Judges as equilibrists: Explaining judicial activism in Latin America

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Intense forms of judicial activism have emerged in Latin America in the last three decades. Judges dictated structural remedies decisions (SRDs) to create, design, and implement public policies to redress structural human rights violations, implementing permanent judicial monitoring of the policy process. In a region marked by judicial instability, SRDs are risky options for judges. They can be seen as strong challenges to the government and, thus, prompt retaliation. They can also damage judges' reputations as they might be strongly criticized by influential conservative groups of society that oppose progressive structural reforms. What drives judges to pursue or avoid this kind of risky activism? I propose the equilibrist approach, an alternative model to standard accounts explaining judicial behavior in Latin America. It incorporates the legitimacy-building dimension of the strategic game and predicts some level of assertiveness but one that is careful about the preferences of elites, the mass public, and opinion leaders. I use the institutional yet fragile Argentine Supreme Court to test the model, as it decided several SDRs in the early 2000s.

1. Introduction

Intense forms of judicial activism have emerged in Latin America in the last three decades. Judges across the region have involved themselves in a wide range of conflicts and devised new forms of interventions in the political arena to protect rights. Beyond the mere annulation of laws and establishing individual remedies, Latin American courts have ordered governments to create, design, and implement public policies to

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redress structural human rights violations and established permanent and innovative forms of judicial monitoring of the policy process.

I call this form of judicial activism *structural remedies decisions* (SRDs). They challenge standard views of the role of judges.[1] In general terms, SRDs are decisions in which the harm is conceived of as ongoing and affects many people's rights and implicates multiple government agencies responsible for failures that contribute to such rights violations. They involve enforcement orders instructing government agencies to protect the affected population, including persons not standing before courts, and requiring judges to monitor the enforcement phase. Thus, SRDs embody the most intense forms of judicial activism.

One might think that judges in Latin America, a region marked by judicial instability, are less likely to issue SRDs. Such decisions can be seen as intense challenges to government authority. Threats of political retaliation aside, the enforcement of SRDs demands financial and administrative resources, political coordination, and perhaps negotiations to reform or create adequate public policies. Implementation and compliance challenges in weak states are almost a foregone conclusion. Additionally, structural remedies often revolve around contested societal issues, and the public does not always welcome them. SRDs might, therefore, also jeopardize judicial legitimacy among the public. Issuing progressive decisions that enhance rights protections does not necessarily raise public support, as important segments of Latin America hold conservative views regarding rights protections. These risks notwithstanding, judges have used—to significant effect—this intense mode of judicial decision-making in countries such as Argentina, Brazil, Colombia, Costa Rica, and Peru.[2]

What drives Latin American judges to pursue or avoid this kind of risky activism? The literature on SRDs, dominated by socio-legal scholars, has primarily addressed enforcement questions such as when and under which conditions they are implemented.[3] On the other hand, extant judicial politics studies explaining judicial behavior have failed to distinguish them from other types of decisions and, thus, to account for what drives judges to use or not use them. Hence, we know little about why and when judges are willing to dictate SRDs.

This article attempts to fill in this gap. Building on the dominant models of judicial decision-making in Latin America, I propose the *equilibrist approach*, an alternative

[1] Alexandra Huneeus, *Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts*, 40 Yale J. Int'l L. 1 (2015).

[2] Varun Gauri & Daniel M. Brinks, Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (2008); Cesar A Rodriguez Garavito & Diana Rodríguez Franco, Cortes y cambio social: Cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia (2010); Malcolm Langford, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (2008); David Landau, *Substitute and Complement Theories of Judicial Review*, 92 Ind. L.J. 1283 (2016).

[3] Daniel M. Brinks & William Forbath, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions*, 89 Tex. L. Rev. 1943 (2010); David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J. 189 (2012); Daniel M. Brinks & Varun Gauri, *The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights*, 12 Perspectives on Pol. 375 (2014); Gerald N. Rosenberg, The Hollow Hope: Can courts Bring About Social Change? (2008); Garavito & Franco, *supra* note 2.

view to standard protective mechanisms explaining judicial behavior in general, and judicial activism in particular.[4] This approach aims to explain judicial decisions on cases of public relevance issued by Latin American high courts, which are regularly subject to political attacks.

My approach seeks to overcome some of the main limitations of standard judicial politics models in the region. First, it incorporates the legitimacy-building dimension of the strategic game. Second, it predicts some level of assertiveness, but one that is careful about elites' preferences and those of the mass public and opinion leaders. Also, unlike mainstream studies, my approach looks at the tools judges can use to respond to the constraints posed by unfriendly political scenarios and to calibrate the intensity of their assertive decisions to condition responses from politicians and the public. Finally, it complexes judicial outcomes and goes beyond the largely held assumption that courts will be either deferent or assertive. Instead, it proposes that rulings can be measured by their degree of assertiveness.

My study contends that high court judges operating in unfriendly environments seek to protect their courts' stability and tenure. In doing so, judges attempt to simultaneously construct public support and avoid political conflicts with the government and walk a tightrope balancing two opposing views with little room for compromise. Judicial decisions are, thus, driven by judges' calculations of reactions from both the public and the government. Nevertheless, they do not only react to the constraints posed by the political contexts, they resort to their institutional powers to select cases, time their decisions, and calibrate their assertiveness to respond to such constraints.

The case of the Argentine Supreme Court ("the Court") illustrates how equilibrist judges behave in Latin America. The Court is a paradigmatic example of "courts under constraints."[5] Notwithstanding operating in a politically unfriendly environment, it handed down eleven SRDs between 2006 and 2012, including some of the most paradigmatic cases cited in the socio-legal literature.[6] Interestingly, however, in 2012, the Court stopped issuing SRDs. What explains this apparent shift in behavior over a relatively short amount of time?

2. Protecting courts from political attacks

High levels of judicial instability are common across Latin America. It is not an exaggeration to claim that courts in the region still operate in hostile political contexts. Recent reviews of the judicial politics literature report a well-established consensus

[4] The name of this model is inspired by a media article by the Argentine influential journalist Irina Hauser about the Chief Justice of the Supreme Court of Argentina, Ricardo Lorenzetti. Irina Hauser, *El Equilibrista*, Página/12 (Feb. 27, 2013), www.pagina12.com.ar/diario/principal/index-2013-02-27.html. She describes how the Chief Justice maneuvers to please different audiences when giving public formal speeches.

[5] Gretchen Helmke, Courts under Constraints: Judges, Generals, and Presidents in Argentina (2005).

[6] Sandra Botero, *Judges, Litigants, and the Politics of Rights Enforcement in Argentina*, 50 Comp. Pol. 169 (2018); Daniel M. Brinks, Varun Gauri, & Kyle Shen, *Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular*, 11 Ann. Rev. L. & Soc. Sci. 289 (2015); Landau, *supra* note 3.

that the consolidation of democracy in the region has not secured judicial institutional security.[7]

Power holders have used a wide range of mechanisms to curb judicial authority. Heavy-handed political attacks are still frequent in the region. Helmke found thirty-six threats or actions aimed at changing the composition of high courts launched by the president, the legislature, or both in Latin American countries between 1985 and 2009.[8] Her study, which includes everything from impeachment, forced resignation, and court-packing to dismantling the court entirely, shows that the incidence of judicial crises has not markedly declined over the last two and half decades. Also, she found no evidence that judicial manipulation is steadily diminishing over time. Notably, in Argentina, presidents have nominated and appointed friendly Justices for open vacancies through secretive and discretionary procedures and influenced when a vacancy would occur. As a result, all democratic and de facto presidents, except three, have managed to substantially alter the composition of the Court from 1946 to 2005.[9]

Less severe but equally effective forms of pressure are also common in the region.[10] Informal modes of interference, which do not require legal action, include rhetorical attacks, threats of violence, and physical assaults. There are also more subtle modes of interference, such as informal communication between judges and those in power, personal or social obligations due to social linkages, and bribes.[11] In Argentina, stakeholders often perceive considerable, albeit subtle, interference in the Court, mainly through informal communication with the judges and reliance on personal and social linkages.[12] Other forms of interference have also been employed to hinder the Court's function. For example, due to impeachment and resignation, six vacancies became available on a nine-seat bench between 2003 and 2005. President Kirchner filled only four of those six openings, so only seven Justices sat on the Court. However, a majority of five judges was needed to hand down a decision, which created problems when the judges could not reach a majority on highly relevant cases. Although the government had the legal prerogative to appoint two new loyal Justices or reduce the Court's size, it did not act for more than a year. This inaction was perceived as a

7 Juan González-Bertomeu, *Judicial Politics in Latin America*, *in* Routledge Handbook of Law and Society in Latin America 169 (Rachel Sieder, Karina Ansolabehere, & Tatiana Alfonso eds., 2019); Ezequiel Gonzalez-Ocantos, *Courts in Latin American Politics*, *in* The Oxford Encyclopedia of Latin American Politics 1 (G. Prevost & H. Vandem eds., 2019).

8 Gretchen Helmke, Institutions on the Edge: The Origins and Consequences of Inter-Branch Crises in Latin America (2017).

9 Gabriel Pereira, Judicial Decision in Hostile Environments: Judges, Executives, and the Public in Argentina (2004–2010) (2014) (Unpublished Ph.D. dissertation, Department of Politics, University of Oxford) (on file with author).

10 Jessica Walsh, *A Double-Edged Sword: Judicial Independence and Accountability in Latin America*, vol. 5 Londres Int'l Bar Ass'n 40 (2016).

11 Mariana Llanos et al., *Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases*, 23 Democratization 1236 (2016).

12 *Id.*

strategy to pressure the Court and prevent the judges from passing decisions on politically controversial issues.

In such contexts, it is not unreasonable to expect judicial decision-making to be driven by the judges' concerns for institutional integrity and their job stability. The *fragmentation of power* approach and the *public support* approach both offer insightful accounts of how judges might behave to achieve institutional security. However, the two approaches have their limits in explaining judicial behavior in present-day Latin America.

2.1. The fragmentation-of-power approach

The fragmentation hypothesis has dominated the field in Latin America and is derived from the separation of power approach.[13] The central claim is that judges have preferences for specific policy outcomes but are aware of the need to make their decisions palatable to other actors. Insofar as judges perceive that their court's institutional security or tenure is at risk, they have incentives on occasion to uphold policies to avoid conflict with powerful governments, no matter how constitutionally suspect the policies.

This type of strategic judicial deference is likely when the political branches find it relatively easy to coordinate a response to unfavorable resolutions.[14] However, when a government is divided, coordination is difficult and space is created for independent judicial review. The central empirical hypothesis of this approach is that divided governments facilitate judicial independence, whereas unified governments undermine it. The term *unified* is used when the legislative and executive branches have largely similar policy preferences, which often, though not necessarily, occurs when both are controlled by a single, relatively homogenous majority party.[15] Meanwhile, divided governments can result when the executive and legislative branches' control is in the hands of ideologically distinct parties or coalitions or constitutional provisions require certain kinds of legislative majorities.[16] In all cases, governments' ability to sanction judges is constrained by how the political powers are distributed among the institutional actors. Thus, the advice for judges seeking institutional protection would be to avoid ruling against governments in unified government situations and rule in this direction in fragmentation situations.

Much has been said about the limitation of this approach in recent Latin American politics. For example, Castagnola and Pérez-Liñán show that despite President Morales's lack of a congressional majority in Bolivia, he managed to make both the constitutional tribunal and the Supreme Court inquorate.[17] Similarly, President

[13] González-Bertomeu, *supra* note 7; Gonzalez-Ocantos, *supra* note 7.

[14] Helmke, *supra* note 8; Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 Latin Am. Pol. & Soc'y 31 (2007).

[15] Rebecca Bill Chávez, John Ferejohn, & Barry Weingast, *A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina*, *in* Courts in Latin America 219 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

[16] *Id.*

[17] Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, *in* Courts in Latin America, *supra* note 15, at 278.

Duhalde attempted to impeach all Argentine Supreme Court judges in 2002, notwithstanding the fragility of his government.[18] In Brazil, where the distribution of power is a long-standing pattern in congressional politics, judges sitting in the Supremo Tribunal seemingly fail to fully exploit their independence, particularly in cases dealing with executive authority.[19] Also, the fact that political attacks against judges are still a feature of Latin American politics suggests that either judges are not using the fragmentation of power as a defensive mechanism or that it has a limited effect in preventing such attacks. Additionally, fragmentation of power is useless when governments launch attacks through informal means. These limitations call for alternative accounts of judicial behavior in the region.

2.2. The public-support approach

One way of overcoming some of the shortcomings of the separation-of-powers model is to incorporate new players beyond elite level actors, such as the public. In particular, the public-support literature might explain why we might still observe conflict or highly assertive behavior in contexts of high instability and insecurity. Courts have an incentive to cater to the policy preferences of their "users" (i.e. civil society, the mass public), even if this puts them on a collision course with presidents or legislatures.

This literature suggests that public support can be a powerful protective mechanism for courts.[20] In simple terms, if citizens value judicial independence and regard respect for judicial rulings as important, elected officials' decisions to resist a judicial ruling or launch attacks on a court may result in losing public support. Consequently, where voters are willing to tolerate non-compliance or political efforts to discipline active courts, judges will lack the leverage to exercise meaningful authority.[21] In such situations, we expect judicial decisions to be linked to elected branches' preferences.

This literature assumes that courts already have a reservoir of public support to protect themselves from political attacks. Unfortunately, that is not the case for Latin American courts. Latinobarómetro surveys provide us with an overview of the evolution of public opinion about the judiciary over the last two decades and across countries. On average, only 7% of Latin American citizens reported that they had "a lot" of confidence. Those with "some" confidence comprise 22% from 1995 to 2018, with average levels of confidence tending to decline over the last two decades.

In addition, the average proportion of respondents with "no trust" is 31% over the same period. In Argentina's case, there is an even smaller number of people with "high" confidence, as the size of this group has decreased from 6% in 1995 to 5% in

[18] Pereira, *supra* note 9.

[19] Daniel Brinks, *"Faithful Servants of the Regime": The Brazilian Constitutional Court's Role under the 1988 Constitution*, *in* Courts in Latin America, *supra* note 15, at 128; Diana Kapiszewski, *Power Broker, Policy Maker, or Rights Protector? The Brazilian Supremo Tribunal Federal in Transition*, *in* Courts in Latin America, *supra* note 15, at 154.

[20] Jeffrey K. Staton, Judicial Power and Strategic Communication in Mexico (2010); Georg Vanberg, The Politics of Constitutional Review in Germany (2005).

[21] Staton, *supra* note 20.

2018, having peaked at 7% in 2000. Meanwhile, the percentage of those with no trust increased from 24% to 38% in the same period.

Nevertheless, failing to enjoy public support does not necessarily mean that Latin American judges are uninterested in it. A low level of public support might indicate that judges are still unsuccessful at building it. Gaining the public's confidence is not easy, and time is crucial for its construction.[22] We cannot discount the possibility, then, that judges in the region are engaged in the process of building such support.

Indeed, a handful of studies show that Latin American judges are increasingly attentive to public reactions. For instance, Huneeus argues that Chilean lower judges care about public views and that such views influence their behavior.[23] In particular, she found that "many judges view prosecution of Pinochet-era cases as the means to redeem the judiciary from its perceived past complicity and its low public ratings."[24] As a result, she affirms that criminal prosecutions of crimes against humanity committed under an authoritarian regime should be understood to be motivated by the judges' desire to atone for the past wrongs of judicial negligence and complicity. More relevant to the discussion at hand, Staton shows that judges sitting on the Mexican Supreme Court are conscious of the importance of "going public" and strategically communicating their decisions to build supportive constituencies, which can potentially protect them from political attacks.[25]

If Latin American judges are in the process of building public support, they need to meet two conditions. First, a court must have sufficient public support to make noncompliance and retaliation unattractive for politicians (*legitimacy condition*). Second, here we need to distinguish between specific and diffuse support.[26] Specific support is a measure of whether people think an institution is doing a good job in terms of judicial outcomes. It is achieved if the content of the decision aligns with public attitudes.

Meanwhile, diffuse support is equated with legitimacy as it refers to a reservoir of favorable attitudes of goodwill that help individuals support institutions even when it rules cases that sometimes do not converge with the interests of the majority.[27] It refers to the extent to which the public supports a court. In turn, it is likely to be a function of courts' ability to show themselves to be impartial bodies, which includes but goes beyond the matter of being perceived as unengaged in partisan politics.[28]

These two types of support, although different, are close and dynamically interconnected as specific support impacts diffuse support.[29] This is because, over time, the

[22] Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009).

[23] Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 Law & Soc. Inquiry 99 (2010).

[24] *Id.* at 101.

[25] Staton, *supra* note 20.

[26] Friedman, *supra* note 22.

[27] *Id.*

[28] For a discussion of how public perceptions of judges' impartiality is theoretically linked to diffuse support, see Staton, *supra* note 20; Vanberg, *supra* note 20.

[29] Vanberg, *supra* note 22, at 50.

support that an individual exhibits for a court is, at least in part, a function of how that person evaluates the substantive outcomes of a court's decision. Judges may realize that their current decisions have implications for future diffuse support.[30] The support they enjoy is a valuable resource that can be spent quickly if they decide on too many unpopular decisions on sensitive matters. Thus, judges might bring their attention to both specific and diffuse support in their attempt to construct public support.

Second, it must be sufficiently likely that citizens will become aware of retaliation attempts so that any support a court enjoys can be brought to bear against elected branches that choose to retaliate (*transparency condition*). For that, courts should become salient to the public.[31] The impact of opinion leadership on media coverage is of particular relevance to this discussion. Mass media are regarded as the primary means by which the public learns about political events. In turn, what is covered, and the views expressed, in the media are profoundly shaped by opinion leaders who, for various reasons, can exercise more influence on what is reported and how than most citizens.[32] Opinion leaders include news editors, editorial writers, reporters, and sources whom these individuals rely on, such as political insiders, experts, and interest groups.

Consequently, in building support, judges might attempt to influence the views opinion leaders have on their courts through, for example, the implementation of a strategic communication policy aimed to filter the information released to the public or the development of public relations activities aimed at making opinion leaders more familiar with some aspect of the work of a court. Furthermore, the attempt to build support will lead judges to calculate opinion leaders' reactions to their decisions. This is crucial for both diffuse and public support.

However, the strategy of building public support faces, at least theoretically, crucial limitations in Latin America. Discredited judges in the early stages of their attempt to construct public support need to increase their work's visibility to show the public that they behave impartially or produce valuable public goods. They have to be assertive, intervene in salient debates, and rule against political elites' interests.[33] In other words, as Helmke and Staton state, they must avoid prudence as a strategy to build public support.[34] That behavior may expose them to political attacks. Even when publicly discredited judges gain some level of public support, the risk of attacks might increase. Helmke and Staton contend that, with middling chances of a public backlash against sanctioning politicians, judges may be sufficiently convinced that they are protected, while governments may be sufficiently convinced that they can get

[30] *Id.* at 51.

[31] Staton, *supra* note 20; Friedman, *supra* note 22; Vanberg, *supra* note 20.

[32] Vanberg, *supra* note 20, at 45.

[33] Studies outside Latin America have collected considerable evidence showing that public support is enhanced by perceptions that judges are, broadly speaking, impartial. Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 Ann. Rev. Pol. Sci. 167 (2015). In Latin America, this hypothesis might be correct. For example, as González Bertomeu claims, the Colombian Constitutional Court and the Costa Rican Constitutional Chamber are fairly well respected bodies due to their record ruling against governments. González-Bertomeu, *supra* note 7.

[34] Gretchen Helmke & Jeffrey K. Staton, *The Puzzling Judicial Politics of Latin America. A Theory of Litigation, Judicial Decisions, and Interbranch Conflict*, *in* Courts in Latin America, *supra* note 15, at 306.

away with an attack.[35] The result is that judges find themselves with an unenviable tradeoff.[36] Political retaliation remains latent in the process of constructing support.[37]

However, assertiveness is not always something that the public will reward. In a region marked with a high level of inequality and political instability, assertiveness is connected to a progressive image of rights protections and, significantly, the protection of the disadvantaged majority in Latin American societies. Nevertheless, Latin American countries have robust conservative voters and interest groups that might lash out at progressive decisions. This situation could harm legitimacy-building efforts. Assertiveness might help build an image of independence and prestige in the long run, but it can backfire in the short run.

As with political fragmentation, the public support mechanism is not able, by itself, to solve the challenges judges face in Latin America. Along with adverse reactions from conservative groups, constructing support might expose courts to political attacks well before they have gained such support. Suppose judges still seek to build support and use it as a protective mechanism. In that case, we need to understand how courts navigate these constraints to legitimize themselves in the eyes of critical civil society constituencies. Securing institutional protection requires more complex strategic behavior.

3. The equilibrist approach

The theoretical starting point of this work is that Justices strategically seek institutional protection. I propose an alternative view to standard protective mechanisms that incorporate the strategic game's legitimacy-building dimension. It predicts some level of assertiveness, but one that is careful about elites' preferences and those of the mass public and opinion leaders. In this line, I argue that Latin American judges engage in a balance game like walking a tightrope. As equilibrists do, they use a pole to balance two opposing forces and calibrate each of their steps. I discuss the model's elements and how it overcomes the limitations of standard models of judicial behavior, and then, I hypothesize judicial behavior.

3.1. Model elements

First, I propose that equilibrist judges weigh two different sets of opposing considerations. I follow the lead of an important strain of the literature proposing that it is perfectly logical to think that multiple motivations shape judicial decisions.[38] Particularly, Kapiszewski proposes that judges engage in a tactical balancing of multiple considerations when deciding cases of political relevance.[39] In her

[35] *Id.* at 319.

[36] Gretchen Helmke, *Public Support and Judicial Crises in Latin America*, 13 U. Pa. J. Const. L. 397, 410 (2010).

[37] Castagnola & Pérez-Liñán, *supra* note 17.

[38] Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior (2006); Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging (2010).

[39] Diana Kapiszewski, High Courts and Economic Governance in Argentina and Brazil (2012).

argument, variation in salience among six types of consideration determines selective assertiveness.

However, I claim that judges' most salient concern is to protect their courts, and that goal leads them to build public support while avoiding political conflicts.[40] Other types of considerations, in my model, play a secondary role, if any. The interests of the public and the government are the opposing forces judges must balance to tread the tightrope.

Second, I argue that judges use balancing tools to walk the tightrope. These tools are represented by institutional powers that they have to exert some control over their power and authority. Unlike standard strategic accounts that view judicial outcomes as an exclusive function of the preferences, resources, and choices of non-judicial actors,[41] my approach looks at the tools judges can use to respond to the constraints posed by unfriendly political scenarios. Specifically, judges can strategically resort to legal techniques not regulated in procedural codes to calibrate the intensity of their assertive decisions for conditioning responses from politicians and the public. Of note are studies from outside Latin America that show that courts have successfully resorted to this strategy to amass public support. The largely celebrated Constitutional Court of South Africa, for example, used technical legal devices to progressively reduce the tension between the need to establish legal legitimacy and the need to avoid political attacks.[42] Similarly, the public seems to react differently to calibrated decisions. González-Ocantos and Dinas's survey experiment concluded that public acceptance of the UK Supreme Court Brexit decision increased when reminded that the court, using particular legal techniques, compensated the government by not accepting all claimant requests.[43]

Furthermore, judges can also resort to other institutional powers to regulate the impact of their decisions on specific audiences. They can select the issues they will hear and decide when to do so. Most legal systems grant high court judges the power not to decide a case, to select the cases they will hear, and to choose when they will hear them.[44] Such courts have the power to grab, delay ruling upon, or duck cases at will.[45] Of particular interest for this discussion, authors such as Fontana contend that

[40] In Kapiszewski's words, these are support-building consideration and deferential consideration. Diana Kapiszewski, High Courts and Economic Governance in Argentina and Brazil (2012) (ebook).

[41] Gonzalez-Ocantos, *supra* note 7; Staton, *supra* note 20.

[42] Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 Int'l J. Const. L. 106 (2009).

[43] Ezequiel Gonzalez-Ocantos & Elias Dinas, *Compensation and Compliance: Sources of Public Acceptance of the UK Supreme Court's Brexit Decision*, 53 Law & Soc'y Rev. 889 (2019).

[44] Diego Werneck Arguelhes & Ivar A. Hartmann, *Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda*, 5 J. L. & Cts. 105 (2017); Santiago Basabe-Serrano, *The Judges' Academic Background as Determinant of the Quality of Judicial Decisions in Latin American Supreme Courts*, 40 Just. Sys. J. 110 (2019); David Fontana, *Docket Control and the Success of Constitutional Courts*, *in* Comparative Constitutional Law 201 (Tom Ginsburg & Rosalind Dixon eds., 2011); Dagmar Soennecken, *The Paradox of Docket Control: Empowering Judges, Frustrating Refugees*, 38 Law & Pol'y 304 (2016).

[45] Kapiszewski, *supra* note 40, at 80.

docket control allows judges to avoid political fights and create and maintain their legitimacy, even when political forces might not support the specific outcome ordered by the court.[46] Institutional powers are, in my model, the balancing pole judges use in their tightrope walking.

Third, rulings are the steps that equilibrist judges carefully take, one after another. The balancing act determines the speed and firmness of the steps. Unlike most studies on Latin American judicial politics, I propose a view of complex judicial outcomes beyond the assumption that courts will be either deferent or assertive with little room between these two extremes. Judicial decisions need not be zero-sum games where one party wins everything.[47]

Rulings can be measured by their degree of assertiveness. Standard strategic accounts tend to measure assertiveness by looking at whether judicial decisions came closer to or fell further away from the government's ideal points over a policy. That usually leads to coding decisions that only look at outcomes and are either in favor of or against a government. However, that approach obscures other dimensions of judicial decisions, which are also relevant to measuring assertiveness. In that regard, the degree of assertiveness can also include other dimensions such as the nature of the remedy, determined by whichever agency is in charge of designing the solution to the controversy contained in the remedy; the court or the elected branches; the collective or individual effects of the remedy; and the cost of enforcement for the elected branches. Particularly, SRDs have collective effects, require the creation or modification and implementation of public policies, and, hence, necessitate financial and political resource investments. Alternatively, judges could protect the rights of individuals by rendering case-by-case decisions satisfying specific claims and establishing individual remedies, thus avoiding demands for structural changes. Moreover, judges can vest, or not vest, particular features in each type of decision. For example, in SRDs, judges can establish either an open timeframe or a strict deadline to enforce a ruling.

Thus, not all decisions against a government are equally intense. SRDs are substantially more intense than other forms of decisions, and there is variation in the intensity of SRDs. As part of their tightrope walk, judges will issue decisions that vary in intensity according to the balance of opposing views performed with the help of their pole. This balancing act results in decisions of varying intensity, as explained in the next section.

3.2. The equilibrist's calculation

In short, my model proposes that judges strategically use a set of tools to respond to the constraint imposed by the political context. To build public support in unfriendly scenarios, judges need to be assertive without risking their relatively weak institutional security. They should be careful not to alienate government elites or conservative blocs in society. By choosing the timing, selecting the cases, and calibrating assertiveness, judges

[46] *See, e.g.*, Fontana, *supra* note 44, at 624.

[47] Gonzalez-Ocantos & Dinas, *supra* note 43, at 9.

may be able to rule against the government in progressive directions, avoid full-frontal challenges, and manage to temper the reactions of those who dislike the outcomes.

To avoid retaliation, judges calculate when the government will tolerate bold decisions. I build on the notion of the government's tolerance interval presented by Epstein, Knight, and Shvetsova to identify when governments will tolerate adverse decisions.[48] The authors propose that any political actor prefers a policy as close as possible to their ideal position but may be willing to tolerate a policy that does not meet their ideal position. Specifically, a tolerance interval exists around each ideal position within which they would be unlikely to challenge a court decision. Decisions falling within this interval will likely be tolerated by the government, meaning the government will not retaliate in response to the ruling. Conversely, rulings falling outside the interval will encourage retaliation.

I propose that the interval length is a function of two factors: the government's political power and the salience of a case to official interests.[49] In the context of high public exposure to judicial matters, negative public reaction to political retaliation may limit the sanctioning powers of a government,[50] so government fear of popular backlash might operate as a constraining element. A government might temper its retaliation against a court if provoking a negative popular backlash would ultimately frustrate its goals. Thus, I do not refer to whether the power is divided or fragmented.[51]

[48] Lee Epstein, Jack Knight, & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 Law & Soc'y Rev. 117 (2001).

[49] I adapt Epstein, Knight, and Shvetsova's proposal to the Latin American context. They propose that four elements determine the tolerance interval length: case salience, case authoritativeness, public policy preferences, and diffuse public support. However, in contexts where there is a lack of a culture of judicial independence, case authoritativeness, understood as the ability of judges to produce a clear, consensual ruling in the general legal area at issue in the dispute, might help little to discourage retaliation. While it might dissuade rulers who tend to abide by the rule of law, it might have limited effects on rulers who have a firm resolution to break clear constitutional clauses and legislation protecting judges from retaliation. As for diffuse public support, the equilibrist model is designed to study courts in which diffuse support remains low, as is the case in Latin America. Thus, this element, I assume, has little impact on the tolerance interval. Finally, in the case of public preference for the policy under review, this factor matters only when reactions to the government's actions, be it tolerance or retaliation, might impact the popularity of the government. I, thus, incorporate this element into the first factor of the proposed tolerance interval, as discussed in the text.

[50] This intuition is congruent with the view established in the American judicial politics literature that courts exhibit deference to the executive when the public has high confidence in the president. Lydia Brashear Tiede & Aldo Fernando Ponce, *Ruling against the Executive in Amparo Cases: Evidence from the Peruvian Constitutional Tribunal*, 3 J. Pol. in Latin Am. 107 (2011).

[51] It is worth noting that potential popular backlash against a government does not arise from diffuse public support to courts. The assumption here is that retaliation could negatively affect the government's support regardless of public sentiment to the courts. That intuition is not groundless in Latin America. For example, in Ecuador, President Lucio Gutierrez's attempt to pack the Supreme Court with politically aligned judges provoked massive public street demonstrations in 2005. Helmke, *supra* note 36. Similarly, in Argentina, newly elected President Macri used an exceptional appointment procedure to fill two Supreme Court seats at the onset of his government in 2015. In response to strong negative public reactions, he had to reverse the appointment, voiced by academics, civil society leaders, prominent politicians from the official coalition, and held by the general public in massive street demonstrations. Andrés Del Río, *President Macri and Judicial Independence on the Argentine Supreme Court*, ICONnect Blog (2015), www.iconnectblog.com/2016/02/president-macri-and-judicial-independence-on-the-argentine-supreme-court/.

A government may also find little interest in retaliation when a case does not relate to its core agenda or could limit some crucial powers. On the contrary, studies from a diverse range of countries have shown that the likelihood of retaliation increases when a judicial decision is contrary to the government and the issue at hand is salient to its agenda.[52]

Furthermore, I assume that salience is the driving force behind retaliation for both strong and weak governments. This assumption derives from the challenges a government would face due to its decision to retaliate or not and its ability to reduce the negative impact of such a decision. Hypothetically, retaliation risks popular backlash. However, a government willing to confront a loss of popular support might be able to resort to a wide range of tools to ameliorate the negative impact of its decision and recover such support, from deployment of effective communication policy regarding the retaliation incident to implementation of other popular policies praised by a substantive portion of society. One can say, then, that once it retaliates, the government still has some control over whether a popular backlash would occur.

What challenges does a government face when it decides not to retaliate? Helmke's persuasive thesis on political uncertainty and judicial manipulation can help to answer this question. In short, she proposes that retaliation is likely to occur in contexts where politicians are frequently at risk of being removed from office, whether the threat of government change is imminent or more distant, through electoral means or otherwise, and courts, in part, shape these prospects.[53]

Departing from here, a bold judicial decision against a policy of high importance for the government represents a strong political challenge due to its immediate and mediate effects. In the short term, the government sees its strong desires frustrated by a ruling. In the medium term, a decision of this kind allows courts to exercise more influence over the political arena. Confronting a government on an issue of its high interest is a potent signal to the government and other actors in the political arena, both non-partisan litigants and litigants from the opposition. They will learn that the court would be willing to hear cases related to issues of particular interest for the government. Finally, such a decision might impact positively the attempts to build public support. Whether litigants will use the court to challenge the government's core policies, whether the court will exert its powers against the government, and whether the public will see the court as a legitimate actor are distant from the government's control. Decisions against issues unimportant to the governments are unlikely to produce such immediate and mediate effects.

Confronted with the choice of facing either popular backlash or strong political challenge, a government might prefer to risk popular backlash, regardless of its power. Under this assumption, strong governments will retaliate in courts as they might

[52] Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. Pol. 422 (2003); Matías Iaryczower, Pablo T. Spiller, & Mariano Tommasi, *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 Am. J. Pol. Sci. 699 (2002); Rebecca Mae Salokar, The Solicitor General: The Politics of Law (1994); Peter Vondoepp, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 Pol. Res. Q. 389 (2006).

[53] Helmke, *supra* note 36, at 8.

either be able to afford to lose some level of support or be willing to deploy strategies to recover it. Weak governments, facing a serious risk of being removed from office, would attack courts to prevent them from contributing to such a fate. In other words, strong and weak governments would rather avoid intense judicial challenges than popular backlash.

Then, strategic judges will calculate how the length of the government's interval will affect the chances of retaliation. The risk of retaliation can vary from high to low in four scenarios, as displayed in Figure 1. A longer interval lowers the risk of retaliation; a shorter interval raises the risk. Thus, I hypothesize that judges will tend to be strongly assertive when the risk of retaliation is low or medium—when the issues are not salient to a weak or strong government. Meanwhile, judges will tend to be more cautious when cases are salient to a weak government and avoid bold decisions in issues salient to a strong government. The length of the tolerance interval will determine judges' decisions on which cases they will hear, the timing of the decision on such cases, and their degree of assertiveness.

However, such a strategic move is limited by the attempt to build public support in two directions. Public reaction can be measured on a three-point scale. Strong public support will occur when a decision attracts diffuse and specific support; medium support will occur when only diffuse support arises; and no support when there is no increase in diffuse support. Ruling against the government in a core agenda issue is likely to bring strong support and is thus the most attractive course of action to build support. However, strategic judges must reduce their degree of assertiveness when facing a very short tolerance interval. However, they must do so in a way that does not prevent raising public support. They must choose cases that are politically charged but not salient to the government agenda. Moreover, these decisions should be assertive enough to become relevant in the public debate and raise strong support.

Similarly, judges must be mindful of adverse reactions from conservative blocs of society. Enhancing the protection of rights and promoting policy changes are not always welcomed, particularly by the conservative and influential segment of society.

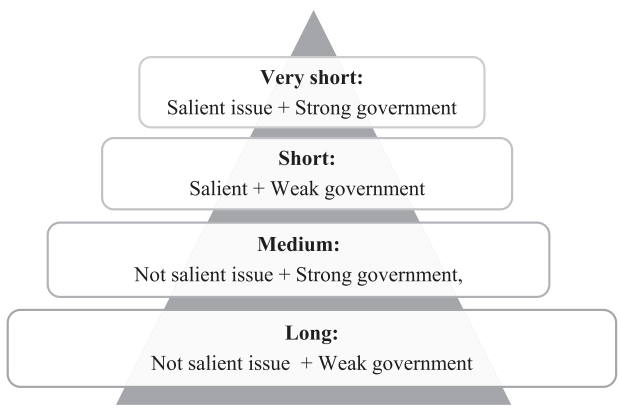

Figure 1. Government's tolerance interval scenarios

Although judges may not seek to please all sectors of society, they should be mindful of conservative reactions that might translate into a lack of specific support. Judges can resort to their institutional powers to avoid such critiques but still decide on progressive directions. They can decrease the intensity of their decisions to accommodate conservative groups' interests. Thus, the judges' calculations of public reactions will also determine the case selection and the timing and intensity of its decision.

To sum up, the equilibrist approach suggests that judges' levels of assertiveness is a function of their attempts to protect their courts. They will select cases and time and calibrate their decisions according to the simultaneous calculation of the government's tolerance interval and the reactions of opinion leaders who are likely to be able to both shape and diffuse specific support. I propose that the intensity of judicial activism, measured by judges' use of a different remedy and altering the features of the same kind of remedy, will increase when the government's tolerance is higher and the public appears to be more supportive.

The model can be folded into two hypotheses for courts issuing SRDs. Under the *bold assertiveness hypothesis*, we expect judges to rule SRDs over politically charged cases, which are both likely to raise public and specific support and are not salient to the agenda of either weak or strong governments (long and medium tolerance interval). Furthermore, the *calibrated assertiveness hypothesis* expects judges to calibrate decisions on controversial issues to avoid substantial losses of public support and to apply full confrontation in cases salient to weak governments (short tolerance interval).

4. Research design

The Argentine Supreme Court provides an excellent case to analyze how courts build public support in unstable contexts.[54] Most new judges lasted between June 2005 and May 2014,[55] and ruled the last SRD in March 2012. The Court composition at that time passed no other ruling of this kind past that date. (I refer to judges sitting on the bench during this period as judges or Justices.) Examining this Court helps me analyze why SRDs were issued and why they stopped.

This study combines primary and secondary sources. Along with the specialized bibliography on Argentine political affairs, I conducted thirty-nine semi-structured elite interviews with various actors, including legal scholars and political scientists, Justices, Court clerks, legal practitioners, and leaders of non-governmental organizations (NGOs) that work on Court issues or have litigated cases before it.[56] Also,

[54] I treat the Argentine Supreme Court as a unitary actor and, thus, do not look at the internal dynamics of collegial decision-making. The assumption that collective actors such as constitutional and high courts, as Epstein et al. noted while ago, have a unique policy preference point is, of course, a simplifying assumption. Institutional actors consist of groups of individuals who may differ among themselves in their preferences over policy questions. But, as they point out, each institution has its own procedures for aggregating these individual preferences into some type of institutional preference ranking, which justifies treating them as unitary actors. Epstein, Knight, & Shvetsova, *supra* note 48, at 128.

[55] One of these judges had passed away and another had resigned by May 2014.

[56] Respondents' names are not mentioned, to protect confidentiality. Rather, I use a prefix to identify each interviewee, as described in Appendix 1.

I created a searchable electronic newspaper database. It contains 2698 relevant articles published by the three leading Argentine newspapers between 2003 and 2012. I then applied media content analysis to interview transcripts and articles according to a coding matrix designed to capture different aspects of independent and dependent variables.

4.1. A "new" Court in search of legitimacy

The newly constituted Court faced a complicated political scenario. First, it had to address a profound legitimacy crisis. Public opinion was at its lowest at the end of the 1990s when President Menem ruled the country for two consecutive terms. The Court was primarily criticized for its partisanship, lack of transparency, and failure to protect human rights. Amid the 2001–02 crisis, the Court was considered to comprise the political elites responsible for the country's downfall, leading to public demonstrations. These events were followed by several judges' impeachment and resignation between 2003 and 2004.[57] Second, the Court still operated in an unfriendly political context. President Kirchner initiated a Court reform that included procedures for appointing judges, restricting presidential powers, increasing transparency, and allowing public participation. Nevertheless, fears of political attacks could not be overcome from the political landscape.[58] The Executive's formal powers enabling retaliation remained untouched. As also discussed above, informal modes of retaliation were in place during the period under study.

In this context, the Court was committed to redressing the legitimacy crisis.[59] Initial evidence suggests that the Justices perceived public support as a defensive mechanism. In an interview with the author, one of the Justices remarked that public support for courts is crucial for protecting courts from political pressure.[60] Another Justice interviewed by the author claimed,[61] "[p]opular support is vital to protecting the Court from potential attacks from other political actors and agencies."[62]

[57] For a discussion of these developments, see Mauro Benente, Fuera la Corte Suprema: Protestas frente a la Corte Argentina (2001–2002) (2011); Alba M. Ruibal, *Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court*, 51 Latin Am. Pol. & Soc'y 59 (2009); Alba Ruibal, *Innovative Judicial Procedures and Redefinition of the Institutional Role of the Argentine Supreme Court*, 47 Latin Am. Res. Rev. 22 (2012).

[58] As a response to the Court's crisis, elected President Kirchner impeached five judges out of eight, as one judge resigned before he took power. Three of them resigned before the end of the impeachment process and two were effectively removed. As discussed earlier, Kirchner eventually reduced the seat number from nine to seven.

[59] Leticia Barrera, La Corte Suprema en escena: Una etnografía del mundo judicial (2012); Pereira, *supra* note 11; Ruibal, *supra* note 57.

[60] Interview with J2, Supreme Court Judge, Buenos Aires (Aug. 16, 2010) [hereinafter J2 Interview].

[61] Interview with J1, Supreme Court Justice, Buenos Aires, Argentina (Aug. 20, 2010) (2010) [hereinafter J1 Interview].

[62] In the same vein, Chief Justice Lorenzetti affirmed in a public interview that a strong Court depends on popular support and the people who must defend it from political attacks. La Nación, *Nueva advertencia de la Corte a Kirchner*, La Nación (May 24, 2007).

The Justices, however, were aware of the high level of mistrust surrounding the Court. In interviews with the author, one of the Justices[63] maintained that the discredit was so deep that it spread to the whole judiciary. Similarly, another Justice acknowledged that negative sentiments to the Court came from a wide range of sectors of society,[64] including the political sphere, academia, the business world, religious circles, the bar, and social movements. Also, three Justices remarked that these negative views were exacerbated during the 1990s.[65]

Furthermore, the Court aimed to present itself to the public as a transparent, independent, and progressive agency to attract diffuse support.[66] Notably, the right-enhancing profile that the Court aimed to build in the public domain is closely connected to the discussion on SRDs. Therefore, legal and socio-legal authors propose that these remedies be taken as part of the Court's attempt to build support.[67]

Concerning the right-enhancing profile, in interviews with the author, leaders of prominent NGOs working on rights issues agreed that the Justices were particularly concerned about presenting the Court as driven by social demands in the public domain.[68] Other influential activists speculated that the Court decided to reconstruct its legitimacy by defending the disadvantaged author; the Justices overtly acknowledged the importance of this image as they sought to reconstitute legitimacy.[69] For example, one Justice maintained the following: "I believe that this Court will be part of the history of the Argentine judiciary, if not the history of the country… because it is an active Court and preoccupied with social issues."[70]

Addressing the transparency condition, they developed a communication policy and created a Court news agency. Through this agency, they attempted to strategically

[63] Interview with J3, Supreme Court Justice, Buenos Aires, Argentina (Aug. 18, 2010) [hereinafter J3 Interview].

[64] J2 Interview, *supra* note 60.

[65] J1 Interview, *supra* note 61; J2 Interview, *supra* note 60; J3 Interview, *supra* note 63.

[66] Barrera, *supra* note 59; Alba Ruibal, *The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts*, 3 Mex. L. Rev. 6 (2011); Ruibal, *supra* note 57.

[67] Ruibal, *supra* note 57; Martin Oyhanarte, *Public Law Litigation in the US and in Argentina: Lessons from a Comparative Study*, 43 Ga. J. Int'l Comp. L. 451 (2014).

[68] Interview with CSL1, Civil Society Leader, Buenos Aires, Argentina (Aug. 24, 2010) [hereinafter CLS1 Interview]; Interview with CSL2, Civil Society Leader, Buenos Aires, Argentina (Aug. 23, 2010) [hereinafter CLS2 Interview]; Interview with CSL4, Civil Society Leader, Buenos Aires, Argenitna (Aug. 23, 2010) [hereinafter CLS4 Interview].

[69] Interview with CSL5, Civils Society Leader, Buenos Aires, Argentina (Aug. 25, 2010) [hereinafter CLS5 Inteview].

[70] J2 Interview, *supra* note 60. In the same line, some justices made bold declarations to prominent newspapers. For example, in an interview with the conservative *La Nación*, Chief Justice Lorenzetti argued that the Court would fix its wrongdoings to further the protection of people's rights. Adrian Ventura, *Queremos mejorar la previsibilidad*, La Nación (Sept. 25, 2005), www.lanacion.com.ar/741760-queremos-mejorar-la-previsibilidad. Concordantly, in response to a journalist asking how the Justice would achieve the goal of bringing the Court closer to the people, Justice Zaffaroni stated that the Court would keep its explicit focus on individual and collective rights. Irina Hauser, *La gente no sabe el riesgo que corre con este Código Penal irracional*, Página/12 (Nov. 12, 2006), www.pagina12.com.ar/diario/elpais/1-76068-2006-11-12.html. Similarly, in announcing the agenda of the Court for each year, Chief Justice Lorenzetti regularly anticipated that a dominant issue would be the protection of human rights. *Los jueces no deben gobernar*, Página/12 (Feb. 17, 2010), www.pagina12.com.ar/diario/elpais/1-140463-2010-02-17.html.

control information.[71] They built unprecedented public relations with opinion leaders, including journalists, academics, and civil society leaders, among others.

4.2. Dependent variable

This paper reviews eleven SRDs (see Appendix 2). Although there are conceptual controversies around the definition of structural remedies, for this study, I consider SRDs to be preliminary or final decisions that (i) request elaboration or reform of public policies aimed to redress or prevent structural human rights violations, and (ii) establish any form of judicial monitoring of the policy process.[72]

All of them are considered cases of contemporary salience as they were widely covered by the media.[73] Examining cases of contemporary salience is crucial for the model, as the judges are more likely to gauge the reactions of both the public and the government in such cases. Besides, using the measure of contemporary salience allows us to factor in public opinion when the case was decided. Finally, cases' contemporary salience relates to the type of issues being decided. According to the human rights leaders interviewed for this work, such cases have all addressed longstanding human rights violations.

The eleven SRDs were scaled according to their intensity and measured by the enforcement mechanisms the Court spelled out based on whether they partially or fully challenged the policy under review. For example, in terms of enforcement, SRDs differ on whether they stipulate a strict deadline (D) by which the policy must be created or no deadline (ND). If there is a strict deadline, one can assume that the government's ability to elaborate on the policy is narrower than in cases where there is no deadline or where vague formulas such as 'within a reasonable time framework' are put forward. Similarly, SRDs sometimes mandate the inclusion of stakeholders in the discussion, implementation, and monitoring of the requested policy. For example, some decisions require Congressional involvement to pass a law, and some involve the participation of a local government, such as a municipality, to implement a policy. They also vary on whether they request the participation (P) of non-governmental organizations during the discussion, planning, and monitoring of such policies or not (NP).

Furthermore, beyond the enforcement mechanisms, SRDs can partially challenge (PC) or fully challenge (FC) a given policy. When a policy is challenged, an ad hoc measure is required for each case. Based on these three dimensions, I scale the intensity of the SRDs as follows:

- Most intense: when D, P, and FC are present
- Intense: when only two of them are present

[71] Ruibal, *supra* note 57.

[72] For an excellent discussion of the debate on what structural remedies are and what elements constitute them, see Mariela Puga, Litigio y cambio social en Argentina y Colombia (2012).

[73] By contemporary salience I mean that the actors thought a particular event was salient at the time it occurred, regardless of whether analysts now view it as salient. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 Am. J. Pol. Sci. 66 (2000). I consider a case to be salient when it was covered by the three newspapers at least ten times.

- Moderate: when only one element is present
- Least intense: when none of them is present.

4.3. Independent variables

I relied on country-specific secondary sources to measure the government's strength. Concretely, I propose that a government can be scored as *strong* if it can afford to incur a loss of support and *weak* if it cannot. My study covers the complete terms of Presidents Kirchner (2003–07) and Fernández (2007–11) and the first year of Fernandez's second term (2012), both from the Frente para la Victoria (FPV) coalition. The literature on Argentine politics suggests that Kirchner's government was weak as it could not afford a loss of public support. Meanwhile, President Fernandez's government, at least until 2012, can be scored as strong.

Under President Kirchner's administration between 2003 and 2007, the government was marked by its political weakness. Kirchner took power with only 22% of the share of the vote.[74] Although his party had the majority in both chambers of Congress, it was highly fragmented, which initially prevented Kirchner from enjoying a parliamentarian majority.[75] Also, former President Duhalde's support for Kirchner's candidacy was crucial for his electoral victory. Duhalde aimed to exert determinant political influence over the new administration, and in consequence, Kirchner's political autonomy was seen as highly restricted.[76] In such a context, Kirchner's administration could not afford a loss of public support.

Eventually, President Kirchner successfully reconstituted his political power and reversed his initial weakness. He managed to convert the FPV coalition into a strong political coalition that included the most powerful factions of the Justicialista Party and many other parties.[77] Also, some parties did not formally join the FPV but became close Kirchner allies.

President Fernandez led the subsequent administrations with consolidated FPV power. Through this phase, the government enjoyed relative strength and, in such conditions, could afford a temporary loss of support while still maintaining a powerful position. President Fernandez was elected president with 45% of the votes in October 2007; the ruling FPV won more than three-quarters of the country's governorships and secured a vast majority in both chambers of Congress.[78] Overall, the government remained strong during this period and even managed to recover from the loss of seats in mid-term elections. In 2011, Fernandez was re-elected with 54% of the vote and recovered the majority in the national Parliament.[79]

[74] Nicolás Cherny, Germán Feierherd, & Marcos Novaro, *El Presidencialismo Argentino: De la Crisis a la Recomposiciónde l Poder (2003–2007)*, 54 América Latina Hoy (2010), https://doi.org/10.14201/alh.6954.

[75] Steve Levitsky & María Victoria Murillo, *Argentina: From Kirchner to Kirchner*, 19 J. Democracy 16 (2008).

[76] Cherny, Feierherd, & Novaro, *supra* note 74.

[77] *Id.*

[78] Levitsky & Murillo, *supra* note 75.

[79] Gabriela Catterberg & Valeria Palanza, *Argentina: Dispersión de la Oposición y el Auge de Cristina Fernández de Kirchner*, 32 Revista de Ciencia política 3 (2012).

The second aspect of the tolerance interval refers to the salience of the case to the government. Measuring salience is also a difficult task as I focus on contemporary salience; I am interested in what is considered salient to the government when facts occur.

For that purpose, I elaborate an ad hoc mechanism to measure issue salience. Given the high power concentration in the Argentine political system, only the most influential government members and the party are authorized and authoritative voices to refer to salient issues. Thus, who makes public declarations about a particular issue is indicative of the issue's salience for the government. Moreover, if these declarations occur, they will likely be reported by the three leading newspapers used as sources in my thesis. As a result, and given that these public declarations might occur either before or after a decision is issued, I consider as indicative of salience public declarations that represent: (i) a defense of the policy or government position under judicial review; (ii) a critique of the Court's decision for affecting official policy; and (iii) welcoming the decision as it validates official policy. In conclusion, I measure whether an issue is salient or not to the Government based on analyzing the influential character of the Government or party officers in charge of defending the policy and/or attacking or welcoming the Court's decision.

In terms of public support, and given the absence of opinion surveys on the Court, I relied on opinion leadership and media coverage to capture whether a decision increases or decreases public support. Following the three-point scale of public support discussed above, I coded media articles as strong, medium, or negative impact. It is necessary to highlight that opinion leaders' reactions increased support when media articles did not include statements damaging diffuse support. The positive impact occurs because if the Justices have already put a strategy to portray the Court in a particular way, the nonexistence of statements contradicting or undermining these images can be seen as implicitly reinforcing these images.

5. Analysis of structural remedies

The Court handed down eleven SRDs in only eight years. In all the cases, the Court addressed structural violations of human rights, requested the Government implement a new policy, laid the constitutional standards as a framework for such policy, and appointed itself to monitor the enforcement process. As an equilibrist, it performed unusual and risky movements to build legitimacy and avoid political attacks. It showed its skills to calculate the Government's tolerance interval and influence and anticipate public opinion. In doing so, the judges carefully chose the timing, the intensity, and the issues to address in their decisions.

Nine cases fall under the bold assertiveness hypothesis. These decisions ruled over politically charged cases, which attracted strong public support but were not salient to the agenda of weak or strong governments. Meanwhile, three rulings are explained by the calibrated assertiveness hypothesis. Judges calibrated the intensity of *Fundación*

Sur and *FAL* to avoid substantial loss of public support and *Badaro I* to avoid full confrontation with the Government, as I discuss in this section.[80]

Each decision seems timed in response to discretional criteria over any formal rule. In interviews with the author, journalists,[81] academics,[82] and practitioners[83] agreed that the eleven SRDs' timing seemed to align only with what the Justices found most desirable or convenient. Although this is only a preliminary confirmation that the proposed independent variables affected decision timing, it is also consistent with previous studies on the Argentine Supreme Court.[84] As Kapiszewski highlights, local analysts, scholars, and practitioners acknowledge that the Court represents an extreme case of judicial discretion.[85] It enjoys expansive discretion in every aspect of its decision-making.

Regarding which cases to accept, the Court has little formal docket control; it must accept almost every case filed.[86] Nonetheless, it has ample room for discretion when deciding which cases to consider at what time. As Herrero and Kapiszewski note, no formal rules establish timeframes or deadlines for hearing cases.[87] Therefore, when a case reaches the Court, it can rest on the docket for as long as the Court considers appropriate. Additionally, no rules exist regarding the order in which or speed with which the Court must issue decisions, and it has adopted several practices that facilitate decision-making delays.[88]

The findings suggest that the Court's strategy of resisting the government through issues not salient to the official agenda did not obstruct their independent image. Ten

[80] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/12/2008, "García Méndez, E. y Musa, L. C. s/ causa N° 7537," Fallos (2008 331:2691) [hereinafter *Fundación Sur*]; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012, "F. A. L. s/ medida autosatisfactiva," Fallos (2012 335:197) [hereinafter *FAL*]; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/08/2006, "Badaro, Adolfo Valentín c/ ANSeS s/ Reajustes varios," Fallos (2006 329: 3089) [hereinafter *Badaro I*].

[81] Interview with R1, Journalist, Buenos Aires, Argentina (Sept. 2, 2010) [hereinafter R1 Interview]; Interview with R3, Journalist, BuenosAires, Argentina (Sept. 2, 2010) [hereinafter R3 Interview]; Interview with R4, Journalist, Buenos Aires, Argentina (Sept. 4, 2010) [hereinafter R4 Interview]; Interview with R5, Journalist, Buenos Aires, Argentina (Sept. 6, 2010) [hereinafter R5 Interview].

[82] Interview with LS1, Legal Scholar, Buenos Aires, Argentina (Sept. 7, 2010) [hereinafter LS1 Interview]; Interview with LS2, Legal Scholar, Buenos Aires, Argentina (Sept. 7, 2010) [hereinafter LS2 Interview]; Interview with LS3, Legal Scholar, Buenos Aires (Sept. 10, 2010) [hereinafter LS3 Interview].

[83] CSL2 Interview, *supra* note 68; Interview with CSL3, Civil Society Leader, Buenos Aires, Argentina (Aug. 25, 2010) [hereinafter CSL3 Interview]; CSL5 Interview, *supra* note 69; Interview with CSL6, Civil Society Leader, Buenos Aires, Argentina (Sept. 7 2010) [hereinafter CSL6 Interview]; Interview with CSL7, Civil Society Leader, Buenos Aires, Argentina (Sept. 10, 2010) [hereinafter CSL7 Interview]; Interview with LP1, Legal Practitioner, Buenos Aires, Argentina (Sept. 20, 2010) [hereinafter LP1 Interview]; Interview with LP3, Legal Practitioner, Buenos Aires, Argentina (Sept. 20, 2010) [hereinafter LP3 Interview]; Interview with LP4, Legal Practitioner, Buenos Aires, Argentina (Sept. 23, 2010) [hereinafter LP4 Interview]; Interview with LP5, Legal Practitioner, Buenos Aires, Argentina (Sept. 27, 2010) [hereinafter LP5 Interview].

[84] Herrero, *supra* note 45; Kapiszewski, *supra* note 40.

[85] Kapiszewski, *supra* note 40.

[86] *Id.*

[87] Herrero, *supra* note 45; Kapiszewski, *supra* note 40.

[88] Kapiszewski, *supra* note 40.

decisions provoked strong public support (with positive effects on specific and diffuse support). Among them, seven decisions provoked reactions that explicitly enhanced the image of an independent and progressive Court, and three enhanced just the activist image. Only two decisions prompted medium support as they were criticized by vocal groups that reached the media.

In the following paragraphs, I discuss three SRDs. They show both variation among this type of decision and the type of balancing Court performed. *Rosza* illustrates the bold assertive hypothesis.[89] By contrast, *Badaro I* and *Fundación Sur* are explained under the remit of the calibrated assertiveness hypothesis. The former shows how the Court altered the features of SRDs to avoid full confrontation with the government.[90] The latter discusses how they did so to prevent the loss of public support.[91]

5.1. Intense SRDs: The *Rosza* decision

If we look at the constituting features of SRDs, the *Rosza* decision can be scored as intense on the enforcement scale.[92] Also, it challenges a full policy. Notably, it requested Congress pass a law creating a new appointment procedure for interim judges within one year of the decision date.

The case revolved around a critical deficit of the federal judiciary. The national constitution established that the Judicial Council, the Executive, and the Senate should be involved in the appointment of federal judges. For that purpose, Law 24.937 implemented a procedure in which each agency played a different role.[93] The law did not set a timeframe for each stage of the appointment process, which permitted excessive delays in new judges' appointments. Eventually, the Judicial Council created a mechanism to appoint one-year interim judges to tackle the effects of these delays. The Council was the only agency in charge of the appointment, and it was empowered to renew temporary appointments. This mechanism, meant to be used in exceptional circumstances, became a regular practice as 20% of federal judges were appointed under this system at the ruling time. Such a situation had two negative ramifications: first, it was alleged that the Judicial Council exerted political pressure on interim judges seeking the renewals of their terms, and second, several appeals courts declared interim judges' decisions null.[94]

In this context, Mr. Rosza filed a case that reached the Court. The claimant alleged, in general terms, that the resolutions made by an interim criminal judge in a case where he was involved violated his rights to due process. He alleged that the judge in charge of the criminal trial was not appointed through a mechanism fulfilling the constitutional mandate.

[89] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/05/2008, "Rosza, Carlos Alberto y otro s/ recurso de casación," Fallos (2007 330:2361) [hereinafter *Rosza*].

[90] *Badaro I*, CSJN, 08/08/2006, Fallos (2006 329:3089).

[91] *Fundación Sur*, CSJN, 02/12/2008, Fallos (2008 331:2691).

[92] *Rosza*, CSJN, 23/05/2008, Fallos (2007 330:2361).

[93] Law No. 24.937, Jan. 19, 1998, [28808] B.O. 2 (Arg).

[94] *Rosza*, CSJN, 23/05/2008, Fallos (2007 330:2361).

The Justices faced a tricky situation. On the one hand, as remarked by legal experts in fieldwork interviews, there were solid legal grounds to consider the system unconstitutional. It did not include the Executive's intervention and the Congress.[95] It did not grant interim Justices constitutional protections, such as protection from salary reduction and unlawful dismissal. On the other hand, declaring the mechanism unconstitutional would have triggered a wave of nullifications involving thousands of resolutions made by the already-appointed interim Justices. Also, it would have meant that these judges would have had to eventually leave their positions immediately, resulting in hundreds of vacancies. These consequences would have provoked a severe judicial crisis affecting citizens' access to justice all over the country.

The Justices found an innovative solution. They declared the unconstitutionality of the appointment process but deferred the unconstitutional effects for one year, during which the interim positions would remain valid. Meanwhile, it requested both Congress and the Executive to create a new mechanism by law. Thus, the enforcement of the ruling was not left up to Congress's complete discretion. The Justices set the constitutional standards that should frame the new mechanism. Also, they set a one-year deadline for the new law.

The Justices actively monitored the legislative process. Eventually, they issued an administrative resolution to extend the effect of the *Rosza* decision virtually. They deferred the validity of the incumbent interim judges until the new law was valid. The decree was issued after Congress passed the bill but before the Executive signed it. Because the bill would be in force one week after the Justices' one-year deadline, the resolution was intended to avoid potential legal claims in the future as the Justice stated in the administrative resolution.[96]

Rosza fully met the expectations of the equilibrist approach. The Justices managed to rule against the government without risking their stability, meanwhile building public support. The decision provoked strongly positive reactions from opinion leaders. Notably, the decision was regarded publicly as showing the Justices' independent image and an overt challenge to the government.[97] Although it did not affect crucial government policy, the Executive was alleged to be responsible for the delays in judicial appointments. The Government was thought to engage in this practice because it wanted to exert political pressure on interim judges through the Judicial Council, dominated by counselors aligned with the president.[98]

Furthermore, the ruling advanced the image of activism. The questioned appointment process was highly criticized in the public realm, and many courts of appeal nullified resolutions made by interim Justices. This situation created uncertainty in

[95] LP1 Interview, *supra* note 83; LP3 Interview, *supra* note 83; LS3 Interview, *supra* note 82.

[96] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 22, 2008, Acordada 10/2008, "Subrogancias."

[97] Laura Zommer, *La Corte juega fuerte*, La Nación (Dec. 14, 2008), www.lanacion.com.ar/1080298-la-corte-juega-fuerte.

[98] La Nación, *La movilidad, un tema sin resolverse*, La Nación (Aug. 16, 2007), www.lanacion.com.ar/935012-la-movilidad-un-tema-sin-resolverse; Adrian Ventura, *La Corte se siente víctima de un plan de desgaste*, La Nación (Nov. 18, 2009), www.lanacion.com.ar/1201181-la-corte-se-siente-victima-de-un-plan-de-desgaste.

several judicial processes and led to a judiciary crisis. The Justices were seen as the only agency preoccupied with a highly problematic situation.[99]

Equally, *Rosza* was dictated under the government's widest tolerance interval. It was handed down before the 2007 presidential elections, and retaliation was, therefore, an unattractive course of action for the government. More importantly, the case was not salient to the government but brought political repercussions. Although some media portrayed the decision as a move against the government, no top officials from either the official coalition or the government criticized the ruling for invalidating the appointment mechanism.

In short, *Rosza* is a paradigmatic SRD and an intense variation within this type of decision. The Court managed to rule against the government, raising public support without putting itself at risk. It addressed an issue of public relevance that was not salient to the official agenda and provoked strongly positive public reactions that enhanced the Court's image of independence and activism.

5.2. Calibrating decisions to avoid full confrontation with the government: *Badaro I*

Badaro I is a case in which the Justices strategically reduced the intensity of SRDs, producing the least intense decision.[100] The Court fully challenged the government's policy but did not establish a strict enforcement process or include other parties. This was done in response to the political circumstances under which the ruling was issued. *Badaro I* occurred when the government's tolerance interval was short—that is, when the government was weak. However, the case was salient regarding its agenda.

Badaro I addressed some deficits in the retirement pensions scheme. This issue, mainly the regular updating of pensions, had been on the public agenda for more than two decades.[101] One Argentine social security system pillar is the readjustment of pensions enshrined in the Constitution. However, during the 1990s, President Menem eliminated automatic adjustment mechanisms, and new legislation established that Congress could decide on the issue yearly, according to public funds availability. President Kirchner sought to reconstitute the welfare system starting in 2003. The government implemented a policy that incrementally complied with thousands of courts' rulings in favor of individual pension adjustment claims; facilitated pension benefit access, particularly for those lacking pension contributions for short periods; and decreed that most disadvantaged pensioners' salaries be readjusted.[102]

In this context, Mr. Badaro brought his case to the judiciary. He claimed the judicial readjustment of his pension, which was frozen between 1995 and 2005. As a result,

[99] Adrian Ventura, *Menos conflictos con la Corte Suprema*, La Nación (Mar. 16, 2008), www.lanacion.com.ar/996157-menos-conflictos-con-la-corte-suprema.

[100] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/08/2006, "Badaro, Adolfo Valentín c/ ANSeS s/ Reajustes varios," Fallos (2006 329:3089) [hereinafter *Badaro I*].

[101] Álvaro Herrero, *La incidencia de la Corte Suprema de Justicia en la formulación de políticas públicas: Una exploración empírica del caso argentino*, 49 Revista Política 71 (2011).

[102] *Id.*

it was not adjusted during the 1990s and did not benefit from Kirchner's policy. The claimant also required the correction of the percentage readjustment applied between 1991 and 1994. Given that a lower-court judge applied a minor readjustment, both Mr. Badaro and the state appealed to the Court.

Badaro I stated that the constitutional readjustment of pensions should be conducted by the automatic mechanisms reflecting the relationship between the pension salaries and the workers' salaries. Also, it established that the permanent lack of annual adjustment of pension salaries violated Mr. Badaro's rights. To remedy this situation, the Justices requested that the government enact a new law establishing an adjustment criterion to guarantee a proportional relationship between employed workers' current salaries, retirements, and pensions but disregard inflation indexes.[103]

Compared with the enforcement phase included in other SRDs, *Badaro I* is more flexible. In other cases, such as *Rosza*, the Court established a strict deadline for the enforcement phase. In others, it mandated the government to submit regular reports on the progress of the enforcement phase or hold public hearings to monitor this phase. In *Badaro I*, only a vague timeframe was established for the enforcement phase, represented by the formula "reasonable time."[104] This formula gave the government a wide temporal margin to discuss and negotiate a new policy with other parties. It meant the Justices did not offer an immediate measure to protect Mr. Badaro's rights. Instead, this protection depended on the government's political will.

Additionally, the ruling tone denotes an effort to temper the impact of the government's decision. The Justices explicitly praised the official pension policy as a positive development to tackle some effects of the 2001 and 2002 economic and social crisis. These considerations added no elements to the legal argument supporting the decision. Thus, their inclusion in the ruling was not necessary from a legal point of view. After enumerating all the measures taken by the Executive aimed at improving the situation of those who received the lowest pensions,[105] the Justices declared: "[Such measures] were taken given the severe economic and social crisis and have the clear purpose of serving the most urgent needs primarily, ensuring indispensable resources to their beneficiaries."[106]

Notwithstanding this strategic reduction of intensity, *Badaro I* provoked strongly positive public reactions. There is no evidence of opinion leaders' reactions negatively affecting either diffuse or specific support for the Justices. On the contrary, the decision was highly welcomed in the public realm and enhanced the image of activism and independence. Media coverage interpreted this ruling as the Justices' attempt to set the agenda of the government on the pension issue and remedy a social deficit that remained mostly unattended by the elected branches.[107] Finally, media coverage

[103] *Badaro I*, CSJN, 08/08/2006, Fallos (2006 329:3089).

[104] *Id.* ¶ 8.

[105] *Id.* ¶ 11.

[106] *Id.*

[107] Horacio Verbitsky, Hacer la Corte: La Construccion de un Poder Absoluto sin Justicia ni Control (2006); Mario Wainfield, *Saltos de calidad y deudas impagas*, Página/12 (Sept. 10, 2006), www.pagina12.com.ar/diario/elpais/1-72772-2006-09-10.html.

also implied that it was a sign of independence that the Justices retained their power to evaluate the new policy's constitutionality. For example, the journalist Wainfield commented: "The Supreme Court set the agenda for the other branches of government again. Now, the Justices aim to redress the neglect of pensioners, one of the greatest injustices consummated by recent governments, including the Supreme Court itself."[108] In the same vein, a *La Nación* editorial remarked:

> The decision to deliver justice in this issue highlights the urgency of returning dignity to a large sector of society. Also, [it highlights] the need to address structural reforms in the public sector to make it feasible to maintain fiscal solvency without having to resort again to reducing spending at the expense of violating essential State functions.[109]

A *Clarín* journalist stated: "The Justices shall exercise control over the Congress's decisions and will have the final say on resolving the conflict."[110]

Regarding the government's tolerance interval, the decision revolved around key political issues. First, pension policy was vital to the two subsequent governments between 2003 and 2010. In particular, the government's top officials and allies regarded the pension policy as a significant achievement of Kirchner's administration.[111] Second, compliance with the ruling would have had a substantial economic impact regardless of the adjustment mechanism adopted.[112] Thus, complying with the Justices' ruling meant using significant funding for a policy not on the official agenda. Thirdly, in a political arena where political initiative is typically concentrated in the president's hands, the image of the Court setting the government's agenda affected the president's political leverage.[113]

Notwithstanding, the Justices managed to ameliorate the decision's impact on the government. The Court's approach in *Badaro I* was considered a prudent approach to the issue.[114] Top government officials initially received the decision without hostility. It was viewed as the request for a corrective measure rather than an overt challenge. The head of the National Social Security Administration Office, Sergio Massa, was the top official in communicating its position. In one instance, he declared that "[t]he ruling preserves the function of each power, leaves in Congress's hands the creation of the readjustment mechanism [. . .], and acknowledges as positive measures the adjustments granted by a government's decrees from the past."[115] He also remarked that diverting the ruling from the

[108] Mario Wainfield, *El arte de enriquecer la agenda*, Página/12 (Aug. 9, 2006), www.pagina12.com.ar/diario/elpais/subnotas/71183-23130-2006-08-09.html.

[109] *Justicia para los jubilados*, La Nación (Aug. 10, 2006), www.lanacion.com.ar/830270-justicia-para-los-jubilados.

[110] Silvana Boschi, *La Corte ordenó al Congreso que debe actualizar las jubilaciones*, Clarin (Aug. 9, 2006), http://edant.clarin.com/diario/2006/08/09/elpais/p-00801.htm.

[111] Maximiliano Montenegro, *La reforma más relegada*, Página/12 (Aug. 9, 2006), www.pagina12.com.ar/diario/elpais/subnotas/71183-23128-2006-08-09.html; Wainfield, *supra* note 107.

[112] Herrero, *supra* note 101, at 587.

[113] Montenegro, *supra* note 111; Wainfield, *supra* note 107; Mario Wainfield, *La resurrección del 14 bis*, Página/12 (Aug. 13, 2006), www.pagina12.com.ar/diario/elpais/1-71349-2006-08-13.html.

[114] Wainfield, *supra* note 107; Mario Wainfield, *Los mensajes y los silencios*, Página/12 (Apr. 13, 2008), www.pagina12.com.ar/diario/elpais/1-102340-2008-04-13.html.

[115] Boschi, *supra* note 110.

jurisprudence of lower judges gave the judiciary collective power to set the adjustment formula: "[T]he decision is positive because it establishes that the readjustment of pensions is not under judicial jurisdiction anymore."[116]

There are some alternative explanations for the calibration of assertiveness. It might be argued that the Justices miscalculated the relevance of the issue within the government. However, this is improbable. The improvements in pensions were a fundamental policy of Kirchner's government. As explained above, the ruling praised this policy's main aspects and acknowledged that they were positive developments. Alternatively, it might be said that the ruling was not a real challenge and was in line with the government's interests. However, the government's subsequent behavior leads to a contrary conclusion. Eventually, in 2007, the government passed a law in response to the ruling; the new law did not comply with this and triggered the *Badaro II* decision, which ruled such a law unconstitutional.[117]

Some editorials remarked that the *Badaro I* decision was one in a series of rulings that created political tensions between the Justices and the government.[118] Along these lines, President Fernandez eventually made the ramifications of the *Badaro I* decision evident amid a dispute over the judicial budget. In her opening speech to Congress at the beginning of the legislative year in 2008, she implicitly referred to the *Badaro I* decision. In response to Chief Justice Lorenzetti's demand for a budget increase for the judiciary, she claimed the following:

> We have increased their resources by 173% since 2003. This prestigious Court has instruments in its hands in order to have a better administration of justice [. . .] and if they [the Justices] have powers to instruct the legislature to dictate any law or the Executive to do something that is of its competency [. . .]. How is it that they [the Justices] do not have the power to get things straight within their institution?[119]

The *Badaro I* decision shows how the Justices made skillful movements to balance a complex context. They calibrated their intervention's intensity by altering this remedy's feature in light of the government's tolerance interval. Such reduction did not affect their strategy to build legitimacy as they managed to attract a high level of public support.

5.3. Calibrating decisions to build public support: The *Fundación Sur* decision

Judges must acquire and develop skills for balance in a complex context where the government and the public pose constraints. Deploying a strategy to raise diffuse support based on activism also requires skillful movements. It exposes the Court to

[116] Irina Hauser, *Un blindaje para el bolsillo de los abuelos*, Página/12 (Aug. 9, 2006), www.pagina12.com.ar/diario/elpais/1-71183-2006-08-09.html.

[117] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/11/2007, "Badaro, Adolfo Valentín c/ ANSeS s/ Reajustes varios," Fallos (2007 330:4866), ¶ 24.

[118] *See, e.g.*, *Una relación cargada de tensiones*, La Nación (Mar. 7, 2009), www.lanacion.com.ar/1106296-una-relacion-cargada-de-tensiones.

[119] *Seguridad: "Hay conexidad con la última dictadura militar,"* La Nación (Mar. 2, 2008), www.lanacion.com.ar/992187-seguridad-hay-conexidad-con-la-ultima-dictadura-militar.

criticism from society's conservative sectors. Although the Justices do not expect to please all social sectors, such criticism might be significantly extended. In such situations, Justices may find it more beneficial for their strategy to save the Court from conservative criticism rather than enhance the activist image. This suggests, in turn, that specific support might be more critical than diffuse support under particular circumstances. Therefore, specific support sometimes operates to limit the construction of diffuse support.

The *Fundacion Sur* decision exemplifies how judges balance these constraints in their rulings.[120] As in *Badaro I*, they restrained their activism. However, unlike *Badaro I*, they did so to avoid substantial public support loss and appease conservative critics. They calibrated the decision's intensity to simultaneously resolve the tension they faced to build specific and diffuse support. This time, they avoided ruling that key national legislation, a substantial element of the policy under review, was unconstitutional. Thus, it is coded as the least intense remedy as it partially challenges a government policy, establishes a vague enforcement process, and does not include the participation of other actors in such enforcement.

Under Argentine criminal law, a child under sixteen cannot be held criminally responsible. However, it permits juvenile judges to dictate children's detention under that age to provide moral and material state protection. As a result, they are sent to the same institution in which juvenile offenders are imprisoned. Thus, they not only have to cohabit with juvenile offenders but are also treated as young criminals. It has become an established judicial practice, particularly when the incumbent child comes from a disadvantaged background. Such a tutelary system breached international human rights standards and resulted in the regular violation of children's rights.[121]

In this context, the Fundación Sur (a human rights organization) and the Juvenile Public Defender Office of the City of Buenos Aires filed a *habeas corpus* in favor of all children under sixteen detained in detention centers in the city of Buenos Aires. They requested that Law 22.278 be declared unconstitutional and that children be released immediately.[122] A judge denied the request in the first instance. An Appeals Court reversed this early decision and dictated an SRD, declaring the incumbent law unconstitutional and ordering the children's gradual release as requested by the claimants, state agencies, and civil society organizations. It also requested that the National Congress enact new legislation within the international standard to protect children's rights. The case eventually reached the Supreme Court.

In December 2008, the Court handed down the Fundación Sur decision, substantially modifying the SRDs handed down by the Appeals Court. It requested Congress and the Executive to enact legislation complying with international human rights standards. In doing so, they established that such legislation should be passed within a *reasonable timeframe*. However, they reversed critical features of the SRD dictated by

[120] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/12/2008, "García Méndez, E. y Musa, L. C. s/ causa N° 7537," Fallos (2008 331:2691).

[121] *Id.*

[122] Law No. 22.278, Aug. 25, 1980 (24490) B.O. 3 (Arg).

the Appeals Court decision, including the declaration of the unconstitutionality of Law 22.278. Although they asserted that the law contradicts international human rights treaties, the Justices maintained the tutelary system's validity.

The decision took place within the Government's medium tolerance interval, as it did not relate to an issue salient to the official agenda. Although the case revolved around the detention of children in institutions under the City of Buenos Aire's jurisdiction, the decision ordered the National Government to reform its legislation because the National Congress was in charge of legislating criminal law matters. Notwithstanding, the media did not report any adverse reaction from Government officials.

However, *Fundación Sur* was the only SRD provoking adverse public reactions from a limited number of human rights defenders. The discontent revolved around two specific aspects. First, although the ruling requested that the tutelary system be modified, it was perceived as a validation of a widespread institutional practice that had resulted in a systematic violation of children's rights. For example, the President of *Fundación Sur* and member of the Congress, García Méndez, argued thus: "This ruling is a major human right step back in the country's democratic history because it validates a decree issued by the dictatorship which (in turn) legalizes arbitrary detention explicitly contradicting the National Constitution."[123]

Along the same lines, Laura Musa, Juvenile Public Defender of the City of Buenos Aires, also remarked: "The ruling validates the current tutelary system, which is blatantly against the principles of the rule of law in a democracy. What happened is very grave, and it is a step back in the field of human rights."[124]

The influential journalist Horacio Verbitsky launched a sharp critique. He asserted that the ruling was a reaffirmation of a lukewarm commitment to rights, a tradition embedded in the Argentine society, as the author also claims, which invokes the protection of the weak to justify a violation of rights.[125] Verbitsky referred to the opinion of some Justices that releasing the children would leave them unprotected from a society eager to engage in violent retributive actions, an argument that I discuss below.

Second, the decision on *Fundación Sur* was criticized because it overturned an intense SRD decision. The Court replaced it with a more lenient remedy, leaving the controversial law untouched, and further reversed the release order. Nora Schulman, from the National Monitoring Committee of Children's Rights, declared: "The ruling is a step back because it dismantled a progressive measure [referring to the Lower Court's decision] which helped the State to recognize and implement international standards for the protection of children's rights."[126]

[123] Horacio Cecchi, *La Corte avaló un decreto dictatorial*, Página/12 (Dec. 3, 2008), www.pagina12.com.ar/diario/elpais/subnotas/116033-36960-2008-12-03.html.

[124] Carlos Rodríguez, *Fueron en la línea de la presión pública*, Página/12 (Dec. 3, 2008), www.pagina12.com.ar/diario/elpais/subnotas/116033-36959-2008-12-03.html.

[125] Horacio Verbitsky, *Progresismo*, Página/12 (Dec. 7, 2008), www.pagina12.com.ar/diario/elpais/subnotas/116249-37037-2008-12-07.html.

[126] Cecchi, *supra* note 123.

Why did the Justices render a decision that might have played against their efforts to build public support? One might argue that, in this particular case, the Justices were not preoccupied with building public support. However, a closer look at the context in which the case was dictated suggests the opposite. They were far more concerned with the reactions of conservative actors. Thus, reaffirming the SRDs already in place would have, from this perspective, brought high levels of criticism or, in other words, low levels of specific public support.

If the Justices had ruled the tutelary system unconstitutional, then they would have faced public accusations of releasing allegedly criminal children and thus putting at risk the rest of the population's security.[127] This decision took place in a context where the public agenda was dominated by pushes for harsher sanctions against criminals and stricter measures against juvenile delinquency, as pointed out by human rights activists in my fieldwork.[128] Amid such a debate, there was a widespread sentiment that the judiciary had to also be at fault for the high levels of urban crime. As a result, judges were criticized for not sufficiently investigating and punishing criminals. Key political figures fueled this sentiment. For example, President Fernández, in her speech to Congress, affirmed that police forces were generally fulfilling their duties to protect society by detaining suspects of criminal actions but that judges released them systematically.[129]

Specifically, there was an extended view that lowering juvenile offenders' age was an effective policy against urban crime. For instance, the governor of the Buenos Aires province, one of the most prominent politicians of the official party, claimed that the increasing levels of juvenile delinquency should be tackled by lowering the age of criminal liability to under sixteen.[130]

Fundación Sur was framed publicly as revolving around a juvenile delinquency matter, not a human rights issue. Two of the most important national newspapers covered the issue along these lines. For example, in reporting the Justices' acceptance of its intervention over the issue, *Clarín* made a direct link between the liberation of juvenile offenders and the problem of insecurity, explaining how the potential rise in crime would be fueled by measures such as the one taken by the Appeals Court.[131] In the same vein, the conservative *La Nación* entitled its first article on the case "Juvenile

[127] The foremost critics of the verdict, such as García Méndez, Shulman, and Verbitsky speculated on the Court's strategic behavior. From their perspective, Justices could have anticipated adverse reactions to the release of juvenile offenders, given the visibility of the issue and its media coverage.

[128] CSL1 Interview, *supra* note 68; CSL3 Interview, *supra* note 83; CSL4 Interview, *supra* note 68; CSL7 Interview, *supra* note 83.

[129] Lucas Guagnini, *La Corte Suprema frenó la orden de liberar a los menores de 16 internados*, Clarin (Mar. 19, 2008), http://edant.clarin.com/diario/2008/03/19/sociedad/s-03401.htm.

[130] *Argibay dice que si la Corte libera a los menores serán "blancos móviles,"* Clarín (Dec. 4, 2008), http://edant.clarin.com/diario/2008/12/04/policiales/g-01815504.htm; Emilio García Méndez, *La libertad de los otros*, Página/12 (Nov. 16, 2008), www.pagina12.com.ar/diario/sociedad/3-115110-2008-11-16.html; *Primero, que baje la pobreza*, Página/12 (Dec. 12, 2008), www.pagina12.com.ar/diario/sociedad/3-116442-2008-12-10.html.

[131] Guagnini, *supra* note 129.

Delinquency."[132] It is particularly telling that although they did not praise the ruling as a positive development explicitly, both *Clarín* and *La Nación* gave almost no coverage to the critiques addressed by human rights activists. Only *Página 12* covered the disapproval and framed the case using a human rights angle.

A further element adds leverage to the conclusion that the Justices moved strategically. The ruling contradicted what at least two Justices thought of the tutelary system. Justices Argibay and Zaffaroni stressed publicly that the tutelary system was unconstitutional on several occasions.[133] However, they joined their colleagues in a unanimous ruling that journalists,[134] human rights activists, and legal practitioners and scholars saw as an unjustified change of position.[135]

Perhaps the Justices calculated that human rights activists' adverse reactions would not be extended and would cause little damage to the Court's reputation. At least two factors led to this conclusion. Although the Justices did not meet some human rights defenders' expectations, their decision constituted an *SDR*. In this regard, the Justices preserved, although partially, the Court's activist image. Also, the Justices argued that they had protected the interests of children under the tutelary system. Justices Argibay, Fayt, and Zaffaroni defended the decision.[136] They argued that ruling the tutelary system unconstitutional would have meant putting children accused of criminal action at serious risk. Furthermore, they claimed that high social stigmatization would have translated into violent action against these children by society at large. In this way, the Justices argued they had protected the young people's interests while requesting that the government change the legislation.

The second factor relates to the widespread acceptance the Justices enjoyed among human rights defenders at the time of the ruling. As mentioned by several interviewees, the majority of the most prominent progressive legal scholars and human rights activists viewed the Justices positively. They felt that overtly criticizing the Justices would undermine their prestige. One legal scholar described the situation this way: "There was a sentiment of a partnership between progressive scholars, activists, and Justices in the struggle to reconstitute the legal protection of human rights dismantled by the previous Court. In this context, raising voices against the Justices in the public arena would mean to play against this partnership."[137]

[132] Adrian Ventura, *Delincuencia Juvenil. Frenó la Corte la liberación de 60 chicos detenidos*, La Nación (Dec. 3, 2008), www.lanacion.com.ar/1076893-freno-la-corte-la-liberacion-de-60-chicos-detenidos.

[133] *Argibay dice que si la Corte libera a los menores serán "blancos móviles," supra* note 130; Irina Hauser, *No soy partidario de ninguna medida excepcional en estos juicios*, Página/12 (Dec. 21, 2008), www.pagina12.com.ar/diario/elpais/1-117123-2008-12-21.html; *Argibay insistió con su crítica a la policía*, La Nación (Dec. 8, 2008), www.lanacion.com.ar/1078510-argibay-insistio-con-su-critica-a-la-policia.

[134] R1 Interview, *supra* note 81.

[135] CSL2 Interview, *supra* note 68; CSL4 Interview, *supra* note 68; CSL5 Interview, *supra* note 69; CSL7 Interview, *supra* note 83; LP1 Interview, *supra* note 83; LP5 Interview, *supra* note 83; LS1 Interview, *supra* note 82; LS2 Interview, *supra* note 82; LS3 Interview, *supra* note 82.

[136] *Argibay dice que si la Corte libera a los menores serán "blancos móviles," supra* note 130; Hauser, *supra* note 127; *Argibay insistió con su crítica a la policía*, *supra* note 133; *Primero, que baje la pobreza*, *supra* note 130.

[137] LS2 Interview, *supra* note 82.

The negative criticism against the ruling was limited. As discussed above, only a few human rights defenders publicly criticized the ruling. Laura Zommer, from *La Nación*, interviewed many of the most prominent figures in the human rights community after the Court issued the decision. The article assessed the work of the Justices in a very positive way. The interviewees highlighted the positive image of the Justices as committed to the defense of human rights. Unsurprisingly, *Fundación Sur* was not mentioned.[138]

The evidence suggests that the Justices reduced their assertiveness as a reaction to a potential loss of public support. In this case, they dictated a lenient SRD to avoid severe criticism from a large portion of society, which demanded stricter criminal punishment for juvenile delinquency and blamed judges for not prosecuting criminals. Thus, the Justices preferred to run the risk of being exposed to criticism from a minor but vocal segment of the human rights community.

6. Conclusion

This article aims to understand why Latin American courts, despite their institutional weakness, engage in bold forms of activism represented by SDRs. This type of decision is risky for judges operating in politically unfriendly contexts. They can be seen as strong challenges to government authority and thus prompt retaliation. They can also damage the courts' reputation as they might receive strong criticism from influential conservative groups of society opposing progressive structural reforms.

Grounded on Latin American judicial politics literature, we made the unconventional claim that SRDs are driven by judges' desires to protect the institutional stability of the courts. For that reason, I proposed the *equilibrist model*, an alternative account of how judges seek institutional protection. Incorporating the legitimacy-building dimension of the strategic game, it predicts some level of assertiveness while remaining careful about the elites' preferences and those of the mass public and opinion leaders.

The model proposes that Latin American judges, as equilibrists walking a tightrope, use a pole to balance two opposing forces and calibrate each step. In doing so, they overcome the limitations of standard judicial politics explanations in three realms.

First, the model contends that two concrete sets of considerations drive judicial behavior in salient political cases. I claim that judges' biggest concern is protecting their courts, which leads them to build public support while avoiding political conflicts. The interests of the public and the government are the opposing forces judges must balance to tread the tightrope.

Second, my approach looks at the tools judges can use to respond to the constraints imposed by unfriendly political scenarios. Such tools allow judges to exert some control over opponents' power and authority. For example, they can employ legal

[138] Zommer, *supra* note 97.

techniques, which are not always regulated by procedural codes, and docket control. Judges use such powers to calibrate the assertiveness of their decisions. Under this model, judges can use such powers as balancing tools to walk the tightrope.

Third, the model takes a complex view of judicial outcomes and goes beyond assuming that courts will be either deferent or assertive, with no space for outcomes falling between the two extremes. Judicial decisions need not be zero-sum games where one party wins everything; rulings can instead be measured by their degree of assertiveness. In my model, rulings are the steps equilibrist judges carefully take one at a time. The balancing act determines their speed and firmness.

As a result, I propose that judges select cases, time their decisions, and calibrate their assertiveness according to a strategic calculation. Such calculus considers the government's tolerance interval. The interval varies according to the salience of the cases to the government and its strength to resist popular backlash. Meanwhile, judges also calculate the reactions of opinion leaders who are thought likely to shape diffuse and specific support. I propose that judicial activism's intensity, measured by judges' use of a different type of remedy and alteration of the features of the same kind of remedy, will increase when the government's tolerance is higher and the public appears more supportive.

The public's role becomes crucial in my model. On the one hand, it enables judges to achieve their goals through building public support. On the other hand, the public also constrains judges. If judges care to build public support and, thus, increase their work visibility, their maneuverability in strategically deferring to power elites and ruling in progressive directions will be narrowed.

The analysis of the Argentine Court's SRDs confirms the model. The Justices reduced the likelihood of retaliation mainly by using SRDs over issues that were not salient to the official agenda whether the government was weak or powerful, and these decisions provoked strongly positive public reactions. Additionally, the Justices strategically calibrated assertiveness to avoid a full confrontation with the government. Also, they resorted to calibrating SRDs to save the Court from conservative criticism instead of enhancing the activist image, which suggests that specific support might be more critical than diffuse support under particular circumstances.

This study offers an insightful account to help readers understand judicial activism in Latin America. Particularly concerning SRDs, it shows that strategic judges can use them without damaging their effort to protect their courts and tenure. SRDs, on the one hand, represent some of the most extreme forms of judicial activism, but on the other hand, they present opportunities to navigate political constraints. They also allow courts to build support among key constituencies by ruling in progressive directions. Simultaneously, the nature of SRDs enables courts to adjust decisions to avoid fully antagonizing societal sectors and political elites. Precisely, this study shows that variation in elites' tolerance leads to more or fewer SRDs and that the types of SRDs vary depending on how the Court perceives political and public opinion risks and opportunities.

Appendix 1

Interviewees' Prefixes

Category of interviewees	Prefixes
Supreme Court Justices	J1
	J2
	J3
	J4
Court's clerks	CC1
	CC2
	CC3
	CC4
	CC6
	CC8
	CC9
	CC10
	CC11
	CC12
	CC13
	CC14
Journalists	R1
	R2
	R3
	R4
	R5
Civil society leaders	CSL1
	CSL2
	CSL3
	CSL4
	CSL5
	CSL6
	CSL7
Legal practitioners	LP1
	LP2
	LP3
	LP4
	LP5
Legal scholars	LS1
	LS2
	LS3
	LS4
	LS5

Appendix 2

List of *SRDs*

Case	Summary	Year	Intensity
Verbitsky Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2008, "Verbitsky, Horacio s/ Habeas Corpus," Fallos (2008 328:1146).	The ruling required the creation and implementation of a prison public policy aimed at solving a systemic violation of human rights that occurred under the prison system of the province of Buenos Aires.	2005	Most intense
Riachuelo I Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2008, "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/daños y perjuicios (daños derivados de la contaminación del río matanza-riachuelo," (2006 1569-M-40-ORI).	The ruling requested to the Municipal, Provincial, and National governments to create a specific and coordinated policy to avoid future damages and to start the cleaning of the *Riachuelo* river.	2006	Most intense
Badaro I Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/08/2006, "Badaro, Adolfo Valentín c/ ANSeS s/ Reajustes varios," Fallos (2006 329:3089)	The decision requested the Government to enact a bill establishing a pension adjustment criterion guaranteeing a proportional relationship between employed workers' current salaries, retirements, and pensions.	2006	Moderate
Lavado Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/02/2007, "Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otro s/ acción declarativa de certeza," Fallos (2007 330:1135)	The decisions required the National and Provincial Governments to adopt urgent measures to protect the lives and physical integrity of the individuals detained in prisons in the Mendoza province.	2006	Intense
Rosza Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/05/2008, "Rosza, Carlos Alberto y otro s/ recurso de casación," Fallos (2007 330:2361)	The ruling requested to the Congress and the Executive to create a new mechanism for the appointment of temporary judges.	2006	Intense

Appendix 2 Continued

Case	Summary	Year	Intensity
Editorial Río Negro Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/2007, "Editorial Río Negro S.A. c. Provincia del Neuquén," Fallos (2007 330:3908)	The ruling prohibited the Río Negro provincial government from discriminating against news media by arbitrarily withdrawing or reducing the placement of official advertising. It requested the government to create and implement a new policy on the matter.	2007	Intense
Defensor del Pueblo Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/09/2007, "Defensor del Pueblo de la Nación c/ Estado Nacional y otra (Provincia del Chaco) s/ proceso de conocimiento," Fallos (2007 330:4134)	The ruling requested the National and Provincial governments to implement a series of policies to protect the rights of an aboriginal community.	2007	Intense
Riachuelo II Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/09/2008, "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo)," Fallos (2008 331:1622)	The ruling requested the Municipal, Provincial, and National governments to implement a specific and coordinated policy to avoid future damages and to start the cleaning of the *Riachuelo* river. The implicated state agencies elaborated this policy in response to *Riachuelo I*.	2008	Most intense
Fundación Sur Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/12/2008, "García Méndez, E. y Musa, L. C. s/ causa Nº 7537," Fallos (2008 331:2691)	The ruling requested the Congress and the Executive to enact legislation complying with international human rights standards in matters related to juvenile detention.	2008	Least intense

Appendix 2 Continued

Case	Summary	Year	Intensity
Desmonte Salta Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 29/12/2009, "Salas, Dino y otros c/ Salta, Provincia de y Estado Nacional s/ amparo," Fallos (2009 332:663)	The ruling upheld a petition by seven indigenous communities and an organization of small producers from Salta Province. It ordered the preventive measure of stopping deforestation of aboriginal lands in the province of Salta, and the implementation of a policy aimed to collect information on the environmental impact of this activity.	2009	Most intense
FAL Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012, "F. A. L. s/ medida autosatisfactiva," Fallos (2012 335:197)	The ruling settled a longstanding debate over which abortion cases cannot be criminally prosecuted. It clarifies that any woman who has been raped may seek an abortion without criminal liability and without any court authorization. The ruling required authorities to implement a policy aimed to eliminate illegal hurdles (for example, the need to file a police report or obtain a court order to end a pregnancy resulting from rape) as well as regulatory barriers (such as narrow interpretations of "sexual abuse" or unnecessary waiting periods) to obtaining a safe, voluntary termination of pregnancy.	2012	Moderate