

## **Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002**

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### ABSTRACT

Legal reforms that make judges independent from political pressures and empower them with judicial review do not make an effective judiciary. Something has to fill the gap between institutional design and effectiveness. When the executive and legislative powers react to an objectionable judicial decision, the judiciary may be weak and deferential; but coordination difficulties between the elected branches can loosen the constraints on courts. This article argues that the fragmentation of political power can enable a judiciary to rule against power holders' interests without being systematically challenged or ignored. This argument is tested with an analysis of the Mexican Supreme Court decisions against the PRI on constitutional cases from 1994 to 2002. The probability of the court's voting against the PRI increased as the PRI lost the majority in the Chamber of Deputies in 1997 and the presidency in 2000.

Ferdinand Lassalle said that if a constitution does not reflect the “real factors of power,” it is nothing more than a piece of paper (1997, 29). In a similar vein, according to Adam Przeworski, institutions are effective only when some distinct external and real power stands behind them (2002, xii). But what allows the judiciary, which controls neither purse nor sword, to become an effective power in government? Alexander Hamilton famously argued that the judiciary would be an effective barrier to the “oppressions and encroachments from the representative body” if it were given some power to legislate (that is, to strike down unconstitutional laws) and if judges were granted life tenure and good salaries (Hamilton et al. 1997, 497).

Formal guarantees of judicial review and independence, however, are not enough to make the judiciary an effective power. In many countries, judges do not exercise their legal capacities, or they simply defer to those in power when making decisions. Hence, for those constitutional provisions to become more than “pieces of paper,” the gap between institutional design and the institution's effectiveness must be filled.

Let us define an effective judiciary as one that is able to rule against the interests of power holders without being systematically overruled, challenged with noncompliance, or punished with more aggressive poli-

cies, such as court packing, impeachment of judges, or budgetary cuts. Based on this definition, and building on the separation of powers approach for the study of the judiciary, this article argues that one source of the judiciary's effectiveness is the fragmentation of power in the other two branches of government, the executive and the legislative. This study will show that in the case of Mexico from 1994 to 2002, the higher the degree of fragmentation of power in those two branches of government, the higher the probability that the judiciary would behave in a way consistent with our definition of an effective judiciary.

The paper is divided into three parts. The first part argues that political fragmentation is one source of an effective judiciary. The second part briefly analyzes the judicial reform of 1994 that legally empowered the Mexican judiciary and argues that a good proxy to measure the judiciary's effectiveness in Mexico during the years analyzed is the institution's ability to make decisions that adversely affected the interests of the Institutional Revolutionary Party (PRI). Taking advantage of the peculiarities of the Mexican case, the third part statistically tests the implications of this argument and finds that the legal reforms of 1994 became a political reality when the degree of political fragmentation in Mexico increased.

## **FRAGMENTATION OF POWER AND JUDICIAL DECISIONMAKING**

Montesquieu distinguished between branches and functions of government (1977, XI, 6; Vile 1967, 88; Manin 1989, 730).<sup>1</sup> In every government, Montesquieu argued, there are three functions: the making of law, the enforcement and administration of law, and the adjudication of controversial cases in which the law has to be applied (1977, XI, 6). One or more branches of government can perform the legislative, executive, and judicial functions. Montesquieu wanted to define the conditions under which power cannot be abused. He argued that such political conditions depend on the disposition of fundamental laws that regulate the distribution of functions among the branches of government. He also considered that to prevent the abuse of power, "it is necessary that by the very disposition of things power should be a check to power" (1977, XI, 4). Montesquieu concluded that for power not to be abused, two conditions are necessary: the three functions of government should not be performed by only one branch, and the distribution of functions into branches should overlap, such that each branch performs one main function and some aspects of the other functions (1977, XI, 6).

The ideas of the "celebrated" Montesquieu crystallized in the system of checks and balances of the U.S. Constitution and were famously defended by Madison, Hamilton, and Jay (Manin 1997). There were dif-

ferences, however, between the ideas expressed in the *Spirit of the Laws* and those in the *Federalist Papers*. For our purposes, we can focus on the differences that touch on the role of the judiciary.

For Montesquieu, the judiciary is the famous *pouvoir null*, and judges are the “mouth piece of the law.” Both the judiciary and the executive powers are subordinated to the legislative, and the work of judges is to apply the law, not to exercise political power (Pasquino 2001, 210–13). In contrast, Madison argued for a judiciary equally situated with respect to the other two powers. In this system, judges should defend themselves from encroachments of the other branches and play an active role in the political equilibrium of the government (Pasquino 2001, 213–16).

Although in the system of checks and balances the judiciary is formally equal to the other two branches of government, it is still considered the “least dangerous branch.” According to Hamilton, this is because the judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise of this faculty” (1997, 496, emphasis in the original). In other words, although the judiciary is not a *pouvoir null* in the system of checks and balances, it is still relatively weak because it depends on the other branches to implement its decisions and to secure its economic and political independence.

Notice, however, that the strength or weakness of the judiciary is relative to that of the other branches. The judiciary depends on the other branches to exercise its power effectively. When the executive and legislative organs are strong and ready to react to a judicial decision that affects them, we can expect the judiciary to be relatively weak and deferential toward them. But coordination problems in the executive and legislative branches can reduce the constraints on the courts, empowering them to rule against executive and legislative interests. Therefore, in this system, the judiciary can become effective, despite the absence of a “direct and external force” behind it, if the other two branches of government find it difficult to react to a judicial ruling.

The “separation of powers” approach considers judges and the courts as political actors who are constrained by other institutional actors, such as congress and the executive. In the United States, this approach has generally been used to study the conditions under which judges are more likely to engage in policymaking (e.g., Ferejohn 2002; Bednar et al. 2001; Ferejohn and Weingast 1992; Spiller and Gely 1990). When studying other countries, this approach has also been used to examine the conflictive relationship between the judiciary and the other branches of government, specially the executive (e.g., Helmke 2002; Iaryczower et al. 2002; Epstein et al. 2001; Vanberg 2000; see also Epstein and Knight 1996).

The common assumption in all separation of powers arguments is that judges behave strategically when making decisions, taking into account not only legal constraints (that is, precedent and legal coherence) but also political circumstances (their situation relative to the other branches of government). In particular, it has been argued that fragmentation in the executive power and the legislature has important consequences for the courts, since fragmentation increases coordination difficulties for those branches, leaving them less able to enact policies and to serve as checks and balances (Chávez 2004, 15; Tsebelis 2002, ch. 10; Cooter and Ginsburg 1996, 296).<sup>2</sup>

Fragmentation in the political organs of government (also known as divided government) means that no single political party controls the three branches necessary to enact a policy—the two houses of congress and the presidency, in presidential regimes. There are, furthermore, different degrees of fragmentation. The lowest degree of fragmentation, no fragmentation at all, occurs when the same party controls the presidency and both houses of congress. The degree of fragmentation is higher when both houses of congress are controlled by one party and the presidency by another, and still higher when the executive belongs to a party that controls neither house of congress. Fragmentation, however, can occur not only “horizontally,” or between the elected organs of government, but also “vertically,” among federal, state, and municipal levels of government. The analysis in this paper is restricted to horizontal fragmentation, or divided government. Throughout this study, the concept of horizontal fragmentation is used to link this analysis to those studying the implications of vertical fragmentation for judicial behavior (e.g., Bednar et al. 2001), as well as those studying the relation between fragmentation in the political organs and economic and social conditions (e.g. Chávez 2004).<sup>3</sup>

With regard to policymaking by the courts, the fragmentation hypothesis states that the higher the degree of fragmentation (in this case vertical or horizontal), the more the courts will be involved in policymaking. This is because under those conditions, people seeking to resolve conflicts will tend to gravitate toward institutions from which they can get solutions (Ferejohn 2002, 9–14; see also Bednar et al. 2001, 233). With regard to the relationship between the judiciary and other branches of government, the fragmentation hypothesis states that the higher the degree of fragmentation in the executive and legislative branches, the higher the probability that the courts will rule against the government. The reason is that under those conditions, a fragmented government could not easily overrule a judicial decision (Iaryczower et al. 2002; Cooter and Ginsburg 1996).

This study argues that fragmentation in the political branches is one source for the emergence of an effective judiciary. Fragmentation

implies difficulties to coordinate in order to enact policies. Remember that an effective judiciary should be able to rule against the power holders without being systematically overruled, challenged with noncompliance, or with more aggressive policies, such as court packing or impeachment.<sup>4</sup> Then, if judges take into account other branches of government when making decisions, the more fragmented those branches, the more willing the judiciary will be to decide against power holders. In other words, the higher the degree of fragmentation, the higher the probability that the judiciary will be effective.

Judges should be not only be capable of deciding against power holders but also willing to do so. In other words, we should be able to see decisions against power holders when the preferences and motivations of judges and power holders differ. Life tenure, appointment procedures, and salary protections are among the mechanisms that promote such divergence of preferences. But even if we find these protections in the constitution, they may only be mere words on paper, manipulated informally by those in power in order to have like-minded judges on the courts. This issue is addressed in the empirical analysis, taking advantage of the peculiarities of the Mexican case.

## EMPOWERING THE JUDICIARY IN MEXICO

For the years 1994–2002, judicial decisions against the ruling party, the PRI, are a good proxy to measure effectiveness of the Mexican judiciary. In 1994, a constitutional reform granted the Mexican Supreme Court the power of constitutional adjudication. Before this reform, the Mexican Supreme Court was legally and politically subordinated to the executive power. Legally, the institutional design of the Mexican judiciary fit the Montesquieuan characterization of *pouvoir null*: it was subordinated to the legislative branch, and judges' work was considered to be the "application of the laws," the solution of disputes among private citizens. Politically, the Supreme Court and the judiciary in general were just another piece in the dominant party system that characterized Mexico for 71 years; the PRI was able to incorporate it into its institutional structure together with the other organs of government, worker unions, peasant movements, the army, and entrepreneurs (see Casar 2002; Weldon 1997).

On the legal side of the question, before the 1994 reform, the legal instruments for constitutional control were the *amparo* suit and a weak version of the constitutional controversy.<sup>5</sup> Although important, these instruments did not provide the Supreme Court or the judiciary with good legal weapons to defend the constitution. The main reason was that decisions on those cases had only *inter partes* effects, which means that the decision only applied to the litigants in the case. Thus, an

unconstitutional law or act of authority was declared invalid only for those who presented and won an *amparo*, but remained "constitutional" for everyone else (see Baker 1971; Fix-Zamudio 1999).

Politically, although the 1917 Mexican Constitution granted considerable autonomy to the Supreme Court, with life tenure and congressional appointment of judges, a series of reforms starting in 1928 curtailed this autonomy.<sup>6</sup> First, the appointment procedure was replaced by a system of presidential appointment with senate ratification. Moreover, the 1928 reform involved replacing all justices. In 1934, a new reform replaced the original life tenure with one of six years coincident with the presidential term. From then on, the subordination of the judiciary to the executive was a characteristic of the Mexican regime: "although life tenure was restored in 1944, the tone of executive-judicial relations had been set, and was to remain essentially unchanged until 1994" (Domingo 2000, 713; see also Magaloni 2003, 280–91).

The political subordination of the Mexican judiciary is better understood through the logic of a political system dominated by a single party. Studies that focus on the relations between the executive and the legislative under the PRI regime have shown that institutional incentives, such as no consecutive reelection, and the pork-barrel distribution of offices by the PRI leadership promoted discipline among members of the party while satisfying the career ambitions of individual politicians (Nacif 2002; Casar 2002). Relations between the executive and the judiciary followed a similar pattern.

Dominant-party rule secured the complicity of the judicial branch in the construction and consolidation of the Mexican political system under the hegemonic rule of the PRI (Domingo 2000, 726). From 1934 to 1994, most presidents appointed more than 50 percent of justices during their terms, and almost 40 percent of the justices lasted less than five years, coming and going according to the presidential term (Magaloni 2003, 288–89). The Supreme Court was just another stop in a political career, since people coming from an elected office or a bureaucratic post could go to a governorship or a seat in the national congress after their Supreme Court service (see Magaloni 2003, 289–90). Thus, with the judiciary as another building block in the corporatist state structure, it is unsurprising that the Mexican judiciary became immersed in a political system characterized by clientelism, state patronage, and political deference toward the regime (Domingo 2000, 727).

One of the most interesting features of the PRI's dominance in Mexico was its capacity to remain in power for more than seven decades. Through a series of reforms, the PRI adapted successfully to changing internal and external conditions while simultaneously holding on to power. The Judicial Reform of 1994 was one of these reforms (see, e.g., Molinar 1996). This reform delegated a considerable amount of

power to the judiciary, given that constitutional adjudication involves not only deciding policy issues but also settling disputes over political and partisan matters.

The 1994 constitutional reform gave the Mexican Supreme Court the power to interpret the constitution in order to adjudicate conflicts. The court thereby became equal to the other two branches. Mexican justices, moreover, were empowered not only to defend their institution from encroachments of the other branches but to play a part in maintaining the government's political equilibrium.<sup>7</sup> The 1994 reform granted Mexican Supreme Court justices 15-year tenure in order to isolate them from political pressures of sitting administrations.

The reform also created two effective legal instruments to challenge laws or acts of authority: the constitutional controversy and the action of unconstitutionality (see Cossío Díaz 2000, 2001). These two instruments were added to the *amparo* suit. Constitutional controversies involve problems between different levels and branches of government, both vertical and horizontal. Thus, any dispute between a state and the federal government or the executive and legislative branches, generally with regard to competencies, can be brought before the Supreme Court. State governors, municipal presidents, the federal branches of government and the three branches at the state level can refer constitutional controversies to the Supreme Court (Mexican Constitution, Article 105). Legal standing before the court in constitutional controversies is thus restricted to public authorities representing the institution whose functions are allegedly encroached on. Other Latin American countries, such as Costa Rica and Honduras, have a legal instrument similar to the Mexican constitutional controversy that falls under the jurisdiction of the Supreme Court and is filed to challenge a particular action. But unlike the Mexican case, in those countries, any citizen who is party to a trial can refer these cases to the Supreme Court. Also in contrast to Mexico, it is noteworthy that in other federal countries in the region, such as Brazil and Argentina, there is no legal instrument specifically designed to address conflicts between vertical levels of government (Navia and Ríos-Figueroa 2005, 204–5).

The 1994 constitutional reform also gave the Supreme Court exclusive jurisdiction over “actions of unconstitutionality,” cases in which there is a contradiction between a general rule or executive order and the Mexican Constitution. By contrast, other Latin American countries, such as Chile and Bolivia, assign jurisdiction over this powerful tool of judicial review to a constitutional tribunal outside the judiciary (see Navia and Ríos-Figueroa 2005, 209–10). Legal standing in actions of unconstitutionality in Mexico is also restricted to public authorities: one-third of deputies or senators, the attorney general, one-third of the members of any state legislature (in cases against state laws that con-

tradict the Mexican Constitution), political parties officially registered with the Federal Electoral Institute (only against federal or local electoral laws), and locally registered political parties (only against local electoral laws). The action of unconstitutionality must be filed within the first 30 days after the law takes effect (Article 105, Mexican Constitution).<sup>8</sup> Initially, electoral laws could not be challenged through the action of unconstitutionality, but another judicial reform in 1996 changed this and also incorporated the Federal Electoral Tribunal into the judiciary.

In sum, the 1994 reform made the Supreme Court independent from political pressures, equal to the other organs of government, and thus capable of exercising checks and balances. The reform also created legal instruments that allowed the court to participate in policy issues and political disputes. This reform was undertaken with the PRI still in power. Why did Mexican politicians decide to tie their own hands and empower the Supreme Court? Beatriz Magaloni has argued that multiple-party politics created incentives for President Ernesto Zedillo (1994–2000) to delegate power to the judiciary (2003, 267). As the era of hegemonic *presidencialismo* was fading, politicians of multiple partisan affiliations began to occupy elected offices; “the president’s leadership was challenged, first by members of different parties, and soon by his own copartisans. The president thus delegated to the Supreme Court the power to rule on constitutional issues as a means to solve this dilemma” (Magaloni 2003, 268).

The need for an arbiter to solve partisan disputes may be only part of the story. Jodi Finkel has argued that PRI politicians, unable to control political outcomes at the state or local levels and unsure if they would continue to dominate the national government in the future, “opted to empower the Mexican Supreme Court as a hedge against the loss of office” (2004, 87). In this account, the 1994 judicial reform was a kind of insurance policy to ensure that “those who may come to power in the future are unable to change arbitrarily the rules of the political game in ways detrimental to the former ruling party’s political position” (Finkel 2004, 101). There are reasons to be skeptical of such accounts of long-term strategic behavior, however. As Silvia Inclán argues, “according to some privileged witnesses of the reform process, in 1994, no one could have foreseen the PRI electoral defeat that occurred in 1997 or 2000” (2004, 84). Therefore the motivations of the reform are to be found instead in short-term political considerations, such as winning the election of 1994 in the first place and then gaining confidence in a reform of the state led by the PRI (Inclán 2004, 106).

The yet-to-be-written complete story behind the 1994 judicial reform probably includes all three of these rationales. What we do know is that in 1988 the PRI lost control of the two-thirds majority vote in the Chamber of Deputies necessary to amend the constitution. All



reforms passed since then therefore reflect, in one way or another, some bargain with at least one opposition party (see Pozas-Loyo 2005). Therefore, even though the judicial reform was mainly a PRI initiative, it needed at least some votes from the PAN in the Chamber of Deputies. The result of the political bargain was an empowered Supreme Court capable of being a politically active player. The analysis in this study therefore begins with 1994 and not 1988 because only after the former year is it possible to study the circumstances under which legal norms become political practices.

It is also noteworthy that the response of the elected branches to an adverse judicial ruling need not be a constitutional amendment. A simple majority in the chamber can use the power of the purse and reduce the judiciary's budget or judges' salaries (by failing to adjust them to inflation). A majority in the chamber can also fail to comply with a judicial ruling that requires, for instance, an appropriations bill to be fully executed. Moreover, a simple majority in the chamber can also impeach individual justices. For the purposes of this article, the accusation part of the impeachment process is more important than the final outcome (decided in Mexico by the senate through a two-thirds vote) because it helps to capture the degree of potential influence over Supreme Court judges. A possible objection to this argument is that the lack of a supermajority in the senate would render the chamber's majority threat to impeach not credible. The very accusation by the chamber, however, would impose costs on the judge's reputation by attracting public scrutiny and adverse media coverage.<sup>9</sup>

How can we assess the effectiveness of this legally empowered court? During its more than seven decades of domination, the PRI controlled levels and branches of government to such a degree that people usually referred to it as the "PRI-gobierno," meaning that the PRI and the government became almost synonymous. The opening of the political system in Mexico was gradually controlled also by the PRI. Even when the PRI's hegemony began to fade, some of the pillars of the system, such as the president's power to nominate his successor and use of patronage, did not disappear until the PRI lost the presidential election of 2000. Moreover, after the 1994 reform, to strike down a law meant not only to affect the interests of the PRI but also to rule against the very same political group that empowered the Supreme Court. Therefore, given that effectiveness is the ability to rule against the power holders without being systematically overruled or challenged in other ways, in Mexico, effectiveness was tantamount to deciding against the PRI during the years 1994–2002.<sup>10</sup>

An alternative proxy used for effectiveness is decisions against the government (see, e.g., Helmke 2002). Determining which part is "the government" in constitutional cases in Mexico is tricky, however,

Table 1. President's Party and Percentage of Congressional Seats in Mexican Federal Elections

Party	1994		1997		2000			
	President	Deputies	Deputies	Senators	President	Deputies	Senators	
PRI	Zedillo	60	74	48	59		42	47
PAN		24	20	24	24	Fox	41	36
PRD		14	6	25	15		10	12
Others		2	0	3	2		7	5
Total		100	100	100	100		100	100

Sources: CIDAC; IFE; Observatorio Electoral.

because standing in those cases is restricted to public authorities. Take, for instance, a constitutional controversy in which the legislative branch is challenging the executive with regard to attributions over fiscal policy. Which part should be considered "the government" in this case? In this example, viewing a decision against the executive as a decision against the government would not only be somewhat arbitrary but also would probably cause the researcher to lose relevant information about the partisan conflict involved. In countries where standing in constitutional cases is not restricted to public authorities, such as Argentina, identifying the government becomes somewhat less complicated.<sup>11</sup>

## TESTING THE FRAGMENTATION HYPOTHESIS

If institutional design were sufficient for an institution to become effective, then we should have seen the Mexican Supreme Court exercise its power after the reform was enacted. This, however, did not happen. The Supreme Court waited for some time until it started making decisions against the PRI, the power holder at the time. If the fragmentation hypothesis is correct, then we should see the Mexican justices more likely to decide against the PRI when the degree of fragmentation is higher. Before looking systematically at the decisions made by the Mexican Supreme Court, let us look at the changing political context under which the Mexican Supreme Court worked after it was empowered in 1994. Particularly important in this context is the degree of fragmentation in the other organs of government, the executive and the legislature.

Looking at electoral results in Mexican federal elections from 1994 to 2000, it is clear that there are three different degrees of fragmentation throughout this period (see table 1). From 1994 to 1997, the PRI dominated the presidency and both houses of Congress, as it had since 1929 (Fragmentation Level 1). In the 1997 midterm federal elections, the PRI

Table 2. President's Party, Majority Party, and Degree of Fragmentation in the Mexican Political System, 1994–2003

	Presidency	Chamber of Deputies	Senate	Fragmentation
1994–1997	PRI	PRI	PRI	1
1997–2000	PRI	Divided	PRI	2
2000–2003	PAN	Divided	Divided	3

lost its absolute majority in the Chamber of Deputies but continued to hold a majority in the Senate (Fragmentation Level 2). In the federal election of 2000, the PRI lost the presidency, and this time both chambers of Congress ended up divided (although the PRI still holds a slight relative majority in both) (Fragmentation Level 3). The three different degrees of fragmentation are represented in table 2.

The argument of this study is that the more fragmented the elected organs of government, the more effective the judiciary; that is, the more likely that the Supreme Court will decide against the power holders. To test the hypothesis, a database of Mexican Supreme Court decisions on constitutional cases from 1994 to 2002 was created (N=301). During these years, the Mexican Supreme Court decided 177 constitutional controversies and 124 actions of unconstitutionality. The database with these 301 decisions was constructed according to the information provided by the Mexican Supreme Court (SCJN) in its Summary of the Plenary Sessions.<sup>12</sup> Using electoral data at the county level (Remes 2000) and at the state and federal levels (CIDAC, IFE), the political party of plaintiff and defendant in each case was coded (see appendix for details).<sup>13</sup> In addition, the level of importance of the case was coded, according to the political hierarchy of the parts. Cases in which the “level of plaintiff” plus the “level of defendant” was greater than or equal to 5 were classified as “important” (see appendix).

When the total number of decisions is divided into the three periods considered in this study, the number of decisions on both “important” and “unimportant” cases increases as the degree of fragmentation increases (see table 3). Thus, one could say that the Supreme Court was more active when there was more fragmentation in the political system. However, because the Mexican Supreme Court does not have formal discretionary power to choose cases, the increase in the court's activity may simply respond to an increase in the number of cases.<sup>14</sup>

Anecdotal cases corroborate the fragmentation hypothesis. From 1994 to 1997, the Supreme Court ruled in favor of the PRI in some controversial cases, such as those related to the militarization of public security (Yamín and Noriega 1999, 479) and electoral rules concerning

Table 3. Decisions by the Mexican Supreme Court per Political Context

	1994-1997 Fragmentation = 1	1997-2000 Fragmentation = 2	2000-2003 Fragmentation = 3	Total
<b>All Cases</b>				
Constitutional controversies	45	58	74	177
Actions of unconstitutionality	9	35	80	124
<b>Total</b>	<b>54</b>	<b>93</b>	<b>154</b>	<b>301</b>
<b>Important Cases<sup>a</sup></b>				
Constitutional controversies	3	3	23	29
Actions of unconstitutionality	9	14	20	43
<b>Total</b>	<b>12</b>	<b>17</b>	<b>43</b>	<b>72</b>

<sup>a</sup>Cases in which the sum of the level of the plaintiff and the level of the defendant is equal to or greater than 5 (see appendix).

public financing and accounting procedures of political parties (Fix-Fierro 1998, 9; see also Finkel 2003; Berruecos 2003). During the period 1997-2000, however, some important decisions affected PRI interests, such as the decision against the *Ley de Federalismo Hacendario* (Fiscal Federalism Act) in Puebla and the decision concerning the former governor of Morelos, Jorge Carrillo Olea.<sup>15</sup> From July 2000 on, the decisions against the PRI interests are well known: the Zedillo, Tabasco, and Yucatán cases are some of the most salient.<sup>16</sup> To see if the fragmentation hypothesis holds, however, we must look at all cases.

The litigants' political party in constitutional cases is telling for our purposes (see table 4). From 1994 to 2002, the PRI was by far the most common defendant in constitutional trials: 229 of the 301 cases. The number of times the PRI was challenged before the Supreme Court increases as the degree of fragmentation increases. The PRI appeared as a defendant 50 times in the first period, 74 times during the second period, and 105 times in the third period. The PRI's participation as a plaintiff increased as it lost power: 7 times in the first period, 20 times during the second, and 26 in the third period. Similar patterns exist for other parties. The PAN, in particular, was the most frequent plaintiff from 1994 to 2002 (107 times), but its appearances before the Supreme Court as a defendant have increased since

Table 4. Plaintiff and Defendant by Political Party and Degree of Fragmentation

	Constitutional Controversies		Actions of Unconstitutionality		Total	
	Plaintiff	Defendant	Plaintiff	Defendant	Plaintiff	Defendant
1994–1997 (Fragmentation = 1)						
PRI	7	41	0	9	7	50
PAN	26	4	3	0	29	4
PRD	12	0	4	0	16	0
Other	0	0	2	0	2	0
Total	45	45	9	9	54	54
1997–2000 (Fragmentation = 2)						
PRI	12	50	8	24	20	74
PAN	14	8	8	9	22	17
PRD	25	0	6	2	33	2
Other	5	0	13	0	18	0
Total	58	58	35	35	93	93
2000–2002 (Fragmentation = 3)						
PRI	20	48	6	57	26	105
PAN	31	18	25	21	56	39
PRD	21	7	8	2	29	9
Other	2	1	41	0	43	1
Total	74	74	80	80	154	154

it gained power: 4 times in the first period, 17 during the second, and 39 in the third period.

In order to specify the statistical model, it is necessary to account for alternative explanations. In addition to fragmentation, the literature suggests other variables that explain judicial decisionmaking. The probability of observing the court deciding against the PRI is related to whether the judges can challenge the PRI and the political constraints judges face, but also to whether the judges want to challenge the PRI, the judges' political alignment. In other words, we should see judges deciding against the PRI when their preferences differ, but not if the judges are politically aligned with the PRI. The fragmentation hypothesis captures the political constraints. Political alignment, in turn, depends on both the nomination process, which to some extent will map into preferences, and turnover on the court (Iaryczower et al. 2002, 700).

The case of Mexico allows us to control for political alignment of the judges. The political bargain that led to the empowerment of the Mexican Supreme Court involved the nomination of all the new justices by the president under the rules of the 1994 reform that required two-thirds Senate approval of executive nominees, as well as higher professional standards than before 1994. However, because the president's party had the required vote in the Senate, in practical terms, Zedillo designated the first 11 justices. Moreover, during the period analyzed here, there was no turnover in the Supreme Court. At a first glance, one could argue that these justices were politically aligned with the PRI.

However, the particularities of the 1994 judicial reform indicate that it is not unreasonable to assume that while the PRI did not consider the appointed justices politically threatening, those same justices, under different political circumstances, could hold preferences different from those of their appointing authorities. First, as noted earlier, the judicial reform needed the support of the PAN in the Chamber of Deputies and, in exchange, "the sympathies of at least four of the new justices lay with the PAN" (Finkel 2004, 107). Second, Ernesto Zedillo wanted to appoint judges whose observable characteristics did not openly deny one of the aims of the reform, to get rid of the well-known corrupt justice-politicians of the previous court (Inclán 2004, 120). The justices Zedillo appointed were prominent lawyers at the peak of their careers who were known to favor an independent and effective judiciary (Inclán 2004, 121).

Some features of the 301 cases in the database suggest that Zedillo's appointees were concerned with the strength and independence of the institution. For instance, the correlation between decisions against the PRI and the existence of dissenting opinions is .1140, suggesting that consensus among justices was considered important when deciding against the PRI. Moreover, 83 percent of the decisions against the PRI were unanimous, and this percentage does not decrease when the degree of fragmentation increases. Also, Staton has argued that the Supreme Court selectively publicized some decisions in order to build legitimacy and popular support for itself (Staton 2002).

Once we control for political alignment, we are left with judicial decisionmaking as a function of political constraints. As argued earlier, what judges can do depends on fragmentation of power; that is, the relative strength of the court regarding the other organs of government. But the literature suggests that another explanation for what judges can do depends on whether judges have an "external and direct force" backing them. For instance, Burnett and Mantovani have argued that the Italian judiciary became an effective check in the *Mano Pulitti* (clean hands) operation only when it was backed by big business and the media (1998, 261–63). Mexico has not produced a political actor willing

to invest its political capital in the judiciary. This makes sense, given that in places like Mexico, the judiciary was never effective, but was seen as a mere rubber stamp of decisions taken elsewhere.

Another commonly identified "external force" behind the judiciary is popular support (see Friedman 2000, 2001). When Tocqueville came to the United States, he found it remarkable that judges were obeyed even when they contradicted the preferences and policies of public officials (O'Donnell 2000, 25). Recent scholarship takes this idea further and argues that "diffuse" public support is a necessary condition for the effective judicial control of a state's constitution (Gibson and Caldeira 1995).<sup>17</sup>

The case of Mexico also allows us to control for popular support. According to the opinion poll Latinobarometer, the average percentage of people who had "much" and "some" confidence in the Mexican Supreme Court from 1996 to 2001 was 28 (cited in Zovatto 2001). Other polls also report this low number (e.g., IIS 2001). It may be argued that "confidence" in the Supreme Court is not a good indicator for popular support; but even if the best measure of popular support could be obtained for Mexico, the figures would be low enough to discard "diffuse" popular support as an "external and direct force" behind the Mexican Supreme Court.<sup>18</sup> It should be emphasized that this does not mean the Supreme Court has not been trying to build popular support. On the contrary, the Mexican Supreme Court has launched an important media and public relations program with this particular aim in mind (see Staton 2002). But we have to wait to evaluate the court's success in this regard.

In sum, the case of Mexico allows us to control for the political alignment of the judges, the existence of an "external and direct force" behind the judiciary, and popular support for the court. We are now ready to test the fragmentation hypothesis. To see if the probability of the Mexican Supreme Court's voting against PRI increased when the degree of fragmentation in the other organs of government varied, a probit model was run, in which the dependent variable was a dummy coded 1 if the decision of the Supreme Court was against the PRI and zero otherwise.

Two independent dummy variables were used: Fragmentation 2 and Fragmentation 3, which were coded 1 if the particular case was decided during the period with degree of fragmentation 2 or 3, respectively, and zero otherwise. The benchmark, thus, is the implicit Fragmentation 1 captured in the intercept term. It may be argued that judges' behavior changes depending on whether they are dealing with salient or important cases. Therefore, another independent variable, Level, was included to control for the level of the case. This variable ranged from 2 to 8 depending on the sum of the level of the plaintiff and the level of the defendant (see appendix).

Table 5. Probit Model. Dependent Variable: Decisions Against PRI

Independent Variable	Model 1 Estimated Coefficient	Model 2 Estimated Coefficient
Intercept <sup>a</sup> (Fragmentation 1)	- 1.9 (.4139)	-1.6 (.2892)
Case in period 2 (Fragmentation 2)	.98 (.3170)	1.0 (.3180)
Case in period 3 (Fragmentation 3)	1.1 (.3062)	1.2 (.3057)
Level of the case (Level )	.08 (.0787)	
Important cases (Impcases)		.31 (.2026)
Log-likelihood	-141.0856	-140.41696
Area under the ROC curve	.6538	.6575
Pseudo R <sup>2</sup>	0.0641	0.0685

<sup>a</sup>In model 1 the intercept captures all the cases that were decided in the first period, while in model 2 the intercept captures the unimportant cases decided in the first period.

Notes: For this analysis, N = 261; all cases in which the PRI was not a litigant party were dropped. Standard errors in parentheses.

The previous model specification was chosen to control for time effects, given that the increment in degrees of fragmentation coincides with time. This would not be possible with an explanatory variable Degree of Fragmentation taking the values 1, 2, 3. In addition, the variable Level can also be coded as a dummy taking the value of 1 for "important cases" and zero otherwise. Here, however, the variable Level was left taking values from 2 to 8 in order to avoid having only dummy independent variables. Moreover, the results hold in either case (see model 2 in table 5).

The results of the probit appear in table 5. The omitted variable captured in the intercept (Fragmentation 1), a case occurring in the first period, is negatively related to voting against the PRI, as expected, and statistically significant at the 95 percent level. Fragmentation 1 is the benchmark to analyze the other differential intercepts. Thus Fragmentation 2 and Fragmentation 3 show by how much the probability of voting against PRI in period 2 or 3 differs from that of period 1 (Gujarati 2003, 315). Since both Fragmentation 2 and 3 are positive and statistically sig-



Table 6. Probability of Voting Against the PRI  
by Case Occurrence Period

Case Period (Degree of Fragmentation)	Probability of Voting Against PRI (Model 1)
1	.07 [.02, .16]
2	.44 [.30, .59]
3	.52 [.36, .67]

Note: All other variables set at mean value. Brackets show 95% confidence interval.

nificant, a case occurring under the second or third period had a significantly higher and positive relation to voting against PRI than if the case had occurred in period 1. The control variable, Level, turns out not to be statistically significant. The number of cases here is 261 because cases in which the PRI was not a litigant party were dropped. In order to test the "fit" of the model, the area under the ROC (receiver operating characteristic) curve is reported; for this model it is .6538, indicating a fair degree of accuracy.

For a better interpretation of the probit coefficients, the change in probability of voting against the PRI was calculated for a case that is decided on each one of the three periods with different degrees of fragmentation, setting the other variables at their mean value. Also calculated were the confidence intervals for those predictions (table 6).<sup>19</sup> The probability of the court's voting against the PRI increases as the degree of fragmentation increases, from a very low .07 in the first period to .44 to .52 as the PRI loses the majority in the Chamber of Deputies in 1997 and the presidency in 2000, respectively. Thus the results of the statistical analysis in the Mexican case support the fragmentation hypothesis.

Some patterns in the cases that occurred after the PRI lost the presidency to the PAN provide an interesting comparison. Even though PAN appearances as a defendant increased relative to the first two periods (39 times, versus 4 and 17 respectively), the PRI was still by far the most common defendant (105 times). On the other hand, the PAN clearly was the most common plaintiff (56 times, versus the PRI's 26 and the PRD's 29 times; see table 4). These numbers speak of the PRI's presence, power, and importance even after it lost the presidential election in 2000.

It is also interesting, however, that after 2000, other parties appeared 43 times as plaintiffs, a sign that the times were changing (see

table 4). Focusing on the PAN, it participated as plaintiff or defendant in 91 cases (95 total, according to table 4, but 91 excluding the cases in which it joined other parties as litigant). In 26 of those cases, the PAN beat the PRI in court. In the remaining cases, the Supreme Court decided against the PAN 46 times and in favor of the PAN 17 times (excluding two cases in which the PAN was both plaintiff and defendant). Thus, after July 2000, the Supreme Court decided 46 times against and 43 times in favor of the PAN, roughly half and half.

Perhaps an *ex post* indicator of neutrality in judging could be that the Supreme Court decides, on average, 50 percent of the time in favor and 50 percent of the time against any particular political party. Could fragmentation in the political organs of government promote a judiciary that is not only effective but also neutral in this sense? How are efficiency and neutrality in the judiciary related to the consolidation of democracy? Going beyond the partisan classification of outcomes in judicial decisions may help answer other interesting questions. For instance, do judicial decisions systematically benefit particular social, economic, or political groups other than parties? Are all types of cases decided similarly, or do systematic differences arise across cases dealing with, say, federalism, separation of powers, or civil rights issues? The role of the Mexican Supreme Court as arbiter of partisan battles after 2000 needs further research. It is hoped that the analysis in this paper helps other scholars undertaking this task.

## CONCLUSIONS

A system of checks and balances wherein the judiciary has the legal capacity to strike down laws that are contrary to the constitution is a necessary but not sufficient condition for the judiciary to be an effective power. Something has to fill the gap between institutional design and the institution's effectiveness. If we consider judges to have effective power when they can rule against the interests of power holders without being systematically overruled, challenged with noncompliance, or subjected to more aggressive policies, such as court packing or budget cuts, then one way to fill the gap between design and effectiveness is the fragmentation of power in the other branches of government. If judges take into account the political context under which they make decisions, the higher the degree of fragmentation, the higher the probability of voting against the power holders, hence the higher the probability for the judiciary to be effective.

In Mexico, after the adoption of the Constitution of 1917, the judiciary had meager powers of judicial review and was effectively subordinated to the executive branch. But in December 1994, a constitutional amendment granted the Supreme Court the power of constitutional

adjudication and provided Mexican justices with 15-year tenure and generous salaries intended to insulate them from political pressures. Since 1994, therefore, we would have expected the Mexican Supreme Court to rule against the interests of the power holders acting contrary to the constitution, and adjudicating conflicts between the legislative and the executive on the basis of the supreme law.

Supreme Court decisions against the PRI, however, do not start to appear until years later, and it was not until August 24, 2000 that the Supreme Court decided a case against the executive.<sup>20</sup> Why? It is clear that institutional design is not the answer. To echo Lassalle, the 1994 reform was just a "piece of paper" for some time. What changed that made the Mexican judiciary an effective organ to check other branches of government? This study has attempted to show that Mexican Supreme Court justices modified their behavior after noticing the change in the distribution of power among political parties in the two elected governmental branches: the legislative and the executive. The emergence of an effective judiciary in Mexico is linked to the increment in the degree of fragmentation in the elected branches of government.

The separation of powers approach has also found empirical support in other Latin American countries. Something related to the fragmentation hypothesis has been reported to happen in Argentina (Iaryczower et al. 2002; Helmke 2002; Chávez 2004) and in Chile (Scribner 2002; Barros 2002). Studies converge around the idea that political fragmentation leads to more judicial discretion, but the specific mechanisms to explain this vary. Whether judges are simply freer to rule according to their true preferences, are also trying to gain public legitimacy, or instead may be trying to strategically defect against an outgoing government to curry favor with an incoming one is still not clear. More empirical research is needed, and variations of the fragmentation hypothesis demand a further specification of its underlying mechanisms. As the analysis of the Mexican case shows, however, we are more confident to hypothesize that Latin American judiciaries become effective when they face fragmented political systems.

## **APPENDIX: DEFINITION AND MEASUREMENT OF VARIABLES**

*Level of Plaintiff.* In constitutional controversies, the level of the plaintiff was coded according to the level in the federal structure of the political actor filing the case: 1 = county (*municipio*); 2 = state (*estado*); 3 = Mexico City, Federal District (DF); 4 = federal (*federación*). In actions of unconstitutionality, the level of the plaintiff was coded according to the level in the federal structure of the political actor filing the case, or according to the political importance of the actor filing the case: 1 =

local political party or county governmental organ; 2 = small political party (e.g. PVEM, PSN), or state governmental organs; 3 = national political party (PRI, PAN, or PRD) or Federal District governmental organs; 4 = attorney general or federal governmental organs.

*Level of Defendant.* In constitutional controversies, the level of the defendant was coded according to the level in the federal structure of the political actor responsible for the action being challenged: 1 = county (*municipio*); 2 = state level (*estado*); 3 = Mexico City, Federal District (DF); 4 = federal level (*federación*). In actions of unconstitutionality, the level of the defendant was coded according to the level in the federal structure of the political actor responsible for the action being challenged: 1 = county-level local laws or decrees; 2 = state laws or decrees; 3 = Federal District laws or decrees; 4 = federal laws or decrees.

*Level of Case (Level).* Sum of the level of plaintiff and level of defendant. Thus, the variable takes values from 2 to 8.

*Important Cases (Impcases).* Dummy variable coded 1 if the level of the case (Level) is greater than or equal to 5, and zero otherwise.

*Political Party of Plaintiff.* Whenever the plaintiff in the case was not a political party, the plaintiff's party was coded according to the party that had control of the corresponding government body. For example, if the governor of a state that challenged a federal action was from the PRD, then the plaintiff's party was coded PRD. The codes of this variable were 1 = PRI; 2 = PAN; 3 = PRD; 4 = other.

*Political Party of Defendant.* Whenever the defendant in the case was not a political party, the defendant's party was coded according to the party that had control of the corresponding government body. For example, if the PAN had a majority in a local congress where a state law was challenged, then the defendant's party was coded PAN. The codes for this variable were 1 = PRI; 2 = PAN; 3 = PRD; 4 = other.

*Decision Against PRI.* Dummy variable coded 1 whenever the decision of the case was against the PRI, and zero otherwise. Whenever the judges decided to strike down at least one part of a law or decree, that decision was considered as against the defendant and in favor of the plaintiff.

*Vote.* The votes in the Mexican Supreme Court can be unanimous, by qualified majority (at least 8 out of 11 justices), or by simple majority. The vote was coded as 1 in the first case, 2 in the second case, and 3 in the third case.

*Dissenting opinion.* Dummy variable coded 1 if a judge wrote and published a dissenting opinion, and zero otherwise.

*Degree of Fragmentation (Fragmentation 1, 2, 3).* The degree of fragmentation under which a case was decided. According to the Mexican Constitution, federal elections take place the first Sunday in July every three years. Consistent with the premise of strategic behavior by judges, this day was chosen as the cut-off point (instead of the day the new legislators or presidents assumed office). Arguably, after Election Day, the judges know what the balance of forces will be and make decisions anticipating this situation. The variable therefore is coded as

Fragmentation 1 = 1 if the decision by the Supreme Court was made from July 4, 1994 to July 6, 1997, zero otherwise.

Fragmentation 2 = 1 if the decision by the Supreme Court was made from July 6, 1997 to July 2, 2000, zero otherwise.

Fragmentation 3 = 1 if the decision by the Supreme Court was made from July 2, 2000 to July 6, 2003, zero otherwise.

## NOTES

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1. The English edition of the *Spirit of the Laws* is described here by the number of the book followed by the number of the chapter (XI, 6).

2. In the legislative branch, the greater the degree of party discipline, the more party leadership can influence outcomes in a predictable way (Cooter and Ginsburg 1996, 296). Discipline, in turn, is influenced by nomination and election procedures. In Mexico, nonconsecutive re-election and the centralized party system actually created a high degree of discipline (see Nacif 2002).

3. As Chávez has argued for the case of Argentina, the balanced dispersal of economic power and a reform coalition of nonstate actors that employs societal force to fracture institutional power are two mechanisms that produce fragmentation in the political organs (2004, 17–23).

4. Rosenberg has provided a more complete list: using the senate's confirmation power to select certain types of judges, enacting constitutional amendments to reverse decisions or change court structure or procedure, impeach-

ment, withdrawing court jurisdiction on certain subjects, altering the selection and removal process, requiring extraordinary majorities for declarations of unconstitutionality, allowing appeal from the Supreme Court to a more "representative" tribunal, removing the power of judicial review, slashing the budget, and altering the size of the court (Rosenberg 1992, 377).

5. *Amparo* is sometimes translated as *habeas corpus*, but it encompasses more than that term implies in English (see Baker 1971).

6. The Partido Nacional Revolucionario (PNR), the PRI's predecessor, was created in 1929. The political subordination of the judiciary is linked in its origins with the creation of the dominant party.

7. Not the entire judiciary, because Mexico adopted basically the "centralized" or "European" model of constitutional adjudication, with the exception of the *amparo* cases, which are heard at lower federal courts but still have *inter partes* legal effects (see Navia and Ríos-Figueroa 2005).

8. The action of unconstitutionality would be more effective without the 30-day limit. As Taylor puts it, "raising a challenge to a statute within thirty days is illogical. Either a statute should be struck down for unconstitutionality or it should not, regardless of time. Surviving thirty days unchallenged should not make a law constitutional" (1997, 163).

9. I thank an anonymous reviewer for raising this point.

10. Japan provides another example of a one-party system that lasted for quite a long time. There, the role of the Liberal Democratic Party (LDP) was similar to that of the PRI in Mexico. The LDP was formed in 1955, and held a majority in parliament until 1993. It returned to power in 1996 and held a majority until the 2003 elections, when it formed a coalition that remains in power to this day. It is interesting that Ramseyer and Rasmusen (2003, chap. 3) used decisions against the interests of the LDP as a proxy to assess judicial independence in Japan.

11. For instance, Helmke used the indexes contained in each volume of Argentine Supreme Court decisions (*Fallos de la Corte Suprema de Justicia de la Nación*) to identify cases that named the state as a party or named a decree passed by the current executive (2002, 294).

12. An exception concerns the 2002 constitutional amendment on indigenous rights. More than three hundred counties filed an action of unconstitutionality challenging this amendment. The database codes only one case, because although the Supreme Court recorded them as different cases they are not really independent observations for statistical purposes; and, of course, their sum is more than all the other cases together, so including them would make any statistical inference practically impossible. Moreover, the Mexican Supreme Court ruled that it could not decide on the constitutionality of a constitutional amendment.

13. Magaloni and Sánchez (2001) identify cases by partisan identity and explore how the court's decision might be affected by partisanship in constitutional controversies from 1994 to 2000 ( $N = 165$ ). They conclude that "in the overwhelming majority of the controversies the Supreme Court decided in favor of the PRI. . . . It thus seems that between 1994 and 2000, the new Mexican Supreme Court did not employ its newly acquired constitutional powers against the dominant political player" (2001, 20). Taking into account not only constitutional controversies but also actions of unconstitutionality, the analysis in this

study shows that it was 1997 when the Supreme Court started using its powers. As this analysis also shows, the timing is crucial: that year the PRI lost the majority in the Chamber of Deputies for the first time since it took power.

14. For the Mexican Supreme Court, there is no equivalent to the writ of *certiorari*. However, the court does have some discretion: it can dismiss a case based on procedural grounds or if it finds that jurisprudence on the issue already exists. Moreover, the court does not have a time limit to emit its decision, so it would be able to receive a case under a risky political context and wait for the elections to see if the political context changes before deciding the case.

15. Constitutional controversy 4/98 decided unanimously in favor of the city of Puebla in declaring some parts of the law unconstitutional on February 10, 2000. Constitutional controversy 21/99 decided unanimously in favor of the state congress and against the state judiciary on February 3, 2000. For an analysis of the court's role in dealing with separation of powers and federalism cases, see Zamora and Cossío 2006. For a detailed analysis of the Puebla case see Flaman 2004, ch. 5.

16. In the Tabasco case (action of unconstitutionality 9/2001), the Supreme Court nullified an amendment to the local constitution eliminating a requirement for the local congress to call extraordinary elections within five days of the nomination of an interim governor. The reform was intended to give a time advantage to the would-be interim governor favored by then-governor Roberto Madrazo. In the Yucatán case (action of unconstitutionality 18/2001), the Supreme Court nullified reforms made to the electoral code of the state, which created an electoral council subordinated to then-governor Victor Cervera Pacheco. Both governors, Madrazo and Cervera, belonged to the PRI. For the Zedillo case, see note 20.

17. Diffuse popular support "consists of a 'reservoir of favorable attitudes of good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants'" (Easton 1975, 144).

18. Caldeira and Gibson asked people questions that identify precisely what we should care about when assessing diffuse support, such as whether judicial review should be maintained despite unsatisfactory decisions, whether jurisdiction stripping should be employed, and similar items (see Caldeira and Gibson 1992).

19. The program Clarify was used to obtain the confidence intervals (see King et al. 2000).

20. Constitutional controversy 26/99 decided unanimously in favor of Congress and against the executive. This is the famous Zedillo case, in which the court received in 1999 a constitutional controversy filed by Congress against the executive but strategically waited until one month after the PRI had lost the presidency to decide against the defendant.

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