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Substitute and Complement Theories of Judicial Review

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Substitute and Complement Theories of Judicial Review

DAVID LANDAU*

Constitutional theory has hypothesized two distinct and contradictory ways in which judicial review may interact with external political and social support. One line of scholarship has argued that judicial review and external support are substitutes. Thus, “political safeguard” theorists of American federalism and the separation of powers argue that these constitutional values are enforced through the political branches, making judicial review unnecessary. However, a separate line of work, mostly composed of social scientists examining rights issues, argues that the relationship between courts and outside support is complementary—judges are unlikely to succeed in their projects unless they have sufficient assistance from political and social actors. The coexistence of these two different theories, which has gone unnoticed by scholars, has important implications for both U.S. and comparative constitutional theory. Close examination demonstrates that the simple classifications suggested in existing work—that the substitute logic applies to constitutional structure while the complement logic applies to rights, for example—are incorrect. Instead, courts face a much more complex reality, with both logics being distributed broadly across a range of issues, forms of support, and contexts. To be successful, courts must maximize their relationship with their external support structures, both by targeting issues where levels of support render review neither futile nor redundant, and by shaping their judgments to increase the amount of support they receive from political, civil society, and international actors. This Article draws on numerous examples drawn from both established and new democracies to demonstrate the plausibility of these tasks, and ultimately to highlight the utility of a theory of judicial review that emphasizes judicial consideration of external support.

INTRODUCTION	1284
I. TWO THEORIES OF JUDICIAL REVIEW AND EXTERNAL SUPPORT	1286
A. JUDICIAL REVIEW AND EXTERNAL SUPPORT AS SUBSTITUTES: THE POLITICAL SAFEGUARDS THEORY	1286
B. JUDICIAL REVIEW AND EXTERNAL SUPPORTS AS COMPLEMENTS	1293
II. RECONCILING THE THEORIES	1297
A. RIGHTS VS. STRUCTURE	1297
B. POLITICAL INSTITUTIONS VS. CIVIL SOCIETY	1302
C. THE RULE OF LAW AND INSTITUTIONAL DEVELOPMENT.....	1303
D. FINDING SUBSTITUTES AND COMPLEMENTS FOR JUDICIAL REVIEW—A MESSY AND UNCERTAIN REALITY	1307
III. TARGETING JUDICIAL REVIEW.....	1308
A. A SIMPLE MODEL OF TARGETING	1308

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B. DOUBTS ABOUT THE MODEL.....	1309
1. SHOULD JUDGES TARGET?.....	1309
2. CAN JUDGES TARGET?.....	1312
C. A MODEST THEORY OF TARGETING	1313
IV. THE JUDICIAL CONSTRUCTION OF SUPPORT	1316
A. A TYPOLOGY OF FORMS AND STRATEGIES.....	1317
1. POLITICAL SUPPORT: COALITION SPLITTING	1317
2. ORGANIZING AND LEVERAGING CIVIL SOCIETY	1318
3. DEFINING THE BENEFICIARIES OF LITIGATION.....	1320
4. SOLICITING SUPPORT FROM INTERNATIONAL ACTORS	1322
B. NEW COURTS AND THE CONSTRUCTION OF SUPPORT STRUCTURES: BEYOND THE STRONG-FORM/WEAK-FORM DIVIDE.....	1325
CONCLUSION	1327

INTRODUCTION

While recent constitutional scholarship has been obsessed with methodologies of constitutional interpretation like textualism and originalism, a venerable tradition in constitutional theory analyzes the relationship between courts and a range of external actors including political institutions and civil society groups. However, the fact that this scholarship breaks down into two sets of theories with exactly opposing logic has been overlooked by existing scholarship.

A long line of work, focusing largely on the structural parts of the Constitution, has argued that judicial review and extrajudicial enforcement function as substitutes: courts are needed when extrajudicial safeguards are weak, but as these safeguards strengthen, the constitutional principle becomes self-enforcing and courts are redundant. In contrast, a separate line of scholarship, largely conducted by social scientists and focused on rights, posits that judicial review and extrajudicial support are complements. Under this theory, judicial review is unlikely to succeed when external supports for a court are weak, but becomes increasingly plausible as a court gains more support from extrajudicial actors.

Each of these theoretical families has a rich pedigree and includes a wide variety of work, all sharing the same essential logic. For example, the substitute theory includes much of the “political safeguards” literature on federalism and the separation of powers.¹ Similarly, much important work on the relationship between law and social change adopts the complement logic.² The juxtaposition of these two theories, through numerous examples drawn from both inside and outside the United States, helps to illuminate issues in both U.S. constitutional law and theory and comparative constitutional law.

1. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

2. See, e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

First, it tends to destabilize claims about the kinds of circumstances in which each kind of logic is likely to hold sway. For example, much existing work in American constitutional law seems to work off of the assumption that issues in structural constitutional law are likely to be governed by the substitute logic, while issues of rights are likely to be governed by the complement logic. But a close examination shows that this claim is unpersuasive.³ It is plausible that some rights are effectively self-enforcing through the political process and thus that judicial review protecting these rights would be redundant. It is likewise plausible that for many structural issues, the existing equilibrium is quite far from the constitutionally intended equilibrium, but attempts by the judiciary to remedy the situation are likely to be futile because the Court has little external political or social support. Thus, at least some rights issues may be governed by the substitute logic, and many structural issues are likely governed by the complement logic. The kind of theory that best describes a given legal problem will be identified by the particular political configuration of that problem, rather than by the more sweeping claims about its classification that tend to dominate U.S. constitutional law.

More ambitiously, a reconciliation between the substitute and complement theories points towards a theory of judicial role that puts the relationship between courts and their sources of external support at its center. To maximize the gain from judicial review, courts can potentially “target” it towards issues where external support is neither too scarce to make their work futile nor so pervasive so as to make their actions redundant.⁴ The idea of targeting judicial review has been underexplored in the literature—little work, even in the United States, has studied whether courts and scholars are capable of identifying issues where judicial review is likely to be either impossible or unnecessary, or whether these assertions are empirically ungrounded ones that mask normative preferences derived elsewhere.

Courts also have a significant—albeit limited—power to influence their political and social environments to construct and empower potential sources of support. Thus, if courts currently lack enough support to carry out exercises of judicial review, they may be able to shape their decisions to construct that support. Through these techniques, they may also be able to help construct support structures that will eventually make a given issue largely self-enforcing, rendering future exercises of judicial review unnecessary. Scholars have not paid enough attention to the range of techniques that courts can use to construct this support and the circumstances under which they might work.⁵ For example, courts can calibrate decisions to split political coalitions, thus peeling off potential political allies. They can help to organize and empower civil society, and they can define the group of potential beneficiaries from their decisions in ways that will influence the size of the coalition protecting their work. Finally, they can craft decisions to draw in support from international actors, which may be helpful in situations where domestic support is scarce.

These techniques should be central to the analysis of judicial review in any context, both inside and outside the United States, and in developed and developing democracies. But one of their uses is in shedding light on the way in which courts might

3. *See infra* Part II.A.

4. *See infra* Part III.

5. *See infra* Part IV.A.

work to gain power in new or so-called “fragile” democracies. Recent scholarship by Samuel Issacharoff has argued that courts should aggressively work to defend their emerging democratic orders against potential threats.⁶ Stephen Gardbaum and others have challenged this reasoning, arguing that courts should instead take a relatively deferential view and focus on “weak” forms of review.⁷ The analysis in this Article does not resolve this important debate, but it does suggest that the answers are likely to be contextual, and will depend in large part on a court’s ability to target judicial review towards questions where it is likely to be successful and to construct the sources of support that it needs.⁸ Thus, scholars interested in the success of judicial review in difficult contexts must turn their attention to these questions.

The rest of this Article is organized as follows: Part I introduces the substitute and complement theories of judicial review, explaining their basic logic and giving examples of scholarship drawing on each tradition. Part II works to reconcile the two theories—it rejects as unpersuasive a series of classifications based on rights versus structure, political versus social forms of support, and developed versus developing democracies. Instead, the two logics are likely to be ubiquitous across a range of problems and legal orders, depending on the specific political context that holds in that area. Part III interrogates the possibility of targeting judicial review towards problems on which it is likely to be neither futile nor redundant. Targeting is likely to be difficult, but is plausible—and thus worth more study—in some cases in both American and comparative constitutional law. Part IV argues that the judicial construction of political and social support structures should be central to the analysis of judicial review. It develops a typology of potential tactics, drawing off of numerous examples of judicial decision making from a range of different contexts. Finally, I conclude by arguing, somewhat ambitiously, that the insights into targeting and support building developed in this Article point towards a distinctive perspective on judicial review, which will prove useful across a wide range of legal orders.

I. TWO THEORIES OF JUDICIAL REVIEW AND EXTERNAL SUPPORT

A. Judicial Review and External Support as Substitutes: The Political Safeguards Theory

Particularly in the modern period, a major theme of U.S. scholarship has focused on the question of whether judicial review on structural questions—both separation of powers and federalism—is necessary. The basic theory is that because these aspects of the constitutional structure are already protected by other actors and institutions, courts need not and should not intervene. In other words, judicial review and external support serve as substitutes in this model. When nonjudicial actors are already working to maintain a given aspect of the Constitution, courts should generally stay out of the way.

6. See SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015).

7. See Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 *COLUM. J. TRANSNAT’L L.* 285, 287–89 (2015).

8. See *infra* Part IV.B.

The general claim that the constitutional structure is primarily protected by non-judicial actors goes back in U.S. theory to Madison, who famously claimed that the best guardian of liberty was “[a]mbition . . . made to counteract ambition.”⁹ However, the claim has become particularly widespread—indeed perhaps dominant—among scholars (and at times the Supreme Court) in the post–New Deal period. Herbert Wechsler, writing in the 1950s, noted that the Supreme Court had largely withdrawn from policing lines between the state and federal government.¹⁰ He justified this by pointing to aspects of the structure of the federal government (mostly in Congress) that already protected the values of federalism. In particular, he argued that senators’ selection as members of states induced them to protect state interests, and that even in the House of Representatives aspects of the design and procedural rules incentivized members of Congress to protect subnational interests.¹¹ He argued that even the presidency, selected through the Electoral College, was frequently solicitous to state concerns.¹²

The viability of Wechsler’s safeguards theory was widely criticized in the literature. Critics argued that the safeguards identified by Wechsler did not function effectively, particularly since the ratification of the Seventeenth Amendment, which replaced selection of senators by state legislatures with direct election. Some argued for example that he had identified mechanisms to protect particular interest groups identified with subnational politics, but not to protect state institutions as such.¹³ Indeed, because federal officials would want to claim credit for solving problems brought to them by subnational interest groups, the mechanisms suggested by Wechsler might actually give them an incentive to bypass or undermine those institutions.¹⁴ Later work, however, identified a number of different amendments to Wechsler’s theory, while preserving the essential structure of the argument.

Larry Kramer, for example, has argued that the structural safeguards of federalism were properly found in the nature of the party system, rather than in national-level political institutions as such.¹⁵ His argument is that the decentralized nature of U.S. parties, with state-level organizations holding much of the power, has worked to ensure that those in national-level office work to advance the cause of federalism.¹⁶

9. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

10. See Wechsler, *supra* note 1, at 560 (“[I]t is Congress rather than the Court that on the whole is vested with the ultimate authority for managing our federalism . . .”).

11. See *id.* at 547–52. Wechsler’s argument also relied on a “mood” or “tradition” that “[n]ational action has . . . always been regarded as exceptional in our polity.” *Id.* at 544–45.

12. See *id.* at 557–58 (arguing that although the President is the “main repository of ‘national spirit,’” “both the mode of his selection and the future of his party require that he also be responsive to local values”).

13. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221–22 (2000).

14. See *id.* at 223–24 (noting that “[f]ederal politicians will want to earn the support and gratitude of local constituents by providing desired services themselves—through the federal government—rather than giving or sharing credit with state officials.”).

15. See *id.* at 278; see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1520–42 (1994) (exploring how American political parties act as vehicles for federalism values).

16. See Kramer, *supra* note 13, at 278–79 (noting that political parties in the United States are both not particularly programmatic and noncentralized, which allows members of state and

Subsequent scholars have proposed alternative mechanisms, including the separation of powers,¹⁷ the nature of campaign finance,¹⁸ and legislative solutions such as the Unfunded Mandates Reform Act (“Act”),¹⁹ as other ways in which nonjudicial institutions ensure the achievement of federalism values.²⁰

Most scholars making these arguments also call for little or no role for judicial review in enforcing federalism. Modern works have tended to criticize the Court’s ongoing revival of judicially enforceable limits in this area. The clearest statement perhaps is found from Jesse Choper, who has argued in his “federalism proposal” that

[t]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates “states’ rights” should be treated as non-justiciable, final resolution being relegated to the political branches—i.e., Congress and the President.²¹

But Choper’s recommendation is echoed by Kramer and most other modern scholars who explicate “political safeguards” of federalism.²²

A very similar approach has long been important on the question of separation of powers. Madison’s account is most directly applicable here—he laid out a theory of the Constitution by which the different national institutions would jealously guard their own prerogatives and take action against other institutions that attempted to aggrandize their own power.²³ A number of scholars have taken his insight and built it into a theory of the division of powers at the national level. Choper, for example, again emphasizes the extent to which the President and Congress possess tools needed to protect their powers and punish attempts at incursion.²⁴ Should the

local networks to influence decision making at the national level).

17. See, e.g., Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 335 (2001); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

18. See Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781, 819 (2014) (arguing that the nature of campaign finance was an important safeguard but that it had been imperiled by recent Supreme Court doctrine).

19. See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1115–16 (1997) (arguing that the Act and other framework statutes might themselves serve as structural safeguards by changing the way that Congress is forced to deliberate on issues involving states, and noting that scholars might direct more effort towards these statutes if they think existing political safeguards are insufficient).

20. This is not a complete list. For example, others have noted that bargaining between administrative actors at the state and federal levels is a part of the political process through which state interests are ordinarily (although not inevitably) protected. See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 19 (2011).

21. CHOPER, *supra* note 1, at 175.

22. See, e.g., Kramer, *supra* note 13, at 287–93.

23. See THE FEDERALIST NO. 51 (James Madison).

24. See CHOPER, *supra* note 1, at 276 (“Not only does Congress have powerful incentives to guard its prerogatives, but the President’s actions are limited by institutional inertia within

President attempt to exceed the scope of her powers by invading congressional competences, for example, the Congress can use devices like congressional hearings, refusals to fund, and informal levers of influence over the bureaucracy to take action.²⁵ Unsurprisingly, Choper's "separation of powers" proposal mirrors his federalism proposal—except to protect judicial power (which is presumed to be unprotected by political mechanisms), he argues that judges should play no role in these disputes. In particular, he argues that they should be uninvolved in disputes between the President and Congress.²⁶ More recently, Pozen has argued that national-level political institutions can and do rely on a number of forms of self-help in circumstances where judicial review is either unlikely or ineffective, while Posner and Vermeule claim that political restraints (chiefly public opinion) have replaced legal constraints as the major check on executive power.²⁷

The "political safeguards" account has been most prominent in these two areas of U.S. structural constitutional law. But they have shown up in other areas, mostly but not entirely structural, as well. For example, while Choper argued that judicial prerogatives were insufficiently protected by the political process and thus needed to be protected by court intervention,²⁸ other recent work has challenged this account by arguing that both Congress and the President have in fact, on the historical record, had sufficient abilities and tools to preserve a strong, independent judiciary.²⁹ Other scholars have recently argued that "horizontal" disputes between different states, as well as "vertical" disputes between states and the federal government, are effectively dealt with through political mechanisms, and there should be little need for judicial review.³⁰

the executive branch itself and by external political pressures ranging from party organizations, labor and business groups, and the press to the electorate as a whole.").

25. See *id.* at 281–88 (discussing devices including the refusal to appropriate funds, the refusal to enact laws, the refusal to confirm appointments, and impeachment).

26. See *id.* at 263 ("The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.").

27. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15–16 (2011); David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2 (2014).

28. See CHOPER, *supra* note 1 at 382–83.

29. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 *COLUM. L. REV.* 250, 253 (2012) (making a similar argument with respect to the executive branch, and marshalling historical evidence); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 *COLUM. L. REV.* 929, 944 (2013) (arguing that the exceptions clause of Article III protects rather than threatens Supreme Court jurisdiction because of the political incentives of national actors); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 *HARV. L. REV.* 869, 874 (2011) (exploring the ways in which the legislative process in Congress has protected Supreme Court jurisdiction).

30. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 *MICH. L. REV.* 57, 61 (2014).

Further, a significant element of post–New Deal rights enforcement can be seen through the same basic lens. The *Carolene Products* or representation-reinforcement theory of judicial review states essentially that courts should focus on protecting discrete and insular minorities that are structurally excluded from effective representation in the political process.³¹ Other groups, which are better provided for through ordinary politics, need not receive judicial support. John Hart Ely argues that this process-based theory of judicial review is the best way to overcome the anti-majoritarian nature of judicial review.³² At the same time, it also is based essentially on the “political safeguards” or substitute model: courts should ignore those constitutional interests effectively protected through other means, and focus on those interests without effective external support.

More broadly still, the recent work on “popular constitutionalism” seems to rely in part on substitute-based reasoning. Authors working in this tradition present evidence that there is a robust tradition of constitutional interpretation and application outside of the judiciary, for example in the Congress, the states, or among civil society groups and the general public.³³ Based on this evidence, many scholars argue for weakening the judicial role not just over certain areas of the Constitution, but over the entire text.³⁴ Thus, some popular constitutionalism scholarship functions as a kind of “political safeguards” theory writ large: since U.S. constitutionalism is fairly secure even absent judicial review, it should be either weakened or wholly eliminated.³⁵

In many ways, these safeguard accounts respond to the particular history of U.S. constitutional law. In particular, they tend to reflect a vision of the judicial role in the post–New Deal period. Prior to the New Deal, the Court actively policed the line

31. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (raising without deciding the question of “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

32. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1980).

33. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004) (arguing that throughout much of American history, it was “the people themselves”—working through and responding to their agents in the government—who were responsible for seeing that . . . [the Constitution] was properly interpreted and implemented”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 54–71 (1999) (arguing that Congress may be more capable of engaging in constitutional interpretation than is often assumed, and that part of legislative inattention to constitutional matters can be ascribed to the incentive effects produced by judicial review); Jedidiah Purdy, *Presidential Popular Constitutionalism*, 77 *FORDHAM L. REV.* 1837 (2009) (exploring ways in which presidents have over time engaged in constitutional interpretation).

34. See KRAMER, *supra* note 33, at 252 (rejecting judicial supremacy in favor of a departmental theory of constitutional interpretation); TUSHNET, *supra* note 33, at 154 (calling for a “populist constitutional law” that rejects judicial supremacy and perhaps judicial review altogether).

35. See TUSHNET, *supra* note 33, at 99–102 (noting that the safeguards of federalism argument is one that rests on similar ideas of incentive compatibility to those in popular constitutionalism, although arguing that the political safeguards argument rests on “controversial assessments of *changeable* political reality”).

between national and state power and issued (anti-) canonical decisions like *Lochner* that were perceived as frustrating the political process for the benefit of economically powerful actors.³⁶ As is well known, the Court for a considerable period abandoned attempts to place limits on federal power vis-à-vis the states, and reoriented judicial review around the protection of politically disadvantaged groups.³⁷ Scholars clearly developed safeguards theories partly as legitimation and encouragement of those efforts.³⁸ The Supreme Court itself has only sporadically embraced these theories in its decisions,³⁹ and academic work has disagreed as to the extent to which both scholars and judges hold a consensus in favor of little or no judicial review on federalism and separation of powers questions.⁴⁰ But the scholarly tradition stems in part from peculiar U.S. questions about judicial role.

At the same time, the logic of the model is extremely general, making it potentially suitable for comparative exploration and use. Most existing work on the safeguards theory has fallen in one of three veins. A first set of scholars has been sympathetic to the model, and has either applied it to some new area of doctrine or proposed a new set of mechanisms through which it might work. In federalism, for example, a long line of academic work has proposed different institutions or processes which might be used to promote federalism values, often while critiquing the choices of their predecessors.⁴¹ A second vein of work has criticized the structural

36. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011) (noting that *Lochner v. New York* is typically included in the short, core list of anticanonical cases decided by the U.S. Supreme Court).

37. See ELY, *supra* note 32, at 73–75 (defending decisions on this ground).

38. See, e.g., CHOPER, *supra* note 1, at 64–65 (arguing that the protection of individual rights for those “whose destinies were likely to be disregarded under a regime of simple majority rule” is the “paramount justification for judicial review”).

39. The most important embrace by a majority was in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985) (rejecting the traditional governmental functions doctrine developed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), because of the “effectiveness of the federal political process in preserving the States’ interests,” and citing to Wechsler and Choper among other authors). A majority of the Court later rejected the idea, notably in *New York v. United States*, 505 U.S. 144, 181–82 (1992) (suggesting that the Court will continue to enforce constitutional limits related to federalism because it protects those limits not for the benefit of governments, but for the citizens of those states).

40. On federalism, compare Gerken & Holtzblatt, *supra* note 30 (noting that although a majority of the Supreme Court continues to intervene on federalism issues, the safeguards argument “has carried the day”), with John Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1312 (1997) (arguing that the political safeguards approach is “no longer the controlling theory concerning judicial review of federalism questions”). On separation of powers, compare Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950 (2005) (stating that both courts and scholars draw a “close analogy” between political safeguards approaches on federalism and separation of powers issues), with David A. O’Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1106 (2007) (arguing that Supreme Court rulings “conclusively demonstrate the general rejection of the political-safeguards theory in controversies between Congress and the President”).

41. See, e.g., Clark, *Putting the Safeguards Back*, *supra* note 17, at 328–29 (arguing that existing structural safeguards theories failed to take account of the separation of powers); Kramer, *supra* note 13, at 278–79 (criticizing Wechsler’s model while proposing party politics

safeguards story, noting ways in which it may not hold either theoretically or empirically.⁴² In the separation of powers field, for example, scholars have sharply criticized the Madisonian assumption that American political institutions will act aggressively to check the ambitions of other institutions.⁴³ The U.S. Congress in particular has often welcomed rather than resisted executive encroachment.⁴⁴ Finally, a third set of academics has argued that the empirical truth of the political safeguards model is irrelevant—regardless of whether or not political safeguards exist, the Court must review structural safeguard issues.⁴⁵ In particular, scholars have argued that the original intent of the constitutional design left open a significant role for judicial review on these issues.⁴⁶

All of these lines of scholarship are heavily U.S.-centric, but my aim here is to highlight basic issues surrounding the theory of the model. In particular, these works invite scholars and courts to see judicial review and external sources of support as substitutes—judicial review is more necessary where less external support exists, and less necessary where there is more external support. Notice as well that in its broad form, the model does not define the form these external supports might take. Presumably, then, external support for constitutional values might come from a wide variety of political, or even nonpolitical, institutions and actors. While in U.S. constitutional theory the main accounts revolve around national political institutions (like Congress or political parties), one could also build substitute models of review based on other sources like civil society groups or even international institutions. In sum, the model has both an explicit and implicit theory of how courts should target their efforts. The explicit part is that where other institutions are doing a sufficient job of protecting constitutional values, courts should avoid intervening.⁴⁷ The

as a mechanism).

42. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112–28 (2001) (criticizing the mechanisms identified by both Wechsler and Kramer on the grounds that they failed to prevent federal aggrandizement and did nothing about horizontal aggrandizement between states); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1488 (2001) (criticizing Kramer for failing to show that the protections he has identified are “exclusive or even adequate”).

43. See, e.g., Levinson, *supra* note 40, at 937 (arguing that both federalism and separation of powers-based safeguards theories may fail based on the fact that “there is little reason to believe that empire-building will be the dominant pattern of government behavior”); O’Neil, *supra* note 40, at 1119 (casting doubt on the assumption, in the executive privilege context, that Congress will have adequate incentives or tools to reach the proper constitutional resolution, and thus calling for a role for judicial review).

44. This is in part because multimember institutions like Congress are composed of a large number of actors, many or most of whose motivations may involve personal or party goals rather than the advancement of institutional goals. See Levinson, *supra* note 40, at 928–29.

45. See, e.g., Yoo, *supra* note 40, at 1313 (presenting evidence that the framers did not intend “the political process to be the exclusive safeguard of federalism”).

46. See, e.g., Prakash & Yoo, *supra* note 42, at 1463 (arguing that there is ample historical evidence that “many Framers generally assumed that judicial review would exist, that it could limit federal power that exceeded constitutional limits, and that the mere existence of political process safeguards did not preclude judicial review of the scope of federal power”).

47. The term “sufficient” of course is not self-evident, and the literature has suffered from

implicit part is that courts should instead emphasize other parts of the Constitution without such external support, since in those areas their work will achieve more.

Stated this way, the model raises major questions about whether and when adequate substitutes exist, and whether and how courts should respond to their existence. I treat those issues in more depth below. For now, it is sufficient to note an oddity: while modern U.S. structural constitutional law has been dominated by discussions of the substitute theory, rights discussions have at times been dominated by an exactly contrary logic. In a story that is often told about rights, judicial review and external support are not substitutes, but complements, and less external support should be associated with less rather than more judicial review.

B. Judicial Review and External Supports as Complements

Longstanding work on judicial review suggests that judicial review and external support from political and social actors are better thought of as complements rather than supplements. The seminal works in this tradition are written from a law and social science perspective, and ask under what conditions courts can be effective in sparking social change. Most of this work has been done on rights rather than structure, but the claim again is general and is thus potentially useful for both American and comparative constitutional theory.

A seminal work in this tradition is Charles Epp's *The Rights Revolution*, which carried out a comparative study of judicial activism and public law litigation across several countries. Epp hypothesizes and presents support that the success of courts in carrying out projects to enforce constitutional rights is dependent on their "support structure"—the "financing, organizational support, and willing and able lawyers" who are able to access the courts repeatedly and push projects of rights protection.⁴⁸ Without this support, Epp argues, "judicially declared rights remain dead letters."⁴⁹

Particularly telling is an analysis of the Indian Supreme Court. Epp argues that the court became highly activist on a wide range of rights issues after the late 1970s, but nonetheless that its impressive jurisprudence has resulted in only very modest achievements on the ground.⁵⁰ For example, the court radically expanded access to the judiciary, accepting handwritten notes from indigent petitioners and newspaper articles as petitions.⁵¹ Its substantive jurisprudence recognized a range of new rights

ambiguity on exactly which values it is attempting to protect. *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 954–56 (2001) (noting that existing work fails to clearly distinguish between different kinds of threats to federalism values).

48. EPP, *supra* note 2, at 5.

49. *Id.*

50. *See id.* at 71 ("The Indian Supreme Court clearly *tried* to spark a rights revolution—but *little happened.*" (emphasis in original)).

51. For accounts of the changes in standing and other achievements of the Indian Supreme Court, *see, for example*, P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561, 574–76 (1985) (explaining changes in standing and remedy); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009) (arguing that the Indian Supreme Court is a "good governance court" and that its justices have developed interventionist doctrines to respond to

for prisoners, women's groups, and minorities. It began issuing creative and innovative remedies, including structural injunctions and the ordering of large-scale investigations.⁵² Nonetheless, Epp argues that the court lacked an organized support structure from civil rights organizations, sources of financing, or the legal profession.⁵³ In turn, this weakness has hindered the court's ability to make a systematic difference because it is not being fed either a sufficient number of cases, or sufficiently strategic cases.⁵⁴ Thus, while it has handed down landmark judgments on individual issues, its overall impact on areas like criminal procedure or women's rights has been rather limited.⁵⁵

In the United States, in contrast, Epp argues that the rights projects of the Warren and Burger Courts were fueled by changes in the litigation structure and the creation of powerful, well-financed legal organizations dedicated to rights protection.⁵⁶ These organizations put key issues on the Court's radar and were able to capitalize on individually important decisions by feeding the Court more cases.⁵⁷ A court, then, can issue individually important decisions without a support structure, but such a structure is a significant part of what transforms these isolated decisions into a program that has a systemic impact on social change.

Epp's argument focuses mostly on access to courts, but it should be obvious that the support structures explored by him can easily be expanded to many other roles in the litigation process, including the enforcement of judicial decisions. Indeed, in more recent work he has argued that the interaction of courts, civil rights lawyers and advocacy groups seeking to use litigation to force change, and proponents of reform within government agencies who themselves push these changes, are what have produced sweeping changes in the behavior and practice of both public and private bureaucracies.⁵⁸ For example, he explores the ways in which police litigation pushed by activists in the 1960s and 1970s, along with reformers within police departments, created new structures of "legalized accountability" in police departments after the 1980s.⁵⁹ Thus, supportive external actors—both inside and outside of government—

weaknesses in the political system).

52. See EPP, *supra* note 2, at 85–87.

53. Such a structure developed only briefly, during a period from 1975–1977 in which Prime Minister Indira Gandhi suspended ordinary democracy and ruled by emergency decree (the so-called "Emergency"), but these organizations, which were funded by wealthy opponents of the regime, largely withdrew support after it had ended. See *id.* at 109.

54. See *id.* at 103–08 (surveying the development of support structures in India on criminal procedure issues and women's rights issues).

55. See *id.* at 108. Of course, other factors, including the large and fragmented nature of the court and its lack of docket control, are also plausible contributors. See Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173 (2013) (arguing that both the size of the Indian Supreme Court and the fact that it sits in panels rather than plenary have had an important impact on its behavior).

56. See EPP, *supra* note 2, at 48–65.

57. See *id.* at 65–69.

58. See CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 15–20 (2009) (exploring the ways in which fear of litigation liability catalyzed outside reformers and reformers within the bureaucracy to construct new forms of legal accountability within bureaucratic structures).

59. See *id.* at 93–94 (arguing that this process of interaction created "deep institutional

were critical in producing programmatic compliance with judicial decisions, as well as in sending cases to the judiciary.

Indeed, Epp's argument is embedded in a much larger body of work about the ways in which courts are dependent on outside actors in order to carry out successful programs of rights litigation. Much work on structural litigation, for example, suggests that structural injunctions on issues like school desegregation and prison reform have been more likely to succeed when courts have the support of sympathetic actors such as government officials and civil society groups.⁶⁰ These actors perform a number of different but interrelated functions, such as expanding the information-gathering capacity of courts, developing innovative solutions to problems, monitoring compliance, cajoling recalcitrant arms of the bureaucracy, and bringing problems to the court's attention.⁶¹

This literature seems to have at least two major subparts. One, exemplified by Gerald Rosenberg's famous book *The Hollow Hope*, argues that the American judiciary has been ineffective in carrying out major projects of social change because courts are highly "constrained" institutions that both have only limited independence from other political actors and are dependent on other political or social actors to enforce their decisions.⁶² Rosenberg suggests that in some circumstances, these constraints can be overcome, where there is significant political support for reform projects and where there are extra judicial actors willing and able to help with problems of enforcement and compliance.⁶³ But, as Rosenberg argues, these are circumstances where significant change is likely to happen anyway, thus reducing judiciaries to a role "second[ing] the social reform acts of the other branches of government."⁶⁴ With respect to racial justice reform and school desegregation, for example, Rosenberg argues that *Brown v. Board of Education* and its progeny were relatively unimportant.⁶⁵ The Court "reflected" pressure from a number of different social,

reforms" including the creation of internal mechanisms for the investigation and sanctioning of policing abuses).

60. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998) (exploring the ways in which courts worked with outside reformers and other groups to achieve significant reforms in several structural prison cases); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1077-79 (2004) (explaining the ways in which successful public law litigation can publicize significant problems and empower stakeholders that can then push forward the reformist project).

61. See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 358-62 (2010) (exploring the ways in which constitutional courts can use sympathetic civil society groups and state actors to monitor compliance and as a source of policy-relevant information).

62. See ROSENBERG, *supra* note 2, at 10-21.

63. See *id.* at 30-36 (hypothesizing that courts may overcome their constraints where (1) "other actors offer positive incentives to induce compliance," (2) "other actors impose costs to induce compliance," (3) "judicial decisions can be implemented by the market," and (4) "by providing leverage, or a shield, cover, or excuse, for persons crucial to implementation who are willing to act").

64. *Id.* at 422.

65. See 347 U.S. 483 (1954); ROSENBERG, *supra* note 2, at 169 (presenting evidence that a range of social, political, economic, and international factors were pushing towards the civil

economic, and political actors rather than “create[d]” it; “the changes in civil rights could plausibly have happened without Supreme Court action.”⁶⁶

Looked at in terms of this Article, Rosenberg’s insight combines the logic of the substitute and complement models. Indeed, his argument and evidence suggest that at least on certain issues, there is relatively little space between them. Courts are ineffective when they lack sufficient political and social support—judicial review and external support seem to serve as complements. But when they have significant amounts of such support, change is likely to occur anyway—judicial review and external support are effectively serving as substitutes. Thus, in most circumstances the added value of courts is small, and “U.S. courts can almost never be effective producers of significant social reform.”⁶⁷ The main risk of active courts, according to Rosenberg, is that they will act as “fly paper,” drawing in and wasting the energy of reformist individuals and groups who would be better served by devoting their energies to other aspects of the political process.⁶⁸

The other major subpart of this literature seeks to answer the challenge posed by Rosenberg, partially by suggesting ways in which courts themselves might impact their “support structure.” For example, judicial decisions and the litigation process, even if unsuccessful, may have a symbolic effect, serving as a rallying point for nascent groups and helping them to first organize and then apply pressure through other channels.⁶⁹ The judiciary’s ability to “catalyze” change by strengthening its support structure is a potentially important twist on the complement model.⁷⁰ While courts are clearly dependent on their “support structure,” they may have at least some power to impact and strengthen that structure. Indeed, as I will argue below, this insight could be used to construct a more basic model of judicial review, which combines the logic of the substitute and complement models. In situations where courts face unpromising political and social environments, they can increase the probability that

rights regardless of the Supreme Court’s role). Of course, this argument has been widely challenged, both in initial book reviews and subsequently. *See, e.g.*, Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216, 1222 (1992) (stating that although Rosenberg may be right about the limited judicial ability to create social change, “courts can do a great deal to *stymie* change”); Malcom M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQUIRY 745, 751–52 (1992) (arguing that Rosenberg’s model is incomplete and potentially incorrect, in part because it fails to account for various, more indirect ways in which courts can lead to change).

66. ROSENBERG, *supra* note 2, at 169.

67. *Id.* at 422.

68. *See id.* at 427 (arguing that courts may seduce proponents of social change by offering “only an illusion of change”).

69. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 279–82 (1994) (compiling evidence based on an in-depth study of gender pay equity reform in the United States that demonstrated that litigation served a number of purposes, most importantly in helping to raise rights consciousness and to build a movement); *see also* César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1685–86 (2011) (differentiating “material” from “symbolic” effects of litigation).

70. *See* KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 168 (2012) (arguing that courts should act “eclectically” in cases involving socioeconomic rights in order to develop a “catalytic role conception”).

their actions will have a broader impact by crafting and timing decisions to spark or strengthen a support structure.

The general logic of the complement model is exactly opposed to the substitute or political process model. The support of other actors and groups does not make judicial review redundant, but rather identifies the conditions under which it can be effective. In other words, each theory suggests a logic for the targeting of judicial review, but the political safeguards theory suggests targeting topics and areas where external support does not exist, while the complement model suggests targeting areas where they are strong.

II. RECONCILING THE THEORIES

How might one reconcile these two contrasting theories of judicial review? In this Part, I reject the obvious claim (drawn straight from existing literature) that the substitute logic is likely to hold on structural issues, while the complement approach is likely to hold on rights issues. I also reject—not as irrelevant but as unlikely to hold in stark terms—a number of other possible divisions, including between support from political institutions and other forms of support (such as civil society support), and between more mature and less mature democratic legal systems. Instead, I argue that both the substitute and complement models are likely to hold across different times and different issues. In the next Part, I argue that theories of judicial review should be attentive to this insight, and that this attentiveness can help to construct a more general consideration of the enterprise based on a targeting function (judges intervening in the right contexts) and a support-generating function (judges seeking to build up allies from the political, social, and international spheres).

A. Rights vs. Structure

A fairly common claim in the literature seems to be that the substitute theory of judicial review is mainly applicable to issues of constitutional structure. Thus virtually the entire “safeguards” theory in modern U.S. constitutional theory focuses on structural issues.⁷¹ Meanwhile, virtually all literature analyzing courts through the complement logic has focused on rights issues, particularly large-scale and high-salience litigation projects aimed at spurring social change.⁷²

Yet a neat division of the problem into rights and structure breaks down, in fact fairly easily. First, the substitute logic can perhaps at times sensibly be applied to rights issues. The point, in fact, goes back to the “political process” family of theories spurred by footnote four in *Carolene Products*.⁷³ That work suggests that some kinds of interests may be adequately protected by the political process, and these interests do not need as much, or any, judicial protection.⁷⁴ The system of tiered levels of

71. *See supra* Part I.A.

72. *See supra* Part I.B.

73. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also* ELY, *supra* note 32, at 75–77 (elaborating a theory of judicial review in part from this insight).

74. The claim that the political process produces adequate outcomes for some kinds of rights issues, for example those involving economic interests, has been challenged by scholars who point out that interest group politics itself often produces distorted outcomes. *See* Cass R.

scrutiny for the equal protection clause, as an example, gives far more protection to some groups for differential treatment (race and gender) than it does for others (economic interests).⁷⁵ The claim can be read to say not that the Constitution does not protect these rights, but rather that they need not be protected by the judiciary because other avenues exist for their enforcement.⁷⁶

At both a theoretical and empirical level, at any rate, it is fairly easy to envisage rights that are self-enforcing or enforced through the political process, rather than primarily relying on judicial intervention. As Chilton and Versteeg point out, some rights are particularly likely to result in the construction of politically potent organizations, and those organizations may push for more enjoyment of the right in question, especially through the political process.⁷⁷ The rights to form political parties and to unionize, as examples, may be particularly likely to result in the formation of organizations that can wield political power.⁷⁸ These organizations, once formed, may help to safeguard the right at issue even without much judicial intervention.⁷⁹

Just as the substitute logic can be applied to rights, the complement logic can be applied to structure. Indeed, it is quite easy to show that the complement logic may

Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985) (calling for a “strengthened” rationality review in light of these distortions). Other scholarship suggests that the *Carolene Products* line gets things exactly backwards: “discrete and insular minorities” may at times need less judicial protection, not more, because in theories of interest group politics, those characteristics can be significant organizational advantages. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723 (1985); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 700 (1991) (noting that these groups may find it easier to organize and assert political power under classic theories of interest group politics). The point, at any rate, is not that the *Carolene Products* theory is right but simply that it suggests a logic about the self-enforcing nature of some constitutional rights issues.

75. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488–91 (1955) (upholding economic regulations while applying only cursory scrutiny through the Equal Protection Clause).

76. Cf. Daryl J. Levinson, *Rights Essentialism & Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (challenging the notion that “rights” have any independent existence from prudential and institutional considerations involved in constructing remedies for their violation).

77. See Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016).

78. The authors refer to this as a “theory of organizational rights.” See *id.*

79. To be clear, Chilton and Versteeg do not specify the mechanisms through which this self-enforcement occurs. Since much work suggests that organization and other resources aid litigation (just as they aid other mechanisms of political intervention), judicial intervention may be a key avenue of redress. But the fact that organization is also likely to increase political power suggests that the need for judicial review may decrease as political groups become more organized and thus more able to protect themselves politically. The empirical findings of Chilton and Versteeg, which are that organizational rights are more likely to matter over time than rights that do not tend to create organizational structures, tend to support the point. See *id.* at tbl.2 (finding based on statistical analysis that prior protection of organizational rights like political parties and unions increase actual enjoyment of those rights subsequently, but finding more mixed results for other rights).

commonly be applied to structural issues. The model of courts as potentially redundant on structural issues is firmly embedded in the U.S. literature.⁸⁰ Many of these arguments stem from James Madison's suggestion that structure will be significantly self-enforcing if "ambition" is used to check "ambition."⁸¹ In other words, the Madisonian conception depends in part on a world where each institution (the states, Congress, the President, etc.) will have the incentive and ability to block attempts by other institutions to overreach. Since all actors in the system have an incentive to expand their power, each will naturally be jealous of their prerogatives and will strike back against attempted encroachments.⁸²

The trouble is that structural relationships often do not look anything like this. Political institutions often do not "empire-build," but may instead seek to abdicate large amounts of their own power.⁸³ There are a number of reasons why political institutions may seek to give up their own institutional power (or at least be indifferent to it), rather than seek to build it up. Most importantly, political actors may seek goals other than the pursuit of institutional interests.⁸⁴ For example, in a strong-party system, actors may be motivated by the pursuit of partisan rather than institutional ends, both in order to maximize their chances of reelection and to pursue policy goals.⁸⁵ If these ends are maximized by a congressional majority giving up power to a president from the same party, one would expect that abdication to occur.⁸⁶ This problem may be particularly acute in multimember bodies, like legislatures and courts.⁸⁷ There, the many individuals that make up the body may often be able to advance their interests in a way that does not align with the broader institutional power of the body they constitute.⁸⁸ And if many or even all members of a multimember body seek to empower it, there is still no guarantee that will be the outcome. Collective action problems, or other inefficiencies in aggregating results from the individual to the group level, may prevent coordination.⁸⁹

80. *See supra* Part I.A.

81. *See* THE FEDERALIST NO. 51 (James Madison).

82. For a modern version of this formulation, see CHOPER, *supra* note 1, at 175, 263 (arguing that in the U.S. context, both different levels and branches of government have the ability and desire to block self-aggrandizing moves by other actors).

83. *See* Levinson, *supra* note 40, at 970.

84. *See id.* at 926–35 (explaining why elected politicians and bureaucrats often pursue other goals).

85. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329–30 (2006) (arguing that in modern U.S. democracy, partisan motives outweigh institutional interests much of the time, and thus the separation of powers system performs fundamentally differently under unified versus divided government).

86. *See id.* at 2352 ("If a partisan majority in Congress generally shares the President's ideological and policy goals, abdication might further the party's interest in uniting behind the President.").

87. *See* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 41 (2011).

88. *See* Levinson, *supra* note 40, at 952–64 (exploring the motivations of members of Congress and judges and finding that these motives often diverge from those of institutional aggrandizement).

89. *See* VERMEULE, *supra* note 87, at 41 (noting the flaw in Madisonian logic of ignoring the collective action problem).

In circumstances where many institutions behave in a way that is relatively indifferent to their own power, or actively seek to give it up rather than aggrandizing, the substitute model may do a poor job of analyzing the context in which judicial review occurs.⁹⁰ If one institution has the incentives and ability to exceed its designated sphere of powers, others may, under certain circumstances, acquiesce or invite rather than fight this encroachment.⁹¹ If this happens routinely, there may be less reason to think that institutions themselves will automatically reach the constitutionally mandated balance of power. Instead, the interaction between branches and levels of government may result in an equilibrium that is radically different from the constitutional design.

Indeed, under circumstances where many political institutions abdicate rather than preserve and protect their power, the complement model may do a better job of describing the political context.⁹² Judicial review may not plausibly be redundant in such circumstances, but rather doomed to fail because the court cannot gain any political support to aid in its projects. In other words, in contexts where some institutions aggrandize their power and others abdicate or are indifferent to the expansion, it may well be true that institutions, left to their own devices, will distort rather than protect the structural constitutional design. But it may also be true that courts can do little on their own to rectify these distortions.

My own recent work provides support for using a complement-based conceptualization in many circumstances, at least outside of the United States. Courts functioning in Latin America sometimes face separation of powers contexts gone awry, where presidents dominate policy making to a high degree, and legislatures are marginalized.⁹³ In many of these circumstances, legislatures are complicit or indifferent in these arrangements, rather than fighting them.⁹⁴ This is often because individual legislators, especially in weak-party systems, have incentives (such as the accumulation of patronage resources or the advancement of post-legislative careers) that diverge sharply from those that would lead them to support institutional aggrandizement.⁹⁵ My research on Colombia suggests that even a determined court, issuing

90. The argument here is that many models of political safeguards seem to depend on Madisonian reasoning, not that all such models must do so. There may be versions of the political safeguards argument that can work within, or even depend on, some forms of institutional abdication, but most existing work seems to depend on assumptions very much like Madison's. *See supra* Part I.A.

91. *See* Levinson, *supra* note 40, at 957 (arguing that the true picture of modern U.S. constitutional law is one with "somewhat imperial modern presidents and stubbornly passive Congresses," rather than "mutually rivalrous, self-aggrandizing branches").

92. *See supra* Part I.B.

93. *See* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 *TEX. INT'L L.J.* 1, 3 (2006) ("Presidents are elected but often act and look much like the dictators or *caudillos* of the nineteenth century.").

94. *See* Gary W. Cox & Scott Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, in *LEGISLATIVE POLITICS IN LATIN AMERICA* 446, 467–68 (Scott Morgenstern & Benito Nacif eds., 2002) (rejecting the thesis that Latin American legislatures are unimportant but noting that they are "reactive," and also noting that combinations of executive prerogatives and congressional acquiescence allow Latin American presidents to often "go much further than an American president would be able").

95. *See, e.g.*, Scott Mainwaring & Timothy R. Scully, *Introduction: Party Systems in*

sophisticated decisions and working persistently on an issue, had little prospect of success in rebalancing the separation of powers and reining in presidential power unless it enjoyed some other form of political or social support (from political parties, for example, or civil society groups) that could serve as an alternative to its lack of support from political institutions.⁹⁶ In contrast, in the Mexican case where the court did have the support of a newly empowered legislature in the hands of strong opposition parties, its doctrines were arguably able to have an easier impact on the extent of presidential power.⁹⁷

It is possible, of course, that the context in the United States is different, and that here the substitute or political safeguards model is indeed the right one in most structural situations. But scholarship persuasively demonstrates that abdication rather than empire building is common behavior among U.S. political institutions (particularly Congress and the states) as well as political institutions outside of the United States.⁹⁸ This behavior is a predictable result of common institutional dynamics; it is not just a pathology of banana republics. And below I suggest reasons why the United States is unlikely to have a radically different distribution of “substitute” versus “complement” contexts than other legal systems.

The fact that structural constitutional law in the United States, like structural constitutional law elsewhere, is likely to contain many situations where the complement rather than substitute logic holds does not mean that any particular claim that a given area of law conforms to the political safeguards logic is wrong. Nor should a conclusion that, upon second look, a given area does not have sufficient political safeguards necessarily be an invitation for U.S. courts to conduct aggressive judicial review in that area. The reason is simple: judicial review without significant political support may not be redundant, but it may well be hopeless.⁹⁹ The complement model, in other words, may offer its own compelling reasons for avoiding judicial review of certain structural issues.

At the same time, the straightforward logic laid out in this Part does suggest that something beyond empirical data may motivate the extraordinary popularity of political safeguards arguments in U.S. constitutional law. Critics have, of course, noted

Latin America, in BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 1, 21–28 (Scott Mainwaring & Timothy R. Scully eds., 1995) (noting that noninstitutionalized party systems reduce the dependence of politicians on their parties and thus hinder governance and increase uncertainty); see also Landau, *supra* note 61, at 331–32 (noting that where parties are weak, legislatures are likely to lack both democratic accountability and institutional capacity).

96. See David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069 (2016).

97. See *id.* For a general account of some of the case law on which this account draws, see Stephen T. Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidentialismo*, 4 INT’L J. CONST. L. 411 (2006).

98. See Levinson, *supra* note 40, at 957 (arguing that the U.S. Congress has often willingly abdicated its power and stating that “[s]eparation of powers scholars certainly recognize that Congress has fallen down on the job of empire-building in areas such as delegation and foreign affairs”); see also *id.* at 940–42 (making a similar argument with respect to state governments).

99. See *supra* Part I.B (discussing the logic of the argument that judicial review cannot work without courts having a certain amount of support from political or social actors).

that some of this work relies on vaguely specified political mechanisms and spends relatively little effort demonstrating that the specified mechanisms actually fulfill the values they purport to serve.¹⁰⁰ Moreover, some scholarship pays little attention to measuring the proper constitutional distribution of power between levels and branches of government, or in other words, to the question of how one would know whether the political safeguards were working adequately.

It is likely that some of this work serves as a justification for normative values developed in other ways. For example, it may be a defensible position to assert that structural constitutional review is a lower priority than rights review because it has a more contingent and uncertain relationship to human liberty or other fundamental values.¹⁰¹ It is also possible to argue that structural judicial review, on some topics, would be futile, either because of the complement logic laid out above or for other reasons like the lack of judicially manageable standards.¹⁰² But these positions should be asserted and evaluated directly, rather than retreated behind a political safeguards argument that rests on different logic. It seems difficult to sustain the position that structural constitutional review functions off of an essentially different logic from constitutional rights review.

B. Political Institutions vs. Civil Society

Existing scholarship also suggests a distinction between support provided by state institutions from that provided by nonstate actors such as civil society groups. Most of the work on substitute or political process theories seems to emphasize political support provided by governmental institutions like executives, legislatures, and political parties.¹⁰³ In contrast, work that focuses on the relationship between social actors like civil society groups tends to emphasize the logic of the complement model.¹⁰⁴ The intuition here may be that political support is stronger than that provided by other kinds of actors. Thus political forms of support can be strong enough to make judicial review redundant. Nonpolitical support may aid courts in carrying out their projects, but at the same time not be sufficiently strong so as to render judicial review of a given topic unnecessary.

But this claim again seems unlikely to hold up in a categorical way. It is easy to imagine cases where the complement logic exists with respect to governmental institutions. In the absence of governmental support, just as in the absence of other forms of support, judicial review may prove ineffective. Perhaps more to the point, it is easy to envision cases where some level of governmental support exists, but judicial review serves to augment the impact of that support. The Mexican case of

100. A sweeping critique is offered by Prakash & Yoo, *supra* note 42, at 1476–89 (critiquing the mechanisms identified in various existing “process” theories of federalism).

101. *See, e.g.*, CHOPER, *supra* note 1, at 64 (“[T]he overriding virtue of and justification for vesting the Court with this awesome power [of judicial review] is to guard against governmental infringement of individual liberties secured by the Constitution.”).

102. *See, e.g.*, Kramer, *supra* note 13, at 288–89 (arguing that “[t]he practical difficulties of working out the limits of Congress’s power through litigation are depressingly familiar, having been reproduced each time the Supreme Court has tried its hand at the problem”).

103. *See supra* Part I.A.

104. *See supra* Part I.B.

congressional-executive relations, noted above, may provide one interesting example.¹⁰⁵ Between the 1930s and the 1990s, the Mexican president dominated policy making in the country's one-party state.¹⁰⁶ As Mexico democratized, opposition parties took control of the Congress and the party experienced divided government for the first time in a lifetime and began pushing for a larger role in the policy making process.¹⁰⁷ But the president, aided by ambiguous constitutional language and tradition, continued to assert unilateral powers.¹⁰⁸ By striking some of these assertions down, the Mexican Supreme Court to a degree aided the rebalancing of the separation of powers in the country, even if it was working alongside other political forces (namely the opposition political parties) pointing in the same direction.¹⁰⁹

Moreover, the claim that governmental forms of support are categorically stronger than nongovernmental forms fails to account for the complexity of relationships in this area. It does seem plausible that many forms of self-enforcement involve the state somehow. But the trigger or source of self-enforcement may still be nonstate actors like civil society groups, rather than (or in addition to) friendly institutions or politicians. As an example, imagine that the right to unionize proves largely self-enforcing because it leads to the creation of politically powerful unions that work to protect and extend the right. The mechanisms through which this protection would work would likely go through the legislature and administrative state—the unions would use their political clout to win policy concessions from both branches of government, perhaps partially or totally vitiating the need for judicial review.¹¹⁰ But the ultimate source of self-enforcement would stem from civil society and not the state.

C. The Rule of Law and Institutional Development

Finally, some work focuses on the existence of the rule of law in demarcating the dividing line between substitute and complement logics. One possibility is that the key to sorting between these two theories is concerns about compliance: where courts are regularly disobeyed, their most basic task is to round up or identify sufficient support to make their orders effective. On the other hand, where compliance is much less problematic, redundancy may come to the fore as a bigger issue. Additionally, work in the popular constitutionalist vein argues that where political institutions are well functioning and there is a developed constitutional culture, nonjudicial actors

105. See *supra* text accompanying note 97.

106. See Jeffrey Weldon, *Political Sources of Presidentialismo in Mexico*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 225 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) (noting that the Mexican president has historically “dominate[d] the legislative and judicial branches of the national government” and may be the most powerful executive in Latin America).

107. See Zamora & Cossío, *supra* note 97, at 416 (stating that the Mexican president has become the “supreme coalition builder” and “supreme veto wielder” rather than the “supreme legislator” as was the case previously).

108. See Landau, *supra* note 96.

109. See *id.*

110. Cf. McCANN, *supra* note 69, at 280–81 (noting that pay-equity groups used the courts to increase mobilization, but later in the process sought policy concessions through the political process without much involvement of the courts).

can more readily be counted on to carry out the constitutional project without a need for much judicial intervention.¹¹¹ At a broader level, this suggests an argument that aspects of a system like well-functioning political institutions and salient constitutional cultures make constitutional self-enforcement more likely, and may obviate the need for judicial review.

Recent scholarship generally supports the point that differences in configurations of political institutions and constitutional culture should affect the judicial role.¹¹² And some of these differences may well have an impact on the necessity or futility of judicial review on various questions. But sweeping or categorical distinctions cannot be based on the rule of law, developed versus developing political institutions, or the existence of political culture.

Direct noncompliance is only a minor part of what drives the complement theory. The underlying question is not only whether courts can issue individual orders that will be enforced or ignored, but instead whether it is necessary or possible for them to intervene in order to cause change in complex political or social systems.¹¹³ In this broader sense, noncompliance becomes a significant issue even in systems where the rule of law is strong.

In order to have such a broader impact, courts need to rely on a chain of events that runs well beyond the enforcement of individual judicial orders. At times, both inside and outside of the United States, political actors comply with an individual decision but refuse to alter their practice for other identically situated cases. A dramatic example is the Supreme Court's ruling in *INS v. Chadha*, where the Court left no doubt that "legislative vetoes"—by which one or both houses of Congress reserved for themselves the power to overrule executive discretion within statutory programs—were unconstitutional in all circumstances because they did not abide by the constitutional procedures for bicameralism and presentment.¹¹⁴ The political branches of course complied with the judicial order on the particular facts involving Chadha (who was not deported), but in subsequent cases, Congress has continued to insert and rely on these vetoes, with the acquiescence of the executive branch.¹¹⁵ This problem may be particularly difficult where the bureaucracies or other institutions charged with enforcing a given order are varied rather than centralized. As a simple

111. See Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2225–26 (2013) (laying out the conditions for “political” rather than “legal” constitutionalism as including “widespread commitment among the nation’s citizens to constitutional values” and “vigorous party competition or a robust culture of intraparty discussion”).

112. See Daniel Bonilla Maldonado, *Introduction: Toward a Constitutionalism of the Global South*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1 (2013).

113. See, e.g., ROSENBERG, *supra* note 2 (examining the ability of the U.S. Supreme Court to carry out social change across different areas, including abortion and school desegregation).

114. 462 U.S. 919, 951 (1983) (holding that the legislative veto violated the Constitution by evading the Constitution’s “single, finely wrought and exhaustively considered procedure” for the passage of laws).

115. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 L. & CONTEMP. PROBS. 274, 288 (1993) (noting that Congress added roughly two hundred legislative vetoes to new laws in the ten years after the *Chadha* decision came down).

example, one of the reasons the school desegregation process in the United States was so difficult was because courts had to deal with a myriad of different local institutions.¹¹⁶

Moreover, even where political or other actors adjust their practice for the broader run of similarly situated cases, rather than just for the single case at issue, they may jointly reestablish an equilibrium that does not represent real political or social change.¹¹⁷ For example, faced with a ruling that certain forms of explicit racial discrimination are unconstitutional, actors may switch to alternative methods that are harder to detect but which produce similar results. Or faced with a ruling that a certain type of interaction between the executive and legislative branches is illegal, the two actors jointly may abandon that approach but instead agree on another one that is not very different in terms of its balance of costs and benefits.¹¹⁸

Relatedly, where courts succeed in altering an equilibrium on a given issue, they may also spawn social movements that harm progress on related issues. The basic dynamics of this “backlash thesis” are well known: judicial decisions may galvanize opposition groups, spurring them to organize and seek channels of political change that run contrary to what a court is trying to do.¹¹⁹ Such a story is often told about *Roe v. Wade*¹²⁰ in the United States, even if this narrative has also been heavily contested¹²¹: the Court’s decision may have galvanized opposition groups that worked against progress, both on abortion and on other issues of women’s rights.¹²²

116. See, e.g., ROSENBERG, *supra* note 2, at 85–93 (arguing that little progress was achieved in the decade following *Brown v. Board of Education*, 347 U.S. 483 (1954), because of resistance from local political officials across different districts, refusals by lower courts and state judges to follow the law, and a lack of resources to bring a sufficient number of suits).

117. See Michael A. Fitts, *The Foibles of Formalism: Applying a Political “Transaction Cost” Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643, 1646 (1997) (noting that when the Supreme Court makes a decision, actors may employ “informal or other formal . . . mechanisms . . . to overcome or effect” that decision).

118. See *id.* at 1652 (discussing the legislative veto).

119. See, e.g., Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) (stating that “political and legal backlashes are a foreseeable consequence of controversial judicial victories that require majority groups to reassess in fundamental ways the manner in which they have in the past treated and understood certain minority groups”); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (arguing that *Brown v. Board of Education*, 347 U.S. 483, set in motion a backlash in the South that indirectly led to the civil rights litigation of the 1960s).

120. 410 U.S. 113 (1973).

121. Substantial recent literature critiques the “backlash” thesis as either incorrect or incomplete. See, e.g., Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (questioning the Court-centric backlash narrative of *Roe* based on historical data and finding that other institutions were already engaged in backlash-like dynamics before *Roe*); Mary Ziegler, *Beyond Backlash: Legal History, Mobilization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 972–73 (2014) (“[T]he ideological entrenchment we associate with *Roe* came later than we have thought and emerged for reasons beyond the Court’s decision.”).

122. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (arguing that the decision “stimulated the

Courts of course have at least limited tools to deal with these problems. They can, for example, issue repeated rulings, if necessary, to induce bureaucracies and other actors to comply with their orders. They can also issue more structural remedies, attempting to change broader bureaucratic practice directly.¹²³ Further, courts can develop constitutional doctrines designed to protect against attempted “evasion” of their orders through the adoption of different, but similar, equilibria.¹²⁴ In adopting most of these measures, courts are heavily dependent on support from other political or social actors. These actors can, for example, act as “support structures” in order to bring new cases to the court.¹²⁵ They can also serve a monitoring function, detecting noncompliance with existing orders and bringing new problems to the attention of the court.¹²⁶ Further, resistance from other social and political actors may prevent attempts at judicial evasion through the construction of new, but similar, equilibria. And finally, supportive actors may create virtuous circles through social movements that support a court’s orders and attempt to push them further, rather than movements aiming to create backlash.¹²⁷

The complement logic is thus largely dependent on more sophisticated forms of resistance and inertia that work against judicial rulings, rather than simple and direct noncompliance with court orders. And these more complex problems seem to crop up across all legal systems; they are not just a creature of countries or systems lacking in the rule of law.

The broader argument seems to rely on a claim that constitutional self-enforcement is more likely where political institutions function well and a robust constitutional culture exists.¹²⁸ There is probably some truth to this point, but it risks oversimplifying reality. Many self-enforcement theories do not rely on actors internalizing constitutional norms: Madison’s basic theory, for example, relies mostly on interests and incentives rather than cultural values.¹²⁹ Thus, forms of self-enforcement are quite plausible even in contexts where constitutional culture is weak. Moreover, it may be easy to envision cases where external actors do not support constitutional values, even where institutions function well and a strong constitutional culture exists. Well-functioning political institutions, working within strong-party systems, may still behave in ways that do not conform with Madisonian

mobilization of a right-to-life movement”).

123. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 6–7 (1977) (tracking the emergence of structural remedies seeking affirmative relief in U.S. courts as a way to make policy).

124. See Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776 (defining and finding examples of anti-evasion devices, or “doctrines developed by courts—usually designed as standards, as opposed to rules—that supplement other doctrines (designed as rules) to implement particular constitutional principles”).

125. See EPP, *supra* note 2, at 18 (“[C]ases do not arrive in supreme courts as if by magic.”).

126. See Landau, *supra* note 61, at 360–62 (noting the ways in which civil society groups can extend the capacity of courts to make policy and oversee the state).

127. See YOUNG, *supra* note 70, at 172–73 (calling for a “catalytic” vision of the Court that focuses on spurring civil society and governmental actors to seek further change).

128. See *supra* text accompanying note 111.

129. See *supra* text accompanying note 23.

expectations.¹³⁰ And it is unclear the extent to which a strong constitutional culture actually will translate into effective constitutional self-enforcement.

None of this rules out differences in the distribution of the logics across different institutional contexts. It is intuitive, for example, that the complement logic is ubiquitous across all legal systems, and across problems of both rights and structure. One might ask whether the same is true of substitute-based theories. In some countries, for example, it may be that political institutions are dysfunctional enough, and civil society weak enough, to make plausible claims of the redundancy of judicial review fairly rare.

*D. Finding Substitutes and Complements for
Judicial Review—A Messy and Uncertain Reality*

The three arguments rejected above play first and foremost a destabilization function—they suggest that actors cannot rely on simple delineations of the political context in order to figure out whether judges and scholars need to worry more about the redundancy or futility of judicial review. The interplay of these two logics is instead likely to depend on more complex and contingent features of this context. Analysts (and potentially judges) cannot focus solely on broad claims that judicial review is likely to be redundant in some areas or national contexts, while being insufficient or unworkable in others.

At the same time, the rejection of simple classifications between the two logics may serve a unification function—it may allow us to move towards a more general theory of the relationship between external support and judicial review. The main value of the scheme laid out here is perhaps in highlighting two major issues, which will be the focus of the remainder of this Article. The first is about targeting: whether courts can identify and focus on areas where they are likely to have a particularly high impact, while giving lesser attention to issues where they are likely to be either ineffective or redundant.¹³¹ I conclude that this is quite difficult, but perhaps possible, at least in a rough sense. The second is the ultimately richer question of whether courts can build up support, rather than simply target issues with certain levels of support.¹³² Courts have a number of tools at their disposal that can potentially be used to build up support structures, rather than just taking them as a given. The different permutations of this ability should be more central to future work on courts and their impact.

III. TARGETING JUDICIAL REVIEW

A. A Simple Model of Targeting

There are of course multiple ways in which the substitute and complement models may hold simultaneously. In the most pessimistic extreme, the two may meet exactly,

130. See Levinson, *supra* note 40 (arguing that across a wide range of assumptions and institutional orders, many political actors probably do not have incentives to empire-build or to resist the empire building of other institutions).

131. See *infra* Part III.

132. See *infra* Part IV.

such that judicial review is either redundant or pointless.¹³³ In other words, it may be that the contributions of external political and social actors simply swamp those of courts. In many cases, courts will be unable to accomplish much because they lack the support of political institutions or civil society.¹³⁴ In the remaining cases, they will add no value, because the program they are seeking to accomplish through jurisprudence would have occurred anyway.¹³⁵ This description of the relationship in fact comes very close to matching the empirical conclusions of a branch of the law and social change literature—courts do not matter, at least not very much.¹³⁶

As a theoretical matter, this possibility cannot be dismissed out of hand. But the pessimistic branch of the social change literature has a fairly cramped vision of the influence of courts on political and social structures. It rightly points out that courts can do very little alone, but it may overstate the powerlessness of courts to add value when combined with the actions of other political actors.¹³⁷ Part of the problem may be that some of these causal pathways may be difficult for social scientists to trace. For example, judicial decisions can sometimes have symbolic effects that help groups to organize and subsequently influence public policy through electoral or administrative politics.¹³⁸ More generally, it may be difficult for scholars to trace the added value of courts when courts are working in conjunction with a number of other actors towards a similar goal.

Perhaps, then, a more realistic map of the relationship between the substitute and complement models would be parabolic. Courts face a range of left-tail issues, where judicial review is likely to prove fairly ineffective because courts do not have sufficient external political or social support. They also face a range of right-tail issues, where judicial review is at least largely redundant on other mechanisms of constitutional enforcement. In between these two extremes are zones where the value added of courts is likely to be highest—courts working in this range have sufficient support from other political or social actors to be able to accomplish their goals, but not so much as to make judicial review unnecessary.¹³⁹

Of course, this representation is highly stylized. As noted above, there may be contexts where one or the other tail is either completely missing or at least quite

133. See ROSENBERG, *supra* note 2, at 422.

134. See *id.* at 423 (exploring the failings of desegregation and abortion litigation in U.S. politics).

135. See *id.* at 420 (arguing that change in civil rights in the United States depended on the involvement of the federal government, and not on the actions of the Supreme Court itself).

136. See *supra* Part I.B (describing the work of Gerald Rosenberg and related scholars).

137. See sources cited *supra* note 65.

138. See MCCANN, *supra* note 69, at 279–81 (telling such a story with respect to pay equity litigation); Rodríguez-Garavito, *supra* note 69, at 1680 (noting that litigation can have symbolic effects, which “consist of changes in ideas, perceptions, and collective social constructs relating to the litigation’s subject matter”).

139. The relationship posited here is plausible; I make no claim that it is inevitable. It is possible, for example, that the relationship between external support and the marginal contribution of judicial review, in some circumstances, is not parabolic but rather monotonically increasing. This would occur if courts added more marginal value the more external support they possessed.

sparse. Existing empirical evidence—admittedly incomplete—suggests that complementary relationships between courts and other actors are ubiquitous in law.¹⁴⁰ In virtually any complex context, it seems implausible that courts can be successful without at least some significant external political support. It is unclear to me whether substitute relationships are similarly ubiquitous. Most “political process” accounts stem from U.S. constitutional theory, but it is unclear whether this is due to differences in political context or just to quirks that have led scholars to seek them out in the United States and ignore them outside of it.¹⁴¹

The intuition of the model, at any rate, is straightforward: courts should aim to target areas towards the middle of the curve, rather than the tails. In doing so, they maximize the gain from judicial review. And they avoid the twin traps of issuing decisions in areas where their actions are likely to fail (the left tail) or are unneeded because of very strong forms of external support (the right tail).

As a normative theory, the question here is whether courts *should* behave in this way, not whether they *will* in a descriptive sense. But the theory at least makes reasonable (and perhaps incentive-compatible) demands in a descriptive sense. Judges plausibly have an interest in making sure that their orders and programs are carried out effectively—this gives them an interest in avoiding the left tail of the distribution. More broadly, left-tail cases may be ones where courts, by acting in areas where other political and social actors are indifferent or hostile, may risk damaging their institution. The case for avoiding right-tail cases is not as strong, since ruling in areas where external institutions already provide sufficient support may not threaten the court in an institutional sense. But if judges aim for an impact on policy, they should avoid this part of the distribution because their orders may not result in much of an impact.

B. Doubts About the Model

1. Should Judges Target?

One question is whether targeting is a normatively good theory of judicial behavior, both inside and outside the United States. Here one notes considerable tension with trends in constitutional theory. Inside the United States, political safeguards theories have a long pedigree, and continue to be frequently used in the literature, even though they seem to have lost favor with the Supreme Court.¹⁴² But broader trends in constitutional theory show a move away from institutional and pragmatic theories of review and towards more interpretive theories like originalism and textualism. This work privileges “right answers” to constitutional questions and deemphasizes contextual and institutional variables stemming from other sources.¹⁴³

140. See *supra* Part I.B (giving examples from existing work).

141. See *supra* Part I.A (discussing literature from American constitutional theory).

142. See *New York v. United States*, 505 U.S. 144 (1992) (rejecting a structural safeguards argument with respect to judicial review of the tenth amendment).

143. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 535–536 (2012) (arguing that theories of judicial self-restraint, like those associated with the work of James Bradley Thayer, gave way to constitutional theory which held that “even the most difficult—the most indeterminate-seeming—legal questions have ‘right answers’”).

In this light, political safeguards theories increasingly look like something of an aberration. Indeed, many of those calling for judicial enforcement of structural issues like federalism and the separation of powers argue that the existence of adequate structural safeguards is irrelevant—judges must act on these issues because either the original intent or constitutional text, properly understood, requires that enforcement.¹⁴⁴

In many ways, constitutional theory in a comparative context outside of the United States resembles the interpretive turn in American constitutional theory. The particular theories of constitutional interpretation are quite different. Originalism is somewhat unusual outside of the United States,¹⁴⁵ although important examples of its use do exist.¹⁴⁶ The dominant theory instead is proportionality, which requires courts to methodically weigh competing constitutional values and principles in order to resolve difficult problems.¹⁴⁷ This is a relatively universalist rather than text-bound or nationalist theory of constitutional interpretation, and invites engagement from academics and judges across national boundaries.¹⁴⁸ But it shares a focus on the internal heuristics of interpretation, rather than focusing on the ways in which judges ought to interact with their political and social environments.¹⁴⁹ It is also potentially its own form of “right answer” theory—its proponents sometimes assert that judges using the proper jurisprudential tools can resolve hard constitutional issues on their own terms.¹⁵⁰ Targeting theories, at any rate, do not appear to be common outside of the United States. The same may be true of other doctrines that sometimes facilitate

144. See, e.g., Yoo, *supra* note 40, at 1313 (arguing that judicial review in federalism cases is necessary because of a read of the “text, structure, and history of the Constitution”).

145. See Kim Lane Scheppele, *Jack Balkin Is an American*, 25 YALE J.L. & HUMAN. 23, 23 (2013) (arguing that originalism “is done almost nowhere else in the world”).

146. See Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT’L L. 780, 784 (2014) (arguing that originalism has thrived in Malaysia and Singapore); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT’L L. 1239, 1245 (2011) (demonstrating that the Turkish Constitutional Court has relied heavily on originalism).

147. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015) (noting that the United States is often viewed as an “outlier” in the global embrace of proportionality review, but arguing that some elements of U.S. constitutionalism in effect mirror that form of review).

148. See Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 96–97 (Sujit Choudhry ed., 2006) (locating proportionality as part of a “post-war constitutionalism” broadly embraced by many countries).

149. Proportionality review consists of three sequential parts: legislation must logically advance a sufficiently important objective, it must be the least intrusive means (in terms of restrictions on rights) to advance that objective, and the actual benefit of the law must exceed the harm done to rights-holders. See *id.* at 96–97.

150. See George Pavlakos, *Two Concepts of Objectivity*, in LAW, RIGHTS, AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 83 (George Pavlakos ed., 2007) (comparing a leading theorist of proportionality, Robert Alexy, to Ronald Dworkin and noting that both believe in “right answers” to legal questions, although they begin from premises that are mutually incompatible).

these theories, such as the political question doctrine.¹⁵¹ This suggests that these theories may be bound up with distinctive pragmatic and institutional elements of U.S. constitutional theory, and may not translate as easily to other contexts.

In addition, while the complement theory has long been popular and influential with descriptive analyses of the link between courts and social change (particularly those written by social scientists), it seems to have had much less explicit influence on courts or judicial decision making even inside the United States. One rarely, if ever sees a judge, or even a scholar, argue that judicial enforcement in a given area should be ignored or deemphasized because it would be potentially futile. This imbalance in American constitutional theory—between widespread acceptance of political safeguards theories but rejection of complement-based theories—perhaps suggests that while ignoring areas of the Constitution that are already seen as adequately enforced by other actors is acceptable, abdicating responsibility over underenforced constitutional norms is not. The choice may seem particularly problematic given that the left-tail cases are likely to be among the most ignored or violated norms in the Constitution.

Put together, these arguments suggest that a pragmatic theory like the targeting theory presented here may experience resistance from some judges and scholars, particularly outside of the United States. But they do not necessarily indicate that a targeting theory is ill founded. Instead, the intuition of the theory seems quite plausible: all other things being equal, judges should focus on enforcing those areas of the Constitution where they can have a maximum impact. And in order to figure out which areas of the Constitution meet those criteria, judges must consider the relationship between their decision making and external political actors.

A targeting theory makes particular sense given that judicial resources are scarce, and potential grounds and topics of constitutional enforcement will inevitably exceed the limits of those resources.¹⁵² This is seemingly true even in the United States, where the U.S. Supreme Court has experienced dramatic shifts through time in the topics as to which it has given its greatest attention, as well as in the size of its docket.¹⁵³ It is even more clearly true in a comparative context. Constitutions found elsewhere are often longer, more detailed documents, particularly in the developing world.¹⁵⁴ In those kinds of orders, the possibilities for constitutional enforcement are immense, and the social reality may be quite different from the one envisioned by the constitutional project.¹⁵⁵ One way or another, judges working in those systems

151. See Jenny S. Martinez, *Horizontal Structuring*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 547, 573–74 (Michel Rosenfeld & Andras Sajo, eds., 2012) (noting that some other legal systems, including the German one, have explicitly rejected the political question doctrine).

152. See, e.g., Bert I. Huang, *Lightened Scrutiny*, 124 *HARV. L. REV.* 1109, 1113 (2011) (arguing that “docket pressure can alter the nature of appellate scrutiny”).

153. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 *WASH. & LEE L. REV.* 737, 738 (2001) (noting a reduction in the size of the Supreme Court’s docket over the past several decades).

154. See Kim Lane Scheppele, *Parliamentary Supplements (or Why Democracies Need More than Parliaments)*, 89 *B.U. L. REV.* 795, 805 (2009) (noting that many countries now have “long, detailed and substantively thick constitutions”).

155. See Dennis M. Davis, *Transformation and the Democratic Case for Judicial Review*:

are exercising choice about the kinds of constitutional norms that they want to enforce. It is reasonable for them to choose topics and cases where they will have a relatively high impact.

2. Can Judges Target?

This leaves a more difficult question: can judges effectively target judicial review? A first intuition is that here as elsewhere, the United States (and a few other systems) may be distinctive. Targeting is possible where high courts have extensive powers of docket control, as with the U.S. Supreme Court and some high courts found elsewhere around the world.¹⁵⁶ But high courts in many countries have less power to choose their dockets, and instead are forced to hear cases that meet certain criteria.¹⁵⁷ Also, some courts contain a large number of members which sit in a number of different panels, rather than as a plenary.¹⁵⁸ Courts with full docket control may be able to choose cases to make an impact, and can easily develop a jurisprudential program through time. Courts without docket control, with heavy caseloads, or with a more fragmented structure may have a harder time following this strategy.

More fundamentally, the U.S. experience in finding and acting on political safeguards theories suggests some doubt as to whether courts actually can identify constitutional topics where review would be either redundant or futile. Existing work on federalism, for example, proposes a myriad of competing mechanisms that supposedly make judicial review unnecessary—the national Congress, the party system, and the bicameralism and presentment requirements, as a few examples.¹⁵⁹ There is a potentially vast array of causal mechanisms through which constitutional self-enforcement can occur, which will likely add complexity to the task of identifying these areas. And each of these mechanisms has been persuasively contested in the literature, often by authors seeking to debunk alternative theories of self-enforcement in order to propose their own. The Court itself has vacillated on this point, accepting the political safeguards theory in *Garcia* before rejecting it several years later in *New York v. United States*.¹⁶⁰

Some features of the federalism regime may even suggest that, rather than the substitute logic, the complement logic may actually be a better fit for at least certain aspects of the federalism problem. In other words, the issue may not be that external

The South African Experience, 5 LOY. U. CHI. INT'L L. REV. 45, 45 (2007) (stating that the purpose of the South African constitution is to “seek[] the transformation of the society through the construction of a multicultural social democracy”).

156. See David Fontana, *Docket Control and the Success of Constitutional Courts*, in COMPARATIVE CONSTITUTIONAL LAW 624, 625–27 (Tom Ginsburg & Rosalind Dixon eds., 2011) (finding that docket control seems to be a common, but not universal practice, and that there is little systematic information on docket control across countries).

157. See *id.*

158. See Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 184 (2013) (arguing that the Indian Supreme Court is “polyvocal” and often lacks coherence because it usually sits in panels of two or three justices, rather than as a plenary).

159. See *supra* text accompanying notes 13–20.

160. See 505 U.S. 144 (1992); see also *supra* note 39.

enforcement mechanisms make judicial review largely redundant, but instead that the absence of strong external support makes judicial review somewhat unlikely to achieve major results.¹⁶¹ The fact that state governments are often seen as acquiescing in assertions of federal power, rather than resisting them, may provide some support for such an analysis.¹⁶²

The point, at any rate, is not to locate federalism enforcement by the U.S. Supreme Court at any particular point on the curve—that is a task far beyond the scope of this Article, and at any rate different aspects of federalism would almost certainly be located at different points. The argument instead is that courts and even scholars have had an extremely hard time figuring out where various federalism issues are located. That stylized fact, pulled from perhaps the most sustained attempt to target judicial review, may give us some pause about recommending it as a general theory.

C. A Modest Theory of Targeting

The practical problems laid out in Part III.B ought to lead us to be modest in expectations—one cannot put too much weight on a theory of targeting. But the idea need not be abandoned.

The problems of judicial design laid out in Part III.B certainly can make targeting more difficult. A court without docket control, which has a very heavy workload, and which sits in several different panels may have less ability to prioritize some issues while deemphasizing others. But at least to a degree, these strategies can be followed even in a court without docket control, through doctrines of justiciability, the design of remedies, and similar techniques. Recent decision making by the Brazilian Supreme Federal Tribunal (STF) offers an interesting example. The court has historically had relatively little ability to limit its docket—one commentator likens its docket control technique to “drinking from the firehose”—and an extremely high workload.¹⁶³ Nonetheless, it has developed techniques to improve its ability to shape public policy on key issues where it might have a high impact. In a very recent case, for example, the court declared a state of unconstitutional conditions involving

161. See Landau, *supra* note 96 (defending this argument with a consideration of comparative empirical evidence).

162. See Levinson, *supra* note 40, at 941 (noting that state citizens may not have strong incentives to resist federal regulations as compared to state regulations, and thus that state-level officials might not care much either). What makes federalism—and perhaps all structural dynamics—particularly complex is that the same behavior can be interpreted in many different ways. Ryan, for example, observes that much of the balance between state and federal policy making is a result of bargaining between the two levels of government. See Ryan, *supra* note 20, at 4. It is of course very difficult to interpret the exact dynamics and relationships that underlie these bargains, or to assess their normative significance.

163. See Matthew M. Taylor, *Citizens Against the State: The Riddle of High Impact, Low Functionality Courts in Brazil*, 25 REVISTA DE ECONOMIA POLITICA 418, 429 (2006); see also Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUDS. L. REV. 139 (2006) (noting attempts to decrease the STF’s docket, although finding that it did not deal adequately with the fundamental causes).

the prison system, due to systematic overcrowding, mistreatment, and related issues.¹⁶⁴ This doctrine, which the court imported and used for the first time, allows the court to maintain jurisdiction over the case and potentially to issue a structural remedy.¹⁶⁵ It also may position it to draft in support from civil society groups that will be needed to carry out social change in this area.¹⁶⁶

Broader questions of judicial capacity, of course, must also be taken seriously. But even with judicial limitations on the ability to understand the political and social context, and inherent uncertainty about the effects of judicial decisions on that environment, there are still likely cases where a scholarly or judicial consensus could emerge that judicial review is likely to be useless or unnecessary.

The Colombian example noted above may help to illustrate the potential utility of the theory. As noted, the Colombian Constitutional Court has spent tremendous doctrinal effort since 1991 to weaken the unilateral powers of its historically hegemonic President and to strengthen the national policy-making capabilities of a Congress that was historically uninterested in national issues.¹⁶⁷ It has sought to cut off a number of different routes through which presidents exercised unilateral power or were delegated that power by Congress.¹⁶⁸ On the congressional side, it has exercised a rigorous review of legislative procedure in an effort to make the legislature more deliberative.¹⁶⁹ The efforts are in accord with the basic theory of the 1991 Constitution, which sought to rebalance the separation of powers.¹⁷⁰

But the targeting theory discussed here suggests that at least some of this tremendous doctrinal effort may be misplaced. As a whole, this area looks like one where the complement logic is very likely to come into play. Presidents became extremely strong in Colombia, and dominated national policy making, in large part because

164. See Vanice Regina Lirio do Valle, *An Unconstitutional State of Affairs in the Brazilian Prison System*, INT'L J. CONST. L. BLOG (Sept. 25, 2015), <http://www.iconnectblog.com/2015/09/an-unconstitutional-state-of-affairs-in-the-brazilian-prison-system/> [https://perma.cc/M9QQ-BYLQ].

165. The court imported the doctrine from Colombia, where it has been used to maintain jurisdiction over structural cases. See Rodríguez-Garavito, *supra* note 69, at 1670 (defining an unconstitutional state of affairs as a “massive human rights violation associated with systemic failures in state action”).

166. See *id.* at 1685–86 (noting the role that civil society has played, through a Monitoring Commission and other devices, in monitoring and enforcing the Colombian judgments).

167. See *supra* text accompanying note 91.

168. For an overview, see Landau, *supra* note 61, at 350–54 (covering judicial attempts to limit emergency powers and delegated decree powers); Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 DEMOCRATIZATION 46, 55–60 (2003) (focusing on the court’s control of presidential emergency powers).

169. See David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. REV. 1501, 1522–23 (2014) (recounting the court’s attempt to cleanse the Congress of corrupt elements and to improve the quality of its deliberations by monitoring and enforcing rules of legislative procedure).

170. See, e.g., Manuel Jose Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, WASH. U. GLOBAL STUDS. L. REV. 529, 631 (noting that the drafters of the 1991 Constitution “focused on the redistribution of functions among the three branches of public power” and “sought to restore the equilibrium, which had been altered by the historical prevalence of the Presidential office”).

Congress allowed these developments.¹⁷¹ Individual members of Congress have had incentives to focus on other issues (like the provision of local pork-barrel benefits), and parties have been too weak to serve as a counterpoint to strong presidents.¹⁷² Thus the court embarked on an ambitious program to rein in presidential power without the support of Congress, and without much support from other political and social actors. Some of this effort may have been better off being redeployed to other issues where the court enjoyed more political and social support. In other words, the court should consider shifting some doctrinal effort away from the separation of powers project embedded in the 1991 Constitution in favor of other key constitutional goals like the protection of minority rights and the promotion of socioeconomic justice.

Another potentially interesting comparative example is posed by so-called *sharia* clauses, which exist in many constitutions within the Muslim world.¹⁷³ In brief and with many important variations, these constitutional clauses require that legislation be consistent with principles of Islamic law.¹⁷⁴ Existing work on these provisions suggests that in many legal orders, judges have adopted flexible readings of these provisions, allowing important pieces of social, cultural, and commercial legislation to pass muster that might have been vulnerable.¹⁷⁵ Some recent work has suggested a political logic to these provisions: by packing courts with relatively secular judges, political leaders could both recognize and control pushes towards Islamization of the political order.¹⁷⁶ Without denying the importance of this political logic, it would be worth exploring the extent to which judicial deference could be motivated by a view that these clauses have adequate structural safeguards from elsewhere in the political process. Within political orders that are broadly Islamic, it may be that the political branches of government, and not the judiciary, are the best insurance that Islamic

171. See Ronald P. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 110, 117 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) (arguing that the delegation of national policy-making power from Congress to the President was a way of advancing the interests of members of Congress in patronage-based goals by “freeing members from the burdens of making policy”).

172. See *id.*

173. See Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, 54 *VA. J. INT’L L.* 615 (2014) (finding a form of these clauses in thirty-eight constitutions); Clark B. Lombardi, *Constitutional Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?*, 28 *AM. U. INT’L L. REV.* 733, 734 (2014) (noting the spread of these clauses since 1950).

174. The variations are, however, immense: some constitutions make Islamic law a source of law, while others make it the paramount source of law. Constitutions also differ in the extent to which they bind drafters to a broad corpus of Islamic law or only to certain basic principles. See Lombardi, *supra* note 173, at 772.

175. See *id.* at 771 (noting that in countries where these clauses have coexisted with judicial review, “courts seem to apply the law in a manner that is quite deferential to legislative judgment that their law is consistent with Islam”).

176. See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* 13 (2011) (finding based on a broad survey that courts in “constitutional theocracies” are “bastions of relative secularism” put in place by secular and commercial elites to limit the impact of *sharia* clauses and similar constitutional devices).

principles will be taken seriously in the legislative process.¹⁷⁷ Court-centric analyses of these provisions might therefore miss or even distort their impact.

IV. THE JUDICIAL CONSTRUCTION OF SUPPORT

The framework created here makes judicial efforts to build up sources of external support important to judicial review. These efforts may allow courts to move along the curve hypothesized above (towards the right), rather than be confined to targeting particular points on the curve. Moreover, the building up of political support for judicial decision making should be useful regardless of the point at which a given issue is located. If there is currently little support for the Court on a given issue, it can improve its position by helping to organize some. And even if the Court already enjoys significant support for its initiatives, it can potentially benefit from building up more. The ultimate goal may be to make support for a given issue self-enforcing, so judicial review becomes increasingly unnecessary over time.¹⁷⁸

The approach laid out in this Part most clearly resembles existing work in the law and social change literature that highlights the ways in which courts can influence their political and social environments.¹⁷⁹ My aim here is to go beyond existing work by moving towards a typology of the forms of support that courts can seek, and the most effective ways to gain that support. Further, I argue in Part IV.B below that the judicial construction of support should be particularly central to theorizing about judicial role in new or fragile democracies.

A. A Typology of Forms and Strategies

In a tentative vein, this Part seeks to capture some of the ways in which courts can influence their political and social environments. It does not aim to be comprehensive, but rather seeks to demonstrate the potential richness of strategy in this area by drawing off of examples from a range of countries and contexts. At the outset, it is worth making two important points. The first is that the judicial power to alter the political and social environment is limited. Still, in a range of cases even a limited power may prove critically important. The second is that all of these techniques, to varying degrees, impose costs—they may force a court to compromise on constitutional meaning, for example, in order to draft in support. Whether these costs are worth paying can only be figured out case by case. What is clear is that analysts of judicial review, and judges themselves, should pay more attention to these techniques.

177. See Lombardi, *supra* note 173, at 172–73 (acknowledging that the impact of these clauses depends “primarily on choices by the political branches”).

178. As with the targeting theory, the idea that courts should put effort towards building up political and social support structures at least seems plausible from the standpoint of descriptive theories of how judges behave. The construction of new forms of support should help to protect the judiciary as an institution, and therefore should appeal to judges motivated by institutional goals. Moreover, these support structures may serve individual goals (such as career goals) of judges and therefore may be appealing even to judges without an institutional motivation.

179. See *supra* text accompanying notes 69–73.

1. Political Support: Coalition Splitting

Most obviously, judges may both target and craft their judicial decisions so as to help ensure that they have sufficient political support to be successful. Decisions can be keyed to split political coalitions. Roux, for example, in a very close look at the jurisprudence of the first South African Constitutional Court following that country's transition to democracy, found that the court across a range of issues was far more successful than one would have anticipated based on its status as an institution within a dominant-party state.¹⁸⁰ In part, he found that the court used context-sensitive standards of review to identify opportunities to exploit divisions within the dominant party African National Congress (ANC), thus forging support within the ruling party itself.¹⁸¹ On questions like socioeconomic rights, for example, the court was able to craft decisions that drew the support of more liberal, transformational elements within the ANC—these elements then aided enforcement of the court's orders and broader projects.¹⁸²

Colombia offers a more dramatic example of coalition building. In 2009, the court faced the prospect of a powerful and highly popular President, Alvaro Uribe, potentially amending the constitution to run for a third consecutive term in office.¹⁸³ The court had already allowed Uribe to amend the constitution once and seek a second term, in 2006.¹⁸⁴ But the court declared that a second proposed amendment (via referendum) to allow a President to serve for three consecutive terms was invalid, both on procedural grounds and because the change was so fundamental that it would “substitute” rather than merely amend the existing text.¹⁸⁵ For our purposes, the interesting question is why the opinion succeeded—Uribe complied with it and left office peacefully. The main reason is again because the court's opinion split Uribe's coalition. While the President was popular with the public and controlled a supermajority coalition in Congress, his political majority was made up of a number of different movements and individuals, rather than a single strong party.¹⁸⁶ The court's

180. See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005*, at 2–3 (2013) (noting that the South African Constitutional Court “made remarkable strides in asserting its institutional role” despite its presence in a one-party-dominant state).

181. See *id.* at 387–89 (noting that the court often succeeded by framing its actions as designed to hold the ANC to its own constitutional and electoral commitments).

182. See *id.* at 297–99 (noting the ways in which the court “exploited the micro-politics” and splits within the ANC surrounding HIV transmission drugs to issue a strong ruling).

183. For background, see Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 615–17 (2015).

184. See Corte Constitucional [C.C.] [Constitutional Court], octubre 19, 2005, Sentencia C-1040/05 (Colom.).

185. See Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, (Colom.).

186. See Royce Carroll & Monica Pachon, *The Unrealized Potential of Presidential Coalitions in Colombia*, in *LEGISLATIVE INSTITUTIONS AND LAWMAKING IN LATIN AMERICA* 153, 159–60 & tbl.5.1 (Eduardo Alemán & George Tsebelis eds., 2016) (noting that Uribe's coalition controlled the Congress but was “very fragmented” and contained a number of different parties throughout both his terms).

opinion succeeded because it unleashed the ambition of these various factions. Once it became likely that Uribe would no longer be allowed to run, the leaders of these different movements themselves became committed to seeking the presidency, thus weakening the incumbent's support and making it more difficult for him to defy the judiciary.¹⁸⁷

Similar coalition-splitting dynamics have existed with judicial decisions in the United States. An interesting example is structural prison-reform litigation, where federal district courts in a number of different states attempted to modernize and improve inhumane conditions.¹⁸⁸ In these long-lasting structural reform cases, Feeley and Rubin showed that judges often made progress by co-opting the support of parts of the local political establishment and police bureaucracy.¹⁸⁹ Courts for example framed their interventions as a "professionalization" of prisons stuck in anachronistic models, and thus won support from more progressive-minded elements within these constituencies, which then aided the courts in carrying out reform.¹⁹⁰ Without the support of at least some significant elements of the local political establishment, it would have been even more difficult for judges to spur changes.

2. Organizing and Leveraging Civil Society

Courts also have tools to build up civil society support for their decisions and projects. Most obviously, judicial decisions can help to organize and empower civil society groups, which may then put pressure on the state. McCann notes the way that the litigation process can help to organize groups, although in his narrative of pay equity lawsuits in the United States, civil society used the litigation process for organizational ends, rather than vice versa.¹⁹¹ Evidence from other forms of structural litigation, both inside and outside the United States, amply demonstrates the ways that courts can draft civil society groups into their projects. In Colombia, India, and the United States, for example, courts issuing structural injunctions have relied formally or informally on different kinds of civil society groups as a source of information, as a basis of policy ideas, and as a monitor of compliance by the state.¹⁹² In complex cases, these groups can be invaluable extensions of a court's own limited

187. See Dixon & Landau, *supra* note 183, at 617–18.

188. See FEELEY & RUBIN, *supra* note 60.

189. See *id.* at 260–61.

190. See *id.* at 261 (noting that "[t]he partial acceptance of the rehabilitative ideal . . . enabled judges to do indirectly what reformist administrators generally need to do – to replace the entrenched, traditional officials with their own people").

191. See MCCANN, *supra* note 69, at 88 (finding that movement leaders used the courts to raise consciousness and increase organization).

192. See, e.g., FEELEY & RUBIN, *supra* note 60 (exploring prison litigation in the United States); Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 719–33 (2010) (discussing how the Indian Supreme Court has relied on both civil society and an appointed commission to monitor compliance and develop policy ideas in a structural case involving the right to food); Landau, *supra* note 61, at 359–62 (explaining the role of civil society in structural litigation for internally displaced persons in Colombia).

capabilities.¹⁹³ At the same time, giving civil society groups a role in the litigation process may increase their organization and leverage over the state.¹⁹⁴

Recent Colombian structural litigation, which has been widely studied, represents perhaps the most developed example of this kind of dynamic. In its two most significant structural cases, involving internally displaced persons and the national healthcare system, respectively, the Colombian Constitutional Court has not only relied on civil society as informal sources of support, but has formalized a key role for these groups.¹⁹⁵ In both cases, it ordered the creation of a civil society commission composed of various organizations.¹⁹⁶ It has relied heavily on these groups as a source of information about the underlying problems, for ideas about judicial orders and the direction of policy, and in order to report on state compliance.¹⁹⁷ It has used widely publicized (often televised) public hearings, at which both civil society groups and state officials testify, to give the groups a chance to influence policy and confront recalcitrant state officials.¹⁹⁸ In short, the court engaged in a deliberate strategy to increase the power of civil society.

3. Defining the Beneficiaries of Litigation

Judges may also be able to alter the scope of their judgments in order to draw in additional civil society or public support. A strain of research in political science suggests that certain kinds of public policies, once created, are robust against change because those policies themselves create constituencies that tend to protect the program.¹⁹⁹ For example, many social welfare programs may be difficult to dislodge because they over time will spawn public and organizational support.²⁰⁰ The amount of organizational support may differ depending on the design of the program, however. For example, relatively universal programs may spawn critical middle-class support that protects programs, while means-tested programs targeted at the poor may be more vulnerable because they are supported by smaller and less politically

193. See Landau, *supra* note 61, at 361 (noting that the court was able to act as “the head of a coalition of allied governmental and non-governmental institutions to amass and systematize vast amounts of information and to issue more specific orders where action has been delayed”).

194. See Rodríguez-Garavito, *supra* note 69, at 1681 (noting that a structural case in Colombia helped to organize civil society, but the court then relied on civil society’s policy recommendations to alter state practice).

195. See Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760/08 (Colom.) (health); Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.) (internally displaced persons).

196. See David Landau, *Aggressive Weak-Form Remedies*, 5 CONST. CT. REV. 244, 261 (2013).

197. See *id.*

198. See *id.* at 261; see also Rodríguez-Garavito, *supra* note 69, at 1669 (describing such a hearing in the displaced persons case).

199. See, e.g., Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 143–44 (1996) (arguing that “[t]he growth of the welfare state itself transforms the politics of social policy” by creating new interest groups, and that this dynamic makes retrenchment of these programs more difficult).

200. See *id.* at 173–74 (arguing that efforts to retrench the welfare state have proven to impose high electoral costs because organized groups rally against those efforts).

powerful groups.²⁰¹ As a result, public policy makers may have incentives to create universal rather than more limited programs even if they are not optimal from a design standpoint.²⁰²

To some degree and in at least some cases, judges also have the power to modify the scope of their judgments so as to manipulate the beneficiary group of their judgments in this way. Socioeconomic rights provide a very rich example. Numerous commentators have now noted an oddity: while most assume that the basic purpose of having socioeconomic rights is to carry out social transformation by lifting up the poor, in many countries and contexts the middle class are major beneficiaries of judicial decisions enforcing these rights.²⁰³ To some degree this may be a result of access to justice: the middle class and wealthy are usually more likely to understand their rights and to be able to navigate the legal system.²⁰⁴ It may also be due in part to judicial incentives: judges themselves often identify with middle-class groups and may seek to aid those groups.²⁰⁵ But patterns of middle-class enforcement could also serve as an effective strategy, even for a court that was sincerely focused on helping the poor.

By expanding the scope of beneficiaries to include middle-class groups, rather than simply the poor, courts may make their rulings more robust against political or social backlash. In much the same way as universalizing a social welfare program may help to protect it against change, including the middle class as beneficiaries of social rights may create a potentially powerful constituency that will then rally to the defense of a court's project.²⁰⁶ The Colombian Constitutional Court's jurisprudence again offers an intriguing example, although it is unclear whether it constituted a

201. See GOSTA ESPING-ANDERSON, *THE THREE WORLDS OF WELFARE CAPITALISM* 33 (1990) (arguing that the risk of backlash against welfare states is determined not primarily by fiscal demands, but by whether social programs have drafted in the middle class). *But see* Pierson, *supra* note 199, at 177 (finding that both means-tested and universal programs have been well protected, and hypothesizing that this is because means-tested programs offer only minimal budgetary savings).

202. I do not mean to argue that the only way to increase the political power supporting a program is to expand the size of the group supporting that program. Indeed, as is well known, the logic of collective action holds that it will often be advantageous to decrease the number of beneficiaries because smaller organizations can more easily organize and exert power. See MANCUR OLSON JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). The point here is not that one judicial approach is inevitably better than another, but rather that courts have some ability to manipulate the beneficiary class for the purpose of maximizing support.

203. See, e.g., Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 *TEX. L. REV.* 1643, 1660–62 (2011) (finding that socioeconomic rights litigation in Brazil has mainly benefitted a “privileged-litigant minority” by relatively affluent individuals); David Landau, *The Reality of Social Rights Enforcement*, 53 *HARV. INT’L L.J.* 189, 246 (2012) (arguing based on a case study of Colombia and other evidence that social rights enforcement is a “largely middle-class phenomenon”).

204. See Ferraz, *supra* note 203, at 1662 (“[A]ccess to courts and lawyers is beyond the means and reach of most poor Brazilians.”).

205. See Landau, *supra* note 203, at 243–45 (referring to this phenomenon as “judicial populism”).

206. See *supra* text accompanying note 200.

deliberate strategy. In targeting the scope of socioeconomic rights like the right to health, the court initially focused heavily on whether a petitioner's right to a vital minimum was affected.²⁰⁷ In carrying out this inquiry, the court emphasized the individual economic circumstances of the petitioner, in effect asking whether the claimant was so marginalized that the failure to enforce their rights would place them in danger of falling below a minimum level of subsistence.²⁰⁸ But in subsequent cases, the court relaxed this requirement, in effect allowing massive individualized enforcement of these rights by not only the poor, but also the middle class.²⁰⁹

The court itself has recognized that this pattern of enforcement has distorted the transformational purpose of social rights by diverting resources away from the poor. One reason it subsequently issued a structural remedy on the right to health was because justices on the court felt that existing jurisprudence inequitably aided only those who had actually sued and perhaps had regressive class effects as a result.²¹⁰ Its structural orders on the healthcare system²¹¹ were also aimed at the entire system, but included components that prioritized the package of benefits for poorer citizens and other elements aimed at helping the poor.²¹² In other cases and in other areas as well, the court has attempted to prioritize social spending for poorer citizens. Its complex structural orders for internally displaced persons,²¹³ for example, were targeted mostly at a very marginalized group of the population.²¹⁴

But the court's ability to carry out these transformational remedies has plausibly been aided by the strong middle-class support created by its jurisprudence. On several occasions, this support was critical in warding off political attacks against the court, because powerful coalitions rallied against attempts to weaken an institution

207. See Pablo Rueda, *Legal Language and Social Change During Colombia's Economic Crisis*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 25, 33–35 (Javier A. Couso et al. eds., 2010) (describing the creation of the doctrine); see also Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-426/92 (Colom.) (creating the right to a vital minimum in a case involving an elderly and impoverished man who had been denied access to his wife's pension).

208. See Rueda, *supra* note 207, at 37 (summarizing the court's early doctrine as requiring that petitioners were "absolutely desperate and . . . incapable of self-help").

209. See *id.* at 45 (arguing that this shift occurred partially in response to a deep economic crisis in the late 1990s that led many middle-class petitioners to seek relief from the courts).

210. See Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 *HASTINGS INT'L & COMP. L. REV.* 431, 444 (2010).

211. See Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760/08 (Colom.).

212. See Yamin & Parra-Vera, *supra* note 210, at 445–50 (discussing the orders issued in the case).

213. See Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.).

214. See Julieta Lemaitre & Kristin Bergtora Sandvik, *Shifting Frames, Vanishing Resources, and Dangerous Political Opportunities: Legal Mobilization Among Displaced Women in Colombia*, 49 *L. & SOC'Y REV.* 5, 6 (2015) (finding that most internally displaced persons join "the ranks of the urban poor" and "struggle to survive in informal housing and unregulated labor markets").

that had served their interests.²¹⁵ A more complex question, of course, is in figuring out the circumstances under which the distortion created by the manipulation of the beneficiary class is worth the gain in political and social support.

4. Soliciting Support from International Actors

In some circumstances, support from international actors will be critical to courts, either to bolster domestic support or to substitute for it in circumstances where domestic political and civil society support is unobtainable. Judges also have at least some ability to rally this form of support. One technique, for example, involves signaling, or crafting decisions so as to send the loudest possible message to international organizations that the domestic actions of political or other groups involve international issues, violate international law, or otherwise require international assistance.

Relatively recent actions of the Hungarian Constitutional Court offer an interesting example. As numerous scholars have noted, beginning with the sweeping victory of a populist right-wing party (Fidesz) in 2010, the country has gone through a sustained process of democratic erosion or abusive constitutionalism.²¹⁶ Fidesz first amended the constitution to weaken the court (a traditionally celebrated and independent institution) and other checks on its power, and then replaced the existing constitution with a new one that strengthened its power and further eroded democratic checks.²¹⁷ In an initial decision from late 2010 where the court was asked to hold that one of the constitutional changes enacted by Fidesz (sharply restricting its own jurisdiction) was an unconstitutional constitutional amendment, the court refused by holding that it lacked the competence to make the determination.²¹⁸ But in an intervening period before the court was finally packed by Fidesz, it issued several decisions striking back against constitutional and legal changes enacted by the new majority.²¹⁹

My main interest here is in how these decisions were crafted to draft in attention and support from the international community. In a July 2012 decision, for example, the court struck down (under the new constitution) rules lowering the retirement age of judges.²²⁰ The decision included references to provisions of international human

215. For a complete overview of these attacks and their responses, see David Landau, *Beyond Judicial Independence: The Construction of Judicial Power in Colombia* 292–315 (Oct. 2014) (unpublished Ph.D. dissertation, Harvard University) (on file with DASH Repository, Harvard University).

216. For an overview of events, see Miklos Bankuti, Gabor Halmai, & Kim Lane Scheppele, *Disabling the Constitution*, 23 J. DEMOCRACY 138, 138 (2012).

217. *See id.* at 139–42.

218. *See* Gabor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 183, 196 (2012).

219. By April 2013, close observers had found the court to be fully packed. *See Executive Summary: Analysis of the Performance of Hungary's "One-Party Elected" Constitutional Court Judges Between 2011 and 2014*, HUNGARIAN HELSINKI COMM. 5 (2015), http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf [<https://perma.cc/QWD7-9XSW>].

220. *See* Alkotmánybíróság (AB) [Constitutional Court] 33/2012 (Hung.), <http://www>

rights law, international standards for judicial independence, and European Union (EU) law, and thus seemed designed to draw attention from international actors.²²¹ Moreover, it was issued at the same time the European Court of Justice (ECJ), the high court of the European Union, was considering a challenge to the judicial retirement age provision under EU law. In November 2012, the ECJ held that the law was a violation of EU law.²²² In two other key decisions from late 2012 and early 2013, the Hungarian Constitutional Court first struck down various “temporary” provisions that had been added to the new constitution and which created new crimes, new restrictions on the right to vote, and new institutions, holding that these “temporary provisions” were actually attempted permanent amendments to the constitution and were thus inconsistent with the rule of law and constitutional values.²²³ In a subsequent decision, the same court struck down onerous new requirements for voter registration.²²⁴ In both decisions, as a top Hungarian scholar noted, the court seemed aware of its international audience and crafted decisions so as to “speak the language of European constitutionalism.”²²⁵

In the Hungarian case, this tactic plausibly bore some fruit because Hungary was embedded in a fairly thick network of European and international institutions.²²⁶ Aside from the ECJ and other EU institutions, the Venice Commission of the Council of Europe also became heavily involved in evaluating and critiquing the actions of the Fidesz regime.²²⁷ By April 2013, the court had been packed by the regime, but its actions perhaps did help to slow and limit the erosion of democracy that could be worked in Hungary.²²⁸

Of course, the same signaling techniques can be used for antidemocratic rather than prodemocratic ends. A fascinating but deeply disturbing example is provided by the Supreme Court of Honduras, which recently excised the country’s supposedly unamendable provision providing for a strict one-term limit on presidential terms

.mkab.hu/letoltesek/en_0033_2012.pdf [https://perma.cc/YVN9-PNZZ] (English translation).

221. *See id.* at paras. 8–15 (making extensive reference to the law at the European level and practices in other European states).

222. *See* Case C-286/12, *Comm’n v. Hungary*, 2012 E.C.R. I-687.

223. *See* Alkotmánybíróság (AB) [Constitutional Court] 45/2012 (Hung.), http://mkab.hu/letoltesek/en_0045_2012.pdf [https://perma.cc/FX2V-L43Q] (English translation); *see also* Tamas Boros, *Constitutional Amendments in Hungary: The Government’s Struggle Against the Constitutional Court*, FRIEDRICH EBERT STIFTUNG 3 (Feb. 2013), http://www.fesbp.hu/common/pdf/Nachrichten_aus_Ungarn_februar_2013.pdf [https://perma.cc/868Y-AT3N].

224. *See* Alkotmánybíróság (AB) [Constitutional Court] 1/2013 (Hung.), http://www.mkab.hu/letoltesek/en_0001_2013.pdf (English translation) [https://perma.cc/X5N8-XH6B].

225. *See* Renata Uitz, *The Return of the Hungarian Constitutional Court*, VERFASSUNGSBLOG (Jan. 15, 2013), <http://verfassungsblog.de/the-return-of-the-hungarian-constitutional-court> [https://perma.cc/4FJP-VFC8].

226. *See* Erin K. Jenne & Cas Mudde, *Can Outsiders Help?*, 23 J. DEMOCRACY 147, 149–51 (2012) (noting the network of institutions in which Hungary is embedded, although expressing some skepticism about the effectiveness of those institutions).

227. *See, e.g.*, Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Adopted by the Venice Commission at Its 95th Plenary Session (Venice, 14–15 June 2013), Opinion 720/2013; Opinion on the New Constitution of Hungary, Adopted by the Venice Commission at Its 87th Plenary Session (Venice, 17–18 June 2011), Opinion 621/2011.

228. *See supra* note 218.

from the constitution.²²⁹ It pulled off this extraordinary maneuver—gutting part of the country’s own constitution—by deploying the unconstitutional constitutional amendment doctrine. The court held that the term limit was contrary to higher values embedded in international law and the jurisprudence of the Inter-American Court of Human Rights, including the right to a free choice of voters and the right to freedom of expression.²³⁰ A previous suggestion by a President that the term limit provision should be removed via constituent assembly caused significant domestic strife, a military coup, and condemnation from the international community.²³¹ But the court’s decision largely escaped international criticism.²³² The use of a court, and particularly a court relying on rather than claiming to flout regional and international norms, perhaps helped to signal to the international community that the incident did not require much scrutiny.

*B. New Courts and the Construction of Support Structures:
Beyond the Strong-Form/Weak-Form Divide*

An emphasis on techniques that judges use to build up political and social support helps to clarify and refine a high-stakes recent debate in comparative constitutional law. This recent debate has focused on the role that judges should play in newer and more “fragile” democratic orders.²³³ Issacharoff argues that courts can and should play an aggressive role in these contexts to safeguard democracy, both by monitoring electoral politics and by limiting the power of potentially hegemonic parties and politicians.²³⁴

Gardbaum, in contrast, has pointed out the risks of courts acting too aggressively in “fragile” contexts by showing several cases (including Hungary, South Africa, and Turkey) where assertive courts invited political backlash that ended up weakening the institutions.²³⁵ He has argued that constitutional designers might use various

229. See David Landau, *Honduras: Term Limits Drama 2.0—How the Supreme Court Declared the Constitution Unconstitutional*, CONSTITUTIONNET (May 27, 2015), <http://www.constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional> [<https://perma.cc/DHG5-XPTD>]. For the text of the decision (in Spanish), see Supreme Court of Justice, Constitutional Chamber (Apr. 22, 2015), <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf> [<https://perma.cc/5J7E-8CGH>].

230. See Landau, *supra* note 229.

231. See Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149, 159, 175–80 (2013).

232. See Brian Sheppard & David Landau, *Why Honduras’s Judiciary Is Its Most Dangerous Branch*, N.Y. TIMES (June 25, 2015), <http://www.nytimes.com/2015/06/26/opinion/why-hondurass-judiciary-is-its-most-dangerous-branch.html> [<https://perma.cc/ULX4-9QUN>] (noting that the court’s decision has “largely slipped under the radar” and referring to the “relative silence of the international community”).

233. The term is from Professor Samuel Issacharoff. See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

234. See ISSACHAROFF, *supra* note 6, at 12–13 (arguing that in new democracies, constitutional courts can both “provide a critical process limitation on the exercise of democratic power” and “ease the transition to a new democratic order” by acting “as a constraint on the exercise of consolidated power”).

235. See Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for*

forms of “weak-form” judicial review in order to lessen these risks.²³⁶ Weak-form design involves instantiating forms of review that lessen the degree of judicial supremacy, for example by creating the possibility of political override of judicial decisions (as exists in Canada), or by giving judges only the power to interpret statutes to avoid constitutional problems and/or to point out incompatible statutes, rather than striking them down (as in the UK and New Zealand).²³⁷ Similar techniques can and have been developed judicially even if they are not hardwired into the constitutional design. As the South African Constitutional Court has done, judiciaries can issue declarations that existing public policy on an issue is not in compliance with the constitution, but leave the shape of the solution to the discretion of the political branches.²³⁸

The targeting theory developed above suggests that at least the constitutional design variant of weak-form review may be insufficiently attentive to variations in political context. The intensity of judicial review should vary in response to the amount of political support received by a court, in addition to other variables.²³⁹ Thus, a design approach that forces a uniformly weak form of judicial action may inappropriately constrain a court and prevent it from issuing stronger, more aggressive decisions in circumstances where the political context will support these decisions. A targeting approach shows the errors in a one-size-fits-all solution to judicial overreach.²⁴⁰ This suggests that the debate about strong- versus weak-form review has focused too much on constitutional design, and would be better suited to more flexible, contextual tools like judicial doctrine, which can be adjusted from case to case.

In addition, the fact that judges can take actions to build up their support structures suggests a missing ingredient in the strong-form/weak-form debate. It indicates that scholars should focus more attention on the issue of which forms of review, or other tactics, are most effective in gaining support. Issacharoff’s analysis, for example, relies heavily on the Colombian Constitutional Court’s famous decision noted above, denying the popular Colombian President Alvaro Uribe a third consecutive term in office.²⁴¹ Issacharoff views this case as a paradigm case of proper judicial intervention: the court acted against a powerful incumbent seeking to remain in office indefinitely, and who might have eroded the country’s still-developing democratic order.²⁴² But he expresses puzzlement as to why the decision worked, particularly

New Democracies?, 53 COLUM. J. TRANSNAT’L L. 285, 287–89 (2015).

236. *See id.* at 309–15.

237. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 709–10 (2001) (describing the model as a “new third model of constitutionalism that stands between the two polar models of constitutional and legislative supremacy”).

238. *See* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 242–44 (2008) (describing and analyzing socioeconomic rights jurisprudence from South Africa).

239. *See supra* Part III.C.

240. For a somewhat similar argument against uniformly weak-form judicial review, based on different kinds of blockages in the bureaucratic and policy-making processes, see Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 393 (2007) (calling for a dialogue theory of judicial review that will be more sensitive to context).

241. *See supra* text accompanying notes 182–86.

242. *See* ISSACHAROFF, *supra* note 6, at 150–52, 243.

since, in his view, the reasoning was not especially extensive.²⁴³ The answer, as noted above, lay in the political context and the court's use of that context. By splitting Uribe's coalition, the court's decision acted as a critical juncture to weaken his seemingly overwhelming political support.²⁴⁴ The court's success on such a difficult issue was a result both of well-targeted judicial review and of judicial craftsmanship designed to peel away some of Uribe's allies. Thus the comparative vitality of Issacharoff's theory for term limits and other issues depends on what the political context looks like on those issues, and whether courts can skillfully work within those contexts.

Gardbaum's recommendation that emerging courts rely on weak-form review raises a related, and unanswered, question: are these forms of review generally effective in rallying external support for a judiciary? In South Africa, where the constitutional court's preference for weak-form methods of enforcement is most pronounced on social rights issues, a prominent critique of the court's work is that it has been relatively slow to build civil society and popular support.²⁴⁵ Unlike the Colombian and Indian high courts, the socioeconomic rights jurisprudence in South Africa has not succeeded in institutionalizing a role for civil society or in giving these groups leverage over the state to a great degree.²⁴⁶ The famous *Grootboom* case, for example, sent the question of housing policy back to Parliament, but without requiring or incentivizing groups to pressure the political branches to make policy in a certain way.²⁴⁷ Subsequent decisions have required the state to "engage" with civil society groups representing potential evictees, but generally in concrete housing disputes, rather than over housing policy as a whole.²⁴⁸

The weaknesses of the South African Court on this score cannot automatically be attributed to all exercises of weak-form review. It may be that there are relatively

243. *See id.* at 265 (arguing that the court failed "to articulate a well-fashioned constitutional principle in defense of its actions"). For a more sympathetic account of the court's reasoning, see Dixon & Landau, *supra* note 183, at 617.

244. *See supra* text accompanying notes 182–86.

245. *See ROUX, supra* note 180, at 127–28 (arguing that the first South African Constitutional Court generated little public support although it may have been supported by some civil society organizations).

246. There are of course exceptions, particularly the *Treatment Action Campaign* case where a strong civil society group came to the court to seek access to drugs preventing HIV transmission during pregnancy. *Minister of Health v. Treatment Action Campaign* (2002) (5) SA 721 (CC) (S. Afr.); *see YOUNG, supra* note 70, at 256–62. Even here, though, the group was already well organized and relied on the court to achieve its policy goals; this does not seem to be a case where the process of litigation greatly strengthened civil society or judicial capacity.

247. *See Gov't of the Republic of South Africa v. Grootboom* 2001 (1) SA 1 (CC) at 67 H (holding that the existing program was unconstitutional and ordering the creation of a new program making "reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations").

248. *See, e.g.,* Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 823 (explaining case law in which the court has required "engagement" or "mediation" between the state and those affected by eviction orders that jeopardize the constitutional right to housing).

deferential forms of review that nonetheless are effective at rallying state or nonstate actors to a court's cause. But these questions remain unanswered, and require more attention from scholars. The case for weak-form review in new or fragile democracies cannot rest only on avoiding conflict with powerful actors, but must also consider the ways in which courts can build up supportive coalitions over time. To date, the weak-form literature has not fully addressed this issue.

CONCLUSION

The substitute and complement theories of judicial review emphasize the variety of ways in which courts can potentially manipulate their political and social contexts in order to maximize their impact and odds of success. In other words, it highlights the value of centering a theory of judicial review on the relationship between courts and their external sources of support. The rich examples drawn on in the prior Part highlight the techniques that courts might use to construct or strengthen political, civil society, or international actors that might serve as allies. These tools should prove useful across structural and rights-based issues, across both consolidated and "fragile" democracies, and across a wide range of political contexts. Of course, the analysis in this Article raises a large number of unanswered questions—about the feasibility of targeting judicial review, for example, and about the relative efficacy of different techniques aimed at constructing a stronger support structure. Those questions I leave for another day.