

POLITICAL SUPPORT AND STRUCTURAL CONSTITUTIONAL LAW

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ABSTRACT.....	1070
INTRODUCTION	1070
I. OBSTACLES TO STRUCTURAL JUDICIAL REVIEW	1073
A. <i>Problems of Noncompliance and Evasion</i>	1074
B. <i>Problems of Institutional Weakness and Systemic Effect</i>	1080
II. THE THEORY IN ACTION: A CASE STUDY	1087
A. <i>Redistributing Power from the President to the Congress:</i> <i>A Sophisticated Program with Ambiguous Results</i>	1089
1. <i>Constraining Presidential Policy Making</i>	1090
2. <i>“Improving” the Congress</i>	1094
3. <i>Mexico After 1994: A Comparative Counterpoint</i>	1097
B. <i>Term Limits and Emergency Powers: Two Remarkable</i> <i>Successes</i>	1102
1. <i>Curbing Abuse of Executive Emergency Powers</i>	1103
2. <i>Enforcing Presidential Term Limits</i>	1107
III. IMPLICATIONS FOR CONSTITUTIONAL THEORY	1110
A. <i>Political Safeguards and Judicial Review</i>	1110
B. <i>Judicial Strategy and Political Support</i>	1116
1. <i>Courts and the Mobilization of Political Support: The</i> <i>Example of Unconstitutional Constitutional</i> <i>Amendments</i>	1117
2. <i>Courts and the Mobilization of Public Support: The</i> <i>Hybridization of Rights and Structural Review</i>	1121
CONCLUSION.....	1124

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ABSTRACT

The field of comparative constitutional law has paid insufficient attention to judicial decisions on structural issues. This Article seeks to begin the process of constructing a comparative analysis of structural constitutional jurisprudence. Using both theoretical analysis and a case study, it seeks to demonstrate that courts are more likely to be successful in their programs of structural constitutional law when they enjoy support from other political and social actors. This simple point has significant implications for constitutional theory. First, it suggests that the structural safeguards theory long assumed in United States constitutional law may have only limited applicability. Under common conditions, the existence of political safeguards protecting structural values may not render judicial review redundant, but instead may identify the very types of conditions under which courts are most likely to succeed. Second, courts have at least a limited ability to shape their decisions to mobilize support from political institutions or from other actors like the general public. Thus, an important aim of future work should be in identifying techniques and strategies that courts can use to mobilize such support.

INTRODUCTION

The renaissance of comparative constitutional law has focused heavily on rights jurisprudence and to a considerable extent overlooked structural judicial decision making.¹ Leading scholars have argued that structural constitutional law is inherently bound up with contingent and localized power relations, making comparisons across countries very difficult.² Thus, while a venerable literature in political science and law treats questions of constitutional design like the choice between presidentialism and parliamentarism, there is less work on judicial decisions on structural issues like the separation of powers and the relationship between different levels of government.³

[Editors' note: All quotes to sources originally in Spanish have been translated for the reader's convenience.]

1. See David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 *YALE J. INT'L L.* 1, 46 (2011) (noting that the field of comparative constitutional law has "enjoyed something of a resurgence in the past ten years").

2. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 163 (2014) (summarizing the modern state of the field as being largely focused on "[t]he proliferation of constitutional courts, judicial review, and constitutional rights jurisprudence worldwide, indeed the rise of human rights discourse more generally").

3. See, e.g., Juan J. Linz, *The Perils of Presidentialism*, *J. DEMOCRACY*, Winter 1990, at 51, 68 (1990) (arguing that presidentialism is generally inferior to parliamentarism as a form of government).

This relative omission is troubling because the major purposes of comparative constitutional analysis would be served by greater engagement with structural constitutional law. For United States constitutional scholars, comparative analysis may confirm, rebut, or refine claims about the impact of the U.S. Supreme Court on the broader political system. Key recent claims have rested on assumptions about the impact of configurations of political institutions that could be tested cross-nationally.⁴ For constitutional theorists, engagement with comparative analysis may help to build more general claims about when courts engaging in structural judicial review might be successful. And for comparativists, more cross-national engagement may help to improve the development of doctrine on critically important structural issues. This may be particularly important for courts working on difficult issues like the control of constitutional amendment in unfavorable political environments.⁵

The omission of a comparative literature on structural constitutional law is also unnecessary. Even if courts deciding structural cases face local issues that defy easy comparison, a baseline for comparative work can be built by focusing on the relationship between courts and their political context. This Article takes that route as a starting point for comparative enterprise. The key argument of this Article is, indeed, that structural doctrine cannot be evaluated in a vacuum. Instead, political support from other institutions and actors is the key determinant of the success of this doctrine.

The point can be seen theoretically by emphasizing a common set of problems faced by courts when engaging in structural judicial review. Courts must commonly contend with problems of compliance, either directly or through evasion, when political actors find ways to work around existing jurisprudence by finding alternative routes to achieve a similar end. Courts are more likely to be successful in closing off routes for evasion when they can count on the support of other political actors or civil society groups to help them, or at least to avoid colluding with overreaching institutions. Further, courts often must contend with problems of institutional weakness, which occurs when institutions abdicate their constitutionally assigned responsibilities. These problems of abdication are extremely difficult—perhaps ordinarily impossible—for courts to use doctrine to deal with, and they are in a stronger position when they do not

4. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006) (arguing that the dynamics of United States separation of powers are better explained by party-system dynamics than by the formal separation between the houses of Congress and the President).

5. See *infra* Part IV.A (considering how the theory developed in this Article might inform analysis of the comparative doctrine of unconstitutional constitutional amendment).

arise. Thus, in facing both classes of problems, the level of political support courts receive from other institutions and actors would appear to be to be a critical variable.

The Article examines the impact of political support on structural constitutional doctrine by studying the jurisprudence of one famous Latin American court working in a presidential system, the Colombian Constitutional Court, in a comparative perspective. The Article looks in detail at four of the court's major undertakings related to the separation of powers: its efforts to limit executive use of emergency powers, to prevent executives from remaining in power indefinitely, to weaken unilateral executive policy making, and to strengthen the country's historically weak Congress. In the first two cases, the court achieved justifiably celebrated successes; in the latter two, the impacts of even a programmatic and sophisticated jurisprudence were far more ambiguous. The main difference, the case studies suggest, lies in the degree of institutional and civil society support enjoyed by the court.

Finally, a focus on political support yields rich, although preliminary, implications for both comparative and American constitutional theory. For example, the study suggests the need to rethink a venerable vein of United States scholarship which suggests that "political safeguards" or protections for federalism and separation of powers might be viewed as a substitute for judicial review.⁶ Under these theories, when constitutional structure is likely to be self-enforcing, such as when the states have sufficient access to power at the federal level to protect their prerogatives politically, judicial review is not needed.⁷ The analysis here tends to stand that family of theories on its head. Rather than rendering judicial review unnecessary or redundant, circumstances where there are robust political safeguards in place for the protection of federalism and the separation of powers may be the ideal situations for courts to act. These safeguards provide the political and popular support that helps courts to succeed. The argument also has implications for judicial strategy. While to a considerable extent judges must take their political context as they find it, they do have some ability to shape that context. For example, judges have some ability to craft the timing and content of decisions in order to construct or draft in public or

6. See *infra* Part III.B.

7. See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (updating Wechsler's theory by viewing parties as the main means of state influence on federal policy making); 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, 559 (1954) (arguing that states have political mechanisms to ensure representation in Congress and that judicial review has played little role in protecting states' rights).

civil society support. I argue that a major focus of future studies should be on these efforts.

The rest of this Article is organized as follows: Part I develops the basic theoretical framework, explaining the problems that courts are likely to face in undertaking structural judicial review and the way these problems may vary in response to levels of political support. Part II applies that framework by analyzing the case studies from Colombia. Part III draws out the two major implications of the Article: the need for courts and analysts to consider political context and levels of political support when selecting and executing programs of structural judicial review, and the limited but important ability of courts to shape this context. Finally, Part IV concludes somewhat ambitiously by suggesting that the insights here might point towards a unified theory of the conditions under which judicial review is likely to succeed.

I. OBSTACLES TO STRUCTURAL JUDICIAL REVIEW

This part seeks to construct a basis for comparison by considering common sets of problems or challenges faced by courts seeking to enforce structural elements of the constitution. The general account here is based on recent research conceptualizing structural constitutional law as a system⁸ and/or as an equilibrium.⁹ This means that particular doctrinal issues and even particular institutions cannot be dealt with in isolation; attempts to alter one area or institution will have impacts on other parts of the system.

Subpart A deals with the problem of political actors either directly undertaking noncompliance or evading judicial decisions. Structural institutions are complex systems that often offer actors a number of different ways to achieve their goals, and therefore an actor determined to overreach may have a number of different ways to achieve its goals even if it does not directly undertake noncompliance. Subpart B treats a different set of problems connected with institutional weakness and abdication: courts often confront political institutions that, rather than overreaching, are incapable of or refuse to carry out core tasks. In this context, judicial efforts to fix one institution while leaving others untouched may actually worsen rather than ameliorate structural dysfunction.

These problems of course are not evenly distributed across countries or issue areas. In particular, they vary in systematic ways according to the

8. See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 40–43 (2011).

9. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 32 (1994).

level of support enjoyed by courts from other political institutions. Where courts are acting against overreaching institutions in contexts where other institutions oppose those actors, opportunities for evasion are likely to be scarce and courts will not need to wrestle with problems of abdication. In contrast, the judicial task would appear to be much more difficult in contexts where courts cannot rely on this kind of political support.

A. *Problems of Noncompliance and Evasion*

Direct noncompliance—refusal or failure to carry out a judicial decision—is perhaps the most obvious problem faced by courts. Similarly, courts can face attacks on their jurisdiction or composition as the result of an unwanted decision, and this threat might deter courts from undertaking certain lines of jurisprudence in the first place.¹⁰ These risks exist in all contexts within constitutional law, although they are much higher within some constitutional cultures and contexts than others. Further, both evidence and logic suggest that the risk of noncompliance will vary across issue areas. As noted below, a decision limiting presidential power may create an incentive for noncompliance or retaliation, but probably not as great an incentive as a decision forcing a president out of office.¹¹

There is some literature suggesting that the risks of noncompliance or retaliation may tend to be particularly great for structural issues. Structural constitutional decisions impacting the separation of powers or distribution of national and subnational power may have a tendency to hit powerful political interests hard, which may provoke either noncompliance or backlash. An analysis of the Russian Constitutional Court found that the court's early engagement with important structural issues was a cause of the attacks that caused it to be shut down, and when reestablished, the new justices tended to focus on lower-stakes rights issues rather than constitutional structure.¹² Similarly, a leading analysis of the South African Constitutional Court (which operates in a dominant party system) found that the court has had a fairly free hand on many rights issues, but has had to tread more carefully on issues involving the rights of the political opposition and the constitutional structure.¹³

10. This kind of analysis motivates the “strategic model” of research on U.S. courts. See Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead*, 53 POL. RES. Q. 625, 637–38 (2000).

11. See *infra* Part II.B.

12. See Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 141–42 fig.4 (2001).

13. See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 334–35 (2013).

Existing literature also suggests that the risk of direct noncompliance or reprisal depend in part on whether courts have support from political institutions or the public. Either form of support may make efforts at noncompliance more visible and thus costlier. Similarly, these forms of support may raise the costs of efforts to retaliate against the judiciary.

Direct noncompliance (or retaliation against a court) is not the end of the issue. Structural judicial decisions can be evaded or worked around, even if a decision receives formal compliance. This is because actors can often reach the same goal through a number of different means. This issue is sometimes referred to in the broader literature as one of “hydraulics”: courts or other regulators attempt to impose a prohibition or regulation on a certain kind of conduct, and the regulated entity responds by shifting towards some other pathway.¹⁴ Legal commentators have explored this dynamic in a number of different domains, including tax, criminal law, and campaign finance reform and election law.¹⁵

The literature gives an interesting perspective on how this kind of evasion tends to operate. First, it tends to be more apparent when there is more than one formal pathway to achieve a given goal and when these pathways are roughly equivalent in terms of cost. The tax area is a clear example: the complexity of the system often allows regulated entities and their lawyers to develop alternative strategies that achieve roughly the same goal as the path that has been shut down and without a substantial change in cost or other inconvenience.¹⁶ Second, it may be easier for organizations or institutional arrangements that are relatively complex and/or amorphous to shift resources from part of the system to another in response to a judicial decision. The party-system regulation literature is a good example: these entities are sprawling and have amorphous structures and constantly shifting networks, so in response to a decision—say, cutting off a certain form of financing—they can relatively easily shift to another form.¹⁷ Third, arrangements that work around existing rules or judicial decisions often rely on a combination of formal and informal rules or understandings to achieve their goals. The criminal law context is a good example: in response to a series of decisions during the Warren and Burger courts that

14. See Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 250–55 (2010) (discussing the hydraulics phenomenon and its importance for constitutional theory).

15. See, e.g., Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005) (electoral law); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (criminal law and criminal procedure); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999) (tax).

16. See Weisbach, *supra* note 15.

17. See Kang, *supra* note 15, at 142–46 (“Parties are foremost suprallegal creatures that defy and transcend legal and regulatory definition.”)

imposed strict limits on criminal procedure, authorities both shifted resources to unused formal tools (like plea bargaining) and relied on a set of informal institutions and understandings outside of strict judicial oversight to achieve their goals.¹⁸ The result, according to Stuntz and other key commentators, is that these judicial decisions have in practice achieved much less than was hoped by those pushing the criminal procedure revolution.¹⁹

In very general terms, these three conditions often seem to be met for structural constitutional jurisprudence. Institutions and actors often have multiple pathways to achieve their goals, and it is not always clear that closing off one pathway significantly increases the price of action. An obvious example is the toolkit that Article I of the United States Constitution gives to Congress: a holding that one method of congressional action is beyond the scope of Article I usually does not mean that Congress has no options to achieve the same or a similar end.²⁰ It is well-known among constitutional scholars that legislation struck down, say, as exceeding the commerce power may sometimes easily be re-written to come within the scope of that power, and even if action is held outside of a power completely in a way that cannot easily be fixed, small tweaks to the law might allow it to fit within the confines of a different congressional power.²¹ This kind of setup does not seem to be a quirk of United States structural constitutional jurisprudence; it may instead be a more generic aspect of structural constitutional law. For example, a president seeking to increase her own power over policy may seek to use emergency powers. Should that route fail (because it is struck down by the courts), she may be

18. See Stuntz, *supra* note 15, at 62–64.

19. See *id.*

20. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 346–47 (2008) (noting that “[t]he spending power seemed to offer Congress a way to circumvent the limitations the Court had imposed on the other legislative powers”).

21. One of the best known “new federalism” cases, *United States v. Lopez*, offers a case in point. In the *Lopez* litigation, the Court struck down a law prohibiting the possession of guns in school zones. 514 U.S. 549, 567 (1995). The Court held that the legislation went beyond the commerce power because it purported to regulate “non-economic” local activity with an allegedly “substantial effect” on interstate commerce. See *id.* at 559–60 (making a distinction between economic and non-economic activity). Congress then passed another version of the statute, which was identical in key respects except that it added additional congressional findings and a new jurisdictional hook: the requirement that the gun itself either have moved in interstate commerce or otherwise effect interstate commerce before being possessed. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369–71 (1996) (codified as amended at 18 U.S.C. § 922(q)(1) (2012)); see also Diane McGimsey, Comment, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1679 (2002) (explaining that *Lopez* and related cases limited only one pathway under which Congress could regulate commerce and thus could easily be evaded by draftmanship). The new version of the statute, as well as similar statutes with jurisdictional hooks, have almost universally been upheld against constitutional challenge. See *id.* at 1710–19 (reviewing cases across a number of areas).

able to rely on autonomous regulatory powers, on an express delegation of power from the Congress, or on congressional legislation written to presidential specifications. These three routes may or may not have meaningfully different costs and benefits. A court intent on blocking presidential policy making in a given area would potentially need to close off all of these avenues and perhaps others as well. Yet this may require a tremendous effort from a court, and some of these avenues may not be easily closed off.²²

Second, modern political institutions are complex entities that are often able to shift resources and efforts from one piece of the organization into another. The remarkable set of transformations in the Executive Branch of the United States government are an example of the way in which constitutional rules, structural constitutional jurisprudence, and actual practice might interact. The United States Supreme Court has issued occasional decisions regulating the boundaries of the relative powers of the Congress and the President in the administrative state.²³ But it is deeply unclear how much influence this jurisprudence has had on the actual practice of the modern administrative state. In large part, this is because presidents have been able to strengthen the executive through a set of shifts that have largely been outside the domain of judicial action. While the Supreme Court has been preoccupied mostly with the question of insulation in the processes of appointment and removal,²⁴ the shifts in the power of the presidency have been driven by other institutional dynamics, such as

22. An example in the United States context is the non-delegation doctrine, prohibiting Congress from giving away its “legislative power” to the Executive Branch. *See, e.g., Panama Ref. Co. v. Ryan*, 293 U.S. 388, 432–33 (1935) (holding that a statute allowing the President to prohibit interstate transportation of petroleum exceeding certain limits violated the limits of constitutional congressional delegation). The doctrine is usually considered to have died out, in part, because of the difficulty of articulating a manageable standard. *See, e.g., Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (articulating this view as the standard story, but rejecting it in favor of a view that there simply is no “constitutional warrant” for such a doctrine). To the extent the non-delegation hole is difficult to close off, however, and the cost of the delegation route are similar for an aggrandizing president to the costs of unilateral or emergency action, the non-delegation route may allow the president to evade a decision limiting those other routes.

23. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 478 (2010) (striking down a statute “double insulating” an officer from removal by allowing him to be removed only “for good cause” by members of the Securities and Exchange Commission, who in turn could only be removed on limited grounds by the President); *Morrison v. Olson*, 487 U.S. 654, 691–93 (1988) (upholding an independent counsel statute allowing for judicial appointment of counsel in certain cases and limiting removal to the President based on “good cause”); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630–32 (1935) (upholding a congressional restriction on the President’s removal of Federal Trade Commissioners to “for cause”).

24. *See supra* note 23.

the growth of the review power of the Office of Information and Regulatory Affairs over bureaucratic legislation.²⁵

Third, structural constitutional arrangements reflect a combination of formal and informal norms. In most systems, formal rules matter, but actors have ways of developing arrangements that work around those formal rules. Fitts gives a series of examples from the United States context. He notes, for example, that presidents have informal mechanisms of accountability ensuring that so-called independent agencies (whose heads are only subject to removal by the president “for cause”) are less different from ordinary executive agencies than might be supposed.²⁶ Despite the presence of “for cause” removal protections, presidents have informal means to exercise influence over independent agencies. Another example is provided by the United States Supreme Court’s *Chadha* decision, which struck down “legislative veto” arrangements by which one or both houses of Congress gave themselves the power to disapprove administrative regulations or adjudications in a given area.²⁷ Fitts notes that Congress has used various devices, including through appropriations and oversight hearings, to work around the decision.²⁸ Again, while the U.S. context has been the most studied, the fact that structural constitutional law rests on combinations of formal and informal norms seems to be a broader phenomenon. In presidential systems around the world, for example, presidential power seems to rest on a combination of formal power (vetoes, emergency decrees, etc.) and informal power (patronage, public opinion, control over the party hierarchy, etc.).²⁹ Similarly, judicial independence appears to rest on a combination of formal rules (appointment, removal, tenure, etc.) and informal norms (bribery, irregular removal, etc.).³⁰ The interrelationships between these norms often create pathways for the evasion or mitigation of a particular structural decision.

25. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (outlining a number of techniques, including OIRA review, control of spending, and centralized directives, through which presidents can exert power over the administrative bureaucracy).

26. 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, 1651 (1997).

27. See *id.* at 1652.

28. See *id.*

29. For a general overview of the importance of informal institutions in explaining Latin American politics, see Gretchen Helmke & Steven Levitsky, *Introduction*, in *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 1, 8 (Gretchen Helmke & Steven Levitsky eds., 2006) (noting that across the range of systems at issue, informal institutions “shape how democracy works—for both good and ill”).

30. See, e.g., Gretchen Helmke, *The Logic of Strategic Defection: Court–Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292 & tbl.1 (2002) (showing that Argentine Supreme Court justices throughout modern history have been removed from the court via informal means, even though the constitution guarantees life tenure).

Courts may have a limited ability to influence the possibilities for evasion through judicial doctrine. Most obviously, courts can work, either within a single case or a series of cases, to close off or raise the costs of action along the other potential routes. But there are also more complex doctrinal devices. For example, courts can develop what recent scholarship has called “anti-evasion doctrines”: standard-like devices that seek to close off pathways left open by existing rules.³¹ In other words, courts can develop doctrines to “bolster[] or backstop[]” rules in order to “prevent circumvention of the constitutional command by formal compliance with the decision rule itself—that is, compliance that nevertheless permits avoidance of the principle the initial decision rule was designed to implement.”³² This can be done, for example, by developing doctrines that consider whether an action, although formally following a permissible rather than prohibited route, has a purpose of achieving the impermissible route or is actually a pretext to carry out the prohibited route.³³

In general, then, one should expect “hydraulics” or evasion to be a significant problem for structural constitutional jurisprudence. The fact that these problems are ubiquitous, of course, does not mean that they are equally likely to crop up in all circumstances. In particular, the possibilities for evasion seem likely to vary in predictable ways in response to the formal constitutional and informal political context. Some distributions of formal power offer actors a number of different routes to achieve a similar set of ends—the plethora of tools given to the federal government in Article I of the United States Constitution is one good example.³⁴ In other contexts, the range of formal options may be much more limited.

For our purposes, it is worth emphasizing, once again, ways in which the party system and the behavior of other political institutions bear on this issue. Strong institutions are potentially more likely to push back against overreaching political actors that seek to evade judicial decisions; weak institutions plausibly create less of a check for overreaching actors. Thus, not only are some institutional orders more likely to be self-enforcing, but it is also probably true that those same types of orders—with strong institutions checking strong institutions—may be more likely to support structural judicial interventions.

31. See generally Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773.

32. *Id.* at 1793.

33. See *id.* at 1780–93 (classifying different types of anti-evasion doctrines in accord with common doctrinal devices).

34. See *supra* text accompanying notes 20–21.

B. Problems of Institutional Weakness and Systemic Effect

A core assumption in the field, utilized throughout the last section, is that institutions will systematically seek to violate the separation of powers by overreaching their powers or by “empire building.”³⁵ This is a bedrock idea on which much constitutional theory is based. In the classic Madisonian conception of the separation of powers, for example, powerful institutions are set up so that the ambitions of one counteract the ambitions of another.³⁶ In the political safeguards literature on federalism, judicial enforcement of limits on federal power is viewed as unnecessary because state actors can adequately protect themselves through political processes at the national level.³⁷ The assumption is met often enough to be at least somewhat useful for analyzing some situations. The expansionary president seeking to invade the domain of other branches, for example, has become a standard trope of both United States and Latin American constitutional thinking.³⁸

But recent work in both law and political science suggests that this picture of overreaching political institutions is oversimplified. Rather than seeking to build up their power, institutions often abdicate it or at least seek goals other than the construction of their institutional power.

The problem is again easy to see with respect to United States constitutional law. Congress is often viewed as abdicating chunks of its authority to the Executive Branch through delegations of authority, lax oversight, and other devices.³⁹ For example, Congress has encouraged and abetted the rise of the administrative state in the post-New Deal state; similarly, it has more often left war powers decisions and related foreign policy issues to the President.⁴⁰ Congress has of course engaged in some behavior that is consistent with the empire-building hypothesis (or at least

35. See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (questioning the assumption by considering the incentives faced by politicians).

36. See, e.g., Jeremy Rabkin, *The Success of the Separation of Powers and Its Contemporary Failings*, 1987 B.Y.U. L. REV. 1003, 1005–06 (laying out the Madisonian vision).

37. See Wechsler, *supra* note 7; see also Kramer, *supra* note 7.

38. In comparative terms, this debate has been one of the drivers of the old but important argument that parliamentary systems are superior to presidential ones. See, e.g., Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 6–8 (Juan J. Linz & Arturo Valenzuela eds., 1994).

39. See Levinson, *supra* note 35, at 953–56 (arguing that while the assumption of an imperial presidency has largely been borne out in recent history, Congress has tended to cede ground across a wide range of both domestic and foreign policy issues); Kagan, *supra* note 25, at 2314 (exploring how the incentives of individual members of Congress often prevent the collective body from acting effectively to restrain other branches of government).

40. See Levinson, *supra* note 35, at 954–55 (tracing some of this constitutional history).

resisted some executive overreach), but much of what it has done is hard to explain under such a hypothesis. Similarly, the states are often better seen as acquiescing in expansions of federal power, rather than as resisting them, because states routinely push for the expansion of federal programs rather than their limitation.⁴¹

Problems of political abdication, however, are not peculiar to the United States. Legislatures in many contexts around the world seem to abdicate their power over national policy making rather than choosing to exercise it, often in exchange for the pursuit of other goals, like local pork.⁴² Courts may refuse to exercise power unless the interests of individual judges move in favor of activism.⁴³ Subnational institutions, finally, often seem to acquiesce in the power grabs of national governments rather than resisting them, in exchange for transfers or other benefits.⁴⁴

In its Madisonian version, the “empire building” model of constitutional law, with aggrandizing institutions checking each other, rests on the false assumption that political institutions are unitary actors.⁴⁵ In fact, they are generally aggregations of individual actors, which means that analysts must pay careful attention both to the incentives of these individuals and to the way in which their individual incentives and actions are aggregated into institutions.

Legislative politics offers an intuitive example. Individual legislators in many places seem to have incentives other than a focus on national policy or the increase in the power of the legislature as a whole. Some party systems (particularly weak party systems) produce incentives for individual legislators to cultivate local followings rather than national ones.⁴⁶ Here,

41. See, e.g., Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997).

42. For examples from Latin America, see, for example, Gary W. Cox & Scott Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, in LEGISLATIVE POLITICS IN LATIN AMERICA 446 (Scott Morgenstern & Benito Nacif eds., 2002) (giving examples from across a number of cases in the region).

43. See, e.g., Helmke, *supra* note 30, at 296 (finding evidence that Argentine judges are generally deferential to incumbent regimes but “strategically defect” in cases where those incumbents are likely to lose power in the short run).

44. See, e.g., Sujit Choudhry & Nathan Hume, *Federalism, Devolution & Secession: From Classical to Post-Conflict Federalism*, in COMPARATIVE CONSTITUTIONAL LAW 356, 359–61 (Tom Ginsburg & Rosalind Dixon eds., 2011).

45. See VERMEULE, *supra* note 8, at 40–43.

46. See Scott Mainwaring & Timothy R. Scully, *Introduction: Party Systems in Latin America*, in BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 1, 26 (Scott Mainwaring & Timothy R. Scully eds., 1995) (explaining that some party systems are more institutionalized than others, and exploring the ways in which non-institutionalized party systems may cause legislative dysfunction); John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECTORAL STUD. 417 *passim* (1995) (measuring the effect of different electoral systems on the incentive of candidates to cultivate a personal reputation rather than hewing to a party line). For a discussion of the impact of differences in party systems on legislative

the main problem seems to be that legislators put personal or local motives above partisan ones. Yet even in strong party systems like the modern United States, the willingness of a legislature to promote institutional interests seems to depend heavily on whether government is unified or divided.⁴⁷ Here, the problem is that partisan interests are promoted above institutional ones. Finally, multimember institutions like legislatures create problems of aggregation: even if all or most members of a legislature are seriously interested in policy, there is no guarantee that the institution as a whole will be a serious policy maker.⁴⁸ This might be easiest to see with an extremely fragmented legislature, which contains a large number of parties. Even if all individual legislators in the legislature care deeply about policy, at the institutional level the institution may be incapable of producing coherent policy because the transaction costs of actually producing workable coalitions may be too high.⁴⁹

Abdication, at any rate, is not an either-or phenomenon: it is probably more helpful to think of it as a phenomenon that all institutions engage in to some degree. Legislatures, for example, may jealously guard their power over some areas, while not taking their responsibilities seriously in others. Similarly, courts sometimes act aggressively in circumstances where judicial power is threatened directly, but are more passive on other issues.⁵⁰ At the same time, the structure of individual incentives plausibly means that some kinds of institutions are more likely to engage in abdicating behavior than others: legislatures, courts, and subnational governments

behavior in the context of comparative constitutional law, see David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 328–32 (2010).

47. See Levinson & Pildes, *supra* note 4, at 2329 (“When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches On the other hand, when government is unified and the engine of party competition is removed from the internal structure of government, we should expect interbranch competition to dissipate. Intraparty cooperation (as a strategy of interparty competition) smooths over branch boundaries and suppresses the central dynamic assumed in the Madisonian model.”).

48. See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 249 (1992) (noting that legislatures are collective institutions and therefore that legislative intent cannot be ascribed to any singular will).

49. See, e.g., Argelina Cheibub Figueiredo & Fernando Limongi, *Presidential Power, Legislative Organization, and Party Behavior in Brazil*, 32 COMP. POL. 151, 153–54 (2000) (noting that the Brazilian Congress has trouble forming internal coalitions because of its fragmentation, although presidents are able to use their autonomous powers and control over legislative leaders to exert significant control over the legislative agenda).

50. See, e.g., Daniel M. Brinks, “Faithful Servants of the Regime”: *The Brazilian Constitutional Court’s Role Under the 1988 Constitution*, in COURTS IN LATIN AMERICA 128, 137 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (noting that the Brazilian STF tended to be deferential towards core regime interests, but was more likely to be activist when an issue impacted its own corporatist interests).

seem to be particularly prone to the phenomenon, while executives and national-level governments may be more prone to empire-building.⁵¹

It is tempting—but wrong—to view abdication, unlike overreaching, as a harmless phenomenon that does not require judicial intervention. A major reason why is the fact, as Vermeule points out, that the Constitution is “a system of systems.”⁵² That is, a structural constitution is composed of a set of different institutions, each often composed of a number of different individual actors.⁵³ The aggregation problems within each institution may make certain structural problems difficult to tackle, as the discussion of abdication shows.⁵⁴ But the multiplicity of different institutions within the entire system raises a different problem: judicial efforts focused on one institution may not fully solve structural problems and indeed may make those problems worse than they would have been otherwise.

The point is an example of the general theory of the second best.⁵⁵ If the optimal solution to a problem is one where a series of conditions are met (say, where all institutions behave in a certain way), it does not necessarily follow that it is desirable to fulfill as many of those conditions as possible.⁵⁶ Instead, it is possible that fulfilling many—but not all—of a set of optimal conditions will actually produce a worse outcome than the status quo.⁵⁷ Further, it is possible that in the absence of an ideal solution, it is better to have a series of deeply flawed institutions rather than a world where some institutions work extremely well and others maintain their existing flaws. In general, then, the theory of the second best stands as a warning against even successful—but partial—judicial meddling with some aspects of structural constitutionalism.

A simple model of a legislature and a president should help illustrate the point. Assume an equilibrium in which a president wields most of the national policy making power through the use of emergency powers,

51. Presidents, for example, may reap the benefits of institution-building more than individual legislators, while facing much stronger constituent pressure towards aggrandizing power. See Levinson, *supra* note 35, at 956 (explaining such a pattern in the modern United States).

52. See VERMEULE, *supra* note 8, at 3.

53. See *id.* (“Constitutional analysis examines the interaction among institutions, which are themselves equilibrium arrangements that result from the interaction of their individual members.”).

54. See *supra* Part II.B (discussing the intractability of the problem of institutional abdication).

55. See generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

56. See *id.* at 12.

57. For an application of the theory in the context of judicial reform efforts, see Matthew C. Stephenson, *Judicial Reform in Developing Economies: Constraints and Opportunities*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS—REGIONAL: BEYOND TRANSITION 311, 320–25 (François Bourguignon & Boris Pleskovic eds., 2007) (noting for example that sophisticated, nuanced legal standards might be the “first best” solution to many legal problems, but that these kinds of legal rules may produce inferior results if interpreted by unsophisticated or under-trained judges).

delegated powers, and similar devices while the legislature spends virtually all of its time on symbolic bills and local pork-barrel measures. In the terms we have been developing, we can assume that we have an overreaching or empire-building executive and an abdicating legislature.⁵⁸ We can assume that legislative abdication is rooted in deeply seated structural conditions, perhaps in a party system that is poorly institutionalized and thus produces a large number of parties, high turnover in seats won by parties, and inconsistent party platforms.⁵⁹ Assume further that members of a court construct an argument that this equilibrium is sub-optimal, perhaps because it centralizes decision making too much, hinders democratic deliberation, or for some other reason. The ideal model of decision making, the court decides, would instead be for most issues of democratic decision making to go through full democratic debate in the legislature.

In order to fix this pattern of policy making, the court begins systematically shutting down the routes through which the president has exercised unilateral policy making measures. It sharply limits the circumstances under which emergency powers can be used, places limits on other autonomous constitutional powers of the president, and prevents the legislature from delegating large swaths of policy to the president. One possibility is that even this determined effort would not work: a resourceful executive could perhaps find other devices—including informal means—to carry out her goals.⁶⁰ But if we assume for a second that the effort is successful, then the court may face a different kind of problem: having fixed one institutional dynamic, it does not follow that it has improved the overall dynamic, and indeed, it may have made that dynamic worse. The court has now reined in an overreaching executive but left the abdicating legislature as is. The result may be that neither institution now has the willingness or ability to make national policy: the executive because she is hemmed in by the court, and the legislature because it lacks the incentives or structure to do so. The net result may be a reduction rather than improvement in the quality of policy making. In effect, the court may be blowing up an arrangement reached by the branches as a way to cope with deficiencies in legislative institutions and replacing it with a partial solution that is inferior.⁶¹

58. See *supra* Parts II.A–II.B.1.

59. For a more detailed discussion, see *supra* Part II.B.1.

60. See *supra* Part II.A (discussing the problem of evasion).

61. A similar dynamic exists with the well-known argument that, in a “first best” world, legislators are better constitutional interpreters than courts, either because of their greater democratic legitimacy or for some other reason. See, e.g., Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1560–63 (2002) (arguing that the legislature is superior to the judiciary at interpreting and updating ambiguous constitutional provisions). It may be, as scholars from James Bradley Thayer to Mark Tushnet have asserted, that legislative inattention to constitutional

If, then, one views abdication as a common and often non-self-correcting problem, the question is what a court can do about it. The most likely answer, in most cases, is very little. Forcing an abdicating institution to perform its duties better is likely more difficult than stopping an institution from overstepping its bounds, and the tools that a court might have at its disposal are inadequate. Take, for example, a non-delegation doctrine or similar device that stops a legislature or other institution from giving away some core elements of its power.⁶² Critics of the United States' historical experience with such a doctrine—which was used to prevent abdication of legislative power—often assert that it is difficult for a court to construct a manageable standard.⁶³ A deeper problem is that even a successful invocation of the doctrine will not solve the underlying problem of abdication. A court may be able to prevent a legislature from giving its power away, but it cannot force the institution to use the power that it has retained. The result, then, of successfully invoking a non-delegation doctrine may actually be worse than doing nothing at all.

An abdication problem is often rooted in structural characteristics that are difficult for judiciaries to influence. For example, legislative abdication is often rooted in characteristics of the party system. But it is difficult to see how judicial doctrine could alter the fragmentation or institutionalization of a party system. A potential path would be a sustained structural intervention, but this would be unlikely for a court to undertake. Structural remedies, of course, do exist, both within and outside of the United States.⁶⁴ Indeed, debates about their efficacy, propriety, and cost, as well as

interpretation is due to a “legislative overhang,” and thus that the Congress of the United States may pay little attention to constitutional interpretation precisely because of the existence of strong judicial review exercised by the Supreme Court. *See* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 146 (1893). However, it seems plausible that congressional inattention is also due to other, more structural factors, like a lack of expertise or constituent pressure. These dynamics would not be reversed just because the Supreme Court self-restrained.

62. *See, e.g.*, Cynthia R. Farina, *Deconstructing Nondelegation*, 33 *HARV. J.L. & PUB. POL’Y* 87, 89–95 (2010) (defining the concept of a non-delegation doctrine in the United States context).

63. *See, e.g.*, John F. Manning, *Lessons from a Nondelegation Canon*, 83 *NOTRE DAME L. REV.* 1541, 1543–44, 1548 (2008) (noting the centrality of manageability-like critiques to the argument against the non-delegation doctrine in the United States context, and arguing that these concerns afflict even weaker manifestations of the doctrine); *see also* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–76 (2001) (demonstrating reluctance to entertain arguments that a statute delegated too much lawmaking power to administrative agencies).

64. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015, 1021–53 (2004) (surveying recent experiences by U.S. courts with structural litigation and proposing a model approach). For experiences outside of the United States, *see, for example*, Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 *MICH. J. INT’L L.* 691 (2010) (discussing a structural case on the right to food in India); César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 *TEX. L. REV.* 1669, 1688–97 (2011) (exploring the impact of structural remedies on prisons, displaced persons, and healthcare in Colombia).

ideal model, have consumed a significant volume of scholarship.⁶⁵ The major structural judicial decisions involve large-scale bureaucratic failures to carry out constitutional or legal rights or sets of rights. They often attempt to transform bureaucratic behavior but center around the provision of some particular set of services rather than being more general in scope. Moreover, structural judicial interventions in at least some institutions seem to strain judicial role conceptions to the breaking point. In the United States, justiciability doctrines and the political question doctrine make interventions in legislative procedure and similar internal dimensions of judicial behavior unlikely.⁶⁶ Even in systems without these same constraints, courts may be unlikely to undertake a generalized structural intervention in the legislature or another branch of government.⁶⁷

These problems, like problems of evasion, will vary according to the political context. For example, the party system is a meaningful predictor of legislative behavior in most modern contexts. Take legislative behavior within a presidential system as a paradigm case. “Abdicating” legislatures are probably most likely in contexts where party systems are either weakly developed or where the same political force controls multiple institutions.⁶⁸ In both cases, individual legislators may lack the incentive to exercise control over the executive. In contrast, these problems may be less likely to arise where opposing institutions are in the hands of strong parties that are in opposition to the executive.⁶⁹ Thus, courts will sometimes have to deal with pervasive problems of institutional abdication, but in other cases will be able to rely on ambition checking ambition in the Madisonian

65. Compare MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998) (asserting that structural litigation in the prison reform area in the United States, while time-consuming, achieved much), with ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 11 (2003) (critiquing structural cases by arguing that “[j]udges . . . become embroiled in problems they cannot solve and so become part of the problem”).

66. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (holding, in a case involving alleged procedural irregularities in state legislative procedure during the ratification of a federal constitutional amendment, that “the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments”).

67. There is some debate about the extent to which different constitutional systems converge or diverge in their treatment of “political questions.” See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 116–25 (1992) (arguing that Germany does not apply the political question doctrine and thus takes on separation of powers cases that the United States courts avoid).

68. See Landau, *supra* note 46, at 331 (stating based on evidence from political science that weakly institutionalized parties tend to produce legislatures that “have low levels of both democratic legitimacy and institutional capacity”); Levinson & Pildes, *supra* note 4, at 2327 (arguing that in the United States, conflict is channeled through the branches when different parties control the Congress and the Presidency but not when power is unified).

69. See Levinson & Pildes, *supra* note 4, at 2327.

conception. The judicial task will be much more achievable in the latter case than in the former.

II. THE THEORY IN ACTION: A CASE STUDY

This part demonstrates how the support-based analysis of structure undertaken in the prior section works in practice. For this purpose, it considers (in a comparative perspective) four tasks undertaken by the Colombian Constitutional Court since 1991. The court is an interesting case study because of the breadth and ambition of its structural jurisprudence. First, two areas where the court has put in a great deal of doctrinal effort but has produced only modest results: limiting overall exercises of executive power and improving the performance of the Congress. Second, two areas where the court has experienced stunning successes: limiting presidential states of emergency and imposing strict term limits on presidents.

Across all four issue areas, I argue, the court worked in an unfavorable political context very much like the overreaching executive–abdicating legislature examined in the prior part. That is, it has had to rein in a historically hegemonic president without receiving much help from the legislature. The court's successes in the face of this unfavorable context have occurred when it has been able to wield doctrine strategically to increase political and public support for its programs.

In order to understand the context within which the court was forced to work, one must understand a bit of the history of the 1991 constitution. The court, along with a new constitution (Colombia's first in over 100 years), was created in an environment of deep institutional crisis. The country's ongoing guerrilla insurgency and very high rates of violence created a sense that the institutional order was broken. The separation of powers thus played a meaningful role in discussions at the Constituent Assembly.⁷⁰ This prior institutional order had largely been set during a period called the National Front, which ended one of the country's brief interludes of military dictatorship in 1957. The National Front regime was a power-sharing accord between the main factions of the two traditional parties in the country, the Liberals and Conservatives.⁷¹ The parties agreed to rotate

70. See, e.g., ANTONIO BARRETO ROZO, *LA GENERACIÓN DEL ESTADO DE SITIO: EL JUICIO A LA ANORMALIDAD INSTITUCIONAL EN LA ASAMBLEA NACIONAL CONSTITUYENTE DE 1991*, at 95–167 (2011) (exploring the ways that issues connected to states of emergency were treated in the Constituent Assembly of 1991).

71. See JONATHAN HARTLYN, *THE POLITICS OF COALITION RULE IN COLOMBIA* 56–58 (1988) (recounting the agreement during the military dictatorship of Gustavo Rojas that led to the establishment of the National Front).

the Presidency, share cabinet posts and other institutions like the Supreme Court, and require super-majorities for key categories of legislation.⁷² These changes were partially designed to mitigate the often violent inter-party competition that had marked much of Colombia's prior history.⁷³ The rules also tended to paralyze the Congress from passing many major pieces of legislation.⁷⁴

As a coping mechanism, much power became centralized in a "technocratic" president.⁷⁵ Presidents from the start of the period relied heavily on state of siege powers, other autonomous constitutional powers, and delegated power to make most major policy measures.⁷⁶ A key constitutional reform in 1968 strengthened the President's emergency powers and autonomous constitutional powers, while actually disabling Congress from acting on certain key questions like the details of economic policy.⁷⁷ Thus, during the National Front period most major policies were passed unilaterally by the president. The Congress did not fight this dynamic but rather acquiesced in it, with members of Congress preferring to spend their time on local pork-barrel and related matters.⁷⁸ The National Front formally lapsed in the 1970s, but many of its institutional dynamics continued.⁷⁹

By the late 1980s, however, these dynamics were perceived as deeply problematic. The Congress was widely viewed as a corrupt and inefficient institution. Along with the Supreme Court, it was seen as blocking key constitutional amendments that were necessary for society to progress

72. *See id.* at 61–63.

73. *See id.* at 86 ("The logic of coalition rule combined with an electoral system that permitted each party to present multiple lists on election day sustained and encouraged additional factionalism. With both parties guaranteed a share of government, struggles over use of government resources and patronage participation shifted from inter-party conflict to *intra*-party factional disputes.").

74. *See* Ronald P. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 110, 111–16 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997).

75. *See id.* at 111 (arguing that Congress preferred to delegate most power over national policy making to the Executive because of its own institutional structure).

76. *See id.* at 118–30 (noting that the Presidency "is the source of nearly all substantive legislation, much of which is not even debated in Congress because it is enacted under emergency powers").

77. *See* HARTLYN, *supra* note 71, at 101 (noting how the reforms gave the President exclusive powers to introduce certain classes of economic legislation and created a new kind of state of exception, the state of economic and social emergency, which allowed presidents to enact permanent economic legislation).

78. *See* Archer & Shugart, *supra* note 74, at 117 (arguing that congressional incentives were primarily oriented around "the provision of patronage to clients").

79. *See* DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 249 (1993) (stating that the unwinding of the National Front regime was a "gradual process").

while contributing little to broader policy discussions.⁸⁰ The executive branch increasingly came to rely on state of siege and state of economic and social emergency powers, both to combat the guerrilla threat and to carry out basic governance.⁸¹ On the one hand, these measures often disregarded fundamental rights—they were used to carry out tasks like the trying of civilians by military court.⁸² On the other, they were seen as increasingly ineffective at actually carrying out their goals.⁸³ Further, the Supreme Court was striking down an increasing number of these decrees, threatening to leave a policy void.⁸⁴

Thus, one of the goals of the majority of the Constituent Assembly was to rework the basic institutions of governance. Presidents retained considerable autonomous and emergency powers, but these powers were subjected to stricter limits and greater congressional oversight.⁸⁵ The Assembly also attempted to rejuvenate the Congress, mainly by making it more representative.⁸⁶ Finally, the Assembly created a set of new “checking” institutions, seemingly to watch over the old institutional order and ensure that key goals, like the protection of constitutional rights, were met. The Assembly created the Constitutional Court itself, as well as other institutions like a National Ombudsman.⁸⁷

A. *Redistributing Power from the President to the Congress: A Sophisticated Program with Ambiguous Results*

Against this backdrop, the Constitutional Court’s basic program has been to weaken the President’s ability to make policy unilaterally and to

80. See Fernando Cepeda Ulloa, *Colombia: The Governability Crisis*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 193, 196 (Jorge I. Domínguez & Michael Shifter eds., 2d ed. 2003) (referring to Colombia during this period as the “blocked society”).

81. See Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, DEMOCRATIZATION, Winter 2003, at 46, 51–52.

82. See *id.* at 51 (recounting the ways in which decrees limited due process rights, created new crimes, and allowed trial of civilians by military tribunal).

83. See MARCO PALACIOS, BETWEEN LEGITIMACY AND VIOLENCE: A HISTORY OF COLOMBIA, 1875–2002, at 1999 (Richard Stoller trans., 2006) (noting the disjoint in the late 1970s and 1980s between an increasingly repressive state and an increasing sense of insecurity and lawlessness).

84. See Uprimny, *supra* note 81, at 54–55 (noting that judicial review of decrees issued under states of siege became more robust beginning in the 1980s).

85. See Archer & Shugart, *supra* note 74, at 146 (finding that the constitution of 1991 reduced the formal powers of the President).

86. See *id.* at 152–53 (finding that the new constitution makes the Senate much more representative by allowing election based on proportional representation of a single, nationwide electoral district, although also arguing that these changes are likely to increase fragmentation and factionalism).

87. See Cepeda Ulloa, *supra* note 80, at 212–13 (describing the new auditing and checking institutions in the 1991 constitution).

strengthen the Congress's role in national policy making. As I show here, the Court's jurisprudence has demonstrated a sophisticated understanding of its institutional context and has wrestled intently with the major problems in this area. Nonetheless, its overall achievements in rebalancing the separation of powers have been quite modest.

1. *Constraining Presidential Policy Making*

Presidents used a number of devices to dominate policy making during and after the National Front period. The court's jurisprudence has demonstrated an awareness of all of these tools. First, as explored in more detail in the next section, states of siege and the constant use of emergency powers were a crucial source of presidential power, and the court took rapid and decisive action to reduce their use. But governments during this period also relied heavily on their autonomous constitutional powers and on delegated power from the Congress. Since these different routes are partial substitutes, a judicial attempt to crack down on one and not others could push executives towards the more open routes.

The Colombian Constitutional Court has acted to narrow many of these other routes as well. It has, for example, developed a fairly robust non-delegation doctrine governing certain types of congressional delegations.⁸⁸ While the constitution allows the Congress to invest the President with the power to make statutory law on defined subjects and for defined periods of time,⁸⁹ the court has held that this power must be interpreted narrowly and has struck down delegations for not being "detailed, certain, and exact."⁹⁰ Its jurisprudence is based on the view that the 1991 constitution was

88. The Colombian Constitution grants the president different types of decree-making powers. Presidents can of course issue "regulatory" decrees to flesh out laws passed by Congress; those regulations are legally subordinate to the laws under which they are enacted. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 189, cl. 11. The non-delegation doctrine treated here deals with the more limited power of Congress to invest the president with temporary authority to enact legislation with the force of congressional law. *See id.* art. 150, cl. 10.

89. *See id.* art. 150, cl. 10 (giving Congress power to "[i]nvest, for up to six months, the President of the Republic with precise extraordinary powers to promulgate norms with the force of law when necessity or public convenience demands. Those powers must be expressly solicited by the Government and their approval will require an absolute majority of the members of both Chambers.").

90. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], febrero 11, 2003, Sentencia C-097/03 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2003/c-097-03.htm> (striking down a delegation as too vague, which invested the Executive with the power to "organize a system of inspection, vigilance, and control, adaptable to distinct types of institutions and regions, which will permit attending to special situations. For that purpose, necessary entities may be created."); Corte Constitucional [C.C.] [Constitutional Court], noviembre 2, 2000, Sentencia C-1493/00 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2000/C-1493-00.htm> (striking down a delegation that gave the President power to, *inter alia*, "dictate other provisions" and to "repeal, change, or add other regulations related to the matter").

“inspired by the historical necessity that Congress assume in a direct way the responsibility of issuing legislation on the most important topics for the nation, and thus looked to reduce in an obvious way the capacity of the government to exercise legislative functions through congressional delegation.”⁹¹ Moreover, the court has regularly struck down presidential uses of delegated power as exceeding the scope of the delegation, since it has repeatedly held that all such delegations must be read “restrictively.”⁹²

In an important case during the economic crisis of the late 1990s, for example, the court struck down a congressional attempt to delegate to the president power to “eliminate, merge, restructure, or reorganize entities, bodies, or dependencies” of the state.⁹³ The delegation also granted other sweeping powers like the ability to “revise and adjust” the rules governing foreign service careers, and to “modify the structure” and alter or eliminate employee classes in the National Auditor General (*Contraloría*), Attorney General (*Procuraduría*), and General Prosecutor’s Office (*Fiscalía*).⁹⁴ The court looked skeptically at the broad nature of these delegations.⁹⁵ It also closely examined the legislative process through which they had been granted and found that the process had been highly irregular and did not show sufficient democratic debate.⁹⁶ The key provisions granting extraordinary authority had been brought in only at the end of the legislative process and thus were not subject to “rigorous debate.”⁹⁷

91. Corte Constitucional [C.C.] [Constitutional Court], septiembre 20, 1999, Sentencia C-702/99, <http://www.corteconstitucional.gov.co/relatoria/1999/c-702-99.htm>.

92. Corte Constitucional [C.C.] [Constitutional Court], septiembre 12, 2012, Sentencia C-711/12, <http://www.corteconstitucional.gov.co/relatoria/2012/c-711-12.htm> (“Laws dealing with extraordinary powers issued by the Congress have a restrictive character from both the material and temporal point of view, since they can only be about the topics precisely delimited by Congress, and they have a temporary nature because Congress can confer them only for up to six months.”). For other recent cases striking down extraordinary decrees based on delegated power, see Corte Constitucional [C.C.] [Constitutional Court], mayo 16, 2012, Sentencia C-366/12, <http://www.corteconstitucional.gov.co/RELATORIA/2012/C-366-12.htm> (striking down a presidential decree reorganizing various state entities on the ground that it greatly exceeded the scope of the delegation at issue); Corte Constitucional [C.C.] [Constitutional Court], octubre 18, 2006, Sentencia C-858/06, <http://www.corteconstitucional.gov.co/relatoria/2006/c-858-06.htm> (striking down an extraordinary decree altering coverage classes and benefits in the system of insurance for general professional risks when the delegation only allowed the President to alter the “administration” of that institution).

93. See Corte Constitucional [C.C.] [Constitutional Court], septiembre 20, 1999, Sentencia C-702/99, <http://www.corteconstitucional.gov.co/relatoria/1999/c-702-99.htm> (reprinting the text of the law at issue).

94. See *id.*

95. See *id.* (“By adopting this decision, the Constitutional Court is also inspired by the restrictive character that must guide constitutional interpretation in the matter of extraordinary authority given to the Government . . .”).

96. *Id.*

97. See *id.*

Further, the court has shown awareness of the informal norms that have historically allowed the Colombian president to dominate the congressional policy making process. For example, presidents have often used their control over state resources to create coalitions in Congress.⁹⁸ Notice that this kind of informal mastery of the legislative process is much more difficult to police than the formal routes utilized by the executive. But in an important 2003 case involving a proposed constitutional amendment that would have given the President a large amount of new security power, the court was confident it detected this kind of influence and acted accordingly.

The amendment at issue was the third attempt by Colombian Presidents Pastrana and Uribe to give the executive sweeping anti-terrorism powers under which normal mechanisms of governance could be suspended and certain rights suspended. President Pastrana's first attempt to proceed by passing an ordinary law was struck down by the court as a violation of the separation of powers because it invested the President with too much discretionary power in sensitive areas and created an institutional order not contemplated by the constitutional text.⁹⁹ President Uribe (who by then had taken power) next attempted to use a state of internal commotion (a type of state of emergency) to promulgate a similar set of measures, but most of these were struck down or altered by the court.¹⁰⁰ Finally, Uribe attempted to pass a constitutional amendment to achieve a similar set of goals.

The constitutional amendment was challenged on procedural as well as substantive grounds.¹⁰¹ Constitutional amendments in Colombia must go through an intricate (although not unduly demanding) procedure in which they must receive a simple majority of both houses of the legislature in one legislative session and then an absolute majority of both houses in the

98. See Eduardo Pizarro Leongómez, *Giants with Feet of Clay: Political Parties in Colombia, in THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES* 78, 92–93 (Scott Mainwaring et al. eds., 2006) (stating that Colombian presidents have a “wealth” of both formal and informal resources, and that “most members of Congress are anxious to receive these resources,” especially pork-barrel payouts).

99. See Corte Constitucional [C.C.] [Constitutional Court], abril 11, 2002, Sentencia C-251/02, <http://www.corteconstitucional.gov.co/RELATORIA/2002/C-251-02.htm> (holding that the law “leads to an extreme concentration of power in the presidential figure, which is incompatible with the rule of law, because it means that the reciprocal controls between the distinct state organs disappear, since they all will remain integrated in a supreme national power, which is essentially a reinforced, supra-presidential power”).

100. See Corte Constitucional [C.C.] [Constitutional Court], noviembre 26, 2002, Sentencia C-1024/02, <http://www.corteconstitucional.gov.co/relatoria/2002/c-1024-02.htm> (The state of internal commotion “does not vest the President of the Republic with total and unlimited authority to reestablish public order, but rather constitutes a legal–constitutional response to a situation of grave disturbance of public order . . .”).

101. See Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm> (laying out the substantive and procedural charges against the amendment).

second.¹⁰² The challenge focused on the second round of debates in the House: in a preliminary vote on the majority committee report recommending approval, it appeared that the requisite threshold failed by a single vote, but the president of the Congress closed the session because of “disorder” in the chamber before it had been finalized, after holding the vote open for an unusually long time in an apparent attempt to round up more “yes” votes.¹⁰³ One day later, the committee report passed the required threshold, with at least fourteen legislators changing their votes from “no” to “yes.”¹⁰⁴

The court held that the amendment should be struck down because of the procedural irregularities.¹⁰⁵ The subtext of the opinion was that the executive (as was standard practice) had exercised undue influence over the legislature, inducing the fourteen “no” votes to switch sides.¹⁰⁶ The security zones case shows the court in full anti-evasion mode: it was acting aggressively to prevent the president from using his informal powers to achieve what was denied him through formal routes like the use of emergency powers. Further, it was using a standard-like conception (undue distortion of the legislative process) to protect its rules governing the separation of powers.¹⁰⁷

And yet it is unclear whether the court accomplished a significant reduction in executive power. First, the court’s control over the evasion problem is incomplete. Some formal means through which presidents can exercise power are left outside of the court’s control. For example, regulatory rather than legislative decrees, if reviewable at all, are within the province of the high administrative court (the Council of State) rather than the Constitutional Court, and yet the two can often be used by an aggressive executive as functional substitutes.¹⁰⁸ One domestic analyst has argued that “in Colombia, a politics of constitutional evasion has been

102. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 375. Constitutional reform can also be accomplished by referendum, *see id.* art. 378, or by Constituent Assembly, *see id.* art. 376.

103. See Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm> (giving a detailed procedural account of the voting irregularities based on the videotape of the session).

104. See *id.* (giving a detailed account of the later session); *id.* ¶ 61 & n.46 (recording the changes of vote).

105. See *id.* (summarizing the holding).

106. See *id.* (questioning the change in vote of at least fourteen legislators because there was “no new public debate of the topic on the floor”); *id.* ¶ 138 (questioning the change in vote because it was done by political forces “outside of the chambers and behind the back of public opinion”).

107. See Denning & Kent, *supra* note 31, at 1793–96 (noting that anti-evasion doctrines in U.S. constitutional rule generally take the form of standards designed to protect the rule).

108. See MANUEL FERNANDO QUINCHE RAMÍREZ, *LA ELUSION CONSTITUCIONAL: UNA POLÍTICA DE EVASIÓN DEL CONTROL CONSTITUCIONAL EN COLOMBIA* 155–221 (2d ed. 2009) (exploring pathways through which the government has used regulatory decrees to avoid decisions of the Constitutional Court on certain key questions).

articulated and perfected, . . . which has progressively removed types of rules (regulatory decrees, simplified accords, statutory decrees, among others) from the network of constitutional control.”¹⁰⁹

More importantly, the court’s ability to influence the informal means through which Colombian presidents exercise most of their power is quite limited. Notwithstanding the extraordinary sequence of legislative procedure that led the court to invalidate the constitutional amendment involving security zones, executive coalition-building and “interference” in congressional deliberation is a standard feature of presidentialism in Colombia (as in most other presidential countries). The executive continues to control patronage and resources that legislators want.¹¹⁰

2. “Improving” the Congress

The amendment case is a useful bridge between the court’s jurisprudence on executive power and its attempts to shape congressional behavior. In a notable passage in the constitutional amendment decision, the court laid out its vision of Congress as, ideally, a deliberative body:

Congress is a space of public debate. Or at least the Constitution demands that it should be. And thus the political forces seeking a legislative decision . . . should come to that space of public debate to present their arguments. They should also summon rival groups, including minorities, to present their perspectives. And in that context, public deliberation is an incentive for distinct groups to transcend the narrow defense of their interests and their specific conceptions since they must develop public justifications of their positions. This should permit . . . legislative decisions . . . that are more just and impartial.¹¹¹

In Congress, the court faced an obvious “abdication” problem: the institution did not approximate the ideal of an involved, deliberative policy maker, even though it should. The root of this problem, as noted above, lay in the party system, which deteriorated further after 1991.¹¹² As the two traditional parties weakened, the overall party system deinstitutionalized and the Congress became more fragmented and dominated by weak,

109. *Id.* at 19.

110. See Pizarro Leongómez, *supra* note 98, at 92–93.

111. Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm>.

112. See Pizarro Leongómez, *supra* note 98, at 80–91 (presenting a portrait of changes in the party system in the 1990s and 2000s and tracking the decline of the traditional two-party system).

personalistic movements.¹¹³ In several major opinions, the court has commented on congressional inattention to deliberation.¹¹⁴

As a result, the court has become heavily involved in the regulation of internal congressional procedure.¹¹⁵ This jurisprudence, while intrusive by the standards of many comparative systems (notably the United States), followed logically from the court's interest in reorienting the separation of powers.¹¹⁶ Thus, the court held that major parts of the law and regulations governing congressional procedure were incorporated into the constitution, and that a violation of many provisions of congressional procedure was in fact a constitutional violation.¹¹⁷ In general, the court's activism in this area has been focused on principles of "democratic deliberation."¹¹⁸ The identity and consecutiveness doctrines, for example, hold that it is a constitutional violation for members of Congress to decline to debate key substantive parts of a law at one stage of the legislative process (say, committee) but then to introduce them at a later stage.¹¹⁹ Similarly, the court has in key cases struck down laws where debate is formally opened and closed, but no real debate on important articles is held.¹²⁰ Finally, the court will often cite

113. See *id.* at 88 tbl.3.3 (tracking the sharp increase in the number of parties represented in the Senate and the instability in representation through time).

114. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm> (noting, in a case expanding the base for the VAT tax to basic necessities, that "the decision to tax all goods and services of primary necessity did not obey considerations founded in a minimum deliberation concerning the ends sought by the broadening of the VAT base").

115. For an overview of the court's regulation of congressional procedure, see Guillermo Otálora Lozano, *El deber de deliberación mínima en el procedimiento legislativo*, 38 PENSAMIENTO JURÍDICO 65, 65 (2013), <http://www.bdigital.unal.edu.co/38995/1/42953-199494-1-PB.pdf>.

116. For an approach that is highly deferential to legislative procedure, see *Coleman v. Miller*, 307 U.S. 433, 447–50 (1939) (holding that the question of whether the ratification of a constitutional amendment by a state was sufficiently timely to "count" was a political question charged to the federal Congress).

117. See Corte Constitucional [C.C.] [Constitutional Court], agosto 30, 2004, Sentencia C-816/04, <http://www.corteconstitucional.gov.co/relatoria/2004/c-816-04.htm> (stating that violations of congressional procedural rules constituted constitutional violations to the extent that they "are of sufficient importance so as to compromise constitutional values and principles, and it is especially necessary that the defect have consequences for the formation of the democratic will of the chambers or have ignored the basic institutional content designed by the Constitution").

118. See *id.*

119. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], febrero 1, 2010, Sentencia C-040/10, <http://www.corteconstitucional.gov.co/relatoria/2010/c-040-10.htm> (striking down a constitutional amendment changing the eligibility rules under which holders of one public office may run for another, on the grounds that key provisions were not added until late in the approval process and skipped key stages of democratic debate); Corte Constitucional [C.C.] [Constitutional Court], septiembre 20, 1999, Sentencia C-702/99, <http://www.corteconstitucional.gov.co/relatoria/1999/c-702-99.htm>.

120. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2004, Sentencia C-754/04, <http://www.corteconstitucional.gov.co/relatoria/2004/c-754-04.htm> (striking down some provisions of a pension reform because they were not included when debates were held in committee).

a lack of democratic deliberation as a reason for refusing to give deference to congressional policy choices, even in areas where the political branches theoretically have discretion to act.¹²¹

The efforts of the court and allied institutions to cleanse the Congress or improve its quality have not borne much discernible fruit. These failures are predictable, since the factors causing the Congress to be an “abdicating” institution are structural. Aggressive attempts to police legislative procedure, for example, treat the symptom instead of the disease: the quality of deliberation in Congress is not low because of a disregard of the niceties of internal rules; it is low because of the deinstitutionalized party system, underlying corruption, etc.¹²² The court cannot mandate that Congress become “deliberative” through constitutional jurisprudence. The measure that has most obviously altered congressional performance in recent years was a reform of the party system pushed through in 2003, which required parties to present only one list in elections and made other changes to reduce fragmentation and improve party discipline.¹²³ Perhaps these kinds of changes, which were pushed hard by Presidents Pastrana (1998–2002) and Uribe (2002–2010), were incentivized by the court’s jurisprudence limiting autonomous executive power. But the court is not capable of making these sorts of structural changes directly.

Thus, the system-wide effects of the court’s structural jurisprudence on the overall separation of powers are rather murky. One risk of forcing the executive to work through an abdicating, poorly functioning legislature is a possible reduction in governance; in effect the court may pull out the coping mechanism of the National Front model without replacing it with anything else. In practice, although a common complaint of modern

and because, at the floor level, debate on the articles was formally opened and closed without any discussion).

121. See Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm> (holding that the absence of rational legislative debate on key provisions of a bill expanding the VAT tax to cover basic necessities was a reason for denying Congress its standard “margin of configuration” in tax cases); see also David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 267, 282–83 (Aoife Nolan ed., 2014) (analyzing the case from the standpoint of the proportionality doctrine, and arguing that the Congress failed to meet its burden of justifying additional hardship on the poor).

122. See Pizarro Leongómez, *supra* note 98, at 91–93 (arguing that the major problems in the administration of Congress are a result of the “atomization and personalization of party life” in the country).

123. See Matthew Søberg Shugart, Erika Moreno & Luis E. Fajardo, *Deepening Democracy by Renovating Political Practices: The Struggle for Electoral Reform in Colombia*, in *PEACE, DEMOCRACY, AND HUMAN RIGHTS IN COLOMBIA* 202 (Christopher Welna & Gustavo Gallón eds., 2007) (giving a detailed account of the efforts that led to the electoral reforms and the reforms themselves).

Colombian presidents, this risk does not seem to have materialized in a very visible way.¹²⁴ Presidents appear to retain sufficient means, formal and informal, to push their programs through Congress, although they may face higher transaction costs than they did before 1991.¹²⁵ A related risk may have proven more salient in practice: forcing the president to work through Congress more may achieve very little if the president continues to possess the tools to dominate that body and if the body itself is not deliberative. Indeed, the president appears to have become a more dominant player in recent years than in the years immediately following adoption of the 1991 constitution.¹²⁶ The president who held power from 2002 until 2010, Álvaro Uribe, was probably the most dominant executive in modern Colombian history.¹²⁷ Despite being an outsider to the party system, he was easily able to push most of his agenda through Congress, and indeed twice convinced Congress to pass constitutional amendments granting him a second and then a third potential presidential term.¹²⁸ His successor, Juan Manuel Santos, has also been generally considered to be an extremely strong president.

3. *Mexico After 1994: A Comparative Counterpoint*

The lesson of the broader Colombian jurisprudence on the separation of powers would seem to be that even a determined and sophisticated court may make only modest gains in an inauspicious political context without political support. The Mexican example is a useful counterpoint. The Mexican Supreme Court has had a significant impact on the separation of powers over the past twenty years despite a much less ambitious agenda and despite issuing only episodic decisions dealing directly with the separation of powers.¹²⁹ The Mexican Supreme Court achieved much with

124. See Mauricio Cárdenas, Roberto Junguito & Mónica Pachón, *Political Institutions and Policy Outcomes in Colombia: The Effects of the 1991 Constitution*, in POLICYMAKING IN LATIN AMERICA: HOW POLITICS SHAPES POLICIES 199, 216 (Ernesto Stein & Mariano Tommasi eds., 2008) (noting that post-1991 presidents have been able to secure workable coalitions in Congress).

125. See *id.* at 228 (linking reductions in governance on fiscal policy to the increased number of players in the policy making process).

126. See, e.g., Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1598 (2011) (noting that efforts to rein in presidential power throughout Latin America have been counterbalanced by trends towards greater power, particularly through the allowance of presidential reelection).

127. See, e.g., Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585, 601–02 (2014) (discussing the sources and impact of Uribe's popularity and power).

128. See *id.* at 602.

129. Miguel Schor, *An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia*, 16 IND. J. GLOBAL L. STUD. 173, 183 (2009) (“[The court has] assumed an important role as an umpire in disputes between the different branches of government.”); Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 INT’L J. CONST. L. 411, 425

less judicial effort because the political context gave it far more institutional support from Congress. Its efforts to reduce presidential power were aided by a change in political conditions that virtually guaranteed a strong, opposition-leaning Congress to oppose the president.

From the 1930s through the mid-1990s, the Mexican political system was a one-party state: the Institutionalized Revolutionary Party (PRI) dominated both national and state-level politics.¹³⁰ In a very distinctive way, the PRI president was the center of the political regime. While presidents were not allowed to run for reelection, the president held extraordinary power during his own term. Presumptive successors to incumbent presidents were picked by the incumbents.¹³¹ Further, presidents dominated the legislative agenda: the president initiated “virtually all” legislation and constitutional amendments, and both were generally approved by the Congress very quickly.¹³² The president dominated local and state governments and often removed their elected officials, despite Mexico’s status as a formally federal country.¹³³

The political system became more competitive in the 1980s and early 1990s with opposition parties winning more seats at the national level and more local- and state-level races.¹³⁴ Even these victories, however, often were won by the brokering of deals by the president between the opposition and local PRI officials.¹³⁵ As the opposition strengthened in the Congress, President Ernesto Zedillo negotiated a constitutional reform with the right-wing PAN party to reform the judiciary.¹³⁶ The resulting reforms

(2006) (“[The court has] assumed a key role in a system that is learning to live with the checks and balances that have been the hallmark of the U.S. constitutional model.”).

130. See Kevin J. Middlebrook, *Mexico’s Democratic Transitions: Dynamics and Prospects*, in *DILEMMAS OF POLITICAL CHANGE IN MEXICO* 1, 4–7 (Kevin J. Middlebrook, ed., 2004).

131. See Joy Langston, *The Birth and Transformation of the Dedazo in Mexico*, in *INFORMAL INSTITUTIONS AND DEMOCRACY*, *supra* note 29, at 143, 143 (defining the *dedazo* as “the imposition of the next president by the outgoing executive”).

132. Jeffrey Weldon, *Political Sources of Presidentialism in Mexico*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA*, *supra* note 74, at 225, 225.

133. See *id.* (noting that the president could “have governors, mayors, and members of Congress removed from their posts”); see also TODD A. EISENSTADT, *COURTING DEMOCRACY IN MEXICO: PARTY STRATEGIES AND ELECTORAL INSTITUTIONS* 96 tbl.4.1 (2004) (presenting evidence of the extent to which presidents in different periods were able to have governors removed informally).

134. See JODI S. FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S* 102–04 (2008) (pointing out the changing context of electoral politics in Mexico in the 1980s and 1990s).

135. See EISENSTADT, *supra* note 133, at 103–06 (showing how President Salinas, who governed from 1988 to 1994, engaged in post-electoral bargaining with the PAN and awarded the party governorships).

136. See FINKEL, *supra* note 134, at 92–93.

constituted important changes to the composition and powers of the judiciary, which historically was subordinated to the PRI.¹³⁷

For our purposes, the major difference between the political context in Colombia and Mexico is that the Mexican Congress strengthened very rapidly at the same time that the Court was strengthened and began to play a structural arbitrator role. The country developed a fairly stable three-party system, with the PRI standing between a left-wing party (the PRD) and a right-wing party (the PAN).¹³⁸ These parties are relatively strong and cohesive; Mexico, unlike Colombia, clearly has a strong and institutionalized party system.¹³⁹ This setup has virtually guaranteed that absent unusual patterns, Mexican presidents would not receive majorities in Congress. Indeed, no Mexican president since 1997 has had a majority in both houses of Congress.¹⁴⁰

Thus, the Court did not face a weak or abdicating Congress, but instead one that was newly empowered and in opposition to the president.¹⁴¹ This limited the president's options for informal workarounds: patronage and other resources were of course available, but the strong parties in the legislature have made it difficult for the president to buy the support of individual legislators.

The Court's most important work on separation of powers since 1994 has perhaps been in limiting the executive's ability to use regulatory measures issued under existing congressional statutes as a way to bypass the legislature. The limits on executive power to effectively change or extend existing legislation via regulation were relatively untested before 1994, but apparently broad.¹⁴² The reason for the lack of much existing

137. See *id.* at 93–94; see also Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, LATIN AM. POL. & SOC'Y, Apr. 2007, at 31, 49 (finding based on an empirical study that the probability of rulings against the PRI increased as the political system became more fragmented).

138. See Jeffrey A. Weldon, *Changing Patterns of Executive-Legislative Relations in Mexico*, in DILEMMAS OF POLITICAL CHANGE IN MEXICO, *supra* note 130, at 133, 140 tbl.5.2 (showing the evolution of the system towards a three-party system).

139. See *id.* at 152 tbl.5.3 (showing empirical evidence on the high discipline of the three major Mexican parties).

140. See Jose Angel Quintanilla, *The Dynamics of Constitutional Change in Mexico 1997–2012: New Data from Reformar sin Mayorías*, I•CONNECT (Feb. 10, 2014) (noting that no single party has had a majority in either house of Congress since 1997), <http://www.iconnectblog.com/2014/02/the-dynamics-of-constitutional-change-in-mexico-1997-2012-new-data-from-reformar-sin-mayorias/>.

141. See Weldon, *supra* note 138, at 154–63 (showing sharp changes in the behavior of the lower house of Congress once the president no longer had a majority there, with more bills introduced by the members and fewer by the president); Zamora & Cossío, *supra* note 129, at 416 (finding that once the PRI lost legislative majorities in 1997, the president shifted from being “legislator-in-chief” and became more of the “coalition-builder-in-chief,” dependent on the support of at least one other major party to pass legislation).

142. See Weldon, *supra* note 138, at 240 (noting that the president worked off of presumably broad regulatory powers).

caselaw was largely due to the structural composition of the Mexican constitution: presidents prior to 1994 could force statutes (and indeed constitutional amendments) through Congress virtually at will, and thus there was little reason to spend time developing the scope of unilateral executive power. When the opposition won control of Congress in 1997, this pathway was largely closed off and the scope of the president's regulatory power gained importance as an issue.

In two cases issued shortly after an opposition-party member had won the presidency for the first time in 2000, the Supreme Court suggested that presidential regulatory power should be read narrowly, and that Congress would only be presumed to have delegated power to do a particular thing to the President where that delegation clearly appears on the face of the statute.¹⁴³ The first involved a relatively trivial legal issue—the new PAN President Vicente Fox's autonomous power to place certain regions of the country, including the Federal District, in daylight savings time in order to conserve energy.¹⁴⁴ The Court held that the President lacked authority to promulgate the rule on his own and would instead need to get a bill passed by Congress.¹⁴⁵

The Court extended this restrictive approach in a more important case involving the President's ability to amend a set of regulations under the law governing the provision of electricity.¹⁴⁶ Fox wanted to allow private

143. The legal landscape is slightly more complicated than suggested by the analysis here. Analysts generally state that presidents have two types of regulatory powers, autonomous regulatory powers stemming directly from the constitution and the regulatory powers to fill in gaps and develop congressional laws. See Josefina Cortés Campos et al., *Orden jurídico administrativo federal y mejora regulatoria*, ESTE PAÍS (Nov. 17, 2002), <http://estepais.com/site/2002/orden-juridico-administrativo-federal-y-mejora-regulatoria/>. In both of the decisions discussed below, the president acted in areas where the court held that Congress had explicitly prohibited the action at issue through existing laws and/or where issues were textually reserved for congressional action. Thus uncertainty remains over the scope of "autonomous" presidential regulatory power in the absence of affirmative or negative congressional action.

144. See Sentencia relativa a la Controversia Constitucional 5/2001, promovida por el Distrito Federal en contra de la Federación y del Poder Ejecutivo Federal, Pleno de la Suprema Corte de Justicia [SCJN], Diario Oficial de la Federación, Novena Época, tomo Miércoles 19 de septiembre de 2001, Segunda Sección, Página 1, <http://www.diputados.gob.mx/LeyesBiblio/compila/controv.htm>.

145. *Id.* In a companion case, the president sued the mayor, alleging that a mayoral decree refusing the creation of daylight savings time exceeded the mayor's powers. See Sentencia y voto de minoría relativos a la Controversia Constitucional 8/2001, promovido por el Ejecutivo Federal en contra del Distrito Federal, Pleno de la Suprema Corte de Justicia [SCJN], Diario Oficial de la Federación, Novena Época, tomo Miércoles 19 de septiembre de 2001, Segunda Sección, Página 70, <http://www.diputados.gob.mx/LeyesBiblio/compila/controv.htm>. The court sided with the president, finding that the creation of time was a federal and not state or local province. See *id.* at 100 (nullifying the decree). Thus, in effect, what the court did was require policy making on this issue to be done at the federal level, but refuse to allow the president to make policy unilaterally.

146. See Héctor Fix-Fierro, *Judicial Reform in Mexico: What Next?*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 240, 253–54 (Erik G. Jensen & Thomas C. Heller eds., 2003).

companies to produce more electricity than was allowed under a historic state monopoly, but he knew he could not get such a bill through Congress.¹⁴⁷ Thus, he attempted to go around Congress via his regulatory powers. He did this by amending old regulations that allowed producers who generated electricity for their own use or as a byproduct of some industrial process to sell quite small amounts of excess electricity to the state. Fox increased these percentages drastically, allowing those who generated electricity for their own use to sell up to half of their total electricity to the state, and permitting those who created electricity as a byproduct of industrial processes to sell all of their generated electricity to the state.¹⁴⁸

The PRI president of the Congress filed a constitutional controversy in 2001, alleging that Fox lacked the power to pass the regulation.¹⁴⁹ In defense, Fox stated that the law explicitly allowed him to regulate electrical energy, and that his regulation did not contradict the letter of the statute because nothing in the text explicitly fixed limits on the amount of electricity that these two groups—self-generators of electricity and those who constructed electricity as a byproduct—could sell.¹⁵⁰ The court disagreed, holding that the statute had to be read as a whole, and as a whole it was designed to give the state a near monopoly on electricity production.¹⁵¹ There were exceptions to that rule for people who produced electricity for their own use or as an industrial byproduct, but these exceptions were carefully carved out of the overall scheme.¹⁵² By allowing these two groups to sell unlimited amounts of electricity to the state, Fox's regulation had essentially gutted the purpose of the statute.¹⁵³

147. *See id.*

148. For the text of the relevant parts of the decree at issue, see *Sentencia y votos concurrentes y de minoría, relativos a la Controversia Constitucional 22/2001, promovida por el Congreso de la Unión en contra del Presidente Constitucional de los Estados Unidos Mexicanos, del Secretario de Energía, de la Comisión Reguladora de Energía y del Secretario de Gobernación, Pleno de la Suprema Corte de Justicia [SCJN]*, *Diario Oficial de la Federación*, Novena Época, tomo Lunes 3 de junio de 2002, Segunda Sección, Página 1, 49–50, <http://www.diputados.gob.mx/LeyesBiblio/compila/controv.htm>.

149. *See id.* at 2–3.

150. *See id.* at 19–24.

151. *See id.* The constitutional provisions establishing that the state would have a monopoly on electricity production played a role in the case: the court suggested that an attempt to change the rules for the production of electricity so directly was also a direct violation of those constitutional provisions. *See id.* at 70–72.

152. *See id.* at 68–69 (noting that the exceptions in the law for the two groups at issue could be justified because of the savings that could be obtained through servicing their own energy needs without violating the public interest).

153. *See id.* at 70 (“The orders at issue represent a substantial change with respect to the conditions established by the law, because they overcome the requirement of personal consumption . . . and they alter the concept of surplus, which changes from being ‘that which is reasonably left over after the personal use of production’ to being ‘the excess capacity of the permittee, once its needs have been satisfied,’ which can be interpreted as everything it can produce and which is not consumed.”).

These two decisions, while not settling all issues related to the scope of presidential power, seem to have created an understanding that many significant acts of policy making need to go through the (opposition-led) legislature.¹⁵⁴ The larger point is that the political context simplified the court's task. The political context in which the court was operating was arguably more important than doctrinal sophistication in determining success.¹⁵⁵ While in the Colombian case the court was trying to create a new equilibrium that was being resisted by other political actors, in the Mexican case it was moving in the direction of a new equilibrium that was being supported by the opposition parties that were now dominating Congress.

B. Term Limits and Emergency Powers: Two Remarkable Successes

The prior section has argued that the Colombian Constitutional Court's attempt to rebalance the separation of powers has borne only modest fruit, hampered by the lack of support from a fragmented Congress. Nonetheless, the court has enjoyed striking success on at least two major structural questions—curbing the historic presidential abuse of emergency powers and preventing presidents from continuing in power indefinitely. The key to the court's success on these issues, I argue, is that it was able to rely on political substitutes for a weak Congress, which helped to support its programs. Indeed, the court's jurisprudence across both areas demonstrates a conscious attempt to rally that support.

154. The court's complex vision of the landscape of formal powers in Mexico is best illustrated by a third Fox-era case involving the president's ability to effectively utilize a line-item veto over the national budget. *See* Sentencia, tres votos particulares, dos paralelos, uno de minoría y uno concurrente, relativos a la Controversia Constitucional 109/2004, promovida por el Poder Ejecutivo Federal, en contra de la Cámara de Diputados del H. Congreso de la Unión, Pleno de la Suprema Corte de Justicia [SCJN], Diario Oficial de la Federación, Novena Época, tomo Lunes 24 de octubre de 2005, Segunda Sección, Página 6, <http://www.diputados.gob.mx/LeyesBiblio/compila/controv.htm>. The text of the constitution was completely silent on this point, but the court relied heavily on purpose-driven interpretation in finding that the president had the ability to exercise a budgetary line-item veto, focusing on the fact that the constitution of 1917 envisioned a strong President. *See id.* The accommodation reached by the court is not obviously correct but it is plausible: unilateral presidential policy making is checked because most policy making is forced to go through the legislature; meanwhile the president is given a new reactive power to check unilateral congressional policy making. This settlement may make some sense in a context where both the president and the congress are seeking to "overreach" rather than to "abdicate."

155. A comparison with another area where the court has taken on a structural project—Mexican federalism—demonstrates the point. The court has been actively trying to redistribute power from the central government to the states, but has had much less success in energizing these historically weak institutions. *See* Zamora & Cossío, *supra* note 129, at 426–36 (discussing continuing problems in Mexican federalism). The reasons why may be that the federal government has many routes to potentially evade restrictions on its power; further, the states are historically weak institutions that may not be in a position to exercise renewed power. *See id.* at 429 (finding that Mexican states continue to be weak even after the opposition has gained significant power).

1. *Curbing Abuse of Executive Emergency Powers*

One of the Colombian Constitutional Court's most celebrated achievements has been in reducing the President's ability to use the two major emergency devices written into the new constitution, the state of internal commotion and the state of economic, social, and cultural emergency.¹⁵⁶ Prior to the writing of the 1991 constitution, the country was governed most of the time under a state of emergency, and virtually all major pieces of legislation were passed unilaterally by the president through using those devices. Since 1991, the situation has changed drastically even though the country has continued to be plagued by civil unrest. After upholding most states of emergency in its first few years, the court has since struck down most attempted uses. Colombia was governed under some form of state of emergency 82% of the time between 1970 and 1991, but only 17% between 1991 and 2002.¹⁵⁷ No state of internal commotion has been successfully declared since 2002, and states of economic, social, and ecological emergency have been limited to true disasters, such as earthquakes.¹⁵⁸

The court managed to sharply limit the use of emergency powers with a series of highly impactful doctrinal devices. The court exercised a stricter review of decrees issued under an emergency. Many decrees that would have passed muster in the past were now struck down as violations of fundamental rights or as not maintaining a close enough relationship with the events necessitating the state of emergency.¹⁵⁹ More importantly, whereas prior to 1991 the old Supreme Court had limited itself to reviewing decrees issued under states of siege, and refused to exercise any substantive review of the declarations themselves, the new Constitutional Court quickly established its ability to exercise a substantive review over

156. See, e.g., Uprimny, *supra* note 81, at 47 (describing this jurisprudence as "one of the most important and original interventions of the Constitutional Court").

157. *Id.* at 65 tbl.3.

158. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], marzo 9, 2011, Sentencia C-156/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-156-11.htm> (upholding declaration of state of economic, social, and ecological emergency due to severe flooding caused by La Niña); Corte Constitucional [C.C.] [Constitutional Court], abril 14, 1999, Sentencia C-216/99, <http://www.corteconstitucional.gov.co/relatoria/1999/C-216-99.htm> (same after earthquake). Note that even during the severe flooding caused by La Niña in 2010 and 2011, the court struck down an attempt to declare a new state of economic, social, and cultural emergency, holding that constitutionally that instrument (unlike the state of internal commotion) did not allow any extensions, and that the existing facts did not justify a new declaration. See Corte Constitucional [C.C.] [Constitutional Court], marzo 29, 2011, Sentencia C-216/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-216-11.htm>.

159. See Mauricio García Villegas, *Constitucionalismo perverso. Normalidad y anormalidad constitucional en Colombia: 1957-1997*, in 1 EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA 317, 352 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001) (presenting statistics from the early 1990s to show increased activism).

the necessity of the declaration itself.¹⁶⁰ Its framework sharply limited use by demanding that declarations be spurred by genuine emergencies of sufficient gravity.¹⁶¹ Further, the court held that declarations must be initiated by new events, rather than “chronic” or “structural” factors.¹⁶² Chronic issues, even very serious structural problems, should be dealt with through the “natural forum” of democratic debate in Congress.¹⁶³

This has basically eliminated the common executive tool of using states of emergency to push through major pieces of legislation. Two particularly striking examples: (1) In 1997 and 1999, the court struck down (fully in the first case and partially in the second) two attempts to declare a state of economic, social, and ecological emergency to deal with a very deep financial crisis.¹⁶⁴ In both cases, the court held that even if the crisis was an aggravating factor, key aspects of the problem were rooted in structural issues like the long-term fiscal deficit.¹⁶⁵ (2) In 2010, the court unanimously struck down an attempt to declare a state of emergency to deal with a crisis in the healthcare system.¹⁶⁶ Again, the court did not deny that a crisis existed, but held that the main elements were structural rather than being created by some external shock, and thus did not justify unilateral presidential policy making.¹⁶⁷ Prior to 1991, both situations

160. See Uprimny, *supra* note 81, at 55 (referring to this power as “the most controversial and arguably the most interesting aspect of Colombian judicial review”); García Villegas, *supra* note 159, at 350–51 (tracing the history of the court’s doctrinal shift).

161. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 2, 1992, Sentencia C-004/92, pts. VII.10–12, <http://www.corteconstitucional.gov.co/relatoria/1992/C-004-92.htm> (clarifying that states of exception can only be used for “extraordinary alterations of normality”).

162. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2010, Sentencia C-252/10, pt. 7.2.1.3.1, <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-252-10.htm> (striking down a declaration of a state of economic, social, and ecological emergency in the healthcare system because of the court’s doctrine “prohibit[ing] the expansive utilization of exceptional emergency powers to resolve chronic or structural problems”).

163. Corte Constitucional [C.C.] [Constitutional Court], marzo 12, 1997, Sentencia C-111/97, pt. III.7, <http://www.corteconstitucional.gov.co/relatoria/1997/C-122-97.htm>.

164. During the crisis, unemployment spiked to 20% in 2000, the economy contracted 4% in 1999, and the fiscal deficit exceeded 5% of GDP. See Andres F. Arias, *The Colombian Banking Crisis: Macroeconomic Consequences and What to Expect 2* (Banco de la República de Colombia, Borradores de Economía No. 157, 2000), <http://www.banrep.gov.co/sites/default/files/publicaciones/archivos/borra157.pdf>.

165. See Corte Constitucional [C.C.] [Constitutional Court], marzo 1, 1999, Sentencia C-122/99, <http://www.corteconstitucional.gov.co/relatoria/1999/C-122-99.htm> (limiting the scope of the government’s declaration of a state of economic, social, and cultural emergency because many of the problems alluded to were “chronic and structural”); Corte Constitucional [C.C.] [Constitutional Court], marzo 12, 1997, Sentencia C-111/97, pt. III.7, <http://www.corteconstitucional.gov.co/relatoria/1997/C-122-97.htm> (entirely striking down a declaration of a state of economic, social, and cultural emergency on the same grounds).

166. See Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2010, Sentencia C-252/10, <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-252-10.htm>.

167. See *id.* pt. 7.2.1.3.2(a) (“In this way, the Court does not value the existence of supervening and extraordinary facts, but of known structural and foreseeable situations.”).

would probably have been dealt with unilaterally by the executive. No state of internal commotion has been declared since a judicial strike in 2008 (that attempt was struck down),¹⁶⁸ and the most recent declarations of economic, social, and ecological emergency have involved weather-related events like La Niña.¹⁶⁹

The court's program has been successful in this area despite major obstacles. First, a series of presidents (running from Samper in the 1994–1998 period to Uribe in the 2002–2010 period) have seen the court's jurisprudence as a significant impediment to their plans and in response either threatened noncompliance or sought changes to the court's jurisdiction. The court also received no consistent congressional support for its program, since the Congress has often continued to prefer executive policy making on major national issues. In 2003, for example, the Congress allowed a second extension of a state of internal commotion declared by President Uribe after a rushed session, without producing a thorough report on why the extension was necessary, and less than halfway before the existing emergency period was to have expired.¹⁷⁰ The court struck down this extension in a decision that reflected its deep distrust of Congress's monitoring of presidential emergency powers.¹⁷¹

The court's success despite these problems appears to be due mainly to the support it has received from political and social elites and from the general public. The court's decisions restricting use of emergency powers fed off of a climate where both ordinary citizens and political elites were weary of governance by state of siege, and the court in turn has helped to contribute to a political atmosphere where states of exception generally cannot be used for the litany of chronic governance problems, including low-intensity warfare, faced by the country.¹⁷² The popular mobilizations

168. See Corte Constitucional [C.C.] [Constitutional Court], febrero 12, 2009, Sentencia C-070/09, pt. 6.2.3.2, <http://www.corteconstitucional.gov.co/RELATORIA/2009/C-070-09.htm> (finding a lack of evidence that ordinary police powers were insufficient to handle the problems caused by the strike). The most recent state of internal commotion to be upheld was in 2002, just after Álvaro Uribe had taken office. See Corte Constitucional [C.C.] [Constitutional Court], septiembre 27, 2006, Sentencia C-802/06, <http://www.corteconstitucional.gov.co/relatoria/2006/C-802-06.htm> (upholding a state of internal commotion to deal with increased violence and guerilla activity, although striking down a part of the declaration purporting to insulate it from judicial review).

169. See Corte Constitucional [C.C.] [Constitutional Court], marzo 29, 2011, Sentencia C-216/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-216-11.htm>; Corte Constitucional [C.C.] [Constitutional Court], marzo 9, 2011, Sentencia C-156/11, <http://www.corteconstitucional.gov.co/relatoria/2011/C-156-11.htm>.

170. Arlene B. Tickner, *Government and Politics*, in *COLOMBIA: A COUNTRY STUDY* 213, 220 (Rex A. Hudson ed., 5th ed. 2010).

171. See *id.*

172. See, e.g., Uprimny, *supra* note 81, at 51–52 (explaining the ways in which use of emergency powers impacted human rights and “blurred the distinction between legality and illegality and between democracy and authoritarianism”).

that led to the Constituent Assembly in 1991 focused in large part on the problems connected to governance by state of siege.¹⁷³ In popular consciousness, the state-of-siege mechanism was connected both with ineffectiveness and with human rights abuses. The ineffectiveness critique focused on the fact that emergency governance apparently did little to stem the tide of violence in the country.¹⁷⁴ The rights critique emphasized the fact that states of siege often allowed presidents to violate rights without much judicial review.¹⁷⁵ This critique was rolled into broader critiques of the way rights were violated by the government, by guerilla groups, and by paramilitaries, with impunity throughout Colombian society.

The court's jurisprudence in the post-1991 period thus gained at least part of its strength from the resonance that the rights issues connected to the state of siege had with the Colombian population.¹⁷⁶ This has become an important part of the discourse even in contexts that are farther from the original focus on human rights abuses connected to low-intensity warfare. For example, a 2009 state of economic, social, and cultural emergency in the healthcare sector generated a massive public outcry, with opponents including patients' organizations and doctors' groups arguing that the resulting decrees restricted constitutional rights to healthcare.¹⁷⁷ The court's decision striking down the declaration reiterated its longstanding doctrine that states of emergency could not be utilized to tackle chronic, structural problems but linked its opinion to the broader discussion swirling around the issue by noting the importance of having fundamental issues bearing on rights decided in open debate in Congress, rather than by a closed group of

173. See, e.g., JAIME BUENAHORA FEBRES-CORDERO, *EL PROCESO CONSTITUYENTE DE LA PROPUESTA ESTUDIANTIL A LA QUIEBRA DEL BIPARTIDISMO 97–100* (1991) (noting how the overuse of the state of siege led to a popular sense that the state was a “generator of violence” rather than contributing to settlement of the armed conflict).

174. See MANUEL JOSÉ CEPEDA ESPINOSA, *INTRODUCCIÓN A LA CONSTITUCIÓN DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 324* (1993) (“We have the worst of both worlds: a state of siege that erodes the prestige of our democracy with its permanent character and its nominal affinity with regimes of martial law but, at the same time, a state of siege that has lost its coercive force, its capacity to intimidate, its effectiveness to reestablish public order.” (quoting speech of President of the Republic Cesar Gaviria at the installation of the National Constituent Assembly, Feb. 5, 1991)).

175. Uprimny, *supra* note 81, at 53–55.

176. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], octubre 2, 2002, Sentencia C-802/02, pt. VI.A.3.b, <http://www.corteconstitucional.gov.co/relatoria/2002/c-802-02.htm> (tracing the history of the state of siege and its treatment in the constituent assembly as “express[ing] the necessary subjection of the cited exceptional powers to the immanence of rights like the right to life, personal integrity, prohibitions on slavery and servitude, the prohibition on discrimination, the right to legal personality, the rights to nationality, political rights, the principle of legality and retroactivity, the freedoms of knowledge and religion, the protection of the family and the rights of the child”).

177. See Abdón Espinosa Valderrama, *Tormenta de la emergencia social*, *EL TIEMPO* (Feb. 4, 2010), <http://www.eltiempo.com/archivo/documento/MAM-3823889> (“Only a few times have we seen in Colombia a more indignant and tempestuous reaction against official orders than the one currently occurring against the decree-laws issued by the Government in this Social Emergency.”).

decision makers in the executive branch.¹⁷⁸ The decision was announced to cheering crowds in the Plaza Bolívar, the central square of Bogotá.¹⁷⁹

The Brazilian case perhaps offers an instructive example suggesting that the Colombian court's ability to tap into broader rights concerns and a long history of abuses was critical for its success. Brazilian presidents also have a long history of relying heavily on unilateral executive policy making (in this case through decree power). But periodic judicial attempts to limit their use have borne no systematic fruit. Indeed, following a reform that was intended to curb their use by altering incentives, reliance on unilateral decrees actually increased. A key difference in the Brazilian context is that decrees are not as strongly associated with abuse of power and violation of rights, so there has been less public support for their curbing.

2. *Enforcing Presidential Term Limits*

Perhaps the most famous example of the court's structural jurisprudence occurred during the term of Álvaro Uribe, when it twice issued landmark decisions regarding the amendment of the constitution in order to allow President Uribe to run for a second and then to prohibit him from running for a third consecutive term. In the first decision of 2005, the court upheld a constitutional amendment passed through a Congress controlled by Uribe against charges that its passage in Congress was procedurally irregular and that it constituted an "unconstitutional constitutional amendment" that substituted core principles of the 1991 constitution.¹⁸⁰ The court noted that the allowance of immediate presidential reelection certainly increased presidential power and strained aspects of constitutional design, but not to the point of replacing core principles of the 1991 text.¹⁸¹

In 2010, however, the court held that a subsequent attempt to hold a referendum potentially allowing Uribe to run for three consecutive terms was in fact invalid both on procedural grounds and because it substituted for core principles of the 1991 constitution.¹⁸² This time the court

178. See Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2002, Sentencia C-252/10, pt. 5.c, <http://www.corteconstitucional.gov.co/RELATORIA/2010/C-252-10.htm> ("[C]ongress is the natural forum to discuss and resolve critical problems.").

179. See Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 195 (2013).

180. See Corte Constitucional [C.C.] [Constitutional Court], octubre 19, 2005, Sentencia C-1040/05, <http://www.corteconstitucional.gov.co/relatoria/2005/C-1040-05.htm>.

181. *Id.*

182. See Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, Sentencia C-141/10, <http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm> (striking down the proposed

emphasized that allowing three consecutive terms in office would effectively unravel the careful scheme of checks on presidential power established in the 1991 constitution, allowing the president to monopolize power beyond the limits of an ordinary presidential regime.¹⁸³ The court also noted that the process by which the referendum had been passed through Congress was marred by serious irregularities on financing and other issues.¹⁸⁴

The court's decision was surprising, particularly since it rested largely on a doctrine—substitution of the constitution—that allowed the court to review not ordinary legislation but a constitutional amendment itself for constitutionality. This was not a power given to the court explicitly in the constitutional text, but rather one the court had worked out in earlier cases based on a distinction between constitutional amendment (which was carried out by a “constituted power,” the Congress) and constitutional replacement (which was carried out by a Constituent Assembly, and thus by the people themselves).¹⁸⁵

Perhaps even more surprising than the decision itself was the fact that it was met with compliance rather than resistance. While some allies of Uribe expressed dismay with the decision, most major political actors accepted it, and Uribe himself stated that he would not seek to disobey the court's order.¹⁸⁶ Uribe therefore did not run for reelection in 2010, and the election was won by a member of Uribe's cabinet, Juan Manuel Santos, who has since governed in a much more centrist manner and has become an enemy of Uribe's faction. The decision is thus credited as serving as an important “hedge” against the possible erosion or undermining of democracy in Colombia.¹⁸⁷

In comparative (regional) terms, the striking thing about the Colombian term limits decision is its rarity. In other recent instances in Latin America where presidents have sought to extend or remove term limits—in Venezuela, Ecuador, Honduras, and Nicaragua—courts have not stood in the way, often despite more favorable constitutional texts that either made term limits explicitly unamendable or suggested that they were placed on

referendum both because of procedural problems with its passage and because the Congress lacked the competence to substitute fundamental constitutional principles).

183. *See id.* pt. 6.3.5.1.1.

184. *See id.*

185. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 376.

186. *Court Blocks Effort by Colombian President to Seek a 3rd Term*, N.Y. TIMES, Feb. 27, 2010, at A5.

187. *See, e.g.*, SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE FIELD OF POWER POLITICS 151 (2015).

higher tiers requiring more demanding procedures to change.¹⁸⁸ Indeed, in the latter two cases, judicial decisions actually deployed the unconstitutional constitutional amendment doctrine to remove term limits in order to serve the interests of those already in power.¹⁸⁹

At least part of the explanation for the Colombian “success story” stems again from political support for its action, which in this case was much greater than it seemed. The court faced a very strong president, but one who commanded only a weak party apparatus and whose congressional support therefore rested on a loose coalition of actors.¹⁹⁰ These actors provided reliable legislative support because of Uribe’s high approval ratings and command of patronage, but much of that support melted away once it seemed likely that he could no longer earn an additional term. Leading politicians from factions around Uribe instead began jockeying for their own power. Indeed, the court’s intervention in many ways served as the key event weakening Uribe’s power. It changed the political game by making it less likely that Uribe would continue as president. Further, political fragmentation made it harder for Uribe to evade the decision by handpicking a successor whom he could control or who would automatically continue his policies—the next president, Juan Manuel Santos, ended up carrying out his own agenda and Uribe relatively quickly became part of the opposition.

The context in the other comparative cases has generally been quite distinct. In Venezuela, Ecuador, and Nicaragua, for example, the political movements of incumbent leaders were more hegemonic and less fragmented, making it less likely that a judicial decision would reveal or encourage cracks in the governing coalition, or galvanize the support of opposition actors. Moreover, the same strength of the governing movement has made it less likely that a decision imposing term limits would weaken incumbents, because the baton would merely be probably passed to a

188. For an overview of the various cases, see David Landau, *Term Limits Manipulation Across Latin America – and What Constitutional Design Could Do About It*, CONSTITUTIONNET (July 21, 2015), <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.

189. In the Honduran case, the court deployed the unconstitutional constitutional amendment doctrine to remove a part of the original 1982 constitution prohibiting presidential reelection, and a provision that was supposedly unamendable. See David Landau & Brian Sheppard, *The Honduran Constitutional Chamber’s Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?*, I•CONNECT (May 6, 2015), <http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary/>.

190. See Laura Wills-Otero, Chávez and Uribe: Similar Political Strategies and Dissimilar Ideological Projects 5, 19 (2012) (unpublished manuscript), <https://c-politica.uniandes.edu.co/docs/doc/wills.pdf> (noting that Uribe was a populist and personalist leader who relied on direct intermediation with the people rather than building a strong party).

successor in the same movement as the incumbent. In Venezuela, for example, President Hugo Chávez had long tapped Nicolas Maduro as his successor; Chávez governed without term limits until his death in 2013, and Maduro has subsequently governed the country.¹⁹¹

III. IMPLICATIONS FOR CONSTITUTIONAL THEORY

The case studies in the prior section lend some support to the theory developed in Part I: judicial success in carrying out projects of structural judicial review depends at least in large part on whether the court can find support from other political and social actors. This is a modest point but one with potentially significant implications for U.S. and comparative constitutional law. This part draws out two major points. First, the relationship between judicial review and political support may be different than is often conceptualized in constitutional theory. The structural safeguards literature argues that courts should refrain from enforcing constitutional structure when other actors or mechanisms are available to enforce that structure. But the theory and evidence presented here suggests that structural judicial review may be most effective when it has significant external support elsewhere in the political system. Moreover, when such support is lacking courts may have little prospect of success regardless of doctrinal effort or sophistication. Thus, at least in some contexts judicial review and structural safeguards should be seen as complements, not substitutes.

The second point is that courts have at least some ability to construct these supports when they are missing at the outset. Courts can, for example, time or draft decisions so as to marshal support from other political institutions. They can also craft decisions so as to garner support from substitutes for these institutions, at the international level or from the public. While scholars are paying attention to the mechanisms when studying rights, they are less likely to focus on them when studying structure.

A. *Political Safeguards and Judicial Review*

U.S. constitutional theorists have long argued about whether the constitutional structure is self-enforcing; that is, whether institutions will fend for themselves even absent judicial intervention. Madison's vision relied heavily on a conception that each branch of government would check

191. See William Neuman, *Even in Crisis, Successor Stays True to Chávez*, N.Y. TIMES, Mar. 10, 2015, at A1.

the others, while the states would check federal power.¹⁹² Some modern theorists have suggested “structural safeguards” whereby either the federalism or separation of powers dimensions of the structural U.S. Constitution might be self-enforcing. Others have critiqued this literature by finding that the proposed mechanisms are unlikely to work.¹⁹³ For example, the founders’ vision of an ambitious Congress checking presidential overreaching might work well if members of each branch hold a strongly institutionalist perspective and seek to preserve the prerogatives of their institutions. However, it might be undermined by elements of the modern party system, which make Congress unduly cooperative under conditions of unified government.¹⁹⁴ Or it might be undercut by the incentives of individual legislators to seek goals other than the making of national policy.¹⁹⁵ Similarly, a conception of states defending their interests effectively against an aggressive federal government may be based on mechanisms like political representation in national institutions or influence over national-level parties.¹⁹⁶ Yet those mechanisms may break down if the relevant pathways of influence are weakened, or if the actors who are supposed to represent state interests in fact do not have the incentives to do so.¹⁹⁷

From a comparative perspective, the degree to which structural systems are self-enforcing will vary in somewhat predictable ways across political contexts. In some cases, the incentives and organization of the relevant institutions will line up so that the Madisonian story fits relatively well. Scholarship suggests, for example, that modern political systems are determined largely by party system dynamics, so where a strong party

192. For an explanation of the Madisonian vision that subordinated courts to a self-enforcing structure, see, for example, Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 735 (2006).

193. See, e.g., Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 24–28 (2009) (arguing that the Madisonian conception of separation of powers is incomplete because it specifies no mechanism by which the different branches would be incentivized to oppose each other).

194. See Levinson & Pildes, *supra* note 4, at 2323 (“[F]rom the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power.”).

195. See Levinson, *supra* note 35, at 952–55 (arguing that both partisan and individual incentives of members of Congress often lead Congress to give power away, rather than seeking to aggrandize the institution).

196. See Wechsler, *supra* note 7 (arguing that the selection mechanisms for members of Congress are sufficient to protect state interests); Kramer, *supra* note 7 (arguing that the structure of modern political parties provides protection for state interests).

197. See, e.g., Garrick B. Pursley, *The Campaign Finance Safeguards of Federalism*, 63 EMORY L.J. 781 (2014) (arguing that the *Citizens United* decision and related developments undermine the ability of national political parties to protect state interests by wresting control of political parties away from the states).

system exists, and where the president and legislature are controlled by different parties, the self-enforcing story of separation of powers may approximate reality.¹⁹⁸ But the story will probably break down where executives and legislatures are controlled by the same party or where parties are weak and poorly institutionalized rather than strong.¹⁹⁹ In comparative terms, then, the United States demonstrates an unusually unpredictable pattern of executive–legislative relations.²⁰⁰ The two-party system found here creates an oscillation between unified and divided government, and thus in relatively strong and relatively weak separation of powers. But patterns elsewhere may be more stable. Executives may work within a strong party system with three or more strong parties, in which case divided government would be the rule (Mexico since 1997). Or they might work within a dominant party system, in which case it would be exceptional for the executive not to enjoy a legislative supermajority (Mexico before 1994). Finally, they might work within a poorly institutionalized party system, where the incentives of individual legislators are not likely to be aligned to produce an ambitious legislature on national issues (Colombia). Even if it would be normatively undesirable for United States constitutional jurisprudence to shift with the frequent oscillations between divided and unified government,²⁰¹ it may be more sensible for the jurisprudence of countries with more stable relationships to be attuned to elements of the party system.

U.S. constitutional theorists have usually identified self-enforcement mechanisms as a substitute for judicial review. That is, in the structure of the arguments, they are seen as reasons why the Court need not worry about a robust judicial enforcement of structural elements of constitutional law.²⁰² But at least in certain contexts, the “political safeguards” literature might have the relationship exactly wrong: rather than “political

198. See Levinson & Pildes, *supra* note 4, at 2329 (“When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches.”).

199. See Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 Minn. L. Rev. 1451, 1468 (2007) (noting that when the president is working within a system where there is unified government and a coherent party in charge of Congress, “he gets what he asks for”).

200. See *id.* (noting this point and wondering “whether it makes sense to design our constitutional structures to deal with a temporary configuration of political power”).

201. See *id.* at 1468–69.

202. See, e.g., Wechsler, *supra* note 7, at 559 (arguing that the constitutional structure protects the states, and that the main role of judicial review was to protect federal prerogatives against state intrusion); Kramer, *supra* note 7, at 219 (explaining that, because federalism is protected politically through the party system, the Supreme Court’s renewed interest in imposing federalism-based limits is “as unnecessary as it is misguided”); Kramer, *supra* note 192, at 735 (observing that in the Madisonian world of separation of powers, judicial review played a lesser role in protecting structure because the system was largely self-enforcing).

safeguards” rendering judicial review unnecessary, they might exist in the only situations where judicial review of structural issues might be successful. Rather than being substitutes, then, political safeguards and judicial review may be complements, and structural judicial review in the absence of strong political safeguards will usually fail.

A comparison of the various contexts in which the Colombian Constitutional Court undertook its review demonstrates the point. In the term limits example and in the emergency powers context, the court was able to rely on the support of external political actors, which proved critical for the achievement of its goals. When tackling the general problem of executive dominance and legislative weakness, the court has not received similar support precisely because of the nature of the party system. This is in sharp contrast to the Mexican case, where the president faced a newly empowered, opposition-led legislature. The Mexican Supreme Court’s actions limiting the president’s regulatory powers had an effect on the distribution of power because the legislature, which was led by the two other large parties in the system, was ready to take up the task of national policy making.²⁰³

The idea that functioning self-enforcement mechanisms may be necessary for effective judicial review is intuitive and in accord with recent work in constitutional politics and constitutional theory. This work tends to show, for example, that courts gain power when they are supported by political actors rather than working against those actors.²⁰⁴ And the argument has useful empirical implications: it suggests that scholars might work to identify self-enforcement mechanisms not as a way to preempt judicial review, but instead in order to determine the conditions under which it might be successful.

In the extreme, this rethinking suggests that in some cases, the best outcome might be little or no judicial review, not because it is redundant but instead because it may be futile. The Colombian court has had only modest success in reducing overall presidential power despite sophisticated and sustained attempts.²⁰⁵ It has had little success in improving congressional behavior.²⁰⁶ Further, to the extent that the court has been

203. See *supra* Part II.B.

204. See, e.g., Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008) (arguing that courts around the world are increasing in power because political actors have incentives to strengthen them); Keith Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005) (presenting evidence that the U.S. Supreme Court grew in institutional strength because the political branches sought to use it as a policy maker on certain kinds of questions).

205. See *supra* Part II.A.1.

206. See *supra* Part II.A.2.

successful in reducing presidential power, it is unclear whether the overall effect of its efforts has been productive or counter-productive, given continued congressional weakness.²⁰⁷ The court may thus have been better off scaling back some of its structural jurisprudence in favor of other goals.

It may be that the structural safeguards theory is correct within the United States but contextual: it depends on background levels of compliance and judicial respect that exist in the U.S. but not in other contexts like those found in much of the developing world. Indeed, the relationship between the U.S. federal government and the states may demonstrate some of these elements. The Rehnquist Court's "new federalism" initiated a period in which the Court has showed renewed interest in enforcing limits on federal power vis-à-vis state governments. This in turn has spawned a massive literature on the judicial enforcement of federalism.²⁰⁸ Many attempts to take stock of the Supreme Court's federalism jurisprudence have been highly critical of it.²⁰⁹ The Court often seems almost willfully indifferent, for example, to the evasion problem.²¹⁰ It routinely allows Congress to use a different route to achieve the same goal as legislation it has struck down. Congressional action that lies beyond the acceptable scope of the commerce power, for example, can often be rewritten by adding a jurisdictional hook or similar device so as to render it constitutional.²¹¹ Further, even when the Commerce Clause as a whole is unavailable, powers such as the taxing or spending power can "save" congressional action. The analysis of the individual mandate in *NFIB v. Sebelius* is a particularly dramatic example from within the very same case: the mandate was held to be beyond the scope of the Commerce Clause, but

207. See *supra* text accompanying notes 154–157.

208. For a few examples of this vast literature, see, for example, CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT* (2012); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004) (mapping the visions of different justices on the Court for the protection of federalism values); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 71 (noting recent case law that has "generated a series of intricate, judicially declared limitations on federal power").

209. A common critique is that the jurisprudence is excessively formal in nature. See, e.g., Adler & Kreimer, *supra* note 208, at 71; Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1228–29 (2001) ("It is now a standard scholarly move to attack federalism jurisprudence as excessively 'formalistic.'").

210. See, e.g., Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397, 428–31 (2014) (arguing that the Supreme Court often declines to get involved in issues like the taxing and spending powers because it believes that the political process is sufficient to stave off abuse, although finding that the spending clause analysis in the Medicaid expansion portion of *NFIB v. Sebelius* was motivated by a fear that those safeguards had broken down in that instance).

211. See *supra* note 21 (discussing *Lopez* and the way the law was rewritten to survive congressional scrutiny by adding a jurisdictional hook).

upheld as a valid use of the tax power.²¹² The choice to close down some routes, while leaving others open, has been argued to be unlikely to have been motivated by a coherent consideration of the costs of different strategies.²¹³

Some scholars have responded to the weaknesses of the Court's existing jurisprudence by calling on it to become more programmatic.²¹⁴ Others have drawn upon a venerable tradition in American constitutionalism by arguing that the limits on federal power are largely self-enforcing and do not require judicial intervention.²¹⁵ But the argument here suggests a third possibility: even if the idea of politically-enforced limitations on federal power were fictitious, a restricted judicial role might make more sense than an aggressive role.

The relationship of the states to the federal government may look a bit like the abdication pattern that is difficult for courts to tackle jurisprudentially. This is not to say that state governments are systematically "weak" institutions, just that recent scholarship has suggested a more nuanced portrait than the Madisonian conception of ambition checking ambition.²¹⁶ In fact, federal and state institutions often cooperate rather than conflict in the furtherance of federal programs, and

212. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (holding that the individual mandate in the healthcare law "may reasonably be characterized as a tax" after holding that it exceeded the scope of the commerce power); see also Denning & Kent, *supra* note 210, at 427–29 (noting that the Court declined to deploy any kind of "anti-evasion" device to hold the label as tax "pretextual" because it seemed to believe that the political process provided adequate protection).

213. The "jurisdictional hook" with which the law in *Lopez* was saved does impose some additional costs on the government because in a criminal case the state now must generally prove that the gun moved in interstate commerce. See Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2106 (2006) ("In a criminal statute, the hook becomes an element of the crime, requiring the prosecution to prove the connection to commerce beyond a reasonable doubt."). More seriously, the majority in *NFIB* noted that the taxing power is in some respects more limited than the commerce power because the government cannot prohibit the conduct but merely require that an individual pay the treasury. See *NFIB*, 132 S. Ct. at 2600 ("[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.").

214. See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (calling for a reinterpretation of the Ninth Amendment to give it renewed force in invalidating federal legislation).

215. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) ("Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that partisan competition explains why state governments will effectively check exercises of federal power); Wechsler, *supra* note 7.

216. See Levinson, *supra* note 35, at 938–44 (arguing that the vision based on Madisonian competition may not be right in practice).

state officials may invite rather than resist federal intervention.²¹⁷ The two levels of government are intertwined, rather than constituting different spheres of policy making. Perhaps put most clearly, federal–state policy making is usually the outcome of bargains that are accepted by both sides.²¹⁸ Further, recent work on federalism has suggested that the informal relationships between state and federal officials are vast and exercise a great influence on policy making.²¹⁹ Federal money is important to state officials in certain contexts, but so too are other resources like expertise and relationships with key groups.²²⁰ It is thus perhaps no accident that those who have written about the complexity of modern federalism arrangements have often tended to call for little role for judicial review.²²¹

B. *Judicial Strategy and Political Support*

The insight that judicial decisions can work partly by galvanizing political or public support is a part of much recent work within the field. But it has not been brought to the fore of discussions of structural judicial review. This section, by nature exploratory, seeks to consider some of the ways in which courts might build up either political or popular support for their programs of structural judicial review. It does not purport to be exhaustive in its consideration of judicial strategy—the main purpose instead is to suggest an agenda for future work.

The interesting cases here are ones where courts are working in inherently difficult environments, without obvious help from political institutions. In these contexts an interesting question arises: can courts find ways to rally support from either ambiguous political elites or other actors like international institutions or the public?

217. See, e.g., Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1632–36 (2014) (exploring the importance of bargaining and cooperation to the federal–state relationship).

218. See Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

219. See, e.g., Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 467–76 (2014) (noting ways in which the states and federal agencies consult informally over federal agency rulemaking).

220. See, e.g., Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016) (exploring the relationships between state policy makers and federal ones, particularly those like the Army Corps of Engineers with regional offices).

221. Much recent theorizing has been critical of “new federalism” jurisprudence on the grounds that it fails to recognize the complexity of institutional dynamics between federal and state governments. See, e.g., Huq, *supra* note 217 (arguing that, contra Madisonian assumptions, cooperation rather than competition describes the relationship between levels and branches of government, and judicial actors are poorly positioned to differentiate good and bad bargains); Ryan, *supra* note 218, at 133–35 (calling for a reorientation of the Court’s role away from enforcing fixed limits on federal power and towards policing the bargaining process through which either the federal or state governments are induced to negotiate exercises of power).

1. *Courts and the Mobilization of Political Support: The Example of Unconstitutional Constitutional Amendments*

In the field of comparative constitutional law, the famous doctrine of unconstitutional constitutional amendment is an excellent example of the need for courts to respond to their political context and find sources of political support.²²² The doctrine has spread rapidly to a number of different countries in Europe, Asia, Africa, and Latin America, and has thus proven to be one of the most prominent doctrines in the field.²²³ Courts have used the doctrine to strike down amendments extending or abolishing term limits, altering the basic characteristics of institutions like the presidency and legislature, stripping jurisdiction from courts, etc.²²⁴

The literature discussing the doctrine focuses largely on problems of justification. Many scholars argue that it represents an extreme form of the counter-majoritarian difficulty.²²⁵ Put this way, the trouble with the doctrine is that it is too strong: if constitutional amendment serves as a safety valve or override device for ordinary judicial review, the unconstitutional constitutional amendment doctrine cuts off that override.²²⁶ This dominant position for courts may clash in a significant way with democratic values.²²⁷

But consideration of the doctrine in the actual political context in which it is usually employed suggests that this theoretical critique is often overstated. Courts often deploy the doctrine against politicians who are seeking abusive forms of constitutional change, and thus who seek to erode the democratic order.²²⁸ It thus pits courts against politicians who usually enjoy significant popular support on issues close to their core interests. The

222. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 48 (2d ed. 1997) (defining the doctrine in the German context as allowing a court to strike down “even a constitutional amendment” where that amendment is contrary to the “core values or spirit” of the constitution as a whole).

223. See, e.g., Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013) (exploring the origins of the doctrine and its rapid spread to a number of jurisdictions around the world).

224. See *id.* at 677–713 (surveying a number of cases from around the world).

225. See Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1799 (2004) (noting that the doctrine is perhaps the “most extreme of countermajoritarian judicial acts”).

226. See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 44, at 96, 98.

227. However, some defenders of the doctrine have argued that this stock democratic objection relies on an overly thin conception of democracy. See Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 336 (2011) (arguing that properly understood, the doctrine helps to preserve democracy).

228. See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 233–36 (2013) (arguing that this context represents at least one of the doctrine’s main justifications).

political context also tends to offer politicians a number of informal mechanisms by which to get around adverse judicial decisions striking down constitutional amendments. Most obviously, powerful political forces have a number of instruments available to attack courts: they can attack their jurisdiction or use a different means to induce resignations and “pack” the court. Further, courts looking for support from other political institutions will often find little in these sorts of situations. Would-be autocratic actors often already control other political branches, and if not they may have delegitimized or marginalized them.

Looked at this way, the counter-majoritarian critique seems somewhat unrealistic; the more trenchant critique may be of pointlessness. As Gary Jacobsohn has noted, in any case where the doctrine actually needed to be deployed, “sober heads might well wonder whether it was any longer worth doing.”²²⁹ A more nuanced view of the doctrine is that its success depends on particular features of the political context. It is possible for courts to be successful given the right institutional conditions. Moreover, courts may have at least some influence on these conditions.

The Colombian term limits decision is a useful one for making this point. As noted above, the court used the doctrine to successfully prevent a highly popular president from being able to run for a third term. Yet it is important to understand the ways in which the court was aided by its political context and in which it worked to shape this context. Most importantly, the court’s decision was embraced rather than rejected by most of the political class, particularly those in Congress. The pro-Uribe coalition was weaker than it appeared, because it was made up of a loose coalition of personalities rather than a strong party. This coalition voted for the referendum in Congress, but much of the support melted away once the court had ruled. Indeed, the court’s decision itself acted as a critical juncture in eroding Uribe’s political support, since it altered the expectations of other political actors as to whether he would remain in power and thus would be a source of political patronage.

The doctrine is often deployed—or requested—in conditions that are even more difficult. As noted above, the court was fortunate that the Colombian political system is relatively fragmented and that Uribe was a relatively personalist leader rather than a party-builder. In the other recent attempts to amend the constitution and remove term limits, in contexts like Ecuador and Venezuela, courts have faced presidents commanding much more cohesive movements and with much weaker oppositions. These

229. See Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460, 487 (2006).

courts were unwilling to intervene despite compelling legal arguments as to the unconstitutionality of the constitutional changes.

One possibility is that courts facing unfavorable domestic contexts may be able to craft opinions so as to garner support internationally. A recent example from Hungary offers a useful example. A right-wing party Fidesz won power in 2010, gaining over two-thirds of the seats in the Parliament with slightly over half of all votes.²³⁰ Since then, the Fidesz party has engaged in a campaign of abusive constitutional change by entrenching its own power and undermining institutions designed to check political power.²³¹ In a key case early in this chain of events, the Hungarian Constitutional Court heard a challenge to a constitutional amendment that stripped the court's own jurisdiction over budgetary laws and other important classes of legislation.²³² The court was asked to deploy the unconstitutional constitutional amendments doctrine but declined, holding that even if substantive limits on the power of constitutional amendment existed, it was incapable of defining those limits.²³³ This decision was criticized by commentators who argued that the case was a situation where the doctrine should have been employed.²³⁴

But a consideration of the context shows that the Hungarian court faced a more difficult situation than the Colombian court in the Uribe case. First, evasion by formal or informal means was a more significant threat. The Hungarian constitution, which was amended but not replaced during the transition to democracy, was envisioned as a temporary document.²³⁵ Thus replacement was contemplated in the text with exactly the same two-thirds majority needed for amendment.²³⁶ This made the constitution vulnerable to replacement and indeed Fidesz eventually replaced the constitution

230. See Miklós Bánkúti et al., *Disabling the Constitution*, J. OF DEMOCRACY, July 2012, at 138, 138–39.

231. See Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 559–60 (2013).

232. See Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182, 191–92 (2012) (noting that the amendment was passed in response to a Constitutional Court decision striking down a retroactive tax).

233. See *id.* at 194–95.

234. See, e.g., *id.* at 199 (noting that “the Court created a very bad precedent”).

235. See Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, 26 S. AFR. J. ON HUM. RTS. 19, 27, 31 (2010) (pointing out that a proposed final constitution-making process was never completed after the transition from communism, and that the constitution as it stood was intended to be an interim text).

236. The situation in fact was somewhat more complex: prior to Fidesz taking power, a provision requiring a four-fifths majority of Parliament to replace the constitution was inserted into the constitution. *Id.* at 41. However, its precise meaning was unclear, and Fidesz abolished it with an amendment that received a two-thirds vote. See *id.* at 41–43 (arguing that the change is unconstitutional).

completely and unilaterally.²³⁷ Informally, the party controlled the appointments process and knew that it would have the ability to “pack” the court within a relatively short period of time.²³⁸ Finally, the party was well-organized and controlled all of the major political posts in the country, while marginalizing the constitutionally independent checking institutions like the ombudsman.²³⁹

In this environment, the court would have had relatively little chance of success domestically. The question is whether it would have galvanized international support. As a member of the European Union, Hungary existed within a network of relatively thick international institutions. These institutions generally have had difficulty responding effectively to the democratic erosion worked by Fidesz.²⁴⁰

Still, a decision of the Constitutional Court may have sent a signal that fundamental principles and rules were being broken, and thus given international actors more legitimacy to intervene. The key question, then, is whether the court could have drawn in international support and how its opinion might have been crafted to do so. A full consideration of this issue is well outside the scope of this Article, but one might suggest that a decision linking the issue of judicial review to transnational constitutional principles in modern European democracy may have been helpful. Indeed, some of the court’s subsequent decisions have done exactly this. Similarly, in the recent Latin American term limits examples, courts might seek to directly engage regional provisions of OAS documents that threaten to sanction or suspend leaders working an “unconstitutional interruption” of the democratic order, or they might seek to highlight how proposed changes undermine regional human rights norms supported by the Inter-American Court or Commission of Human Rights.

237. See Bankuti et al., *supra* note 230, at 142.

238. See Kim Lane Scheppelle, *Guest Post: Hungary’s Attacks on the Rule of Law and Why They Matter for Business*, FIN. TIMES BLOG (Feb. 5, 2014, 5:37 PM), <http://blogs.ft.com/beyond-brics/2014/02/05/guest-post-hungarys-attacks-on-the-rule-of-law-and-why-they-matter-for-business/> (noting that the court was packed in 2010).

239. See Bankuti et al., *supra* note 230, at 142–44.

240. See Erin K. Jenne & Cas Mudde, *Can Outsiders Help?*, J. OF DEMOCRACY, July 2012, at 147, 149 (“[T]he EU has had difficulty framing a valid legal argument against the Fidesz leadership.”). The international community had trouble responding to the “frankenstate,” where the individual parts like gerrymandering and reduced jurisdiction for Constitutional Courts were found in stable democracies, but the combination of different elements was quite anti-democratic. See Scheppelle, *supra* note 231.

2. *Courts and the Mobilization of Public Support: The Hybridization of Rights and Structural Review*

Courts also have an alternative to seeking to draft in support from domestic or international political elites: they may seek to build popular support, thus raising the costs of either noncompliance or evasion. A significant U.S.-based literature has focused on ways in which judicial decision making on rights issues might mobilize popular support in either a positive or negative fashion. For example, scholars have examined how gender pay-equity litigation served as an organizing force for activist groups, and these groups ended up achieving much more because of their increased mobilization than they did directly through litigation.²⁴¹ Other work has examined the “backlash” hypotheses, considering whether major judicial decisions like *Roe v. Wade* may inadvertently mobilize opposition groups that are more powerful than those mobilizing in support of the decisions.²⁴² Finally, recent defenses of judicial review have focused on the role of the court as a “fire alarm” mechanism in a principal-agent game: judicial decisions may serve to alert the public that political actors are overreaching, and therefore that they should mobilize and pay attention to political developments.²⁴³

Virtually all of the work on popular mobilization in response to judicial decisions has focused on high-stakes rights contexts like abortion, anti-discrimination, etc. Structural decisions often (although not inevitably) seem to lack this level of popular engagement.²⁴⁴ The Colombian and Mexican examples studied in this Article are examples. The Colombian

241. See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 4 (1994) (finding that courts were not particularly willing to correct wage inequity, but nonetheless “legal norms significantly shaped the terrain of its struggle over wage equity; and, concurrently, . . . litigation and other legal tactics provided movement activists an important resource for advancing their cause”).

242. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 185–95 (1991) (noting the reaction to *Roe* from opponents of the decision). But see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2076 (2011) (challenging the “court-centric” theory about backlash as a “bad form of politics triggered in response to the Supreme Court’s efforts to shut down democratic decision making”).

243. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723, 731–32 (2009) (“A court engaged in judicial review performs the function of a whistle-blower or fire alarm: it warns the people if their government has overstepped the bounds of its delegated power. Second, courts can coordinate popular action against usurping governments by generating common beliefs and common knowledge about both the constitutionality of government conduct and the ways in which other citizens will react.”).

244. Election decisions may be one common exception: there appear to be a number of examples of courts issuing high-salience decisions on major electoral disputes. See Hirschl, *supra* note 204, at 100 (giving examples from Pakistan, Mexico, Colombia, Uganda, Nepal, Nigeria, and Venezuela, among others).

court's aggressive engagement with structural issues has gone largely unnoticed, and most popular attention has instead gone to the court's high-profile cases on a range of rights issues including same-sex marriage, abortion, and socioeconomic rights.²⁴⁵ The Mexican court is an even more striking case: it is known in the comparative literature as a primarily structural court, and yet even here its limited engagement with hot-button issues like abortion and same-sex marriage has overshadowed its important reshaping of Mexican political structure.²⁴⁶ The United States seems to demonstrate the same basic pattern, with the exception of a small handful of major structural cases (*Bush v. Gore*, *NFIB*). Even the major United States structural cases, including the "new federalism" jurisprudence of the Court, have had relatively little popular impact.²⁴⁷

One judicial strategy that one sometimes observes in response to this dynamic is the development of hybrid rights–structure forms of review. Courts might seek to develop hybrid forms of review that bring structural constitutional law into what Tushnet calls the "thin" constitution, the set of basic principles that is part of the popular consciousness.²⁴⁸ The claim is not that such forms of review will always or routinely emerge, but just that they may be an effective judicial strategy for rallying public support.

The Colombian court's emergency powers jurisprudence offers an example. As noted above, this has been one of the court's most prominent successes—it has effectively closed off the possibility of executives ruling by emergency decree in all but extraordinary and unforeseen circumstances.²⁴⁹ A part of the explanation for the Court's success seems to lie in the historical importance of the issue both for the Colombian political class and the general public. In popular consciousness, the state-of-siege mechanism was connected both with ineffectiveness and with human rights abuses. This critique was rolled into broader critiques of the way rights were violated by the government, by guerrilla groups, and by paramilitaries, with impunity throughout Colombian society. The court's jurisprudence in the post-1991 period thus gained part of its strength from

245. See Schor, *supra* note 129, at 176 (stating that the "task [of the Colombian Constitutional Court] is to deepen the social bases of democracy by constructing rights").

246. See Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1867 (2011) (noting that the court's jurisprudence on abortion and same-sex marriage has "made the court the focus of public attention to an unprecedented degree").

247. See TUSHNET, *supra* note 61, at 10–11 (noting that the Constitution's detailed provisions describing how government is to be organized "do not thrill the heart" and "do not generate impassioned declarations").

248. See *id.* at 9–14 (distinguishing between a thick constitution that consists of the detailed clauses organizing government and the "thin" constitution made up of "fundamental guarantees of equality, freedom of expression, and liberty," which form a basis for constitutional debate outside of the courts).

249. See *supra* text accompanying notes 160–169.

the resonance that the rights issues connected to the state of siege had with the Colombian population.²⁵⁰

In the United States, the landmark *NFIB* decision also demonstrates relationships between structure and popular discourses focused more on rights. As recent scholarship has noted, the popular discourse arguing for the unconstitutionality of the healthcare law focused on the rights implications of the law rather than on the precise structural question at issue.²⁵¹ In other words, the popular focus was largely on the question of whether public actors could force citizens to buy a product rather than whether this was action that was outside the competence of the federal (as opposed to state) government.

This could be seen as a misperception of the core federalism issue in the case, but Mark Rosen and Christopher Schmidt have noted the ways in which the Supreme Court was able to incorporate the popular rights discourse into its Commerce Clause analysis. For example, the particular line the Court drew in the case—between regulating action (which was permissible) and inaction (which was impermissible)—drew off of the libertarian framing adopted in popular discourse.²⁵² And the famous hypothetical asking whether the healthcare mandate could be distinguished from a mandate to buy broccoli, which was a focus at oral argument and in the majority opinion on the Commerce Clause issue, was a response to popular discussion.²⁵³

In both the Colombian and U.S. contexts, it is worth noting the ways in which the hybridization of rights and structural review may distort the meaning of structural principles that the court is attempting to elucidate. In the U.S., popular arguments obscured the fact that the core issue was the distribution of powers between levels of government and not a prohibition

250. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], octubre 2, 2002, Sentencia C-802/02, pt. VI.A.3.b, <http://www.corteconstitucional.gov.co/relatoria/2002/c-802-02.htm> (tracing the history of the state of siege and its treatment in the constituent assembly as “express[ing] the necessary subjection of the cited exceptional powers to the immanence of rights like the right to life, personal integrity, prohibitions on slavery and servitude, the prohibition on discrimination, the right to legal personality, the rights to nationality, political rights, the principle of legality and retroactivity, the freedoms of knowledge and religion, the protection of the family and the rights of the child”).

251. See Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 114 (2013) (“[T]hose who challenged the law in extrajudicial settings generally condemned the mandate as a violation of individual liberty regardless of its source.”)

252. See *id.* at 132; see also *NFIB v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (drawing the activity–inactivity distinction).

253. See Rosen & Schmidt, *supra* note 251, at 101–13 (tracing the evolution of the broccoli hypothetical from popular and social groups outside of the court into the Supreme Court’s oral argument and decision); see also *NFIB*, 132 S. Ct. at 2588 (“Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables.”).

on all government action. In Colombia, the emphasis on human rights perhaps left underemphasized the degree to which unilateral presidential action had been used for ordinary (non-rights-threatening) governance and thus may have preempted a debate about technocratic expertise versus open political debate in a relatively dysfunctional political context.

At this exploratory stage, it seems safest to note that hybrid rights–structural jurisprudence is an observable implication of the theory with unclear normative meaning. To at least a limited degree, emphasizing the rights dimension of structural issues may be a strategic decision within a court’s control. Yet the strategy is not without potential costs or downsides.

CONCLUSION

This Article has demonstrated that a comparative perspective on structural constitutional law that emphasizes differences in political context is possible and may pay significant dividends for both American and comparative scholars. The most immediate return on this inquiry from the standpoint of constitutional theory and doctrine is to counsel modesty. Given the complexity of the systems within which courts are intervening and the formidable difficulties they often face, it seems likely that their successes will often be more limited than one would suspect based on a study of doctrine alone.

In the longer term, the bigger payoff may be in helping to improve and refine judicial decision making on structural issues, particularly in contexts where courts face poorly functioning and poorly defined institutional frameworks. The unconstitutional constitutional amendments doctrine, considered above, is a particularly dramatic example: courts deploying the doctrine often face powerful parties or actors unchecked by other elements of the legal order.²⁵⁴ But even more quotidian exercises in structural jurisprudence can be perilous for courts.²⁵⁵ The tasks of defining the political conditions under which courts are likely to have success and exploring the strategies they might employ to increase the odds are thus urgent ones. This Article is a first step in that effort.

254. See *supra* Part IV.A.

255. See, e.g., Epstein et al., *supra* note 12, at 136–37 (explaining how the Russian Constitutional Court was shut down by President Yeltsin for contentious rulings on the separation of powers).