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VOTING PROTOCOLS AS INFORMAL JUDICIAL INSTITUTIONS: THE POLITICS OF ENFORCEABILITY AND STRATEGIC BREACHING

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Abstract Constitutional courts operate under a framework of formal and informal rules. While formal rules have been extensively studied, our understanding of informal rules remains limited. Courts often rely on internal practices, traditions and unwritten customs developed over time, posing a significant challenge due to their hidden nature. Numerous constitutional courts lack detailed voting protocols in their statutes and internal regulations, leaving essential aspects to the court's discretion, such as, inter alia, the voting order, deliberation style, outcome versus issue voting and tie-breaking protocols. By employing a case study of strategic breaching of informal voting protocols in the Mexican Supreme Court, this article highlights the complexity of enforcing informal voting rules given that external actors may be unaware of them, along with other factors. Even when informal rules are broadly known, certain circumstances may diminish the efficacy of informal sanctions addressing their breach. Thus, key judicial players, such as chief justices or judge-rapporteurs, may take advantage of the informal rules of voting protocols to advance their policy preferences.

Keywords: comparative law, constitutional law, constitutional courts, informal institutions, voting protocols, majority voting, court deliberations.

I. INTRODUCTION

Although performing a conceptually different role from parliaments, apex and constitutional courts in ordinary and constitutional adjudication often also resort to voting to resolve cases.[1] Courts employ various formal and informal rules surrounding voting mechanisms determining the conversion of votes to judicial outcomes.

Constitutional and statutory provisions governing courts tend to provide a decision-making majority threshold. Consequently, much of the existing

[1] J Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts' (2014) 123 YaleLJ 1692.

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literature on voting rules concerns the theoretical justification of majority rule.[2] Conversely, adjacent voting rules, particularly informal ones, remain unexplored despite their fascinating complexity.[3]

Constitutional courts' statutes and internal regulations are often silent on many aspects of voting procedure, which is thus left to judicial discretion. Courts often adopt essential voting mechanisms to remedy this silence, including regarding whether courts vote on redacted drafts or assign cases post-conference discussion, and whether discussion should happen concerning legal issues or merely potential outcomes. Occasionally, courts themselves choose the thresholds required for making decisions.

Informal institutions pertaining to voting mechanisms have been documented in various contexts, from apex courts in common law jurisdictions to formal constitutional courts/apex courts in civil law countries and even in international courts. For example, in the United States (US), an informal rule provides that a four-justice minority suffices to grant *certiorari*.[4] In Peru, the Constitutional Court informally required a supermajority to issue interpretative judgments even before the rule was implemented by statute.[5] *Stare decisis* arose informally in the Chilean Supreme Court.[6] In Germany, most methods of the *Bundesverfassungsgericht* are determined by practice and informal rules, not legal provisions.[7] Finally, in the Grand Chamber of the European Court of Human Rights, an unwritten rule specifies the number of times a judge may take the floor.[8]

This article attempts to analyse the enforceability of voting protocols as informal institutions, ie unwritten customary rules developed by courts to regulate voting procedures and assign judicial outcomes through preference aggregation. To do so, it relies on a case study of the Mexican Supreme Court in which the Chief Justice successfully saved a statute from being declared unconstitutional by changing the informal voting protocol, advancing policy preferences aligned to those of the majoritarian party.

The article's contribution to the literature is three-fold. First, the case study provides empirical evidence strengthening previous theoretical claims that

[2] C Caviedes, 'Is Majority Rule Justified in Constitutional Adjudication?' (2021) 41 OJLS 376; G Krishnamurthi, 'For Judicial Majoritarianism' (2019) 22 UPaJConstL 1201.

[3] M Kumm, 'Constitutional Courts and Legislatures: Institutional Terms of Engagement' (2017) I CatólicaLRev 55, 62.

[4] J Leiman, 'The Rule of Four' (1957) 5 ColumLRev 975.

[5] C Hakansson-Nieto, 'Los Principios de Interpretación y Precedentes Vinculantes En La Jurisprudencia Del Tribunal Constitucional Peruano' (2009) 23 Díkaion 57; 'TC Solo Necesitará Cuatro Votos Para Emitir o Apartarse de Un Precedente Vinculante' *La Ley* (Lima, 14 October 2015) <https://bit.ly/3LIJW2n>.

[6] MA Requa, 'A Human Rights Triumph? Dictatorship-Era Crimes and the Chilean Supreme Court' (2012) 12 HRLRev 79, 84 (fn 27).

[7] U Kranenpohl, 'The U.S. Supreme Court's Strategic Decision-Making Process' in R Rogowski and T Gawron (eds), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (2nd edn, Berghahn Books 2016) 155.

[8] H Keller and C Heri, 'Deliberation and Drafting: European Court of Human Rights (ECtHR)' in H Ruiz-Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2019).

visibility and awareness of informal voting institutions may increase their potential enforceability. Second, it delves into the circumstances that may diminish the efficacy of informal sanctions, such as polarization, electoral preferences, public perception and a desire to protect the institution's reputation. Finally, it strengthens the claim that within informal institutions, several key judicial players may seek to advance their policy preferences by strategically breaching such rules.

The remainder of the article is structured as follows. Section II analyses informal voting protocols, placing them within the broader context of informal practices typically adopted by apex and constitutional courts. Section III offers the case study of the Mexican Supreme Court. It first justifies the selection of the case study, noting that the Mexican jurisdiction is ideal for exploring informal decision-making practices due to its public deliberation model. Second, it explores the breach of voting protocols that occurred in Acción de Inconstitucionalidad (AI) 64/2021 and the role of the Chief Justice and Judge-Rapporteur in securing a result favourable to the government. Section IV draws lessons from the case study and explores the external enforceability of informal rules through public awareness and the factors that may diminish the efficacy of informal sanctions in ensuring compliance. Section V provides concluding remarks and offers an agenda for future research.

II. VOTING PROTOCOLS AS INFORMAL JUDICIAL INSTITUTIONS: A THEORETICAL DISCUSSION

Constitutional courts are governed by a set of formal and informal rules. Formal institutions are 'rules and procedures that are created, communicated, and enforced through channels widely accepted as official'.[9] Conversely, informal institutions are 'socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels'.[10]

Formal rules contained in constitutions, statutes and codes have been an object of study for a long time, but informal rules remain largely unknown. Courts often reach their decisions informed by internal practices, customs, traditions and non-written usages developed through years of internal arrangements. Analysing such informal rules is challenging. Constitutional courts tend to hold private deliberations and value secrecy in handling administrative duties. Judges are careful and sometimes reluctant to disclose internal practices.[11]

There is a growing body of literature exploring informal institutions within the judiciary. A critical subset of this literature concerns how informal institutions influence judicial selection. For example, some scholars have

[9] G Helmke and S Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2 PerspectivesPol 725, 727.
[10] ibid.
[11] A Trochev, 'Patronal Politics, Judicial Networks and Collective Judicial Autonomy in Post-Soviet Ukraine' (2018) 39 IPSR 662.

delved into the informal relationship between judges and other judicial and political players affecting court organization and judicial behaviour.[12] Others have engaged in empirical endeavours analysing how informal networks and informal selection mechanisms affect judicial careers and foster patronage in various jurisdictions, such as Mexico,[13] the Czech Republic,[14] the Philippines,[15] Georgia[16] and Ukraine.[17]

Some studies have focused on the impact of informal institutions on *de facto* judicial independence[18] in several Latin American countries.[19] Some have analysed other informal institutions surrounding the judiciary, such as mechanisms of judicial discipline.[20] A growing body of literature also analyses informal institutions concerning key judiciary players, such as court presidents, which exercise considerable informal powers.[21]

Although the literature on informal institutions within the judiciary is growing, systematic study of decision-making procedures is still rare in both national and international courts, although some exceptions exist.[22] Epstein and Knight identified specific unwritten rules of the US Supreme Court as informal institutions in 1997.[23] More recently, Lindquist has argued that informal rules in many appellate courts govern key voting

[12] B Dressel, R Sanchez-Urribarri and A Stroh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 AnnRevLSocSci 413.

[13] A Pozas-Loyo and J Ríos-Figueroa, 'Anatomy of an Informal Institution: The "Gentlemen's Pact" and Judicial Selection in Mexico, 1917–1994' (2018) 39 IPSR 647.

[14] Kosař analysed an informal group formed by presidents of regional courts and their impact on the Czech judiciary. D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016) 179–81.

[15] B Dressel and T Inoue, 'Informal Networks and Judicial Decisions: Insights from the Supreme Court of the Philippines, 1986–2015' (2018) 39 IPSR 616.

[16] N Tsereteli, 'Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions' (2022) 47 RevCEEL 167.

[17] Trochev (n 11).

[18] Previously, Hayo and Voigt had highlighted the relevance of informal factors to *de facto* judicial independence: B Hayo and S Voigt, 'Explaining *de facto* Judicial Independence' (2007) 27 IntlRevLEcon 269.

[19] A Pozas-Loyo and J Ríos-Figueroa, 'Instituciones Informales e Independencia Judicial de Facto' (2022) 29 Política&Gobierno 1.

[20] CG Geyh, 'Informal Methods of Judicial Discipline' (1993) 142 UPaLRev 243.

[21] A Blisa and D Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Governance' (2018) 19 GermLJ 2031; D Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice' (2017) 13 EuConst 96.

[22] For an analysis of international courts, see J Meierhenrich, 'The Practice of International Law: A Theoretical Analysis' (2013) 79 Law&ContempProbs 1. See also the special issue of *Law and Contemporary Problems* broadly analysing the practices of the International Criminal Court, edited by J Meierhenrich. See also JL Dunoff and MA Pollack, 'International Judicial Practices: Opening the "Black Box" of International Courts' (2018) 40 MichJIntlL 47, analysing informal practices within decision-making procedures of international courts such as opinion drafting, judicial deliberation and other broader decision-making mechanisms.

[23] L Epstein and J Knight, *The Choices Justices Make* (CQ Press 1997) 118.

issues, such as deliberation secrecy, opinion assignment and consensual decision-making.[24]

Voting protocols are a narrow subset of broadly understood judicial decision-making institutions, constituted by rules regulating how votes translate into judicial outcomes. Despite their importance, voting protocols are a tricky field of study. Since many statutes of constitutional courts outline only limited aspects of the voting procedure, such as the required majority or the intervention order during deliberation, courts are tasked with creating informal rules that interplay with formal ones to fill those gaps.[25]

While in some cases, courts may opt for creating formal rules under their regulatory powers, in many cases, informal institutions are set instead by practice and custom, surviving subsequent court compositions by tradition or inertia. Understanding and analysing informal voting protocols is thus particularly challenging since they are not set in any statute and often lack visibility to external actors.[26] Contrary to other informal practices, such as informal judicial networks formed by dozens or hundreds of judges, unwritten voting protocols in constitutional and apex courts are mostly known to the few judges or law clerks taking part in judicial deliberations or working within the heart of the court. Courts often do not make such informal rules public on their official websites or guidelines and are even reluctant to do so.[27]

Awareness of the existence and functioning of such informal institutions is often raised only through judges' individual opinions,[28] interviews, or archival research based on internal papers, which may only become known many years later. Given these challenges, little comprehensive research has been done on informal voting protocols in most jurisdictions,[29] although in

[24] SA Lindquist, 'Stare Decisis as Reciprocity Norm' in CG Geyh (ed), *What's Law Got to Do With It?: What Judges Do, Why They Do It, and What's at Stake* (Stanford University Press 2011) 173. Even the respect for precedent has been identified as an informal rule, as it has not been formalized in a statute. See TR Johnson, 'The Supreme Court Decision Making Process' in TR Johnson, *Oxford Research Encyclopedia of Politics* (OUP 2016).

[25] Some scholars have identified this set of operative rules as complementary: HJ Lauth, 'Informal Institutions and Democracy' (2000) 7 Democratization 21, 25.

[26] M Lando, 'Secret Custom or the Impact of Judicial Deliberations on the Identification of Customary International Law' (2022) 81 CLJ 550, 552. Lando makes a case that secret deliberations, unknown to scholars, shape how the International Court of Justice adopts methodologies concerning the identification of customary international law.

[27] R Revesz and P Karlan, 'Nonmajority Rules and the Supreme Court' (1988) 136 UPaLRev 1067, 1067; IP Robbins, 'Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?' (2002) XXXVI SuffolkULRev 1, 2.

[28] Particularly when dissenting opinions claim a breach of informal institutions has occurred. Epstein and Knight deem dissents denouncing breaches of informal court rules as 'informal sanctions'. Epstein and Knight (n 23) 121.

[29] See V da Silva, 'Deciding without Deliberating' (2013) 11 ICON 557, 584, dwelling on the importance of internal court rules and customary practices, arguing that switches in those informal rules may lead to different judicial outcomes.

the US, systematic treatment of certain aspects has occurred concerning the rule of four, vote switching and the so-called shadow docket.[30]

The following section will present a case study of a breach of voting protocols, analysing its implications for a comparative discussion.

III. A CASE STUDY OF THE MEXICAN SUPREME COURT AND INFORMAL VOTING PROTOCOLS: LESSONS FOR A COMPARATIVE DISCUSSION

A. Why Mexico? A Fertile Ground for Observing Informal Voting Protocols

The Mexican jurisdiction has two key characteristics that make it optimal for a case study on informal voting protocols. First, constitutional adjudication operates under a public deliberation model. Second, several political events have polarized the judiciary in recent years and created identifiable internal judicial factions, making it an ideal scenario to test policy preference advancement through strategic behaviour. Both factors will be briefly reviewed.

Most courts hold secret deliberation procedures. Judges gather and discuss behind closed doors, where law clerks are frequently not allowed. Knowledge of how informal rules are applied during decision-making is restricted. In courts functioning under closed deliberation, the analysis of features pertaining to voting protocols is primarily focused on formal elements of statutory and constitutional provisions. Even though some scholars have reflected on informal voting protocols in closed deliberation jurisdictions, the primary legal sources come from the courts' opinions and dissents—which may not truly reflect internal agreements—or secondary sources such as interviews, papers and internal notes discovered many years later. However, some courts function under a public deliberation model. Judges of apex courts argue and discuss publicly in several jurisdictions, such as Switzerland, Brazil and Mexico.[31]

Contrary to closed deliberation models, public deliberation grants access to the very core of informal voting protocols. Scholars and legal community members are allowed to see which unwritten rules the court has developed and how consistently such rules are followed and applied. Unwritten protocols become clear.

[30] Epstein and Knight (n 23) 118–25; A Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (OUP 2007) 101; R Davidson, 'The Mechanics of Judicial Vote Switching' (2004) 38 SuffolkULRev 17; DS Cohen, 'A Tale of Two Vote Switches' (2021) 100 TexLRev 39; SI Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, Hachette Book Group 2023).

[31] G Biaggini, 'Constitutional Adjudication in Switzerland' in A von Bogdandy, PM Huber and C Grabenwarter (eds), *The Max Planck Handbooks in European Public Law* (OUP 2020); V da Silva, 'Big Brother Is Watching the Court' (2018) 51 Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America 437; F Pou Giménez, 'Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court' in R Davis and D Taras (eds), *Justices and Journalists* (CUP 2017).

Public deliberation models provide an interesting idea of transparency in ordinary or constitutional adjudication, but their theoretical validity is controversial. Some scholars have claimed that public deliberation might hinder debate, having a negative impact on judges who behave differently, knowing the public eye scrutinizes them.[32]

Adopting a model of public deliberation does not change the fact that several aspects of the voting protocol are left to be filled by courts through informal institutions. Their need and creation are analogous to those in courts practising closed deliberation; it is merely the arena in which they are applied that changes.

Intuitively, public deliberation should contribute to a different dynamic concerning how courts apply their informal voting institutions. The literature has not empirically analysed the impact of public deliberation on the development and functioning of informal voting protocols. However, making a case for public deliberation negatively affecting the consolidation of informal voting protocols is challenging. Public deliberations allow the legal community and other actors to monitor the consistency of the court's application of its unwritten protocols.[33] It is reasonable to assume that judges, feeling observed by cameras, television and the legal community, would feel more compelled to show consistent and principled behaviour. Judges might receive additional motivation to conform to rules that observers have perceived to exist.

Under the closed deliberation model, by contrast, it is reasonable to assume that judges deciding behind closed doors would be less deterred from breaking informal rules and applying them inconsistently to advance their policy preferences since external pressure upon breaches is diminished. Without the indirect pressure from the political and legal community, closed deliberations are likely to produce rules that are not widely known by external actors, leaving their enforcement to the judges. Thus, all else being equal, it can be hypothesized that a court might be more consistent in the application of informal voting protocols when their deliberations are public than when they are reserved under a standard closed system.

A second characteristic of the Mexican jurisdiction is that, since the election of President López Obrador under the Movimiento de Regeneración Nacional (MORENA), the judiciary has faced a polarized context,[34] which has translated

[32] Pou Giménez ibid; da Silva ibid. For research on judges' perception of public deliberation, see V da Silva, 'Do We Deliberate? If So, How?' (2017) 9 EurJLegalStud 209.

[33] Epstein and Knight perhaps advanced this idea, as they deemed that the rule of four, as an informal institution, had two essential characteristics, 'the justices share knowledge of it, and they have informed external communities of its existence and maintenance'. Epstein and Knight (n 23) 119.

[34] Since his election in 2018, President López Obrador has heavily criticized the judiciary, depicting it as composed of an unelected elite concerned with maintaining high-salary privileges while remaining unconcerned with the needs of ordinary people. Backed up by his MORENA party congressional majority, the President has made what many consider overtly partisan

into tensions between the political branches and the judiciary,[35] and even clashes within the Supreme Court since some recent appointees are perceived to be aligned with the government in an openly partisan way.[36] The emergence of perceived internal factions provides a fruitful backdrop for analysing strategic breaches since they may be contextually incentivized.

B. Setting the Stage: Formal and Informal Voting Protocols

Since its creation by the 1917 Constitution, the Mexican Supreme Court has had the power to perform judicial review. However, authoritarian rule and institutional design diminished the Court's role.[37] It was highly dependent on the political branches and was only granted the authority to dis-apply statutes in particular cases. Precedents on the unconstitutionality of legislation were not binding to the ordinary judiciary or the elected branches, who could continue applying statutes long declared unconstitutional.

A constitutional amendment in 1994 fundamentally transformed the role of the Court. In a manner often described as an 'insurance policy',[38] a constitutional amendment championed by President Zedillo from the ruling party Partido de la Revolución Institucional vested the Supreme Court with the functions proper of a constitutional court, changing its powers, size and composition. The Court could invalidate *erga omnes* a statute for the first time and became *de jure* a decisive arbiter of political and federal disputes.[39] A law was issued regulating the newly acquired powers of the Court,[40] and the Court had to adapt to new formal rules governing the recently introduced procedures. This entailed developing informal rules to govern their functioning.

The Supreme Court has 11 members and may sit *en banc* or in 5-member chambers. The law provides only a limited *en banc* protocol. The Mexican Supreme Court functions formally under a draft system. Once a case enters Court, the Chief Justice assigns a judge-rapporteur based on a rotational system.

appointments to the Supreme Court, suggested that resolutions disfavouring his policies are due to corruption, and, so far unsuccessfully, attempted to implement court-packing and court-curbing measures. For a broader explanation of the political context, see MA Rivera León, *Supermajorities in Constitutional Courts* (Routledge 2024).

[35] J Olaiz-González, 'Mexican Supreme Court at Crossroads: Three Acts of Constitutional Politics' (2021) 14 ICLJ 447.

[36] R Villanueva Ulfgard, 'Separation of Powers in Distress: AMLO's Charismatic Populism and Mexico's Return to Hyper-Presidentialism' (2023) 6 Populism 55, 66–7.

[37] JM Serna, *The Constitution of Mexico: A Contextual Analysis* (Hart Publishing 2013) 116.

[38] J Finkel, 'Judicial Reform as Insurance Policy: Mexico in the 1990s' (2005) 47 LatAmPol&Socy 87.

[39] MS Berruecos García Travesí and L Whitehead, 'Constitutional Controversies in the Subnational Democratization of Mexico, 1994–2021' (2021) 12 LatAmPol 405, 408.

[40] *Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos* [Regulatory Law of Sections I and II of Article 105 of the Political Constitution of the United Mexican States], Official Gazette of the Federation, 11 May 2015.

Although vested with a wide array of competences,[41] the Chief Justice lacks formal decisional capabilities concerning opinion assignment. The Judge-Rapporteur prepares a draft to submit to the Court for discussion. Instead of arguing about the actual case, the Court will discuss the draft prepared by the Judge-Rapporteur. The Chief Justice has significant discretion in the critical task of deciding whether to include draft proposals on the deliberation agenda.

A simple majority is required in procedures with *inter partes* effects, ie, where the Court can only declare the unconstitutionality of a statute vis-à-vis a single plaintiff. In turn, in procedures leading to a general invalidation of a law, an eight-vote supermajority is required to strike down legislation,[42] while a simple majority suffices to uphold it. The law provides an impasse rule: the case is formally dismissed if the Court gathers a non-qualified majority favouring the statute's unconstitutionality. The Court neither upholds nor strikes down the law but rather decides not to decide.[43]

Since only the majority threshold and some impasse rules are governed by formal rules, the remaining features of the voting protocol rely on informal norms: a tacit understanding that has emerged between the justices over many years of practice and tradition.

The first crucial non-codified rule is the distinction between issue and outcome voting. In general, outcome voting requires judges to reach an independent opinion on the due outcome of the case, consequently determining the court's judgment by the prevailing majoritarian outcome. Issue voting instead would require judges to decide the legal questions raised in a case. The court's judgment would be determined by the outcome favoured by a collective decision on the separate legal issues.[44]

The Mexican Supreme Court *en banc* has developed a general rule that breaks a case into admissibility and merit. Both parts are voted on separately. The Court first discusses and votes on whether a case is admissible, for example, if the plaintiff has legal standing, whether the claim is time-barred, if there is an actual case or controversy, or if there is any other formal obstacle impeding the Court from hearing a case. Justices vote on the case's admissibility by a simple majority, regardless of whether the case would require a supermajority to resolve a statute's unconstitutionality. The Court's decision is generally

[41] H Concha, 'El Procedimiento de Designación' in C Astudillo and JR Cossío (eds), *Organización y funcionamiento de la Suprema Corte de Justicia de la Nación* (Tirant lo Blanch 2020) vol 1, 523–4.

[42] MA Rivera León, 'Artículo 105' in JR Cossío Díaz (ed), *Constitución Política de los Estados Unidos Mexicanos Comentada* (Tirant lo Blanch 2017) vol 3, 1666.

[43] Generally, see MA Rivera León, 'Control and Paralysis? A Context-Sensitive Analysis of Objections to Supermajorities in Constitutional Adjudication' (2024) 22 ICON 134.

[44] D Post and SC Salop, 'Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels' (1991) 80 GeoLJ 743. For a rejoinder, see D Post and SC Salop, 'Issues and Outcomes, Guidance, and Indeterminacy: A Reply to Professors John Rogers and Others' (1996) 49 VandLRev 1069; J Rogers, 'Issue Voting by Multimember Appellate Courts: A Response to Some Radical Proposals' (1996) 49 VandLRev 997.

deemed binding on all court members.[45] Insofar as this system breaks a case into several subtopics, it resembles issue voting.

Once the admissibility debate has finished, the Court[46] decides on the constitutionality of statutes through an outcome voting protocol. Since plaintiffs may challenge multiple normative provisions in abstract normative control, the Court generally votes separately on every article or group of articles sharing the same characteristics. Justices must declare whether a provision infringes the Constitution. The reasons behind the votes do not matter as they would in an issue voting system. Thus, if eight justices believe a provision to be unconstitutional, it is irrelevant that each has a different reason for reaching such a conclusion or if they believe the provision infringes a different constitutional provision.

The informal features of the voting protocol are widely understood by justices and assumed as natural by the legal community. Justices have not explained why they choose to function under such rules, but generally they abide by them.

C. Breaking Informal Voting Rules: A Case Study of AI 64/2021

In April 2022, Chief Justice Zaldívar shocked Mexican legal scholarship through a bold manoeuvre. The government led by President López Obrador mobilized its MORENA parliamentary majority to amend several provisions of the Federal Industry Act (FERECA). The opposition challenged the amendments before the Supreme Court.

MORENA has had a polarizing effect on society, placing pressure on the legal system. Constitutional challenges to governmental laws have often been characterized as critical junctures for the judiciary. The Mexican supermajority rule, requiring 8 out of 11 justices to vote to strike down a law, has added fuel to the fire and multiple political commentators have painted scenarios in which justices closer to the Executive could block the striking down of what many deemed an unconstitutional law privileging fuel-based energy production and State companies over private competition.

Since the Supreme Court follows a public deliberation system, lawyers need not second-guess what happens when justices sit in conference: they may see it firsthand. Thousands of lawyers and activists witness the discussions through television and YouTube.

Justice Ortiz Ahlf, appointed by President López Obrador, was the Judge-Rapporteur in the case. She divided her draft proposals into sections analysing the legal grounds for invalidation rather than the usual approach of focusing on single normative provisions. It is convention that judge-

[45] If a judge believes the Court lacks jurisdiction to hear a case, but the Court declares by a 6:5 vote that the case is admissible, the judge is forced to analyse and vote on the case's merits.

[46] The described procedure accounts for the Supreme Court *en banc*. The Supreme Court may also solve cases in Chambers, with a five-justice composition. Chambers operate with identical voting protocols, although they do not hold actual public deliberations.

rapporteurs can freely present their proposal in the most convenient manner for the analysis. Since the Judge-Rapporteur divided her draft into sections, justices debated whether the challenged provisions infringed different constitutional rules. After justices deliberated, votes were issued following the Judge-Rapporteur's particular division.

Six justices believed the provisions infringed both the right to a healthy environment and economic freedom/free competition principles. On the other hand, Justices Gutiérrez and González had a nuanced approach. Justice Gutiérrez believed that the provisions were solely unconstitutional regarding the right to a healthy environment. In turn, Justice González posited that the law only infringed constitutional provisions related to free competition.

Thus, seven votes deemed the provisions unconstitutional, infringing economic freedom and free competition principles. At the same time, seven votes indicated that the provisions infringed the right to a healthy environment. As a result of the approaches of Gutiérrez and González, eight justices agreed that the provisions were unconstitutional, even though no more than seven justices agreed on the constitutional provision the challenged law infringed. Under the standard voting protocol forged over many years of court practice, the provision would have been declared unconstitutional.

As Chief Justice of the Supreme Court, Justice Zaldívar conducted the deliberations and the voting procedures and was formally tasked with proclaiming the outcome of the case. Zaldívar had not been a neutral figure.[47] Formerly characterized as a fierce liberal dissenter, since his election as Chief Justice, he had been seen as too deferential to the parliamentary majority, if not outright submissive and partisan.[48]

Zaldívar understood the paradox created by voting on draft sections rather than on the provision's constitutionality. Although the Chief Justice knew the voting protocol and could have proclaimed the statute unconstitutional, he resorted to asking Justices Gutiérrez and González[49] how their votes should be counted.[50] The justices in question repeated that the laws were invalid according to their preferred line of reasoning, thus delegating the matter of proclaiming the result to the Chief Justice.[51]

[47] Olaiz-González (n 35) 455.

[48] R Villanueva Ulfgard, 'López Obrador's Hyper-Presidentialism: Populism and Autocratic Legalism Defying the Supreme Court and the National Electoral Institute' (2023) IJHR 1, 9–10; Villanueva Ulfgard (n 36) 67.

[49] See the stenographic version of the discussion, AI 64/2021, 7 April 2022, 123. Zaldívar asked: 'Perhaps the respective Justices can clarify how they voted' […]. After Justice Aguilar explained that eight votes for the unconstitutionality had been reached, Zaldívar repeated: 'I believe the Justices should tell us how their votes are to be counted.'

[50] Perhaps, as some scholars have observed, justices might tend to adopt interpretations of internal rules 'because of its potential effect on the outcome of a particular case'. Revesz and Karlan (n 27) 1067. That seems to have been the case with Justice Zaldívar.

[51] After being asked, Justice Gutiérrez declared: 'Let us see, in my case, the provision or provisions are unconstitutional since they infringe on the right to a free environment. That is my

The Chief Justice counted the votes as favouring upholding the provisions in the respective section. Consequently, he proclaimed that the eight-vote supermajority required to strike down the law had not been met. Effectively, the Chief Justice switched the Court's protocol from issue voting to outcome voting. Justices Aguilar, Pérez Dayán and Piña objected during the discussion, arguing that the supermajority threshold was usually calculated based on the justices' position on the constitutionality of a statute. They pointed out that an eight-vote supermajority had been reached.

Table 1 provides a voting matrix. It portrays the ideological leaning of the justices and their position regarding the main arguments analysed by the Court. The table further clarifies whether each justice found the provisions unconstitutional and whether they raised or addressed in separate opinions the alleged breach of protocol. It also shows what the correct outcome should be applying issue and outcome voting systems.

The Chief Justice did not break any formal rule. Neither the Constitution nor any statutes governing the Court require outcome voting. As with many essential features of how the Court operates, the voting protocol is an informal rule. However, breaking the rule changed the case's outcome and visibly favoured the policy preferences of the Chief Justice, the Judge-Rapporteur and the government.

The breach of informal voting protocols did not go unnoticed. It was the first time every justice had filed a dissenting or concurring opinion. Four concurring and eight dissenting opinions were filed to the plurality opinion, some questioning how votes were counted and summed.[52] Furthermore, newspaper commentators,[53] scholars[54] and politicians noticed the breach of the rule.

vote.' While González Alcántara responded: 'For me, there is an unconstitutionality through the arguments I expressed at the beginning …'

[52] Supreme Court [Suprema Corte de Justicia de la Nación], Acción de Inconstitucionalidad 64/2021, 7 April 2022. Separate opinions of Justices Gutiérrez, González, Pardo and Aguilar (dissenting). For example, Justice Pardo stated: 'Generally, in the Plenary, every Justice gives his/her arguments to consider a provision constitutional or unconstitutional. Even if shared reasons are often found, it is mostly through the effort of consensus in the session, but not always those voting to strike down a provision share the same reasoning … at least eight Justices considered several provisions invalid, even if it was through different reasoning. Those provisions should have been declared unconstitutional, independently of the reasoning that the judgment would have subsequently established for it.' Furthermore, Pardo added: '… It is not a matter of every Justice to define how their votes ought to be counted, but rather of the Chief Justice and the Court *en banc* together to define how votes are counted.'

[53] J Garza and J Martín, 'Sin Derecho al Futuro' *Reforma* (Mexico City, 4 August 2022) <https://www.reforma.com/sin-derecho-al-futuro-2022-04-08/op224360>; JM Cullel, 'Embrollo En La Suprema Corte Por El Conteo de Votos En Su Decisión Sobre La Ley Eléctrica' *El País* (Madrid, 20 April 2022) <https://elpais.com/mexico/2022-04-20/embrollo-en-la-suprema-corte-por-el-conteo-de-votos-en-su-decision-sobre-la-ley-electrica.html>.

[54] The episode was narrated with confronting views by M Velasco-Rivera, 'When Judges Threaten Constitutional Governance: Evidence from Mexico' (*Blog of the International Journal of Constitutional Law*, 2022) <http://www.iconnectblog.com/2022/06/when-judges-threaten-constitutional-governance-evidence-from-mexico/>; R Niembro Ortega, 'Seeing the Whole Picture of the Debate in the Mexican Supreme Court: A Response to "When Judges Threaten

Table 1.
Voting matrix of AI 64/2021

Justice	Ideological leaning	Infringes free competition	Infringes right to a healthy environment	Provision is unconstitutional	Raised protocol breach	Result under outcome voting	Result under issue voting
CJ Zaldívar	M	No	No	No	Yes		
JR Ortiz*	M	No	No	No	No		
Esquivel*	M	No	No	No	No		
Gutiérrez	N	No	Yes	Yes	Yes		
González*	N	Yes	No	Yes	Yes		
Pardo	-M	Yes	Yes	Yes	Yes		
Piña	-M	Yes	Yes	Yes	No		
Ríos*	N	Yes	Yes	Yes	No		
Pérez	-M	Yes	Yes	Yes	No		
Laynez	N	Yes	Yes	Yes	No		
Aguilar	-M	Yes	Yes	Yes	Yes		
Votes		7	7	8		Unconstitutional	Constitutional

Notes: M, majority, pro-MORENA; -M, hostile to the majority/MORENA; N, neutral.
* Appointment by the current government.

Senators asked the Court to clarify the voting, formally accusing the Chief Justice of breaking court rules.[55] The pressure mounted. The Chief Justice felt the need to publish a newspaper article claiming he had not been involved in vote tampering.[56]

IV. INFORMAL VOTING RULES: EXTERNAL ENFORCEABILITY AND STRATEGIC BEHAVIOUR

The case study raises two lessons for the analysis of voting protocols. First, it suggests that the awareness of informal voting rules increases their enforceability, supporting analogous theoretical claims of previous scholarship. Second, it reveals that several factors may contribute to softening informal judicial voting rules even when fully public, allowing different actors to act strategically to advance their preferences.

A. Awareness and Enforceability

In the case study, the public awareness of the breach resulted from the public nature of the Court sessions. Even though no formalized rule exists in statute, court guidelines or protocols, public deliberation makes the rule known to those outside the Court. It allows external audiences to witness that the Court has consistently followed an outcome voting model. The awareness of the rule led to several demands to enforce the protocol. Political parties, newspapers and political commentators demanded a clarification of the result. There was even a formal petition in the Senate for a vote recount. The fact that the Chief Justice felt the need to address the media through a newspaper article attempting to explain the result demonstrates that the external pressure was considerable.

The fact that the voting protocol was broken, despite the public deliberation model allowing a certain degree of external enforcement, does not mean that the impact of such enforcement is to be disregarded. Although in this case the external enforcement was insufficient to force *ex-ante* compliance with the informal voting protocol, it did have some impact. First, informal sanctions were imposed, albeit to a diminished extent, for reasons explained in the following subsection. Second, it illustrated that the enforceability of informal voting protocols should be viewed as a matter of degree rather than a binary outcome.

Constitutional Governance: Evidence from Mexico"' (*Blog of the International Journal of Constitutional Law*, 2022) <http://www.iconnectblog.com/2022/06/seeing-the-whole-picture-of-the-debate-in-the-mexican-supreme-court-a-response-to-when-judges-threaten-constitutional-governance-evidence-from-mexico/>.

[55] S Barragán, 'Senadores Piden Que Corte Resuelva Que Fueron 8 y No 7 Votos Por La Inconstitucionalidad de La Ley Eléctrica' *Aristegui Noticias* (Mexico City, 13 April 2022) <https://aristeguinoticias.com/1304/mexico/senadores-reclaman-y-exigen-corregir-calculo-indebido-de-votos-en-debate-de-la-corte-sobre-la-reforma-electrica/>.

[56] A Zaldívar, 'La Votación' *Milenio* (Mexico City, 5 March 2022) <https://amp.milenio.com/opinion/arturo-zaldivar/los-derechos-hoy/la-votacion>.

It is reasonable to assume that were the Court to have held its session behind closed doors, the issue would have passed chiefly unnoticed other than in scholarly commentary which might have discerned the breach through the dissenting opinions. It is also noteworthy that during the remainder of his term, the Chief Justice did not resort to further strategic behaviour in vote counting. Many eyes were watching and he had learned that the breach had some political costs. It could thus be argued that publicizing informal voting protocols helps to promote adherence to them.

In the US, some have argued that the US Supreme Court should formalize some of its unwritten practices to avoid legitimacy issues regarding their application and breach.[57] The publication of rules aids parties and the legal community in understanding judicial procedures[58] and arguably in assessing whether decisions are politically charged or follow previously set legal guidelines consistently.

The degree to which informal institutions surrounding voting protocols affect substantive decisions varies greatly. For example, the order of deliberation or opinion assignment indirectly affects the court's decisions, as it may generate inertia into reaching an outcome, but per se does not change the outcome of a case. However, institutions that translate votes into results directly affect the disposition of a case, such as outcome voting conventions, or as discussed in US scholarship, non-majority rules to hear cases and supermajority voting requirements for summary reversals.[59]

While an argument could be made for the publicity of all informal rules surrounding voting protocols, there is a particularly strong case for the publicity of those rules with the potential to impact the outcome of cases. Making those rules public, either in the guidelines of the court, in internal core regulations, or simply through usual publicity on a court's website, vests them with a semi-formalized status.

Publicity of informal rules aids in their enforceability by dissipating doubts about their existence to internal and external audiences. It also encourages judges to abide by them, confirming they have a higher status than mere non-binding practice. It also enables external monitoring of their enforcement by parties, litigants and the legal community, who would understand when a court applies its voting protocol and when some of its members have deviated from it to achieve their policy preferences.

Lack of public awareness or open recognition of such rules contributes to lower enforceability. In such cases, a judge attempting to claim a breach of the informal rule must first determine whether an informal rule exists and

[57] LS Bressman 'The Rise and Fall of the Self-Regulatory Court' (2022) 101(1) TexLRev 86.
[58] Robbins (n 27) 21.
[59] On non-majority rules in the US Supreme Court, see Revesz and Karlan (n 27). For a mention of the six-vote supermajority internally required for summary reversals, see J Biskupic, *Nine Black Robes: Inside the Supreme Court's Drive to the Right and Its Historic Consequences* (William Morrow 2023) 70.

whether exceptions are sufficiently tolerated so as not to be fully binding. Since there are no straightforward criteria for proclaiming informal rules, the dilemma generates a judge-dependent standard for determining the rule's existence. Different judges may reach different conclusions or at least consider that their peers will reasonably differ on the rule's existence. Contrary to formalized rules, whose existence and binding nature are evident in themselves, denouncing an informal rule breach requires first a conviction of the rule's existence and consistent application and then the will to denounce its breach, which may be perceived as having a lesser status by non-court members, ie politicians, legal scholars and the legal community.

B. Are Informal Sanctions Inferior?

The case study also suggests a second hypothesis: several factors may diminish the efficacy of informal sanctions in forcing compliance with informal voting protocols, even those fully shared by their participants and known to the legal community and politicians.

Most legal scholars associate legal obligations with sanctions.[60] When judges break formal legal provisions about sentencing or voting, their judicial decisions can be appealed and they can be sanctioned. Several scholars have analysed the informal sanctions associated with the breach of unwritten conventions or practices. Some have noticed that political actors follow conventions not only out of a sense of morality—for example, principled considerations on the rule—but also out of fear of sanctions for its breach.

Sanctions concerning informal judicial rules are extra-judicial informal retaliation for perceived breaches,[61] which must be separated from narrower types of formal legal sanctions.[62] Understood broadly, informal sanctions may be imposed by fellow judges, public opinion, political actors or the political branches. Justices may sanction breaches by pointing at them in their dissents,[63] expressing extra-judicial disapproval,[64] or retaliating through judicial behaviour in present[65] or future cases.[66] Citizens may retaliate by

[60] See, for example, H Kelsen, *Pure Theory of Law* (Lawbook Exchange 2002) 116; H Kelsen, 'Pure Theory of Law and Analytical Jurisprudence' (1941) 55 HarvLRev 44, 57–8.

[61] A Vermeule, 'Conventions in Court' (2015) 38 DULJ(NS) 283, 288.

[62] Kosař (n 14) 35.

[63] Epstein and Knight (n 23) 121.

[64] Bowie and Songer provided evidence, through interviews, that US judges are concerned about the image of their peers (although initially exploring the fear of informal sanction by reversals). 'There appeared to be a consensus that one would be viewed negatively by his or her colleagues if he or she ignored the law or precedents or accepted canons of legal reasoning …'. JB Bowie and DR Songer, 'Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals' (2009) 62 PolResQ 393, 404–5.

[65] For an example, see L Epstein, JA Segal and T Johnson, 'The Claim of Issue Creation on the U.S. Supreme Court' (1996) 90 AmPolSciRev 845.

[66] This point is implicitly made by Caminker when he suggests that under a unanimity rule, judges could identify non-consensus-justices '… whose recalcitrance thwarts the majority, for purposes of levying informal sanctions'. EH Caminker, 'Thayerian Deference to Congress and

losing faith in the institution[67] or public opprobrium,[68] while the elected branches may sanction breaches through amendment proposals.[69]

All the above informal sanctions occurred in the Mexican case study: justices denounced the breach publicly during the session and through dissenting opinions; the external audience reacted with criticism and politicians demanded that the Court clarify the result, accusing the Chief Justice of breaking the rules.

The case study also demonstrates that several circumstances may diminish the likelihood of informal sanctions being imposed—such as legitimacy concerns—and multiple external factors may reduce their efficacy even when levied. These circumstances will now be examined.

Regarding factors affecting sanction imposition by fellow justices, Kranenpohl reported that some German Constitutional Court judges expressed a preference for silencing criticism of such breaches to avoid the institutional legitimacy costs they would entail for the Court itself.[70] By casting doubt on the legality of the procedure and the motives of their peers, rather than on their legal arguments, judges may endanger the legitimacy of the institution to which they belong, diminishing their own status as part of that institution. The notion that judges consider such unintended consequences when considering dissenting opinions and their tone is not unlikely.

The case study demonstrates that this kind of judicial behaviour does occur. Justices denounced the breach during the session, but it was done in a timid manner. The informal rule providing for outcome voting was widely known to the justices and the legal community. Nonetheless, its breach produced moderate controversy in the session, despite allowing the Chief Justice and the Judge-Rapporteur to advance the political majority policy preferences. Many justices in favour of applying the outcome voting approach remained silent, even though they evidently understood the voting rule.

Furthermore, despite raising it in the session, several justices whose position did not ultimately prevail solely due to the switch of the voting protocol omitted this fact in their ensuing dissenting opinions. One could claim that the issue was unclear for many justices in the heat of the discussion. Nevertheless, dissenters

Supreme Court Supermajority Rules: Lessons from the Past' (2003) 78 IndLJ 73, 100 (fn 99). See also EG Lee II, 'Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit' (2003) 92 KyLJ 767, 772, arguing that judges departing from *stare decisis* may risk informal sanctions from their colleagues. Finally, Ura and Flink considered that the Chief Justice may impose informal sanctions through their administrative powers. JD Ura and CM Flink, 'Managing the Supreme Court: The Chief Justice, Management, and Consensus' (2016) 26 JPubAdminRes&Theory 185, 190.

[67] Bressman (n 57) 13.

[68] Vermeule (n 61).

[69] Bressman (n 57) 13.

[70] Kranenpohl delved into the informal rules within the German Constitutional Court. He reports a judge declaring: 'There are many rules that most follow. However, if they do not, you will not find out, no one outside [the Court] will find out. The Court would not let it be known, not to endanger its reputation.' U Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (VS Verlag für Sozialwissenschaften 2010) 485.

had weeks to analyse the session. Perhaps they were reluctant to accuse fellow justices openly of partisan rule-breaking when no formal rule existed, or preferred to minimize the breach out of concern for preserving the institution's legitimacy, as suggested by Kranenpohl. Even those who addressed the issue in separate opinions did so cautiously, rather than as an open accusation of breach—such as Justice Pardo.

As to public sanctions, the case study shows that electoral preferences and political developments may hinder their effectiveness. As noted above, significantly, several journalists and commentators addressed the breach, giving media coverage to an informal voting protocol that would not usually be deemed 'media material'. Politicians from the opposition petitioned the Court to clarify the judgment, contending that the eight votes had been met. The pressure must have been considerable since the Chief Justice decided to write a newspaper article defending the legality of his behaviour. Nonetheless, although the breach caused political unrest as commentators and politicians raised the issue, pressing political matters and other essential topics in the Court's agenda rapidly superseded the matter. Even opposition politicians, concerned with new critical challenges to the Court, abandoned interest in the issue.

Polarization and the electoral landscape, which strongly supported the result favoured by the breach, may explain why informal sanctions were unsuccessful in deterring the breach or leading to further accountability. Recently, Levitsky and Ziblatt noted that US politics is marked by two informal norms: mutual toleration and institutional forbearance.[71] They posit that 'Polarization can destroy democratic [informal] norms.'[72] They claimed that the erosion of unwritten norms may lead to a systemic breakdown. This theory helps to explain the context that allowed informal rules to be broken in the Mexican case study, as polarization played a critical role in diminishing the effectiveness of informal sanctions. Not only was the Court's position vis-à-vis the elected branches marked by confrontation, but the appointment of the President and the open ideological leanings of some justices eroded the restraining power of institutional forbearance, giving way to hardball tactics. Since the breach aligned with the interests of a robust political majority, representing substantial electoral support, justices opposed to it perhaps presumed that informal sanctions held less weight in these circumstances. Conversely, the Chief Justice, perceived as aligned with the majority, knew that substantial political support would potentially diminish the consequences of the breach. Minorities in Congress lacked the political strength to sanction, and the majority lacked the forbearance to denounce a breach that favoured them. Thus, public sanctions may be affected by electoral preferences, the importance of a given case and the political landscape.

[71] S Levitsky and D Ziblatt, *How Democracies Die* (Penguin Books 2018) 102–7.
[72] ibid 115.

Whether the breach would have produced greater outrage if the Court had ignored formal constraints provided by the Constitution and statutes, such as ignoring a decisional supermajority or a quorum regulation, remains an open question. Would the sanctions have had a strong impact if such a breach had occurred, despite the President's policy preferences and the strong electoral majority? It is reasonable to assume that the outcome would indeed have been different with the breach of a formal rule.

In the Mexican case study, the circumstances deterring the judicial imposition of informal sanctions contributed to a lower level of enforceability of informal voting protocols than would normally be expected, leaving a wide margin of potential for strategic behaviour.

The case study offers evidence consistent with scholarly analysis from other jurisdictions that has noted inconsistencies in the application of internal voting protocols potentially as a result of the internal positions of justices in individual cases.[73]

V. CONCLUSION

Informal voting protocols remain one of the most understudied aspects of judicial practice, despite their ability to shape the outcome of constitutional and apex court cases profoundly by complementing, interacting with or substituting for formal rules. This study of the Mexican jurisdiction raises three critical lessons for a comparative conversation on informal voting protocols.

First, the study suggests that, as mentioned by previous scholars, awareness of informal voting protocols allows for broader enforceability through external pressure and the inner conviction of judges of the binding nature of such rules. By demonstrating the potential for public deliberation models to engage more critical players in assessing and denouncing breaches, the article advances the notion that awareness of the existence of these rules and their breach should provide a deterrent for such breaches and increase the potential of sanctions for non-compliance. Nonetheless, external enforceability should be seen as a matter of degree rather than a factor that will invariably lead to strict compliance, as in certain conditions, the effectiveness of such informal sanctions in safeguarding against breaches of informal voting protocols may be diminished.

The potential circumstances affecting the effectiveness of these informal sanctions are the second lesson that can be taken from the case study. The threshold for deciding whether to denounce a breach is unique to each particular judge, and multiple strategic considerations can affect the decision on whether to issue informal sanctions, such as a justice's concerns for institutional legitimacy.

[73] Robbins (n 27) 17–20 (making the case regarding the so-called 'courtesy fifth' rule for stays of execution in the US Supreme Court).

Furthermore, several factors may diminish the efficacy of informal sanctions even when imposed. These include a context of polarization that has contributed to eroding institutional forbearance, a robust political landscape favouring the policy goals promoted by a given breach, and strong electorate support for the objectives pursued by the breaching party.

Third, the case study sheds light on how informal voting protocols may be inadvertently employed through strategic behaviour to advance the policy preferences of other judicial actors. The article adds to the body of literature that has analysed the powers of chief justices and judge-rapporteurs as strategic actors. The case study showed that informal dynamics may open a window for significant power transfers from the court as an institution to some of its members through multiple strategic and informal channels.

Several avenues for further inquiry may be observed based on the lessons drawn from the Mexican case study. Although scholarship has delved into specific aspects of voting protocols in the US and has occasionally provided evidence from other jurisdictions,[74] much context-sensitive research is required in other countries to facilitate a comparative conversation. A comparative examination of the impact of closed versus open deliberations in a selection of jurisdictions facing a similar polarized political context could illuminate whether public opinion contributes to the enforceability of informal institutions within judicial voting protocols. Choosing appropriate jurisdictions to engage in such cross-comparison will remain a significant challenge.

Finally, further theoretical research is required to identify whether informal voting protocols differ from other unwritten rules of publicly debated stable political practice—such as constitutional conventions—or those enforced through elite channels such as patronage networks. It may be the case that such nuanced procedural rules are inherently more challenging to enforce than more broadly shared conventions, perhaps because of the restricted number of participants and the usually closed deliberation model, among other factors.

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[74] See above, nn 4–8.