justices, as portrayed in Figure 7.5. The most straightforward interpretation of proximity in spatial models is voting likeness. So with the exception of Justices Gudiño, Góngora, and Aguirre, the rest voted likewise most of the time. Two dimensions are remarkably evident in the period, and it is minority votes that define them. The three aforementioned justices most often disagreed with the majority bloc but did not systematically vote together (else they would occupy adjacent positions in space). It is interesting to note that all three were among the seven justices whose appointment was negotiated with the PAN. Aguirre occupies the rightmost position on the left-right dimension, and Gudiño and Góngora stand next to each other on this ideological dimension but are positioned at the extremes on the interptetativist-legalist line of cleavage, Góngora representing the first of these and Gudiño the second.

The model estimates informative parameters about how often justices voted together. By the assumptions of the spatial model, each vote cleaves the space into two camps separated by a line. The slope (a_i) and constant (b_i) of this line are estimated along ideal point coordinates. The right column of Figure 7.5 gives an idea of the angles of estimated lines in the period, as determined by the posterior distribution of slopes. The plot breaks a circle into eight slope groups appearing as pie slices and reports the relative frequency with which posterior slopes fell in each. Frequencies appear as a point inside each slice and are read like a histogram: the edge of the circle corresponds to the maximum frequency, so all other points shrink radially in proportion to the relative frequency of cleavages with that specific angle. The Aguinaco court saw cleavages in all angles, except the most vertical ones, with more or less similar frequency. By implication, it was least likely to have Justices Gudiño and Góngora voting together (this required cleavage lines near 90° or −90° – nearly half as likely as any other cleavage angle – to put them on the same side). More likely were cases in which Gudiño and Aguirre voted against the rest (cleavages sloping at about −45°) or Góngora and Aguirre against the rest (at about 45°).

Chief Justice Góngora's period between 1999 and 2002 saw the compact bloc break into two more or less distinct groups. To a large extent, the Góngora court can be defined by this justice pulling the court toward significantly more interpretativism, with Justice Gudiño clearly resisting the expansion of the court's powers. Justices Azuela, Castro, Ortiz, and Sánchez slid rightward toward Aguirre in the figure, leaving Aguinaco, Román, and Díaz in the left with Silva. This shift more clearly defined the left-right dimension in the court. Cleavage lines took mostly horizontal angles (less than 45° in absolute value), implying that one side of the left-right divide voted with Góngora (or Gudiño, reversing the mild slope) against the other side and Gudiño (or Góngora). Again, Justices Gudiño and Góngora rarely voted the same way, as seen by the infrequency of vertical cleavage lines: the interpretativist-legalist dimension was still basically defined by these two justices' opposition to each other, as in the previous period, with the rest of the court in the middle.

Chief Justice Azuela's period between 2003 and 2006 coincided with three new appointments to the court: Justices Aguinaco, Castro, and Román were replaced by Justices Cossío, Luna, and Valls. The space also looks much less two-dimensional than before, with a more fluid distribution of ideal points. An approximately 45° line on the left side of the figure would seem to capture much of the variance in justices' positions, excepting Gudiño and Aguirre. Positions in the horizontal and vertical dimensions in the Azuela court became highly collinear, with Góngora and Ortiz representing the extremes of the conjoint spectrum – for example, Góngora being the left-wing/interpretativist justice and Ortiz the right-wing/legalist one. Justices Gudiño and Aguirre, however, departed from this line in opposite directions. And there was, as in the first period, a relatively uniform distribution of cleavage angles (with the exception of the most vertical categories, much less frequent than the rest).

The final period reports the start of Ortiz's court presidency in 2007. The space, as is evident in the bottom row of Figure 7.5, became again clearly two-dimensional, as in the first two periods, but with justices spread more evenly across space, as in the third. Silva and Aguirre are opposite each other on the left-right dimension, although both stand next to each other on the interpretativist-legalist dimension. Two significant blocs can be distinguished looking at the 45° angle – Gudiño, Valls, Franco, and Aguirre on the right-legalist side and Góngora, Sánchez, Silva, and Luna on the left-interpretativist one. Justice Cossío moves close to Aguirre in this last court, although he often votes with the Góngora bloc. Ortiz is close to the median in both dimensions.

ANCHORING THE COURT'S CLEAVAGES IN CASES

This final section illustrates the court's cleavages and the meaning of the two-dimensional space by studying a subset of actual rulings. We select cases that reflect

legal reasoning to highlight the meaning of judicial philosophies and of left and right.

Interpretativists and Legalists

We begin by discussing the famous case of *Temixco* (1999) as an illustration of the interpretativism-legalism cleavage and of why we claim that Justice Góngora is consistently the most interpretativist. The court was deciding a lawsuit filed by the Temixco municipal government challenging the procedures adopted by the legislature of the state of Morelos to solve a boundary conflict between the Temixco and Cuernavaca municipalities.

In this case, the court declared, for the first time, the constitutionality of its power to examine the procedures followed by a local legislature while solving the boundary dispute. Justice Góngora stated that "constitutional controversies had been established as means to protect the spheres of competence of the different powers which final goal is to achieve people's welfare, and, thus, it would be against the aforesaid goal, and against the strengthening of federalism, to deny the power to control those violations on the basis of technical interpretations" (*Temixco*, 1999). This new definition of the scope of constitutional controversies resulted in the expansion of the court's power to exercise judicial review over due process violations (substantive and procedural), which meant that an impressive variety of cases could now be subject to review by the court.

Justice Góngora's success in reaching a majority in *Temixco*, however, was the result of a series of precedents redefining the scope of constitutional controversies.[6] Originally, constitutional controversies were limited to solving encroachments between different branches and levels of government,[7] yet the court subsequently expanded the scope of constitutional controversies to include also direct violations to the constitution.[8] Later on, the court changed the scope of review again to include the review of indirect violations to the constitution – that is, violations to state constitutions "fundamentally related" to the constitution.[9] Finally, the scope of constitutional controversies was expanded to encompass any violation to the constitution,

[6] For a more detailed discussion of the (nonlinear) evolution of the supreme court's criteria, see Justice Cossío's dissenting vote in the constitutional controversy 18/2003.

[7] "Controversia constitucional: La tutela jurídica de esta acción es la protección del ámbito de atribuciones que la ley suprema prevé para los órganos originarios del Estado." *Semanario Judicial de la Federación, Novena Época*, 1998.

[8] "Controversias constitucionales entre un estado y uno de sus municipios: A la Suprema Corte sólo compete conocer de las que se planteen con motivo de violaciones a disposiciones constitucionales del orden federal." Mexican Supreme Court. *Semanario Judicial de la Federación, Novena Época*, 2000.

[9] "Controversia constitucional: Es procedente el concepto de invalidez por violaciones indirectas a la constitución siempre que estén vinculados de modo fundamental con el acto o ley reclamados." *Semanario Judicial de la Federación, Novena Época*, 1997.

fundamentally related or not, based on the principle of constitutional supremacy (*Temixco*, 1999).

Justices Gudiño and Ortiz were the dissenting minority in *Temixco*, but they disagreed for different reasons. Justice Gudiño disagreed with the majority because he did not "share the majority's view of what it means to interpret the constitution and what are the limits of such power." In his view, "the ruling approved by the majority assumes that the interpretation of the constitution has no limits, or if that they exist, they can simply be ignored."[10] Justice Ortiz simply did not agree with the case's procedure.

Another recent example of the debate between the interpretativist and legalist blocs is *Nuevo León* (2006). This case is important because the court had to decide if an administrative court has standing in constitutional controversies. The arguments used by the legalist bloc in this case inevitably resemble the court's interpretation previous to *Amparo Mexicali* (1991). Prior to the 1994 reform, the supreme court denied relief to virtually all municipalities in the country. The way to do this was by strictly interpreting who was a power under Article 105 of the constitution.[11] At the time, Article 105 provided that the supreme court had jurisdiction to solve conflicts "between two or more states, between the *powers* of a state, and conflicts where the federation is a part." From 1917 to 1991, the supreme court interpreted this to mean that because the municipalities were not a power, they lacked standing to sue in constitutional controversies. A question remained: if municipalities were not a power, what were they? The court did not answer this question, nor did it recognize any alternative means of relief for municipal governments, dismissing all constitutional controversies filed by municipalities during these years.

In *Nuevo León* (2006), the state's supreme court brought a constitutional controversy against the state's administrative court. The issue was to determine if the administrative court had jurisdiction to reverse a decision made by the state's Council of the Judiciary. The supreme court, however, had to determine first if the administrative court had standing to be a party in constitutional controversies. A majority of the justices, headed by Justice Valls, interpreted that the administrative court was not a power and consequently lacked standing to be a party in constitutional controversies. According to the majority (Gudiño, Franco, Ortiz, Aguirre, Azuela, Luna, and Valls), the only possible defendant in the constitutional controversy was the governor of the state. The majority argued that unless the case was declared a conflict between the governor and the state's judiciary, the supreme court should dismiss the case because the administrative court is not a power.

The dissenting minority (Justice Cossío and Justice Góngora), on the other hand, sustained that the administrative court had standing to be a part of constitutional

[10] Justice Gudiño's dissenting vote in *Temixco* (1999).

[11] Remember that Article 105 is the provision that regulates the supreme court's power to solve constitutional controversies and constitutional actions.

controversies. As they explained it, administrative courts are courts that specialize in administrative issues, particularly disputes concerning the exercise of public power. Because of their nature, administrative courts are considered separate from the judiciary but also from the other branches of government. For the minority, if the court were to recognize that the governor had standing as defendant, it would be denying administrative courts, and any other autonomous entity for that matter (such as the Federal Electoral Institute), their independence from the executive power. Moreover, the court would be de facto depriving all administrative entities of any means of constitutional protection. Eventually, Justices Silva and Sánchez, the pivotal voters, joined the majority in considering that the administrative court lacked standing, and the case was dismissed.[12]

Nuevo León not only serves to substantiate the existence and meaning of the interpretativist-legalist line of division but further allows us to highlight how justices' positions on this cleavage have important implications with respect to the autonomy of administrative agencies and specialized courts. Those advocating legalism, as is clear in this case, also support a narrow interpretation of separation of powers and stronger limits on the range of action for the supreme court on these matters.

The Left-Right Division and Electricity

We discuss the famous electricity case to illustrate the left-right ideological cleavage in the Mexican court. In 1992, President Salinas amended the Electricity Law to allow private investment in the generation of electric power. The amendment provided that the power generated by cogeneration, self-supply, independent power producers, small power production, and some exports and imports by permit holders would not be subject to the prohibition on private participation found in Article 27 of the Mexican constitution. The new Electricity Law also stated that it would be the executive power, through regulations, that would establish the allowable quantities of power such private producers could sell to the Federal Commission of Electricity (CFE).

A year after the Electricity Law was amended, President Salinas (PRI) issued the first electricity regulation. Until today, the regulation has been amended three times: first in May 1994, when President Salinas established limits to the surplus power that private producers could sell to the CFE; second in July 1997, when President Zedillo (PRI) amended the regulation to grant private investors greater flexibility to participate in the bidding processes for capacity and associated energy; and finally in May 2001, when President Fox (PAN) attempted to establish new limits

[12] The reasons of each justice to join the majority were different. Justice Silva finally agreed with the majority in considering that the administrative court lacked standing to act on its own. Justice Sánchez, however, issued a more pragmatic vote. Before joining the majority, she justified her vote, explaining that she would rather have the governor as a defendant than the case dismissed. Transcript of the session of August 21, 2007.

to the surplus private producers could sell to the CFE.[13] Not surprisingly, although the three reforms were an equal exercise of the presidential rule-making power, none of the reforms passed during the years of *presidencialismo* were challenged. Only after the election of 2000 did conflicts about the use of the presidential rule-making power start.

Led by the opposition parties (PRI-PRD) in both chambers, congress brought, in July 2001, a constitutional controversy against Fox's reform (*Electricity*, 2001). This constitutional controversy was the first case in which the supreme court had to pass judgment on a conflict between the executive and both chambers of congress. Congress challenged the regulation's legality on the grounds that although the Electricity Law did not establish any explicit limit to the amounts that cogenerators and self-supply permit holders could sell to the CFE, the law always intended to provide for the selling of excess energy by private investors as an exception to the state's exclusive right to provide electricity and not as an indirect way to open the electric sector to private investment.

The president's response was that the Electricity Law does not establish any limit on the amount of excess energy that private investors may sell to the CFE; rather it explicitly provides that it is the president, through regulations, who can determine the limits of such amounts. Thus, if the regulation did not fall outside the scope of the legislation, updating the amounts already set in the regulation was not a violation of the legislative power of congress.

When ruling on *Electricity* (2001), the court had to determine the validity of the regulation vis-à-vis the legislative intent, that is, contrast it to the Electricity Law. However, a second interpretation was promoted by Justices Góngora, Azuela, Ortiz, and Díaz, who considered that the court should declare the unconstitutionality of the regulation, not because it violated the legislative intent, but because it violated Articles 25, 27, and 28 of the constitution, which explicitly prohibit any private participation in the energy sector.

When contrasting the regulation to the Electricity Law, four of the eleven justices voted in favor of the presidential regulation: Aguirre, Gudiño, Aguinaco, and Sánchez. As Justice Aguirre explained, the increasing participation of private investment in the electricity sector was not something new; rather it was a process that had started in 1992 and was supported by other legislative acts such as the Regulatory Energy Commission Law and the North American Free Trade Agreement. According to the minority, the explicit reference in the Electricity Law to the executive's power to set the limits to the amounts that CFE could buy from private generators

[13] The reform mainly consisted of three modifications. First, an increase up to 20 MW for self-supply permit holders with an installed capacity of 40 MW; up to 50% of their capacity to self-supply permit holders with an installed capacity over 40 MW; and up to 100% of the cogenerators' excess capacity. Second, the reform authorized the minister of energy to modify the power percentage to buy from private cogenerators and self-suppliers. Finally, the new rule granted authorization to the Commission for Electricity to buy permits holders' excess power without going through a competitive tender.

reflected the legislative intent when adopting the law. If the current legislature had a different intention, it could undelegate the executive's power by amending the Electricity Law. The remaining seven justices, led by Justice Silva, who was in charge of writing the opinion, considered that "if we were to uphold the constitutionality of the regulation it will allow, in practice, the privatization of a strategic sector of the country."[14] As explained before, the court's decisions on separation of powers controversies can only have general effects when voted by a majority of eight votes. To reach the required majority, two days after the initial voting, Justice Sánchez changed her vote from voting in favor of the president on statutory grounds to voting against him when comparing the regulation against the literal interpretation of the constitution.

Though congress's claim in the electricity controversy was a violation of the principle of hierarchical subordination, Justices Góngora, Azuela, Ortiz, and Díaz considered that the effective congressional claim was to compare the presidential regulation against Articles 25, 27, and 28 of the constitution. The legal technicality that allowed them to do this was by curing the deficiency of the claim (*suplencia de la deficiencia de la queja*).[15]

In both constitutional controversies and constitutional actions exists the concept of deficiency of the claim. However, in constitutional controversies, the court is limited to curing the deficiency of the claim, whereas in constitutional actions, the court has a much broader power and can decide "upon the violation of *any* Article of the constitution," whether or not it was claimed by the parties.[16] Interestingly, in the *Electricity* case the supreme court applied a principle closer to the one for constitutional actions, where the court exercises an abstract review of the constitutionality of general norms, rather than a more limited approach as provided for constitutional controversies such as *Electricity*, where the court rules on a concrete dispute.

When the majority of the court found that President Fox's regulation violated the state's exclusive right to provide electricity, it not only ruled the regulation as unconstitutional but most significantly, it also questioned the validity of the Electricity Law passed by congress (the legal basis for all the contracts signed with the private sector during the past sixteen years).

The *Electricity* case highlights the bidimensionality of the policy space within the Mexican court. Those who voted against the regulation of the Electricity Law not only voted in favor of expanding the role of the state versus the private sector

[14] Transcript from the session of April 25, 2002.

[15] In the *amparo* procedure, the "deficiency of the claim" is a well-developed concept. It essentially means that if a judge realizes that the plaintiff's claim is "incomplete" or "deficient," he may "cure" the claim as a way to ensure that equity and justice prevail in a trial procedure. The most common *amparo* areas where this concept is applied are labor law, where it only operates in favor of the workers, and agrarian law, where it also operates in favor of the less privileged party – the peasants.

[16] Articles 40 and 71 of the Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos.

in the generation of electricity but also favored an expansion of the courts' policy-making power over other branches of government. To expand the court's powers, they engaged in a direct interpretation of the constitution that led them to review the constitutionality of a law that had not been challenged. Justice Góngora, consistently situated in our maps in the lower left quadrant, most clearly embodies this vision of a more interpretativist-leftist court. Justice Gudiño consistently differs with this vision on the grounds of legalism and Justice Aguirre on the grounds of ideology. Hence both voted against the *Electricity* decision.

FINAL REMARKS

This chapter has examined the expansion of the policy-making power of the Mexican Supreme Court since 1994, when a constitutional reform turned the court into a constitutional tribunal. Analysis of rulings on constitutional controversies and actions in the period has offered a quite comprehensive tour of recent court activity as an arbiter in the system of checks and balances and between levels of the federal arrangement. The chapter built on the intuition of separation of powers models that the supreme court can never act against the interests of both the executive and legislative branches simultaneously; otherwise the ruling is likely to be overturned and/or justices might be sanctioned. The court can only use legal interpretation as a tool of policy influence when the elected branches have polarized preferences and the court itself is centrally located.

Despite the onset of divided government since 1997 in Mexico, the conditions for court influence only appeared with the triumph of the PAN in the presidency in 2000, bringing sufficient fragmentation of political power and ideological polarization between the branches of government. Multivariate regression confirmed that the probability of the court striking down a law increased significantly after 2000, but only in the type of rulings (constitutional actions) likelier to involve substantive ideological disputes. In rulings of the other type (constitutional controversies), mostly used to resolve federalism disputes, the court showed a marked propensity to side with the PRI, the party that set the new judicial system in place and also controls most subnational units. This pattern has not changed after 2000.

Separation of powers models construe justices as legislators in a robe. Though this reductionism has offered powerful intuitions about the political determinants of judicial behavior, the model has the drawback of failing to capture the important dimension of judicial philosophies; that is, justices are not different from one another simply for the political ideology predisposing their actions; they also differ in their view of the proper role that the supreme court ought to play in the system of separation of powers.

Moving beyond a formal model that incorporates this second dimension of court action, the chapter also explored this more complete view of court politics by analyzing justices' voting records to provide estimates of their ideal points and to confirm

if the space is in fact two-dimensional. The method revealed that when justices' opinions split, they in fact cleaved in two directions. Case studies confirmed that the first dimension of cleavage is the standard left-right divide of normal politics and the second corresponds to legalism versus interpretativism.

With the rise of political fragmentation in 1997, but especially after 2000, our results demonstrate that justices are arranged along the two dimensions of judicial politics. The compact eight-member block located at the left end of the spectrum in the first years (1995–1998) gave way to subdivisions along the two dimensions.

Our econometric results and analyses of representative court rulings suggest the importance of modeling courts under this more realistic assumption regarding the two-dimensionality of the space. Justices not only divide along the prevailing ideological cleavage in the polity that most conventionally divides citizens, political parties, and hence the other branches of government along a left-right line but also differ with respect to judicial philosophy or forms of legal interpretation that define the limits of the court's lawmaking capacities. Incorporating this second line of division between what we have labeled legalist versus interpretativist into formal models of courts is important for understanding the full range of court policy action within the system of checks and balances and even the emergence of possible conflicts with the other branches of government. One problem politicians confront, we suggested, is that the judicial philosophy of interpretation that is likely to prevail might be highly uncertain, especially where courts are created anew or in moments of realignment when the space for court powers is likely to expanded for the first time or in ways not previously anticipated.

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8

A Theory of the Politically Independent Judiciary

A Comparative Study of the United States and Argentina

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This chapter specifies the institutional conditions for an autonomous judiciary. It seeks to address the question, when will judges act independently of elected officials? Although scholars agree that judicial autonomy is an essential condition for the rule of law in presidential systems, no consensus exists about the circumstances under which it occurs. We argue that when the executive and legislative branches are united against the courts, the courts have few resources with which to defend an independent course, which may include arbitrating interbranch disputes and upholding rights. In contrast, when significant and sustained disagreements arise among elected officials – such as take place under divided government – judges have the ability to challenge the state and sustain an independent course, with little fear of political retribution.[1]

We seek to demonstrate that a country's position on the judicial autonomy continuum depends on more than so-called parchment barrier guarantees of life tenure (or some other long-term length) or protections against salary reduction. Informal practices that allow elected officials to control the courts often overshadow formal (constitutional) guarantees of judicial independence. Institutionalized subconstitutional practices can shape the incentive structure facing judges so that they are unlikely to oppose government policies. These subconstitutional practices can include withholding funds from the judiciary, imposing limitations on the jurisdiction of the courts, or instituting more drastic measures such as removing judges and court packing. Unified government permits the president and congress to employ these practices or to threaten to do so to subordinate the courts.[2]

[1] Bednar et al. (2001) present a related theory of the conditions for stable federal arrangements. Because judges often play a role in preserving federalism, it should not be surprising that similar factors underlie the stability of federal arrangements and an independent judiciary.

[2] See Chávez (2004) for an in-depth discussion of the relationship between informal practices and judicial autonomy.

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