

An Essay on the Emergence of Constitutional Courts: the Cases of Mexico and Colombia

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Abstract

This essay examines the emergence of the Mexican Supreme Court and the Colombian Constitutional Court as powerful political actors. Mexico and Colombia are both troubled democracies in a region where courts have historically been marginalized from political disputes. Both nations undertook constitutional transformations in the 90s designed to empower their respective national high courts as a means of effectuating democracy. Yet the two courts clearly play different roles in their respective democratic orders. The Mexican Supreme Court primarily facilitates democracy by effectuating vertical and horizontal separation of powers whereas the Colombian Constitutional Court primarily deepens the social bases of democracy by effectuating rights. Why the Mexican Supreme Court plays a role akin to the one played by the Marshall Court in the early American republic and why the work of the Colombian Constitutional Court bears a familial relationship to the Warren Court is a puzzle. Both courts are, after all, guardians of constitutions with procedural and substantive components. Both courts, moreover, were transformed as part of a global wave of judicial empowerment that occurred in the late twentieth century. The argument is that the role or mission that courts undertake in transitional democracies is shaped both by short-term political bargains *and* long-term societal transformations. In short, both the political and the intellectual environment in which courts operate matter.

Outline

I. Introduction

- A. The marginalization of the developing world in scholarly accounts of constitutionalism.
- B. Latin America is a theoretically rich region for the study of constitutional failure and success. *See* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L. J. 1 (2006).
- C. Scholars largely ignore the role of courts in troubled democracies.

- D. Issue: why does the Mexican Supreme Court play a role akin to the one played by the Marshall Court in the early American republic and the work of the Colombian Constitutional Court bear a familial relationship to the Warren Court?

II. A new umpire in Mexican politics

- A. The Mexican Supreme Court is primarily an umpire that handles disputes between the different branches of government while playing only a limited role in effectuating rights.
- B. Mexico's authoritarian past shaped the politics of the Mexican Supreme Court and the attitudes of its justices.
- C. The election of Ernesto Zedillo as president and the Judicial Reform of 1994.
1. The reforms were constitutionally proper but democratically suspect.
 2. Goals of the reforms: (a) to effectuate judicial independence and (b) to move Mexico towards, what I have called elsewhere, the political court model of judicial review. See Miguel Schor, *Judicial Review and American Exceptionalism*, 46 OSGOODE HALL L.J. ___, <http://ssrn.com/abstract=1081385> (forthcoming 2008).
- D. The Mexican Supreme Court has replaced the Mexican President as the arbiter of disputes between political actors.
- E. Judicial decisions on abortion test how courts conceptualize their role in a political order. The plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992), for example, defends the Court's abortion doctrine against a perceived political backlash. Similarly, the reasoning employed by the Mexican Supreme Court in its abortion decision, *Acción de Inconstitucionalidad 10/2000*, illustrates how the Mexican Supreme Court envisions its role in Mexican politics.

III. A new anomalous democratic actor in Colombian politics

- A. Mexico had a stable and "open" authoritarian regime throughout the twentieth century whereas Colombia experienced a stable but "closed" democracy throughout the twentieth century.
- B. Colombia adopted a new Constitution in 1991 that was marked by constitutional illegality and a strong democratic provenance.
- C. The new constitution created a watchdog, the Colombian Constitutional Court, which has become, somewhat surprisingly, a powerful democratic actor. The emergence of this court rests on a short-term political bargain (the adoption of the writ of tutela) and on longer-term transformations in attitudes towards rights.

- D. The writ of tutela allows any person whose rights are aggrieved to file an action that must be handled expeditiously. The success of the tutela can be measured by the explosion of claims brought by ordinary citizens. The success of the tutela has also helped create a constituency for the legal system that has allowed the Colombian Constitutional Court to weather political storms.
- E. The role played by the Colombian Constitutional Court also rests on a transformation in how rights are conceptualized. Balancing tests have replaced legal formalism as the Court has undertaken a larger role in effectuating rights.
- F. Colombia's first abortion case in 1994, Sentencia No. C-133/94, illustrates how the Colombian Constitutional Court envisions its role in Colombian politics.

IV. Conclusions

- A. Lumping Mexico and Colombia politically and juridically:
 - 1. Mexico was an "open" authoritarian regime throughout the twentieth century whereas Colombia was a "closed" democratic one.
 - 2. Today both nations are troubled but vigorous democracies.
 - 3. Both nations empowered their national high courts in the 90s. Mexico's reforms were democratically suspect but constitutionally proper; Colombia's were democratic but constitutionally improper.
- B. Both Mexico and Colombia illustrate the judicialization of politics as courts around the globe gained power at the expense of democratically elected branches.
- C. The Mexican Supreme Court bears a familial relationship to the Marshall Court.
- D. The Colombian Constitutional Court bears a familial relationship to the Warren Court.
- E. Some constitutional theorists posit that activist courts are democratically suspect and the proper job of courts in a democracy is to play a limited role.
- F. Lessons drawn from the American experience may not translate well abroad. See Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257 (2008). Activist courts may play an important role in constructing democracy in the developing world. The reasoning employed by the Colombian Constitutional Court in Sentencia No. C-133/94 has potentially a greater democratic pay-off than the reasoning employed by the Mexican Supreme Court in Acción de Inconstitucionalidad 10/2000.