



4-9-2010

Rethinking Judicialization: Towards a Better Empirical Model

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Recommended Citation

Levan, Ryan J., "Rethinking Judicialization: Towards a Better Empirical Model" 09 April 2010.
CUREJ: College Undergraduate Research Electronic Journal, University of Pennsylvania,
<http://repository.upenn.edu/curej/124>.

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Abstract

Since World War II, scholarly examination of countries in nearly every corner of the map has discovered the rampant growth of the power of judges and courts. I contend that this growth has been overstated by a tradition of recent scholarship that has at times demonstrated the tendency to brand courts as powerful prematurely. This fundamental error is the result of two chief difficulties. First, we have yet to arrive at a universally accepted definition of judicial power, which, in turn, contributes to the second problem: the inadequate number of reliable and universally applicable metrics of judicial power. The aim of this essay is to introduce a new way of thinking about the power of courts from the first premises—what constitutes power—to our ultimate goal—the models we employ to explain its development. I attempt to accomplish this renovation in two primary ways. First, I introduce a new definition of judicial power that, at its heart, focuses on the persistence of power over time. Second, I present key revisions to the extant judicialization frameworks by merging the prevailing theories into a single hypothesis that emphasizes the development of judicial power as a function of the spread of liberal democracy. Finally, I apply my framework and test empowerment hypotheses in an empirical examination of Mexico.

Keywords

Judicialization, Judicial Empowerment, Democratization, Mexico, Social Sciences, Political Science, Rogers Smith, Smith, Rogers

Disciplines

Comparative Politics | Models and Methods

**Rethinking the Judicialization of Politics:
Towards a Better Empirical Model**

By
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Thesis Submitted for Political Science Honors
University of Pennsylvania
April 9, 2010
Advisor: Rogers M. Smith

Acknowledgements

I am extremely grateful to Dr. Rogers Smith for not only his instruction as my advisor in this project but also for introducing me to the topic of judicialization in the first place. Additional thanks go to my father, Richard Levan, for reading drafts of this essay and providing his ever-helpful insights. Finally, I want to thank my mother Gail Cummings for being a superb listener, lending me ideas, and generally supporting me through the challenging yet rewarding writing process.

Abstract

Since World War II, scholarly examination of countries in nearly every corner of the map has discovered the rampant growth of the power of judges and courts. I contend that this growth has been overstated by a tradition of recent scholarship that has at times demonstrated the tendency to brand courts as powerful prematurely. This fundamental error is the result of two chief difficulties. First, we have yet to arrive at a universally accepted definition of judicial power, which, in turn, contributes to the second problem: the inadequate number of reliable and universally applicable metrics of judicial power. The aim of this essay is to introduce a new way of thinking about the power of courts from the first premises—what constitutes power—to our ultimate goal—the models we employ to explain its development. I attempt to accomplish this renovation in two primary ways. First, I introduce a new definition of judicial power that, at its heart, focuses on the persistence of power over time. Second, I present key revisions to the extant judicialization frameworks by merging the prevailing theories into a single hypothesis that emphasizes the development of judicial power as a function of the spread of liberal democracy. Finally, I apply my framework and test empowerment hypotheses in an empirical examination of Mexico.

Table of Contents

Introduction

- I. What is Judicial Power, Anyway?**
- II. Mapping Judicial Power: Explanations for Increased Power**
 - a. The Cultural-Ideational Model and its Components**
 - i. The Rights Hypothesis
 - ii. Judicial Professionalism and the Legal Support Structure
 - b. The Structural-Institutional Model and its Components**
 - i. The Diffusion of Power
 - ii. The Elite Power-seeking Model
- III. A New Dimension: the Maturity Hypothesis**
 - a. Combining Factors
- IV. Why the Maturity Hypothesis Makes Sense: Individual Factors and the Incorporation of Time**
 - a. Entrenchment of the Diffusion of Power
 - b. Increased Distance from Past Regimes
 - c. Judicial Professional Experience and the Exercise of Judicial Agency
 - d. Evolution of the Legal Support Structure
 - e. Expansion of Jurisdiction
- V. Mid-Point Summary and Initial Conclusions**
- VI. An Empirical Examination: Mexican Judicialization**
 - a. Judicial Behavior Prior to 1994: Symptoms of Judicial Puppetry**
 - i. External Limits to the Court's Power: Abridging Judicial Independence
 - ii. Internal Limits to the Court's Power: Curtailing Political Relevance
 - iii. Implications of a Weak Court During Hegemonic Rule
 - b. History of the Court: Various Eras of Judicial Power (or Lack Thereof)**
 - i. Chapter 1: 1824-1882, Creation and Definition

- ii. Chapter 2: 1882-1917, the *Porfiato*
 - iii. Chapter 3: 1917-1928, First Instance of Mexican Judicial Power
 - iv. Chapter 4: 1928-1944, First Infringements on Power
 - v. Chapter 5: 1944-1986, Administrative Organization
 - vi. Chapter 6: 1986-Present, An Empowered Court
 - vii. What This Framework Shows Us
- c. The 1980s and the Deterioration of PRI Hegemonic Domination**
- d. Ernesto Zedillo and the 1994 Reforms**
- i. Independence Through Structural Reform
 - ii. Political Relevance Through Subject Matter Reform
 - iii. The PRI's Strategy: Restrictions on Judicial Power
- e. Explaining Mexico's Judicial Empowerment Moment**
- f. Post-1994 Judicial Power: More Reforms**
- i. Reforms of 1996
 - ii. Reforms of 1999
- g. Assessing Judicialization in Modern Mexico: Power or Puppetry?**
- i. Post-2000 Diffusion of Power: Legislative Gridlock
 - ii. Presidential Election of 2006
 - iii. Increased Substantive Jurisdiction: Landmark Rulings
 - iv. Judicial Rulings in Light of Regime Allegiance
 - v. Increased Judicial Professionalism
 - vi. Trending Towards a Rights-Conscious Culture
- h. Impediments to Judicial Power in the 21st Century**
- i. Overcrowded Docket
 - ii. Loose Rule of Law
 - iii. Weak Property Right
 - iv. Restrictions on Activism
 - v. Restricted Standing to Sue
 - vi. Limitations of the *Amparo* Suit

Conclusion on Mexican Judicial Power

Introduction

There is a phenomenon sweeping through hallowed courtrooms and vaunted halls of justice the world over: “the expansion of judicial power” (Tate and Vallinder 1995). Examination of countries in nearly every corner of the map has discovered the apparent rampant growth of the power of judges and courts, prompting scholars to consider its implications. Some condemn mounting judicial power as an invasive evil creeping onto the bench and donning the robes of esteemed judges, undermining democratic legitimacy and acting as a countermajoritarian menace. Others have embraced the trend as a catalyst for democracy and the promotion of democratic ideals. Despite the importance of this debate, the aim of this essay is not to mediate the normative discussion concerning judicial power. Rather, it is to work towards a better empirical understanding of judicial empowerment. What *is* it? How do we explain its rapid growth? How can we predict its future?

Many scholars agree that judicial power has expanded at a torrid pace—so much so that some of the most crucial questions have gone overlooked. For one, is judicial power *actually* spreading or is that merely a perception? There has been an undeniable, visible growth of judicial power around the globe since the Second World War, but I contend that this growth has been overstated by a tradition of recent scholarship that has at times demonstrated the tendency to brand courts as powerful prematurely. This fundamental error is the result of two chief difficulties. First, we have yet to arrive at a universally accepted definition of judicial power, which, in turn, contributes to the second problem: the inadequate number of reliable and universally applicable metrics of judicial power.

In addition to discrepancies about the (figurative) constitution of judicial power, there are gaps in how the dissemination of that power has been explained. When it comes to mapping the spread of judicial power empirically, comparative public law scholarship is split into two overarching theoretical camps: the structural-institutional model and the cultural-ideational model. While not without merit, I believe this dichotomous framework no longer adequately explains the rise of judicial power—as understood by the definition I will provide shortly—in light of the burgeoning empirical work that has been done throughout the world in a variety of settings.

The aim of this essay is to introduce a new way of thinking about the power of courts from the first premises—what constitutes power—to our ultimate goal—the models we employ to explain its development. I intend to accomplish this renovation by presenting key revisions to the principal prevailing judicialization frameworks. I develop this by first reviewing various definitions of judicial power and traditional empowering factors before arriving at a new definition that focuses, at its heart, on the persistence of power over time. Second, I examine the explanations existing literature has provided for the empowerment phenomenon. Third, I briefly discuss the flaws in the literature before presenting a new model that emphasizes widespread judicial empowerment as a function of the growth of liberal democracy. Fourth, I apply my persistence of power framework and test my liberal democracy empowerment hypothesis in an empirical examination of Mexico. Finally, I end with a conclusion that summarizes the findings of this essay.

I. What is Judicial Power, Anyway?

One should not be fooled by the imaginative nomenclature that has accompanied the expansion of judicial power. While inventive terminology like “judicialization” (Tate and Vallinder, 1995), “governing with judges” (Stone Sweet, 2000), “courtocracy” (Schepple, 2002) and even the bristling “juristocracy” (Hirschl, 2004) each carries a unique connotation, they all refer to the same basic phenomenon: a growing trend towards stronger courts.¹ Yet much more difficult than coining these colorful monikers is determining exactly what they purport to describe. As yet, there is no conclusive understanding of judicial power. This is because the power of courts—regardless of the name it masquerades under—is remarkably challenging to measure. As Ginsburg (2008, 94) notes, there are an inadequate number of reliable and universally applicable metrics with which to study courts. Our ability to generalize is further hampered by the unique context in which each tribunal acts. Different political landscapes elicit different responses from the same type of political actors, and the courts are no exception.

We may look to any number of sources for direction in categorizing judicial power. Ferejohn (2002, 41) finds judicialization in the “increasingly important, pervasive, and direct role that courts play in making policy.” The Filipino Constitution explicitly employs a substantive notion in its definition: “judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable” (Pangalangan, 2009, 318). But I find Ginsburg’s results-oriented definition (2003, 252) to be most useful: “[judicial power is] the *independent* input of the court in producing *politically significant* outcomes that are *complied with* by

¹ Going forward, I will use many of these terms interchangeably to refer to judicial power.

other actors.”² He uses outcomes to identify three specific criteria critical to cementing *real* power for a court: judicial independence from other branches; the discretion to render politically significant rulings; and the enforcement of and compliance with those decisions on the part of other political actors.³ Independence is essential so that the court is not constrained by subservience to the regime or other political actors. Politically relevant decisions are key because even an independent court must be able to exercise power meaningfully on important matters, without which it would serve as just another paper-filing arm of the bureaucracy. Compliance with court rulings by other political actors not only legitimizes judicial authority but also ensures the enforcement of court policy in everyday life.

To these three criteria I would add one more to complete the power picture: the persistence of power over time. This is a critical addendum: the ability of a court to sustain its power for a period of years rather than months distinguishes the pretenders from the truly powerful. The timing component of judicial power is itself difficult to measure. In this essay, I will consider the power of a court to have persisted if the court has issued at least 3 significant rulings in the first 10 years following its empowerment moment. Rulings are significant when they address politically contentious issues, directly depart from the entrenched political status quo, and prove their import in the public psyche by drawing national media attention.⁴ Of course, some courts will progress

² Ginsburg considers a court that demonstrates all three of these components at once to be in a state of “high equilibrium” (74).

³ Finkel (2004, 779) echoes Ginsburg conceptually using alternative terminology: “judicial power...encompasses three interconnected concepts: independence, authority, and jurisdiction.” In her definition, independence means the same, authority corresponds with compliance, and jurisdiction corresponds with political relevance.

⁴ I have borrowed the criteria of national media attention from David Mayhew’s discussion of U.S. legislation and front-page *New York Times* coverage in *America’s Congress: Actions in the*

more quickly than others. Some may hand down a cascade of landmark rulings within the first few years whereas others will need the full ten years to meet the three case persistence criterion.

However, I do not wish to advance a binary framework in which courts are either dangerously powerful or pathetically weak. Judicial power is certainly not an all-or-nothing enterprise. Courts may indeed exhibit varying degrees of independence, political significance, and outside compliance. They may also display some of these components but not others. One of the greatest challenges this scholarship faces is to differentiate genuine power from that which is fleeting, ephemeral, limited, or artificially contrived by political actor puppeteers. As Finkel notes, “The current literature...*remains weak with respect to its ability to evaluate the power of reformed judiciaries* or to systematically compare them across countries” (Emphasis added. Finkel 2004, 780). I believe Ginsburg’s model, revised to include my element of sustained power over time, will help address that challenge. Therefore, throughout the remainder of this essay, complete judicial power will be understood to mean:

“the *independent* input of the court in producing *politically significant* outcomes that are *complied with* by other actors...all of which *persists* over time and can be reasonably expected to *persist* in the future.”⁵

Public Sphere, James Madison Through Newt Gingrich. New Have, Connecticut: Yale University Press, 2000.

⁵ Ginsburg does make a distinction between formalistic and maintained judicial power. However, he does not explicitly incorporate the element of time and duration in his central definition of judicial power like I do here.

II. Mapping the Empowerment Story: Explanations for Increased Power

In mapping judicial power, comparative public law scholarship is split into two general camps of theories: the structural-institutional and the cultural-ideational. Thus far, nearly all empowerment theories emphasize one or the other of these two larger headings, although some bridge the two, since they are not mutually exclusive.

The Cultural-Ideational Model and its Components

The cultural-ideational model is predicated on the notion that judicialization has expanded globally due to shared cultural conditions that have encouraged its prospect for growth. Judicial power flourishes in societies with political cultures that are capable of promoting it. That volition is manifested in various ways, including the demand for protected human rights, a mobilized legal community, and the promotion of democratic ideals.

The Rights Hypothesis

The rights hypothesis emerged as one of the most prevalent frameworks from the beginning of judicialization scholarship. Tracing the legal codification of human rights, the rights hypothesis asserts that the boom in judicial power since World War II has been causally related to the demand to rectify the social failures of the World War era. Shapiro (2002) points to the universal cry for the protection of rights in the wake of the gross human rights violations committed during the fascist era in Western Europe. The plea was heard, and Europe institutionalized rights protection as a major function of the courts, followed shortly by the emergence of a *global* climate of concern for human

rights in the latter half of the 20th century. Nascent democracies from post-Soviet Eastern Europe to post-dictatorship Latin America to post-Apartheid South Africa have entrusted their judiciaries with the guardianship of group and personal liberties in the wake of unspeakable rights infringements. As the aggregate rights awareness of the international community has elevated, rights protection has become increasingly institutionalized in supranational bodies like the European Court of Justice and the European Court of Human Rights. Furthermore, global responses to deteriorated political situations like Darfur, Yugoslavia and Iraq demonstrate the international community's initiative to speak out against rights abuses and the emergence of a global legal morality. The United Nations is no longer the lone whistle blower on rights violations. International political elites do not hesitate to voice rights concerns directly to delinquent regimes and have increasingly brought war criminals to trial.

But why have states across the globe elected to charge their *courts*—as opposed to any other political organ—with the responsibility of safeguarding rights? Courts make sense as natural guarantors of human rights because, unlike the executive and legislative branches of tripartite governments, courts are seldom majoritarian institutions. Those that wield the juridical power are generally appointed and approved by other political figures, actors who often (but not always) *are* beholden to the electorate. This insulates the judiciary from both the populace and outside politicians and allows it to manage the principal-actor relationship between polity and government, giving judges discretion to check the government on behalf of the people or less powerful groups. Judicial insulation also makes the courts the *safest* option for resolving disputes between political actors. The court's natural political insulation gives it legitimacy as a third party dispute

mediator in the process of triadic dispute resolution on two levels, both vertically—in disputes between higher and lower levels of government—and horizontally—in disputes between the executive, legislative, and judicial branches (Shapiro 1981). The end result is the juridical prevention of rights abuse even in the case of popularly sponsored and democratically conceived governmental behavior like that of the Jim Crow American South.

Judicial Professionalism and the Legal Support Structure

Tate (1995, 33) has asserted that, although exogenous conditions must permit judicial empowerment, judges themselves are ultimately responsible for cultivating judicial power. Regardless of the textual mechanisms providing for theoretical power or favorable political conditions, it is still the judges who must actualize that potential power by delivering rulings and exercising their agency, thereby promoting their own power. Termed judicial activism, the increased proclivity of judges to invalidate legislation has become one of the many phenomena associated with global judicial empowerment. Keck (2002) agrees that judicial attitudes and political preferences have colored the American judicial empowerment experience and continue to shape the state of the U.S. Supreme Court today. Hilbink's (2008) account of the Chilean judiciary's timidity despite its maintenance of formal independence and the potential to assert itself during the Pinochet regime supports this claim as a negative proof.

While it is certain that only judges may author the opinions that become legal precedent, Epp (1998) has argued that the presence of a legal support structure—composed of lawyers, advocacy groups, and law professors, among others—is in fact the

most essential enabling condition for judicialization. Rather than affecting legal change from the top down, Epp sees the activity of civil society and movements at the grass roots as instrumental to forging a new constitutional order. The support structure may be more in touch with society's cultural preferences than socially isolated, politically elitist judges and therefore is better suited to advance its goals.⁶

The Structural-Institutional Model and its Components

As opposed to the cultural model, theories in the structural-institutional strain focus on political-institutional arrangements as catalysts for judicialization. Among the most important of these are the diffusion of power and strategic elite behavior.

The Diffusion of Power

Judicial power has flourished in nations where the central governing power is divided in the Montesquieu-ian tradition amongst multiple political institutions, branches and organs. Ginsburg forcefully posits that “domestic political diffusion is a necessary condition for the development of judicial power” (2003, 20). For that reason, authoritarian regimes—predicated on highly concentrated or unitary power—serve as hostile environments for the development of strong courts. The diffusion of power theory does seem to explain many global instances of empowerment. Perhaps that is why it has no shortage of defenders. Shapiro (1981) sees judicialization as a likely byproduct of a strong tradition of federalism. In federalist systems with multiple levels of government,

⁶ Although he does not go so far, a radical extrapolation of Epp's hypothesis could interpret judicial actions and attitudes as incidental because they are mere reactions to the behavior of the legal support-structure that controls the legal agenda and process. I find, however, judicial behavior and attitudes to be an extremely important element of judicial empowerment, as I explain below.

courts serve to mediate disputes between local and federal government in the process of triadic conflict resolution. Ginsburg (2009) adds that when power is delegated to administrative agencies, courts assume the additional responsibilities of monitoring federal administrative agents and arbitrating administrative law. Dahl (1957) asserts that courts derive power from the interplay between all branches in the form of inter-branch political coalitions. Whittington (2007) follows this current by identifying the executive as the center of modern American political coalitions and the power of the court as a direct function of the presidential political alignment at any given moment. Graber (1993) tracks the historical rise of judicial power in the United States and views the courts as beneficiaries of voluntarily delegated legislative power to resolve nationally divisive issues that are problematic for the legislative and executive branches, evidenced by the landmark decisions on slavery, segregation, and abortion.⁷ Ferejohn (2002) addresses this same phenomenon with his “fragmentation hypothesis,” but argues that, as opposed to voluntary delegation, courts seize legislative power when political gridlock in the normal legislative organs creates a power vacuum. These theories all see the court’s power at one level or another as a function of divided, diffuse political power. The more diffuse the system, the greater the potential for a powerful court.

The Elite Power-seeking Model

Another valuable account in the structural-institutional camp is the elite power-seeking model. Ginsburg (2003) and Hirschl (2004) both advance models of judicial empowerment founded in the strategic response to waning power or the expectation

⁷ *Dred Scott v. Sanford* (60 U.S. 393), *Brown v. Board of Education* (346 U.S. 483), *Roe v. Wade* (410 U.S. 113),

thereof of anxious political elites. In Ginsburg's "insurance hypothesis," political elites who are confronted with electoral uncertainty and foresee themselves being ousted from power are more prone to arrange a constitutional bargain in which they empower courts as a means of protecting and pursuing their agenda after their political removal. Hirschl (2004) proposes a similar elite-driven theory of hegemonic preservation in which political, economic, and judicial elites all collude to create a new constitutional order that wrests policymaking agency away from majoritarian institutions and empowers courts. This occurs because elites believe their interests and agendas are more likely to be served by insulated judicial panels with compatible elite views than normal democratic processes that favor the masses. This notion is shared in part by Smith (2009), who believes that power-seeking elites do benefit from judicial empowerment—perhaps more so than their apolitical mass counterparts—and, therefore, have settled upon proliferating judicialization in democratic settings as a successful means of legitimately procuring their goals.

The influence of this hypothesis is supported in part by Magaloni (2008) and Trochev (2004) who agree that judicial empowerment is largely the work of political elites striving to maintain autocratic or authoritarian rule. However, rather than elites who anticipate losing power, Magaloni and Trochev offer accounts of Mexico and Russia that focus on politicians whose political clout is secure. Magaloni cites the PRI hegemonic domination in Mexico as an example where the ruling party empowered the courts not because it feared losing power, but because it needed to maintain vertical order among party members from the national level down to the regional politicians. The courts in this account acted as interparty mediators and helped stabilize the regime.

Similarly, Trochev points to the regional courts in Russia, which were empowered by governors who faced no electoral threat but wanted to legitimate their autocratic power formally before their local electorate as well as their national political superiors.

As for economic elites, Hirschl's hypothesis sees both domestic and international players as key in promoting their economic interests through judicial empowerment.

Domestic white land-owning elites in South Africa managed to maintain their economic superiority through the installation of a democratic constitution despite the document's drastic social reforms that ended Apartheid (Klug 2007, 319). Similarly, Anwar Sadat's Egypt was in desperate need of international investment after the previous regime expropriated foreign-owned international assets in a nationalization campaign that alarmed economic elites and discouraged further investment. To jumpstart its economy and distinguish itself from its political predecessors, Sadat turned to Egypt's courts to uphold the rule of law over property and demonstrate legal legitimacy in a successful effort to attract new international investors (Moustafa, 2003).

III. A New Dimension: The Maturity Hypothesis

I believe this dichotomous framework, while not without merit, does not adequately explain the rise of judicial power—as understood in this essay—in light of the burgeoning empirical work that has been done throughout the world in a variety of settings. Individually, the cultural-ideational and structural-institutional models may explain particular *components* of judicial empowerment—indeed, they each do well to outline instances of *partial empowerment*. **But both structural-institutional and cultural-ideational factors are necessary for accounting for complete, real judicial**

power at the national and the global levels. The two families of factors are inextricably intertwined, working in concert to reinforce one another. It is the simultaneous maturity within a state of factors belonging to each one of the families that yields true judicial power—the power defined at the outset of this paper. That is why only rights-based democracies with diffuse power structures, a liberal economic agenda and an active judicial profession⁸ host *genuinely powerful* courts.

Combining Factors

The greatest contributor to the rise and expansion of judicial power has been the growth of liberal democracy. Historically, we have seen judicialization follow the spread of democracy from the end of World War II through the second and third waves and the global decline of communism (Huntington, 1991). During the last sixty years, the number of the world’s democracies has sharply increased, and along with it, instances of judicial power. Domingo (2004, 2) asserts that “The judicialisation of politics is a phenomenon of modern democratic rule.” Many contend that democracy is the *only* necessary condition for judicialization (Tate, 1995; Ginsburg, 2008). I will argue that liberal democracy provides the only environment that simultaneously develops the cultural and institutional factors necessary for the realization of true judicial power.

As a political organization, democracy is ideologically rooted in the *greatest* diffusion of power: the rule of the people. Ginsburg and his academic predecessors have shown that the formal division of powers is crucial to the birth of judicialization, and greater diffusion breeds greater judicial power. Liberal democracies are characterized in

⁸ Various descriptive categorizations come to mind when discussing such nations, for example, the welfare states or modernized polities. Although it is an imperfect classification, I will use the term “liberal democracies” to refer to such nations in the remainder of this essay.

part by competitive multiparty systems, influential civil society and pressure groups, and an unconstrained media. All of these exogenous sources wield power that is clearly manifested in the political process. They merge with traditional sources of state power, which are themselves divided, to form one large power-sharing mosaic that is incredibly diffuse. Accordingly, liberal democracies—unlike states that repress political parties, media networks, and social movements or concentrate their formal power—foster the greatest opportunity for diffusion of power and, therefore, judicial power.

In addition to structural factors, modern liberal democracy includes substantive cultural guarantees. The term liberal democracy has come to imply an underlying culture of rights and rights protection, and some sort of bill of rights has become requisite in modern liberal democracies. Indeed, Israeli academics argue that rights-protection is so fundamental that it has become a foundational block of modern democracy (Barak 2006; Edrey 2005). The Philippines explicitly institutionalized court protection of rights in their constitution (Pangalangan 2009), as have many other nascent democracies that have adhered to the growing trend of adopting “thick” constitutions that contain specific provisions and directives for the judiciary (Schepple 2005).

Liberal democracy has also been linked with the spread of economic liberalism. The market system’s encouragement of private sector economic enterprise has made it necessary to institutionalize individual and corporate economic rights. Those rights, like human rights, require a formal guardian. And just as with human rights, the courts have been charged with guarding economic rights. Furthermore, the rule of law is necessary to sustain a market economy. It is critical in ensuring predictable and fair corporate

practices, upholding property rights, and shielding international investment from undue government nationalization efforts (Moustafa 2003).

The elite framework has been touted for explaining the *timing* of constitutional revolutions (Ginsburg 2007, 91). I concur that it does well to pinpoint the causes of the specific empowerment moment, but I am skeptical that elite explanations are equally relevant in the judicial politics of a nation going forward from the empowerment moment and even less so after a court has achieved the maintenance criterion. While the prerogatives of political, economic, and judicial elites may be in sync at the time of empowerment, it is less likely that the compatibility of those elites within complex coalitions will endure over time. Since political and economic landscapes constantly evolve, contemporary elites may no longer share the same needs or interests as their predecessors who initially empowered the judiciary. In response, courts may either shift their allegiance from one group or type of elites to another or abandon elites to advocate for the masses.

Using the United States as an instance of shifting elite beneficiaries, we see that the elites responsible for drafting the Constitution in 1789, promulgating the Judiciary Act of 1789, and handing down the *Marbury* decision of 1803 are nowhere to be found in the 21st century. With perhaps the exception of the oil industry, domestic economic preeminence has shifted from land to transferable assets. Similarly, the political elites of white males groomed in the English pedigree have given way to political equality embodied by an African-American president. True, international economic implications are as important as ever in the midst of a global financial lull, but the change in “who

benefits” from judicial power demonstrates a clear divergence from the orientation of the empowerment moment.

Not only elites benefit from empowered courts; the masses can too (Smith 2009; Epp 1998). Mass interests are served when marginalized groups profit from court decisions, particularly at the expense of groups that traditionally dominate the legal system. Although elites vary from country to country and era to era, mass groups may include legal underdogs like indigenous peoples, the poor and uneducated, and unpopular religious groups.⁹ One indication of the masses benefitting is the increased use of the courts. Underrepresented groups tend not to petition redress from courts if they do not believe they have a legitimate chance of being afforded remedy by them. Another indication is the type of rulings handed down. Typically, pro-mass rulings involve social reforms like welfare, labor, agricultural distribution, and other democracy-strengthening goals.

Take the French Fifth Republic, for instance, where the Conseil Constitutionnel gained real power only *after* its empowering political elites left power—specifically, President Charles de Gaulle (Stone Sweet, 1992). The Filipino Supreme Court also began advocating mass interests shortly after the promulgation of the Filipino Constitution by compensating for the majoritarian branches’ failures and “correcting the deficiencies of the democratic processes” (Pangalangan 2009, 324). As I will show later,

⁹ Liberal democracies further challenge the elite theory because they tend to have developed economies and present greater opportunity for socio-economic mobility, blurring the lines between elites and masses. For that reason I am more inclined to accept Smith’s (2009) notion of elites and masses through the Machiavellian framework as those who desire to rule and those who simply do not want to be oppressed.

Mexico offers two distinct historical instances in which empowerment has led to judicial advocacy on behalf of the masses.

The Hungarian Court is another example of a court that sought to serve the interests of the masses shortly after its empowerment by elites. In the years directly following the fall of the Soviet Union and Hungary's independence, the Supreme Court handed down rulings defending "pensioners, poor families, people with chronic illnesses, pregnant women and others" (Schepple 2005, 47). However, the Hungarian Court succumbed to elite political pressures not long after its empowerment, failing the maintenance criterion for true judicial power. This episode demonstrates how a court may imperil itself and detract from its power if it too quickly abandons or threatens elite interests in pursuit of mass ones, explaining why court advocacy of mass interests grows as time passes from the empowerment moment and courts learn to stand on their own feet.

Finally, the conjunctive maturation over time of all the above factors strengthens judicial power in a given nation.

IV. Why the Maturity Hypothesis Makes Sense: Individual Factors and the Incorporation of Time

In Part I, I stressed the importance of maintenance of power over time. Why is time such an important factor for judicialization? As time passes after the constitutional revolution or empowerment moment, we can expect courts to experience the following developments:

Entrenchment of the Diffusion of Power

As outlined earlier, in the Ginsburg, Shapiro, Whittington, Graber, Ferejohn and Dahl theories, diffuse power is critical to judicialization. As time passes after the empowerment moment, we can expect the diffusion of power to vary, often becoming more entrenched. Widner (2008) shows us that diffusion also means diverse perspectives within the political organs. As a country ages, political parties within that country also tend to mature. Heightened party opposition leads to more litigation and court policymaking, as I will demonstrate with Mexico's three-party system in the second half of this paper. The infamous United States case of *Bush v. Gore*¹⁰ demonstrates that party opposition was so contentious, the nation so ideologically divided, and both parties so confident in the courts that the 2000 presidential election was decided as much in the courtroom as in the polls.

After the constitutional moment, we can also usually expect a nation's commitment to constitutionalism to grow. In liberal democracies, this commitment will help protect and cement the autonomy of opposition parties, advocacy and pressure groups, and the media, all of which contribute to diffuse power arrangements and judicial authority.

Increased Distance from Past Regimes: Developing the Rule of Law

Not every court receives an explicit empowerment mandate at the successful overthrow of an authoritarian regime or imperial hegemon. Some courts simply pass from one authoritarian regime to another and never become empowered at all. In fact, most courts start out weak after democratization or state independence and incrementally

¹⁰ 531 U.S. 98

gain power thereafter. But in the cases of courts that *do* experience empowerment moments as the result of national independence, democratic constitution writing or the restoration of democracy after a stretch of authoritarian rule, we can expect their power to grow as the new regime becomes more stable with the development of cultural factors, none more important than the widespread embrace of the rule of law (Stone Sweet 2000).

Although some level of judicial autonomy and agency is possible in authoritarian regimes, authoritarianism is an environment hostile to fully independent, politically relevant judiciaries (Ginsburg and Moustafa 2008).¹¹ As increasing distance is put between the current democratic and past authoritarian regimes, old authoritarian practices are generally exchanged for democratic ideals. As Tate (1995) and Ginsburg and Mustafa (2008) have indicated, authoritarian regimes are loath to support a rule-of-law culture or a system of legalistic norms because they fear it will be used against them by opponents of the regime. With a new constitutional order and the passage of time, the rule of law should take hold, facilitating judicialization.

Judicial Professional Experience and the Exercise of Judicial Agency

It is nearly inevitable that courts will be confronted with the challenge to define the scope of their own power once they become empowered. They must do so in “grand

¹¹ Ginsburg and Moustafa outline the various functions of courts in authoritarian regimes vis-à-vis the central government. They identify two general strategies for authoritarian leaders: either empower the courts or constrain them, whichever better suits the regime. Motivating factors for empowerment include social control, regime legitimation (e.g. Russia), controlling administrative agents (e.g. Mexico), controlling the economic sphere (e.g. Egypt), and delegated power for controversial reforms (e.g. U.S. a-la Graber). Courts are constrained so they cannot challenge the regime. This is accomplished by imposing judicial self-restraint (e.g. Chile), a fragmented judicial system, limited public access to justice, and incapacitated judicial support networks. Regimes need to strike a careful balance so that courts are powerful enough to aid them but not powerful enough to topple them.

cases,” or the “*Marbury* moment” (Ginsburg, 2003, 17).¹² For some, this task is simple. The constitution or constitutional text may explicitly spell out the jurisdiction and provinces of the court or its role as the supreme or compartmental interpreter of the constitution.¹³ In that case, all the court must do is reaffirm the original constitutional mandate. Deferential courts may choose to cede components of their power or deny that it ever existed in the first place. For others, namely those courts in polities bounded by a thin constitution, the scope of judicial power may be harder to clarify. In either situation, the *Marbury* moment is a coming-of-age experience that helps a court carve out its own place in the greater constitutional adjudication scheme.

Once the court defines the scope of its power, it can be more sure about the power that it exercises. It may even become more willing to increase the power it has. This is quantitatively demonstrated in the statistics of statutory invalidation in most countries with constitutional review. As Ginsburg (2008) suggests, it may be erroneous to measure composite judicial strength by the sheer number of invalidations alone, but it is incontrovertible that an increase in statutory invalidation over time indicates an elevated and growing willingness of judges to exercise their agency, respond to other political branches and actors, and generally entangle themselves in the political process.

¹² Chief Justice of the U.S. Supreme Court John Marshall established the first instance of judicial review by invalidating a statute in the United States in the landmark case *Marbury v. Madison* (5 U.S. 137) in 1803.

¹³ The judicial branch in a given polity may be the sole interpreter of the constitution, charged with the exclusive right to interpret the document’s goals, aims, and mandates. Conversely, constitutional interpretation may be compartmental or joint enterprise, in which the courts share constitutional responsibilities with one or more other branches of government.

Evolution of the Legal Support Structure

With time, the legal community that accompanies a grounded judiciary can be expected to grow. Just like with judges, those involved with the legal profession—lawyers, law professors, interest groups—will become more comfortable with their roles within the greater cultural and institutional framework. Accordingly, legal procedures used to challenge laws and statutes will become more familiar, making the courtroom more effective as a policymaking forum. In that event, challenges to laws and statutes can be expected to occur more frequently and with better preparation and more bite. Additionally, public access to courts and standing to sue may become more widespread.

Expansion of Jurisdiction

In nascent democracies, the political agenda immediately following the founding constitutional moment may be crowded with exorcising the demons left behind by the previous regime. In many cases, this includes bolstering property rights and neo-liberal economic values in an economic opening that follows the political opening. It may also include the policing of corrupt officials or punishment of past tyrants, as in the Philippines (Pangalangan). Furthermore, as cases accrue, precedents are set. Stable jurisprudence in these areas is typically necessary before the court turns to issues of social justice, human rights, and welfare concerns. Courts that attempt to take on these issues too early imperil themselves, as the case of Hungary demonstrated. It took the United States sixty years after the establishment of review to amend the greatest rights controversy in the country's history, slavery, and another hundred to enforce the new egalitarian provisions meaningfully.

V. Mid-Point Summary, Initial Conclusions

U.S. Supreme Court Justice Potter Stewart once famously wrote in a concurrence about the definition of pornography, that for all its elusiveness, “I know it when I see it.”¹⁴ We are unfortunately unable to say the same about judicial power. Our recourse is to construct—like Justice Stewart’s Supreme Court colleagues eventually did—a rigid definition to help identify observable phenomena. I believe that the current definitions of judicial power require clarification. I propose the implementation of an expanded version of Ginsburg’s definition, in which judicial power is “the *independent* input of the court in producing *politically significant* outcomes that are *complied with* by other actors...all of which *persists* over time and can be reasonably expected to *persist* in the future.”

With this definition, I believe we can distinguish instances of true judicial power from judicial puppetry. While I find that judicial power is increasingly across the globe in a variety of contexts, the only conditions in which complete judicial power can flourish are nurtured in mature, liberal democracies. Although we have seen various types of partial empowerment stories in authoritarian contexts, it remains to be seen whether a court will arise that can be truly, completely powerful in a non-democratic context.

VI. An Empirical Examination: Mexican Judicialization

In December of 1994, Mexican President Ernesto Zedillo initiated a reform of the judicial system through constitutional amendment that transformed the country’s

¹⁴ 378 U.S. 184

Supreme Court from an executive puppet to a functional constitutional court.¹⁵ Prior to the reform, the Mexican judiciary was politically dependent and operationally constrained, failing both the judicial independence and political relevance power criteria. But the Zedillo administration made judicial empowerment one of its top priorities, breaking from party precedent of the 71-year hegemonic Institutional Revolutionary Party (PRI), whose rule was generally characterized by direct judicial subordination to the executive (Fix-Fierro 1998; Domingo 2000; Cárdenas Gracia 2000; Finkel 2008; Magaloni 2008). Ten years after Mexico's inauguration as a legitimate electoral democracy and fifteen years after its historic judicial reform, this section seeks to determine 1) the impetus for the Zedillo administration's decision to judicialize Mexican politics and 2) whether that empowerment effort has indeed created a powerful court.

Section A addresses the Mexican judiciary's systemic lack of power prior to the 1994 reform that originated from the absence of institutional independence, a legally limited political relevance, and an anti-political attitude that was internalized in the judicial profession. Section B examines specific eras in the judiciary's history to demonstrate fluctuating levels of judicial power based on the solidification of the principles outlined in Section A. Section C discusses the social, political and economic circumstances leading to the 1994 reform. Section D details the structural, substantive, and resulting attitudinal changes imposed by the 1994 reform that empowered the Court by imbuing it with formal independence, constitutional review, and a new judicial professionalism. Section E explores the competing explanations for Zedillo's decision to empower the Mexican courts. Section F outlines the post-1994 judicial reforms that have

¹⁵ Cárdenas Gracia (2000) notes that the Court "was [originally] conceived more as an appeals rather than a constitutional court" (172).

contributed to and bolstered the ramifications of the 1994 empowerment moment. Section G discusses judicial power in the 21st century. Section H addresses the contemporary impediments to the maintenance of judicial power in Mexico. I end with a conclusion summarizing the findings of this section.

A. Judicial Behavior prior to 1994: Symptoms of Judicial Puppetry

External Limits to the Court's Power: Abridging Judicial Independence

From 1929 until the 1994 reform orchestrated by President Ernesto Zedillo, the Mexican judiciary—like every other political organ—had been the puppet of the hegemonic ruling party, the *Partido Revolucionario Institucional* (PRI). Despite explicit mandates for the separation of powers embodied in the 1917 Mexican Constitution,¹⁶ the judicial branch during the PRI regime was effectively a department of the executive (Chaires Zaragoza 2007, 51). This lack of independence stemmed from the fact that PRI rule was characterized by a phenomenon endemic to Latin America: *presidencialismo* (presidentialism), the domination of the entire political landscape by the president of the nation (Weldon, 1997). In Mexico, the president was able to maintain near total control of the constitutional order thanks to both explicit constitutional provisions and unintended *de facto* circumstances (Magaloni 2008, Zamora 2004, Domingo 2000).

First, the PRI was a highly synchronized hegemonic regime. As the leader of the PRI, the president set the party agenda and the rest of the autocratic order adhered to it (Magaloni 2008; 2003). From 1929 to 1994, the PRI perpetually held more than two-thirds of the seats in both Congressional houses—the Senate and the Chamber of Deputies—as well as two-thirds of the seats in each of the thirty-two Mexican state

¹⁶ Title III, Article 49.

legislatures. The PRI's overwhelming electoral representation, in addition to facilitating effortless promulgation of regular legislation, gave the Mexican president perennial control of the supermajorities necessary to ratify constitutional amendments and turned Mexico's formally rigid constitution into an exploitable document (Fix-Fierro 1998, 4). As a result, PRI presidents barreled through constitutional roadblocks and were able to quickly promote ambitious agendas despite the temporal limitations of the nonrenewable six-year term of office (*sexenio*). This is evidenced by the more than 400 constitutional amendments ratified between 1929 and 2004 (Ansolabehere, 111).¹⁷

Second, the judicial appointment and removal mechanisms provided the president the ultimate power to appoint and remove judges. Less rigid than the amendment process, judicial appointment required presidential nomination with only a simple majority of votes from the upper house, the Senate (*Senado*). Again, the PRI's staggering numbers in Congress made the approval of the president's judicial nominees little more than a formality (Domingo 2000, 713). Accordingly, the president could populate the Supreme Court with judges sympathetic to his agenda while simultaneously maintaining order through the threat of judicial removal. In turn, the members of the Supreme Court were charged with the administration of the entire judicial order. The justices themselves appointed lower federal court members and were responsible for internal regulation (Finkel 2008, 91). Because the judges of the High Court controlled the lower court nominations, and the party controlled the appointment of the High Court justices, the PRI was effectively in control of the appointment of every federal judge in Mexico. On the state side, judges were appointed through nomination and confirmation in the state

¹⁷ By comparison, the U.S. constitution has been amended just twenty-seven times over the course of more than 200 years.

legislatures. The PRI's vice grip on state legislature seats resulted in its control of all the state judicial appointments, in addition to its command of all federal appointments.

The fallout was that *all* judges—prospective, veteran, and even those not directly appointed by the sitting president—were beholden to the party. If a judge sought appointment, he had to earn his nomination by demonstrating obedience to party principles. If he wished to retain his judgeship after ascending the bench, he had to rule in favor of the party or else imperil himself. Rogue judges could be and were replaced at the discretion of the president with approval from the *Senado* (Domingo 2000, 712). In fact, every president from 1954 to 2000 appointed at least 54% of the justices of Supreme Court (Magaloni 2008, 2003; Domingo 2000).¹⁸ Another result of constitutional malleability during PRI rule was fluctuations in the number of Supreme Court justices (changed 8 times), term length (changed 3 times), appointment and removal specifications (3 times), as well as the wholesale replacement of all sitting judges (2 times) (Ansolabehere 2007, 120).

Internal Limits to the Court's Power: Curtailing Political Relevance

Compounding the exogenous institutional constraints from the legislative and executive branches, judicial power was endogenously curtailed by an exceedingly limited subject jurisdiction, the judicial charter to apply rather than *interpret* the law, and an anti-interventionist juridical-political professional preference (Finkel 2008, 91-2). The combination of these impeding factors left the Mexican courts politically irrelevant.

¹⁸ By comparison, the average U.S. president appoints 33% of the Supreme Court (Domingo 2000, 725).

Critically, the courts lacked jurisdictional authority over many salient spheres of jurisprudence. Electoral and agrarian law are perhaps the two areas where the absence of judicial oversight had the largest implications. Both were subject to unilateral executive discretion and, as a result, both were abused to advance PRI interests (Fix-Fierro 1998, 4). In the electoral arena, the courts were forbidden to hear challenges to the electoral code, the rules governing campaigning, the execution of polling, and the oversight of the final ballot tallying. With no political checking organ, the PRI confidently ran “open” elections as a veneer of democratic legitimacy without fear of electoral loss; the party could, and frequently did, rely on electoral fraud without repercussion if and when the need arose (Haber et al. 2008, 125).

The courts were shackled with the same executive handcuffs in the agrarian sector. Mexico’s revolution revolved in large part around the equitable redistribution of land that had become increasingly disparately owned by the wealthy and powerful during the *Porfiriato*, the dictatorship of Porfirio Díaz from 1876-1910. At the close of the revolution that overthrew Díaz, a host of inventive land reforms were instituted in the new constitution, including the creation of the *ejido* system that arranged communal leasing of government owned land by private citizens. But because agrarian law was outside the scope of the courts’ jurisdiction, private citizens were unprotected from government infringements on the *ejido* lands they leased.

The courts were also responsible for oversight of Mexico’s deeply valued Federation. Included in the Constitution of 1917 was the specific provision for a federal system,¹⁹ complemented by a mandate for the courts to uphold it through checks on other branches and dispute mediation between government entities, called *controversias*

¹⁹ Article 40 of the Constitution of 1917.

constitucionales (constitutional controversies).²⁰ Yet despite these formal powers, the courts lacked the clout to exercise them: “Prior to the political and judicial reforms of the 1990s, conflicts between federal and state entities, or between different government agencies or officials, would be resolved behind closed doors, in the offices of the President. The judicial system was marginalized from these conflicts” (Zamora et al. 2004, 282). Once again, *presidencialismo*, rather than *constitucionalismo* (constitutionalism), limited judicial subject jurisdiction and curtailed the political relevance of the court. In the seventy-seven years before the 1994 reform, *controversias constitucionales* was only invoked fifty-five times. Ten years after the reform, that number had already increased more than ten times to over 700 filings (Zamora et al. 2004, 275-7).

Coupled with limited subject jurisdiction, judicial exercise of legal discretion was abridged during PRI rule. This was in part a function of Mexico’s civil law tradition, in which only designated courts may exercise constitutional review. Until 1994, Mexico’s Supreme Court was not a constitutional court (Zamora et. al 2004, 257). Unlike its North American counterpart, the Mexican Supreme Court did not wield the power of judicial review,²¹ the “province...to say what the law is” in its entirety.²² Rather, its task was to apply the law in specific cases without considering the constitutionality or validity of the legal issues at bar. Therefore, the Court could not claim to be the ultimate authority on the constitution.²³

²⁰ Article 105 of the Constitution of 1917

²¹ Judicial review, mentioned above on page 6, is the right to consider legislation in light of the constitution and invalidate any offending law or provision. Review is one of the hallmarks of a truly powerful court.

²² *Marbury v. Madison*, 5 U.S. 137.

²³ As noted early, the President commanded the constitutional order.

However, there did exist one legal mechanism by which Mexican citizens could challenge the constitutionality of government actions: the *amparo* trial. The *amparo* suit was specifically designed to safeguard the constitutionally guaranteed individual liberties of Mexicans against government malfeasance. Yet even this procedure was imperfect. The stringent procedural specifications and above all the poor success rate of the *amparo* suit detracted from its usefulness as a remedial legal tool. Furthermore, *amparo* jurisdiction was severely limited, and sectors like the electoral and agrarian laws that were off limits in other capacities of judicial activity remained out of bounds in *amparo* jurisdiction (Fix-Fierro 1998; Finkel 2008). Even when the Court did determine a constitutional breach under *amparo*, it had only limited latitude to rule and its decision applied exclusively *inter partes*, to the parties to the suit, and not *ergo omnes*, to the population at large. Thus, legal remedy was provided only for the plaintiff and was not extrapolated to set precedent for future cases (Finkel 2008, 92).²⁴

Finally, judicial attitudes were submissive to the executive and the justices themselves adhered to attitudes of political non-involvement. Judges were externally incentivized to conform with party expectations, since the judicial profession was not viewed as a career within itself but rather a political stepping-stone to higher and loftier positions. A judge who served the party well during his tenure as a justice could increase his chances at garnering future political posts (Domingo 2000; Cárdenas Gracia 2000).

²⁴ Precedent could be created in one situation, when the same law was declared unconstitutional in five different *amparo* challenges. (Magaloni 2008, 188-89).

Implications of a Weak Court During Hegemonic Rule

The control and constraint of the Mexican Supreme Court by the executive was favorable for the hegemonic PRI regime on multiple levels. First, it allowed the regime to legitimize its rule publicly under the guise of legality. Second, the PRI could rely on a corrupt legal system to achieve certain goals without actually having to submit itself to genuine legal scrutiny (Magaloni 2008, 190; Domingo 2000, 712). Third, while the Court maintained the veneer of autonomy, its lack of power prohibited it from checking the other branches and effecting the separation of powers embodied in the constitution of 1917, precepts that would threaten PRI hegemony if faithfully upheld.

One note of import is that although the courts enjoyed little independence and equally meaningless political relevance, they did achieve a high level of political compliance, precisely due to the absence the first two principles. That is, since the PRI controlled the court and its subject jurisdiction, and the regime commanded great compliance from all political actors top-down, court rulings were obeyed (Magaloni 2008, 189).

B. History of the Court: Various Eras of Judicial Power (or lack thereof)

Much of the recent scholarship on Mexican judicialization centers on Zedillo's 1994 reform. This essay is no exception. Evidence abounds for why this moment is among the most significant in Mexican legal history and why it deserves such elevated attention. That being said, Mexican judicialization scholarship must remain wary of reducing the empowerment story to a simple binary tale of pre-1994 judicial impotence and post-1994 judicial power. The best variation on the binary schematic comes from

Mexican scholarship, which feature accounts that consider alternative narratives not hinging on the 1994 constitutional reforms. Furthermore, Mexican scholars have pinpointed several pivotal moments in Mexico's judicial-political history that have left indelible marks on the development of the country's judicial system prior to 1994.²⁵ Lest I should be guilty of exclusively employing the diametric pre- and post-1994 power division I have just criticized, I will use the next section to demonstrate that the ballad of Mexico's pre-reform judiciary is not a single-note tune.

There are a handful of apposite frameworks for understanding judicial evolution in Mexico.²⁶ I find Cárdenas Gracia's (2000, 173) account to be particularly instructive. His outline identifies six distinct chapters in the Court's history based on the extent and character of judicial power from the promulgation of the 1824 Constitution to the present day. These eras cover from 1824-1882, 1882-1917, 1917-1928, 1928-1944, 1944-1986, and 1986-present. I will employ that framework in the following pages to demonstrate empirically the fluctuating, if never great, power of the Mexican Court prior to 1994.

Chapter 1: 1824-1882

The Constitution of 1824, although it was replaced twice subsequently by the Constitutions of 1857 and 1917, established some of the legacies of the Court that would carry into the 20th century and continue to impact the Court today. The Constitution of

²⁵ This may be a function of the fact that much of this scholarship was completed shortly after the reform and/or before the fall of the PRI, when the efficacy of the reform remained much more unclear than it does today.

²⁶ For alternative judicial power frameworks not utilized in this essay, see López Ayllón and Fix-Fierro (2003), who see three distinct eras of judicial power from 1917-1970, 1970-1982, and 1982-present; Ansolabehere (2007, 112) notes three periods of judicial power, from 1917-1950, 1950-1993, and 1994-present; Fix-Fierro (1998) adopts an era structure similar to Cárdenas Gracia with some slight changes: 1917-1928, 1928-1968, 1968-1987, and 1987-present.

1824 established a Court that was essentially an appellate court without the political relevance to decide either matters of constitutionality or to mediate intergovernmental disputes (Cárdenas Gracia 2000, 174). As elucidated previously, it was exactly the deficiency of these two abilities that would resurface after 1928 under PRI rule and smother the Court's political relevance.²⁷

The second greatest legacy of the mid-Nineteenth Century came with the introduction of *amparo* to the federal court system in the Constitution of 1857 and the definition of its scope in the years that followed. During this period the Court and its members were faced with the opportunity to define the scope of *amparo* as they believed the language of the 1857 Constitution dictated. But rather than read it expansively, as some members of the Court wished to do, the majority of the Court interpreted narrow application guidelines for the *amparo* (Cárdenas Gracia 2000, 176). That minimalist approach haunts the efficacy of the *amparo* trial even today.

Chapter 2: 1882-1917

This period corresponds directly with the dictatorship of Porfirio Díaz and the Mexican Revolution that culminated in 1910 from his oppressive regime. During the *Porfiriato*, the Court abstained from asserting itself while the executive unconstitutionally usurped legislative powers (Cárdenas Gracia 2000, 177). The compression of the legislative and judicial powers under the office of the executive during the *Porfiriato* was Mexico's first grave breach of the separation of powers and

²⁷ It was not until the *amparo* suit was written into the Constitution of 1857 that the Court formally gained these powers (Cárdenas Gracia 2000, 174).

would set the stage for the PRI to follow suit less than twenty years after Díaz's departure.

These first two chapters, covering the years 1824-1917, are integral in understanding the genesis of phenomena that would result in judicial impotence for nearly the rest of the 20th century. First, the tradition of political irrelevance was conceived with the very creation and institutional arrangement of the early court as an appeals court with limited scope—even under *amparo*—as opposed to an interpretive authority on the constitution. Second, judicial autonomy was first compromised under the Díaz dictatorship. Third, judicial preferences yielded to the consolidation of a Mexican juridical-legal culture embodied in the attitudes of non-interventionism in political issues as well as protectionism and the legitimation of the autocratic ruling regime.

Chapter 3: 1917-1928, First Instance of Mexican Judicial Power

In comparison with the *Porfiriato*, judicial power flourished in the years directly following the ratification of the constitution of 1917. The drafting convention of Querétaro sought to empower a judiciary that had been subverted into an instrument of the executive—as it fatefully would be again years later—and made it part of their constitutional mission to bring judicial autonomy to Mexico (Fix-Zamudio 1990, 285-6). “The framers of the 1917 Constitution viewed a strong Supreme Court as a necessary element of a federal system of government” (Zamora et al. 2004, 276). The immediate results were that the Supreme Court was freed from appointment by the president. The original appointment procedures contained in the constitution called for each state

legislature to nominate a single candidate. The aggregate list of nominations would then be submitted to Congress, which would conduct a secret vote to approve one candidate by a majority vote. To ensure additional institutional insulation from the executive, the Supreme Court—not the president—was charged with the appointment of lower tier federal judges, a responsibility it retained until the 1994 reforms (Finkel 2008, 91). Although this was intended to promote judicial autonomy, Supreme Court administration of the federal judiciary would later serve to facilitate the PRI's control of the legal system.

In addition to early structural independence, the Court demonstrated power by asserting itself against other branches and political actors, something it would do little of in the years that followed (Domingo 2000, 710; Cárdenas 2000). In fact, amidst early jurisdictional discrepancies arising from a new constitutional mandate, the Court actively assumed the responsibility of advancing the precepts enshrined in the new constitution, among them the legal protection of labor from exploitation and the faithful implementation of the agrarian reform (Fix-Zamudio 1990, 287-289).²⁸

One more boon to the courts during this initial period was that the hegemonic PRI regime had yet to take power and reform the political order into a smoothly functioning, formalistic system that could control the judiciary through both legal and extralegal tactics. By all measures of independence, relevance, complicity and persistence, this *was* a period of judicial power, the first ever in Mexico's history. Sadly, it would also be the last for the next seven decades.

²⁸ Like the Hungarian Court, the Mexican Court would later be punished by elites for its premature advocacy of mass interests like agrarian and labor reform. For example, agrarian law would be expunged from the Court's purview and given to the executive.

Chapter 4: 1928-1944

When the PRI's ancestor National Revolutionary Party (PNR) came to power in 1928, the recently established judicial power immediately relapsed. The Court suffered the first blows to judicial independence and experienced the beginning of "the process of subordination of the Court to the executive" (Domingo 2000, 712) in President Calles' 1928 constitutional amendment that transferred the power of judicial nomination from the state legislatures to the president, still contingent on simple majority approval by the *Senado*. Notably, all sitting justices at the time of the passage of the amendment were replaced—a measure President Zedillo would borrow for his reforms more than sixty years later.

Judicial independence endured another attack only a few years later, this time at the hands of President Cárdenas' 1934 amendment that altered the life terms of federal justices to *sexenios*, six-year terms that coincided with president's tenure (Domingo 2000, 712). The end of life term limits destroyed judicial insulation and politicized the judicial profession by making it a political stepping-stone rather than a career within itself.²⁹

Finally, the Court's political relevance dwindled during this period. Substantive judicial power was abridged with the 1931 removal of agrarian law from the scope of justiciable issues under the *amparo* trial. Jurisdiction over agrarian law was only returned to the courts in 1992 by constitutional amendment (Fix-Zamudio 1994, 290).

²⁹ However, the lack of judicial insulation in this regard was relatively short-lived. Life term limits for federal justices were restored by constitutional amendment in 1944 (Cárdenas Gracia, 180).

Chapter 5: 1944-1986

The period from 1944-1986 was marked by reforms that reshuffled the internal administrative responsibilities of the Court. In 1944, Supreme Court judges regained their life tenure that had been limited to just six years in 1934. In 1951, constitutional reform created additional sub-national courts to decentralize the federal judicial power in order to help dissolve the overwhelming caseload pressuring the Supreme Court.

Amparo jurisdiction was given to these new courts. Subsequent reform in 1968 further diminished the Supreme Court's crowded docket, inching closer to a constitutional court (Cárdenas Gracia 2000, 182). Despite these progressive steps towards a more effective judicial system, the Court still did not enjoy sufficient autonomy or relevance to manifest true power.

Chapter 6: 1986-Present

The reform of 1987 had two major effects. It raised the political relevance of the sub-national courts and increased the administrative power of the Supreme Court. The lower circuit courts were assigned the power of *amparo* jurisdiction, with the Supreme Court reserving the power to reconcile any *amparo* discrepancies that arose between various courts on the lower levels. On the administrative end, the Court gained the power to create new lower courts (Fix-Fierro 1998, 5-6).

What This Framework Shows Us

The various periods of Supreme Court history demonstrate that, while judicial power was stifled for most of the *Porfiriato* and PRI rule, there were fluctuating levels of

power at various points during those regimes, including a brief epoch of *real* judicial power from 1917-1928. This framework also shows that the causes and factors of judicial constraint date back to 1824, over a century before the PRI rose to power. Furthermore, this schematic highlights an effort to change the Court through the canon of constitutional reforms. The Court moved incrementally closer to a higher-functioning, constitutional court through reforms that aimed to disperse its bureaucratic responsibilities and alleviate its overflowing docket.

These alternative classifications of power are instructive because they help us understand that judicial power in Mexico during the 20th century was not a one-note tune. I still see a critical division at the year 1994 because it represents the true empowerment moment.³⁰ Exploration of the era from 1994-present is important because it allows us to treat the crucial questions: “Is it real power? If so, is it maintaining over time?”

C. The 1980s and the Deterioration of PRI Hegemonic Domination

The National Revolutionary Party (PRN) took power in 1929 at the close of the Mexican Revolution and the series of bloody civil wars that followed it. Ultimately changing its name to the Institutional Revolutionary Party (PRI) in 1946, the party continued its rule well into the 1990s, when it experienced a series of electoral losses that culminated in the presidential election of opposition National Action Party (PAN) candidate Vicente Fox Quesada in 2000 (Finkel 2008, 90; Magaloni 2008, 182). The

³⁰ There is a notion that the 1987 constitutional amendment could be considered the empowerment moment—and the 1994 amendment a mere follow-up measure—because it aimed to free the court of its extraneous responsibilities to make it a constitutional court. However, the scope of the Court’s constitutional activity was still too limited and its autonomy still too dubious at that point to consider it empowered under my power definition.

PRI's 71-year reign was marked by fraudulent elections, party-controlled politics, and little institutional independence. So what precipitated the PRI's fall from power?

Mexico experienced an economic crisis in the 1980s that would shake the PRI and usher in its demise.³¹ In 1982, outgoing president José López Portillo (1976-1982) privatized the banks, beginning a trend among the next PRI presidents of implementing unpopular neo-liberal economic initiatives that later ruptured the economy. PRI presidential successor Miguel de la Madrid (1982-88) inherited the extremely precarious position of dealing with a fleeing electorate and a bleeding economy, both of which only continued to deteriorate over time (Gonzalez 2008, 179). "Traditionally, the PRI had used economic growth to legitimate its rule and obtains votes" (Finkel 2008, 103). So when the financial crisis arrived and the regime could no longer hang its hat on economic prosperity, it panicked and initiated a liberalizing economic transition away from expansive government control of the financial sector.

At the same time, in an effort to minimize the anticipated electoral loss in the upcoming elections, the de la Madrid administration implemented more pro-party electoral legislation. The 1987 electoral code—conveniently promulgated at the end of de la Madrid's *sexenio* and right before the 1988 presidential elections—included provisions that hampered new political party formation, changed the voting procedure to favor PRI representation at the expense of PAN and the Party of the Democratic Revolution (PRD), and ensured PRI's majority position in Congress through the infamous "governability clause" that awarded the party with the highest proportional vote 51% of the seats in the Chamber of Deputies even if it accrued less than 50% of the vote.

³¹ Mexico would experience another economic crisis under Zedillo in 1994, dubbed the Peso Crisis.

This was a clear deviation from the past three PRI administrations' agenda of liberal electoral reform and a sign that the PRI was now willing to sacrifice democratic legitimacy for formal power (Haber et al., 131).

As expected, the PRI took a huge hit in the 1988 presidential election. PRI candidate Carlos Salinas defeated National Democratic Front (FDN) candidate and former PRI defector Cuauhtémoc Cárdenas with a slim majority of 51.7%, thanks in part to an election night computer "malfunction" in the ballot-counting machines that earned the election the distinction of being the most corrupt in Mexican history (Haber et al., 132-3). In the immediate wake of the election, the PRI had succeeded in that they managed to save the presidency. But the party's use of fraud and disregard for electoral legitimacy outraged the public and would provoke future electoral backlash, resulting just the next year in the first PRI gubernatorial defeat in Baja California by the primary opposition PAN.

After the debacle of the 1988 presidential election, the regime responded to domestic pressure by creating legitimate electoral agencies to reinstitute a veneer of democratic legitimacy. Thus, the Federal Electoral Institution (IFE) was born to oversee elections. For the first time, oversight of elections in Mexico would not be handled by the party but by an independent entity (Haber et al., 135). When the 1994 presidential election came around, it seemed the PRI's political opening strategy would pay dividends. PRI candidate Ernesto Zedillo claimed victory in a relatively "clean" election. But the victory was still not enough; the PRI—experiencing its own internal fragmentation—turned to judicial reform.

D. Zedillo and the 1994 Reforms

Zedillo's 1994 constitutional amendments transformed the Mexican judiciary from an executive puppet devoid of political significance into an autonomous constitutional court. This was accomplished through a wholesale renovation of the judicial system that restored to it in full the two judicial power criteria that had made fleeting cameos at other points in its history: independence and political relevance.³²

Judicial Independence Through Structural Reform

Zedillo introduced independence to the Mexican judiciary for the first time since 1928 through structural changes to the Supreme Court as well as with the creation of an autonomous judicial agency that would accept the administrative responsibilities previously assigned to the Supreme Court, the Federal Judicial Council (*Consejo Federal Judicial*, CFJ). The reforms changed many of the structural aspects of the Supreme Court that prevented the development of a strong judicial profession. To begin, a higher degree of professionalism was required to become a Supreme Court justice. Nominees now required 10 years of experience as an attorney and two years of residency in Mexico immediately prior to nomination. Similarly, stipulations were made to weed out political cronyism and incompetence. Supreme Court justices could no longer be nominated after the age of 65 or have held an elected political office (except as president of the Federation) in the year before nomination. Next was a change to the contemporary culture of the court. The sitting banc of 26 judges was completely removed and replaced with 11 new justices, cutting the court's membership to less than half of its formerly

³² At the empowerment moment it is impossible for a court to possess the other two critical criteria, compliance from other political actors and maintenance over time.

cumbersome body. Finally, the life terms of the justices were reduced to 15 years with staggered appointment every two years (Ansolabehere 2007, 117). Additionally, the nomination procedure was altered to give the president and party less power. The new reform called for the president to submit a list of three candidates to the *Senado*, which would then select one and submit him to a confirmation vote requiring a two-thirds supermajority rather than the old standard of a simple majority (Domingo 2005, 9).

The 1994 reform forged independence on the sub-national levels and within the judicial profession. Zedillo created a new agency, the Federal Judicial Council (CFJ), which benefitted the judicial system in two distinct ways. First, the CFJ inherited most of the administrative functions of the Supreme Court. Until the reform, the Supreme Court was responsible for the appointment of lower federal judges and the organization of the entire federal judicial order. The transfer of these responsibilities to the CFJ helped to alleviate the pressure on the Supreme Court, whose procedural and administrative duties had perpetually detracted from the number of cases it could hear. The CFJ's handling of the judicial administrative power permitted the restructured Supreme Court, with fewer members after the reduction, to focus on its newly granted constitutional responsibilities (Ansolabehere 2007; 115).

Secondly, the removal of the Supreme Court's power to appoint lower judges diminished the opportunity for inter-stratum judicial collusion and corruption. The High Court no longer possesses the power to structure the entire judicial profession, which reduces the prospect for political cronyism (Zamora et al. 2004). However, there is one drawback of the new appointment process. Supreme Court judges can no longer install doctrinally like-minded judges. This makes the vertical adjudication process less

streamlined because it replaces the doctrinal uniformity of the past with a greater diversity of judicial philosophies, creating the capacity for conflicting statutory interpretation on the lower levels. As a result, The Supreme Court now has to expend greater energy resolving the conflicts stemming from the lower judicial tiers.

Political Relevance Through Subject Matter Reform:

The reform granted the Supreme Court the power of judicial review through two new mechanisms that would finally wrest control of the constitutional order away from the president and place it in the hands of the courts for the first time in the history of the Federation. These procedures were the “constitutional controversies” and “unconstitutionality of laws.”

The constitutional controversies clause allows the court to mediate disputes between public officials and entities. The Court may now hear challenges brought by public ministers against states, a state against another state, a state against the federation, or between branches. The implications of this provision were great; it resulted in checks and balances and the guardianship of the federal system. Prior to 1994 *controversias constitucionales* did exist, but that power was severely limited by *inter partes* application. Like the *amparo*, the holding in a *controversias constitucionales* case had narrow implications and could not serve as future precedent (Finkel 2008, 96). The reform expanded the *controversias constitucionales* to apply *ergo omnes*. Additionally, *controversias constitucionales* was infrequently invoked. In the seventy-seven years before the 1994 reform, the mechanism was only used fifty-five times. Ten years after the reform, that number had already increased more than ten times to over 700 filings

(Zamora et al. 2004, 275-7). “[T]he dramatic increase in the numbers of constitutional controversies that have been taken up in the 1990s has led to the Supreme Court becoming a key actor in the complex redefinition of federalism that is part of Mexico’s political transition towards democratic rule” (Domingo 2004, 11; Berruecos 2002).

The unconstitutionality of laws clause effectively made the Supreme Court a constitutional court with the power of constitutional review. In the current Mexican system, a constitutional challenge may be brought by an individual (concrete review) or by a one-third vote of the legislative chamber on a law it proposed and passed. Originally, Zedillo had stipulated that a challenge brought by either one of the houses of Congress required a 45% near-majority vote, but the revised version of the bill reduced that number to one-third, welcoming more challenges (Finkel 2008, 96).

The PRI’s Strategy: Restrictions on Judicial Power

Despite the historic empowerment implications of the 1994 reform, Zedillo was careful to protect the PRI by inserting key institutional safeguards that would limit the new powers of the Supreme Court. The new Court could not apply the unconstitutionality of laws to electoral laws (which could further challenge the PRI’s hegemony); eight of the eleven Supreme Court justices had to agree on the unconstitutionality of a law to invalidate it rather than a simple majority of six; and constitutional challenges had to be filed no later than one month after the promulgation of legislation (Finkel 2008, 97). All of these provisions placed a higher burden on the Court in invalidating legislation and challenging PRI dominance.

E. Explaining Mexico's Judicial Empowerment Moment

Mexico's momentous 1994 constitutional revolution occurred as the necessary result of Mexico's simultaneous transitions towards economic liberalization and political democratization. The sudden propulsion of judicial power in Mexico stemmed from a diffusion of power created by a democratization process that, while slow and incremental, eventually toppled the 71-year hegemonic authoritarian rule of the PRI. This diffusion of power was manifested in 1) the rise of opposition parties and a competitive multi-party system through electoral reform, 2) an ideological schism within the PRI, 3) delegation of executive power to independent agencies like the IFE, 4) the decline of *presidencialismo* and the resulting adoption of *constitucionalismo*, and 5) the opening of the media from being exclusively party-controlled to opposition accessible.

Judicialization in Mexico resulted from a slow and incremental transformation from a closed authoritarian state to a more liberal democracy³³. This maturation was precipitated by two major changes that arose in the 1980s. First, economic failures required an evolution from a corporatist to a neo-liberal state and played a part in decentralizing economic power. Second, the democratization process catalyzed perhaps the chief factor in establishing judicial power: diffusion of political power.³⁴

Zamora et al. (2004, 161) posit that "The strengthening of election laws and the decline of centralized economic power as a result of neo-liberal reforms served to reduce

³³ Granted, Mexico continues to be haunted by its authoritarian legacy, inhibiting its progress towards a full liberal democracy. Perhaps the chief impediment is an aversion to the rule of law, which, as Ayllón and Fix-Fierro (2003, 286) write, faces such mitigating factors as "poverty and the unequal distribution of wealth, environmental degradation, migration, social exclusion and violence, drug trafficking and organized crime, corruption, unemployment, [and] regional imbalances."

³⁴ "The government encouraged [economic liberalization] while at the same time imposing a tight and centralized process of selective political opening" (Gonzalez, 179).

the power of the Mexican presidency.” I concur and believe that it also caused judicial empowerment in Mexico. The decline of *presidencialismo* was imperative to the establishment of judicial power because its demise ushered in the arrival of constitutionalism (Ansolabhere, 115). In the era of *presidencialismo*, the constitution was malleable and the constitutional order was directly subjected to the president’s whims. But the successful alternation of power from PRI president Zedillo to PAN president Fox signaled that, from then on, every political party and president would be bound by the constitution.

Current scholarship has developed two main competing explanations for the empowerment moment: political insurance and regime-legitimation. I believe both of these hypothesis are encapsulated by my own, that Mexico’s judicial empowerment resulted from its economic and political transitions. Domingo (2005) supports this notion, attributing Mexican judicialization to modernization and democratization. As Mexico liberalized and democratized, the PRI was forced to explore both the options of political insurance and regime-legitimation

Similar to Hirschl’s elite hypothesis, the political insurance hypothesis describes judicial empowerment as part of the strategic planning of a regime that anticipates losing power due to waning electoral certainty (Ginsburg 2003, Finkel 2008). Regimes that fear their downfall in the majoritarian institutions, like the executive and legislative branches, may opt to empower the judiciary to insulate their agenda from the public after they suffer electoral defeat. Conversely, legitimation is an attempt by the regime to maintain power by placating public demands for genuine legal norms. Both domestic and international pressure to legitimize the regime caused the PRI to adopt electoral reforms,

particularly after the 1988 election debacle. Despite remnant pro-party electoral mechanisms, the reform gave way to a political opening by providing a discontent polity the tools necessary to voice its qualms in the polls. With electoral losses accumulating on all levels, the PRI sensed the need for safeguards in case it were to finally fall from power.

Inclán (2009, 2007) has argued that Zedillo's timing in introducing judicial reform—soon after his inauguration—does not fit with the political insurance model because the PRI had just won the presidential election. However, to pass a constitutional amendment, Zedillo required two-thirds support of both houses. While the 1994 presidential election resulted in success for the PRI with the election of Zedillo (albeit with a plurality win with less than 50% of the vote), the PRI did not have as much success in the congressional election, maintaining two-thirds in the Senate but only a bare majority in the lower Chamber of Deputies. Thus, in order to promulgate the legislation, Zedillo's PRI required a coalition effort from one of the other major parties. As part of the party's anti-PRI stance, the PRD had made it clear they would not support the amendments (Haber et al. 2008). That left the PRI with only PAN as a possible coalition partner. This empowered the PAN, who was able to push for some concessions from the PRI in exchange for cooperation in the Chamber of Deputies. Another challenge was that Zedillo needed to pass the legislation before the 1997 midterm elections, when the possibility of losing even more seats in the congressional houses could submarine his reform efforts. Accordingly, Zedillo had less than two years to draft his reform legislation, recruit an opposition party for his coalition, and engage in the bargaining

process about the details of the legislation. With all these obstacles, it is no wonder the Zedillo administration made the judicial reform of 1994 one of its first priorities.

Another explanation for judicialization in Mexico is the development of a true federal system. Shapiro (1981) has linked judicialization to federalism and the need for a third party arbiter to resolve dispute between various levels of government. Mexico is divided into 32 districts, each with its own governor. Prior to 1989, the PRI perennially controlled each district, winning every gubernatorial race and maintaining majorities in the state legislatures. During that time, governors acted as parochial servants of the national party, working to pursue the party's goals on the state level (Magaloni 2008, 189). But in 1989, the PRI lost its first gubernatorial race to the PAN in the district of Baja California, followed by two more gubernatorial losses before 1994. While three out of thirty-two is a far cry from a majority, the growing cadre of opposition party governors leading states constituted a very real threat to PRI hegemony. One of the central implications of the 1994 reform was that the federal judiciary would now be able to hear disputes brought between levels of the federation—exactly as Shapiro asserts.

When all the governors were members of the PRI, there was little chance that a state would bring suit against the nation for two reasons. First, it was unlikely that the governor's interest deviated from the national party's agenda because, just as the president controlled the national party, the national party controlled the local governors. Second, if a problem did arise, it could be mediated within the party without the use of external arbiters: "Prior to the political and judicial reforms of the 1990s, conflicts [of federalism] would be resolved behind closed doors, in the offices of the President. The judicial system was marginalized from these conflicts" (Zamora et al. 2004, 282).

Therefore, there was little need for or use of an inter-level arbiter. As power diffused across federal levels and the PRI began losing key districts, there finally became a need for an independent, impartial arbiter to mediate disputes.

Gonzalez (2008) asserts that the 1994 reform was promulgated as a result of President Zedillo's personal political preferences. He believes Zedillo deviated from traditional PRI party politics and took office with the intention of initiating a political opening that would make Mexico a true free-market democracy. Accordingly, Zedillo empowered the judiciary in order to strengthen the rule of law, a necessary component of the democratic and liberal transition (Moustafa 2008; Hirschl 2004). However, the notion that Zedillo sought judicialization for personal reasons is flawed because Congress included many obstacles to achieving complete judicial power.³⁵ Not to mention, many of these restrictions were even more stringent in the original version of the reform bill but were scaled back during Congressional deliberation. Among other provisions, Zedillo proposed more presidential involvement in the appointment process, a greater percentage of Congress to question the constitutionality of a law, a greater number of justices required to invalidate a law, and a limited window of time to constitutionally challenge legislation. That is to say, Zedillo empowered the judiciary, but tried to do so with a great number of impediments to swift and sweeping change. Finally, Zedillo prohibited electoral laws from the scope of Supreme Court review, denied *ex post facto* review of laws already in effect, and appointed all eleven of the new Supreme Court justices that took the bench in 1994.

³⁵ See pages 47 and 64 for more on these restrictions.

F. Post-1994 Judicial Power: More Reforms

If the 1994 reforms are to be considered the empowerment moment, the reforms of 1996 and 1999—once again initiated by President Zedillo—can be said to have “culminated the process” of Mexican judicialization (Haber et al. 2008, 142).

Reform of 1996

The introduction of another constitutional amendment in 1996 further empowered the Mexican judiciary and “has significantly raised the political profile of the Supreme Court” (Domingo 2000, 720). The impact of the 1996 reform can be summed up in one theme: electoral review. Thanks to the reform, the Supreme Court today enjoys the purview of electoral laws, a luxury it never had in the past. The Court may now apply its constitutionality of laws review to the electoral laws. Additionally, the Federal Electoral Court was restructured, its powers augmented, and its jurisdiction expanded. It now is the ultimate authority on electoral laws and may hear *amparo* challenges to electoral legislation that runs afoul of the constitution (Fix-Fierro 1998, 7).

The 1996 reform was crucial to completing the Supreme Court’s rise in political relevance. After President Salinas returned the review of agricultural law to the courts in 1992, the electoral sphere was the last and most important area of law outside judicial purview. The Court’s ability to check the electoral code practically eliminates the prospect for the gross electoral fraud that kept the PRI afloat for so many years.

Reform of 1999

Just as the 1996 reforms capped the evolution of the Court's political relevance, the constitutional amendment of 1999 signaled the climax of the Court's independence. The 1999 reform finished the long and incremental administrative reshuffling of the federal judiciary that began in 1944 and capped the previous attempts to reduce the unbearable caseload the Supreme Court perennially faced. The Court now has the power to delegate cases to lower courts, the Collegiate Circuit Courts (CCC), helping alleviate the overwhelming number of case submissions it receives annually (Zamora et al. 2004, 191).

G. Assessing Judicialization in Modern Mexico: Power or Puppetry?

This essay has detailed the Mexican Court's legacy of impotence prior to the 1994 empowerment moment as well as the institutional and theoretical implications of the empowerment. But in order to determine if Mexico's courts are stronger today after the constitutional revolution than they were in the decades before we must examine the cultural and institutional factors impacting the Court's behavior *since* the empowerment moment. The following section outlines the cultural and institutional conditions that have tended to encourage judicial power since 1994.

Post-2000 Diffuse Political Power: Legislative Gridlock

Since the election of consecutive PAN presidents Vicente Fox and Felipe Calderón in 2000 and 2006 respectively, Mexico has finally come to experience executive-legislative gridlock. Distance from the official democratizing moment in 2000

has seen the entrenchment of political competition and the diffusion of power across Mexico's three-party system. Currently, in the *Senado*, the PAN holds 39% of the seats, the PRI 26%, and the PRD 20%, with the remaining 15% spread across minority parties and independents.³⁶ In the Chamber of Deputies, the PRI holds the most seats with 47%, the PAN 29%, and the PRD 14%, with the remaining 10% spread across minority parties.³⁷ No one party has an absolute majority in either house, and each house is dominated by a different party—PAN in the *Senado* and PRI in the Chamber of Deputies. Furthermore, no one party has held the two-thirds supermajority in either of the houses since before the 2000 election (Haber 2008, 208). All this points to the necessity of inter-party coalitions and inter-branch cooperation. The PRI's near majority in the Chamber of Deputies presents a very real block to the ruling PAN's agenda despite its consecutive presidential victories. What does this all mean for judicial power? Political fragmentation and a greater propensity for Supreme Court policymaking.

In one example, the Supreme Court ruled on behalf of President Fox in a 2005 discrepancy between the executive and Congress over federal budget spending. Fox exercised his presidential line-item veto over provisions of a federal bill engineered by the opposition coalition that aimed to increase federal spending on education and health care. The Court issued a narrow opinion in the case, supporting Fox's procedural right to veto rather than addressing the competing executive-legislative claims to federal budgetary authority (Haber et al. 2008, 204-5). Regardless, the Court's ruling had important national policy impacts and exemplified the growing need for the Supreme

³⁶ Statistics from the official website of the *Senado de la República*, www.senado.gov.mx.

³⁷ Statistics from the official website of the *Camara de Diputados*, www3.diputados.gob.mx/camara/001_diputados/005_grupos_parlamentarios.

Court as a third party policymaker when the executive and legislative branches arrive at an impasse.³⁸

Presidential Election of 2006

In Mexico's equivalent of *Bush v. Gore*,³⁹ the Electoral Tribunal of the Federal Judicial Branch (TEPJF)—the court established by the 1999 reform specifically to preside over electoral law—was asked to intervene and substantiate the winner of the neck-and-neck 2006 presidential election between the PAN's Felipe Calderón and the PRD candidate, former governor of the Distrito Federal Andrés Manuel López Obrador.⁴⁰ The TEPJF ordered a partial recount before verifying the Federal Electoral Institute's initial declaration that Calderón had won by an incredible margin of .06% of the popular vote, defeating López Obrador 36.7% to 36.1% (Haber et al. 2008, 159). Calderón's subsequent inauguration signaled the compliance of the whole Mexican political system with the TEPJF's ruling in perhaps the most controversial political moment since the 1994 empowerment and demonstrated the integral nature of the courts in 21st century Mexico's political landscape. Furthermore, since the TEPJF is an autonomous tribunal, the 2006 presidential election illustrates broad compliance with a court other than the Supreme Court and suggests the presence of judicial power on various tiers of the judiciary.

³⁸ This episode also demonstrates the Court's necessary and successful role as the impartial third party mediator of governmental triadic dispute resolution essential to federalism.

³⁹ 531 U.S. 98.

⁴⁰ A testament to the true competitiveness of the election, PRI candidate Roberto Madrazo Pintado came in third in the voting with 22.7%.

Increased Substantive Jurisdiction: Landmark Rulings

The Mexican Court has continued to hand down rulings on a wider spectrum of issues, ranging from abortion to same-sex marriage to economic rights. The Court's expanding substantive docket proves the continuing rise of its political relevance as well as the country's growing willingness to comply with Court rulings on a greater number of political topics.

A 2009 Supreme Court ruling upheld Mexico City's progressive abortion law granting free abortions to women before the twelfth week of pregnancy. Abortion in Mexico, as in the U.S., is subject to state legislative discretion. But 8 of the 11 justices determined that the Mexico City law does violate the constitution. Ruling narrowly, the High Court neither elected to establish abortion as a constitutional right nor outlaw it completely.⁴¹

Mexico celebrated its first same-sex marriages in the nation's capitol in March 2010 as a result of a law passed in late 2009 permitting homosexuals to marry and adopt children.⁴² The PAN attorney general, supported by President Calderón, has submitted a constitutional challenge of the law to the Supreme Court, arguing that same-sex marriage is not constitutionally permissible.⁴³ The Court has yet to hear the petition, but the simple fact that the case was brought to the Court constitutes use of the Court by a

⁴¹ Tuckman, Jo. "Judges uphold abortion rights in Mexico City." *The Guardian*. The Guardian, 9 Aug. 2008. Web. 31 Mar. 2010.

<<http://www.guardian.co.uk/world/2008/aug/29/mexico.humanrights?>

⁴² "5 Couples in Mexico City Inaugurate Same-sex Marriage." *CNN World*. CNN, 11 Mar. 2010. Web. 24 Mar. 2010.

<<http://www.cnn.com/2010/WORLD/americas/03/11/mexico.same.sex.marriage/index.html>>.

⁴³ O'Connor, Anne-Marie. "With same-sex marriage law, Mexico City becomes battleground in culture wars." *Washington Post*. Washington Post, 3 Mar. 2010. Web. 31 Mar. 2010.

<http://www.washingtonpost.com/wp-dyn/content/article/2010/03/02/AR2010030203671_2.html>

political pressure group—in this case anti-same-sex marriage advocates—as a policymaking organ when it is not content with the policy of majoritarian institutions. Additionally, the appeal to the Supreme Court expands the breadth of its subject matter jurisdiction.

The TEPJF ruled on the controversial 2006 presidential election, but the Supreme Court has also handed down watershed rulings on electoral law. In 1996, the recently empowered Court served a blow to the PRI's electoral fraud by ruling to allow the investigation of state electoral fraud by the state attorney general. The Court followed up in 1998 when it unanimously struck down the PRI-favoring governability clause of the Quintana Roo state legislature in the Court's first ever invalidation of an electoral law (Finkel 2003, 789, 793).

In the 2005 Electricity Case, the Court exercised its power as the protector of federalism while simultaneously affecting state economic policy. The Court was asked to rule on President Fox's reform of a law that would have allowed the Federal Electoral Commission to purchase electricity from private sources rather than from the state, the amount of which would be subject only to executive discretion. Mexico's electricity industry is state-run; Fox's reform was an attempt to usurp legislative power and boost private economic interests at the expense of the state. The Court ruled against Fox and the PAN, supporting Congress' legislative power as well as the public interest in the electricity industry (Magaloni 2008, 203).

In 2007, the Court invalidated a number of provisions of the 2006 Broadcasting Law that would have challenged fair competition and effectively provided media broadcasting monopolies to the two country's largest television networks, Televisa and

TV Azteca. The ruling hinged on the justices' belief that the law would have disadvantaged media development in indigenous communities, thereby violating the 2002 indigenous-rights law.⁴⁴ With this decision, the Court asserted itself not only in the name of just and competitive corporate practices but also on behalf of Mexico's indigenous minority, merging economic and social liberalism.

Judicial Rulings in Light of Regime Allegiance and Elite/Mass Considerations

Magaloni and Sanchez (2006) have argued that the Supreme Court has ruled in favor of its empowering political elites, the PRI, in most challenges since the 1994 empowerment. That claim, if true, may not come as a surprise; PRI President Zedillo handpicked all 11 of the Supreme Court justices as part of the 1994 reform package. Pursuant to the staggered replacement criteria, the last of those judges will retire just this year, meaning the PRI has had judicial representation on the Court since the reform. Furthermore, it is worth noting that, though PRI elites empowered the Supreme Court in 1994, the party did not fall from power until 2000.

However, Finkel (2003) finds the Court's support of the PRI to be a decelerating trend, evidenced in part by the Court's meaningful defiance of the PRI in two instances of electoral adjudications (mentioned above). Considering the election of consecutive PAN presidents and the rulings in the aforementioned landmark cases,⁴⁵ Finkel's claim appears legitimate. As such, the Court has demonstrated the divergence from elite support that is expected of maturing judiciaries.

⁴⁴ "Supreme Court Declares Key Provisions of Broadcast Law Unconstitutional." *SourceMex Economic New & Analysis on Mexico*. AllBusiness, 20 Jun. 2007. Web. 31 Mar. 2010. <<http://www.allbusiness.com/legal/legal-services-litigation/5522712-1.html>>

⁴⁵ Notably, many of these cases were argued after Magaloni and Sanchez wrote in 2006.

Furthermore, the Court has increasingly supported mass interests over time, evidenced in the areas of abortion, gay, and indigenous rights discussed in the previous heading. The Court's most recent rulings have favored marginalized group interests for homosexuals (the right to marry, the right to adopt children), pregnant women (the right to abortion in the face of the historically powerful Catholic Church), and small businesses (the Broadcasting Ruling that defeated monopolizing big corporate stations).

Increased Judicial Professionalism

Finkel (2008, 94) argues the diffusion of power has changed the perspectives of the judges themselves. Before 1994, the judicial profession and Supreme Court positions were used mainly as political stepping-stones to loftier positions within the party. But the constitutional reforms—coupled with the shift towards legitimate electoral democracy and the downfall of the PRI—have changed the nature of the judicial profession. Thanks to a competitive multi-party system, a judge can no longer expect the party of the president who appointed him to remain in power in the future. Therefore, the judicial career has become a legitimate profession in and of itself, with judges aspiring to higher judicial posts rather than other political positions.

Trending Towards a Rights-Conscious Culture

Individual rights and the due process of law were only nominally afforded by the PRI during the early and middle stages of its regime (Magaloni 2008, 190). But coinciding with the political and social liberalization of the past two decades, Mexico has experienced the emergence of a culture with concern for rights protection. In 1990,

President Salinas responded to the public outcry against Mexico's poor human rights record by creating a completely independent office charged with the protection and oversight of national human rights, the National Human Rights Commission (CNDH) (Gonzalez 2008, 192). Evidence for Mexico's rising rights culture is that the number of *amparo* petitions has steadily risen each year since 1997 (Zamora et al. 2004, 258). This means more citizens are aware of their rights guarantees, are confident in the judicial system as a venue for remedy, and are actively pursuing the protection of their constitutionally promised rights.

H. Impediments to Judicial Power in the 21st Century

Despite all of the conditions that foment judicial power in Mexico, there are also many impediments to it. Among these are an overcrowded docket, a loose rule of law, weak property rights, institutional restrictions on judicial activism, and the limits of the *amparo* trial as a remedy.

Overcrowded Docket

The Mexican Supreme Court is forced to act as a court of first instance in a large number of cases. Conversely, the U.S. Supreme Court has reduced the number of cases it "must" take each year so that it may hear the truly salient issues. After all, the power to determine the legal agenda is an important aspect of judicial power. The high number of reforms reshuffling the Supreme Court's responsibilities—like the one in 1999—is an indicator that significant attention has been paid to the Court's overfull docket. While those reforms have certainly improved the position of the Court in terms of its caseload,

they may not be enough. More alterations may be required to make the Court a more effective tribunal.

Loose Rule of Law (estado de derecho)

When discussing Mexico's prospect for further liberal democratic development, existing scholarship instinctively addresses the country's rule of law problem. Law enforcement, drug trafficking cartels, and corruption have all been identified as serious challenges to Mexico's progress in fostering the rule of law (López-Ayllón and Fix-Fierro 2003). The rule of law deficit may be a function of cultural predilections rather than the legal support structure or judicial attitudes: "the bottlenecks presently facing the rule of law in Mexico lie less in the shortcomings of the legal infrastructure and more in the lack of the basic social support it requires to operate" (López-Ayllón and Fix-Fierro 2003, 286).

One of the greatest implications of the flimsy rule of law is the epically high rate of violent crime in Mexico. Much of Mexico's violent crime is linked to drug cartelism, which prevails particularly on the periphery. One CNN report calls the border city of Juarez the "murder capital of the world" and the home to "the highest murder rate in the world."⁴⁶ Recent statistics project Mexico as the nation with the sixth highest murder rate in the world with more than 13 murders per 100,000 people, a number that likely

⁴⁶ Tuchman, Gary. "The War Next Door." *CNN*. CNN Video. Web. <<http://www.cnn.com/video/#/video/bestoftv/2010/03/24/tuchman.mexico.violence.cnn?hpt=C2>> 24 March 2010.

undercuts the actual murder rate due to underreported crime and the difficulties of measuring crime rates.⁴⁷

Weak Property Rights

Property rights in Mexico have been traditionally weak as a result of the historically absent rule of law and the preeminence of a monopolistic authoritarian rent-seeking coalition (Haber et al. 2008, 210-11). Consolidating property and economic rights is typically an integral part of the jurisdictional focus of newly empowered courts. The experience of the nascent Mexican Supreme Court has proven to be no exception, and property and economic rights are stronger than before. But property rights may only enjoy the fullest protection if Mexico can successfully sanctify the rule of law.

Restrictions on Judicial Activism

The stringent requirements on invalidation put a difficult burden on the Supreme Court for striking down laws. Rather than a bare majority of justices, the Mexican Court requires the agreement of eight of the eleven justices in order to invalidate a law and set legal precedent. Some of the initial restrictions Zedillo imposed on the judiciary in the 1994 reform linger and hamper the judiciary today. Constitutional challenges still require filing within one month after the promulgation of legislation. All of these provisions placed a higher burden on the Court in invalidating legislation.

⁴⁷ "'Crime Statistics Murders (per Capita) (most Recent) by Country." *NationMaster.com*. NationMaster.com. Web. 24 Mar. 2010. <http://www.nationmaster.com/red/graph/crime_mur_percap-crime-murders-per-capita&int=-1>.

Limitations of the amparo suit

The *amparo* suit remains limited in a number of ways. *Amparo* is only invoked by private citizens against the government, excluding “protection against the curtailment of constitutional rights by important non-governmental actors in society: political parties, news media, private associations, labour unions, businesses, etc.” (Zamora et al. 2004, 273). Next, *amparo* is subject to many procedural limitations that cause it to be a slow, costly process and may preclude its use by poorer claimants. Finally, the limited application of *amparo* decisions—still only *inter partes*—means that each *amparo* decision is by its nature narrow, causing courts to frequently adjudicate nearly identical cases, further clogging the already overloaded legal system (Zamora et al. 2004, 274).

I. Conclusion on Mexican Judicial Power

In the past 15 years, the Mexican Supreme Court has transitioned from an impotent instrument of the president to a powerful constitutional tribunal. Thanks to a cascade of constitutional amendments that have mostly exorcised the authoritarian legacy of judicial constraint, the Court today is an independent, politically relevant and politically complied with constitutional tribunal. While not without significant impediments, judicial power has persisted for the past fifteen years in Mexico, entrenching itself ever more with the passage of time. The Court has delivered significant rulings on a host of different political issues, constantly expanding its jurisdictional breadth. Courts at the sub-national level have also evolved into entities with meaningful power and purview. With any luck, Mexico will soon be able to overcome the few remaining obstacles preventing the country from arriving at a complete

liberal democracy, facilitating even greater judicial power.

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