

Constitutional Review and the Selective Promotion of Case Results

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A significant majority of the world's constitutional courts publicize their decisions through direct contact with the national media. This interest in public information is puzzling in so far as constitutional judges are not directly accountable to voters. I argue that the promotion of case results is consistent with a theory of judicial behavior in which public support for courts can undermine incentives for insincere decision making. In this article, I develop a simple game theory model that identifies how case promotion is linked to judicial choice. Results of a simultaneous equations model estimating the Mexican Supreme Court's merits decisions and its choices to publicize those decisions by issuing press releases to national media outlets support an account of constitutional review in which judges believe they can influence their authority through case promotion.

Scholars have long recognized the political value of good public relations. In presidential studies, the ability to go public is considered among the chief executive's most powerful tools (Kernell 1992). Legislative research similarly finds an important role for public strategies of issue promotion (Cook 1996). Even bureaucratic analysis suggests that agency concerns over public information as shaped by the media may influence policy implementation (Carpenter 2002). Yet when it comes to judicial politics, scholars largely ignore the interest high court judges take in shaping public information.¹

This omission is especially striking for two reasons. First and foremost, high court judges engage in public relations activities. While John Marshall's defense of the United States Supreme Court's *McCulloch* decision is well known (Gunther 1969), modern constitutional court members frequently speak and publish work on judging (Barak 2002). Nearly every constitutional court in the world maintains a Website through which they distribute information on case results, and like Marshall, a number of these courts selectively promote their decisions among national media outlets.² Second, the nature of constitutional court appointment and tenure, which separates these judges from the voting public, presents

scholars with an intriguing puzzle. In so far as constitutional judges are not directly accountable to voters, it is not immediately clear why they would promote their resolutions among the mass media. Why a constitutional court would promote some resolutions and not others is even less clear.

I argue that the selective promotion of case resolutions is endogenous to judicial decision making. In particular, case promotion offers judges solutions to political problems induced by the separation of powers system and the way the media covers constitutional review. I develop this argument by extending Vanberg's (2001) model of inter-branch relations, which integrates separation of powers and legitimacy theories. I then test a set of empirical implications derived from the model using an original data set on all constitutional decisions of the Mexican Supreme Court between January 1997 and December 2002 in review of state or federal laws. Given the proposed link between judicial decision making and case promotion, I seek to simultaneously explain the Supreme Court's merits decisions and its choices to publicize the results of those decisions by issuing detailed press releases to print and television media. In what follows, I first review how selective case promotion fits within a

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¹Davis (1994) is a notable exception.

²An exhaustive search of all European and American high, constitutional, or international court Websites suggests that 71% of these courts issue press releases summarizing at least some of their resolutions.

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theory of judicial choice. I then develop the theoretical model and identify its empirical implications. In the subsequent section, I discuss my research design and results. I conclude with a few remarks on the implications of this research.

Separation of Powers, Legitimacy, and Public Relations

Comparative researchers have increasingly turned to separation of powers models in order to explain why some constitutional courts appear unwilling to hold political officials accountable for their behavior, no matter how suspect (Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Vanberg 2001). Although these models assume that judicial decisions are driven by policy preferences, they also posit that interbranch politics may influence choice (Epstein and Knight 1998, 22–51). Legislators and executives ordinarily enjoy control over judicial institutions including jurisdiction, budgets, and tenure. This control may grant politicians undue influence over the judiciary, especially where judicial institutions are relatively easy to change (Ferejohn 1999; Ramseyer and Rasmusen 2001). In light of these mechanisms of control, separation of powers models predict that high courts will be increasingly likely to strategically avoid conflict by upholding challenged public policies as the importance relevant officials assign to those policies increases (Helmke 2002, 294).

Separation of powers models are theoretically precise, but they cannot explain why courts sometimes challenge powerful officials. Judicial legitimacy theorists propose that because the coercive sources of judicial power are minimal, courts heavily rely on societal beliefs in their legitimacy to gain compliance. Legitimacy here is conceptualized as *diffuse public support* or deep commitment to the institutional integrity of the judiciary (Caldeira and Gibson 1992, 638). Although legitimacy theory is designed to explain personal acceptance of unpopular decisions, it is a short step from the individual to the institutional level.

Vanberg integrates key insights from these two approaches (also see Friedman 2000). In his model, courts and politicians interact under the sometimes-watchful eye of a public, which is capable of punishing recalcitrant officials if aware of the conflict. In this sense, diffuse public support provides courts with a sort of political cover; however, this is only true if people are informed about the decisions they are purportedly enforcing. A key empirical implication of this model is that constitutional courts should be more likely to strike down public policies

when the public is able to monitor the reactions of their representatives (2001, 347). In the sense that the public is better able to monitor when the media covers a conflict, the model suggests that media inattention presents judges with a significant political problem. Without media coverage, courts may be forced to strategically defer to political interests. While the Vanberg model nicely integrates separation of powers and legitimacy theories, he treats the likelihood that the public will be informed about interbranch conflicts as exogenous. But what if courts are able to influence their media coverage? It would seem likely that judges might wish to exercise that power. In the model that follows, I identify conditions under which public relations can address the problem posed by media inattention and ask how the ability to influence media coverage might influence decision making itself.

If Vanberg is correct, media inattention presents constitutional judges with a political problem, but because reporters do not perfectly translate jurisprudential language, so does media attention. Although the press frequently communicates merits decisions accurately, they often misinterpret jurisprudential rationale, an outcome that judges themselves cite as frustrating (Davis 1994, 31). Indeed, the Mexican Supreme Court, the empirical object of this study, has explicitly stated a concern with the way reporters cover the jurisprudential theories that support their decisions.³ In the model that follows, I consider how the incentive to ensure accurate reporting might interact with the more political motivation described above.

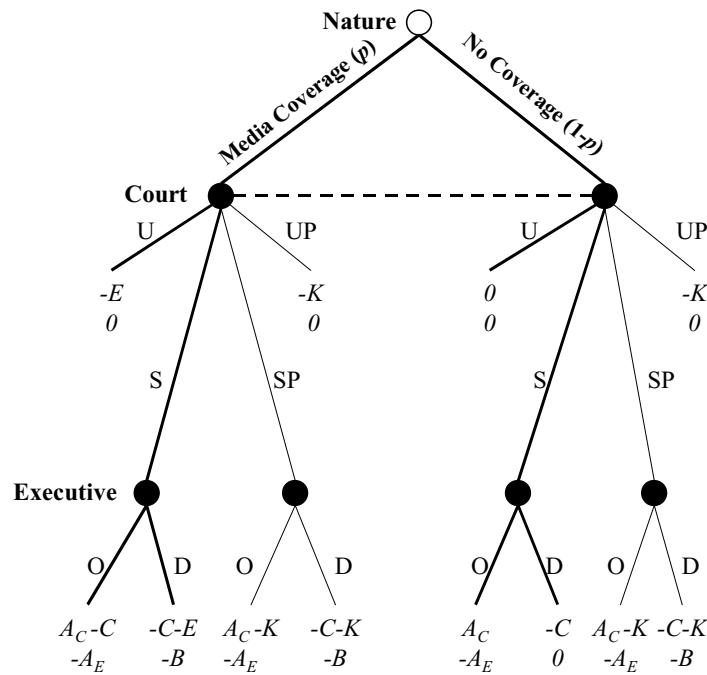
To summarize, the selective promotion of case resolutions might be able to address two problems consistent with a model that integrates separation of powers and legitimacy theories. Promoting cases both may be a means of generating media attention when it is particularly useful and ensuring accurate communication of jurisprudence when the media decides to cover a decision. The following model considers the degree to which case promotion can resolve these problems.

A Separation of Powers Theory of Case Promotion

Figure 1 depicts an extensive form game of incomplete information played between a constitutional court and a national executive, though the second player may be

³This policy is published in “Compromiso, órgano informativo del Poder Judicial de la Federación,” número 1, julio-agosto 1999, pp. 21–22. [Commitment: A Newsletter of the Judicial Branch of the Federation, 1 (July-August):21–22].

FIGURE 1 Extensive Form of Baseline and Promotion Models



Legend

Parameters

- p Probability of media coverage
- A_C Court's value of alternative policy
- A_E Cost of alternative policy for Executive
- B Cost of public backlash
- E Cost of media errors
- K Cost of promoting a case

Actions

- U Uphold
- UP Uphold and promote
- S Strike down
- SP Strike down and promote
- O Comply
- D Defy

Assumptions

$A_C \in \Re; A_E, B, E, K > 0; |A_C| > E, K$

Note: Figure 1 specifies the extensive form of both the Baseline and Promotion versions of the game. The Actions available to the players only in the Baseline version are bolded.

conceptualized as any government official.⁴ I begin by discussing a baseline model in which the court cannot promote its opinion. I then analyze the same model but allow the court to promote its decision in the national media. The bolded lines in Figure 1 indicate the only actions available in the baseline model. The court is asked to review a policy associated with the executive. It may uphold the status quo or strike it down, substituting an alternative policy. If the court strikes it down, the executive chooses whether to comply with the alternative. I conceptualize noncompliance broadly. Although noncompliance always involves the continued implementa-

tion of the status quo, noncompliance may also involve taking retributive actions against the court, the severity of which I parameterize in the court's payoff function.

Before either player moves, there is a random draw from a set that determines the level of media attention, and by implication, public awareness of the case. Either the media covers the case and accurately communicates the court's merits decision or the media ignores the decision and the public goes uninformed about the interaction. Denote the probability that the media covers the case p . The court does not observe the outcome of the draw, but it knows the distribution from which it is drawn (i.e., the court knows p). Since the executive moves after the decision it observes whether the media has covered the case. As a result, the executive is perfectly informed about

⁴I thank Georg Vanberg for his suggestions concerning how to simply endogenize case promotion in the context of his model.

the history of the game. Thus, a strategy for the court is a function s_C , that assigns an action, *Uphold* or *Strike Down*, to its single information set, depicted by the dashed lines in Figure 1. A strategy for the executive is a function s_E that assigns an action, *Comply* or *Defy*, to each of its two singleton information sets.

I assume that judicial choice is primarily a function of policy preferences. I fix the value of the status quo policy at 0 for both players. If the executive faithfully implements an alternative, the court receives $A_C \in \mathfrak{R}$. This allows the court’s evaluation of the status quo relative to the alternative to vary across cases. The court pays a cost $C > 0$ if the executive fails to comply. Although I assume that the media accurately covers the merits decision, consistent with the judicial belief that reporters often mischaracterize jurisprudential details, I assume that the court pays a cost $E \in (0, |A_C|)$ if the media covers the resolution. This cost represents the value the court places on reporters accurately communicating their decisional rationale. If the media ignores the case, there is no rationale to misrepresent and the court saves E .⁵

The executive is assumed to prefer the status quo over any alternative and will pay a cost $A_E > 0$ if she complies with an unfavorable decision. If the executive fails to comply and the media is covering the case, she pays a cost among her constituents for defying the court, $B > 0$. A natural interpretation of these parameters incorporates the concepts of specific public support for the policy under review (the public’s issue-related preferences) and diffuse public support for the court. If we assume that the executive is responsive to public preferences, then A_E may be interpreted as specific public support for the status quo policy and B as diffuse public support for the court. Interpreted in this way, the model allows executives to defy highly legitimate courts over valuable policies, but it also allows executives to implement decisions that are unpopular among their constituents, as long as diffuse public support is sufficiently large. This is a sensible result to

⁵I take the judicial interest in ensuring accurate coverage as a professional end in itself; however, it may be that judges perceive the inaccurate communication of their rationale as threatening to diffuse or specific public support. If the written opinion is the primary tool through which courts persuade dissatisfied people or propagate the myth of impartiality (Gibson, Caldeira, and Baird 1998, 345), a key component of legitimacy, inaccurate reporting may affect their control over diffuse support. If this is true, then a reasonable alternative modeling choice is to have the court pay $E' > E$ when it strikes down the policy, since this is where the court faces the largest set of dissatisfied citizens for whom the written opinion may be persuasive. While reasonable, this change only increases the incentive to publicize decisions striking down the status quo and does not affect the decision-making results.

TABLE 1 Baseline Model Equilibrium Predictions

Court Preferences	Executive Preferences: Value of Status Quo Relative to a Public Backlash	
	Large ($A_E > B$)	Small ($A_E \leq B$)
Court prefers the status quo ($A_C \leq 0$)	Case 1 For all p $s_C = (Uphold)$ $s_E = (Defy, Defy)$	Case 2 For all p $s_C = (Uphold)$ $s_E = (Comply, Defy)$
Court prefers the alternative ($A_C > 0$)	Case 3 For all p $s_C = (Uphold)$ $s_E = (Defy, Defy)$	Case 4 4A. For $p \leq \frac{C}{C + A_C}$ $s_C = (Uphold)$ $s_E = (Comply, Defy)$ 4B. For $p > \frac{C}{C + A_C}$ $s_C = (Strike Down)$ $s_E = (Comply, Defy)$

Note: Table shows SPE strategy profiles in the baseline model for given values of the parameters. The court assigns probability p to the history *Media Coverage* and $1 - p$ to the history *No Coverage*.

allow for since the heart of the diffuse public support concept is that people are willing to accept unpopular decisions as long as the decisional source is legitimate.

For any given values of the parameters, there is a unique pure strategy subgame perfect equilibrium (SPE). Table 1 lists the SPE strategy profiles in the baseline model for given values of the parameters (see appendix for proofs).

Table 1 partitions the combinations of judicial and executive preferences over the status quo into four general cases. The court prefers the status quo to the alternative in Cases 1 and 2 ($A_C \leq 0$) and prefers the alternative in Cases 3 and 4 ($A_C > 0$). The value the executive assigns to the status quo is greater than the cost of the public backlash in Cases 1 and 3 ($A_E > B$). In Cases 2 and 4 the value of the status quo is smaller than the cost of noncompliance ($A_E \leq B$). For Cases 1, 2, and 3 the court’s equilibrium strategy is to uphold the status quo. In the first two cases, it does this sincerely. As should be expected, upholding the status quo over an inferior alternative is always optimal (Cases 1 and 2). This captures the reasonable implication that courts do not veto public policies they sincerely like—*strategic judicial behavior is essentially deferential*.⁶ In Case 3, where the court prefers the alternative policy yet the executive will defy all decisions, the court strategically

⁶See Helmke (2005) for a model of judicial behavior in which courts veto policies that they sincerely prefer.

upholds the status quo in order to avoid being defied. The model only predicts that courts will be influenced by media coverage in Case 4, a world in which the expected public backlash is sufficient to induce compliance and the Court prefers the alternative policy. As Vanberg predicts, for relatively low values of p , $p \leq \frac{C}{C+A_C}$, the court will strategically uphold the status quo because it is insufficiently likely that the public will be able to monitor the interaction. For sufficiently large p , the court will take advantage of likely media coverage and strike down the status quo.

The results of the baseline model capture Vanberg's analysis, though he does not explicitly discuss the conditional effect I now introduce. If courts are unable to influence their media coverage the following proposition is consistent with the equilibrium results.

Proposition 1. *The relationship between media coverage and judicial activism is conditioned by the importance of the status quo relative to diffuse public support (i.e., the size of A_E relative to B). When policy importance is relatively small, courts should be more likely to strike policies down as p increases; however, when importance is relatively large, there should be no relationship between p and the court's decision.*

In other words, courts should be more aggressive when the public is likely to be able to monitor the interaction, but only if the status quo is not overly important. When it is, no amount of public monitoring will enhance judicial authority.

The baseline model highlights the two problems judges may be able to resolve through public relations. First, it is the uncertainty surrounding the public's ability to monitor the interaction that produces strategic judicial behavior in Case 4. If the court were sure that the media would cover the resolution, it would have no incentive to uphold the status quo. Thus, if judges are able to induce media attention for their resolutions, they may be able to eliminate the necessity to strategically defer in situations like Case 4. Second, in all cases, the Court expects to lose pE in equilibrium, the cost of imprecise media coverage discounted by the probability that the media will report on the case. This problem may be resolvable via public relations as well. The choice publicly to promote a decision may give judges the ability to clarify their resolutions, improving on the reporters' description of the case. I now turn to a version of the model in which the court is able to produce accurate media coverage through case promotion, which allows me to evaluate the plausibility of solving these problems through case promotion.

Promotion Model

The promotion model, also depicted in Figure 1, is identical to the baseline model in all but one regard. I allow the court to promote a resolution among the national media at a cost $K > 0$. K measures the administrative costs associated with promoting a case and the opportunity cost of promoting one decision over another. Maintaining the assumption that constitutional politics is ultimately about policy, I assume $|A_C| > K$.⁷ I further assume that if the court promotes the resolution, the media accurately translates information about the case to the public. Clearly, this is a strong assumption, but it reduces the set of parameters and relaxing it will not materially affect the implications of the model. What matters is that case promotion at least increases the chances of quality media coverage.⁸ The remaining structure of the model is identical to the baseline. A strategy for the court continues to assign a single action to its single information set; however, the set of actions now includes the following choices: *Uphold*; *Uphold and Promote*; *Strike Down*; and *Strike Down and Promote*. An executive strategy assigns an action, *Comply* or *Defy*, to each of its four singleton information sets.

Like the baseline, the promotion model produces implications for judicial decision making; however, it also suggests implications for the selective promotion of case results. More generally, it suggests limits to case promotion as a strategy for resolving the problems of media inattention and reporter inaccuracy. As before, there are four general cases to consider. Table 2 summarizes the results, which suggest the following proposition if courts can control their media coverage.

Proposition 2. *Courts should be less likely to strike down policies as importance increases relative to diffuse public support; however, there should be no relationship between media coverage and decision making.*

It is still the case that courts sincerely uphold the status quo in Cases 1 and 2 and strategically uphold the status quo in Case 3; however, it is no longer the case that the court will uphold the status quo for sufficiently low p in

⁷This assumption reduces the number of cases I consider. Allowing $K > |A_C|$ does not affect the relative incentives to promote decisions when courts either uphold or strike down; however, it would allow for some equilibria in which courts strategically uphold the status quo in order to avoid having to pay the cost of promotion, a result that only obtains for small A_C . Since policy is generally perceived to be paramount, the model assumes away this possibility.

⁸Davis (1994) provides empirical support for this claim in the United States, and my own investigation of the Mexican data, which I briefly discuss below, supports it as well.

TABLE 2 Promotion Model Equilibrium Predictions

Court Preferences	Executive Preferences: Value of Status Quo Relative to a Public Backlash	
	Large ($A_E > B$)	Small ($A_E \leq B$)
Court prefers the status quo ($A_C \leq 0$)	Case 1	Case 2
	1A. For $p \leq \frac{K}{E}$ $s_C = (Uphold)$ $s_E = (Defy, \dots, Defy)$	1A. For $p \leq \frac{K}{E}$ $s_C = (Uphold)$ $s_E = (Comply, Defy, Comply, Defy)$
	1B. For $p > \frac{K}{E}$ $s_C = (Uphold and Promote)$ $s_E = (Defy, \dots, Defy)$	1B. For $p > \frac{K}{E}$ $s_C = (Uphold and Promote)$ $s_E = (Comply, Defy, Comply, Defy)$
Court prefers the alternative ($A_C > 0$)	Case 3	Case 4
	1A. For $p \leq \frac{K}{E}$ $s_C = (Uphold)$ $s_E = (Defy, \dots, Defy)$	4A. For $p \leq \frac{C + A_C - K}{C + A_C - E}$ $s_C = (Strike Down and Promote)$ $s_E = (Comply, Defy, Comply, Defy)$
	1B. For $p > \frac{K}{E}$ $s_C = (Uphold and Promote)$ $s_E = (Defy, \dots, Defy)$	4B. For $p > \frac{C + A_C - K}{C + A_C - E}$ $s_C = (Strike Down)$ $s_E = (Comply, Defy, Comply, Defy)$

Note: Table shows SPE strategy profiles in the promotion model for given values of the parameters. The court assigns probability p to the history *Media Coverage* and $1 - p$ to the history *No Coverage*.

Case 4. Instead, when p is sufficiently low, the court will strike down the status quo and create its own media coverage via case promotion. For sufficiently high values of p , the court merely strikes down the status quo taking advantage of the media’s expected coverage. In this sense, the model suggests that public relations can solve the problem of strategic judicial deference associated with uncertainty about public information (Case 4 behavior), but only if the value of the status quo is sufficiently low. If the status quo is highly valued, then as before, no amount of public monitoring will change the dynamics of the interaction. In short, public relations can help constitutional courts but there are limits—limits imposed by the political importance of the status quo.

Finally, the promotion model suggests that courts will promote both decisions upholding the status quo and decisions striking it down; however, the incentives to promote these different types of resolutions are distinct.

Proposition 3. *Courts should be more likely to promote decisions that strike down the status quo than those that uphold it. This relationship should be especially strong when the media is unlikely to cover a case.*

Using the results in Table 2, let $p^U = \frac{K}{E}$ and $p^S = \frac{C + A - K}{C + A - E}$. The court will promote a resolution upholding the status quo if and only if $p \geq p^U$; it will promote a

resolution striking down the status quo if and only if $p < p^S$. First, note that p^U does not depend on whether the court upholds the status quo sincerely or strategically; it is identical in Cases 1, 2, and 3. This means that whatever the reason for upholding the status quo, whether sincere affinity for the policy or strategic deference, the choice to publicize the result is governed by the same logic. Second, recognize that if there is a p that satisfies the p^U condition (and the Court promotes a decision upholding the status quo), then the same p satisfies the p^S condition (and the Court promotes a decision striking it down); however, the converse is not true. There are two possibilities. Either the cost of promotion is less than the cost of media inaccuracy or it is not (i.e., $K < E$ or $K \geq E$). If $K < E$, $p^U \in (0, 1)$ and will be satisfied for sufficiently high p , yet p^S is satisfied for *all* parameter values, because $\frac{C + A - K}{C + A - E} > 1$. Alternatively, if $K \geq E$, the court will never promote a decision upholding the status quo, because $p^U \geq 1$, and no p is this large. For the same values of K and E , $p^S \in (0, 1)$, and it will be satisfied for sufficiently low p .

The intuition behind this result is as follows. Whether the court upholds the status quo or strikes it down, it faces the problem associated with imprecise media coverage (i.e., the parameter E); however, when the court strikes down a policy it faces the additional political problem of noncompliance. If the cost of promotion is sufficiently small, there will be cases in which the court promotes

decisions upholding the status quo, but any time it is optimal to promote a decision upholding the status quo, it is optimal to promote a decision striking it down. This explains the direct relationship between the decision type and case promotion; the following is the intuition behind the conditional relationship. Continue to assume that K is small enough so that p^U can be satisfied. At high values of p , the court will promote all kinds of decisions, resolving reporter inaccuracy, but at low values of p the incentive to promote in order to address inaccuracy disappears because it is unlikely that there will be any inaccuracy to correct. At such values of p , only decisions striking down the status quo will be promoted in order to deal with potential noncompliance.

In addition to suggesting a testable empirical hypothesis, this result suggests that there are different limits to public relations as a strategy for resolving media inattention and reporter inaccuracy. As before, the policy importance of the status quo limits the ability of the court to resolve the potential noncompliance problem resulting from media inattention. In contrast, the limit on the ability of courts to resolve reporter inaccuracy is only imposed by the cost of promoting cases. That is, for arbitrarily small K , courts can always address this problem via case promotion. To review then, the theoretical models suggest three testable hypotheses. Both models speak to judicial decision making, but only the promotion model generates a prediction for case promotion.

Decisional Hypotheses

H1 (Baseline Model): If a court is unable to control its media coverage, it should be more likely to strike down public policies when the media is likely to cover the outcome; however, this relationship is conditioned by the importance of the status quo policy for relevant political actors. When the value of status quo is sufficiently high, media coverage should have no effect.

H2 (Promotion Model): If a constitutional court is able to control its media coverage, it should be less likely to strike down important policies, but media coverage should not affect its decision making.

Case Promotion Hypothesis

H3 (Promotion Model): If a constitutional court is able to control its media coverage, it should be more likely to promote decisions striking down

public policies than those upholding policies. This relationship should be especially strong when the media is unlikely to cover the resolution.

I now turn to the data I use to test these implications.

Research Design

Mexico at the turn of the twenty-first century presents an excellent environment for testing the argument. As Helmke (2002, 291) notes, strategic models are more likely to explain judicial behavior in settings where institutions are relatively unstable. Although a monumental judicial reform in 1994 significantly expanded the Court's jurisdiction, tenure was changed from life to a nonrenewable 15-year term, its membership was reduced from 26 to 11, all ministers were forced to resign, and a new Court was appointed. This was not the first such change during the twentieth century. In fact, the size of the Supreme Court changed four times between the adoption of the 1917 Constitution and the 1994 reform. Rules governing judicial tenure changed five times over that period. In all, the federal constitutional articles governing the judiciary have been amended over 69 times since 1928 (Carranco Zúñiga 2000, 97). Also, Mexican historians and political scientists point to at least three clear instances of institutional change during the twentieth century that were designed to reign-in an activist Supreme Court (Domingo 2000, 713; Schwarz 1973, 313). Thus, it would appear at least facially valid to assume that the ministers of the Supreme Court who took the bench in early 1995 might have perceived a risk of further institutional tinkering.

Second, the Supreme Court's membership did not change between February 1995 and December 2003, when two members of the original 11 stepped down. This absolute stability in membership allows me to control for aggregate judicial ideology. Unless preferences are changing over the course of the period studied, the aggregate ideology of the court, whatever that may be, is controlled by design.

In addition, three key assumptions of the theoretical model are met in the Mexican case. First, the Court has formally stated that it wishes to ensure accurate media coverage of its decisions.⁹ Second, there is reason to believe that Supreme Court coverage was largely neutral during the period I study. The Supreme Court's own internal analysis of its daily coverage in 25 newspapers and magazines during the first half of 1999 classified 87% of

⁹See note 25.

the 3,222 stories as neutral and 93% as either neutral or positive. Of the 230 articles judged to include a negative opinion of the Court, 173 (75%) involved a reporter quoting an individual that disagreed with the decision, rather than a negative editorial.¹⁰ Further, many of the remaining 57 articles had nothing to do with constitutional cases, but rather concerned judicial reform proposals. Third, there is evidence that the Court has been able to generate coverage through case promotion. My own analysis suggests that the newspaper *La Jornada* was roughly 1,300% more likely to cover a case in which the Court issued a press release than a case for which it did not. This result holds up to a variety of multivariate specifications in which I control for elements of newsworthiness.¹¹

The final advantage of the Mexican case concerns judicial legitimacy. Diffuse support is controlled by research design, unless it is rapidly changing over the short time period of the study. This result is highly unlikely given the slow way diffuse support has been shown to develop (Gibson, Caldeira, and Baird 1998, 353). Still the study does require that diffuse support be greater than zero. If it is not, then the court will have no incentive to inform the public, since a public backlash against a recalcitrant official will be costless. Unfortunately, there is no precise measure of diffuse public support for the Mexican Supreme Court during the period studied here.¹² That said, the available public opinion data suggests that diffuse support may not have been completely absent. In a series of national opinion surveys conducted by the newspaper *Reforma* between December 2000 and March 2002, respondents were asked to evaluate the job of the Supreme Court. During this period, the percentage of respondents expressing favorable opinions varied between 40% and 50%, statistics that climb as high as 87% when excluding nonresponses and neutral ratings.¹³

¹⁰See “Quiénes hablaron bien y quienes hablaron mal de la Suprema Corte de la Nación en el primer semestre de 1999? [“Who spoke well and badly of the Supreme Court of the Nation during the first half of 1999?”]. This report is on file with the author. It may be used with the permission of the Supreme Court.

¹¹Results available upon request.

¹²Unfortunately, neither the World Values Survey nor the Latinobarómetro include items appropriate for measuring Supreme Court support. The World Values Survey asks about public trust in the “legal system” (Question V137, 1995 Wave, <http://www.worldvaluessurvey.org>) while the Latinobarómetro asks about trust in the “judiciary” (Question V.2.32, <http://www.latinobarometro.org>). Given the high levels of public confusion in Mexico about what institutions fall with the judiciary or the legal system, these are highly imprecise measures of institutional commitment to the Supreme Court itself.

¹³During this period, the director of public opinion for *Reforma* was political scientist Alejandro Moreno, the country in-

Data

I use an original data set on the universe of Supreme Court constitutional decisions in review of state or federal laws made in plenary session between January 1, 1997 and December 31, 2002.¹⁴ The data set includes three kinds of constitutional actions: amparo appeals, constitutional controversies, and actions of unconstitutionality. Amparo is a form of individual constitutional complaint wherein persons, organizations, and corporations may seek redress in federal court against alleged governmental violations of individual rights. The Supreme Court hears amparo suits on appeal from lower federal district and circuit courts. In contrast, the Supreme Court hears constitutional controversies and actions of unconstitutionality in the first instance. In constitutional controversies, the Court resolves jurisdictional conflicts between levels of government and across branches of government within a level (i.e., federalism and separation of powers issues). In actions of unconstitutionality, the Court exercises abstract review over the constitutionality of state laws, federal laws, and international treaties.¹⁵ With one limited exception, the Supreme Court’s jurisdiction in all three cases is mandatory.¹⁶ Thus, the data set includes all constitutional claims that met the Court’s statutorily defined jurisdiction.¹⁷ This is the first

investigator for the 2000 wave of the World Values Survey. Information on the *Reforma* sampling design can be obtained at <http://www.reforma.com/encuestas> or by contacting the author. I have been unable to locate national public opinion results for the period between 1997 and 2000.

¹⁴All replication material is available at <http://mailer.fsu.edu/~jstaton>. Copies of full Supreme Court opinions are available on the Web at <http://www.scjn.gob.mx>.

¹⁵On the differences between these actions see Carranco Zúñiga (2000) or Cossío (2002).

¹⁶Pursuant to a 1988 constitutional amendment, the Supreme Court enjoys a limited power of discretionary review through what is called *atracción* (Mexican Constitution, Article 107, Section 8). If the Court deems an issue raised in an appeal outside of its appellate jurisdiction fundamentally important to the law, it may exercise *atracción*. In addition, the Federal Attorney General may request that the Court take up a case of national interest, and circuit courts may certify appeals for Supreme Court review.

¹⁷Between 1995 and 2002 the Supreme Court resolved 3,084 cases. The data set restricts the number of analyzable cases to 1,536. Many cases with distinct case numbers address identical legal issues and resulted in identical resolutions resolved by an identical vote on the same day. For example, a major constitutional reform on indigenous rights reform passed by Congress in the summer of 2001 generated 292 distinct constitutional controversies filed by municipalities from across the country. Each of the 292 cases challenged the procedures Congress adopted when considering the amendment. These cases make up nearly 10% of the Court’s total constitutional caseload, yet they were all formally resolved on September 6, 2002, by the same vote and for the same reason. These cases are clearly not independent of each other.

quantitative study of which I am aware that includes the full range of constitutional actions, an important feature for the measurement of policy importance.¹⁸

Measurement and Estimation

Since I will test both decisional and case promotion hypotheses, I require two dependent variables. The first, *Strike*, indicates whether the Court invalidated a policy challenged through one of the three constitutional actions. *Strike* is coded 1 if the Court supported at least one complainant argument made on the merits, and 0 otherwise. The second dependent variable, *Press*, is coded 1 if the Court issued a press release announcing the result, and 0 otherwise. Press releases on case outcomes typically summarize the major components of the resolution, including the parties to the case, the constitutional question, and a brief statement of the rationale. Formally, press releases are issued by the Court's public relations office (DCS). Since the DCS director remains in close contact with the Supreme Court president, there is little reason to believe that the kinds of cases the DCS publicizes fail to reflect the Court's own preferences.¹⁹

If the promotion model is correct, these variables are jointly determined. We can estimate their joint distribution and test the hypotheses specified above by the following recursive simultaneous equations model.

$$\begin{aligned} \text{Strike} &= \beta_1(\text{Importance}) + \beta_2(\text{Coverage}) \\ &+ \beta_3(\text{Importance} * \text{Coverage}) + \alpha_1 X_1 + u_1 \\ \text{Press} &= \beta_4(\text{Strike}) + \beta_5(\text{Coverage}) \\ &+ \beta_6(\text{Strike} * \text{Coverage}) + \alpha_2 X_2 + u_2, \end{aligned}$$

where *Importance* is a measure of political importance assigned to the challenged policy by Mexican federal officials, *Coverage* measures the court's expectations about subsequent media coverage, and the X_i are vectors of control variables for each equation. As recommended by Greene (1998), this model can be estimated via bivariate probit.

I measure federal policy importance by appealing to the kind of constitutional claim under review and the level of the public official against which the claim was raised. Two assumptions underlie the measure. Federal officials

¹⁸Cossío (2002) uses a qualitative research design and neither Magaloni and Sánchez (2001) nor Schwarz (1973) study all three actions.

¹⁹Although many press releases are drafted by DCS staff, the language is approved by individual ministers, the DCS director or his immediate assistant.

care more about federal policies than state policies, and they care more about the policies challenged through constitutional controversies and actions of unconstitutionality than they do about those challenged through amparo. Given these assumptions, I generate a scale of increasing federal importance, coded from 0 to 3, ranging from a state law challenged via an amparo suit to a federal law challenged under the action of unconstitutionality or constitutional controversy.²⁰

The first assumption would appear relatively uncontroversial. On average, the Federal Congress likely cares more about the federal penal code than it does about the penal code of Nuevo León. On the other hand, the first assumption deserves further justification. Resolutions to amparo suits settle only the immediate controversy being adjudicated.²¹ In contrast, decisions in both constitutional controversies and actions of unconstitutionality have the potential of setting general effects.²² With respect to the measure, I argue that federal officials ought to care more about resolutions that have the potential of setting precedent than about those that do not.

Constitutional controversies and actions of unconstitutionality also deal with what we might understand as generically more significant political issues. Typical constitutional controversies involve state-municipal conflicts over the autonomy of local governments, state-state boundary disputes, and federal interbranch conflicts over competing claims on power (Fix-Fierro 1998). Actions of unconstitutionality frequently involve political party challenges to the constitutionality of electoral laws, rules quite essential to political interests. These are cases that affect large numbers of people and large sums of money.

²⁰The results are robust to an alternative coding scheme where I combine the state policies into one category and where I use a dummy variable distinguishing between state and federal policies.

²¹The Court may establish formal jurisprudential theses in amparo. A jurisprudential thesis is binding on all lower federal court judges; however, it is not clear that theses significantly affect bureaucratic decisions to enforce laws. Legal principles may become part of the jurisprudence when the Court establishes that it has invoked a similar principle in five consecutive cases (Ley de Amparo, Article 192). These theses may be abrogated by a coalition of eight Ministers voting contrary to provision under analysis (Article 194).

²²When the Federation moves a constitutional controversy against the laws or acts of a state or municipality, decisions supporting the federation's claim, when made by a super-majority of eight ministers, set general effects. Similarly, if a state moves a constitutional controversy against a municipality, the Court's decision will govern that state if it rules with the state by a super-majority vote of eight. In all other cases, the Court's decisions only affect the immediate parties to the case. Similarly, for the action of unconstitutionality, the effects of the decision are general if the Court resolves the case by a super-majority of eight votes. Otherwise, the decision only affects the immediate parties to the case (Mexican Constitution, Article 105).

In contrast, state entities have extremely limited standing in amparo; political parties have none. Also, individuals are prohibited from challenging electoral codes through amparo. Finally, the Court itself has argued that amparo suits are generically less important than constitutional controversies and actions of unconstitutionality.²³

I measure the Court's expectations regarding subsequent media coverage by appealing to prior national print media coverage of the case or the conflict that generated it. Here I assume that the Court estimates a higher probability of ex post coverage when the case has already been covered by the print media. Because each member of the Supreme Court receives a daily news briefing with photocopied articles of every print story that even tangentially relates to the federal judiciary, print coverage is a natural way for them to generate beliefs about subsequent levels of public information (also see Epstein and Segal 2000). Specifically, I use the newspaper *La Jornada* as a proxy for general media attention.²⁴ Coverage is coded 1 if *La Jornada* ran an article on the controversy prior to the decision and 0 otherwise. Unsurprisingly, cases that received prior coverage represent only 3% of the total. On the other hand, prior coverage is an excellent predictor of whether the resolution will receive subsequent media attention. *La Jornada* covered 72% of the resolutions to cases on which it had previously run a story; it only covered 3% of the resolutions to cases that it had previously ignored.

Controls

In the *Strike* equation, I control for three potential influences on judicial decision making. Iaryczower, Spiller, and Tommasi (2002, 704) suggest that courts should be more deferential under unified government, because it is easier for presidents and legislators to coordinate on a response to undue judicial activism. To capture the three phases of unified-divided government in Mexico between 1997

²³In April 2002, the ministers agreed to begin returning amparo appeals to the benches, an effort designed to leave the full Court free to consider what the ministers themselves claim raise more important questions of constitutional law—constitutional controversies and actions of unconstitutionality. See Acuerdo [Accord] 4/2002, Suprema Corte de Justicia de la Nación.

²⁴Preliminary analysis on the internet and inside Mexico at research university libraries offered little confidence in the reliability of electronic searches for articles concerning the Mexican judiciary. *InfoLatina*, Lexis-Nexis's Spanish search engine and all utilities maintained by the main national newspapers produced highly erratic results, especially for the mid 1990s. Accordingly, the best strategy appeared to be a daily, full text search. *La Jornada* maintains a publicly accessible Website that contains issues dating from March 29, 1996 to the present. In addition, *La Jornada* is one of a small number of widely circulated newspapers known for its independence (Lawson 2002, 69).

and 2002, I include dummies for the period of truly divided national government under Vicente Fox (*Divided*) and the period of unified PRI government, when the PRI only enjoyed a plurality of support in the legislature under Ernesto Zedillo (*Unified-Pl*). Thus, the period of truly unified government under Zedillo is the base category.²⁵ In order to address the possibility that Supreme Court decisions were affected by partisan factors (Magaloni and Sánchez 2001), I also include a dummy variable coded 1 if authority responsible for the challenged policy is either a priísta executive or a majority priísta legislature and 0 otherwise.²⁶

I also control for the identity of the plaintiff moving the constitutional action, capturing the notion that the quality of legal representation should vary according to plaintiff type and using the assumption that political status is a reasonable proxy for litigant resources (McGuire 1995; Sheehan, Mishler, and Songer 1992). The issue of legal representation is an especially relevant issue in Mexico, where access to good counsel is limited and the disparities between the legal representation of various parties is often great (Rubio, Magaloni, and Jaime 1994, 119–34). Controlling for plaintiff identity involves estimating a series of dummy variables that account for a large number of plaintiff categories.²⁷ The base category is the modal plaintiff, a private individual.

In the Press equation, I control for a Supreme Court-based theory of case promotion. In 1999, the Supreme Court issued a formal policy statement defining the DCS mission. In addition to its charge to ensure that media coverage accurately reflects jurisprudence, the DCS was asked to publicize the results of cases that resolve intrinsically “important” issues of Mexican law.²⁸ Unfortunately, the policy does not define what the ministers mean by an intrinsically important issue, and there does not appear to be a ready-made measure of this concept. Still, it would appear that *Importance*, as defined above, might capture exactly what makes a particular constitutional question more intrinsically important than another. The questions

²⁵The first period ended on September 1, 1997 and the second on December 1, 2000.

²⁶Partisanship data for the state legislatures and governors may be found at the Website for the Mexican Senate (<http://www.senado.gob.mx>) and in Lujambio (2000).

²⁷These categories include: individual or private business, municipality, union, civil or religious association, small political party, corporation, large political party (PRI, PAN, PRD), university, state legislature, state executive, federal commission, federal congress, state judiciary, federal judiciary, and federal executive. The results are robust to various ordinal measures of complainant political status.

²⁸See supra note 3.

TABLE 3 Determinants of Supreme Court Merits Decisions and Press Releases

	Including Procedural Dismissals Model 1			Excluding Procedural Dismissals Model 2		
	β	RSE	p	β	RSE	p
Strike Equation						
Importance	-.131	.02	<.001	-.120	.02	<.001
Coverage	1.12	.81	.164	1.56	.34	<.001
Importance * Coverage	-.367	.27	.178	-.603	.04	<.001
Unified-Pl Government	.213	.11	.048	.264	.13	.044
Divided Government	.342	.22	.117	.351	.22	.115
Party	.082	.09	.362	.078	.08	.323
Complainant Types						
Corporation	.292	.06	<.001	.251	.07	.001
Large Political Party (PRI, PRD, PAN)	.741	.15	<.001	.904	.13	<.001
State Legislature	.494	.17	.004	.624	.17	<.001
Federal Executive	7.06	.58	<.001	6.10	.31	<.001
Constant	-.910	.042	<.001	-.864	.06	<.001
Press Equation						
Strike	1.88	.33	<.001	2.13	.14	<.001
Coverage	2.01	.21	<.001	1.80	.29	<.001
Strike * Coverage	-.956	.37	.010	-1.02	.17	<.001
Importance	.282	.07	<.001	.325	.05	<.001
Góngora	-.121	.15	.415	-.106	.11	.333
Constant	-2.14	.34	<.001	-2.25	.27	<.001
		N = 1005			N = 852	
		$\rho = -.558$			$\rho = -.723$	
		$\chi^2 = 6.35$			$\chi^2 = 45.68$	
		p = .011			p < .001	

Note: Bivariate results displayed with robust standard errors reported clustered on the type of constitutional action. These models include dummy variables for 14 of the 15 complainant categories. Individuals are the base category. The full results are all available upon request.

the Court addresses ought to matter more as the level of government challenged and precedent-setting value of the decision increase. They are intrinsically important questions for exactly the same reason that federal political officials ought to care more about the outcomes of these cases. Accordingly, we ought to expect the Supreme Court to be more likely to publicize its decisions as the federal importance of the policy increases.

Finally, I control for the Genaro Góngora Pimentel regime. The Supreme Court selects its own president from among all current members. Each president serves a four-year, nonrenewable term. In 1999, the ministers elected Góngora, and it is popularly assumed that the Court's public relations activities became increasingly aggressive and strategic following his election. It was under Góngora that the DCS conducted its content analysis of the Court's media coverage. In order to address this possibility, I include a dummy variable *Góngora*, which is coded 1 for all

cases resolved during President Góngora's tenure and 0 otherwise.

Results

Table 3 displays results from two bivariate probit estimations. Model 1 includes observations on all constitutional cases resolved by the Supreme Court between 1997 and 2002. Model 2 excludes those cases that the Court dismissed for procedural default (i.e., the Court did not reach the underlying constitutional issue). There is a fair reason to treat procedural dismissals as equivalent to denials, as Model 1 does. Mexican federal judges have a great deal of freedom to find procedural default in their cases, and scholars have argued that they manipulated these rules in order to reduce the judicial caseload (Rubio, Magaloni, and Jaime 1994). On the other hand, some dismissals

would appear to be clearly required by law, suggesting that these cases are fundamentally different from those in which the Court resolved the underlying constitutional issue.²⁹ Whatever the correct interpretation of a procedural dismissal, the estimates and their significance levels are nearly identical across the two models.

The results provide support for both the baseline and case promotion models against the null hypotheses but there is not universal support for one theoretical model over the other. Consider the Strike equation. Both theoretical models suggest that federal policy importance should influence the Court's decisions, and it clearly does. In Models 1 and 2, $\beta_1 + \beta_3 * Coverage$, the effect of *Importance* on the merits decision, is negative and significant for both values of *Coverage*, suggesting that the Court is decreasingly likely to strike down policies as federal importance increases.³⁰ That said, the effect of media coverage is more consistent with the baseline model than the promotion model. Indeed, H1 predicts that $\beta_2 + \beta_3 * Importance$, the effect of *Coverage* on the merits decision, should be positive and significant at relatively low values of *Importance* yet insignificant at high values. This is precisely the result, though the effect is stronger in Model 2. In both models the effect of *Coverage* is positive and significant for the first two values of *Importance* (the state law cases), but the size of the effect decreases for larger values of *Importance* and it is insignificant.³¹

²⁹In 2001, the Supreme Court dismissed a municipal challenge to President Fox's decision to expropriate a plot of communal land for the construction of a new airport after Fox reversed his decision and the cause of action ceased to exist. Clearly is not a dismissal that should be treated like a denial of the underlying constitutional claim.

³⁰The coefficients and standard errors of this effect when *Coverage* is 0 are given in the table. When *Coverage* is 1 the effect is $-.50$ in Model 1 and $-.72$ in Model 2, with standard errors of $.28$ and $.07$ respectively, statistically significant effects at the $.10$ and $.05$ levels, respectively. We might also study the Court's potentially strategic decisions by asking whether it was particularly likely to uphold important PRI-affiliated laws during the period of unified federal government. Given the theoretical relationship between *Coverage* and *Strike* this involves estimating a quadruple interaction term and 10 constituent interaction terms. Unfortunately the correlation between the various interaction terms was too great to estimate simultaneously the parameters. That said, a simple check of the data suggests that the Court struck down 0 of 14 PRI-affiliated policies during this period. While this is generally consistent with the model, it is impossible to test this theory econometrically with the existing data.

³¹In both models, the marginal effect of *Coverage* when *Importance* is 0 and its statistical significance are given by the coefficient of *Coverage* in Table 3. In Model 1, when *Importance* is 3, this effect is $-.02$ and the standard error of that effect is $.19$, far from significant. Similarly, in Model 2, when *Importance* is 3 the effect of *Coverage* is $-.25$ with a standard error of $.34$.

These results provide support for Vanberg's model in a strikingly different political environment. Given the obvious differences between Germany and Mexico, this is a fairly surprising result. Still, the results do not necessarily falsify the promotion model. Recall that I have assumed that the courts can ensure public monitoring by promoting its cases, yet I have measured case promotion with press releases. If press releases do not perfectly ensure media coverage (which they do not) then it is possible that media coverage would continue to have some impact on decision making. In any event, the added value of the promotion model is its potential to explain case promotion, something the baseline model does not address.

If media coverage is endogenous, H3 suggests that we should estimate a positive relationship between *Strike* and *Press*, but that this relationship should be conditioned by media coverage. This suggests that $\beta_4 + \beta_6 * Coverage$ (the effect of *Strike*) should be positive but $\beta_6 < 0$, indicating that the effect is attenuated for cases in which the media is already covering the conflict. The data provide strong support for H3. The positive and significant coefficient for *Strike* in both models suggests that when *La Jornada* fails to cover a conflict, the Court's decision to promote is strongly related to whether it strikes down the status quo. The coefficient on the interaction term is negative and significant, indicating that when there is prior press coverage the positive relationship between *Strike* and *Press* is attenuated, exactly as suggested by H3. Moreover, the relationship between *Strike* and *Press* is still positive and significant when *La Jornada* has covered the case.³²

While this statistical result is encouraging, the substantive effects detailed in Table 4 offer a compelling summary of the case promotion results. Consider the left half of the table, where *La Jornada* has not been covering the case. Whatever the importance of the policy for federal officials, the Court is unlikely to publicize a resolution in which it upholds the law under attack. Merely changing the direction of the merits decision increases this probability terrifically. Indeed, there is not a level of policy importance for which the percentage change is less than 750%. This is consistent with an incentive to publicize in order to ensure compliance when the media is unlikely to cover the resolution.

Now consider the right half of the table, where *La Jornada* has already been covering the case. For all levels of policy importance, the Court is fairly likely to issue a press release, consistent with the added incentive to ensure accurate coverage of its opinion when the media is likely to cover the resolution; however, the percentage increase in the probability of the Court releasing a press release

³²In Model 1 the effect of *Strike* when *Coverage* is 1 is $.93$ with a standard error of $.54$. In Model 2, the effect is 1.12 with a standard error of $.12$.

TABLE 4 Predicted Probabilities of the Supreme Court Issuing a Press Release by Federal Policy Importance, Merits Decision and Prior Coverage

Policy Importance	No Prior Coverage			Prior Coverage		
	Policy Upheld	Policy Struck	% Change	Policy Upheld	Policy Struck	% Change
Low Importance ^a	.01	.35	3,400	.40	.75	88
Medium Importance ^b	.04	.57	1,325	.62	.89	44
High Importance ^c	.08	.68	750	.72	.94	31

Note: Predicted probabilities of a press release based on Model 1 in Table 3. Cell entries are the predicted probability of the Court striking down a public policy for selected values of *Importance*, *Coverage*, *Strike*, and *Strike * Coverage*, during the Góngora regime. The third column of each half of the table shows the percentage increase in the probability of issuing a press release caused by changing the Court's merits decision from *Uphold* to *Strike Down*.

^aAmparo against a state law.

^bAmparo against a federal law.

^cConstitutional controversy or action of unconstitutionality against a federal law or executive order.

associated with a change in the merits decision is moderate; it is never greater than 88%. This largely reflects the higher predicted probabilities in the fourth column, but it also clearly makes the substantive point. There is always an incentive to publicize in order to ensure accurate coverage when the media is likely to cover the resolution, but when the media is not, the merits decision is a powerful predictor of whether the court publicizes, precisely because these are the decisions for which public support is most helpful.

I conclude by noting that the results provide some support for the control variables suggested by the literature. In the first equation, the identity of the complainant clearly appears to influence decision making. Corporations, large political parties, state legislatures, and the federal executive were all more successful than individuals. In addition, the measures of unified-divided government are both positive, suggesting that the Court was more aggressive in the periods of partially divided and fully divided government (under Vicente Fox) than it was during the period of unified government. Interestingly, *Party* is not significant in either model, undermining the notion that the Court was in some way specially attached to the PRI. Turning to the second equation, the probability of a press release being issued increased with federal policy importance. This result is consistent with the Court's account of its press releases. Finally, it does not appear that Genaro Góngora was more likely than his predecessor to push the DCS to issue a press release.

Conclusion

This article develops a theory of judicial public relations embedded within a separation of powers model of con-

stitutional review. It suggests that the decisions of constitutional judges to promote their cases are endogenous to constitutional politics. This theory has two specific implications for constitutional review. First, we should observe constitutional judges engaging in strategic public relations. I find empirical support for this implication in Mexico from 1997 to 2002, where the Mexican Supreme Court's choices to publicize its cases were intimately tied to whether it chose to strike down public policies or not. Indeed, the Court publicized decisions striking down important federal policies with near certainty. The second implication is that the ability to influence public information through case promotion should break the connection between judicial uncertainty about public information and decision making predicted by Vanberg's model. I find less support for this claim, but continue to find support for Vanberg's approach, which underscores the importance of information for judicial power.

This article suggests broader implications for democratic governance. Judicial public relations suggests a route through which judges can increase their authority (Widner 2001) by creating accurate media attention where appropriate. Still, the model suggests that the effectiveness of judicial public relations is limited. As I discuss above, public relations strategies for resolving noncompliance problems are limited by the importance officials assign to the policies under review, and the ability to resolve reporter inaccuracy is undermined by the generalized costs of promoting cases. Further, knowing that judges behave as if public relations works and knowing that public relations actually works are two distinct matters. As a first step, scholars might ask whether judges are generally capable of influencing the quantity and quality of their media coverage. If the kinds of cases judges promote are the same cases likely to be covered absent judicial intervention, selectively

promoting case results may not increase the probability that a particular resolution is covered. Of course, even if judges are only publicizing inherently newsworthy stories, going public clearly affords them the opportunity to put their own spin on their resolutions.

I close by noting a caveat related to judicial public relations, one perhaps recognized by John Marshall in the early nineteenth century. When presidents go over the heads of legislators and take their interests directly to the voters, they do what comes naturally to successful politicians (Kernell 1992, 2–6). In contrast, judges are not selected for their ability to successfully influence mass opinion. Indeed, the legitimacy of unelected judges is presumed to depend on their isolation from daily political life. In light of this difference between a judge and a politician, judges likely face an important tradeoff when considering whether to pursue public relations, an inherently political activity. While they may obtain benefits from influencing their media coverage, they may risk generating an image of a politicized court. It is noteworthy that Marshall’s essays following the McCulloch resolution were published under a pseudonym. While this was the norm for much political commentary in the early nineteenth century, Marshall’s choice to publish anonymously surely must have appeared obvious to a man so interested in developing an image of an apolitical federal bench. How modern courts navigate the trade-off between publicity and politicization may be a critical determinant of the aggressiveness with which judges pursue their interests and by implication the degree to which judges are able to build their institutional strength.

Appendix

Baseline Model

The solution concept is subgame perfect equilibrium. Consider the executive’s choice in the baseline model first. If $A_E > B$, the executive always defies the court. This is the strategy (*Defy, Defy*) in Cases 1 and 3. If $A_E \leq B$, the executive complies if the media has covered the case and defies if the media has not. This is the strategy in (*Comply, Defy*) in Cases 2 and 4.

Next consider the court’s expected payoffs given the executive’s strategy. The expected utility of upholding the status quo is $-pE$, whatever the executive’s strategy. If the executive plays (*Comply, Defy*), the court’s expected utility of striking down the status quo is $p(C + A_C - E) - C$. If the executive plays (*Defy, Defy*), the court’s expected utility of striking down the status quo is $-pE - C$.

There are two possible cases to consider. Either $A_C < 0$ (the court likes the status quo) or $A_C \geq 0$ (the court likes the alternative). Whatever the value of A_C , if the executive plays (*Defy, Defy*), the court plays *Uphold* because $-pE > -pE - C$. This establishes that the strategy profiles in Cases 1 and 3 in Table 1 are SPE. Also, if $A_C < 0$, the court will play *Uphold* even if the executive plays (*Comply, Defy*), because $p(C + A_C - E) - C < -pE$, which establishes Case 2.

Finally, if $A_C \geq 0$ and the executive plays (*Comply, Defy*), the court’s strategy depends on p because $p(C + A_C - E) - C$ may be larger or smaller than $-pE$. For $p > \frac{C}{C + A_C}$ the court will play (*Strike Down*); if $p \leq \frac{C}{C + A_C}$, the court will play (*Uphold*). This establishes Cases 4A and 4B.

Promotion Model

Here I wish to establish the claims made in Table 2. Consider the executive’s choices first. As before, the executive defies all decisions if $A_E > B$. This is the strategy (*Defy, . . . , Defy*) in Cases 1 and 3. If $A_E \leq B$ the executive complies with decisions covered by the media and defies those decisions the media ignores. This is (*Comply, Defy, Comply, Defy*) in Cases 2 and 4. The court’s expected utilities if it plays *Uphold* or *Strike Down* (i.e., it does not promote) are identical to those in the baseline model. If the court plays (*Uphold and Promote*) it expects $-K$, the cost of promotion. If the court plays (*Strike Down and Promote*) and the executive plays (*Comply, Defy, Comply, Defy*), the court expects $A_C - K$. If the court plays (*Strike Down and Promote*) and the executive plays (*Defy, . . . , Defy*), the court expects $-C - K$.

Again, there are two possible cases to consider: $A_C < 0$ or $A_C \geq 0$. Begin by assuming that $A_C < 0$. In such a case, we already know that the court will not play (*Strike Down*) because it always does better with (*Uphold*) for the reasons given above; however, it is also clear that the court will never strike down and promote because upholding and promoting is always better if $A_C < 0$. This is because $-K > -K + A_C$ when $A_C < 0$. Thus, the only question is whether the court will play (*Uphold*) or (*Uphold and Promote*). This requires asking when $-K > -pE$. Solving for p indicates that the court will uphold and promote if and only if $p > \frac{K}{E}$. This establishes the results in Cases 1A, 1B and 2A, 2B in Table 3.

Now consider $A_C \geq 0$. If the executive plays (*Defy, . . . , Defy*), striking down is never better than upholding for the reason given in the baseline model. Similarly, striking down and promoting is never better than upholding and promoting. If the court plays (*Strike Down and Promote*) in this case it gets $-C - K$ and it could get

–K by upholding and promoting. Thus, this case is exactly like Case 1, and the court will play (*Uphold and Promote*) if and only if $p > \frac{K}{E}$. If $p \leq \frac{K}{E}$, the court will play (*Uphold*). This establishes the results in Cases 3A and 3B.

Finally, if $A_C \geq 0$ and the executive plays (*Comply, Defy, Comply, Defy*), (*Uphold and Promote*) is never optimal, because the court could use (*Strike Down and Promote*) and get $A_C - K$, which is larger than $-K$ since I have assumed $|A_C| > K$. Further, simply upholding is also never optimal because $A_C - K$ is clearly larger than $-pE$. Thus, the only question is whether the court will play (*Strike Down*) or (*Strike Down and Promote*). This involves asking when $A_C - K \geq p(C + A_C - E) - C$, which it is if and only if $p \leq \frac{C + A_C - K}{C + A_C - E}$. If $p \leq \frac{C + A_C - K}{C + A_C - E}$, the court plays (*Strike Down and Promote*); if $p > \frac{C + A_C - K}{C + A_C - E}$, the court plays (*Strike Down*). This establishes Cases 4A and 4B.

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