2022

Courts, Constitutionalism, and State Capacity: A Preliminary Inquiry

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Modern constitutional theory deals almost exclusively with the mechanisms for controlling the exercise of public power. In particular, the focus of constitutional scholars lies in explaining and justifying how courts can effectively keep the exercise of public power within bounds. But there is little point in worrying about the excesses of government power when the government lacks the capacity to get things done in the first place. In this Article, we examine relations between the courts, constitutionalism, and state capacity other than through limiting state power. Through a series of case studies, we suggest how courts confront the problem of state building, and how the question of state capacity informs constitutional doctrine. Our studies consist of litigation over life-saving medication in Brazil, "engagement" remedies in South Africa, the problem of pretrial detention in India, and the validity of India's recent biometric identification project. As we show, state capacity is a crucial variable in the development of constitutional doctrine—and while engaging with the issue of state capacity, courts often play a role in facilitating its expansion. The case studies identify a number of mechanisms that courts use to encourage capacity development: providing incentives to enhance capacity, guiding and directing the state to perform specific actions, compensating for weak capacity by absorbing the problem, and endorsing measures that purport to increase capacity. We then offer an expressly idealized model by which courts can negotiate capacity-related concerns. Courts can, in certain instances, respond to the problem of state capacity through weak-form, dialogic, experimentalist forms of review. The precise role that courts can and should play in this regard remains to be fully studied, but focusing on the question of state capacity allows us to better explain contemporary constitutional doctrine in several jurisdictions, and highlights the challenges involved in at once creating and limiting state power.

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† https://doi.org/10.1093/ajcl/avac009

Introduction

"You must first enable the government to control the governed; and in the next place oblige it to control itself."[1] So wrote James Madison in *Federalist No. 51*. Modern constitutional theory deals almost exclusively with the "next place"—the mechanisms for controlling the exercise of public power. Constitutional review by courts has become the primary mechanism for doing so. The focus of constitutional scholars lies in explaining and justifying how courts can effectively keep the exercise of public power within bounds.

We think that Madison had his priorities right. There is little point in worrying about the excesses of government power when the government lacks the capacity to get things done in the first place. In this Article, we examine relations between the courts, constitutionalism, and state capacity other than through limiting state power.[2] That courts can and often do control the exercise of state power is widely known—it is a key reason for why we have them. However, the role that courts might play in building the state has been relatively less studied. Through a series of case studies, we suggest several ways in which courts confront the problem of state building, sometimes explicitly but more often implicitly, and how the question of state capacity shapes and informs constitutional doctrine. State capacity is a crucial variable in the development of constitutional doctrine—and in the process of engaging with the issue of state capacity, courts often play a role in facilitating its expansion.

The question of state capacity has invited remarkably little attention within constitutional law. On occasion, scholarship in comparative constitutional law addresses questions of state capacity; when scholars examine how "well" different forms of governance do along specified dimensions and find that one form does better than another along some dimension, they are implicitly concluding that the "better" form has more capacity to perform the specified function.[3] These evaluations, though, tend to be "in gross," focusing on forms of government described in quite general terms, as when scholars contrast presidential and parliamentary systems or democratic and authoritarian ones.[4]

This is a mistake. As Samuel Huntington observed, "[t]he most important political distinction among countries concerns not their

1. The Federalist No. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).
2. For our definition of "state capacity," see *infra* text following note 11.
3. *See, e.g.*, Torsten Persson & Guido Tabellini, The Economic Effects of Constitutions (2005) (concluding that presidential systems have smaller governments than parliamentary ones, as measured by government spending as a fraction of gross domestic product).
4. On constitutions in authoritarian states, see Constitutions in Authoritarian Regimes (Tom Ginsburg & Alberto Simpser eds., 2013); Authoritarian Constitutionalism: Comparative Analysis and Critique (Helena Alviar Garcia & Günter Frankenberg eds., 2019).

form of government but their degree of government."[5] He continued by noting that many countries in Asia, Africa, and Latin America were at the time ones "where the political community is fragmented against itself and where political institutions have little power, less majesty, and no resiliency—where, in many cases, governments simply do not govern."[6]

Huntington was not alone. His emphasis on state capacity—on the ability of political institutions to negotiate and enable socio-economic change—has been a central feature in the study of politics for several decades. Political scientists have considered how state capacity can be defined and measured, as well as how it emerges and evolves.[7] Among other things, scholars have emphasized the importance of state building to democracy and development;[8] have attended to factors, such as public goods, that can contribute to better capacity;[9] have studied the impact of state capacity on welfare outcomes;[10] and have examined how the problem of low capacity can shape the behavior and incentives of public officials.[11] One relatively modest goal of this Article is to bring to the fore the ways in which variations in state capacity affect the problems that constitutional courts are called upon to address, and to illuminate some facets of the ways in which courts indirectly and (less often) directly deal with state capacity while dealing with constitutional challenges "on the merits," so to speak.

In this Article, we avoid an elaborate account of state capacity and adopt a relatively simple and thin definition: state capacity is the ability of a government-in-place to develop and implement policies that its leaders believe will improve national well-being. We take this to identify a condition that exists in degrees. Consider a government that operates a nation's rail system. It has *some* capacity even if the trains run only roughly on time and regularly break down. It has *less* capacity if the government is unable even to develop programs that hold out the prospect of improving on-time performance. It has *some* capacity when it has a sales tax in place; it has *less* capacity when taxes levied at the point of sale are not fully remitted to the treasury; and it has even less capacity when it is unable to develop a

5. Samuel P. Huntington, Political Order in Changing Societies 1 (1968). For Huntington's reference to Madison, see *id*. at 7.

6. *Id*. at 2.

7. For a helpful review, see Elissa Berwick & Fotini Christia, *State Capacity Redux: Integrating Classical and Experimental Contributions to an Enduring Debate*, 21 Am. Pol. Sci. Rev. 71 (2018).

8. *See, e.g.*, Francis Fukuyama, *The Imperative of State Building*, 15 J. Democracy 17 (2004).

9. *See, e.g.*, Timothy Besley & Torsten Persson, *The Origins of State Capacity: Property Rights, Taxation, and Politics*, 99 Am. Pol. Sci. Rev. 1218 (2009).

10. *See, e.g.*, Daron Acemoglu, Camilo García-Jimeno & James A. Robinson, *State Capacity and Economic Development: A Network Approach*, 105 Am. Econ. Rev. 2364 (2015).

11. *See, e.g.*, John D. Huber & Nolan McCarty, *Bureaucratic Capacity, Delegation, and Political Reform*, 98 Am. Pol. Sci. Rev. 481 (2004).

plan for increasing the rate at which the taxes are remitted. Similarly, a state lacks capacity when the government is routinely thwarted in its efforts to implement the policies it adopts, by resistance from an established bureaucracy or by bureaucratic inertia or incompetence. To provide yet another example—a simple, concrete one drawn from a scenario explored in our study—a system that has in place a regular system for updating lists of approved medications has greater capacity than one that lacks such a system. The term thus refers to much more than the sum of material resources available to a government for implementing its programs, and specifically includes the varying ability of bureaucracies.

State incapacity has, of course, many causes. The nation's party system may be so chaotic and incoherent—if, for example, parties are generally the vehicles solely for their leaders' personal enrichment—that coalition governments could come and go without accomplishing anything. Bureaucrats may be so underpaid that they take bribes that lead them to systematically ignore the directives they receive from higher-ups. We could extend the list of incapacity's causes to almost indefinite length. Our interest, though, lies in a somewhat different question: How can institutions address the problem of state capacity where it is lacking? Clearly enough, they can do so by addressing specific causes of incapacity. For example, a government that can develop policies but is unable to implement them because of bureaucratic incompetence or corruption can professionalize the civil service by establishing a central training body and by creating a vigorous anti-corruption agency.

This Article focuses on courts as institutions where the problem of capacity surfaces in important ways, and where legal doctrine is asked to adapt to the reality on the ground. The case studies that we consider demonstrate how courts can sometimes share an empowering relationship to state power. Their role is not restricted to limiting the state. We do not think that courts can (or do) routinely play a large role here. Their ability to build capacity is limited where the roots of incapacity run deep. Still, the case studies in this Article illustrate several ways in which courts confront the issue of state capacity, and how they can at times contribute—always on the margins—to building state capacity. To appreciate the role of courts in building the state, we must attend to how legal doctrine can on occasions influence the development of state capacity, and sometimes seems motivated by an interest in doing so.

The case studies that follow describe four mechanisms by which courts can address gaps in capacity, including deficits in planning ability. We do not argue that considerations of state capacity either expressly motivate what the courts we examine do, or that addressing issues of state capacity will inevitably produce greater conformity to constitutional requirements (and therefore will not offer a complete solution to problems that have sometimes been intractable). Each

case study involves judicial intervention in complex policy domains. Identifying the many ways in which governments can intervene in those domains is outside our concern, as is offering even modest normative guidance about the best substantive policies in those domains. Our descriptive and normative interests are in comparing what we sometimes call the remedies that courts use, with the aim of bringing to attention what we believe to be a generally overlooked dimension of remedial action: the consideration of state capacity.

Drawing on these studies, the Article then puts forth an expressly idealized model by which courts can negotiate capacity-related concerns. The case studies identify a number of mechanisms that courts use to encourage capacity development: providing incentives to enhance capacity, guiding and directing the state to perform specific actions, compensating for weak capacity by absorbing the problem, and endorsing measures that purport to increase capacity. Our case studies suggest both the possibilities of the mechanisms outline in our model, as well as limitations and concerns that might be associated with them.

Our first two examples are well-known in the literature on judicial remedies for rights-based violations. The first is a relatively basic example from Brazil: A simple bureaucratic failure led to litigation over a constitutional right to life-saving medication. The litigation generated outcomes that were increasingly irrational from the government's point of view. Prodded by the litigation, the government responded by attempting to fix the bureaucratic failure.

The second example, from South Africa, begins with litigation like that in Brazil, but here the situation was one in which the government's policies were legally defensible. NGOs shifted their attention to other areas involving socioeconomic rights where the government's policies were substantially more vulnerable. The courts ordered remedies that the government could implement with minor changes in its policies. The remedies did not substantially enhance state capacity. Later, litigation over socioeconomic rights produced a novel set of "engagement" remedies that focused on the state's capacity to adopt policies that would be acceptable to those affected by them—in short, the remedial action contributed to an increased capacity to generate policy both within the government and for the affected communities.

The third and fourth examples come from India, and we present them in somewhat greater detail because the third and probably the fourth are less well-known than the first two. In the third, the Indian courts took note of the inability of the nation's police forces to deal promptly with serious questions about pretrial detention. Rather than enhancing the police capacity to deal with those questions, the Indian courts simply absorbed the tasks into the judiciary. In doing so, they raised a second question of capacity—their own capacity to deal with the problem at hand.

That concern becomes prominent in the final case study. India has an ambitious system of social provision, though it is notoriously affected by corruption at the point of delivery. Many intended beneficiaries do not get what they are entitled to receive, and many who are not entitled to benefits get them nonetheless by bribing low-level officials. Drawing upon the availability of new technologies, the Indian government has developed a system of biometric identification. This has enhanced its capacity to deliver social services accurately, but it has also threatened citizen privacy interests. The Indian Supreme Court found the biometric identification system constitutionally permissible on the condition that it was implemented with certain safeguards against invasions of privacy, though it paid far greater attention to the problem of building the state (Madison's first concern) than to the problem of excessive state power (Madison's second concern).

Of course, these court decisions do not come out of the blue. Most resulted from organized efforts by NGOs with litigation-oriented strategies. Charles Epp once described these organizations as providing a "support structure" for constitutional revolutions.[12] NGOs and other entities that generate court action too must have the capacity to act. While we leave to another occasion the examination of how such organizations develop their distinctive capacities, we underline several aspects of our present effort. First, comparative constitutional scholarship has long focused on varying patterns of legal and judicial development across different jurisdictions without sufficiently attending to the possibilities and constraints that courts face within their nations. As we show, such inattention can limit our understanding of comparative constitutional doctrine. The usual focus on how constitutions restrict state power might be beside the point in nations where the primary concern is the creation of the state. As we have already noted, variations in state capacity might be relevant to identifying a wider-than-usual range of judicial remedies for constitutional violations, and, to some degree, relevant in explaining what different remedies might accomplish. Simply put, attention to the problem of state capacity might provide an important explanatory account of legal doctrine.

Moreover, this Article contributes to a burgeoning body of literature on the role that courts occupy in regimes that suffer from problems of weakness and instability.[13] It explores how the institutional role that courts play will, in an important sense, be shaped by the context in which they operate not only in terms of power relations and

12. Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (1998).

13. *See, e.g.*, Samuel Issacharoff, Fragile Democracies: Contested Power in the Era of Constitutional Courts (2015).

public opinion, but also in terms of what can and cannot be achieved at the level of capacity.

Third, the present study intervenes in an emerging genre of scholarship around the idea of positive constitutionalism; that is, the thought that constitutionalism should be understood as a means to construct and devise the state rather than as a tool to inhibit and control it.[14] Constitutionalism is, in other words, not exclusively about the restrictions on state power. Our Article considers the role that courts can and do sometimes play within an affirmative understanding of constitutionalism.

Finally, the emphasis on building state capacity also speaks to the traditional concern in constitutional law of limiting state power. Abuses of power do not occur only in strong states, where the machinery of government can be used in a systematic and organized fashion to limit freedom. Such abuses occur in weak states as well, where the form of abuse involves agents acting independently in an environment where the state is unable to rein in its agents. In other words, as Madison understood, an important dynamic exists between creating the state and preventing the misuse of power.[15]

We do not, because we could not, claim that judicial attention to questions about state capacity would provide definitive solutions to constitutional problems generated in part by the lack of state capacity. Nor do we claim that the judicial interventions we describe were uniformly successful (nor that whatever success the courts achieved occurred *because* they addressed issues of state capacity). Rather, our aim is to identify and then offer some theorization of what we believe to be an under-appreciated aspect of contemporary constitutional adjudication.[16]

14. *See, e.g.*, JEREMY WALDRON, POLITICAL POLITICAL THEORY 23–44 (2016); N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (2018).

15. Contemporary commentators have recognized that state capacity can be a double-edged sword. For a recent observation in the context of police reform in India, see Pratap Bhanu Mehta, "*Thoka Raj*," INDIAN EXPRESS (July 11, 2020), https://indianexpress.com/article/opinion/columns/vikas-dubey-encounter-case-up-police-6499823 ("The police, by all accounts, is one of the most distrusted institutions of the Indian state. You might say that police reform will create more trust. But when you have low levels of trust, you fear that empowering the police more or reforming it is simply giving them more powers of repression. If you don't trust the police, do you actually want to make it more efficient? If the structure of your existence, as is the case with hundreds of millions of poor people, inhabits zones of state-created illegality, would you actually want to give police more enforcement power? Disempowered groups, who already suffer most at the hands of the police fear an effective police force even more; whatever little margins of negotiation they might have would disappear. And the privileged would rather have a negotiable system.").

16. We note that a great deal of sophisticated theorization deals with constitutional violations that occur deliberately, as with the use of torture to extract confessions, or that occur when governments act in bad faith, as with many issues associated with the regulation of speech. As we discuss, cases about "states of unconstitutionality" sometimes deal with problems presented by state incapacity, although not always.

I. Brazil: Incentives and Bureaucratic Capacity

Brazil's 1988 Constitution, like many post-1945 constitutions, contains a right to "health."[17] The nation's healthcare system is extremely complex. Healthcare is available to all. City, state, and national governments administer the delivery of healthcare, both by operating facilities themselves and by contracting with private providers for that delivery.[18] The Ministry of Health maintains a list of medications that will be provided to Brazilians who demonstrate a need for them.[19] The list, periodically updated, includes many medications, but not those that the Ministry regards as experimental or whose benefits, the Ministry determines, have not yet been adequately established.

A Brazilian whose request for a specific medication has been denied can seek judicial review of the denial. Administrative and constitutional law provide the bases for such review. The complainant can argue, for example, that the Ministry mistakenly defined the medication as experimental, or that its identification of the permitted dosage of an approved medication is inconsistent with sound medical judgment. Or, in a constitutional register, the complainant can assert that the medication, though experimental, is necessary to protect the patient's constitutional right to health: the patient's life is at risk, all approved medications have failed to treat the patient's condition, and there is some reason to believe that the medication might cure or at least alleviate the medical condition.

Similar claims have been brought in other jurisdictions. The most well-known instance is South Africa's *Soobramoney* case.[20] There a patient with severe ("terminal," as it was referred to in the litigation) heart and vascular disease sought an order directing that he should receive renal dialysis pending a kidney transplant. The public hospital that Soobramoney visited had developed criteria for eligibility for those treatments at public cost. The hospital's guidelines aimed at providing the services to those who would receive the most benefit from them, and Soobramoney's condition meant that he would receive far less benefit—a quite short prolongation of his life at most—than others. The Constitutional Court of South Africa recognized the

17. Constituicao Federal [C.F.] [Constitution] art. 6 (Braz.) (". . . health. . . [is a] social right[], as set forth in this Constitution"); Constituicao Federal [C.F.] [Constitution] art. 196 (Braz.) (1988) ("Health is the right of all and the duty of the National Government and shall be guaranteed by social and economic policies aimed at reducing the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.").

18. According to Hoffman and Bentes, this is done "through more than seventy different payment modalities." Florian F. Hoffman & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* Courting Social Justice 100, 107 (Varun Gauri & David M. Brinks eds., 2008).

19. *Id*. at 127 (referring to the "*Consenso*, or list of approved medications and procedures").

20. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

emotional pull of Soobramoney's claim but rejected it.[21] Some method of allocating the limited resources available for transplants was necessary, and the medical judgments underlying the ministry's priority list were reasonable.[22] The South African Court's evaluation of the priority list's reasonableness reflected its understanding that granting Soobramoney's plea would have precedential effects throughout the transplant system: the ministry would have to adjust its priority list according to whatever principle the courts developed to explain why Soobramoney had a constitutional right to jump the queue.[23]

Confronting the structurally similar claims for medications that held out the prospect of saving a life, the Brazilian courts responded differently. One after another they granted the patients' pleas, finding that denying the medication would violate the constitutional right to health. Scholars who have discussed these cases have suggested that Brazilian judges were unable to resist the emotional tug given their sympathies by seeing an actual dying patient before them.[24] Yet, the fact that South Africa resisted that tug suggests that something more was involved.[25]

The difference between the South African and Brazilian responses to the problem of prioritization in determining access to potentially life-saving medical treatments may arise in part from the fact that the latter is a civil law system without a well-developed account of precedent. Not only is there no concept of horizontal precedent or even influence by one trial-level judge's decisions on another's,[26] there is an extremely weak practice of vertical precedent, according to which only a quite limited number of decisions by even the nation's highest constitutional court bind lower courts.[27] Further, Brazil's legal culture

21. *Id*. ¶ 31 ("One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life.").

22. *Id*. ¶ 29 ("A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.").

23. *Id*. ¶ 28 ("The appellant's case must be seen in the context of the needs which the health services have to meet, for if treatment has to be provided to the appellant it would also have to be provided to all other persons similarly placed.").

24. *See, e.g.*, Hoffman & Bentes, *supra* note 16, at 132 (referring to "[u]ninformed judges facing inadequate prescriptions couched in the rhetoric of a life and death emergency").

25. The impressive work Octávio Luiz Motta Ferraz, Health as a Human Right: The Politics and Judicialization of Health in Brazil (2020), provides an up-to-date review of the literature and offers an appropriately tempered judgment about the Brazilian story.

26. *See* Mariana Mota Prado, *The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help?*, 41 J.L. Med. & Ethics 124, 128 (2013).

27. Recent changes have made the system of vertical precedent stronger, though it remains to be seen to what extent this will alter the historically weak system. On the recent changes, see Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 Emory Int'l L. Rev. 555 (2012). The weakness of the system of vertical precedent in Brazil is often used as a key point of contrast with other jurisdictions. *See, e.g.*, Julio Rios-Figueroa & Matthew M. Taylor, *Institutional Determinants of the Judicialization of Policy in Brazil and Mexico*, 38 J. Latin Am. Stud. 739 (2006).

encourages a "formalist" or "syllogistic" mode of legal reasoning that minimizes the legal relevance of a decision's consequences.[28]

Without a sense that they were creating precedents, then, Brazilian lower court judges routinely entered judgments in favor of patients seeking life-saving medications not on the approved list. Success rates have been reported as between 80 and 90 percent.[29] Many of the medications were quite expensive precisely because they were experimental or had not yet been shown to be effective.[30] The result was predictable: there were large financial burdens on health ministry budgets. "More than half of the Brazilian Unified Health Care System (SUS) budget in 2010," it has been observed, "was spent on pharmaceuticals and hospital procedures."[31] Florian Hoffmann and Hernando Bentes report that "extra spending on judicially granted medicines for all types of disease rose from R$188,000 in 2003 to around R$26 million in the first half of 2007 alone," and that in São Paulo "the state spent R$48 million on litigated medication in 2004, out of a total medical budget of R$480 million. . .."[32] The situation is such that contempt orders have been routinely entered against health ministers reluctant to devote what they regard as excessive resources to medications and procedures they believe to lack foundation in sound medical judgment, although the orders are rarely enforced.[33]

These right-to-medication cases clearly affected—or distorted—the allocation of resources, both within the healthcare budget and across budget categories.[34] One author observes that "the state spent approximately R$400 million (approximately US$200 million) to comply with court orders benefiting around 35,000 successful claimants," which was equivalent to the resources to be "invested in a

28. Hoffman & Bentes, *supra* note 16, at 105 (referring to Brazil's "formalist tradition"); Mota Prado, *supra* note 24, at 130 (referring to "syllogistic reasoning").

29. Ana Paula de Barcellos, *Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil*, 16 HEALTH & HUM. RTS. J. 35, 36 (2014) (suggesting a "90% success rate for individual lawsuits that request medicines and medical treatment"); Hoffman & Brinks, *supra* note 16, at 119 (observing that "plaintiffs end up with an 82 percent success rate," based upon a somewhat different data set).

30. Hoffmann and Bentes cite a then-recent decision ordering the government "to supply four doses of *Erbitux* (*Cetuximad*) per week to a cancer patient, with each dose of the imported medicine costing approximately US$1,500." Hoffman & Bentes, *supra* note 16, at 123.

31. de Barcellos, *supra* note 26, at 2.

32. Hoffman & Bentes, *supra* note 16, at 140.

33. Hoffmann & Bentes, *supra* note 18, at 133 ("Even daily fines of approximately US$550 to $1,100. . . for non-compliance with a preliminary injunction. . . are often not enough to induce compliance, nor is the issue of a prison mandate for a state or municipal health secretary for criminal contempt, which is hardly ever enforced. . .."). The authors cite a case involving right-to-education litigation in which a school director was "temporarily detained at a police station for not having complied with court orders. . .." *Id*.

34. *See* FERRAZ, *supra* note 25, ch. 8 (epigraph) (quoting a health activist and former minister of health: "The budget of the Brazilian health system is limited. When a judicial order forces the state to provide extremely expensive technologies, these resources will come out of other programmes and policies. . ..").

program of vaccination against pneumococcal bacteria to cover all 3.2 million children born every year in Brazil."[35] Another study places the right-to-medication cases against claims for a right to sanitation, a public health matter with benefits flowing to large populations.[36] And, of course, allocations to the health care budget compete with allocations to other budget areas including some with overtones of constitutional rights such as education and housing and others with centrally important but perhaps not constitutionally mandated matters such as national defense.[37]

Responding to the burgeoning right-to-medication cases, the Brazilian Supreme Federal Court, the nation's highest court for constitutional matters, convened a public audience or hearing in 2009.[38] Many observers expected the hearing to produce a comprehensive solution to the right-to-medication cases, but in the end the Court's decision was seemingly limited.[39] It "provided guidelines" for the courts to use in right-to-medication cases: "[F]or benefits not already offered by the Brazilian health care system (i.e. not in the 'official list'), the courts should distinguish cases where the medication/treatment was simply not considered by the legislative or executive branch from cases in which the government has considered the possibility and decided not to offer the medication/treatment."[40]

This guideline, though, can and does have powerful effects within the health bureaucracy. The health ministry can reduce its costs by updating the list of approved medications because, having done so, it can negotiate with the drug's manufacturers for discounts that would

35. Octavio Luiz Motta Ferraz, *The Right to Health in Brazil: Worsening Health Inequities*, 11 HEALTH & HUM. RTS. J. 33, 41 (2009).

36. de Barcellos, *supra* note 26.

37. Initial studies of the distributional effects of right-to-medication litigation suggested that the cases primarily benefited relatively well-to-do litigants who could afford to hire lawyers. Subsequent studies have qualified that observation by noting that some private lawyers do represent less well-to-do clients and, more important, that significant right-to-medication litigation has been brought by public prosecutors on behalf of the poor. Mota Prado, *supra* note 24, at 125–26, provides an overview of the literature and concludes tentatively that the litigation "seems to be fairly regressive," not with respect to outcomes in the right to medication cases themselves but rather when one takes into account the diversion of resources from other public health programs that might provide greater benefits to the poor. For the most recent contribution to this discussion, see FERRAZ, *supra* note 25, at 225–74.

38. Public audiences or hearings are quasi-legislative sessions in which the Court's members hear testimony from legal and policy experts. Nominally the testimony is about the legal issues implicated in some general matter such as the right to an abortion or the right to medication. Such issues include, for example, the scope of judicial authority. Yet, lawyers can readily import questions of policy into their legal analysis, so the public hearings do explore policy matters as well as legal ones. For a description of public audiences, see Mark Tushnet, *New Institutional Mechanisms for Making Constitutional Law*, *in* DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 167 (Thomas Bustamente & Bernardo Gonçalves Fernandes eds., 2016).

39. Mota Prado, *supra* note 24, at 130 (referring to "very high expectations").

40. *Id*. at 131.

be unavailable were it to pay for the medications as result of litigation.[41] Hoffmann and Bentes suggest that this occurs because "[o]nce a certain litigation density [that is, a significant volume of litigation dealing with a single medication] has been reached, public authorities tend to seek cover by including the medication in the SUS list. . .."[42] Further, when the authorities address themselves to the inclusion of a new medication or procedure on the approved list and offer reasoned justifications for refusing to do so, any litigation that ensues is transformed from the domain of constitutional to administrative law.

The Supreme Federal Court's approach gives health authorities incentives to develop administrative capacity to deal with right-to-medication claims. Mariana Mota Prado offers one example. The Sistema Único de Saúde (SUS) list includes allowable dosages of approved medications. Health officials can refuse to fill a prescription for a larger-than-allowable dosage. According to Mota Prado, "the Health Department in the State of São Paulo created an administrative procedure where the patient can file a request for special treatment."[43] Hoffmann and Bentes describe a settlement in a Rio de Janeiro litigation also seeming to increase bureaucratic capacity.[44] The settlement required the health ministry to create a "one stop" shopping mechanism that would dispense appropriate medications for a range of illnesses on request.

Much of the scholarly literature on the right-to-medication cases, and on the judicial enforcement of social welfare rights more generally, focuses—and often advocates for—enforcement by means of structural injunctions that give the courts a role in continuing oversight of the bureaucracies charged with providing health services, education, housing, and other social welfare rights.[45] Brazilian courts have taken a different approach, yet one that may contribute to the building of state capacity more effectively than structural injunctions that focus on outcomes. The latter tries to reform state bureaucracies coercively, raising the possibility of bureaucratic resistance. Perhaps worse, structural relief does not give bureaucracies strong incentives

41. *Id*. at 128 (referring to a case where the government could have but did not include a treatment on the approved list and "negotiated a discount with the manufacturer of the drug. . . and saved money in transportation and storage with the economies of scale of wholesale purchases").

42. Hoffman & Bentes, *supra* note 16, at 137.

43. Mota Prado, *supra* note 24, at 131. Mota Prado notes that it is unclear whether this procedure "was adopted as a response to litigation," and expresses some skepticism about its likely effectiveness in forestalling litigation. *See also* Motta Ferraz, *supra* note 25, ch. 8.3 (on the role of lists in the Brazilian system).

44. Hoffmann & Bentes, *supra* note 16, at 130–31 (describing a study of the case in Portuguese by Luiz Werneck Vianna and Marcelo Baumann Burgos).

45. A relatively early discussion is Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Perspective (2008). The articles on Brazil that we have cited all juxtapose the right-to-medication cases with structural relief. For additional discussion with regard to remedies in social rights cases, see *infra* note 70.

to overcome the problems of incompetence, inertia, or even corruption that give rise to the problems generating litigation.

Some structural injunctions do address capacity. The Colombian Constitutional Court, for example, has ordered the government to compile statistics on the conditions facing internally displaced persons, and to report these statistics regularly.[46] The government responded by creating statistical units within the relevant ministries. Merely by producing information, these units become players within the bureaucracy and thereby can affect policy development, though the extent to which they do so will depend upon "local" political considerations.[47]

What is notable in the Brazilian case is the use of incentives to improve capacity. As we noted in the Introduction, when courts intervene in complex policy domains, whatever success that occurs often has concurrent sources, and interventions that provide incentives to increase state capacity are no different from other remedial interventions in that regard.[48] Judicial decisions that give bureaucracies incentives to improve capacity are not a magic bullet. Hoffmann and Bentes have observed, for example, that the "one stop" shopping mechanism basically failed because the "stocking with medicines was delayed and insufficient."[49] Where capacity is absent because of incompetence or corruption, judicial remedies of any sort are likely to fail, and remedies that shift responsibility from incompetent or corrupt institutions to

46. The case is excerpted and discussed in Manuel José Cepeda Espinosa & David Landau, Colombian Constitutional Law: Leading Cases 178–89 (2017).

47. We note two components of the scholarly literature on judicial enforcement of social welfare rights, neither of which we discuss here. First, some authors describe "indirect" effects of social-rights litigation. *See, e.g.*, Cesar Rodriguez-Gavarito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 Tex. L. Rev. 1669 (2011). Such effects include "[f]orming coalitions of activists to influence the issue under consideration" and "[t]ransforming public opinion about the issue's urgency and gravity." *Id*. at 1679. Second, others analyze the origins of social rights litigation, especially successful litigation, in social-movement mobilizations. Successful litigation about the provisions of medication to treat HIV/AIDS in South Africa and Brazil is a common example. *See, e.g.*, William Forbath with assistance from Zackie Achmat, Geoff Budlender & Mark Heywood, *Cultural Transformation, Deep Institutional Reform and SER Practice: South Africa's Treatment Action Campaign*, *in* Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty 51 (Lucie E. White & Jeremy Perlman eds., 2010) (discussing South Africa); Hoffmann & Bentes, *supra* note 16, at 125–27 (discussing Brazil). We note here only that we know of no similar accounts of the right-to-medication cases that we discuss here, and we suspect that any such account would be implausible. As far as we know, there were no significant social movement organizations associated with this litigation. *Cf*. Mota Prado, *supra* note 24, at 131 (observing that a Colombian Constitutional Court decision ordering structural relief with respect to health care was not "linked with strong social movements").

48. Our study of the right to health in Brazil does not engage with the debates around intellectual property and generic medications that have been of much importance in the developing world, but it is worth noting that they, of course, relate to the state capacity question in important ways. *See generally* Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 Calif. L. Rev. 1571 (2009); Kenneth C. Shadlen et. al., *Patents, Trade and Medicines: Past, Present and Future*, 27 Rev. Int'l Pol. Econ. 75 (2020).

49. Hoffman & Bentes, *supra* note 16, at 131.

others might be more promising.[50] However, where capacity is absent because of bureaucratic inertia, a small-ish coercive shove may well help to improve outcomes.

II. South Africa: Planning and Citizen Engagement

The 1996 South African Constitution's recognition of socioeconomic rights signaled a major moment in modern constitutionalism. Over the past two decades, the South African experience has played a central role in the broader theoretical and comparative debate over socioeconomic rights. Socioeconomic rights have long invited controversy, and the controversy has typically centered on two themes.[51] The first concern has been democratic legitimacy. That is, whether it is appropriate for unelected judges—rather than elected representatives—to adjudicate matters relating to social and economic welfare that might, for example, implicate budgetary allocations. The second concern has been institutional capacity. Here, the question has been whether courts possess the necessary tools to make fair and efficient determinations on socioeconomic matters. At the heart of the inquiry has been the question of whether courts should intervene in what Lon L. Fuller once termed "polycentric" questions.[52]

In recent years, scholars have addressed these traditional concerns in a variety of ways. Much literature has addressed the artificiality of the conventional distinction between civil-political and socioeconomic rights, and has focused on the conceptual underpinnings of the resistance toward socioeconomic rights.[53] Even though the philosophical interventions in the debate over socioeconomic rights

50. Structural injunctions can be thought of as doing just that, transforming the courts into the direct administrators of social welfare benefits. As we note below, though, whether courts can succeed depends upon *their* capacity. *See infra* Parts III–V. An instructive example comes from India's initial right-to-food litigation. *See* People's Union for C.L. v. Union of India, (2013) 2 SCC 688. There the government had food on hand, stored in warehouses, but because of incompetence simply failed to distribute it to those legally entitled to the food. A simple mandatory injunction was sufficient to overcome the incompetence. For the classic study on the relationship between food availability and distribution: *see* Amartya Sen, Poverty and Famines: An Essay on Entitlement and Deprivation (1981). In India, the present challenge appears to be the quality rather than quantity of food. *See* Abhijit V. Banerjee & Esther Duflo, Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty 19–40 (2011). It should be noted that courts may have inadequate capacity to administer the bureaucracy itself where remedies are more complex, as they often are in structural litigation.

51. *See, e.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. Rev. 857 (2001).

52. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

53. *See* Cécile Fabre, Social Rights Under the Constitution: Government and the Decent Life (2000); Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties 65 (2008); Amartya Sen, The Idea of Justice 379–85 (2009); Jeff King, Judging Social Rights (2012); Katharine G. Young, Constituting Economic and Social Rights (2012).

have been of much significance, an important feature of the response to traditional concerns has been the real and lived experience of socioeconomic rights enforcement. Here, the South African effort with socioeconomic rights over the past two decades has provided scholars with considerable material to evaluate and affirm the possibilities of socioeconomic rights adjudication.[54]

The early years of scholarship on socioeconomic rights in South Africa was primarily focused on three cases: *Soobramoney*,[55] *Grootboom*,[56] and *Treatment Action Campaign*.[57] These cases were seen by global commentators as offering a new model of judicial review—a model that was distinct from the standard form of judicial review that was usually adopted in rights-based cases. Unlike the typical approach toward constitutional rights, where rights have a minimum core and individualized remedies are provided, the South African judiciary had demonstrated the prospect of "weak-form" judicial review.[58] This prospect would allow courts to play some role in the adjudication and enforcement of socioeconomic rights, while being sensitive to some of the concerns relating to judicial review.[59] This approach had been made possible by the text of the South African Constitution. Section 26, for example, which provided for "the right to have access to adequate housing," stated that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."[60] Similarly, Section 27, which provided for a right of access to healthcare, water, and the like, spoke

54. One should note that the traditional concerns with socioeconomic rights were raised with the regard to their specific incorporation in the 1996 South African Constitution. *See* Certification of the Constitution of the Republic of South Africa 1996, 1996 (10) BCLR 1253 (CC). South Africa is, of course, hardly the only nation whose experience with socioeconomic rights has invited study. Prominent other examples include Colombia and India. *See* David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J. 190 (2012); Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 Int'l J. Const. L. 739 (2010). On some trends in socioeconomic rights adjudication globally, see generally Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (Malcolm Langford ed., 2008). For a recent reflection, see The Future of Economic and Social Rights (Katharine G. Young ed., 2019).

55. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

56. *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC).

57. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC).

58. *See* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 Int'l J. Const. L. 391 (2007); Tushnet, *supra* note 45; Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, *in* Designing Democracy: What Constitutions Do 221 (2001). For an account of the first decade of the South African Constitutional Court, with an emphasis on judicial strategies that allowed the Court to make its decisions, see Theunis Roux, The Politics of Principle: The First South African Constitutional Court, 1995–2005 (2013).

59. *See* Mark Tushnet, *The Rise of Weak-Form Judicial Review*, *in* Comparative Constitutional Law 321 (Tom Ginsburg & Rosalind Dixon eds., 2011).

60. S. Afr. Const., 1996 § 26.

the identical language of "reasonable legislative and other measures," of "available resources," and of "progressive realization."[61] The new model of rights-based enforcement that emerged in South Africa held the promise of moving beyond the all-or-nothing orientation that has characterized the contest over rights and review for decades.[62]

But the conventional reading of these cases may in fact have missed one of their facets, namely the relationship between state capacity and constitutionalism, and the role of courts in addressing that relationship.[63] Consider the *Grootboom* case dealing with the right to housing. A group of individuals residing in poor, desperate settings chose to illegally occupy land that belonged to another. The grave housing situation that existed, the Constitutional Court observed, was the outcome of the influx policies during apartheid, where limitations had been placed on the African use of urban land. Several people, including the individuals in the case at hand, had applied for low-cost housing but were on a waitlist which held little promise of delivering a spot in the near future. In response, the individuals chose to settle on land that was private, and they were subsequently ejected by the owner. With no place to go, the individuals eventually came before the judiciary.

The relevant constitutional provisions were Sections 26 and 28 of the Constitution. These dealt with, among other things, the "right to have access to adequate housing" and the right to every child to shelter, respectively.[64] The former imposed a duty on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of the right.[65] The challenged housing policy, the Court found, excluded an entire section of the population, namely people who simply had no homes whatsoever. Housing development, as the law understood it, did not "contemplate the provision of housing that falls short of the definition of housing development."[66] A policy that did not incorporate a complete segment of

61. *Id.* § 27.

62. The debate over the legitimacy of judicial review is one that is focused on strong-form judicial review. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) ("There are a variety of practices all over the world that could be grouped under the general heading of judicial review of legislation. . .. The most important difference is between what I shall call strong judicial review and weak judicial review. My target is strong judicial review.").

63. It is worth noting, without pursuing the matter in any great detail, that there might be several reasons for capacity-based limitations, and the nature of such reasons may well be relevant in how courts address the matter. For example, it is possible to imagine that moments of economic crises may well engender capacity-based concerns. On the possibility of socioeconomic rights realization during such moments, see David Bilchitz, *Socio-Economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710 (2014).

64. S. AFR. CONST., 1996 §§ 26, 28.

65. *Id.* § 26.

66. *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) ¶ 52.

the people—those in most severe circumstances—was one that could not, the Court held, count as reasonable.

For our purposes, what is striking is not this particular outcome but the Court's overall approach. For the state's reasonableness demand to be discharged, the Court noted, there needed to be a program that incorporated actions by various tiers and levels of government and had the required financial and human resources. The Court observed that it was possible for the state's obligations to be satisfied in several ways; there was no single path to reasonableness. The formulation of a plan was, of course, only an initial step in the state's burden being discharged. The implementation of the plan was a further, crucial component to be assessed. "In determining whether a set of measures is reasonable," the Court held, "it will be necessary to consider housing problems in their social, economic and historical context and to consider the *capacity* of institutions responsible for implementing the program."[67]

Treatment Action Campaign delivers an account that is similar in interesting ways. Here, the Constitutional Court addressed whether the state had rightly refused the availability of an antiretroviral drug in the public health sector, and thereby not done enough to prevent the potential transmission of HIV from mothers to children. While the judiciary had a limited role to play in a democratic setting—a "restrained and focused role"—the Court found that the state had violated its constitutional obligation.[68] The central fact leading to this conclusion was that the drug had been made unavailable outside research and training sites. Even at public hospitals and clinics, which had the provision for testing and counselling, the drug was not allowed to be administered. The state's argument restricting the use of the drug rested in part on the problem of capacity: understanding the drug's administration required a full-blown plan and facilities and training, which the state did not have the capacity to provide.

Rather than viewing the problem of capacity in burdensome terms—by, for example, delving into the creation and implementation of a major plan across the healthcare sector—the Court considered how the use of the drug could be made possible even under current circumstances. Could state capacity be enabled in some fashion, even without a radically new healthcare plan? The answer was yes, quite simply because the drug could be used outside research and training locations which contained facilities where testing and counselling occurred. In such locations, the state could increase its performance and administer the drug. The state's contention had been that limiting the use of the drug to research and training sites would allow for the collection of data, which over time would shed light on concerns

67. *Id.* ¶ 43 (emphasis added).

68. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) ¶ 38.

such as efficacy and resistance and thereby help the state to assess whether the drug should be administered. The Court recognized the importance of such data collection, but it drew attention to the realities of framing policy under non-ideal conditions: it did not follow from the need to collect data and to formulate a comprehensive plan over time, that the drug should not be administered in sites where testing and counselling were available. One could not wait, the Court observed, "until the best program has been formulated and the necessary funds and infrastructure provided for the implementation of that program."[69] Because the Court's order was limited to sites where testing and counselling facilities already existed, there were no major additional costs to factor into the decision.

In *Grootboom* and *Treatment Action Campaign*, we can see a clear, if subtle, understanding of how a court might negotiate the problem of state capacity. *Grootboom* focuses on whether and how a program can be implemented; on how a program must focus on the state's limitations and try to mitigate or obviate them, and thereby be effective. The point here is not that having limited capacity will relieve the state of its constitutional obligation. It is rather that the state needs to respond to its own lack of capacity. In *Treatment Action Campaign*, we see the Court offering the state a path to being more responsive to citizens' needs, to offering better services and care, in ways that are consistent with its limitations. The Court shows that there are ways to enable the state to demonstrate greater capacity than it does. The remedies adopted in these cases have effects similar to those discussed in the Brazilian case study: they give the government incentives to develop bureaucratic capacity to address the complex problems associated with implementing socioeconomic rights in situations of severely constrained public resources.[70]

These initial cases are typically contrasted with more recent decisions of the South African Constitutional Court. Whereas the "first wave" of cases are seen as exhibiting a degree of promise, the "second wave" are viewed as "weaken[ing] the potential of socio-economic rights litigation to produce substantial benefits for poor people."[71]

69. *Id.* ¶ 68.

70. Seeing these cases through the lens provided by the idea of state capacity casts existing discussions of the choice among minimum-core remedies, planning remedies, and coercive structural injunctions in a somewhat different light. State-capacity remedies might produce better long-term outcomes, for example, but only under conditions that scholars might be able to identify. For reflections on the remedial approach of the South African Constitutional Court, see DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS (2007); Eric C. Christiansen, *Adjudicating Non-justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED (2008); SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (2010); SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? (Malcolm Langford et al. eds., 2013).

71. Stuart Wilson & Jackie Dugard, *Constitutional Jurisprudence: The First and Second Waves*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE?, *supra* note 70, at 35, 37.

The particular charge has been that the Court has moved away from developing substantive commitments, and instead narrowly focused on procedural considerations. We consider the nature of the "second wave" of socioeconomic rights adjudication in South Africa by turning to two decisions: *Olivia Road*, which put forth the idea of "meaningful engagement,"[72] and *Blue Moonlight*, which elaborated upon the idea.[73]

In *Olivia Road*, hundreds of residents in Johannesburg challenged a mass-eviction program. The program was part of a plan to redevelop the city in ambitious ways, but it was noticeably silent on the problem of relocating persons who would be evicted. Here, the questions were whether the housing program was sustainable given Section 26 of the Constitution; whether the eviction of persons who had no real alternative shelter could be ordered; and what, if any, restrictions and safeguards might be placed upon such an order for eviction. In an interim order, the Constitutional Court declared that the state and the applicants must "engage with each other meaningfully. . . in an effort to resolve the differences and difficulties aired in this application" as per the constitutional and legal framework involved.[74] Subsequently, an agreement was reached on certain issues whereas others remained to be determined.

Before the Court turned to the outstanding issues, it explicated its reasons for the interim order. A central feature of the reasonableness requirement under provisions like Section 26, the Court observed, was that state action must be *implemented* reasonably. That is, the right in Section 26 was not only substantive in its guarantee but also procedural. Yet, the Court noted, no effort had been made to engage with the persons evicted prior to their removal. The Court offered some illustrations of what "meaningful engagement" might involve in a situation such as this—engagement might focus on the consequences of eviction, on the duties and responsibilities of the state, on how the impact of such an action might be managed, and so on. Engagement between both parties, the Court felt, might enable a kind of participation, allowing each group to better understand the objectives and constraints of the other. Importantly, the Court did not read any specific substantive requirement into Section 26. It stated that, depending on the situation, it might be "reasonable to make permanent housing available" or equally "to provide no housing at all."[75] What mattered was "the response of the municipality in the engagement process."[76] If this was reasonable, then Section 26 would be satisfied. Rejecting the suggestion that engagement was impossible where the number of

72. *Occupants of 51 Olivia Road, Berea Township v. City of Johannesburg* [2008] ZACC 1.

73. *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd.* [2011] ZACC 33.

74. *See Olivia Road*, [2008] ZACC ¶ 5 (excerpting the interim order).

75. *Id*. ¶ 18.

76. *Id*.

persons being evicted were so large, the Court observed that, in such situations, the burden of engagement was only higher. The "larger the number of people potentially to be affected by eviction," it noted, "the greater the need for structured, consistent and careful engagement."[77] Thus, no eviction could have taken place without "meaningful engagement," thereby necessitating the interim order.

The "meaningful engagement" and the agreement that it facilitated resolved the question of temporary accommodation. The remaining issue was that of permanent accommodation. Here, the Court resisted intervening in the matter in any major fashion, relying on the promise that "meaningful engagement" had exhibited. The problem of permanent accommodation would, the Court observed, be resolved through a process of consultation, dialogue, and engagement; and it was important to give this process a chance. The Court could be approached if the process failed, but there was no reason why the process should not be allowed to address the situation as it develops.

Requiring the government to engage meaningfully with the residents required the government to *create* a new, though in each case ad hoc, institution for engaging the residents. The remedy, that is, directly targeted the problem of state capacity. And it did so in two ways: first, it gave government bureaucrats greater opportunities for drawing upon "local knowledge;" that is, the possibility that the residents have information about their environment that bureaucrats might overlook but that could be used to solve the problem at hand better than the resources that the bureaucrats ordinarily rely on. And second, it recognized that the engagement itself could enhance the self-governing capacity of the local residents: It provided a new, though temporary, institution of partial self-governance.[78]

The general understanding among commentators has been that the substantive rights which the Court's first wave promised have given way to a purely procedural set of guarantees with little impact.[79] Brian Ray's book, *Engaging with Social Rights*, provides us with a somewhat different analysis.[80] The *Blue Moonlight* case plays a major role in Ray's

77. *Id*. ¶ 19.

78. We speculate that this might be particularly important in nations with a dominant political party, because the local residents might not have ready access to the party apparatus that generally determines policy.

79. *See* Paul O'Connell, *The Death of Socio-Economic Rights*, 74 Mod. L. Rev. 532 (2011); Marius Pieterse, *Procedural Relief, Constitutional Citizenship and Socio-Economic Rights as Legitimate Expectations*, 28 S. Afr. J. on Hum. Rts. 359 (2012); Wilson & Dugard, *supra* note 71. *But cf.* James Fowkes, Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa 287–300 (2016) (noting the myriad and complex sets of problems that the City of Johannesburg was trying to address in experimenting with a new water policy, the evolution of the water policy over time, and the broader service delivery apparatus that formed the context for the policy and the litigation).

80. Brian Ray, Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave (2016).

study.[81] There the Court was faced with the problem of unlawful occupants on private property, and with having to determine the state's obligation to provide housing to the occupants if they were to be evicted. The Court noted that, though *it* could not impose impossible requirements on the state, neither could the state hide under the cover of resource constraints and the like if its budgeting and program setting were the outcome of a failure to understand its constitutional obligations. The Court observed that "it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."[82] It also observed that all levels of government were to be involved in eviction cases of the kind in issue, and that the Court could by implication address processes at every tier of government. It proceeded to strike down the differentiation between different kinds of occupants in the state's housing policy.

It might be possible to see such a ruling in purely "procedural" terms, but it would hardly be accurate to view the outcome as one that did not significantly alter the rights of homeless persons. Though there may be a turn away from the explication of abstract principles such as those that occur in applying a "minimum core" approach, there is nonetheless the provision of a strong remedy. The Court's power to review the bases of budgetary allocations is, for instance, far from insignificant. Importantly, as Ray observes, the "managerial judging" that the Constitutional Court performed in such a case—which saw a focus on the specificities of an eviction, such as its timing—enabled it to "turn *Grootboom's* famously weak programmatic declaration into a strong individually enforceable right to immediate, if temporary, relief under Section 26."[83] Ray's key point is that the Court's second wave reveals a "recharacterization of social rights as tools to enforce democratic accountability."[84] The turn to participation is, for Ray, a defining feature of the Court's orientation in recent years.

Ray's analysis might be carried further. It is worth regarding the "second wave" decisions as not only enabling democratic accountability, as he rightly does, but as also seeing them as enabling state capacity. A crucial feature in the Constitutional Court's decisions was the recognition that bureaucrats and politicians often have their own agendas that displace the agendas of constituents. This is illustrated in several ways, whether one considers the participation requirements outlined in *Olivia Road* or the scrutiny of budgetary rationales in *Blue Moonlight*. The Court's engagement remedies followed from this recognition and provided a way to reconnect constituents with their representatives. If one understands poor state capacity as

81. *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties* 2012 (2) BCLR 150 (CC).
82. *Id*. ¶ 74.
83. Ray, *supra* note 80, at 147.
84. *Id*. at 185.

including institutional deficits, we can see how engagement remedies address such deficits. The Court recognized that there are forms of institutional functioning that reveal shortfalls, and that attention to such shortfalls can allow the state to function better. This sensibility was reinforced by other features of the Court's decisions, such as the focus on different levels of government and the emphasis on coordination across state departments and tiers. The Court's approach did not merely hope to make the governance system more democratic; it also tried to make the state more capable and efficient. It is in this way that both the early and the more recent decisions of the South African Constitutional Court reflect, for all their differences, a uniformly present judicial attention toward the problem of poor state capacity. They offer different ways in which courts address the problem, and can play a role in the seeing how state capacity can be improved.[85]

Importantly, the Court's point was not that the resources available to the state will be a factor in assessing whether the right to housing been complied with. The problem of state resources had already been internalized by the right, by way of the reasonableness clause.[86] As the Court observed, "the state is not obliged to go beyond available resources or to realize these rights immediately."[87] Rather, it was that for the right to be reasonably met, attention must be devoted to the problem of capacity—the state must address which institutions and functionaries can perform what kinds of roles and functions, and how they should work together. As per the Court, a valid program that fulfills the state's constitutional obligation is one that can be implementable. And, an implementable program was one that is sensitive to the capacity question. This logic of this position should now be clear: for the state to be effective, it needs to understand how best to work with its own limitations; and understanding that will allow the state to move beyond those limitations. In other words, attention to the problem of capacity will allow the state to develop a more effective program, meaning that the state will have greater resources. As before, we do not here claim that engagement remedies have become dominant or are always effective,[88] but only that such remedies have capacity-expanding features that deserve attention.

85. Needless to say, this claim is predicated on a certain belief in deliberation and collaboration—in the idea of "engagement." It is because of this belief that we hold that a system such as that required by the engagement decisions has greater capacity to come up with reasonable plans for addressing problems of material deprivation than a system that relies solely upon decision making within government bureaucracies.

86. We note a resonance here with the analysis in Motta Ferraz, *supra* note 25, which concludes that the adoption and then political implementation of a constitutional right to health appears to have had greater effects in Brazil than the right-to-medication litigation.

87. *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) ¶ 94.

88. We note that the South African Constitutional Court has held, as the very idea of an engagement remedy implies, that *after* engaging, the government may adopt the program it initially proposed. *See Residents of Joe Slovo Community v. Thubelisha Homes* 2009 (9) BCLR 847 (CC). Even here, though, the democracy-enhancing effect of the engagement remedy might occur.

III. India: Absorbing Weak Capacity

The criminal justice system is a domain where weak state capacity is often most powerfully revealed. We might contrast what we can call deliberate constitutional violations, such as unlawful searches or the use of coercion in police interrogations, with large-scale failures to provide basic security against criminals because the state does not employ enough police officers or unreasonably long pretrial detentions that occur because there are not enough judges to process cases, the latter being a problem of state capacity.[89]

The various facets of the criminal justice system—from investigative agencies and prosecutors to trials and prisons—are sites where the strengths and weaknesses of the state are brought into sharp focus. India is no exception to this.[90] With its reality of weak governance, legal reform measures in the domain of criminal justice cannot escape the problem of state capacity. Here we focus on one specific and unique feature of the Indian criminal justice system: its provision for *anticipatory bail*. Under the scheme of anticipatory bail, an individual can be granted bail before he or she is arrested, based on a worry about being arrested, and then released at the moment of arrest.[91] To compensate for gaps in state capacity, Indian courts have generously interpreted the anticipatory bail mechanism, allowing them to act quickly even when facing a large caseload, and have thereby sought to absorb the problem of weak capacity. To better understand the idea of a pre-arrest bail mechanism where courts review claims from both parties, one must turn to the Forty-First Report of the Law Commission of India (1969).[92] The Report focused on a colonial-era legislation, the Code of Criminal Procedure, 1898, and offered a comprehensive assessment of India's criminal procedure framework. The study ranged from the scope of the criminal procedure code to the

89. The distinction is not sharp, because, as we discuss below, we can sometimes attribute the deliberate constitutional violations to a failure effectively to train police officers, which can be thought of as a problem flowing from weaknesses in state capacity.

90. On the nature of the Indian police, see R.K. Raghavan, *An Anatomy of the Indian Police*, 47 Indian J. Pol. Sci. 399 (1986); Arvind Verma, The Indian Police (2005); Arvind Verma, *The Police in India: Design, Performance, and Adaptability*, *in* Public Institutions in India: Performance and Design 194 (Devesh Kapur & Pratap Bhanu Mehta eds., 2005). Recently, internal security in India has been the subject of some attention. *See* Sarah J. Watson & C. Christine Fair, *India's Stalled Internal Security Reforms*, 12 India Rev. 280 (2013); Paul Staniland, *Internal Security Strategy in India*, 17 India Rev. 142 (2018).

91. *See* Code of Criminal Procedure § 438 (1973). For a superb assessment of anticipatory bail in India, and arguably the first major study of the topic, see Vikramaditya S. Khanna & Kartikey Mahajan, *Anticipatory Bail in India: Addressing Misuse of the Criminal Justice Process?*, *in* Comparative Criminal Procedure 119 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

92. Law Comm'n of India, Ministry of Law, Government of India, Forty-First Report (1969).

structure of the criminal justice apparatus to the nature of substantive principles and rules.

Chapter Thirty-Nine of the Report addressed provisions relating to bail. There was broad consensus, the Report noted, that there existed no power under India's criminal procedure code for anticipatory bail to be granted. The Report called for this gap to be filled. "The necessity for granting anticipatory bail," it observed, "arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days."[93] The Report proceeded to observe that false cases of this kind had only increased with greater political competition. Moreover, there was an additional reason for anticipatory bail outside of false cases:

> [W]here there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems to be no justification to require him to first submit to custody, remain in prison for some days and then apply for bail.[94]

The Report recommended adopting a new provision that would allow persons who had "a reasonable apprehension" of being arrested to apply to a court, which "may, in its discretion, direct that in the event of his arrest, he shall be released on bail."[95] Four years later, this recommendation was accepted and acquired statutory force when India enacted a new code of criminal procedure. Section 438 of the Code of Criminal Procedure, 1973, was titled "Direction for grant of bail to person apprehending arrest."[96] In addition to providing for such a direction, it listed factors that might be considered in determining whether a direction should be issued as well as conditions that might be specified in case a direction was issued. The Forty-Eighth Law Commission Report, which appeared just prior to the new Code of Criminal Procedure, endorsed a draft version of Section 438, noting however that "it is in very exceptional cases that such a power should be exercised."[97]

The 1969 Report of the Law Commission identified two kinds of weaknesses in India's state machinery that necessitated the provision for anticipatory bail. The first was false cases. The criminal justice system was being manipulated by persons with power, and the power to enable arrest was a kind of weapon deployed against a rival. The second pertained to cases involving arrests that occurred in good faith and were motivated by honest reasons, but where there was no reason

93. *Id*. at 321.
94. *Id*.
95. *Id*.
96. Code of Criminal Procedure § 438 (1973).
97. Law Comm'n of India, Ministry of Law, Government of India, Forth-Eight Report 10 (1972).

to deny the arrested person bail. India's courts were so severely burdened that without the provision of anticipatory bail that the person who had been arrested might have to wait for several days in custody before receiving bail.

In the first situation that the Report identified, the weakness was the independence and integrity of the police. The police as an institution was not immune from powerful social and political forces, and it lacked the mechanisms to guard against individual officers being influenced. In the second situation, the weakness was the capacity of the judicial system. Arrested individuals could not obtain bail in a timely and swift manner. They would have to languish in prison for some days, thereby offsetting the very point of bail. By providing for anticipatory bail, the new criminal procedure code could respond to each of these weaknesses.[98]

There are, of course, many factors that are likely to have contributed to these weaknesses. An important study on anticipatory bail has rightly observed that the historical absence of oversight and standards in the police's powers of arrest and prosecution has been one major reason for police abuse and manipulation.[99] What is interesting, however, is that neither the Law Commission nor the subsequent statutory framework addressed the weaknesses at any systemic level. There was no effort, for instance, to make the police force function with greater independence or integrity. Instead, the emphasis was on reducing the negative consequences that followed from the state's incapacity to control its own police officers.

With the new 1973 Code of Criminal Procedure in force, the Supreme Court initially declared that the power to grant anticipatory bail was "somewhat extraordinary in character" and was to be exercised "only in exceptional cases."[100] In time, though, the Court adopted a more liberal view.[101] The core difference between ordinary bail and anticipatory bail, the Court noted, "is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest."[102] The latter was "insurance against police custody. . .."[103] Though the Court felt that police officials had no real incentive to abuse ordinary crimes and criminals, matters changed significantly in cases that arose from political rivalries and contests:

98. Khanna and Mahajan study the Law Commission Report though do not address the second situation in the terms that we do, and instead see the Law Commission's concerns as being entirely about abuse, either involving political targeting or corruption and extortion. *See* Khanna & Mahajan, *supra* note 91, at 128.
99. *Id*. at 123–26.
100. Balchand Jain v. State of Madhya Pradesh, (1976) 4 SCC 572, 576.
101. Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565.
102. *Id*. at 575.
103. *Id*.

> Attended upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of parading of a respectable person in handcuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.[104]

In *Gurbaksh Singh Sibbia*, the Court treated the provision for anticipatory bail as closely linked to the presumption of innocence. The judiciary should not, the Court stated, insert additional conditions that limit the operation of Section 438. Attempts to create strict rules and guidelines in an effort to reduce discretion would, the Court feared, undermine the provision by rendering it static in the face of new factual circumstances. The Court's task was to exercise discretion within the terms set by the statute. According to Chief Justice Chandrachud, the power to grant anticipatory bail may well be extraordinary—as it was a departure from the ordinary idea of bail—but it did not follow that it could only be exercised in exceptional cases.

The jurisprudence around anticipatory bail proceeded alongside increasing judicial attention toward the abuse of police powers in India. In an important 1978 decision dealing with the right against self-incrimination, the Supreme Court recognized that India faced major criminal law enforcement challenges, with increasing crime taking place alongside increasing state abuse.[105] There was an urgent need, the Court felt, to reform the practices and capacities of the police force.[106] In the years ahead, this theme acquired some prominence in the Court's evolving doctrine. In an early 1990s case, the Court was faced with an act of illegal detention by the police. Referencing studies on the police force, it underlined the misuse of the arrest power in India. The power to arrest an individual, the Court observed, did not mean that every arrest was justified. There was a distinction, that is, between the "existence of the power to arrest" and the "justification for the exercise of it."[107]

Subsequently, in a major decision *D.K. Basu*, the Supreme Court confronted the reality of persons being subject to violence and death while in police custody.[108] It found the perversity of the situation to be startling: those meant to protect society had become perpetrators. The Court observed that increases in practices like torture and the

104. *Id*.
105. Nandini Satpathy v. P. L. Dani, (1978) 2 SCC 424, 433.
106. *Id*. at 457–58.
107. Joginder Kumar v. State of U.P., (1994) 4 SCC 260, 267.
108. D.K. Basu v. State of W.B., (1997) 1 SCC 416.

occurrence of deaths had called into question the entire legitimacy of India's criminal justice system. Such events were, needless to say, radically at odds with the variety of constitutional and statutory safeguards that the formal legal system promised. The Court pointed to new legal measures that could improve conditions on the ground, it highlighted greater checks on police authority that might help matters, and it underlined the need for police training that could result in longer term changes.

The last of these, we think, can fairly be described as addressing an issue of state capacity, although merely asserting that more training is needed of course does not mean that it will be provided.[109] Importantly, the Court put in place a number of guidelines that could serve as preventive measures.[110] Around this time, the problems with police authority acquired attention even outside the courtroom. In 2001, the Law Commission considered the nature of arrest powers, and its study ranged from documenting police excesses to noting the status of under trials.[111] The Commission recommended stronger regulation of the police's power to arrest individuals without a warrant, which subsequently led to change in the Code of Criminal Procedure.[112]

The concern for weak state capacity with regard to the police—manifest in cases involving abuse and corruption—thus played a major role in cementing the Supreme Court's broadly liberal attitude toward anticipatory bail, as powerfully articulated in *Gurbaksh Singh Sibbia*, and in its checking of police investigative and interrogation practices, as captured in cases like *D.K. Basu*. In more recent years, the Court has cautioned against limiting anticipatory bail to a narrow set of exceptional cases, highlighting the severity of the state's power to arrest individuals, and it has refused to read any additional restrictions into the power to grant anticipatory bail under section 438 of the Code of Criminal Procedure.[113] The Court has also underlined the widespread nature of the abuse of arrest powers, the relationship of this phenomenon to police corruption, and the devastating consequences that an arrest has for an individual both in terms of freedom and humiliation.[114] Police violence too has remained a matter that has invited judicial attention and scrutiny.[115]

109. Moving from a system staffed by amateurs to one staffed by professionals seems to us a paradigmatic example of an increase in state capacity, and training guidelines are a modest effort to move in that direction.

110. *D.K. Basu*, (1997) 1 SCC at 435–36.

111. Law Comm'n of India, Ministry of Law, Gov't of India, One Hundredth and Seventy-Seventh Report (2001).

112. Code of Criminal Procedure § 41 (1973).

113. *See* Savitri Agarwal v. State of Maharashtra, (2009) 8 SCC 325; Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694; Bhadresh Bipinbhai Sheth v. State of Gujarat, (2016) 1 SCC 152.

114. *See* Arnesh Kumar v State of Bihar, (2014) 8 SCC 273.

115. *See, e.g.*, People's Union of C.L. v. State of Maharashtra, (2014) 10 SCC 635.

As one might expect, the use of anticipatory bail in India has been the source of considerable legal doctrine. Within a broadly liberal approach, courts have considered how specific factual circumstances should shape the exercise of this power and what conditions should be imposed alongside anticipatory bail orders.[116] Some questions, such as the period for which anticipatory bail should be granted, remain unsettled.[117] The operation of anticipatory bail has also invited the attention of other institutions. The Law Commission, for instance, has considered how specific amendments to the provision have affected its purpose and functioning, and suggested directions that the law should accordingly take.[118] Such questions will continue to emerge. What remains striking, however, is the stable reality that deeper changes with regard to police reform are nowhere to be seen. Even after countless official reports calling for major police reform, few modifications have occurred.[119] The problem of false and unnecessary arrests, the lack of standards and guidelines and checks with regard to police behavior, the colonial structure of the police force, and so forth, remain by and large unchanged.[120] As weak state capacity is taken to be a permanent feature of the system, the judicial answer has been to absorb the problem of weak state capacity through a liberal approach toward anticipatory bail.

IV. India: Validating Capacity Expansion

In 2017, *The Economist* published an article suggesting that data was replacing oil as the world's most important resource.[121] Amid widespread global interest in what has come to be known as the "data economy," the Indian state has attempted to create the world's largest biometric identification project.[122] Conceived of over a decade ago, the proposal was to create a unique identity for every individual residing in India. After a series of government meetings and efforts, the Unique Identification Authority of India (UIDAI) was created in 2009 and initially began functioning under the umbrella of the Government of India's Planning Commission. In April 2010, the Planning Commission published a strategy paper on "Creating a Unique Identity Number

116. *See Siddharam Satlingappa Mhetre*, (2011) 1 SCC 694.
117. *See* Sushila Aggarwal v. State (NCT of Delhi), (2018) 7 SCC 731.
118. *See* Law Comm'n of India, Ministry of Law, Gov't of India, Two Hundredth and Third Report (2007).
119. *See especially* Ministry of Home Affs., Gov't of India, Reports of the National Police Commission (1979–1983).
120. For some reasons that explain police behavior, such as the unavailability of tort claims, lack of arrest standards, etc., see Khanna & Mahajan, *supra* note 91.
121. *The World's Most Valuable Resource Is No Longer Oil, but Data*, The Economist (May 6, 2017), https://econ.st/3uEOVdS.
122. The regulation of data has, more generally, been a matter of much recent attention in India. For a valuable study, see Ananth Padmanabhan & Anirudh Rastogi, *Big Data*, *in* Regulation in India: Capacity, Design, Performance 251 (Devesh Kapur & Madhav Khosla eds., 2019).

for Every Resident in India."[123] The absence of an identity for a great many residents of India, the document noted, limited their ability to obtain services. This was especially true of the poor, many of whom could not access state-provided benefits and subsidies because they lacked required documentation.[124] What India required was a kind of digital welfare state.[125] In addition to detailing the benefits that would arise with regard to the delivery of services, the 2010 document also noted additional advantages from unique identities, such as their assistance in determining the flow of money, in aiding state action during emergencies, and so forth.[126]

The 2010 Planning Commission document provided an overview of the state's efforts at creating such an identity. The Unique Identification (UID) scheme would, the document noted, "provide a clear and unique identity number for each resident across the country and would be used primarily as the basis for efficient delivery of welfare services."[127] The 2010 document provided some basic details of the proposed scheme: a central repository of data; a unique identification number containing both demographic and biometric information (such as a person's name, date of birth, fingerprints, and iris scans); and so on. The information collected would generate a unique identification for each individual; the information would be stored digitally; and the information would enable the authentication of identity. The proposal was evidently responsive to concerns about inadequate state capacity at the point of delivery of services.

The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act of 2016 gave the UID program a statutory basis. The Statement of Objects and Reasons of the Act reiterated the

123. Plan. Comm'n, Gov't of India, UIDAI Strategy Overview: Creating a Unique Identity Number for Every Resident in India (2010).

124. The efficacy of welfare programs in India and potential solutions to the problem have long been a matter of debate. A major point of contestation has, for example, been the suitability of direct cash transfers. *See* Arvind Subramanian, Devesh Kapur & Partha Mukhopadhyay, *The Case for Direct Cash Transfers to the Poor*, 43 Econ. & Pol. Wkly., no. 15, Apr. 12–18, 2008, at 37; Mihir Shah, *Direct Cash Transfers: No Magic Bullet*, 43 Econ. & Pol. Wkly. no. 34, Aug. 23–29, 2008, at 77; Arvind Subramanian, Devesh Kapur, Partha Mukhopadhyay, *More on Direct Cash Transfers*, 43 Econ. & Pol. Wkly., no. 47, Nov. 22–28, 2008, at 37; Devesh Kapur, *The Shift to Cash Transfers: Running Better But on the Wrong Road?*, 46 Econ. & Pol. Wkly., no. 21, May 21, 2011, at 80. Welfare entitlements in India have, in recent years, taken the form of rights. *See generally* Sanjay Ruparelia, *India's New Rights Agenda: Genesis, Promises, Risks*, 86 Pac. Affs. 569 (2013); Devesh Kapur, *The Wrongs of Rights*, Bus. Standard (July 7, 2013), www.business-standard.com/article/opinion/the-wrongs-of-rights-113070800015_1.html.

125. On the idea of a digital welfare state, see Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/74/48037, (Oct. 11, 2019), https://undocs.org/pdf?symbol=en/A/74/493; Liesbet van Zoonen, *Data Governance and Citizen Participation in the Digital Welfare State*, 2 Data & Pol'y 10 (2020); Lina Dencik & Anne Kaun, *Datafication and the Welfare State*, 1 Glob. Persp. 1 (2020); Malcolm Langford, *Taming the Digital Leviathan: Automated Decision-Making and International Human Rights*, 114 Am. J. Int'l L. (unbound) 141 (2020).

126. For a history of identification in India, see Tarangini Sriraman, In Pursuit of Proof: A History of Identification Documents in India (2018).

127. Plan. Comm'n, Gov't of India, *supra* note 123, at 6.

goal of making welfare delivery more effective, and it noted numerous additional uses to which a UID number might be put.[128] From the beginning the program drew a series of legal and political concerns. These concerns included the technology architecture of the scheme and its safety;[129] the accuracy of the data;[130] potential exclusions during the enrollment process, its coercive element, and a possibly negative impact on welfare delivery;[131] the process of the law's formal enactment that appeared to fly in the face of parliamentary procedure and constitutional rules;[132] the sudden and widespread expansion of the program across both the public and private sector, and the necessity of having a UID number to access a wide array of services;[133] and the impact on privacy and personal data.[134] Here, we focus on how the Supreme Court of India considered the balance between the legitimacy of a program that purported to improve state capacity—that is, to make the state welfare programs more efficient—and the impact on constitutional rights.

Some brief details of the program are in order. The Unique Identification Authority of India (UIDAI) is the body that is responsible for enrollment, authentication, and management of data. The UID information is stored in a "Central Identities Data Repository," maintained by the UIDAI. Other players in the ecosystem include requesting entities (authentication user agencies) who seek authentication services from the UIDAI via an intermediary (authentication service agencies). The authentication either responds with a Yes/No answer, or it provides a service of electronic Know Your Customer (e-KYC) compliance by sharing demographic information and the photograph with requesting entities. Thus, the UID scheme can work two ways. It can be used to verify identity and to provide proof of other details that banks and other services may require.

How does the UID number interact with other databases? Seeding is a process by which an UID number is linked to other services (say,

128. AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT (2016), Statement of Objects and Reasons.

129. *See* UNIQUE IDENTIFICATION AUTH. OF INDIA, PLAN. COMM'N, GOV'T OF INDIA, AADHAAR TECHNOLOGY AND ARCHITECTURE (2014); Shweta Agrawal, Subhashis Banerjee & Subodh Sharma, *Privacy and Security of Aadhaar: A Computer Science Perspective*, 52 ECON. & POL. WKLY., no. 37, Sept. 16, 2017, at 93.

130. *See* Hans Verghese Mathews, *Flaws in the UIDAI Process*, 51 ECON. & POL. WKLY., no. 9, Feb. 27, 2016, at 74; Unique Identification Auth. of India, *Erring on Aadhaar*, 51 ECON. & POL. WKLY. no. 11, Mar. 12, 2016, at 84.

131. *See* Reetika Khera, *Impact of Aadhaar on Welfare Programmes*, 52 ECON. & POL. WKLY. no. 50, Dec. 16, 2017, at 61. *But cf.* Karthik Muralidharan, Paul Niehaus & Sandip Sukhtankar, *Building State Capacity: Evidence from Biometric Smartcards in India*, 106 AM. ECON. REV. 2895 (2016).

132. The law was enacted as a "Money Bill," which as per Article 110 of India's Constitution can be enacted without support from the Council of States (the upper house of India's Parliament). INDIA CONST. art. 110.

133. *See* Sumit Mishra, *The Economics of Aadhaar*, MINT (July 31, 2017), www.livemint.com/Home-Page/s22gUzxOULwQxqukfcBMiM/The-economics-of-Aadhaar.html.

134. The status of the right to privacy under the Indian Constitution was contested during the hearing of the UID case. The Supreme Court constituted a separate bench to consider this question, and it affirmed the place of the right under the Constitution. K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

your bank account or mobile number). The database is "federated." Even though the UID number may be linked with other services, the UID number is linked with each of those services separately. Simply put, your bank would have your bank information and the UID number, the telecom operator would have your phone information and the UID number, but the telecom operator would not have access to your bank information. Further, the UIDAI would not have this information because the database is linked one-way (the informational access is restricted in one direction). Thus, the UIDAI only knows that you are linking your number with a specific bank or telecom operator. They neither know your bank account number/phone number nor any transaction-related details. The linking is considered one-way because the UIDAI can only see that you have used Aadhaar to authenticate your identity with a specific bank or telecom operator but not what you are doing with it. The bank/telecom operator can see the Aadhaar details but the UIDAI cannot have access to anything else.

The Supreme Court of India's verdict on the validity of this scheme captures the challenges that can arise for courts in negotiating the problem of state capacity in constitutional disputes.[135] In an interim order in 2015, the Supreme Court referred privacy-based challenges to a larger bench—to settle the question of the status of the right to privacy under the Constitution—but did not issue a stay on the enrollment process. During the proceeding that had led to the interim order, the Attorney General of India specifically relied on weak state capacity to support the state's case:

> The learned Attorney General has further submitted that the Aadhar card is of great benefit since it ensures an effective implementation of several social benefit schemes of the Government like MGNREGA [Mahatma Gandhi National Rural Employment Guarantee Act], the distribution of food, ration and kerosene through the PDS [Public Distribution System] and grant of subsidies in the distribution of LPG [liquefied petroleum gas].[136]

135. In an early order, the Court focused on the voluntariness of the scheme, observing that "no person should suffer for not getting the Aadhaar card in spite of the fact that some authority had issued a circular making it mandatory." K.S. Puttaswamy v. Union of India, W.P. (Civil) No. 494 of 2012 (Sup. Ct. of India Sept. 23, 2013).

136. K.S. Puttaswamy v. Union of India, W.P. (Civil) No. 494 of 2012 (Sup. Ct. of India Aug. 11, 2015). Regarding the concern that personal information was at the risk of being widely circulated and exploited, the state contended that 90 percent of India's population had received a UID number, that enormous amounts of money had been spent to enable such enrollments, and that therefore the standard considerations that apply to the issuing of an injunction do not exist. In response, the Supreme Court proceeded to observe that the "balance of interest" would best be served by allowing enrollments to proceed so long as services were not denied to individuals on the ground that they did not have a UID number. In a later interim order, the Court permitted an increase in the list of schemes for which a UID number would be required, but again observed that enrollment was only voluntary and could not considered to be mandatory. K.S. Puttaswamy v. Union of India, W.P. (Civil) No. 494 of 2012 (Sup. Ct. of India Oct. 15, 2015).

In a later 2017 verdict—in which the Supreme Court upheld the mandatory linking of UID numbers with PAN (Permanent Account Number) data that is used for the filing of income tax returns in India—we again find the presence of capacity-based arguments.[137] The Court observed that it was "the duty of any responsible government to come out with welfare schemes for the upliftment of poverty-stricken and marginalized sections of the society," and that even though the government had over time taken considerable measures to address development, the reality on the ground remained underwhelming.[138] A major reason for the failure of welfare programs, the Court noted, was the "failure to identify" the persons to whom benefits were due.[139] The UID scheme was the solution to this problem: "It cannot be doubted that with UID/Aadhaar much of the malaise in this field can be taken care of."[140] In addition, the Court described "corruption and black money" as a "menace" that had "reached alarming proportions."[141] If there existed "one uniform proof of identity," the Court felt, it "may go a long way to check and minimize the said malaise."[142] Finally, the Court stated that the UID program, with its "most advanced and sophisticated infrastructure, may facilitate law-enforcement agencies to take care of the problem of terrorism and also help investigating agencies" in criminal matters.[143]

Each of the abovementioned observations engages with the idea of state capacity. In each instance, the Court describes the UID program as holding the promise of improving state capacity, whether in delivering welfare services, in tackling economic frauds and crimes, or in addressing national security and law and order concerns. This promise is taken to support the constitutional basis for the program. By the time the constitutionality of the overall UID program was adjudicated a year later, the program had not only gone remarkably far in terms of enrollments and services, it had also been given some form of legal approval. Interim orders had refused to stay enrollments under the program, even though the program only received a statutory basis in 2016, and a move beyond the initial voluntary character of the program had been upheld.

In the final 2018 verdict, the UID program was, for the most part, held to be constitutional.[144] The most remarkable part of the Supreme

137. The Court noted the harm that was caused to the state by economic frauds of various kinds, and the importance of a unique identity to tackle them. Binoy Viswam v. Union of India, (2017) 7 SCC 59.
138. *Id*. at 145.
139. *Id.* at 146.
140. *Id*.
141. *Id.* at 147.
142. *Id.*
143. *Id*.
144. K.S. Puttaswamy v. Union of India, W.P. (Civil) No. 494 of 2012 (Sup. Ct. of India Sept. 26, 2018). Here, we focus on the majority opinion, but it is worth noting that the minority opinion, delivered by Justice D.Y. Chandrachud, did pay far greater attention to the capacity gaps in the Aadhaar scheme itself.

Court's decision was its lack of engagement with a number of the questions that had been raised. This lack of engagement arose in part because of the role that capacity-related arguments had played in the case. Consider, for example, concerns based on privacy and surveillance. An important feature of the UID program is that it stores information about the use of the UID number only for the purposes of authentication, but it does not contain information about the reasons for the authentication. As noted above, the program registers that a person has authenticated his or her identity at a particular bank, but it cannot access the transaction made at the bank. The petitioners contended that though this made sense in theory, in practice, because specific schemes and services required UID authentication for predefined purposes, the "meta data" itself would suffice to discern the use to which the UID number had been utilized. For example, if banks needed a UID number to open a new account, one could infer from the use of the number at a bank that a new account had been opened. This fact, coupled with the knowledge of the different services to which a person subscribes, would allow one to form a reasonably substantive picture of a person's activities.

The majority opinion did not address concerns of this kind in ways that we might expect, say by inquiring into whether the scheme had involved permissible limitations to the right to privacy. Instead, it framed the question as a conflict between two kinds of rights—the right to privacy and a set of socioeconomic rights, such as the right to food. The UID program's welfare-based goals were relied upon to make this framing. The program was termed as an effort to realize welfare rights, which have long been read as part of the right to life in Article 21 of India's Constitution.[145] Seeing the matter as a conflict between two sets of rights, the Indian Supreme Court deferred to the state.

Before the Court, the petitioners argued that the UID program effectively put in place a surveillance state: citizens could be profiled and tracked; their patterns and practices could be documented; and the authentication record maintained by the state could be put to any number of uses. The state contended that the information received was minimal and the design of the UID program prevented abuse. In the verdict, what is interesting is the Court's deep reliance on the state's factual claims about security and efficiency. The Court went so far as to reproduce aspects of the UIDAI CEO's presentation, avoiding probing the claims in any substantive fashion. Apart from the matter that the empirical claims made by the state were contested, the Court not only relied on them but also paid little attention to the fact that the institutional design of the UIDAI meant that it had little incentive to take any potential flaws seriously. The authority was, after all, the custodian and regulator of the data. Its presentation would, of course,

145. On the Indian experience with socio-economic rights, see Khosla, *supra* note 54.

suggest that the program it oversees is safe. Much of the state's case was built around how the program worked in theory, without quite answering the petitioner's case about numerous potential ways in which guidelines and protections could be circumvented in practice. The state defended the need for the program on the ground that it lacked capacity in many domains, yet relied on its own capacity—here, the accuracy of its assessment of security and efficiency—to defend the validity of the program.

What appears to have had great significance for the majority opinion are the important benefits that the program might have. The "Aadhaar Act," it was noted, "is a beneficial legislation which is aimed at empowering millions of people in this country."[146] Welfare entitlements, it observed, were central to the idea of autonomy, and had been recognized and protected as part of a set of socioeconomic guarantees. The state had explicitly contended as part of its legal argument before the Court that around half of the amount of money spent on welfare schemes does not reach the intended recipients, and that the UID program would remedy this reality and increase the capacity of the state. In such a scenario, the Court declared, mere fear or apprehension of abuse could not come in the way of the impugned program.

The Attorney General's arguments before the Supreme Court highlighted studies and reports that outlined the failure of welfare programs. In defending section 7 of the Aadhaar Act, the Attorney General drew on the jurisprudence that has, over the past several decades, developed around the right to life in Article 21 of the Constitution.[147] Section 7 empowers the state to require authentication via the UID program "for the purpose of establishing identity of an individual as a condition for receipt of a subsidy, benefit or service for which the expenditure is incurred from, or the receipt therefrom forms part of, the Consolidated Fund of India."[148] In other words, the UID scheme can be extended without limitation or restriction to any subsidy, benefit, or service so long as it is funded by the Consolidated Fund of India. In linking this provision with the right to life, the Attorney General argued that the right to life was "not a mere animal existence but the right to live with human dignity which includes the right to food, the right to shelter, right to employment, right to medical care, etc."[149] The Court was persuaded by this reasoning.

Central to the state's argument was the claim that the case at hand did not involve the violation of any right. Instead, what was at issue was "a balancing of two fundamental rights: the right to privacy

146. *Puttaswamy*, W.P. (Civil) No. 494 of 2012 (Sept. 26, 2018) at 296.

147. *See generally* Anup Surendranath, *Life and Personal Liberty*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 756 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

148. AADHAAR (TARGETED DELIVERY OF FINANCIAL AND OTHER SUBSIDIES, BENEFITS AND SERVICES) ACT (2016) § 7.

149. *Puttaswamy*, W.P. (Civil) No. 494 of 2012 (Sept. 26, 2018) at 325.

and the positive obligation of the state to ensure right to food, shelter and employment under Article 21 of the Constitution."[150] The Court found this framing compelling. It observed that, in recent years, several welfare schemes had been launched in India, in areas ranging from food to education to employment. Moreover, a number of these schemes had the force of rights—socioeconomic rights had not merely acquired traction and support around the world, they had been recognized and enforced by the Indian judiciary. The Court also observed that, for all the legal backing that they might possess, welfare programs were poorly implemented, and intended beneficiaries were too often deprived of benefits. The Court argued that the UID program should be interpreted in such a context. It was important to understand, the Court felt, that "the Aadhaar Act truly seeks to secure to the poor and deprived persons an opportunity to live their life and exercise their liberty."[151] The infringement of the right to privacy was "minimal," the Court argued, when compared with the "above larger public interest."[152] In a ringing endorsement of the state's power to increase its capacity, the Court observed that the technology under dispute was "a vital tool of ensuring good governance in a social welfare state."[153]

There is a certain tension in the reasoning that was put forth by the state and subsequently adopted by the Supreme Court. On the one hand, the argument in favor of the UID scheme was poor state capacity, and the need to improve such capacity. On the other hand, potential worries about abuse and mismanagement were rejected on the ground that the state had the capacity to manage and control and regulate the data effectively. The petitioners appeared to have gestured at this tension, in observing that "successful monthly authentication is contingent on harmonious working of all attendant Aadhaar processes and technologies—i.e. correct Aadhaar-seeding, successful fingerprint recognition, mobile and wireless connectivity, electricity, functional POS [point of sale] machines and server capacity—each time."[154] Yet the observation had little impact on the Court. This tension is nicely captured by the Court's assessment of exclusions under the program. The petitioners contended that the nature of the biometric identifiers used meant that numerous persons were excluded from enrolling in the program, and that they were thereby excluded from the benefits that enrollment carries. Among the state's responses was the claim that exclusions were not internal to the program. They were a matter of implementation, and this was being improved and worked on in important ways. The Court declared that the "remedy"

150. *Id.* at 326.
151. *Id.* at 365.
152. *Id.* at 376.
153. *Id.* at 378.
154. *Id.* at 313.

when it comes to exclusion "is to plug the loopholes rather than axe a project, aimed for the welfare of large section of the society."[155] It was the "harm to the society" that the Court repeatedly highlighted.[156]

Commentators on the UID verdict have generally agreed that the Supreme Court avoided many of the hardest questions that it faced.[157] The logic that shaped the Court's decision appears to have been visible in another important and related development—India's efforts at a new data protection legislation. In July 2018, a government committee submitted a report and draft bill on data protection in India.[158] The Srikrishna Committee Report, as it has been called, drew a great deal on the European Union's recent General Data Protection Regulation. It observed, for example, the need for meaningful consent in the digital domain and the importance of a consent architecture that is sensitive to the experience of users. Yet, while the proposed legislation doubtlessly responded to some of the emerging global concern surrounding major technological companies, it appeared to be remarkably tolerant of state power.

Section 13 of the proposed Personal Data Protection Bill, 2018, for example, permits the processing of personal data if "such processing is necessary for any function of Parliament or any State Legislature."[159] This could occur for "the provision of any service or benefit to the data principal from the State" or "the issuance of any certification, license or permit for any action or activity of the data principal by the State."[160] Moreover, the Bill observes that "sensitive personal data may be proceeded" in cases where it is "explicitly mandated under any law made by Parliament or any State Legislature."[161]

The wide leeway given to the state is remarkable. No limiting principles are outlined in clear terms, and no guidelines are issued which might require that the invasion of privacy takes the least restrictive

155. *Id.* at 389.
156. *Id.* at 387.
157. *See* Madhav Khosla & Ananth Padmanabhan, *On Privacy, Supreme Court's Aadhaar Verdict Doesn't even Engage with the Concerns*, THE PRINT (Sept. 27, 2018), https://theprint.in/opinion/on-privacy-supreme-courts-aadhaar-verdict-doesnt-even-engage-with-the-concerns/125434; Madhav Khosla & Ananth Padmanabhan, *In Aadhaar, Supreme Court Did Not Probe if It Is a Tool to Track Citizens*, THE PRINT (Sept. 30, 2018), https://theprint.in/opinion/in-aadhaar-supreme-court-did-not-probe-if-it-is-a-tool-to-track-citizens/127118; Pratap Bhanu Mehta, *Verdict as First Word*, INDIAN EXPRESS (Sept. 28, 2018), https://indianexpress.com/article/opinion/columns/verdict-as-first-word-aadhaar-verdict-supreme-court-5377361; Amba Kak, *Limits of Delayed Scrutiny*, TIMES OF INDIA (Oct. 1, 2018), https://timesofindia.indiatimes.com/blogs/toi-edit-page/limits-of-delayed-scrutiny-scs-aadhaar-verdict-appeared-reluctant-to-engage-with-underlying-technical-and-evidentiary-claims.
158. COMM. OF EXPERTS UNDER THE CHAIRMANSHIP OF JUSTICE B.N. SRIKRISHNA, MINISTRY OF ELEC. & INFO. N TECH., GOV'T OF INDIA, A FREE AND FAIR DIGITAL ECONOMY, PROTECTING PRIVACY, EMPOWERING INDIANS (2018); Personal Data Protection (Draft) Bill (July 27, 2018).
159. Personal Data Protection Bill § 13(1).
160. *Id.* § 13(2).
161. *Id.* § 20.

path possible. The strong message in the proposed law appears to be that governance requires unconstrained powers to process data—that the state can only function effectively if it can process data without hindrance.[162] The latest version of the law has granted the state even greater powers and exemptions that the earlier draft.[163] It remains to be seen what final shape India's data protection legislation will take, and how the judiciary will approach that legislation should it invite constitutional challenge. What appears clear, however, is that the argument from state capacity is emerging as a major weapon for the increase in state power as India negotiates the relationship between technology and constitutionalism.

One seeming anomaly in the developments described here is this: the Court defended the UID system as one that was deployed at the point where services are delivered as a response to state incapacity there, while relying upon state capacity at the central level to ensure that the system does not unduly infringe upon citizens' informational privacy. At least conceptually this seeming anomaly can be explained away by observing that the question of capacity arises at different levels of government: the point of delivery and the central administration. That governance capacity is weak at the point of delivery does not necessarily mean that it is weak at the center.[164] And yet, the objections noted above as regards supervision at the center suggest that it might be a mistake to simply assume central capacity to allay privacy-related concerns.

V. Negotiating Capacity

Our case studies demonstrate the explanatory value of paying attention to state capacity. Constitutional doctrine is forged not only out of first principles that address the ideal limits of state power. It also emerges from an understanding of what states are capable of doing.[165] As we have shown, courts do address, often indirectly but sometimes directly, the question of state capacity in countries where capacity is

162. Madhav Khosla and Ananth Padmanabhan, *Draft Data Protection Bill Pays Little Attention to the Dangers of State Power*, The Print (July 30, 2018), https://theprint.in/opinion/draft-data-protection-bill-pays-little-attention-to-the-dangers-of-state-power/90511. *See generally* Amba Kak, *The Emergence of the Personal Data Protection Bill, 2018*, 53 Econ. & Pol. Wkly., no. 38, Sept. 22, 2018, at 12.

163. *See* Personal Data Protection Bill (Dec. 11, 2019).

164. For example, consider a stylized account of governance in the People's Republic of China. The capacity of the state at the center is undoubtedly strong, but the ability of the center to effectuate its directives throughout the nation is notoriously highly variable. On the variability of state capacity in China, see Vivienne Shue, *State Power and Social Organization in China*, *in* State Power and Social Forces: Domination and Transformation in the Third World 65 (Joel Samuel Migdal, Atul Kohli & Vivienne Shue eds., 1994); Daniel Koss, Where the Party Rules: The Rank and File of China's Communist State (2018).

165. Constitution makers have often been sensitive to this fact in making institutional choices. In the Indian context, see Madhav Khosla, India's Founding Moment: The Constitution of a Most Surprising Democracy 72–109 (2020).

a real concern. Attending to variations in state capacity, both across nations and across policy domains within individual nations, might contribute to our understanding of what courts have actually done—and, we now suggest, to understanding what courts might do—when dealing with constitutional violations.

The case studies suggest that courts can, in engaging with the problem of state capacity, contribute to its improvement and expansion in important if limited ways. But how precisely should courts act while addressing weak capacity? In this Part, we shift our focus from an explanatory analysis of how the problem of state capacity features in constitutional doctrine to a prescriptive assessment of how courts should negotiate gaps in capacity. The idealized model that we conceptualize sees courts as perhaps playing some role in building the state—in promoting capacity—in other branches where such capacity does not exist, but then involves courts receding and occupying a restrained posture when capacity does improve.[166] Courts encourage stronger capacity but then retreat into the background once other institutions begin to improve along capacity-related metrics.[167]

The precise intervention that courts can make in improving capacity will necessarily involve some degree of experimentation. In conceiving of a judicial role in building the state, it is worth recalling Michael C. Dorf and Charles F. Sabel's effort to shift the focus in democratic governance from first principles to a more pragmatist orientation.[168] In their vision, institutions should take an experimental approach toward public policy, and courts should perform their role by framing judicial review in the context of what experimentation reveals. Such an approach, as Dorf and Sabel have noted, can provide for new kinds of citizen engagement and can allow reform to proceed

166. Scholars who have focused on the judicial role—such as Young—rightly appreciate that real long-term change will have to eventually occur in other institutions beyond the courtroom, and that the task of courts is limited to sparking such change and making critical interventions. *See* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 54, at 167–91.

167. We note once again the connection between our analysis and existing discussions of structural injunctions. *See, e.g.*, *supra* text accompanying notes 45–50. Our model suggests one basis for analyzing the question: When should structural injunctions terminate? The answer that emerges from our approach is that they should terminate when the institutions under supervision have gained enough capacity to perform their tasks subject only to ordinary political accountability.

168. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). For additional discussions of democratic experimentalism, see Charles F. Sabel & William. H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008); Charles F. Sabel & William. H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2012). For a valuable intervention that considers the role of democratic experimentation in the specific context of social rights and shares our orientation in some respects, see Sandra Liebenberg & Katharine G. Young, *Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 237 (Helena Alviar García et. al. eds., 2014).

in useful and constructive ways. At the heart of the democratic experimentalist project has been the insight that the solution to a number of public policy problems can be determined only through practice. This fact seems to be especially true of a problem such as weak state capacity, which is deep seated and systemic, and implicates a range of actors.

Courts might well approach the problem of weak state capacity with strategies envisioned by democratic experimentalism, such as "learning by monitoring." It is difficult to determine ex ante what kinds of judicial interventions are likely to promote capacity expansion. Courts will have to issue directions and grant remedies based on specific institutional realities—within, of course, what is legitimate and required within the applicable legal framework.[169] Because judicial interventions that address capacity will be targeted and limited, they will not result in wholesale changes, but they can provide meaningful change in small ways, which may in turn lead to larger changes. A judicial engagement of this kind is related to what is now regarded as *dialogic judicial review*.[170] As scholars of comparative constitutional law have shown over the past decade, global practices are no longer exclusively explained by the strong form of judicial review that characterizes American constitutionalism.[171] The idea of a judicial dialogue moves beyond a conflictual framing of the relationship between the legislature and the judiciary. The interpretive moves performed by both branches are part of a conversation, one in which the popular branches of government can deliberate based on constitutional considerations that courts bring to light.

Because judicial efforts at building state capacity will have budgetary implications in more direct ways than others, because they will involve upsetting established bureaucratic practices and

169. This caveat is important to prevent too much experimentation and to preserve the rule of law. For a reflection on this concern in the context of South Africa's engagement remedies, see Sandra Liebenberg, *Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement,"* 12 Afr. Hum. Rts. J. 1 (2012).

170. *See* Mark Tushnet, *Dialogic Judicial Review*, 61 Ark. L. Rev. 205 (2008). The literature on dialogic review is now quite large. For representative examples, see Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 Osgoode Hall L.J. 235 (2009); Scott Stephenson, *Constitutional Reengineering: Dialogue's Migration from Canada to Australia*, 11 Int'l J. Const. L. 870 (2013); Mark Dawson, *Constitutional Dialogue Between Courts and Legislatures in the European Union: Prospects and Limits*, 19 Eur. Pub. L. 369 (2013); Po Jen Yap, Constitutional Dialogue in Common Law Asia (2015); Ming-Sung Kuo, *In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place*, 29 Ratio Juris 83 (2016); Miguel Schor, *Constitutional Dialogue and Judicial Supremacy*, *in* Comparative Constitutional Theory 86 (Gary Jacobsohn & Miguel Schor eds., 2018); Steven Sanders, *Dignity and Social Meaning:* Obergefell, Windsor*, and* Lawrence *as Constitutional Dialogue*, 87 Fordham L. Rev. 2069 (2019).

171. *See* Tushnet, *supra* note 45; Tushnet, *supra* note 59; Rosalind Dixon, *Weak Form Judicial Review and American Exceptionalism*, 32 Oxford J. Legal Stud. 487 (2012); Stephen Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice (2013).

institutional inertia, and because there is no single path to an increase in state capacity, judicial intervention may encourage lawmakers and bureaucrats to increase capacity in different ways from those that the courts had initially envisaged. Here, to adapt the idealized form of dialogic judicial review, courts may help to bring the question of capacity to the attention of the legislature and prompt it to act in a way that can build the state.[172] As David Landau has shown, a *dynamic* account of judicial review can enable courts to intervene in various ways.[173] Our project continues Landau's in several respects with one key difference: whereas Landau's focus has primarily been on the threats to democracy and on sustaining self-government, including through engaging civil society, furthering deliberation, and spreading constitutional values, ours has been on addressing and improving the capacity of the state.

The kind of experimentalist, dialogic model that we have in mind is partly driven by the reality of state capacity. An important feature of countries with weak capacity is that their capacity is, in fact, highly variable. In major developing economies such as China and India, for example, capacity varies considerably both across levels of government and across sectors and institutions.[174] Countries with weak state capacity manage to do *some* things remarkably well, and limited, targeted, and engaged judicial interventions that can grapple with the workings of capacity on the ground may be quite effective in contributing to its expansion.

The four case studies we have presented suggest certain strengths and weaknesses of this stylized model, and of the general ability of courts to address weak capacity in other institutions. In the Brazilian case, we can see how judicial involvement can lead a government to appreciate the rhythms and pathologies of its own institutional reality. The case does reveal the potential of an iterative exchange, as the government's response to bureaucratic failures was directly engendered by litigation. Similarly, in the South African social rights cases, we notice that the Constitutional Court did not try to radically alter the government's decision-making authority but forced it to take decisions in ways that could address the capacity question. By the use of "engagement" remedies, the state was made more responsive, and it was made to improve its capacity to address specific concerns in the process of exercising its power.

172. *See* Tushnet, *supra* note 170, at 212.

173. David Landau, *A Dynamic Theory of Judicial Role*, 55 B.C. L. Rev. 1501 (2014). *See also* David Landau, *Institutional Failure and Intertemporal Theories of Judicial Role in the Global South, in* The Evolution of the Separation of Powers: Between the Global North and the Global South 31 (David Bilchitz & David Landau eds., 2018).

174. *See* Shue, *supra* note 164; Koss, *supra* note 164; Regulation in India: Design, Capacity, Performance (Devesh Kapur & Madhav Khosla eds., 2019); Devesh Kapur, *Why Does the Indian State Both Fail and Succeed?*, 34 J. Econ. Persp. 31(2020).

The two Indian case studies similarly offer examples of how courts might negotiate the capacity question, and they are especially useful in underlining the considerations that need to be kept in mind. As Landau has observed, when courts intervene and adopt an expanded judicial role, their interventions may well be counterproductive.[175] In the case of anticipatory bail, it is easy to understand the Indian judiciary's efforts given the genuine concerns over police abuse. Here the courts have engaged in a kind of second-best constitutionalism. In the absence of any thoroughgoing attempt at police reform, they have tried to address the worst outcomes generated by a weak and compromised police force, namely innocent persons languishing in jail hostage to a slow-moving criminal judicial system. Yet, understandable as the judiciary's approach has been, it is worth noting that the absorption of state capacity in this fashion can create costs and perverse consequences, and it might even further weaken state capacity over the long run. The overall legitimacy of the criminal justice system is to an extent undermined, as false and unnecessary arrests are now seen as a part of the system.

This can have important on-the-ground implications. The prospect that a person could be released on anticipatory bail reduces the police force's incentives to screen arrests carefully. The provision of anticipatory bail might only increase false and unnecessary arrests as the police now know that the stakes of such errors are limited.[176] Of course, the benefits may be equally limited, but the very fact that this matter is now viewed in such terms rather than through correcting the exercise of the arrest power captures already how much is lost. And, as is only to be expected, though anticipatory bail is a response to specific abuses, it can itself be a source of abuse. It can prevent the police from performing its task in an honest and effort manner. Indeed, Indian courts have acknowledged instances wherein the mechanism is abused by individuals who, accused of serious crimes, are able to retain their freedom, escape custodial interrogation, and undermine the arrest power.[177] In countries like India, courts are thus faced with a genuine dilemma. They lack the power to reform the criminal justice system in any serious way, and yet they recognize that inattention to the weak capacities of the system—such as by limiting anticipatory bail to a few rare instances—is to ignore social reality. The approach that the courts have taken toward anticipatory bail illustrates their

175. Landau, *supra* note 173, at 1541 ("[C]ourts are products of their political regimes. . . in the worst case they may actually tend to exacerbate defects in their political systems rather than helping to correct them.").

176. *Cf*. Gary T. Marx, *Seeing Hazily (but Not Darkly) Through the Lens: Some Recent Empirical Studies of Surveillance Technologies*, 30 LAW & SOC. INQUIRY 339 (2005) (outlining the argument that lowering the costs of policing techniques increases their use in surveilling the population); Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 441 (2019) (providing a review of the literature).

177. *See* Muraleedharan v. State of Kerala, (2001) 4 SCC 638; State of Gujarat v. Narendra K. Amin, (2008) 13 SCC 594.

effort to internalize the social reality into legal rules in the hope that, until systemic changes occur, the law can be at least somewhat responsive to the weaknesses of the system in which it operates. Yet, as we have observed, it remains an open question as to whether this will only make the system weaker over the long run.[178]

The biometric identification case is revealing for a different reason. Here the problem is not perverse consequences that may potentially arise as a result of judicial interventions, ones that could address immediate cases of injustice but eventually undermine the system. Rather, the concern relates to the ability to keep both of Madison's considerations—the *creation* of state power and the *limitation* on state power—in mind. In the biometric identification case, the Indian Supreme Court focused nearly exclusively on the former question, failing to observe how efforts to increase state capacity, however genuine and sincere, can involve an extraordinary increase in state power. The decision is a reminder that as courts acknowledge the importance of increasing capacity, the challenge lies in not only building capacity but also in assessing *how* it should be built.[179] In the biometric identification case, the Supreme Court barely interrogated the mechanisms by which capacity was being built, and thereby satisfied one Madisonian goal at the cost of the other. As a result, an appeal to state capacity emerged only as a justification for state power.

Before we conclude, it is important to register one concern with our iterative and of course idealized model. Even if courts can find ways to negotiate the problem of state capacity and interact with other branches of government, to be cognizant of concerns such as perverse consequences, to understand which interventions to make and which ones to avoid, and to attend to both creating and limiting the state, one worry might be an increased involvement by the judiciary in political decision-making and policy-related questions. Moreover, as our idealized model envisages courts stepping back in due course, one might reasonably wonder why courts should feel inclined to retreat once they have managed to obtain power over certain kinds of processes.

We suggest two answers to such a concern. First, the model that we propose does not involve courts playing a very different role from the one they already occupy. As our case studies show, courts are already engaged in matters involving social rights, bureaucratic

178. One may question the case study in the first place, by suggesting that the absorption might not be meaningful because the arrested person has to get to court to get bail, and the difficulty in getting to court to have (ordinary) bail set was why anticipatory bail developed. This may well be true but one modest qualification would be in order, namely that a relatively loose standard for granting anticipatory bail means that bail cases can be processed more quickly. Though the anticipatory bail system was statutory, the key point in understanding the absorption of capacity is the standard for granting bail that the judiciary developed.

179. Indeed, determining the processes by which a state acts is a crucial question for public law. *See* ALON HAREL, WHY LAW MATTERS (2014).

decision making, criminal justice, and more. The studies demonstrate that courts are already negotiating the problem of state capacity—it is a matter that they can scarcely avoid given the reality of state weaknesses in the jurisdictions involved. Rather than calling on courts to hold a different position than they already have in many of the world's most prominent constitutional democracies, we focus on a shift in emphasis. We hope for courts to engage in specific kinds of considerations, and to perform such engagement in particular ways. To the extent that our model puts forth a certain kind of active role for courts, it is a role that has been a feature of public law adjudication for decades.[180]

Second, our framework might not result in the aggrandizement of judicial power as courts are, like other institutions, equally subject to capacity-related constraints.[181] This fact is likely to encourage them to retreat in situations where their task is complete. Over the long run, the greater the intervention of courts in matters where their involvement is no longer necessary, the greater will be the impact on their overall functioning and efficiency; that is, with respect to all the other matters they must dispose of. Rather than fearing that self-interested concerns will encourage courts to stay active even when other institutions are sufficiently addressing capacity-related concerns, it is precisely a self-interested concern for the court's own capacity that will encourage it to take a step back. In other words, there are good reasons for each of the actors within our iterative framework to allow the mechanisms we describe to function in a reasonably productive and meaningful fashion.

Needless to say, in countries where capacity is not merely variable and weak in some domains but is instead a pervasive and fundamental feature of the system, courts are unlikely to be able to contribute much to constitutionalism as it is practiced on the ground. This is quite simply because the background conditions that make effective judicial review possible—at the very least, an independent, honest, and engaged court system—are unlikely to exist. In the absence of such conditions, courts are unlikely to be able to make deliberative and experimentalist interventions. Such interventions are, after all, is predicated on some form of capacity being present, both in courts and in other institutions. Our emphasis has been on how courts can negotiate the capacity question in situations where such a minimum threshold exists and yet weak capacity is a real concern.

180. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing institutional litigation four decades ago).

181. For a recent study linking the content of the American Supreme Court's constitutional doctrine to the Court's own limited capacity, see ANDRE COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

Conclusion

Modern constitutional theory has focused nearly exclusively on constitutionalism as a restriction on the exercise of state power. It has, in the process, addressed the role that courts can and should play in enforcing the limits within which the state must operate. Yet, in a great many countries in the world, the dominant concern is the creation rather than limitation of state power. Such countries are burdened by weak state capacity and face genuine problems of effective governance. This institutional reality has rarely been confronted by constitutional scholars, whose emphasis on constitutionalism's limiting role has served as the global paradigm for the study of state power and public institutions.

Drawing on case studies from Brazil, South Africa, and India—three prominent constitutional democracies where state capacity is a real worry—this Article emphasizes the empowering nature of constitutions, and highlights the particular ways in which courts negotiate the reality of the state. Our case studies show that the problem of state capacity does inform the approach of courts, and they suggest that a better understanding of this phenomenon is crucial for understanding the theory and practice of constitutionalism in weak states. We have suggested that one might use the lens of state capacity to see weak-form, dialogic, experimentalist forms of review as ways by which courts can address the problem of weak state capacity; and can, in certain instances, contribute to good governance by deploying remedies that, in various ways, enhance the capacity of other institutions. An appreciation of the judicial role in negotiating state capacity and in, on occasion, contributing to its expansion allows us to better grasp the complex role that courts play in much of the developing world, and it enables us to better understand the challenge that constitutionalism faces in at once creating and limiting state power.