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The Reality of Social Rights Enforcement

David E Landau
THE REALITY OF SOCIAL RIGHTS ENFORCEMENT

David Landau*

ABSTRACT

Despite the American refusal to include socio-economic rights in the U.S. constitution or to enforce them, the vast majority of constitutions around the world now include these rights, and courts are enforcing them in increasingly aggressive and creative ways. Scholars have produced a large and theoretically rich literature on the topic. Virtually all of this literature assumes that social rights enforcement is about the advancement of impoverished, marginalized groups. Moreover, the consensus recommendation of that literature, according to scholars like Cass Sunstein and Mark Tushnet, is that courts can enforce socio-economic rights but should do so in a weak-form or dialogical manner, whereby they point out violations of rights but leave the remedies to the political branches. These scholars argue that by behaving this way, courts can avoid severe strains on their democratic legitimacy and capacity. Based on an in-depth case study of Colombia, which draws on my extensive fieldwork within that country, and on evidence from other countries including Brazil, Argentina, Hungary, and India, I argue that both the assumption and the consensus recommendation are wrong. In fact, most social rights enforcement has benefitted middle- or upper-class groups, rather than the poor. Courts are far more likely to protect pension rights for civil servants or housing subsidies for the middle class than they are to transform the lives of marginalized groups. Moreover, the choice of remedy used by the court has a huge effect on whether impoverished groups feel any impact from the intervention. Super-strong remedies like structural injunctions are the most likely ways to transform bureaucratic practice and to positively impact the lives of poorer citizens. The solution to the socio-economic rights problem is to make remedies stronger, not weaker.

* Assistant Professor of Law, Florida State University College of Law. I would like to thank Jorge Dominguez, Tara Grove, Jim Rossi, and Miguel Schor for comments and conversations about this draft.
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I. INTRODUCTION

For all practical purposes, the debate about whether to include social rights in constitutions is over. The American position against social rights is an outlier; there is now a “near consensus” (outside of the United States) that countries should include such rights in their constitutions.\(^1\) Moreover, there is an increasingly vibrant and varied jurisprudence on what rights to housing, food, and health care mean, and how these rights should best be enforced. Social rights are not mere paper rights; they are being actively enforced by courts around the world.\(^2\)

However, there is a basic disjoint between the theoretical claims being made about the enforcement of social rights and the empirical realities of their enforcement. In the theoretical literature, a robust enforcement of social rights is equated with the advancement of the prospects of marginalized groups – by ensuring that citizens have minimum levels of things like food and shelter, the courts will improve the lot of the poorest members of society. Yet much of social rights enforcement is aimed not at the poor, but instead at middle and upper-class groups. When courts in the developing world prevent pension reforms or salary cuts that would affect civil servants, when they order the state to give an expensive medical treatment or pay a pension to a middle-class professional, or when they force the state to raise subsidies for homeownership, they are deciding cases that help mainstream rather than marginalized groups.

One aim of this paper is simply to marshal empirical evidence showing that most of the literature mischaracterizes what social rights enforcement is – courts can aggressively enforce these rights and yet do little to affect social transformation. I focus on a case study of the Colombian Constitutional Court, which has an extraordinarily vibrant social rights jurisprudence, but has struggled to target its jurisprudence towards marginalized social groups despite a doctrinal and ideological commitment to those groups. The case study is based off of my own extensive fieldwork in the country. I supplement that evidence with evidence from Hungary, South Africa, Brazil, and other countries, showing that the hypotheses derived from the Colombian case appear to hold more broadly.

The second major aim of this paper is to reorient the very rich, but in my view misguided, debate about how social rights should be enforced.

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\(^1\) See Cass Sunstein, Designing Democracy: What Constitutions Do (2001) (“A remarkable feature of international opinion – indeed a near consensus – is that socioeconomic rights deserve constitutional protection. The principal exception to the consensus is the United States...”)

\(^2\) Several important edited volumes have attempted to come to terms with this enforcement by surveying practices around the world. See, e.g., Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (Varun Gauri & Daniel M. Brinks, eds., 2008); Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (Malcolm Langford, ed., 2008); Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor? (Roberto Gargarella et al., ed., 2006).
Scholars led by Mark Tushnet and Cass Sunstein have argued that “weak form” or dialogical enforcement of social rights, whereby courts point out political failures to fulfill these rights but generally leave the remedy to the discretion of the political branches, is the best way to balance a desire to enforce social rights and the legitimacy and capacity strains that such enforcement places on courts. The dialogue-based approach has not really been used outside of South Africa, and in that country it has not accomplished much. Systematic failures in both legislative and bureaucratic politics in developing countries make dialogic approaches unlikely to work in those countries – the intended recipient of the dialogue is unlikely to respond effectively.

Instead, courts have relied mainly on two models of social rights enforcement: (1) in an individualized model, courts give a single remedy to a single plaintiff for provision of a treatment, pension, or subsidy, but tend to deny systematic remedies that would effect larger groups; (2) in a negative injunction model, courts strike down benefit cuts or other laws that change the social benefits being given in the status quo. Courts focus on these two models because they look most like more traditional modes of judicial review. However, both models have a very pronounced tilt towards higher income groups; they are unlikely to do much for poorer citizens. Moreover, they appear to do little to improve bureaucratic performance.

All of this argues for remedial innovation, but towards stronger forms of review and judicial supervision, not weaker ones as argued by Tushnet, Sunstein, and others. Experience in both Colombia and India has shown that more aggressive, unconventional enforcement strategies – especially the judicious use of structural injunctions – can more effectively target social rights’ interventions towards the poor. Moreover, these strategies may be more effective at strengthening civil society groups and at inducing important changes in the bureaucracy. The conclusion is not that structural injunctions are the right answer to all social rights problems; they will fail in many political contexts, and the resource costs that they will place on courts may be too high to pay in many circumstances. It is that there is a desperate need to innovate with aggressive remedies if social rights are to live up to their constitutional promise.

The rest of this paper is organized as follows: In part I, I survey the existing literature on both the inclusion of social rights in constitutions, and the question of how social rights should be enforced. My aim is to show that existing work has mischaracterized both what social rights enforcement is about and how most courts are actually enforcing social rights. Part II presents a case study of the social rights jurisprudence of the Colombian Constitutional Court, which has produced one of the most varied and vibrant bodies of jurisprudence on these issues. I show that the Court has consistently proclaimed a serious interest in improving the situation of marginalized groups, but because of both remedial issues and populist tendencies on the Court, it has had trouble targeting

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its interventions towards these groups. Part III presents complementary evidence from other systems, aimed particularly at showing that the link between the form of the remedy and the beneficiaries of the intervention is strong. Part IV presents some important policy implications of my analysis: in particular I suggest changes in the doctrines used by the Committee on Economic, Social, and Cultural Rights (which is charged with interpreting the International Convention on Economic, Social, and Cultural Rights), so that the poor are more clearly targeted, and argue that the transnational dialogue or migration of constitutional ideas needs to focus on remedies and not just on the definition of rights. Further, I suggest that institutions other than constitutional courts might be more effective enforcers of social rights. Part V concludes.

II. THE EXISTING DEBATE

A. The Debate on Inclusion of Social Rights in Constitutions

The debate on whether to include social rights in constitutions is an old one. The United States constitution does not include these rights, and it served as a very influential model for other constitutions in the 19th century. But the force of the U.S. model began to cede ground to competing ideologies and newer models in the 20th century. For example, both the Mexican constitution (written in the midst of the Mexican revolution) and the German constitution (written after the country’s catastrophic defeat in World War I) during the Weimar Republic included lists of social rights.

The ideological importance of these rights gained force in the post-World-War II period, with a parade of post-colonial constitutions in the developing world. Internationally, countries agreed to the International Covenant on Economic, Social, and Cultural Rights as well as to the International Covenant on Civil and Political Rights, although the language of the two covenants reflects a continuing difference in how they were seen by the international community. Domestically, countries in the developing world which have written new constitutions since the post-war period have generally included lists of social

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6 Most importantly, Article 2 of the International Covenant on Economic, Social, and Cultural Rights states that the State Parties agree to “take steps...to the maximum of [their] available resources, with a view to achieving progressively the full realization” of the rights in the Covenant. International Covenant on Economic, Social, and Cultural Rights, G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 933 U.N.T.S.3, entered into force Jan. 3, 1976, art. 2(1). Thus most of the Covenant is seen as being “progressively” rather than immediately realized; this sharply limits the obligations placed on states. No similar provision exists in the International Convenant on Civil and Political Rights.
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rights like rights to food, housing, health care, and social security. Some of these countries have conferred less than full constitutional status on these rights, for example labelling them as non-directive fundamental principles, but this position has also become an outlier in recent constitutional design. Thus, in this area as in others, the U.S. is increasingly “exceptional” – despite the American rejection of social rights, they are firmly part of the post-war synthesis on the contents of constitutional law.

Still, the debate about the appropriateness of these rights has continued to be important to scholars and constitutional designers. An important group of scholars, particularly in the United States, continues to defend the position that social rights have no place in a constitution. The major arguments here revolve around the undesirability of judicial enforceability of these rights, and focus on two prongs: first that judges lack the democratic legitimacy to enforce these rights, and second that they lack the institutional capacity. The argument begins by positing that social rights are a subspecies of positive rights, which entail the right to receive something from the state rather than just requiring the state to leave you alone. Enforcement of these rights might require, then, that the judge order the state to provide people with goods or services, which would raise the specter of “the courts running everything – raising taxes and deciding how the money should be spent.” Judges lack the democratic legitimacy to carry out this kind of policymaking, and they lack the capacity to do so. Courts are unsuited to decide where to spend the state’s limited resources, and they will have trouble giving precise content to vague rights of the sort of the right to food or housing. Fuller’s observation that courts perform poorly when adjudicating “polycentric” issues is particularly applicable to socioeconomic rights; they have an inherent “[r]aging indeterminacy.” The result of all this is that courts are unlikely, in practice, to actually enforce socioeconomic rights: they will be unwilling to incur the wrath of the political branches or to fulfill undertakings located so far beyond their own capacity. Courts will auto-limit in order to avoid sanctions from other branches of government or from the public: “It is futile to rely on the judiciary to provide basic welfare for the disadvantaged, if the political branches are unwilling to do so.”

7 See Tushnet, supra note 3, at 196.
9 See, e.g., Frank Michelman, The Constitution, Social Rights, and Liberal Political Justification, 1 INT’L J. CONST. L. 13 (2003) (summarizing the conventional arguments and arguing that they are inadequate in coming to grips with the full scope of the issue).
10 See Frank Cross, The Error of Positive Rights, 48 UCLA L. Rev. 857 (2001) (posing “the following simple test for distinguishing between positive and negative rights–if there was no government in existence, would the right be automatically fulfilled?”).
12 See, e.g., Michelman, supra note 9, at 15 (summarizing this position).
13 Michelman, supra note 9, at 31.
14 See Cross, supra note 10, at 878-93.
15 Id. at 888.
These arguments have been attacked by a different group of scholars, who argue that social rights are actually not different from traditional, first-generation rights, and can and should be enforced by courts. The distinction, these scholars argue, may even be “meaningless.” They argue that social rights have a negative dimension as well as a positive dimension: enforcement may often require that Courts enjoin states from taking some action that threatens social rights (for example, industrial development that threatens the right to health, or forced evictions from slums that threaten the right to housing). They also argue that enforcement of civil and political rights may often require the spending of significant amounts of state resources – for example, the right to a fair trial requires the state to spend significant amounts of money. On the legitimacy and capacity points, these commentators note that the enforcement of traditional civil and political rights can also involve the court in complex remedies (the US school desegregation and prison reform cases are examples), and that courts can (albeit perhaps awkwardly) develop the capacity to deal with these sorts of cases. Finally, these scholars note that many cases of social rights enforcement can be undertaken without leading to unduly complex issues of enforcement or policy line-drawing – in many cases the court can provide an individualized remedy to a single plaintiff, which obviates the need to make a large-scale intervention in public policy.

The truth in this debate is almost certainly somewhere in between. That is, the critics of the conventional view are right that social rights enforcement is not always and inevitably different from negative rights enforcement. By sticking with certain kinds of cases and certain remedial techniques, courts can assimilate enforcement of social rights to enforcement of more traditional kinds of rights. But there is often a difference of degree. As Tushnet notes: “[I]t is not that recognizing social and economic rights would have budgetary consequences, while recognizing other constitutional rights does not…. Protecting background private law rights and first- and second-generation constitutional rights is cheap, though not free. Protecting social and economic rights is expensive.”

Moreover, while some kinds of social rights could likely be enforced through

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17 See, e.g., Kent Roach, The Challenges of Crafting Remedies for Violations of Socio-economic Rights, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 46, 46 (Malcolm Langford, ed., 2008) (arguing that “the distributional implications of traditional remedies are also underlined by the fact that some socio-economic rights can be enforced by traditional remedies”); see also Michelman, supra note 9, at 17 (noting that “social rights can sometimes be ‘negatively protected’ by comfortably kosher forms of judicial intervention).
19 See id. at 35-37.
20 See Roach, supra note 17, at 46.
21 Tushnet, supra note 3, at 234.
negative injunctions or individualized remedies, many kinds of enforcement are likely to require the creation of new programs.\textsuperscript{22} These are tasks that it is difficult for courts to perform, and they may refuse to perform them because of a perceived lack of capacity or legitimacy. As I explain in more detail below, the fact that social rights have some aspects that are more easily assimilated to traditional rights enforcement, and other faces that would require courts to undertake radical tasks, is important. It means that in practice, courts are likely to enforce social rights either by issuing negative injunctions or by giving individualized remedies to individual plaintiffs. Such methods of enforcement will be least likely to get courts into serious trouble.

B. The Debate on Enforcement and the South African Obsession

Most of the more recent work in the field has focused on the specific question of how social rights should be enforced rather than the older question of whether they should be included in constitutional texts in the first place. Some critics of social rights argued that if social rights were actually put into constitutional texts, courts would be unlikely to actually do anything with them.\textsuperscript{23} Understanding their lack of democratic legitimacy and institutional capacity, they would merely ignore these rights. Empirical experience has shown this observation to be false—courts have found a variety of approaches to enforce these rights. However, scholars have emphasized a clear tension between the desire to enforce socio-economic rights once they find their way into the text and the strains on both capacity and democratic legitimacy that courts may feel if they aggressively enforce them.

The theoretical debate, however, has focused almost entirely on a single country (and largely on a single case). In the famous \textit{Grootboom} decision, the South African Constitutional Court held that the political branches in South Africa had violated the constitution by failing to develop a housing plan that would meet the immediate needs of the poorest people most in need of assistance, like the plaintiff.\textsuperscript{24} But the Court refused to order an individualized remedy for the plaintiff, such as an order that the state provide her with housing—the constitution did not create a right to housing “immediately upon demand.”\textsuperscript{25} Nor did the Court give the details of such a plan and require the political branches to adopt it, or try to implement the plan itself. Instead, it merely stated that the political branches had the obligation to “devise and implement a coherent, coordinated program” and that a “reasonable” part of the total housing budget had to be reserved for those in desperate, immediate need for housing.\textsuperscript{26} The underlying concerns of the Court appeared to be the ones of

\textsuperscript{22} See id.
\textsuperscript{23} See Cross, supra note 10, at 888.
\textsuperscript{24} \textit{Government of the Republic of South Africa v. Grootboom}, 2000 (11) BCLR 1169 (CC).
\textsuperscript{25} Id. at ¶ 95.
\textsuperscript{26} Id. at ¶¶ 92, 95.
the critics of social rights – the Court was concerned that it would lack the legitimacy and capacity to issue a stronger order.\textsuperscript{27}

A prominent group of American constitutionalists lauded the decision as finding a way to reconcile two imperatives previously thought irreconcilable by most – the enforcement of the detailed social rights now found in most constitutions and the assurance that courts do not overstep their bounds of democratic legitimacy and capacity. Thus, Mark Tushnet wrote that the Court’s work constituted a new kind of judicial review, “weak form review,” that allowed courts to judicially enforce these rights without involving them in complex public policy decisions or letting them run roughshod over the legislature.\textsuperscript{28} In other words, the Court gave the right to housing “some judiciously enforceable content,” but at the same time, gave “legislatures an extremely broad range of discretion about providing” the right.\textsuperscript{29} In a similar vein, Cass Sunstein wrote that the Court had effectively “steer[ed] a middle course” between holding socio-economic rights nonjusticiable and holding them to “create an absolute duty” to provide housing or food or health care for everyone who needs it.\textsuperscript{30} Instead, the Court had enforced the right to “promot[e] a certain kind of deliberation, not by preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life.”\textsuperscript{31}

More recent work has critiqued the positions of Sunstein and Tushnet. A large group of both South African and American scholars has argued that weak-form enforcement, as exemplified by \textit{Grootboom}, did not work – the plan asked for by the Court was not produced, and the case did virtually nothing to actually advance the right to housing.\textsuperscript{32} Many of these academics have argued that \textit{Grootboom} had more or less the right idea but needed to be ratcheted up: the remedy needed to be made a little less “weak” in order to be effective.\textsuperscript{33} In a series of recent articles, Brian Ray notes that the South African Court has abandoned the \textit{Grootboom} approach for another tactic that Ray calls

\begin{itemize}
\item \textsuperscript{27} See Tushnet, supra note 3, at 243 (noting that the Court used “the language of nonjusticiability” but “went on…to enforce the relevant social welfare right).\
\item \textsuperscript{28} See id. at 242-44.\
\item \textsuperscript{29} Id.\
\item \textsuperscript{30} Sunstein, supra note 1, at 233.\
\item \textsuperscript{31} Id. at 236. Other U.S. scholars have written similar assessments. See, e.g., Michelman, supra note 9, at 27 (noting that \textit{Grootboom} “does not…seem shockingly preemptive of legislative and executive policy choice); Mark S. Kende, Constitution Rights in Two Worlds: South Africa and the United States 261-65 (2009) (defending \textit{Grootboom} against various critics).\
\item \textsuperscript{33} See Davis, supra note 32; Rosalind Dixon, Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited, 5 Int’l J. Const. L. 391 (2007) (arguing that the court may want to consider ratcheting up the remedy even as it maintains a minimalist vision of the right).\
\end{itemize}
engagement. The core of the engagement remedy is that the Court orders the state to negotiate with the plaintiffs so that a satisfactory agreement can hopefully be reached. For example, in the *City of Johannesburg* case, 300 residents of an unsafe building in a slum sued to stop the state from evicting them forcibly in order to carry out a large-scale urban regeneration. The Constitutional Court issued an interim order requiring that the city and the residents “engage with each other meaningfully...in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.” The parties reached agreement; the City agreed to stop evictions in the short-term and to refurbish rather than destroy many of the buildings in the area. Ray argues that engagement, which the Court has also used in subsequent cases, is an alternative to *Grootboom* that also manages the tension between the need to enforce these rights and the capacity and legitimacy problems that Courts feel when they enforce them. Engagement “falls somewhat short of the call by the Constitutional Courts’ critics for full-fledged judicial interpretation and enforcement, but the same features that make engagement something less than strong court enforcement also enhance its legitimacy.” As with *Grootboom*, however, there are real questions about the general effectiveness of the engagement remedy, at least as it is currently used by the South African Constitutional Court – engagement has failed in several subsequent cases.

C. The Reality of Social Rights Enforcement

Critics of social rights argued that courts would probably respond to the constitutionalization of social rights be declining to enforce those rights. Tushnet, Sunstein, and Ray argued that courts should relieve the tension between enforcement of social rights and democracy/capacity issues by adopting the “weak form” or dialogical review used in *Grootboom* or an engagement remedy like the one used in *City of Johannesburg*. But neither approach seems to function well or to accurately describe the majority of social rights enforcement occurring around the world. The critics were wrong to suggest that social rights enforcement would not occur; in reality, courts have found a variety of ways to give content to these rights. But the South African solutions seem deeply bound

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36 See *Occupiers of 51 Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC).


38 See id.

39 See infra Parts II & III (summarizing evidence that most courts focus on other approaches).
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up with the political situation and legal culture of that country and have not been used anywhere else.\textsuperscript{40}

In reality, courts have found other ways to manage the tension between the enforcement of social rights and the capacity and legitimacy costs perceived to go along with that enforcement. Many courts appear to rely upon an \textit{individualized enforcement} model – when an individual plaintiff comes to the court asking for provision of some particular medicine or treatment, they grant relief to that individual plaintiff.\textsuperscript{41} This model relieves the tension noted above by providing relief to only a single plaintiff, thus avoiding complex management issues and making it appear that the court is not intervening massively in public policy. Even though the aggregate affect of these decisions on the public budget can be very large, the individual decisions appear to be familiar court-like work: the court is simply deciding whether one plaintiff is entitled to a remedy against one defendant. A second way in which courts manage the tension is by issuing \textit{negative injunctions} striking down a law and maintaining the status quo, rather than issuing positive orders forcing the state to provide a service.\textsuperscript{42} Again, by doing this the courts are assimilating social rights enforcement to the enforcement of traditional first-generation rights – it is issuing a merely negative remedy for the right.

Both of these remedies allow courts to carry out social rights enforcement relatively securely, without worrying that they will be seen as overreaching beyond the traditional tasks of courts. But there is a significant cost – both tools are heavily tilted towards middle class and upper income groups rather than poor plaintiffs. In other words, in much of the world social rights enforcement is vibrant, but accrues to the benefit of higher class groups rather than those social groups most in need.\textsuperscript{43} With individualized enforcement, this occurs because individual middle class rather than poor plaintiffs are more likely to know their rights and to be able to navigate the expense and intricacies of the legal system.\textsuperscript{44} In the negative injunction cases, it occurs because the state usually tries to cut middle class pension and health care benefits for civil servants and other middle class groups rather than those few services going to the very poor.\textsuperscript{45} Put another way, the status quo gives the poor relatively little to protect via negative enforcement. To make matters worse, courts often manage the tension between social rights enforcement and democracy by engaging in judicial populism – issuing decisions that are calculated to raise the ire of the political branches but to gain strong support from the middle class groups. For example, courts often strike down austerity measures that limit middle class social benefits precisely

\textsuperscript{40} Cf. Roux, \textit{supra} note 32 (arguing that South African jurisprudence has to be understood within the context of the country’s dominant party system).
\textsuperscript{41} See \textit{infra} Parts II.C & III.A.
\textsuperscript{42} See \textit{infra} Parts II.D & III.B.
\textsuperscript{43} See \textit{infra} Parts II and III (presenting evidence for this argument).
\textsuperscript{44} See \textit{infra} text accompanying notes 121-127.
\textsuperscript{45} See \textit{infra} text accompanying notes 227-228.
because they will have the support of the median voter when they do so, which may insulate them from retaliation.46

All of this suggests that the conventional literature misspecifies both the general nature of social rights enforcement and the tradeoff faced by courts. Most of the literature on social rights, whether in favor of or against enforcement, assumes that it is a counter-majoritarian exercise, and that the beneficiaries of its enforcement will be marginalized groups.47 This does not appear to be true – social rights enforcement is essentially majoritarian in many cases, and the beneficiaries are middle and upper class groups rather than the marginalized. Moreover, the real tradeoff faced by courts when choosing remedies is more complex than simply a tradeoff between effective enforcement and legitimacy or capacity issues. Instead, there are three issues – the effectiveness of the intervention, the legitimacy/capacity cost to the court, and the question of which group benefits from the intervention.

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<td><strong>Approach</strong></td>
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<td>Individualized enforcement</td>
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<td>Negative injunctions</td>
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46 See infra text accompanying notes \Error! Bookmark not defined.-155.
47 See, e.g., Roberto Gargarella, *Theories of Democracy, the Judiciary, and Social Rights, in Courts and Social Transformation in New Democracies* 13, 28 (Roberto Gargarella et al., eds., 2006) (noting the social rights “are normally claimed by groups that consider themselves marginalized by the dominant political forces”); Ran Hirschl, *Towards Juristocracy* 125-39 (2004) (arguing that courts in South Africa, New Zealand, Israel, and Canada have not aggressively enforced social rights because these courts were set up to protect the interests of entrenched elites and have no interest in protecting marginalized groups); Sunstein, *supra* note 30, at 223 (noting that protection of social rights is about the provision of “minimal protections against starvation, homelessness, and other extreme deprivation”); Michelman, *supra* note 9, at 32 (arguing that social rights are about providing “a social citizenship guarantee” or “a credible guarantee of constant, good faith pursuit by the powers that be of assurance of the prerequisites to social citizenship of all who seek them on fair terms”); Cross, *supra* note 10, at 886 (noting that positive rights claims would “pit poor individuals against the government”). Only a few authors have noted the point that social rights claims might be aggressively enforced, but in favor of the rich or middle class instead of the poor. See Andras Sajo, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court, in Courts and Social Transformation in New Democracies* 83 (Roberto Gargarella et al., eds., 2006) (arguing that social rights enforcement in Hungary has accrued largely to the benefit of the middle class); Langford, *supra* note 16, at 38 (noting that “[a] particular concern is that middle classes may better capture the Courts in comparison to the poor.”)
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<td>Weak-form</td>
<td>Low to moderate</td>
<td>Won’t cause any change</td>
<td>Nobody, although may aim at poor</td>
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<td>enforcement</td>
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<td>Structural</td>
<td>High</td>
<td>May alter bureaucratic practice</td>
<td>May target lower income groups</td>
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These tradeoffs are summarized in Table 1. Individualized enforcement may have a low legitimacy cost and does not strain the capacity of the court, but it primarily benefits upper income groups. Further, the evidence indicates that it does little to improve the performance of the bureaucracy in providing social services, and thus it may be relatively ineffective as well. Negative injunctions are effective (at least at maintaining the status quo) and may have only moderate capacity and legitimacy costs to the Court (depending on their macroeconomic effect), but they again benefit primarily upper income groups. Weak-form enforcement or engagement appears to be targeted at lower income groups, and to have low legitimacy and capacity costs for the court, but it also appears to be ineffective at accomplishing anything. A fourth approach, *structural enforcement*, is familiar from US public law and occurs when a court issues broad orders aimed at reforming institutional practice over a long period of time. This appears to hold some promise at targeting relief towards lower income groups, and may be able to do so effectively in some circumstances, but it obviously involves the Court deeply in polycentric decisions and thus may put a significant strain on the legitimacy and capacity of the court.

### III. A Case Study on the Difficulties of Social Rights Enforcement

In this section I use a case study to test my two major hypotheses: (a) that much of social rights enforcement is majoritarian and benefits middle and upper class groups, and (b) that there is a strong relationship between the type of remedy used by courts and the identity of the beneficiaries from the intervention. I focus on the Colombian Constitutional Court from 1991 to the present. The Court makes a good case study for several reasons. First, it has been extraordinarily active in enforcing social rights and has used three types of remedies noted above – individualized enforcement, negative injunctions, and complex structural remedies – in its jurisprudence. Second, it constitutes what political scientists have called a “least likely case” for my theory that social

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48 *See, e.g.*, [Donald L. Horowitz, The Courts and Social Policy](1977) (surveying structural injunctions across a range of areas in U.S. law).
49 *See infra* Part II.E.
The concept of least likely case was invented by political scientists as a way to make causal inferences from the case-study method, which often involves, by necessity, a small number of observations. See, e.g., Harry Eckstein, Regarding Politics (1992).

See generally Alfonso Charría Angulo, Legalidad para tiempos de crisis (1984) (examining the role of the Supreme Court between 1886 and 1933); Hugo Palacios Mejía, La economía en el derecho constitucional colombiano (1975) (looking at Supreme Court decisions from the National Front era); Estado de sitio y emergencia económica (Manuel José Cepeda, ed., 1985) (detailing the Supreme Court’s attempts to limit executive power in the 1980s).


See id. at 223-48.
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constitutional reforms, but the Congress and Supreme Court would block those efforts. 54

Finally, after a series of political assassinations culminated in the killing of the liberal candidate for president, Luis Carlos Galan, in 1989, a short-lived student movement erupted and the major presidential candidates agreed to support the calling of a Constituent Assembly in order to write a new constitution. 55 A referendum, held concurrently with the presidential election on May 27, 1990, supported calling an assembly by a huge margin, with 5,236,863 in favor of the Assembly, and only 230,080 opposed (along with 364,656 blank votes). 56 Because of the electoral rules under which the Assembly was elected and the nature of the political moment, the composition of the assembly was considerably more plural than ordinary politics and included several political groupings beyond the traditional two party system. While the largest block was the Liberal party, the second large party was a demobilized guerrilla group called the M-19, and the third largest group was a breakaway segment of the Conservative party called the Movement for National Salvation (MSN). 57 There were also a few representatives of other guerrilla groups, of evangelicals, and of indigenous organizations. 58

As I have noted elsewhere, the resulting constitution both sought to make existing institutions, particularly the Congress, stronger and more pluralistic, and sought to establish new institutions in order to allow actors to short-circuit these existing institutions. 59 Chief among this latter effort was the creation of a new, specialized Constitutional Court, whose nine justices served nonrenewable eight-year terms. 60 The system was designed to distance justices from politics in general and particularly from any one political force: thus the president, Supreme Court, and Council of State (the nation’s high administrative

55 See id. at 101-57. A Constituent Assembly was not explicitly contemplated in the 1886 Constitution, which only allowed amendment via congressional action. Nonetheless, the Supreme Court, in a narrowly divided vote, allowed the Assembly to proceed on the theory that ultimate power to rewrite the Constitution rested with the people. See id. at 157-232 (reprinting both the majority opinion and the dissents).
56 Id. at 113.
57 Of the 70 seats elected to the Assembly, the Liberals won 23 seats, the M-19 19, the MSN 11, and the Conservatives only 9. See JAIME BUENAHORA FEBRES-CORDERO, EL PROCESO CONSTITUYENTE: DE LA PROPUESTA ESTUDIANTIL A LA QUEBRA DEL BIPARTIDISMO 354-55 tbl. 4 (1991). Turnout was quite low – only 3,710,557 citizens voted in the election, out of a total electorate of 14,237,010. Somewhat paradoxically, this may have actually increased the pluralism of the organization because it reflected the fact that the standard political machines that dominated rural Colombian politics may not have mobilized for the election. See id. at 357-63.
58 Evangelical organizations, indigenous groups, and the Union Patriotica (which represented the FARC guerrilla group) all won two seats each. See id. 354-55 tbl. 4.
60 See CONST. COL., art. 239.
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court) each had the power to send lists of three candidates for one-third of the vacancies on the Court.\textsuperscript{61} The final selection was made by the Congress from each list of three candidates.\textsuperscript{62} The Court had the power to hear the traditional Colombian instrument of review, the unconstitutionality action, which was an abstract review petition that could be initiated by any citizen against any statute.\textsuperscript{63}

In addition, the 1991 Constitution created a new device, the tutela.\textsuperscript{64} Tutelas were constitutional complaints allowing citizens harmed by government (and in some cases private) actions in violation of their constitutional rights to bring suit.\textsuperscript{65} The device was designed to be fast (it had to be heard and decided within ten days by the first instance court and twenty by the appellate court) and informal (it merely had to contain a short statement of the facts, and could be filed by telegram or even orally in certain cases).\textsuperscript{66} It would be heard by two courts within the ordinary judiciary and then sent to the Constitutional Court, which could use a certiorari-like mechanism to select some for revision.\textsuperscript{67}

The then-president, Carlos Gaviria, saw the tutela, along with the Constitutional Court itself, as one of the key achievements of the new Constitution. In his only speech before the Assembly during its work, he noted the pervasive problem of “arbitrariness” in Colombian society, both because of the low quality of government and because of pervasive violence.\textsuperscript{68} He argued that the tutela was necessary in order to make “the Constitution cease being something theoretical, a collection of illusions and good intentions, and convert it into an instrument to resolve conflicts peacefully, combat injustices and fight

\textsuperscript{61} See id.
\textsuperscript{62} See id.
\textsuperscript{63} See Const. Col., art. 241, para. 4.
\textsuperscript{64} See Const. Col., art. 86. In part, the article states: “Every person has the right to file a tutela before a judge, at any time or place, through a preferential and summary proceeding … for the immediate protection of his fundamental rights when that person fears they may be violated by the action of omission of any public authority…. In no case can more than 10 days elapse between filing the tutela and its resolution.”
\textsuperscript{65} The tutela was allowed against any “public authority”; it could also be brought against private actors if they were charged with delivering a public function, if their conduct had a serious affect on collective interest, or if the petitioner was left in a “defenseless or subordinate” state before the private actor. See id.
\textsuperscript{66} See Decree 2591 of 1991, Diario Official 40,165 (Nov. 19, 1991), art. 1 (noting that a tutela can be filed at any “day or hour”); art. 14 (noting that the procedure is “informal,” for example, that it need not cite the precise constitutional norm at issue and that it can be filed by telegram, or in case of urgency, orally); art. 29 (noting that the first instance judge must render a decision within 10 days); arts. 31-32 (requiring appeals to be filed within 3 days and requiring the appellate court to render decision within 20 days).
\textsuperscript{67} See Decree 2591 of 1991, Diario Official 40,165 (Nov. 19, 1991), art. 32 (setting up the ordinary appeals procedure); art. 33 (setting up a procedure whereby, following any appeal, panels of two justices on the Constitutional Court select tutela decisions for revision by the full Court “without express motivation and according to their own criteria.”).
against arbitrariness.” He also emphasized the ease of the new device, which would allow citizens to “easily” bring their cases, and would force judges to decide them “quickly and without formality.”

The Constituent Assembly also included a long list of rights in the new Constitution; particularly important here, they included a comprehensive list of social rights, including rights to education, housing, health, and social security. Moreover, article 1 of the Constitution, which enshrined the basic definition of the new state, defined it as an “estado social del derecho” or “social state of law.” This was a significant change from the 1886 constitution, which was broadly seen as enshrining an “estado del derecho” or “rule of law.” The change in terminology reflected the Assembly’s desire to move Colombia towards a social welfare state.

The inclusion of these social rights and social principles was not controversial at the Assembly; what was controversial was the enforceability of these rights. President Gaviria argued that social rights should be included as societal goals but that it would be a mistake to render them directly enforceable via the tutela or other device. Article 85 of the 1991 Constitution defined a list of rights as “immediately applicable” – this list included most of the traditional rights but pointedly excluded the social rights. Moreover, the tutela only runs to protect “fundamental rights,” and the Constitution contains separate chapters for “fundamental rights,” “economic, social, and cultural rights,” and “collective and environmental rights.” Thus there is some evidence that the Assembly intended to make socio-economic rights judicially unenforceable, or at least to make them unenforceable absent prior legislative action to define their

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69 Id. (“When dealing with obvious cases of arbitrariness, it is clear that the public unconstitutionality action, with all its virtues, by itself, is insufficient to protect rights….“)
70 Id.
71 See Const. Col., arts. 48 (social security), 49 (health), 51 (housing), 67 (education).
72 Article 1 states: “Colombia is a social State of law organized in the form of a unitary Republic, decentralized, with autonomy of its territorial entities, democratic, participatory and pluralistic, founded in respect for human dignity, in work and solidarity of the persons that integrate it and in the prevalence of the general interest.” Const. Col., art. 1.
74 See Cesar Gaviria, Words of the President of the Republic, Dr. Cesar Gaviria, at the Opening of the National Constituent Assembly (Bogota, Colombia, Feb. 5, 1991), in Introduccion a la Constitucion de 1991: Hacia un Nuevo Constitucionalismo, at 313, 317 (Manuel Jose Cepeda, ed., 1993) (“As is obvious, these socioeconomic and collective rights cannot be directly enforced by an individual before a judge. The reform proposal adopts that understanding. But it also adopts the understanding that, in this respect, as in general with respect to the entire Bill of Rights, all Colombians must live and develop a sense of commitment with the fundamental democratic principles that drive us all to be ever-alert guardians of liberty, justice, and equality.”).
75 See Const. Col., art. 85.
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content. As we see below, the new Constitutional Court would quickly reject these positions in favor of one allowing justiciability.

B. The construction of the vital minimum principle

The first Constitutional Court was controlled by progressive justices who moved quickly to emphasize the place of social rights in the constitution. In one of the Court’s first decisions, the Court established that the definition of fundamental rights used for determining whether a tutela could be taken was not a closed set of provisions either listed in article 85 or designated as such in the chapter titled “Fundamental Rights,” but instead was an open set of provisions that had to be established by the Court on a case-by-case basis. Although most of the social rights were not immediately designated as “fundamental” because of this decision, it did make it easier for the Court to move towards enforcing social rights via tutela. Further, the Court developed its “connectivity” doctrine, whereby rights that the Court was unwilling to otherwise deem fundamental in this period (like the rights to health and social security) could be treated as fundamental if connected to rights that were fundamental, mainly the rights to life and human dignity.

But the most important conceptual innovation in this area was the idea of the “vital minimum”, which the Court created in a 1992 decision authored by Eduardo Cifuentes. There is no explicit right to a minimum level of subsistence in the constitution. However, the Court deduced such a right from the social rights found in the text and from the social state of law and human dignity principles stated in article 1: “Every person the right to a minimum of conditions for their material security. The right to a vital minimum – or right to subsistence as the petitioner calls it – is a direct consequence of the principles of human dignity and the Social State of Law that define the political, social, and economic order….” The Court was also careful, however, to view the right in systematic terms, and not to turn it into an unlimited right to take resources from the state: “The right to a vital minimum is not a subjective right by anyone to

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76 For a discussion of the legislative history in the Constituent Assembly and its meaning, see MANUEL JOSE CEPEDA, LA TUTELA: MATERIALES Y REFLEXIONES SOBRE SU SIGNIFICADO 33-34 (1992)
77 The progressives were actually outnumbered on the new court, four to three, by career judges with strong links to the old Supreme Court. As explained to me by both Cifuentes and his then law clerk Rodolfo Arango, the three managed to exercise disproportionate influence on the Court largely because they maintained an essentially united jurisprudential position, whereas the other justices did not act cohesively. Moreover, precisely because the Constitution was a new document, very different from the old 1886 text, the justices with ties to the old Supreme Court felt uncomfortable interpreting the document and tended to defer to the academic justices: “We were owners of the garden, and they felt like guests there.” Personal interview, Eduardo Cifuentes, May 11, 2010; Personal interview, Rodolfo Arango, April 11, 2010.
80 T-426/92 (June 24, 1992), § 5.
demand, in a direct way and without attending to the special circumstances of the case, economic assistance from the State. Although the social duties of the state require the future realization of this guarantee, while this is impossible, the State is obligated to promote effective and real equality before the inequitable distribution of economic resources and the lack of opportunities.

In the tutela decision which coined the concept, the Court protected the right of an elderly man to receive a pension that had been improperly denied him, and where in fact the agency had declined even to respond to his petitions. The Court emphasized the age of the man and the fact that he lacked any economic resources.

Thus, when created, the “vital minimum” doctrine, which has become one of the most important concepts in Colombian constitutional law, served two key purposes. First, doctrinally it offered a means for determining when the socio-economic rights were sufficiently connected to other rights, like the right to life, to be enforced via tutela – when the failure to fulfill these rights threatened the petitioner’s right to be provided with some minimum level of subsistence, then they were clearly connected to these fundamental rights. Second, it established a vision of social rights that emphasized those social groups with the greatest need. Related to the doctrinal concept of the “minimum core” in international law, it established what was in essence a rule of prioritization – the state should spend money in ensuring that all citizens receive at least a minimal level of food, clothing, and housing.

The “minimum core” concept was developed by the Committee on Economic, Social and Cultural Rights (charged with enforcing the International Covenant on Economic, Social, and Cultural Rights) in an effort to give some immediately enforceable content to the positive obligations in the Covenant. States that fail to provide at least “minimum essential levels” of the social rights would, prima facie, be in violation of the Covenant. Thus social spending should generally go towards the poorest members of society. The magistrate who coined the concept, Eduardo Cifuentes, was adamant on this point when speaking to me: “I had thought that our law needed a strong component of social justice. It needed something to redress poverty.”

So viewed, the “vital minimum” principle was both a way to give social rights teeth and a limitation on the teeth of those rights. Social rights could only be invoked via tutela by those marginalized groups who most needed them. This reasoning was built into the doctrine in both pension cases and health cases,
which would become the two workhorses of the Court’s social rights tutela jurisprudence. In pension cases, the petitioner needed to show that he lacked other resources, so that the failure to pay his pension would threaten his right to a dignified life. In health cases, the doctrine demanded that the petitioner show both that the failure to receive the treatment was severe enough to threaten his rights to life, dignity, or personal integrity, and that the petitioner lacked the resources to pay for the treatment or to attain it under some other plan. And in general, in these early cases the Court was cautious about expanding the vital minimum concept: as Rueda shows in his careful analysis of the spread of the doctrine, the Court heard few vital minimum cases before about 1995 and in those cases, “when the claimants could not prove that their situation was absolutely desperate and that they were incapable of self-help, the court did not grant protection of their right to a minimo vital.” The inquiry into this question was deeply fact-specific: claims were denied even for poorer plaintiffs if it appeared that they could take care of themselves under the precise circumstances of the case. For example, a woman’s petition asking that her child, who was in a coma, not be discharged from the hospital because of her non-payment of the bill was denied because the Court found that the mother could provide the necessary care for the child on her own.

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86 See, e.g., T-516/93 (Nov. 10, 1993); see also Augusto Conti, “Procebilidad de la accion de tutela en materia pensional,” in TEORÍA CONSTITUCIONAL Y POLÍTICAS PÚBLICAS 295, 309-10 (2007) (discussing this case); see also T-193/97 (April 15, 1997) (“The jurisprudence of the Court has been emphatic in sustaining that the liquidation and payment of workers’ obligations escapes the proper ambit of the tutela action, and although it has been allowed in certain cases, these have been exceptional…. Thus, the Court has found that the right of a worker to receive the payment of a salary can be vindicated via tutela when his right to a vital minimum has been affected: that it is possible to use the tutela to force monthly pension payments for an elderly person in pressing circumstances when this is his only income….”).


88 Pablo Rueda, LEGAL LANGUAGE & SOCIAL CHANGE DURING COLOMBIA’S ECONOMIC CRISIS, in CULTURES OF LEGALITY: JUDICIALIZATION & POLITICAL ACTIVISM IN LATIN AMERICA 25, 37 (Javier Couso et al., eds, 2010). Mauricio García Villegas has some data on the incidence of tutelas on social issues in these early years. He finds that between 1992 and 1996, looking at all tutelas filed nationwide, 31 percent of tutelas dealing with first generation rights were granted, but only 19 percent of tutelas dealing with social issues were granted. See Mauricio García Villegas, DERECHOS SOCIALES Y NECESIDADES POLÍTICAS. LA EFICACIA JUDICIAL DE LOS DERECHOS SOCIALES EN EL CONSTITUCIONALISMO COLOMBIANO, in EL CALEIDOSCOPIO DE LA JUSTICIA EN COLOMBIA 455, 464 (2004). At the Constitutional Court level, he finds a total of only 164 social rights cases levied against the state between 1992 and 1997, although he also finds that 66 percent were granted. See id. at 470 tbl. 7. Thus, nationally lots of social rights tutelas were being filed but they were generally denied, while at the Constitutional Court level claims were generally granted but the Court was unwilling to spend much of its docket on these issues.

89 See id. at 37.

90 See T-527/93 (Nov. 10, 1993).
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C. The Vital Minimum Evolves: Individualized Enforcement

Individualized social rights cases, especially those to enforce rights to health and to pensions, exploded sometime in the late-1990s. The typical health claim was brought against an insurance company by a single petitioner and alleged that the company failed to provide some treatment that was necessary for the petitioner. The typical pension claim was brought against the state by a single petitioner and alleged that the state either calculated benefits wrongly or simply failed to pay the pension to which the petitioner was entitled. Thus, these suits, although alleging claims that either the state or a private company fulfill certain positive obligations to the petitioner, in many ways resembled classic judicial activity. The claim is simply that the state or a private company owes the petitioner some benefit, and the remedy is an individualized order that the state provide that benefit.

These suits were fairly important from the outset of the 1991 constitution: a study of tutelas filed nationwide between January of 1991 and December of 1996 found that 11.6 percent of all tutelas demanded that an entity offering “social security” (health care or pension) services respond to a request, 9.2 percent allege that an employer or other entity had failed to pay either social benefits or salary for their employees, and an additional 3 percent allege that a request for social security benefits has been denied.91 Thus social themes constituted at least a quarter of all tutelas filed even in the early years of the Court’s work.

But the number of these suits climbed sharply and steadily during the 1990s, particularly with respect to the right to health. For example, only 10,732 tutelas on the right to health were sent to the Constitutional Court for possible revision in 1992; however, this number reached 133,373 cases by 2001.92 And according to the Defensoria del Pueblo, tutelas invoking the right to health increased from 24.7 percent of all tutelas filed in 1999 to 41.5 percent in 2008.93 Similarly, the number of tutelas related to the right to health that were actually heard by the Court climbed from 21 in 1994 to 290 in 2003, an increase from 3.9% to 33.4% of the court’s total tutela docket.94 A similar thing, on a lesser scale, happened with respect to pension claims, which in by 2001 consumed 9.9 percent of the Court’s tutela docket.95 The result, as noted by Augusto Conti, is

94 See id. at 138 tbl. 2 & 141 tbl. 4.
by 2003, half of the Court’s tutela docket dealt directly with these two rights, and of the other half, Conti asserts that a large portion dealt “indirectly” with related themes.  

The sharp rise in the quantity of these tutelas, especially those invoking the right to health, can best be explained by a combination of supply and demand factors. On the demand side, people were driven to file tutelas because of serious failures in both the regulatory systems and the ordinary judiciary. Both the pension and health systems had fundamental problems in their design and oversight. The pension system, as Conti notes, was sub-divided into a confusing welter of types of pensions, each with their own subrules – this confusion was a major cause of regulatory errors and thus of litigation. The health care system allowed private, HMO-like organizations to offer service to the public, but these private organizations had to offer a standard package of treatments (called an Obligatory Health Plan or POS) to their patients. The POS was designed to exclude certain treatments in order to ensure the profitability of the health care organizations and the financial viability of the system; for example, the standard POS initially excluded a lot of expensive but life-saving treatments, such as HIV medication and cancer treatments. Moreover, the Law created two different health care systems, a contributory regime for those who held formal employment or who could otherwise pay into the system and a subsidized regime for the poor (often the unemployed or those with informal employment) who could not buy into the contributory regime. The Law established a goal of equalizing the two regimes, but the subsidized POS was initially set to be much smaller than the contributory POS. Further, there were a very large number of citizens who were not attached to either system. These elements are obvious

96 See id. at 295.  
97 See Conti, supra note 95, at 296-97 (emphasizing the “complexity” of the pension legislation and the “legislative diaspora that governs it”).  
98 The POS was not left up to each company to design, but instead a standard POS was imposed by regulators. The health providers were compensated by receiving a fixed payment for each member who was affiliated to their service. See, e.g., Juan-Manuel Diaz-Granados Ortiz & Nelcy Paredes Cubillos, Sistema de salud en Colombia: Cobertura, acceso y esquemas de financiacion. Vision de futuro desde el aseguramiento, in REVISION A LA JURISPRUDENCIA CONSTITUCIONAL EN MATERIA DE SALUD: ESTADO DE LAS COSAS FRENTE A LA SENTENCIA T-760 DE 2008 (Maria Lucia Torres Villareal, ed.), at 29, 33-36 (2009).  
101 See PROCURADURIA GENERAL DE LA NACION, EL DERECHO A LA SALUD EN PERSPECTIVA DE DERECHOS HUMANOS Y EL SISTEMA DE INSPECCION, Vigilancia, Y CONTROL DEL ESTADO COLOMBIANO EN MATERIA DE QUEJAS EN SALUD 74 (2008), available at http://www.dejusticia.org/interna.php?id_tipo_publicacion=5&id_publicacion=402 (presenting data showing that overall coverage in the system was only 29.1 percent in 1995, including only 2.9 percent of the poorest quintile, although by 2005 it had climbed to 68.1 percent).
contributors to litigation, because people would sue because they could not receive treatment that they needed to survive or remain healthy but that were excluded from their POS or that they were unable to receive because they were not affiliated with a system.

But beyond basic design problems, both systems were plagued by rampant noncompliance and by a lack of effective oversight of the noncomplying actors. Conti argues that in many pension cases, there is no real dispute about the rule; instead the agency simply uses “trivial” arguments as cover to avoid paying the claim.\textsuperscript{102} Further, there is no effective administrative oversight of these entities.\textsuperscript{103} On the health side as well, statistical evidence shows that the majority of tutela claims have been for things included in the POS, rather than for treatments found outside it.\textsuperscript{104} And all actors agree that the entity charged with policing the health providers, the National Superintendent of Health, has done very little to regulate the conduct of the health providers towards their consumers.\textsuperscript{105} Further, the ordinary judiciary is an unappealing option for citizens who have failed to receive their pension or who require health care; it is expensive to access, slow, and unpredictable.\textsuperscript{106} In contrast, the tutela mechanism is quick, inexpensive, and has tended to favor petitioners. For example, the petitioner prevailed 86 percent of the time in right to health cases between 2006 and 2008.\textsuperscript{107}

Finally, changes in the economic environment fueled the expansion in claims. Both Rueda and Uprimny argue that the severe economic downturn at the end of the 1990s, which began around 1998 or 1999, led to a flood of new litigation, especially by middle class groups who previously would have avoided the court. The statistics bear this out: the Constitutional Court received only 33,633 right to health tutelas in 1997 and 38,248 in 1998, but in 1999 the number rose to 90,248, and in 2000 it reached 131,765.\textsuperscript{108} As we will see below, the economic downturn also fueled much of the Court’s populist structural litigation aimed at the middle classes.

\textsuperscript{102} See Conti, supra note 95, at 297-98.
\textsuperscript{103} See id.
\textsuperscript{104} See, e.g., DEFENSORIA DEL PUEBLO, supra note 93, at 56 (showing that 53.4 percent of all demands were for treatments included in the POS in the 2006-2008 period); see also Alicia Ely Yamin & Oscar Parra-Vera, Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates, 33 HASTINGS INT’L & COMP. L. REV. 431, 443 (2010) (analyzing these statistics).
\textsuperscript{105} See, e.g., PROCURADURIA GENERAL DE LA NACION, supra note 101, at 134-36 (criticizing the performance of the Superintendent of Health in policing healthcare providers and handling complaints).
\textsuperscript{106} See Augusto Conti, “Procebilidad de la accion de tutela en materia pensional,” in TEORIA CONSTITUCIONAL Y POLITICAS PUBLICAS 361-62 (giving examples of the problems of both the administration and ordinary judiciary in handling pension cases) (Manuel Jose Cepeda et al., eds., 2007).
\textsuperscript{108} Arango, supra note 92, at 138 tbl. 1.
Of course, while the demand-side story is important in explaining why an increasingly huge number of actors would file tutelas, there is an equally important supply-side story which explains why the Court became increasingly receptive to these claims. As noted above, in the early to mid-1990s the Court developed an important but cautious social rights jurisprudence and spent relatively little time on these issues – it protected the rights of the most marginalized members of society on an individualized basis. Since the Court has total control over its tutela docket (it chooses the cases it wants to hear via a certiorari-like mechanism), it is very significant that the Court used only 5.8 percent of its docket on health cases in 1994, but by 1998 that number had risen to 14 percent, and by 2003, 33 percent.

The Court shifted its doctrines to encourage claims from a broader range of groups. Rueda emphasizes two important points. First, the Court began to broaden the connectivity doctrine to include not just life but also other values such as dignity. For example, the Court began allowing treatments such as knee replacements and prosthetic eyes and breasts when it felt that they were required for the petitioner to be able to live with dignity, even though they were not necessary for life as such. This was related to a broader long-term doctrinal shift where the Court has scrapped the connectivity doctrine and instead held that social rights like the right to health can be fundamental and enforceable via tutela in-and-of-itself.

Further, the Court began to abandon its very fact-specific inquiry into whether a given plaintiff needed assistance in order to avoid falling below the “vital minimum” and instead began thinking in broader categories. This was in large part necessitated by the nature of the tutela mechanism: because courts had only ten days to make decisions, the tutela was unsuited to highly fact-specific inquiries. Moreover, the Court had to provide guidance to the other courts in the country, which may have pushed it towards using broader rules. Lopez Medina locates 1995-1996 as the key moment in the doctrinal evolution of the Court on the right to health. He finds that in this moment the Court ceased paying attention to the precise factual situation of the petitioner and began focusing on the healthcare system and particularly the POS, which it found to be “unacceptably rigid.” The Court thus began a systematic effort to broaden the POS to include treatments necessary for the life or health of the patient.

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109 See infra text accompanying notes 86-88.
110 Id. at 138 tbl. 2, 139 tbl. 3, 141 tbl. 4.
111 See Rueda, supra note 88, at 39-40.
112 See Arango, supra note 92, at 94-95.
113 See, e.g., T-760/08 (making such a shift with respect to the right to health); see also Yamin & Parra-Vera, supra note 104, at 441-42 (describing this doctrinal shift).
114 See Rueda, supra note 88, at 39.
115 See id.
116 See Lopez Medina, supra note 87, at 31. Lopez Medina also notes that at this moment the Court developed doctrines seeking to make its doctrinal interventions financially sustainable. Thus it ordered the state to reimburse the healthcare providers for any treatments that they were ordered to provide that were found outside the POS. See id. at 32.
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An important point here is how the Court shifted its doctrines dealing with the economic resources of the petitioner. As noted, in the doctrines dealing with pensions and healthcare as originally conceived there was a strong emphasis on allowing the tutela to proceed only when the petitioner could show a lack of other resources. This emphasis faded with time. In the pension area, it did this largely by classifying many kinds of claims as per se actionable via tutela, regardless of the wealth of the petitioner. At any rate, powerful members of society, including ex-congressmen, magistrates of the high courts, and state functionaries, have been able to use the tutela to gain access to their pensions. An illustrative case is that of ex-Supreme Court Justice Cesar Julio Valencia Copete. When he argued that his pension was wrongly calculated, the Court took the case via tutela and adjusted it. It is notable that the pension that the state had already agreed was due to Valencia was about 12 million pesos per month, or about 6,000 US dollars monthly, a fairly large sum in Colombia. His new pension would be around 20 million pesos monthly, or about 10,000 US dollars.

In the health area, the Court technically maintained the doctrinal requirement that the petitioner be unable to afford the treatment, but in practice paid little attention to it. This appears to have been an artifact of two separate problems in the health area – the first is that a lot of important health care purchases are expensive enough to overwhelm the resources of virtually any household in the country, and the second is that the design of the tutela, which requires that the judge render a decision within ten days, leaves little time for fact-finding. Because of the latter problem, in practice courts “cannot discriminate” between households who could pay for treatments and those who could not. This too has become a largely middle class right. A study by the Procuraduría (a kind of Attorney General who monitors the state) found that the number of tutelas was strongly concentrated among middle and upper class groups rather than the poor. Their study, conducted in 2003, approximated that 73 percent of all tutelas on the right to health were filed by members of the contributory regime, or those who generally have formal employment and a reasonable income. This group represents only 35 percent of the population.

117 See infra text accompanying notes 105-106.
118 For a general overview, see Conti, supra note 106.
119 See id. at 362 (collecting cases).
120 T-483/09 (July 21, 2009).
121 See, e.g., Lopez Medina, supra note 87, at 40 n. 58 (noting that this doctrinal principle has been maintained but also stating that “[d]espite this doctrinal effort, it is clear that today the judges cannot discriminate adequately between the users of the system. The redistributive effect of the decisions needs to be studied more carefully but it seems clear, in any case, that the doctrine of the Court is not sufficient to overcome the clear differentiation between the population with capacity and without capacity to pay for treatments outside of the POS.”).
122 Id. at 40 n. 58.
Members of the subsidized regime, who receive free health care through the state and represent 23 percent of the population, filed only 3 percent of tutelas, while those who are linked ("vinculados") to the health care system but not formally a member of either group (generally also very poor) represent 38 percent of the population and yet filed only 13 percent of all tutelas.

The key point, then, is that individualized tutela jurisprudence focused on pensions and especially health care became a massive part of what the Constitutional Court (and the judiciary in general) was doing. Further, this jurisprudence moved far away from its underpinnings in the "vital minimum" doctrine aimed at the very poor and became an essentially middle class right open to everyone. Because middle and upper class groups were much more likely to know their rights and to be able to afford to go to court, they naturally filed the bulk of the claims. The Colombian experience shows the limits of judicial design in alleviating inequities in access to justice. The Colombian tutela appears to be among the cheapest and easiest devices of its kind in the world – it lacks any formalities, can be brought potentially without a lawyer, and must be decided by the courts very quickly.\(^\text{124}\) And yet severe inequities in access to justice persisted even within such a system.\(^\text{125}\)

The effects of this kind of massive individualized jurisprudence on the executive bureaucracies was largely negative. We can focus on evidence from the health field, which has been more extensively studied. Petitioners inevitably bypassed the regulatory structure and went straight to a tutela for two reasons: first because it was ineffective at policing the healthcare providers, and second because the courts, and not the regulators, would order the provision of treatments found outside the POS (and in fact would order the state to reimburse the healthcare provider for the expense). The aggregative effect of all these decisions did alter regulators’ decisions about the nature of the POS. In particular, a 1997 regulation created the concept of an "open POS" and thus recognized that treatments not included in the list could be prescribed if necessary to preserve the life or health of the patient, and stated that the state would pay for these treatments (rather than the healthcare provider) under many conditions.\(^\text{126}\) In 2005 through 2007, the regulators changed the contents of the POS somewhat, adding for example treatments for chronic diseases like HIV and kidney disease.\(^\text{127}\) But the regulators made little effort to improve oversight of

\(^{\text{124}}\) \textit{See generally} Manuel Jose Cepeda-Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court," 3 WASH. U. GLOBAL STUD. L. REV. 529, 552-53 (2004); \textit{see also infra} text accompanying notes 64-70 (discussing the design of the tutela).

\(^{\text{125}}\) An analogous result occurred in India, where the Supreme Court’s attempts to broaden standing requirements and allow even hand-written notes to serve as the basis for lawsuits did not produce a flood of litigation by lower-class groups. \textit{See} CHARLES R. EPP, \textit{THE RIGHTS REVOLUTION} 85-86, 91-93 (1998). Epp argues that the lack of a legal support structure such as civil society organizations oriented towards the courts stunted this development. \textit{See id.} at 95-105.

\(^{\text{126}}\) \textit{See} Lopez Medina, \textit{supra} note 87, at 41.

\(^{\text{127}}\) \textit{See id.} at 47.
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the healthcare providers, and thus about half of cases continued to be for
treatments that were actually located in the POS, but that the healthcare
providers erroneously refused to provide.\textsuperscript{128} Moreover, judicial institutions
sometimes competed with administrative structures – while regulators in 1997
set up Technical-Scientific Committees (staffed by doctors and other medical
professionals) to evaluate individual claims to treatments not included in the
POS, these Committees were used much less frequently than the courts, likely
because the courts moved quickly and virtually always sided with petitioners
(who of course were able to choose the forum). In the health care area, then, the
courts were primarily a substitute for effective regulation rather than a force
helping to construct better regulation.\textsuperscript{129}

The Court’s aggressive jurisprudence, increasingly unmoored from its
foundations in the “vital minimum” doctrine, produced some pushback from
within the Court itself. The most notable of these efforts was a 1997 case
decided by Justice Cifuentes, the original author of the vital minimum doctrine.
Diego Lopez Medina, in his landmark study of the health litigation as a whole,
argues that this decision has to be understood both as a response to the inequities
in the litigation (that advantaged groups were obtaining the same benefits as
disadvantaged groups) and as the Court’s response to a system-wide worry (that
the individualized jurisprudence of the Court was putting massive strains on the
financial health of the overall system).\textsuperscript{130} Cifuentes noted that the courts had
issued orders that aided petitioners in particular cases, but had no way to “hold
for all those who find themselves in the same situation as the petitioner.”\textsuperscript{131} Nor
did the judge normally understand the “final cost or possibilities of attaining” an
individualized order across all similarly situated cases.\textsuperscript{132} As noted by the South
African Constitutional Court in \textit{Soobramoney}, granting individualized claims to
relief thus had ramifications both for equality, since many others in the same
position would never benefit from the order, and democracy, since on aggregate

\textsuperscript{128} \textit{See} DEFENSORIA DEL PUEBLO, \textit{supra} note 107, at 56 tbl. 23 (finding that in the 2006-2008
period, 53.4 percent of all tutelas in this area were for treatments included in the POS, and
only 46.6 percent were for non-POS treatments).
\textsuperscript{129} One other reaction to the Court’s jurisprudence is worth mentioning: in 2007 the Congress
passed a new law that, \textit{inter alia}, attempted to give the Superintendent of Health new powers.
For example, the Superintendent was given power to exercise certain quasi-judicial powers
and to resolve certain categories of disputes, most importantly disputes dealing with whether a
given treatment is inside the POS, in an attempt to remove cases from the judiciary. \textit{See}
PROCURADURIA, \textit{supra} note 101, at 183-87 (discussing Law 1122 of 2007). The same law
creates a Committee to revise the contents of the POS at least once per year. \textit{See id.}
\textsuperscript{130} \textit{See id.}
\textsuperscript{131} \textit{See SU-111/97, ¶ 15}. The case itself involved a 64-year old woman who suffered from
arthritis, and whose treatments had been suspended by the state insurance company. The
Court held both that she had not shown any injury to her right to a “vital minimum,” and that
she had failed to exhaust the legal avenues open to her in the ordinary judiciary. \textit{Id.} ¶ 19.
\textsuperscript{132} \textit{See id.}
Cifuentes reemphasized that social rights were justiciable primarily under the “vital minimum” idea, whereby there is a “grave attack against the human dignity of persons pertaining to vulnerable sectors of the population and the State … has failed to provide the minimum material assistance without which the defenseless person will succumb before his own impotence.” In other cases, Cifuentes suggests, the tutela should only proceed when the person has no other legal mechanism (like the ordinary judiciary) to defend his rights, and only in order to gain access to services or treatments already created by law (in other words, those treatments found inside and not outside the POS). Cifuentes proposed both to reorient the health case jurisprudence along the lines of the “vital minimum” doctrine and to limit the financial impact on the system by disallowing most claims by middle class groups for treatments excluded from the POS. This proposed solution, however, gained no traction, as the caseload statistics noted above show. The Court continued with an essentially middle class jurisprudence and continued to grant a large volume of claims for treatments not included in the POS.

D. The Vital Minimum Evolves: Large-Scale Judicial Populism

The economic crisis of the late 1990s did more than spur an increase in the Court individualized social rights jurisprudence. It also pushed the Court towards finding larger-scale remedies for perceived constitutional violations. The most famous example, and one of the largest scale interventions in the Court’s history, was its decisions dealing with a housing crisis in 1999 that threatened more than 200,000 mortgagees with foreclosure (a significant number in a country of about 35 million people at that time). The housing financing system, called UPAC, adjusted the mortgage payments that homeowners owed according to interest rates in the economy. In the late 1990s, due to Central Bank action and other factors, the nominal interest rate reached 33 percent (far higher than the rate of inflation), which caused mortgage payments to skyrocket and thus caused trouble in the mortgage market. Homeowners and associations of homeowners began bringing claims (both via abstract review and tutela) to the Court, which proved receptive.

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133 See Soobramoney v. Minister of Health, CCT 32/97, available at http://www.escr.net.org/usr_doc/Soobramoney_Decision.pdf. In Soobramoney, the Court held that a man who suffered from chronic renal failure but who was ineligible for dialysis because it would merely prolong and not save his life did not enjoy a right to the dialysis. The Court emphasized (1) the limited resources of the state, (2) that the treatment would need to be provided to all others in a similar condition, and (3) that the legislature had the ability, at first instance, to determine the distribution of limited resources in order to fulfill the right to health.

134 SU-111/97, ¶ 16.

The Court struck down the law requiring the Central Bank to set the UPAC rate according to the interest rates in the broader economy. The Court declared this rule unconstitutional under the Social State of Law principle, and more particularly under the articles of the Constitution consecrating a right to “dignified housing” and calling for a “democratization of credit.”

The Court emphasized that while the system properly aimed to stabilize the actual value of the debt through time, the economic interest rate could diverge significantly from the rate of inflation (as it had in the late 1990s). Thus, the Court held, tying UPAC to interest rates “distorts completely the just maintenance of the value of the obligation.”

In July 1999, the Court held a broad public, legislative-style hearing on the housing matter, to which it invited twenty-five individuals to speak, including members of civil society groups dealing with housing, bankers, labor union leaders, economists, congressmen, and government officials including the Ombudsman and the Minister of Housing. Finally, in September 1999, the Court struck down the entire UPAC system on structural grounds, holding that the law, which had been issued by the President during a state of emergency, instead had to be issued by Congress.

The Court also suspended the declaration of unconstitutionality for eight months, in order to give the Congress time to construct a new system. The dissenters pointed out that the reasoning seemed flimsy, and the Court’s real motive appeared to be the substantive one of aiding debtors.

At any rate, the President did construct a new system, called the UVR, and submitted a bill to Congress by the deadline. The new bill incorporated the Court’s prior jurisprudence; for example, it banned prepayment and

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136 See C-383/99 (May 27, 1999); see also CONST. COL., art. 51 (creating a right to “dignified housing”); art. 335 (requiring the state to take steps to “promote the democratization of credit”).

137 Id. § 4.11. The Court also held that the law violated the autonomy of the Central Bank to set its own policies. See id. § 3.3. Other decisions in this period also aided debtors — the Court held capitalization, whereby payments do not even cover the accrued interest and it is therefore added onto the principal, unconstitutional, and further banned prepayment penalties from mortgages. C-747/99, § 4.3 (Oct. 6, 1999); C-252/98, § 4 (May 26, 1998).

138 For a list of participants and a description of their contribution, see C-700/99, § VI. The Court also received an extremely high number of written comments from various economists, public officials, and leaders of civil society groups. See C-955/00 (July 26, 2000), § III; C-747/99, § V.

139 C-700/99 (Sept. 16, 1999).

140 See id. § 5.

141 The argument of the majority was that the law dealing with UPAC constituted a ley marco, a kind of basic law that had to be issued by the legislature. Thus the 1993 executive decree issuing these regulations was void. See id. § VII.3. But as the dissenters pointed out, the 1993 decree merely reorganized existing regulations from a number of different statutory sources and place them in one law; it did not actually add anything new to the system. See id. (Cifuentes Munoz & Naranjo Mesa, dissenting). And the Court had also previously held that the decree at issue was valid. See id.
capitalization, and tied mortgage payments only to the rate of inflation.\footnote{142 See C-955/00 (July 26, 2000) (reprinting the text of Law 546 of 1999); see also Salomon Kalmovitz, La Corte Constitucional y la Capitalizacion de Intereses 3 (2000), \url{available at http://www.banrep.gov.co/documentos/presentaciones-discursos/pdf/K.Cortecapitalizacion.pdf} (arguing that the prior judicial decisions “predetermined in some measure the deliberations of Congress”).} It also went beyond the Court’s jurisprudence by providing funds to bailout struggling homeowners and refinance their debts.\footnote{143 The law also took other important measures, for example it required a down payment of at least 30 percent of the value of the house so as to help ensure that the mortgage payments did not become unsustainable down the road. See Sergio Clavijo, Fallos y Fallas Economicas de la Corte Constitucional: El Caso de Colombia, 1991-2000, at 23 (2001), \url{available at http://www.hacer.org/pdf/clavijo.pdf}. This was perhaps inspired by the Court’s jurisprudence forbidding capitalization (which got at the same goal), but went beyond any prior express command of the Court.} Nonetheless, after the new bill was passed, it too was challenged on abstract review, and the Court used its power of conditional constituionality – holding a norm constitutional only under the condition that it be interpreted a certain way – to make substantial changes to the law. For example, it required on equality grounds that the debtors who had not missed payments be given the same opportunity to refinance as debtors who had already missed those payments, and (after stating the opinions of various economists who had given their opinions to the Court) it capped interest rates at the “lowest interest rate” being charged in the Colombian economy.\footnote{144 See id. §§ 4, 21.}

As I pointed out in prior work, the background to these decisions was the obvious policy problems with the existing system, and the failure of the political branches to take effective action to alter the system.\footnote{145 See David Landau, \textit{Political Institutions and Judicial Role in Comparative Constitutional Law}, 51 Harv. L. Rev. 319, 354-58 (2010)\footnote{\textit{supra} note 142, at 2.}} The dissenters and economists also suggested that the Court was acting in a populist manner. The economist Salomon Kalmovitz argued that the Court was attempting to “replace the Congress” by holding a public hearing, but that those at the hearing were not selected by “proportional representation elected by popular suffrage,” but instead by “the positions with which the Constitutional Court sympathizes.”\footnote{146 Kalmovitz, \textit{supra} note 142, at 2. See Kalmovitz, \textit{supra} note 142, at 8. Kalmovitz argued that because all mortgage-holders received the same capped interest rate, and all received the same terms of refinancing, most went to wealthy mortgage holders or speculative investors. See \textit{id.} (noting that the smallest mortgages of between $0 and $48 million pesos constituted 78 percent of all mortgages, but received only 51 percent of the new subsidies).} Kalmovitz argued that the Court’s intervention primarily benefited the upper and upper middle class, and not the lower middle class or poor, because those groups were generally left outside of the formal housing system and either obtained financing on the black market or rented homes.\footnote{147 See \textit{id.} §§ 4, 21.} Similarly, the economist Sergio Clavijo argued that the Court’s measures, which capped interest rates for all homeowners and provided the same subsidized terms for everyone to refinance, were significantly less targeted towards the lower
classes than earlier executive action which would have focused bailout funds on the owners of the least expensive homes.\textsuperscript{148}

Indeed, few actors missed the fairly obvious point that the Court was acting as a populist body in making these decisions. An editorial in \textit{Semana} (the country’s most important weekly newsmagazine) stated that these decisions “appeared to give preference to populism, camouflaged beneath a doubtful veneer of equity, over economic considerations.”\textsuperscript{149} There was considerable speculation that the decisions might be a starting point for a political campaign by key actors involved.\textsuperscript{150} Further, the author of the two key decisions striking down the entire system and reviewing the new law passed by Congress, Jose Gregorio Hernandez, gave several interviews in the press in which he defended his work largely in popular terms. When asked about the effect of his jurisprudence on the banking sector, he stated that “housing is not a business.”\textsuperscript{151} In another interview, he made a striking statement when asked about criticisms of the Court:

\begin{quote}
[If you are talking about the criticisms, there is no need for the Court to discuss them because they have already been defeated, and in what a fashion, by public opinion…. [T]he work of the Constitutional Court has been well received by the people. Because the people are much more intelligent, as Gaitan\textsuperscript{152} says, than their leaders, they have understood exactly that in the Constitution are consigned their rights, their guarantees, their liberties and prerogatives, that when the Court gives value to the Constitution what it is doing at root is make respect for their rights prevail.\textsuperscript{153}
\end{quote}

After leaving the Court in 2001, Magistrate Hernandez was the Liberal candidate for vice-president; Magistrate Cifuentes (who had dissented from all of the UPAC decisions) was named on a list submitted by the President and then appointed by the Senate to serve as the national Ombudsman (\textit{Defensor del

\textsuperscript{148} See Clavijo, \textit{supra} note 143, at 24-26 (explaining that a 1998 Economic and Social Emergency decree would have focused bailout funds, at least initially, on the smallest mortgages, and then used leftover funds on wealthier homeowners).


\textsuperscript{150} See “Pelea de Gallos,” \textit{Semana}, Oct. 30, 2000 (“[F]or many it is fairly probable that this [has to do with] the desire of some magistrates on the Constitutional Court to aspire to occupy other positions in the State.”), \textit{available at} http://www.semana.com/noticias-nacion/pelea-gallos/15227.aspx.


\textsuperscript{152} Jorge Eliecer Gaitan was a populist leader in the 1940s who was assasinated on April 9, 1948, and whose death precipitated along period of violence in the country. \textit{See} DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 196-202 (1993).

\textsuperscript{153} “Interview with Jose Gregorio Hernandez,” \textit{La Republica}, November 12, 2000.
The second major “populist” moment of the Court during the economic crisis was the Court’s intervention in public sector salaries in 2000. Because of the economic crisis and its resulting effect on tax revenue, the budget for 2000 proposed a nine percent increase for government employees making less than twice the minimum wage, and no increase for government employees making more than that amount. The nine percent increase was running just about at the rate of inflation, which was about nine or ten percent in 1999 and 2000.

The Court held that the government had to provide every government worker with an increase in salary at least equal to the rate of inflation. This decision affected about 600,000 government workers. It held that there was a basic right for salaries to retain their real value. The Court based this on a constitutional right for the government not to “deteriorate the social rights of workers, among which is found naturally the salary” either during normal periods of time or an economic state of emergency. As Uprimny and Guarnizo have pointed out, this strain of the Court’s jurisprudence is based on another principle found in international law, and in particular in the U.N. Committee on Economic, Social, and Cultural Rights – the principle of progressivity or non-retrogression. The Committee has stated that most of the rights found in the UN Convention on Economic, Social, and Cultural Rights need to be fulfilled progressively over time. One consequence of this framework, according to the Commission, is that “any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of rights provided for the Covenant and


155 For example, from the first Court, other than the two names already mentioned, Magistrate Carlos Gaviria subsequently served as Senator, and Magistrate Alejandro Martinez Caballero served on the municipal council. From the second Court, Jaime Araujo Renteria served as candidate for the presidency. See “Ex-Magistrados Piden a Nilson Pinilla Retraerse De Afirmaciones,” El Tiempo, Mar. 30, 1999, available at http://www.eltiempo.com/archivo/documento/CMS-4919789 (listing names of magistrates who subsequently served in political posts).

156 See C-1433/00 (Oct. 23, 2000), § 2.2.


158 Id. at § 2.7.

in the context of the full use of maximum available resources.” As explained by Langford and King, the non-retrogression principle is not an absolute bar to measures which might worsen the situation of some groups; instead, such measures receive “a particularly strict form of scrutiny” and require “a high level of justification.”

The Court also attempted to link its decision back to the “vital minimum” principle, stating that workers must receive a wage that “not only must represent the value of the work, but that also must be proportional to the material necessity of the worker and her family, in dignified and just conditions, and which will permit her to subsist adequately and decently. For this reason, the wage should assure a vital minimum, as the jurisprudence of this Court has understood, and also be mobile, and thus always maintain equivalence with the price of work.” The reference to the vital minimum principle is puzzling, because the Court is striking down a government scheme that focused on protecting government workers at the bottom of income distribution while sacrificing those at the top. The Court is instead requiring that all wages for government workers retain their purchasing power. Yet wealthier workers are not in danger of falling below the vital minimum.

This decision was stridently attacked in the press and by economists. As a dissenting justice and economists pointed out, the Court’s decision could have a significant effect on the macroeconomy by extending the budget deficit and raising inflation, an issue that was normally left up to the political branches. The press also emphasized the equitable impact of the Court’s decision, noting that most government workers were from relatively high income strata, and that the decision would hurt poorer workers by reducing social investment.

Newspaper articles warned that with the UPAC, salary, and other decisions the Court had intervened in large chunks of macroeconomic policy.

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161 See Langford & King, supra note 84, at 502. The Committee, in particular, believes that retrogressive measures can be justified based on the level economic crisis currently being faced by the country and whether the country had considered other options like international assistance, the level of participation of effected groups, and whether the measure impinges on the “minimum core” rights of poorer groups. See id.
162 C-1433/00, § 2.6
163 See C-1433/00 (Pardo Schlesinger, J., dissenting), § 3 (“Macroeconomically, an increase in salary for a significant group of workers, like those of the central administration, could have a harmful impact on inflation.”); see also Clavijo, supra note 142, at 30-39 (making similar points with empirical data).
165 See id. The Court also issued a number of other decisions, most on structural grounds like separation of powers, that struck down governmental initiatives aimed at overcoming the economic crisis. For a list, see, for example, Clavijo, supra note 142, at 17 (noting that the Court struck down key elements of an economic emergency in 1998 including taxes on financial institutions, the government investment plan for the 1999-2002 period, a grant of
Current and former government officials, and presidential candidates, criticized the Court harshly. The presidential candidate (and later president) Alvaro Uribe hinted that the Constitutional Court should be abolished.166 An editorial in the most prominent Bogota newspaper wondered “[h]ow an institution like the Court could cause so much damage without anyone being able to control it?”167 Finally, there was fear that the known “populists” on the Court would seek to extend the effect of the decision to the private sector.168

E. Attempted Refocus on the Vital Minimum Principle

There was, then, a backlash against the Constitutional Court in the political air. Given the fragmented nature of Colombian politics, it is unclear whether political forces could have rounded up enough votes to punish the Court by reducing its powers amending the Constitution. But most of the Court was due to turn over in 2001 after completing their eight year terms. The appointment procedure gave political forces an opportunity to influence judicial behavior. The behavior of the prior court was a major issue in the hearings for the new justices.169 Some of the aspirants for a new post stated publically that they favored a different approach on some issues from the current court. For example, Manuel Jose Cepeda, who was on one of the president’s lists and who won election to the Court in a close vote,170 stated in relation to the Court’s macroeconomic jurisprudence that “a new law is required that has the tools to be able to incorporate the effects of decisions without sacrificing principles.”171

The new Court immediately undertook a new approach to the salaries question. In a 2001 decision reviewing the budget for the year, the Court (in a decision written by Cepeda and Justice Jaime Cordoba Trivino) changed its doctrine.172 It held that the rights of workers who made less than two minimum salaries to an increase in accord with inflation was untouchable, but that the real incomes of wealthier workers could be limited in some circumstances when

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extraordinary powers to the executive to restructure the public sector, and executive decrees aimed at restructuring the public sector). As I argue elsewhere, these structural decisions may have had a substantial negative impact on the Colombian economy. See Landau, supra note 145, at 352-54.

166 See id.


170 See “Corte Constitucional de Avanzada,” El Tiempo, Dec. 15, 2000, available at http://www.eltiempo.com/archivo/documento/MAM-1217594 (noting that the closest election was on Cepeda’s list, and that he won in the Senate by only nine votes, 51 to 42).


172 See C-1064/01 (Oct. 12, 2001).
required by macroeconomic conditions. The Court stated: “The limitation of the right to maintain the aquisitive power of a salary, for workers situated in the superior rungs of the salary structure, implies no limitation on their right to a vital minimum.”

In other words, the Court reestablished the vital minimum doctrine as a doctrine aimed mainly at the poor. By paring back the macroeconomic effects of its jurisprudence, the Court also headed off the backlash. When Álvaro Uribe won election in 2002 and his new Interior and Justice Minister, Fernando Londono Hoyos, sought to attack the powers of the court via constitutional amendment, the proposals went nowhere.

The new court has still faced the problem, however, of a massive individualized rights jurisprudence, particularly on health issues, which appeared to benefit middle and upper class groups much more than the poor. It would eventually tackle this problem via a new device, the “state of unconstitutional conditions” doctrine. As I explain elsewhere, the “state of unconstitutional conditions” doctrine works much like a structural injunction in the United States. Rather than issue an individualized tutela remedy to an individual plaintiff, the Court issues structural orders to the bureaucracy in order to make it change policy in an area. The Court also maintains supervisory jurisdiction over the case for a very long period of time.

The Court has only used this device, in a full-fledged way, twice, but both attempts have been massive interventions in public policy and are still ongoing. The first, in 2004, was the Court’s intervention into displaced persons, or refugees who have been displaced from their homes but are still residing somewhere in Colombia (usually in the big cities). Because of Colombia’s ongoing civil violence, displaced persons are just shy of 10 percent of the total population, or 3 to 4 million people. The second attempt occurred in 2008, when the Court took structural jurisdiction over the entire health care system. Both decisions were written by the same justice, Manuel José Cepeda.

My interviews with the justices, particularly Cepeda, revealed several motives for their decisions to issue a “state of unconstitutional conditions” order. First, they were concerned about docket congestion on the Court itself, as well as on the lower courts – issues involving displaced persons were taking up an

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173 See id. § 5.2.4.
175 See infra part II.C.
176 See Landau, supra note 145, at 358-62.
177 The Court has labelled other areas “states of unconstitutional conditions,” but has not accompanied these declarations with broad structural orders and ongoing supervisory power. See id. at 359.
179 T-760/08 (July 31, 2008). The Court did not actually use the label “state of unconstitutional conditions” in this decision, but it effectively set up the same kind of supervisory authority over the system.
increasing amount of space on the Court’s docket, and the health issue, by around 2008, had reached about half of the Court’s entire tutela docket. Second, they were concerned about equity issues, especially in the health area, where as we have already seen, middle and upper class groups filed the bulk of claims. Third, they believed that both areas had pervasive regulatory failures, although in somewhat different ways. In the displaced persons area, before the Court’s decision a public policy simply did not exist – hardly any actors in the state took notice of the problem. This was a breathtaking failure for an issue that affected such a large percentage of the population. In the healthcare area, a public policy did exist, but the judiciary believed that the bureaucracy was essentially abdicating its regulatory and supervisory role to the Courts, which already was managing the system through individualized jurisprudence: “We were the bureaucracy.”

The Court’s approach has been broadly similar across the two cases: it proceeds first by gathering information from the government, civil society, and governmental monitoring groups like the Ombudsman and Attorney General. Based on this information, it issues fairly detailed orders to the government. Finally, it periodically holds public hearings in which it solicits the views of civil society groups, governmental monitoring organizations, and cajoles the government. In the displaced persons case, it began by trying simply to develop an adequate set of statistical indicators for the state to use in assessing the scope of the problem. It also worked on building up a state bureaucracy and a set of basic programs that would respond to the immediate needs for subsidies on a range of social rights (housing, health care, etc). Finally, it has focused on a range of more particularized problems – for example it has held public hearings on particularly affected groups with distinctive problems (children, women, Afro-Colombians, indigenous groupsm, the handicapped).

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180 See Personal interview, Manuel Jose Cepeda, August 26, 2008, Bogota, Colombia; personal interview, Jaime Cordoba Trivino, August 25, 2008, Bogota, Colombia; see also Landau, supra note 145, at 360 (noting the “flood of tutelas” on the displaced persons issue).
181 See Personal interview, Manuel Jose Cepeda, August 26, 2008, Bogota, Colombia; see also Yamin & Parra-Vera, supra note 104, at 444 (noting that equity concerns drove T-760/08).
183 See Personal interview, Manuel Jose Cepeda, March 25, 2009, Bogota, Colombia.
184 For a general description, see Landau, supra note 145, at 358-62. The contempt sanction is rarely used, although some public officials stated that they were concerned about its application. Personal interview, Angela Portela, Accion Social, July 22, 2009, Bogota, Colombia.
185 See Auto 109 of 2007; Auto 233 of 2007; Auto 116 of 2008 (all debating and adopting certain statistical measures for state use).
186 See, e.g., Auto 175 of 2005 (considering the sufficiency of the government’s efforts to increase the budget).
187 See Auto 092 of 2008 (considering the plight of displaced women, and ordering the creation of specific programs aimed at them); Auto 251 of 2008 (displaced children); Auto
and has recently been focused on expanding administrative capacity at the regional and local level.\(^{188}\) In the health care case, the Court has focused on four areas: (1) expanding the POS of the subsidized regime so that it is equal to the POS of the contributory regime, which was a goal originally set out in law but not realized, (2) fixing the system of state reimbursement to the health care providers for treatments located outside of the POS, and (3) ensuring that the POS be updated annually by the regulators, (4) expanding access to the system and ensuring universal coverage.\(^{189}\)

A full assessment of the results of these two massive cases is another project. But we can make several key points here. First, these structural remedies have allowed the Court to target its interventions at lower class groups, rather than issuing a largely middle class jurisprudence. The displaced persons case has allowed the Court to cajole the state into funnelling resources towards income support and subsidies for the displaced, who are almost always very poor.\(^{190}\) Similarly, one of the major goals of the health care case has been to equalize the quality of care in the subsidized regime, which is utilized by poor Colombians who are unemployed or who work in the informal sector.\(^{191}\) This may help poorer Colombians receive health care without needing to file a tutela.

Second, my field research indicates that these two cases are taking up a large amount of the Court’s resources. The Court is a fairly small institution, and each case has required a large amount of time of some of the judges and law clerks, and has the hiring of additional staff.\(^{192}\) It would be difficult for the Court to perform more than a few of these structural interventions at any one time.

Third, the debate about structural injunctions in the United States has focused on two main issues: whether judicial involvement of this type is

\(^{004}\) of 2009 (indigenous groups); Auto 005 of 2009 (Afro-Colombians); Auto 006 of 2009 (handicapped).

\(^{188}\) \textit{See, e.g.,} Auto 008 of 2009 (focusing on coordination between the central government and regional entities).


\(^{190}\) \textit{See, e.g.,} COMISION DE SEGUIMIENTO A LA POLITICA PUBLICA SOBRE DEZPLAZAMIENTO FORZADO, \textit{EL RETO ANTE LA TRAGEDIA HUMANITARIA DEL DESPLAZAMIENTO FORZADO: GARANTIZAR LA OBSERVANCIA DE LOS DERECHOS DE LA POBLACION DESPLAZADA 199 tbl. 59 (2009)} (finding that only 14 percent of displaced persons age 12 or over earn the minimum wage or more).

\(^{191}\) \textit{See infra} text accompanying notes 98-101.

\(^{192}\) Each of the two cases is managed by a panel of three judges, with one member of each panel serving as the presiding judge and spending a substantial amount of time on the case. One of the three law clerks (magistrados auxiliares) of these presiding judges works full time on the case, assisted by an additional technical staff of four or five people. Personal interview, Ivan Escurciera, Magistrado Auxiliar (Justice Jorge Ivan Palacio Palacio), Corte Constitucional, August 26, 2009, Bogota, Colombia (charged with coordinating the health case).
undemocratic and whether judges possess the capacity and skills to make successful interventions of this type.\footnote{For views generally critical of structural injunctions, see, for example, ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREED: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 223 (2003); GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (arguing through case studies of abortion and desegregation cases that courts cannot bring about large-scale social change); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 273 (1977) (noting that structural judicial orders often lead to unexpected results because “the situation they propose to control [may be] too fluid”, or because the “interaction of several targets [may] combine ‘chemically’ to transform the decree on the ground.”); JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF MISSOURI V. JENKINS (2008) (showing that the desegregation of Kansas City school systems went awry when the court and the city sought to build magnet schools to attract white upper-income students, but those students still preferred suburban schools, leaving the district with many expensive and empty schools). For a more favorable view, see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE (2000) (arguing that the structural reform cases aimed at overhauling Southern prisons were largely succesful).} The Court’s intervention in the displaced persons area has been largely successful on both scores; its intervention in the health care area has been markedly less successful. This suggests that structural injunction cases can work, albeit only in certain political contexts.

As demonstrated by Cesar Rodriguez Garavito and Diana Rodriguez Franco in their landmark study of the displaced persons case, since the Court’s intervention, the government had drastically increased the budget for the problem and has created a massive bureaucracy spread across numerous agencies.\footnote{See RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, supra note 182, at 212 tbl 1 (showing that the budget for the problem rose from 120,700 million pesos in 2003 to 542,185 million pesos in 2005 and 1,021,936 million pesos in 2008).} Further, there is now a well-functioning set of statistical indicators to measure the depth of the problem.\footnote{See id. at 216-45 (explaining the construction and evolution of the statistical indicators ordered by the Court).} Finally, the government appears to have improved displaced persons’ enjoyment of rights in certain areas by creating functioning subsidy programs for things like food, housing, and health care.\footnote{See, e.g., id. at 254-72 (finding some progress along these dimensions); Comision de seguimiento, supra note 190 (finding the same in a national survey of displaced households).} In the health care area, progress has been very slow. An agency is theoretically carrying out the redesign of the POS and equalization of the subsidized and contributory regimes, but it is working very slowly and probably lacks a sufficiently high profile within the government.\footnote{Personal interview, Heriberto Pimiento, Member of the Comision de Regulacion de Salud (CRES), April 29, 2010, Bogota, Colombia.} The government also issued a social emergency in December 2009, and pursuant to that emergency issued new taxes to fund the system, but also made it very difficult to gain access to treatments outside the POS and that limited access to the tutela.\footnote{See, e.g., “Medicos dicen que son ‘aberrantes’ los decretos de la emergencia social,” Semana, Feb. 1, 2010, available at http://www.semana.com/noticias-problemas-sociales/medicos-dicen-aberrantes-decretos-emergencia-social/134430.aspx.} Many of these decrees cut against the body of the Court’s tutela jurisprudence and were
clearly a form of resistance to the Court. The decrees provoked large protests by doctors and consumer groups, and the Court struck down the declaration of social emergency in March 2010, but left the new taxes in place.\textsuperscript{199} The judges charged with implementing the structural decision on health care told me in April 2010 that they were uncertain whether the government is genuinely interested in complying with the decision.\textsuperscript{200}

I would emphasize differences in the political context as the key variables for understanding this difference. In the displaced persons case, the Court was writing on a clean slate – no public policy or bureaucracy existed prior to the Court’s decision.\textsuperscript{201} In response to the Court’s decision, the administration quickly created a budget on the issue and began hiring bureaucrats who would work solely on this issue. There is now both a central office in Accion Social, the executive’s own social program, that coordinates the effort and a series of bureaucrats spread across many agencies within the state.\textsuperscript{202} Further, the Court has been aided by the support of a strong and fairly cohesive civil society group, which it organized into a Compliance Commission.\textsuperscript{203} The Commission is made up of domestic NGOs, international organizations like the U.N. High Commission on Refugees, and the groups of displaced persons themselves.\textsuperscript{204} Many of the Court’s policy ideas and much of the monitoring of the executive was done by this Commission.\textsuperscript{205} The Court’s work has plausibly been democracy-enhancing both in the sense that it has created a public debate on the issue of displacement (the number of news articles dedicated to the topic has increased sharply\textsuperscript{206}) and in the sense that it has empowered civil society groups and given them access to the bureaucracy.\textsuperscript{207}

\textsuperscript{199} See id. (outlining the resistance of doctors to the measures); T-252/10 (Apr. 16, 2010).
\textsuperscript{200} Personal interview, Mag. Jorge Ivan Palacio Palacio; Mag. Gabriel Eduardo Mendoza Martelo, & other members of the Court’s staff on the health case, April 15, 2010, Bogota, Colombia.
\textsuperscript{201} See Rodriguez Garavito & Rodriguez Franco, supra note 182, at 94-96 (noting that the “problem was relatively absent from the public discussion” before the Court’s decision); 130-33 (noting that little public policy existed on the topic prior to the judicial intervention).
\textsuperscript{202} Personal interview, Angela Portela, Accion Social, July 22, 2009, Bogota, Colombia; Personal interview, Viviana Ferro, Ministerio del Interior y Justicia (Group on territorial coordination in displaced persons), May 5, 2010.
\textsuperscript{203} Personal interview, Marco Romero, director of Codhes, Aug. 4, 2009, Bogota, Colombia.
\textsuperscript{204} See Comision de seguimiento, supra note 190, at 17-18 (listing individual and corporate members of the Commission).
\textsuperscript{205} For example, the director of the Codhes, a key NGO on the Commission, told me that most of the statistical indicators adopted by the Court came from proposals by the Commission. When the state disagreed with the Commission, the Court almost always sided with the Commission. Personal interview, Marco Romero, director of Codhes, Aug. 4, 2009, Bogota, Colombia.
\textsuperscript{206} See Rodriguez Garavito & Rodriguez Franco, supra note 182, at 98 tbl. 1 (presenting data from Semana and El Tiempo to support this claim).
\textsuperscript{207} Directors of domestic NGOs (Codhes and the Colombian Commission of Jurists) and international organizations (the UN High Commission on Refugees) all told me that the bureaucracy had become much more receptive to them since the decision. Personal interview, Marco Romero, Director of Codhes, Aug. 4, 2009, Bogota, Colombia; Personal interview,
It appears to have been succesful because the Court, the civil society groups, and the bureaucracy all share a basically common vision of how to create and improve public policy in this area. On most issues, there has been no plausible vision other than that of the Court and the Commission. Further, President Uribe managed to figure out a way to fit support for displaced persons into his broader political program. He placed the bulk of the policymaking role in Accion Social, which is an arm of the executive, and focused the program around doling out individualized benefits to actors who registered as displaced. As with other social benefit programs in Latin America that depend on direct monetary receipt from the president, this has plausibly helped to build presidential support. It is notable that progress on bigger structural issues – like reduction of targeted violence by paramilitaries and return of land to displaced groups – has been much slower than the granting of targeted subsidies and aid packages.

The political context of the health care case is completely different. The Court stepped into the middle of an already well-developed, although flawed, public policy. There was already an army of bureaucrats, for example, in the Ministry of Health. Top policymakers have felt that the Court was modifying the framework in ways that were too costly. For example, they have felt that given the relative numbers of people in the contributory and subsidized systems, several officials told me that full equalization of the two systems was economically impossible. Lower level officials dislike that the tutela is the main tool for accessing health care, and feel that the judges lack an understanding of the relevant technical principles. Many doctors and consumer groups feel that the Court’s intervention is insufficient, and that what is needed is a move towards a completely different system, for example a public single-

Juan Manuel Bustillo, Comision Colombiana de Juristas, July 22, 2009, Bogota, Colombia; Personal interview, Andres Celis, UN High Commission on Refugees (ACNUR), Aug. 11, 2009, Bogota, Colombia. I do not want to overstate the degree to which the decision benefitted all civil society groups. Because the court tends to talk in a technical language, and has emphasized statistical measures and complex public policy goals, many of the organizations of displaced persons have had little voice when compared to the technically-savvy NGOs. Personal interview, Juan Manuel Bustillo, Comision Colombiana de Juristas, July 22, 2009, Bogota, Colombia; see also RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, supra note 182, at 180-88 (presenting evidence for this point).

One factor here is that some of the personnel hired in the government formerly worked for the NGOs working on the topic. Personal interview, Claudia Juliana Melo, Departamento de Planeacion (Displaced Persons Group), May 6, 2009.

This is not to say that Uribe would have supported this spending absent the Court’s intervention. As was pointed out to me, he sought to cut the budget on this issue in his first full year in office, in 2003. He was thus initially indifferent to spending on displaced persons, but his stance changed once the Court put the issue on the public agenda. Personal interview, Andres Celis, UN High Commission on Refugees (ACNUR), Aug. 11, 2009, Bogota, Colombia.

See generally COMISION DE SEGUIMIENTO, supra note 190.

Personal interview, Jose Fernando Arias Duarte, Departamento de Planeacion, Apr. 28, 2010, Bogota, Colombia.
The health insurance companies are worried that the Court’s actions will eventually subject them to additional regulatory scrutiny and will raise their costs. In short, the Court lacks a cohesive constituency – there is little organized support or shared vision for the Court to draw upon. The Court, for example, has been unable to build a similarly strong Compliance Commission in the health area as exists in the displaced persons case.

The lesson, perhaps, is that the structural remedy may be an effective tool for courts enforcing social rights and at targeting this enforcement towards more marginalized social groups, but one that must be used sparingly and carefully. Courts are not nearly so incompetent at handling social problems or politically detached as they are sometimes portrayed in the theoretical literature. But their ability to build up civil society, to spur public debate, and to alter political patterns will depend heavily on the specifics of the political environment that they are entering.

IV. Evidence From Other Countries

The case study of Colombia supports the two major hypotheses of the paper – that social rights enforcement largely benefits middle class rather than poor groups, and that the choice of remedy makes a significant difference on the questions of who benefits from the enforcement and what effect it has on the bureaucracy. Indeed, despite the fact that the Court at its outset announced a policy that seemed to target its social rights jurisprudence towards the marginalized, it subsequently had great difficulty actually targeting those groups. In this section I present evidence from other countries to support both hypotheses. In particular, I emphasize the argument about remedies – both individualized enforcement and the negative injunction approach appear to have a pronounced tilt towards upper-income groups, and the individualized enforcement approach seems to do little to improve bureaucratic performance, while the negative injunction approach tends to involve the court in serious macroeconomic messes. Finally, a structural injunction approach, although relatively rare in comparative law, appears to have some promise both in targeting lower-income groups and in effecting positive changes in the bureaucracy, at least in certain political contexts.

A. Individualized Enforcement

212 Personal interview, Dr. Gabriel Carrasquilla, Director, Centro de Estudios y Investigacion en Salud, April 13, 2010, Bogota, Colombia.
213 Personal interview, Ana Cecilia Santos, Vice-President of ACEMI, Apr. 28, 2010, Bogota, Colombia.
214 The Court has attempted to build such a Commission, but as of April 2010 the justices and their clerks told me that they had had little luck getting civil society groups to cooperate with the Court and to monitor the government. Personal interview, Mag. Jorge Ivan Palacio Palacio; Mag. Gabriel Eduardo Mendoza Martelo, & other members of the Court’s staff on the health case, April 15, 2010, Bogota, Colombia.
Comparative evidence strongly supports the inferences, drawn from the Colombian data, that individualized enforcement of social rights tends to disproportionately benefit middle and upper class groups, and that its effect on bureaucratic effectiveness is ambiguous at best. Further, individualized enforcement, especially of the rights to health and social security, appears to be very common in comparative constitutional law. This is likely because individualized enforcement appears to be “court-like”: it involves courts in litigating one-on-one disputes without seeming to involve them in complex policy disputes that are beyond their competence. The analysis here will focus on Brazil, which is a case that has been studied relatively extensively.

Brazil presents a case where the Courts have aggressively protected the right to health, but almost always through individualized rather than structural enforcement. As in Colombia, the success rate of these individualized claims has tended to be quite high. A careful empirical study by Florian Hoffmann and Fernando R.N.M. Bentes looked at health litigation between 1994 and 2004 in five Brazilian states and in the two highest federal courts of the system, the Federal Supreme Court and the Superior Court of Justice. The paradigmatic case is a claim by an individual against the state or a private health insurer for the provision of some treatment or particularly a medicine, driven as in Colombia by the complexity of the healthcare provision system.

What they found is that plaintiffs begin with about a 70 percent success rate at the trial court level, that this success rate reduces to about 60 percent after accounting for the decisions of the intermediate appellate courts, but goes back up to 82 percent after accounting for review by the apex courts.

In contrast, few collective claims have been filed and these have usually been denied – Hoffmann and Bentes posit that the Brazilian judiciary is still steeped in a civil law tradition and thus unwilling to take on the obvious policymaking role implied by aggregate litigation. That is, they decide individualized claims from a “purely individual civil rights perspective” without giving much thought to economic or social impact; thus they tend to grant these

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215 For example, individualized enforcement of the rights to health and social security are fairly common in Argentina and Venezuela. See, e.g., Christian Courtis, Argentina: Some Promising Signs, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 163, 169-76 (Malcolm Langford, ed., 2008); Enrique Gonzalez, Venezuela: A Distinct Path Towards Social Justice, in id. at 192, 202-04.


217 See id. at 101 (describing the methodology of the study). The study also included education claims, but the authors found few such claims in their data. See id. at 117 (noting “the lack of individual cases” in the education area).

218 See id. at 122-23 (“[T]he great majority of health cases in Brazil concern individual provision or financing claims, notably access to medicines and, less frequently, access to treatment.”).

219 Id. at 119.

220 See id. at 116-17.
But the arguments flip for collective cases, where arguments about social and economic impact are used to justify nonconcession because judges are unwilling to appear to be making large-scale policy judgments. Hoffmann and Bentes lack good quantitative data on exactly who is filing these cases. And they note that some cases are filed by NGOs or public entities like the Ombudsman on behalf of poorer clients. But their qualitative interviews suggest that the bulk of cases are filed by private lawyers on behalf of middle class clients. This is not surprising, given that Brazilian legal devices, unlike the Colombian tutela, are relatively complex and expensive, and, as they find, that the poor have a “general lack of rights consciousness and trust in the judiciary.” Also, they find that the litigation rates for health claims in the wealthiest states in their study were far higher than in the poorer states. Thus they state that on aggregate this litigation likely has some distributive effects: “[T]he queue jumping of individual litigant patients, many of whom are middle class, at public pharmacies does have a direct impact on nonlitigant patients, the majority of whom are, quite likely, indigent.”

Finally, Hoffmann and Bendes find little evidence that this individualized jurisprudence has provoked positive effects on the executive bureaucracy. They find that the major policy decision to include HIV drugs on the lists of allowable medicines was unrelated to litigation, although they do find that some other medicines have been included on the list because of a critical mass of litigation. Still, they find that, as in Colombia, most of the real problems in the Brazilian health bureaucracy are problems of “implementation” rather than design – even when a drug or treatment is included on the list it often is not provided to patients without legal action. In this sense, as in Colombia, the Brazilian courts have become a partial replacement for the bureaucracy rather than helping to improve bureaucratic action.

B. Negative Injunctions

Another very common tool has been enforcement of social rights by negative injunction – preventing the government from withdrawing some existing benefit. This is closely related to the concept, found in international law and already discussed, of non-retrogression: reductions of existing social benefits will be subject to heightened scrutiny in order to determine their

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221 Id. at 126.
222 They indicate, however, that NGO litigation really only exists in the HIV/AIDS area, and that the Ombudsman often ends up representing middle class rather than poor clients. See id. at 111-15. They also note that even if poor clients can get to the courts by going through a public agency like the Ombudsman, the involvement of these public agencies tends to slow the cases down considerably. See id. at 113.
223 Id. at 113.
224 See id. at 143.
225 See id. at 138-39.
226 See id.
The Colombian Court used this principle in its 2000 public sector salary case, where it ordered all public sector employees to receive increases in salary at least equal to the rate of inflation. The negative injunction is very popular in comparative law as a means to enforce social rights, most likely because it also appears relatively court-like: the judiciary is not involved in making complex budgetary allocations or otherwise constructing policy, but instead merely prevents the state from putting some new policy into effect. In other words, enforcement of social rights by negative injunction makes these rights look more or less like other kinds of rights.

This kind of social rights enforcement is likely to have a strong tilt in favor of more affluent groups. This is because the very poor do not have many benefits for the government to take away, and because they have so little states do not seem to be interested in cutting these benefits during recessions and periods of structural adjustment. In contrast, middle and upper class groups tend to have pensions, decent health care, and other subsidies – these benefits can be attractive targets for governments that urgently need to cut budget deficits and which may be under international (IMF, World Bank, etc) pressure to do so. The point may be best made by one of the most common types of social rights enforcement “for the benefit” of the poor – injunctions against evictions of the “squatting” poor from slums built on lands that they do not own, or from living on the street, in both India and South Africa. The jurisprudential logic in both countries is that there is a right to housing in the two constitutions, and while the positive aspect of this right (the building of decent housing for all) cannot be realized immediately, the courts will at least enforce the negative aspect of the right by making it more difficult to evict poor tenants from their existing homes in ramshackle slums or on the streets. These cases may do something for the poor, but it isn’t very much.

The run-of-the-mill negative injunction case in comparative constitutional law benefits the middle class. The Hungarian Constitutional Court’s activism on social benefits in the mid-1990s, when the Court struck

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227 See supra text accompanying notes 159-161 (describing the non-retrogression principle as a creation of the Committee on Economic, Social, and Cultural rights that is charged with interpreting the International Covenant on Economic, Social, and Cultural rights).

228 See, e.g., S. Muralidhar, India: The Expectations and Challenges of Judicial Enforcement of Social Rights, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102, 112-14 (Malcolm Langford, ed., 2008) (discussing cases from India although finding enforcement of even this minimal protection spotty); Brian Ray, Extending the Shadow of the Law: Using Hybrid Mechanisms to develop Constitutional Norms in Socioeconomic Rights Cases, 2009 Utah L. Rev. 797 (2009) (explaining how South African Courts have made forced evictions of slum dwellers more difficult for the state to carry out). The South African Court has gone beyond just issuing negative injunctions; in some cases it has imposed novel remedies – for example in one famous case it ordered the government to compensate a landowner because slum-dwellers were on his land, and because of constitutional principles he could not evict the slum-dwellers. See Brian Ray, Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights, 45 Stan. J. Int’l L. 151, 188-89 (2009) (discussing the 2005 case of President of the Republic and others v. Modderklip Boerdery).
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down a series of important government measures. The Hungarian government, in
the midst of a severe economic crisis and under pressure from international
organizations like the IMF, attempted to cut many benefits from the social
benefits system (pension, child supports, sick leave, etc) and to move that system
from a universal system towards a need-based system, is illustrative.229 The
jurisprudential basis for these judgments was that those with existing benefits
had property-like rights to those entitlements that could not lightly be taken
away.230 While there is a debate about the appropriateness of these decisions,231
there is no doubt that these judgments benefited mainly upper-income groups,
and that Sajo is correct in calling the Hungarian social rights "middle class
entitlements."232 Like the Colombian UPAC and salary cases, these decisions
were also very popular with the public – a poll taken just after the decisions
found that 89 percent of the population had heard of them, and that 84 percent of
those who voted for the ruling parties and 90 percent of those who did not
favored the decisions.233

Experience from Brazil and Argentina has at times shown similar
patterns. In Brazil, for example, the Supreme Federal Tribunal (STF) in 1999
enjoined a large chunk of President Cardoso’s public sector pension reform,
holding that the reform should have been done via constitutional amendment and
not via ordinary law.234 In Argentina, there were a flood of complaints seeking

229 See, e.g., Kim Lane Scheppele, A Realpolitik Defense of Social Rights, 82 TEX. L. REV. 1921, 1943-47 (explaining how the Court, in a series of fifteen decisions, blocked much of an Economic Stabilization Package that imposed sharp cuts on maternity benefits, social security, healthcare, child support, and sick pay).

230 See Malcolm Langford, Hungary: Social Rights or Market Redivivus, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 250, 256-60 (Malcolm Langford, ed., 2008). The Court divided benefits into two types – (1) insurance-like benefits where the individual pays in to the state program in order to receive benefits later, and (2) solidarity benefits where the individual did not pay into the system before receiving benefits. There were constitutional protections for both types of benefits, but they were higher for the former type because of the prior payments made by the individual. See Scheppele, supra note 229, at 1944-45.

231 Compare Scheppele, supra note 229 (defending these decisions as democracy-enhancing because they empowered domestic groups over international austerity organizations like the IMF) and Langford, supra note 230, at 259 (arguing that the Court merely imposed reasonable due process protections and ensured that safety nets were not drastically changed too quickly), with Andras Sajo, “Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court,” in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 83, 97 (2006) (arguing that Hungarian social rights were “understood as an entitlement of the vast majority,” and thus “judicial enforcement…cannot be seen as counter-majoritarian, even if…the prevailing majoritarian solutions were both inefficient and socially unjust”).

232 See Sajo, supra note 231.

233 See Kim Lane Scheppele, Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 49 (Adam Czarnota et al., eds., 2005).

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Injunctions after restrictions on cash withdrawals (the famous “corralito”) were imposed during a deep economic crisis in 2001. Claimants won a ton of individual injunctions against these measures, primarily at the lower court level (although the Supreme Court issued contradictory rulings, with some supporting the claimants as well). As Linn Hammergren noted, this was a species of “judicial populism” – the court was “playing to the masses.” In both cases, again, the beneficiaries were middle and upper-class groups – those who had civil service pensions and who had significant bank accounts.

A final point is that this kind of jurisprudence, although seemingly court-like, tends to get judiciaries in big trouble. The reason is because these cases tend to impinge on core macroeconomic policy decisions at precisely the moment in which governments are experiencing budgetary stress and need to undertake structural adjustments. These are often “populist” decisions and may be popular with the public, as the Hungarian and Colombian decisions show. But they also anger presidents and legislatures, who may seek to attack or overhaul judiciaries as a result. The popularity of courts like the Hungarian and Colombian courts might have protected them from obvious attempts to attack it, like jurisdiction-stripping efforts or attempts to pack the court or remove the existing justices. But the appointment process offers a much lower-salience way to alter judicial behavior: in Hungary in 1999, the entire court turned over and the legislature appointed a much less activist group of justices to replacing the outgoing court. To a much lesser degree, the same happened in Colombia, where the justices appointed in 2001 continued to make activist decisions but also promised self-restraint, and particularly that they would pay attention to the economic consequences of their decisions.

C. Structural Injunctions

Structural injunction-like devices have been rare in comparative constitutional law. Although various scholars have pointed out their theoretical utility in resolving difficult social rights problems, they remain for the most part the pipe dream of academics in other countries, a remedy that exists in journal articles but is almost never seen in reality. This is especially true in South

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235 See generally Catalina Smulovitz, ‘Judicialization of Protest in Argentina: The Case of ‘corralito,’” in ENFORCING THE RULE OF LAW: CITIZENS AND THE MEDIA IN LATIN AMERICA 55 (Enrique Peruzzotti & Catalina Smulovitz, eds., 2006). Smulovitz finds that in 2002 the courts granted 165,384 injunctions; each injunction led to the return of about $20,000. See id.

236 LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007).

237 See supra text accompanying notes 151-152; 233.

238 See generally GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2005) (arguing and providing evidence for a claim that public support insulates a court from attempts to retaliate against it by the political branches).

239 See Schepple, supra note 233, at 53-54 (stating that “[t]he old Constitutional Court was dead” after 1998).

240 See supra text accompanying notes 170-171.
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Africa, where the Court has aggressively taken on the challenge of defining constitutional rights but has been willing to give only very limited remedies for their violation.241 And, as the Colombian example shows, structural remedies are expensive, time-consuming, demand a tremendous amount of legal and political skill from the judiciary, and only appear to work well in certain political contexts.242 On the other hand, they have the potential to correct some of the biases seen in the other devices, and they may be especially promising for targeting lower income groups. The limited comparative experience that exists for these devices supports these hypotheses.

In particular, the Indian Supreme Court has at times experimented with structural remedies for constitutional violations. The most famous example is the Court’s 2001 order in People’s Union for Civil Liberties v. Union of India & Others.243 In this case an Indian NGO challenged the federal government’s grain distribution policy, which it argued violated the constitutional right to be free from hunger. In order to protect export agriculture, the government was storing rather than distributing huge amounts of grain even as the country was in the midst of a severe famine.244 The Indian Supreme Court agreed with the challenge; although its initial order was mainly declaratory, it maintained jurisdiction over the case and began issuing increasingly expansive and specific orders, quickly branching out from an exclusive focus on grain policy. For example, the Court has ordered to creation of specific programs giving grain to poor families, implementing complex food-to-work programs, and creating a school lunch program for children.245 The Right to Food Campaign, a collection of NGOs that first brought the claim to the Court, has been instrumental in monitoring compliance, bringing new information to the court, filing new claims, and in acting as a bridge between the court and the public.246 The Court also established a Commission in 2002 to monitor implementation; the two


242 See supra text accompanying notes 208-214.


244 See, e.g., Neff, supra note 241, at 165.


246 See id. at 723-26.
central commissioners in turn appointed advisors from each state. The Commission collects information from the governments to give to the Commission, influences the design of interim orders, and mediates policy changes with the governments.247

Overall, the intervention appears to have been successful both in improving food policy in India and, more broadly, in starting a broad public debate on the topic – the federal administration recently announced a new law (the National Food Security Act) aimed at regulating the entire problem.248 The similarities between the Indian structural litigation in the food case and the Colombian displaced persons case are striking and may help us construct usable theory for when structural interventions are likely to be successful. In both cases the Court took on massive issues that had basically been ignored by the political branches, and constructed public policy from the ground up. In both cases the Court had strong and unified support from civil society, and took the government on over an issue that it morally could not easily oppose. This suggests again that courts might be better at building new public policies than they are at taking on already established and entrenched policies and bureaucracies. In other words, these are less institutional reform cases and more institutional construction cases. Moreover, the nature of civil society in a given area seems to be critical to judicial success – courts may not be good at resolving complex pluralistic disputes in areas where different kinds of civil society groups are coming in with different kinds of claims (as in the Colombian health case).249 Courts may be more effective where they have a clear vision being offered by a relatively monolithic set of civil society organizations, as in the Colombian displaced persons and Indian food cases.250

V. IMPLICATIONS

The analysis presented above has significant policy implications for how domestic courts should enforce social rights, and also for how international bodies and organizations should think about enforcement of these rights and principles. The normative assumption on which I base this section is that better

247 See id. at 726-29 (noting that the Commission has had a significant impact on the interlocutory orders of the Indian Supreme Court, and that it has both referred compliance issues back to the Court and at times attempted to resolve them autonomously through mediation).
248 See id. at 752-60 (noting that the proposed law clearly evolved out of the work of the Court, the Commission, and the Right to Food Campaign).
249 See supra text accompanying notes 211-214.
250 Along related lines, the seminal study of Feeley and Rubin on structural reform of U.S. prisons concluded that courts were successful at reforming certain Southern prisons because a large battery of experts on prison policy all concluded these prisons were run off of an antiquated “plantation” model, and the experts proposed a clear vision for reform in order to modernize. However, courts have been less interested or effective in altering prison practice in modern but very harsh establishments like the “SuperMax” prisons, because these have been defended by large segments of the prison experts while being attacked by other experts. See Feeley & Rubin, supra note 193, at 366-88.
targeting of enforcement towards lower-income social groups is desirable. (In my conclusion, I return to the idea that a relatively middle-class-based jurisprudence on social rights is probably inevitable, and discuss the implications of that fact). I emphasize three points in this section. First, international policymakers, particularly on the Committee on Economic, Social, and Cultural Rights, should emphasize and better define the minimum core and should deemphasize potentially dangerous concepts like non-retrogression. Second, the international dialogue between constitutionalists in different countries should emphasize remedies rather than just rights, and a consideration of the United States experience (which amply demonstrates both the possibilities and limits of structural reform litigation) may be useful for these ends. Third, policymakers designing or reforming a judiciary should consider ways not only to preserve judicial independence while maintaining a link to the people, but also to rein in populist behavior by the judiciary.

A. The Conceptual Apparatus of the International Law of Social Rights

As already indicated, the principle instrument governing socio-economic rights under international law is the International Covenant on Economic, Social, and Cultural Rights. The Committee on Economic, Social, and Cultural Rights, a standing committee of experts, acts as the interpreter of the treaty. It reviews state reports, but its major policy instrument has been the emission of “general comments” on various topics. The general comments lay out the Committee’s conceptual vision of how the rights in the Convention must be enforced. Obviously, the influence of the Committee on state judicial practice will vary tremendously from country to country. But many countries now explicitly give international law very high status in domestic law, sometimes requiring for example that Constitutions be interpreted in light of international human rights principles. Further, many constitutional courts appear to be increasingly knowledgeable about and comfortable with international law. Colombia and South Africa certainly offer two cases where international law is textually given high status in the constitution, and in practice it has been important to judiciaries when undertaking constitutional interpretation – for example, the constitutional courts of both countries have paid considerable attention to the Committee’s work. We should thus expect the Committee’s work to be influential in an increasing number of cases.

251 See Langford & King, supra note 84, at 478-81. Note that unlike the other United Nations human rights conventions, the Committee is not set up by the treaty itself as the textual interpreter of the treaty. That role was given to the Economic and Social Council, a body of state parties and not independent experts. But the Standing Committee was created in 1985, and technically reports to the Economic and Social Council. See id. at 478.

252 See generally VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010) (looking at ways in which various countries engage with international and comparative law).

253 See CONST. COL., art. 93 ("The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.");
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The Committee has recognized that most of the rights under the Convention are meant to be progressively rather than immediately realized. Article 2(1) imposes on the state parties an obligation to “take steps…to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” As the Committee noted in its seminal General Comment 3: “[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”

The question then becomes one of measuring whether the steps taken by a State are adequate to comply with the Convention. Here General Comment 3 introduces two concepts of great importance. First, it introduces the concept of non-retrogression: “any deliberately retrogressive measures…would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” This concept has been fleshed out in subsequent General Comments. For example, General Comment 20, on the right to social security, states as follows:

There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.

In other words, the provision against retrogressive measures is not an absolute bar; rather, such measures face a “particular strict form of scrutiny.”

CONST. S. AFRICA, art. 39 (stating that when interpreting the Bill of Rights, a court “must consider international law” and “may consider foreign law”).


255 General Comment No. 3, The nature of States parties’ obligations, (Fifth session, 1990), U.N. Doc. E/C.12/GC/19, para. 2. The Comment also notes that there is a separate obligation to make access to these rights non-discriminatory; the separate non-discrimination norm is not dealt with here. See id., para. 1.

256 Id., para. 9.


258 Langford & King, supra note 84, at 502.
This kind of standard has the advantage of being relatively easy to use—it is fairly easy to determine when a measure is retrogressive or takes away benefits from a group. But the Colombian, Hungarian, Argentine, and Brazilian examples all suggest that the rule may have dangerous and counterproductive effects when given teeth by domestic courts. It is quite rare for retrogressive measures to be targeted at the poorest sectors of society; the normal cases of this sort deal with pension or salary cuts that hit the middle and upper classes, groups like civil servants. Judicial activism on these sorts of issues is dangerous for courts because it involves them in core macroeconomic issues. It may prevent or slow necessary structural reforms. And it is dubious on equity grounds. The non-retrogression principle should be deemphasized or abolished by the Committee.

The more promising concept is the minimum core, also introduced in General Comment 3. The Committee wrote:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, \textit{prima facie}, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its \textit{raison d’être}…. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.\footnote{General Comment No. 3, supra note 255, para. 10.}

This, as Bilchitz has written, is basically a rule of prioritization: it states that given that states have a finite amount of resources, they must spend money first on ensuring that all citizens enjoy at least a minimum level of enjoyment of their basic social rights.\footnote{See David Bilchitz, \textit{Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights} 183-96 (2007) (making the case for a minimum core approach to socio-economic rights enforcement).} It had a considerable influence on the vital minimum doctrine created by the Colombian Constitutional Court.
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Some commentators have objected to the minimum core concept on the ground that it is too vague, and for example that it is unclear how the content of the minimum core is to be determined, and whether it should focus on the fulfillment of basic needs or the attainment of core values like human dignity. But this objection has relatively little relevance for the actual practice of domestic courts. The evidence presented here shows that domestic constitutional courts face a more basic question of whether to protect social spending on upper-income groups or instead to target poorer segments of the population. What is needed is a framework that clearly tells them to obligate states to spend on the poorest members of society. The precise content of the obligation can be worked out by each country through time. International law is useful here as general guidance to constitutional courts for use in constitutional interpretation; it need not and should not resolve all of the details. My analysis suggests that the minimum core should be given a greater emphasis by the Committee.

B. The Nature of the International Dialogue on Comparative Constitutional Law

There is a dialogue across countries between judges on constitutional courts. Not all countries participate in this dialogue – some countries, like the United States, have relatively “closed” systems of constitutional law and tend to resist engagement with comparative law. But there is a rich conversation occurring among many of the constitutional courts in Europe, along with some other courts (South Africa, Canada, and Israel, for example) elsewhere in the world. Courts within this circle take jurisprudential ideas from each other. A wider circle of courts (often in the developing world) is receptive to this discourse and receiving ideas from it, but has been less successful at gaining influence with the major players.

261 See Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 YALE J. INT’L LAW 113 (2008); see also Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC), §§ 32-33 (arguing that a minimum core approach is inappropriate in South Africa because the Court cannot figure out what the content of that minimum core might be).
263 See, e.g., Jackson, supra note 252, at 8 (noting that Justice Antonin Scalia’s position advocating resistance to transnational engagement has recently been influential in the United States); Lorraine E. Weinreb, The Postwar Paradigm and American Exceptionalism, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (arguing that the United States has erroneously become an outlier in this transnational discourse).
264 See generally Sujit Choudhry, “Migration as a new metaphor in comparative constitutional law,” in The Migration of Constitutional Ideas (Sujit Choudhry, ed., 2006) (characterizing this exchange as a “migration” and giving some sense of the major participants).
265 A good example here is arguably Hungary in the 1990s, where the Constitutional Court relied heavily on the concept of human dignity borrowed from Germany. See CATHERINE DUPRE, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS (2003).
The actual content of this discourse has rarely been examined, since most of the work has focused on either its existence or its desirability. But it seems to have been heavily influenced by the identity of the core players, especially the prominent European constitutional courts like the German Constitutional Court. The discourse focuses heavily on the content of various kinds of rights, and on techniques for balancing these rights against one another and against state interests. For example, the technique of proportionality, which specifies the conditions under which rights may be limited, has proven to be highly portable across systems.  

The discourse has also focused heavily on the interaction between courts and legislatures. The trademark type of review in these systems is abstract review that occurs at the behest of a political minority in the legislature immediately after a bill has been enacted. Courts in these European systems have thus adapted techniques to condition the type of dialogue that occurs between court and parliament. For example, the “conditional decision” allows the court to hold a law constitutional only if interpreted in a certain way – the conditions are then supposed to be binding on all subsequent authorities. The “integrated decision” allows the Court to actually add textual content to an existing law in order to make it constitutional. Finally, the “modulated decision” allows courts to hold a law unconstitutional, but to defer its unconstitutionality for a set period of time in order to allow legislative correction of the law. These techniques appear to flow very freely across civil law countries with constitutional courts.

Where the dialogue has relatively little to say is on the concept of remedies for actual violations of people’s constitutional rights. The paradigm in Europe is of abstract review between court and parliament on the contents of the written law. 

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266 See Weinreb, supra note 263, at 97 (arguing that proportionality is a part of “the postwar judicial paradigm”). Proportionality analysis generally proceeds in three steps. First, the objective pursued by the state for limiting the right must be of sufficiently high importance. Second, the measure taken must be rationally related to the stated goal and must infringe on the right no more than necessary to do so. Third, the actual benefit of the measure must exceed the cost to the rights-holder. See id. at 96-97.

267 This model springs from the influence of Hans Kelsen, whereby constitutional courts act as “negative legislators” to control parliamentary behavior. See, e.g., Miguel Schor, The Strange Cases of Marbury and Lochner in the Constitutional Imagination, 87 Tex. L. Rev. 1463, 1482-83 (2009). This is not the only model of judicial review in these countries, but it is the paradigmatic model. Some of these countries, like Italy, also allow ordinary judges to refer concrete cases to constitutional courts for resolution, and most, like Germany, Spain, and now France, allow citizens to file constitutional complaints for acts that violate their individual constitutional rights. See, e.g., ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 47 tbl. 2.2 (2000).

268 See Stone Sweet, supra note 267, at 50-55.

269 See id.

270 See id.

271 As an example of its influence in Colombia via one of the first Constitutional Court’s most influential magistrates, see, for example, Alejandro Martinez Caballero, Tipos de Sentencias en el Control Constitucional de las Leyes: La Experiencia Colombiana, REVISTA ESTUDIOS SOCIO-JURIDICOS, Mar. 2000.
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law, not of judicial protection of the rights of injured defendants, and certainly not of protection en masse of a social group or structural reform litigation aimed at altering the behavior of an institution. And international law is little help: the orders of international tribunals tend either to be highly individualized or to lack any real supervisory teeth. Perhaps the most useful source of information for complex cases aimed at protecting individual rights is the United States, and especially its experiences with institutional reform litigation. The vast literature and caselaw on this litigation could be of great help in figuring out what kinds of remedies are likely to be helpful in different political contexts.272 The recent South African experiences with weak-form review and engagement should also be part of this conversation – scholars should look carefully at why these remedies have largely failed to achieve their purpose.273 But the broader point is that this discourse needs to encourage judicial creativity not just in abstract review cases, but also (and especially!) in concrete but complex cases involving the violation of rights of a large number of citizens by institutions. At least within the developing world, the dialogue between countries needs to put complex judicial remedies at its core.

C. Avoidance of Judicial Populism

The comparative politics literature has shown a near obsessive interest in the concept of judicial independence; the underlying assumption is that judicial independence from political actors is a key aspect of democracy.274 But there is another question lurking here, which has gotten much less play in comparative terms: how exactly will an independent court behave? While there is a significant literature on political populism, few actors have noted the important point that courts as well often act in populist ways.275 If populist behavior is undesirable, then constitutional designers should focus on creating more responsible courts as well as independent courts.


273 See supra text accompanying notes 24-38.


275 An exception is LINN HAMMGERREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007) (arguing that courts in Latin America need to be attentive to public demands, but that they too often engage in populist behavior for which they are poorly suited).
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This is not easy to do, but judicial design is never easy. Sometimes the cause of populism appears, paradoxically, to be an overdependence on the political branches and a corresponding lack of institutional strength in the judiciary – Argentina is such a case. As Helmke and Kapizewski have argued, the Argentine Supreme Court is highly dependent on the president because presidents have a history of removing justices at will; as a result, the judiciary has never developed a strong internal organization. This has led to bizarrely obstructionist behavior at times – justices turn against unpopular outgoing presidents because they want to be maintained by the incoming opposition administration. In cases like these, the remedies for a lack of independence may be the same as those for populist behavior.

But in other cases, the two diverge – independent courts like the Colombian and Brazilian judiciaries have both had problems with populism. In the case of Brazil, part of the problem seems to be the judicial hierarchy – judicial placements and promotions are based almost entirely upon seniority, and neither the Supreme Court nor any other body (like a judicial council) has much control over individual judges. As a result, a common problem in Brazil is that lower courts obstruct important government measures by issuing injunctions; these messes take time to be cleaned up by the Supreme Federal Tribunal. This could be solved by giving a Council, staffed preferably by a mix of personnel from inside and outside the judiciary, control over judicial career paths. In the case of Colombia, the problem of populism has arisen at the Constitutional Court level itself. Here a big part of the problem is post-Court career paths; magistrates are often appointed at a fairly young age, serve one eight-year term, and then are looking around for more opportunities. In a weak, fragmented party system like the Colombian system, political entrepreneurship has been an appealing option – magistrates make a name for themselves with several “big name” decisions and then run for political office. Jose Gregorio Hernandez, who made a name for himself as the UPAC justice and then was chosen as a vice-presidential candidate for a major party, is a paradigmatic example. Fairly simple design fixes could resolve the problem – justices could be barred from running for elected office or from holding appointed office for some set period of time.


277 See Helmke, supra note 276.

278 See Julio Rios & Matthew Taylor, Institutional Determinants of the Judicialization of Policy in Brazil & Mexico, 38 J. LAT. AM. STUDS. 739, 746-47 (2006) (noting that individual judges have a “remarkable degree” of independence from their superiors in Brazil).

279 As an example, when the Brazilian federal government attempted to privatize a mining company in the 1990s, the scene was a “tragic comedy”: hundreds of injunction requests were filed across the country, and several were granted (including one several minutes into the bidding), only to be later thrown out by the Supreme Federal Tribunal. See id. at 762.

280 See supra note 155

281 See supra text accompanying note 154.

282 A second solution, establishing a high minimum age for justices so that the Constitutional Court tends to be their last post, is probably less appealing. Much of the appeal of the court
D. Substitutes for Constitutional Courts

The analysis also raises the important question of whether bodies other than constitutional courts would target socio-economic rights enforcement more effectively at marginalized social groups. This question is not wholly new: Bruce Ackerman has argued for example that courts would be unlikely to take social rights seriously or to have the capacity to enforce them, so it would be better to leave social rights enforcement up to a special “Distributive Justice Branch.”\(^{283}\) Of course, the construction of such an explicitly-dedicated branch is unlikely, but most developing democracies now include a set of powerful “control institutions” other than constitutional courts. These include institutions like national ombudsmen and human rights commissions, as well as other bodies like electoral commissions and anti-corruption commissions. Christopher Elmendorf has argued that these institutions could serve as partial substitutes for constitutional courts and might help to consolidate democracy.\(^{284}\)

For the purposes of developing a targeted but effective social rights jurisprudence, the promise of institutions like ombudsmen or human rights commissions seems mixed. One of the major problems with courts appears to be a reluctance to innovate with new remedies, and perhaps some lack of capacity to take on the management role that is necessary with complex patterns of enforcement. The result is that courts stick to what they ordinarily do: hearing cases between one individual and the state or some private provider, and striking down laws. Other institutions might be more remedially innovative, and they might be more suited to managing complex social problems (for example, they often have larger staffs, and are generally staffed by social scientists and public policy managers in addition to lawyers).

However, these other institutions generally lack any sort of binding power for their policy proposals – they usually function through discussions with the elected branches and by publicizing problems in reports, or by reporting abuses to other authorities like prosecutors.\(^{285}\) This would be problematic for the same reason that weak-form enforcement is problematic: dialogic methods of judicial review that lack a high degree of coercion are unlikely to work in developing countries with weak bureaucracies and severe representation problems in the legislature.\(^{286}\) The political branches are unlikely to respond to the Court absent high levels of pressure. This suggests that institutions like ombudsmen and

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285 The general model is that they have coercive powers of investigations, but cannot issue binding policy orders. See id. at 978-82.
286 See Landau, supra note 104 (arguing that developing countries have problems in both their legislatures and bureaucracies that make more coercive remedies appropriate).
human rights commissions should be given the power to issue binding orders on other institutions of state in at least some circumstances (perhaps subject to ultimate review by the judiciary). 287

VI. CONCLUSION – COMING TO GRIPS WITH A MIDDLE-CLASS SOCIAL RIGHTS JURISPRUDENCE

Social rights enforcement has been vibrant in a number of countries. However, the patterns of enforcement show disturbing relationships. One claim in this piece is that there is a perverse relationship between choice of remedy, the likely set of beneficiaries, and the perceived (although perhaps not actual) strains on a court’s capacity and democratic legitimacy. Empirically, court are most likely to enforce social rights by negative means (such as striking down a law) or via individualized rights enforcement, since these tools are closest to the tools courts use for everyday judicial review. But both are bad ways to enforce social rights claims – they have perverse distributive effects and do not appear to do anything to improve the performance of the bureaucracy. Stronger, structural remedies are certainly difficult to pull off – the Colombian and Indian examples show that they demand a lot of the court’s resources and do not work in certain political contexts. But they can work. They should be part of the judicial toolkit, and scholars should start building theories for when and why these kinds of remedies are effective.

The broader point is that we need to reevaluate what social rights do; we must reenvision them as a largely middle-class phenomenon. As such, their enforcement is mostly majoritarian, not counter-majoritarian. While U.S. constitutional theory coined the phrase “countermajoritarian difficulty,” American scholars have long noted that this is an oversimplified view of what the Supreme Court does and that it essentially follows majority will in many circumstances. 288 But the same vision has not penetrated much of comparative scholarship. Making a full evaluation of the fact that courts are majoritarian in many (perhaps most) circumstances is a task for another paper. But even relatively populist judicial enforcement may not be a bad thing, given the dearth of legitimacy that most state institutions have in developing countries and the low quality of their bureaucracies. This suggests that the core question attending this sort of enforcement is the rebound effect that judicial action has on

287 An additional problem deals with incentives: these institutions may be expected to have the same majoritarian tilt as courts. Here, the solutions, although difficult, are likely to come through the selection process. Constitutional Courts are inevitably going to be selected by political means – usually with the involvement of the congress at least. But these mediating institutions might be selected by processes that privilege civil society groups – for example, a commission of NGOs and similar groups might provide the Congress with a short list of names, and the Congress would be required to select a name from the list.

bureaucrats, politicians, and civil society groups – does it strengthen civil society and improve bureaucratic performance? A big part of the answer, again, is likely to rely on remedial innovation: courts may need to intrude more on democratic institutions in order to improve them.