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SYMPOSIUM:
LATIN AMERICAN CONSTITUTIONALISM

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Symposium

Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970–2010

Javier Couso*

I. Introduction

Models of democracy are hardly separable from models of constitutionalism. The model of democracy that a person embraces may determine to a great extent the model of constitutionalism that she will adhere to. Thus, for example, if someone is persuaded by the virtues of direct democracy, it is unlikely that she would favor a model of constitutionalism that includes review by nonelected judges of the constitutionality of the *content* of legislation approved by the people through a referendum—although she would presumably admit the legitimacy of judicial review of the constitutionality of the *procedural* aspects of such a referendum. The same goes for those who advocate strong versions of deliberative democracy: they would be likely to accept judicial review of the constitutionality of laws regulating the democratic process, but not the control of the constitutionality of the *substantive outcomes* adopted through well-conducted, deliberative-democratic procedures.[1]

Of course, the assertion that models of democracy have a profound impact on models of constitutionalism presupposes the adoption of an external point of view in relation to the latter[2]—that is, one that regards different accounts of constitutionalism as equally plausible, which is problematic for those of us who think that there are some very specific core values associated with the concept of constitutionalism. Having said this, if we assume for a moment such an external approach to constitutionalism, it

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1. I take this to be a position compatible with what has been argued in the past by JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996); and MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

2. H.L.A. HART, THE CONCEPT OF LAW 89–92 (1961) (describing social structures where the primary rules of obligation are supplemented with "secondary rules . . . concerned with the primary rules themselves").

becomes immediately apparent that there are, at the present time, competing accounts of both democracy and constitutionalism in Latin America. In the 1990s, there was widespread consensus throughout the region as to the virtues of liberal democracy and the model of constitutionalism prevalent in Western Europe, the United States, and other former British colonies. In recent years, however, some Latin American countries have diverged from that consensus and embraced different models of democracy, which have led them to adopt different models of constitutionalism. For example, Venezuela, Bolivia, and Ecuador have, over the last few years, adopted radical forms of democratic rule—multiethnic democracy in Bolivia and Ecuador,[3] and the so-called Bolivarian democracy in Venezuela[4]—that have been shown to be incompatible with some core elements of the liberal-democratic model of constitutionalism, such as judicial independence and full freedom of expression.

Given this scenario, and bringing back the internal point of view regarding the concept of constitutionalism, it is important to unpack the latter in order to identify its essential and contingent elements. When one does so, one finds that, for all the celebration of judicial review of the constitution typical of the last decades,[5] this institution is not a *sine qua non* of liberal-democratic constitutionalism. In fact, the United Kingdom and the Netherlands developed strong democracies without judicial control of the constitutionality of legislation.[6] On the other hand, it is difficult to imagine

3. *See* MARK GOODALE, DILEMMAS OF MODERNITY: BOLIVIAN ENCOUNTERS WITH LAW AND LIBERALISM 171 (2009) (discussing a "broader shift in Bolivia's modern trajectory, in which the nation's historically disenfranchised and marginalized majorities appropriated dominant national discourses in order to claim their patrimony"); Rodrigo Uprimny, *The Recent Transformations of Constitutional Law in Latin America: Trends and Challenges*, 89 TEXAS L. REV. 1587, 1601 (2011) (stating that the most recent Bolivian and Ecuadorian constitutions have "recognized and strengthened community forms of democracy—a trait closely linked to the autonomy of indigenous and other ethnic communities"); *see also* Paul H. Gelles, *Indigenous Peoples and Their Conquests*, 98 AM. ANTHROPOLOGIST 408, 408, 410 (1996) (reviewing DONNA LEE VAN COTT, INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA (1995)) (quoting Victor Hugo Cárdenas, an indigenous activist and at that time the incoming vice president of Bolivia, as identifying Bolivia as a "multiethnic democracy," and claiming that indigenous groups have created a national "political space").

4. *See* Rogelio Perez Perdomo, *Lawyers and Political Liberalism in Venezuela*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 345, 351 (Terence C. Halliday et al. eds., 2007) (arguing that President Hugo Chávez's regime borrows many elements from Bolivar and the liberal *caudillos*).

5. *See, e.g.*, Miguel Schor, *The Strange Cases of* Marbury *and* Lochner *in the Constitutional Imagination*, 87 TEXAS L. REV. 1463, 1464, 1466 & n.27 (2009) (recognizing the adoption of judicial review practices in Latin America and noting the similarity between these practices and those in the United States).

6. *See* TUSHNET, *supra* note 1, at 163 (highlighting that Great Britain, which does not have a written constitution, and the Netherlands, which has a written constitution that is unenforced by the courts, guarantee individual rights and have governments with limited powers).

that meaningful constitutionalism can coexist with effective executive branch controls of the judiciary and hostility to free speech, as in Venezuela.[7]

Of course, it is an open question whether radical democracy of the sort currently being tried in Venezuela, Ecuador, and Bolivia necessarily requires the sacrifice of basic aspects of liberal-democratic constitutionalism. The fact that political leaders such as Hugo Chávez, Rafael Correa, and Evo Morales have ended up controlling the judiciary of their respective countries[8] does not mean that the sort of democratic regimes they embrace will always do so. Having said this, the kind of political leadership they have all displayed is strongly reminiscent of the very old practice of the region, *caudillismo*—that is, the assertion by charismatic leaders that their actions are necessary to "save" their countries, even at the cost of violating the law and the constitution. Thus, it cannot be denied that—together with truly new forms of radical democracy aimed at eliminating the quasi-elitist practices of technocratic control that characterize so many liberal-democratic regimes in Latin America[9]—much of what is being heralded as new forms of democracy and constitutionalism represents nothing more than a replay of the old political practice of populism, which has damaged the development of sustainable democratic regimes in the past.[10] This rather pessimistic perspective comes from the awareness that, as Brian Loveman's work suggests, Latin America has had many constitutions, but very little constitutionalism.[11] Indeed, due to abuse of states of emergency and to the sheer disregard of constitutional provisions limiting executive powers, most states in the region have lacked for most of their independent history even the most basic type of

7. *See generally* Alisha Holland et al., *A Decade Under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela*, HUMAN RIGHTS WATCH (Sept. 22, 2008), *available at* http://www.hrw.org/es/reports/2008/09/22/decade-under-ch-vez (chronicling the impact of the Chávez regime, including its takeover of the supreme court and infringement on the freedom of expression).

8. *See* Frank M. Walsh, *The Legal Death of the Latin American Democracy: Bolivarian Populism's Model for Centralizing Power, Eliminating Political Opposition, and Undermining the Rule of Law*, 16 L. & BUS. REV. AMERICAS 241, 252, 253 & n.71 (2010) (recounting the efforts of Chávez and Morales to limit judicial independence, and speculating that such measures will be taken in Correa's Ecuador).

9. For good critiques of liberal-democratic experiences in the region, with historical and contemporary analysis, see LEONARDO AVRITZER, DEMOCRACY AND THE PUBLIC SPACE IN LATIN AMERICA (2002); ROBERTO GARGARELLA, THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860 (2010); and TOMAS MOULIAN, CHILE ACTUAL: ANATOMIA DE UN MITO [PRESENT-DAY CHILE: ANATOMY OF A MYTH] (1997).

10. For an excellent historical analysis of this issue, see Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neoliberalism: Law's Dilemma in Latin America*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 139 (Yves Dezalay & Bryant G. Garth eds., 2002).

11. *See generally* BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA (1993) (chronicling Latin American politics and constitutions in the nineteenth and early twentieth centuries).

constitutionalism[12]—one in which the government respects the rule of law and the constitutional provisions restricting government action, thereby allowing individuals and groups to enjoy a basic set of fundamental rights.[13]

Despite this rather grim historical background, and the worrisome situation prevailing in the countries currently experimenting with radical versions of democracy, it is still true that the last "wave" of democratization that reached Latin America in the late 1970s was accompanied by an unprecedented concern for constitutionalism and the rule of law.[14] This trend was the result of both regional and global factors. With regard to the former, the ferocity of the repression perpetrated by the military dictatorships of the 1960s and early 1970s made groups that had been skeptical of liberal-democratic constitutionalism (such as Marxist political parties and movements) start to appreciate the value of traditional legal institutions (such as the writ of habeas corpus).[15] Regarding the second trend, over the last two to three decades, the world saw the emergence of an international human rights movement that promoted the ideals of constitutionalism as crucial elements of democratic politics.[16] The combined effect of these two factors, highlighted by students of processes of democratic transition and consolidation and endorsed by multilateral organizations, contributed to the idea that, without liberal constitutionalism, democracy itself has little chance to endure.[17]

As indicated above, the general state of affairs concerning democracy and constitutionalism in Latin America is mixed. On one hand, there are countries in which new forms of radical democracy have effectively put some core elements of the constitutional state at risk, while in the rest of the region there have been remarkable advances in the consolidation of the rule of law and constitutionalism. This mixed state of affairs makes the study of constitutionalism in the region all the more important. As pointed out above, however, to do so requires a clear understanding of what exactly

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12. *See* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 5 (2006) (characterizing the transition to democracy, and therefore constitutionalism, in Latin America as "recent").

13. *See* Larry Alexander, *Introduction* to CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 1, 4 (Larry Alexander ed., 1998) (recognizing the argument that constitutions "affect human conduct" and provide order to government).

14. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 22–23 (1991) (identifying the adoption of Latin American constitutions in the 1970s and 1980s and marginalization of military forms of government).

15. Javier A. Couso, *The Seduction of Judicially Triggered Social Transformation: The Impact of the Warren Court in Latin America*, *in* EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 237, 247 (Harry N. Scheiber ed., 2007).

16. *See* HUNTINGTON, *supra* note 14, at 85–100 (identifying a major shift in international policies toward the promotion of human rights).

17. *See generally* Marc F. Plattner, Response, *Liberalism and Democracy: Can't Have One Without the Other*, FOREIGN AFFAIRS, Mar.–Apr. 1998, at 171 (exploring the intrinsic links between electoral democracy and a liberal order).

constitutionalism entails, which in turn makes the adoption of an internal point of view inescapable.

Thus—and to stress a point mentioned in passing above—it is crucial that we distinguish between what is essential and contingent about constitutionalism, an exercise that will necessarily include the old but persistent issue of whether judicial review of the constitutionality of legislation represents an indispensable element of liberal-democratic constitutionalism. The reason for returning to this much discussed issue is not merely academic, but comes from the fact that, due to the enormous amount of political power that judicial control of the constitutionality of legislation puts in the hands of the courts, in the last two decades, several Latin American countries have experienced the outright destruction of, or more or less subtle intervention into, their supreme or constitutional courts by the executive branches.[18] This often happens when courts engage in an activist use of their powers of judicial review in the context of low social support for the judiciary.[19] Thus, courts that were encouraged by academia and civil society to exercise their constitutional-review powers in an activist manner lost the independence from the government that they had enjoyed before and that had allowed them to engage in the admittedly more modest (but still crucial) role of exerting judicial control over the legality of administrative action.[20] At this point it is perhaps useful to note that when the courts engage in the control of the legality of governmental action, they are "working" for legislatures. Thus, in

18. Indeed, starting with Carlos Menem's "packing" of the Argentinian supreme court in 1990 and the closing of the Constitutional Court of Peru by Alberto Fujimori in 1993, there have been episodes of intervention or outright destruction of judicial independence every few years. *See* Schor, *supra* note 12, at 4 (noting President Fujimori's firing of three court justices and his belief that the judiciary was corrupt); Irwin P. Stotzky & Carlos S. Nino, *The Difficulties of the Transition Process*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 3, 8 (Irwin P. Stotzky ed., 1993) (discussing President Menem's intervention into the judiciary). Other examples include Venezuela in 1999 and Ecuador in 2007. *See* Schor, *supra* note 12, at 4 (noting Venezuelan President Chávez's inauguration-day promise to do away with the existing constitution and implement a new one, and Ecuadorian President Gutiérrez's decision to "sack a Supreme Court that sided with his political opponents").

19. This problem is not peculiar to Latin America. Except for the transitional countries of Eastern Europe that aspired to enter the European Union, the record of constitutional or supreme court destruction in transitional countries in that region is as bad as in Latin America. Incidents started as early as 1993, when President Yeltsin suspended Russia's Constitutional Court. *See* ALEXEI TROCHEV, JUDGING RUSSIA: CONSTITUTIONAL COURT IN RUSSIAN POLITICS, 1990–2006, at 73–79 (2008) (summarizing Yeltsin's efforts to limit the role of the Constitutional Court and related constitutional debates); Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 92–93 (2004) (observing that judicial decision making in post-Soviet republics was characterized by a lack of political safeguards, but recognizing that protections were afforded under certain legal systems, including Hungary's).

20. Note that in a region such as Latin America, where executive branches are the main human rights violators, it is no small feat to have an independent judiciary exercising control over the legality of governmental action. *See* Schor, *supra* note 12, at 3–4 (giving recent examples of executive attacks on Latin American judiciaries); *see also* Ludwikowski, *supra* note 19, at 96–97 (noting the historical impediments to an independent, robust judiciary in Latin American countries).

these situations, the judiciary may rely on the support of the legislative branch against potential attacks by the executive branch. However, this is not the case when a constitutional court or a supreme court takes on legislation backed by the executive and legislative branches on the grounds of its presumed unconstitutionality. In this latter hypothesis, courts confront two powerful entities, a context that leaves them in rather desperate need of strong support from public opinion.

Another issue that the perceived relevance of constitutionalism for democratic sustainability raises is whether adherence to constitutional values can be engineered,[21] or if sustainability is instead a type of cultural achievement[22] that is heavily dependent on political and cultural traditions. This in turn presents the question of the possibility of instilling cultural change of the type needed to get the values associated with constitutionalism in societies that lacked it.

As suggested above, the relationship between democracy and constitutionalism in transitional societies poses a rather formidable normative and empirical research agenda. This Article aims to contribute to that agenda by providing an account of what has happened in Chile, a country that has long been considered one where legality and constitutionalism have reached relatively high degrees of consolidation. Specifically, I analyze the evolution of the different models of constitutionalism recognized by the Chilean Constitutional Court since its introduction in 1970. The relevance of the matter at hand cannot be underestimated. Indeed, though several studies are available on the constitutional politics of Chile,[23] we lack an analysis of the evolution of the Chilean Constitutional Court's understanding of constitutionalism. As we shall see below, this analysis suggests that although the model of constitutionalism followed by a specific judicial body can experience dramatic changes due to institutional, cultural, ideological, and political factors (both domestic and global), the practices normally associated with even the most basic understanding of constitutionalism are heavily dependent

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21. *See* GIUSEPPE DI PALMA, TO CRAFT DEMOCRACIES: AN ESSAY ON DEMOCRATIC TRANSITIONS 44–46, 112–17 (1990) (arguing that careful crafting of democratic transitions is a means of securing loyalty to the new system); GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 203 (1994) (concluding that "the crafting of constitutions is an engineering-like task" because it must create "a structure of rewards and punishments").

22. This reference is to E.P. Thompson's well-known dictum, describing the rule of law as "a cultural achievement of universal significance." E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265 (1975).

23. For examples of these studies, see JULIO FAUNDEZ, DEMOCRATIZATION, DEVELOPMENT, AND LEGALITY: CHILE, 1831–1973 (2007); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007); Javier A. Couso, *The Judicialization of Chilean Politics: The Rights Revolution that Never Was*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 105 (Rachel Sieder et al. eds., 2005); and Druscilla L. Scribner, *The Judicialization of (Separation of Powers) Politics: Lessons from Chile*, J. POL. LATIN AM. (Ger.), no. 3, 2010, at 71.

on the degree of state formation achieved by a given country and on social and political patterns rooted in the historical trajectory of the state.

II. The Control of Constitutional Supremacy Before the Constitutional Court: 1818–1970

A. The Rule of Law and the Emergence of an Incipient Constitutionalism in the Era of Chile's State-Formation Process: 1818–1925

From its beginning as an independent nation (1818) through 1925, Chile did not have any judicial checks on the constitutionality of legislation. Thus, the protection of fundamental rights and liberties recognized in the constitution of 1833 was largely confined to the political process itself.[24] Indeed, the only body formally charged with protecting the constitution was the *Comisión Conservadora*, an ad hoc committee of senators.[25] This committee, however, did little to protect fundamental rights.[26]

Yet, the lack of any judicial mechanism aimed at ensuring the constitutionality of laws did not prevent the gradual development of an effective rule of judicial independence in the last quarter of the nineteenth century,[27] a rare achievement in a region that for the most part lacked any form of rule of law at the time.[28] The establishment in Chile of even a rudimentary form of rule of law at this early stage resulted from the political fragmentation that gradually developed when the country consolidated a competitive political-party system around 1860.[29] Indeed, the materialization

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24. Although Chile gained independence from Spain in 1818, it was not until 1833 that it got a constitutional charter that would endure and thus shape the country's political system. *See* FAUNDEZ, *supra* note 23, at 17–18 (tracing the establishment of Chile's constitution of 1833 and observing that it gave the president "sweeping administrative and legislative powers, including a broad legislative veto, . . . [as well as] direct control over the judiciary"). The constitution of 1833 "mutated" throughout the nineteenth century and was then formally derogated by the constitution of 1925, which would last until the military coup of 1973. *See* HILBINK, *supra* note 23, at 46–48 (noting the effectiveness of the 1833 constitution until 1925); *id.* at 106–14 (summarizing Pinochet's undermining of constitutional provisions under the guise of a state emergency).

25. *See* WILLIAM W. PIERSON & FEDERICO G. GIL, GOVERNMENTS OF LATIN AMERICA 180 (1957) (citing Chile's *Comisión Conservadora* as an example of a "permanent committee," an institution common to many Latin American countries that was charged with guarding the laws and the constitution against the executive).

26. *See id.* (lamenting the ineffectiveness of permanent committees such as Chile's *Comisión Conservadora*).

27. *See* Javier A. Couso, *Judicial Independence in Latin America: The Lessons of History in the Search for an Always Elusive Ideal*, *in* INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES 203, 216 (Tom Ginsburg & Robert A. Kagan eds., 2005) (describing the increased independence of the judiciary toward the end of the nineteenth century).

28. Adelman & Centeno, *supra* note 10, at 146–47 (describing chaos and political instability throughout Latin America in the nineteenth century).

29. *See* TIMOTHY R. SCULLY, RETHINKING THE CENTER: PARTY POLITICS IN NINETEENTH- AND TWENTIETH-CENTURY CHILE 47 (1992) (describing the competitive relationship between government and opposition parties and the resultant alliance between liberals and conservatives necessary to accomplish specific political ends); J. SAMUEL VALENZUELA, DEMOCRATIZACIÓN VÍA REFORMA: LA EXPANSIÓN DEL SUFRAGIO EN CHILE [DEMOCRATIZATION BY REFORM: THE

of opposition parties with strong representation in congress eventually made the formal separation of the executive and legislative branches, contemplated in the constitution of 1833, a reality. Thus, in much the same way as happened in other places and eras, political fragmentation cleared the way for the emergence of a rudimentary, yet tangible, rule of law. This accomplishment was marked by the approval of the Law of the Organization of the Judiciary in 1875, which established a truly independent judiciary for the first time in the nation's history.[30]

To sum up this subpart, Chile's constitutional state in the nineteenth century can be characterized as rudimentary, although it slowly became more sophisticated. The strong point was the consolidation of a separation-of-powers system in which the three traditional branches could be clearly distinguished and had enough autonomy to operate without the intervention of the others. The weak aspect was that it was utterly insufficient to protect fundamental rights.

B. Constitutionalism Without Judicial Review: The Democratic and Constitutional Model of Mid-twentieth Century Chile

After the demise during the first quarter of the twentieth century of the progressively republican—but still oligarchic—regime that had characterized the previous century, Chile inaugurated, with the constitution of 1925, a reasonably democratic regime under a model of constitutionalism similar to that of most consolidated democracies at the time (with the exception of the United States, which had judicial review of its Constitution). It was one in which the political branches were largely in charge of controlling the supremacy of the constitution. In fact, the consolidation of the 1925 charter, following turmoil between 1927 and 1932, marked a basic consensus within the population and the political elites on the basic features of a constitutional state, which included an independent judiciary, separation of powers, and a basic set of civil and political rights. This consensus, however, did not include the notion that it was the role of the courts to be the guardian of the constitution.[31] To the contrary, it was widely believed that congress should be fundamentally involved in ensuring that bills being discussed were not

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EXPANSION OF SUFFRAGE IN CHILE] 81 (1985) (characterizing the conflict between the church and the state as fundamental to the development of Chilean politics and the rise of the conservative and radical parties).

30. *See* Couso, *supra* note 27, at 216 (explaining that the judiciary would have jurisdiction over most of the country's judicial disputes).

31. *See* FAUNDEZ, *supra* note 23, at 1 (observing that, between 1932 and 1973, Chile's stable political and legal institutions maintained an independent judiciary, imposed constraints on the state bureaucracy, and respected civil and political rights); HILBINK, *supra* note 23, at 60 ("[T]he jurisprudential record of [1924–1932] overwhelmingly reveals judicial passivity and submissiveness to the executive."). For a discussion of political ferment at this time, including judicial independence and workers' demands for rights, see *id.* at 55–58.

contrary to the constitution.[32] The task was performed by a special body within the legislative branch: the powerful Senate Committee on Constitution, Legislation, and Justice (*Comisión de Constitución, Legislación y Justicia*), which was the functional equivalent of a constitutional court, with abstract and a priori powers of review.[33] This committee took its work very seriously (as can be seen by reviewing the records of its work), and enjoyed a great deal of prestige.[34] The committee was comprised of the senate's most respected members, most of whom were prestigious jurists who had later become elected politicians.

The widespread legitimacy of this type of internal control of the constitutionality of bills being discussed by the legislature may explain the lack of interest demonstrated by the Supreme Court of Chile in exercising the somewhat limited power of judicial review of the constitutionality of legislation that the 1925 charter had given it, the so-called *recurso de inaplicabilidad por inconstitucionalidad.* This injunction-style writ was a judicial mechanism at the disposal of any individual who wanted to challenge the application of a particular piece of legislation considered to be in violation of the constitution.[35] The *recurso de inaplicabilidad* could be filed directly to the top of the judicial branch, the supreme court.[36] Given that it could only affect the particular case at hand, even a ruling accepting that a given piece of legislation was in fact unconstitutional left the challenged law intact.

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32. *Cf.* FAUNDEZ, *supra* note 23, at 145 (noting the judiciary's willingness to defer to the legislature and "its refusal to play its role as guardian of the constitution").

33. *See* ROLANDO ACUÑA RAMOS, LA CONSTITUCIÓN DE 1925 ANTE LA COMISIÓN DE CONSTITUCIÓN, LEGISLACIÓN, JUSTICIA Y REGLAMENTO DEL SENADO [THE CONSTITUTION OF 1925 BEFORE THE COMMISSION OF CONSTITUTION, LEGISLATION, JUSTICE AND REGULATION OF THE SENATE] 8–9 (1971) (discussing the committee's selection, composition, and power).

34. *See generally id.* (collecting and commenting on numerous reports produced by the committee).

35. HILBINK, *supra* note 23, at 57. *But see id.* at 60 (clarifying that the judiciary was passive and generally submissive to the executive). The intellectual roots of this rather moderate type of judicial review were French. *Cf.* John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 612 (2006) (characterizing French judicial review as "quite limited"). President Arturo Alessandri, the great political force behind the adoption of the constitution of 1925 and the *recurso de inaplicabilidad*, was heavily influenced by the constitutional thought of French scholars including Léon Duguit. *See* Joseph R. Thome, *Expropriation in Chile Under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489, 494 n.27 (1971) (explaining that Alessandri relied on the writings of Léon Duguit in support of his position on property rights). Duguit and fellow French scholar Laurence Lambert maintained opposite stances regarding American-style judicial review, which at the time was associated with the socially conservative *Lochner* Court. Lochner v. New York, 198 U.S. 45 (1905); *see* Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2757–59 (2003) (positing that the French movement championing judicial review, to which Duguit contributed, was halted by Lambert's book, which vilified judicial review and substantially weakened French political and doctrinal support of judicial review).

36. *See* HILBINK, *supra* note 23, at 57 (noting that the *recurso de inaplicabilidad* could be filed to the supreme court on appeal from a case before any lower court).

Even with its shortcomings, this mechanism of judicial review represented a relevant development in Chile's constitutional history because, for the first time, there was a judicial remedy against unconstitutional legislation. This explains why at the time of its introduction there was much expectation concerning its potential. Such hopes, however, were soon abandoned when the supreme court signaled that it was not very interested in this writ; indeed, instead of actively using this important new power of review of the constitutionality of law, the court consistently construed its power concerning this writ narrowly.[37]

As if unilaterally cutting down its own constitutional powers were not enough, the supreme court showed extreme deference to the political branches of government when dealing with *recurso de inaplicabilidad.* In fact, its reluctance to actually do much with what was, in any case, a mild form of judicial review meant that constitutional justice was all but absent until the late twentieth century. In fact, both conservative and progressive analysts have expressed disappointment over the way in which the supreme court dealt with the *inaplicabilidad* writ. For example, in his fine analysis of the supreme court's jurisprudence in cases of *inaplicabilidad* involving private property rights between 1925 and 1973, conservative scholar Jorge Brahm expressed his deep frustration toward the record of the court in such cases, arguing that the cases allowed property rights to be systematically curtailed by the legislative branch, leading to a situation he labeled as "property without freedom."[38] From a different side of the political spectrum, Julio Faundez has eloquently shown how the Chilean supreme court utterly failed to defend even the most fundamental civil and political rights, particularly in the case of legislation banning the civic and political participation of members of the Chilean Communist Party during the years of the Cold War.[39] In another work, I have argued that the reluctance of the supreme court to do much with this procedural tool was a strategic move to

37. The problems began rather early when the court decided to construe its constitutional powers in a way that reduced its power, declaring that it would only review legislation if its material content violated the constitution (*inconstitucionalidad de fondo*) and would refrain from analyzing whether a law had been adopted in violation of the procedures set out in the constitution (*inconstitucionalidad de forma*). *See id.* at 59–61 (noting that, following the adoption of the 1925 constitution, some supreme court judges suffered expulsion from the bench and even deportation at the hands of the executive, and thereafter displayed "passivity and submissiveness" by disclaiming their power to review certain constitutional questions).

38. ENRIQUE BRAHM GARCÍA, PROPIEDAD SIN LIBERTAD: CHILE 1925–1973 [PROPERTY WITHOUT FREEDOM: CHILE 1925–1973] 44, 84, 107, 123, 186, 225 (1999).

39. *See, e.g.*, FAUNDEZ, *supra* note 23, at 133 (stating that the supreme court's approval of the State Security Act of 1948, which disenfranchised members of the Communist Party, "made a travesty of the principle of constitutional supremacy as it transformed the constitution into little more than a voluntary code of conduct that the legislature was free to supplement, revise, or ignore").

avoid entering into conflict with the political branches, hoping to develop its regular judicial functions without government intervention.[40]

Beyond the reasons that the supreme court might have had to avoid exercising the *inaplicabilidad* writ, there was wide consensus in Chile's legal academy that the writ had been largely a failure toward the late twentieth century.[41]

As this subpart indicates, toward the mid-twentieth century, Chile progressed toward a meaningful constitutional state, but it still exhibited some deeply problematic features, particularly in the protection of the rights of minorities. Having said this, its judiciary was independent from its government, and even if it was reluctant to exercise its moderate powers of control over the constitutionality of legislation, it was nonetheless able to control the legality of administrative action. This control was an important achievement in a region where the government often poses serious threats to the fundamental rights of groups and individuals.

III. The Era of the Constitutional Court: 1970–Present

After a century and a half in which the country lacked effective mechanisms of judicial control over constitutional supremacy, in 1970, Chile introduced a Constitutional Court. This institution, an autonomous body lying outside the regular judiciary—though integrated in part by active members of the supreme court—maintained its name throughout the eventful years that followed its creation. It was so deeply affected by the changes experienced by the political regime—from democracy (1970–1973)[42] to the authoritarianism of General Pinochet (1973–1990)[43] to the transition back to democracy (1990–2005)[44]—that it is more appropriate to say that Chile has had three different constitutional courts. Indeed, as we shall see below, over

40. *See* Couso, *supra* note 27, at 217 (noting the "strong corporate identity" that the supreme court developed between 1932 and 1973, and asserting that the court's nonconstitutional work "was adjudicated with professionalism and independence").

41. *See generally* Gastón Gómez Bernales, *La jurisdicción constitucional: Funcionamiento de la acción o recurso de inaplicabilidad, crónica de un fracaso* [*Constitutional Jurisdiction: The Performance of the* Inaplicabilidad *Writ, Chronicle of a Failure*], FORO CONSTITUCIONAL IBEROAMERICANO [LATIN AM. CONST. F.], July–Sept. 2003, *available at* http://www.idpc.es/archivo/1212653789a3GGB.pdf (demonstrating the failure of the *inaplicabilidad* writ with statistics and case studies).

42. *See* HILBINK, *supra* note 23, at 1 (describing General Pinochet's 1973 overthrow of Chile's democratic regime).

43. *Id.* at 1, 177 (describing Pinochet's regime as authoritarian before transferring power to an elected candidate in 1990).

44. *See* Claudia Heiss & Patricio Navia, *You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*, 49 LATIN AM. POL. & SOC'Y, Fall 2007, at 163, 172 (recounting that lingering undemocratic provisions in the constitution were removed in 2005); Alexandra Huneeus, *Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn*, 35 LAW & SOC. INQUIRY 99, 100 (2010) (characterizing the post-1990 period as a "transition to democracy").

the last forty years, this body experienced radical changes in its nature, conception of its role, and impact on Chile's political process.

The "first" Constitutional Court (1970–1973) was modeled after de Gaulle's Constitutional Council, and it conceived of itself as mediator between the executive and legislative branches. The "second" Constitutional Court (1981–2005) was originally introduced by the military dictator as an insurance mechanism aimed at protecting the constitutional design introduced by the authoritarian regime against the perceived danger posed by what was seen as the inevitable return to democratic rule.[45] Finally, the "third" Constitutional Court (2005–present) has been a more conventional constitutional court in that it actively promotes and defends the fundamental rights of individuals and groups. In the following subparts, I analyze the three different eras of Chile's Constitutional Court.

A. The First Constitutional Court: 1970–1973

The origins of the first Constitutional Court can be traced to the early 1960s, when conservative President Jorge Alessandri (1958–1964) called for a constitutional amendment to introduce a specialized body in charge of arbitrating "jurisdictional" conflicts between the legislative and executive branches.[46] Alessandri was deeply frustrated by what he perceived as the unconstitutional intrusion by congress (which he did not control) into the regulatory powers of the president. In this context—and inspired by France's Constitutional Council of 1958[47]—he proposed the creation of a special court empowered to declare bills adopted by the legislature, but not yet promulgated by the executive, contrary to the constitution. Even though Alessandri ultimately failed in getting this amendment approved,[48] his successor, centrist President Eduardo Frei Montalva (1964–1970), experienced the same problems and continued to press for the creation of a constitutional court very similar to that proposed by Alessandri.[49] Frei eventually succeeded and, in

45. *Cf.* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 18 (2003) (explaining that constitutional drafters "may seek to entrench judicial review as a form of political insurance" if they expect to lose power after the constitution is in place).

46. *See* Verónica Montecinos, *Economic Policy Making and Parliamentary Accountability in Chile* 16 (U.N. Research Inst. for Soc. Dev. Programme on Democracy, Governance, & Human Rights, Paper No. 11, 2003) (mentioning Alessandri's proposal to reform the constitution in such a way as to temper the legislature's intrusion upon presidential budgetary powers).

47. *Cf.* ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 8 (1992) (indicating that France's 1958 constitution created the Constitutional Council to rule on the constitutionality of bills that the legislature has adopted but that the executive has not yet promulgated).

48. Montecinos, *supra* note 46, at 16.

49. This is confirmed by the president of Chile's first Constitutional Court, Enrique Silva Cimma. Interview with Enrique Silva Cimma, in Santiago, Chile (Sept. 11, 2009).

the last months of his term in office, received congressional approval to create the Constitutional Court.[50]

As can be seen from its origin, the model of constitutionalism behind the introduction of this new body was not different from the one that had prevailed in the previous half-century in Chile—that is, one based in the supremacy of legislation and the strict separation of powers. Given this context, all that the new Constitutional Court was expected to do was to serve as an arbiter in cases of jurisdictional conflicts between the two elected branches, a role that was thought to benefit the executive branch. Since the court was not considered a guarantor of the fundamental rights of the people, the constitutional paradigm that had characterized Chile during most of the twentieth century was hardly touched by the introduction of this special organ.

As a result, the first Constitutional Court was not predisposed, and did not consider its duty to be, to enforce the fundamental rights enshrined in the constitution. The intellectual environment that produced this court involved a model of constitutionalism lacking any sort of rights consciousness. Of course, the political parlance of the time included plenty of social-justice talk, but the very notion of human rights was lacking in most of the political spectrum.[51]

As for the actual performance of this first Constitutional Court, the least that can be said is that it was rather poor. Indeed, amidst the worst constitutional crisis the country had experienced in a half-century, the Constitutional Court was not even able to fulfill its role of arbiter between the executive and legislative branches, which was precisely the function for which it had been created. It is true that the crisis was already unfolding with full force when the court started to operate, thus giving it few chances to get enough legitimacy to act with authority. Confronted with a rather dismal record, the court's first president, Enrique Silva Cimma, attributes the court's failure to arbitrate effectively between the political branches to the opposition's perception that the Constitutional Court was the ally of socialist President Salvador Allende (1970–1973); the opposition considered three of the court's five members to be close to Allende's coalition.[52] Whether or not this was the case, the Constitutional Court could have done something to mediate in a conflict that ultimately led to a military coup, an extremely unusual event in Chile's political trajectory.[53]

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50. *See* ENRIQUE SILVA CIMMA, EL TRIBUNAL CONSTITUCIONAL DE CHILE (1971–1973) [THE CONSTITUTIONAL COURT OF CHILE (1971–1973)], 34–35 (1977) (noting that the law establishing the court was promulgated on January 21, 1970, and published two days later).

51. *See* HILBINK, *supra* note 23, at 73–74 (stating that prior to the coup in 1973, "judges generally deferred to the executive in the area of civil and political rights," and identifying the role of the courts as "quite illiberal and undemocratic").

52. Interview with Enrique Silva Cimma, *supra* note 49.

53. Whatever the reason, Chile's first Constitutional Court was conspicuously absent from the story of the constitutional crisis and breakdown of democracy. *See* Edith Z. Friedler, *Judicial*

To sum up, the idea at the inception of Chile's first Constitutional Court was to enhance the powers of the executive branch against the legislative branch by providing a neutral arbiter. As a result, the court could ensure that the legislature respected the regulatory powers of the president.[54] Thus, the model of constitutionalism underlying Chile's first Constitutional Court was aligned with the traditional model of democracy that the country enjoyed over most of the twentieth century. It was one centered on the supremacy of legislated law and one that regarded the constitution as a document setting the basic rules of the political game rather than as a charter of rights that could be directly applied by the courts. The model of constitutionalism inherent in this first court was also in line with the legal philosophy predominant at the time in Chile, that is, the strong legal positivism advocated by Hans Kelsen and Andrés Bello earlier in the nineteenth century.[55] In this approach, there were no high principles to be adjudicated by the courts—just plain, simple constitutional rules about who gets to decide what according to a textual reading of the constitution.

B. The Second Constitutional Court: 1981–2005

1. The Intellectual Origins and Initial Stage of the Second Constitutional Court.—To talk about the model of constitutionalism adopted by the military regime that took over power in Chile in 1973 and then imposed a new constitution in 1980 would strike jurists as oxymoronic. A dictatorial regime characterized by gross human rights violations and complete control of political power could not possibly have any model of constitutionalism; to the contrary, it should be regarded as the antithesis of even the most basic form of constitutionalism. Therefore, a constitutional court introduced by such a regime could only be a facade. For political scientists, however, it still makes sense to study the kind of weak rule of law and incipient constitutionalism set by Chile's military regime under the constitution of 1980 and the reintroduction of the Constitutional Court in 1981. In fact, that is precisely the point made by Robert Barros, who, after a detailed analysis of the workings of Chile's military regime, demonstrated that the constitution of 1980 introduced a meaningful separation of powers between the military junta, which was in charge of elaborating legislation,

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Review in Chile, 7 SW. J.L. & TRADE AM. 321, 330–31 (2000) (describing the Constitutional Court's designed role to exercise judicial review and its failure to effectively intervene in constitutional disputes until being dissolved in 1973).

54. Silva Cimma endorses this interpretation of the goal of the court, adding that President Eduardo Frei was convinced that his political group (the Christian Democratic Party) would prevail in the next presidential election, so Frei saw the Constitutional Court as a body that would make it easier for the next administration to govern rather than as a brake on presidential powers. Interview with Enrique Silva Cimma, *supra* note 49.

55. Bello was an assistant to Jeremy Bentham before moving to Chile, where he served as a senator and played a key part in drafting Chile's civil code. IVÁN JAKSIĆ A., ANDRÉS BELLO: LA PASIÓN POR EL ORDEN [ANDRÉS BELLO: THE PASSION FOR ORDER] 190–203 (2001).

and the head of the executive branch, General Pinochet.[56] Barros's argument helps to explain why Pinochet was forced to accept the 1985 Constitutional Court's decision declaring unconstitutional a bill proposed by him that would have ensured a fraudulent plebiscite in 1988 and thus guaranteed him eight more years as president.[57] Indeed, in a stunning and unexpected decision, the court ruled that the referendum had to be governed by Chile's traditional voting standards—with a National Electoral Register, an Electoral Tribunal, and representatives of all political parties at the polling places—to ensure a fair electoral process.[58] Needless to say, without this decision by the Constitutional Court, the defeat of Pinochet in the 1988 plebiscite would have been impossible.

But let us take a step back and see the origins of the constitution of 1980 and the second Constitutional Court. As is well known, on September 11, 1973, Chile's constitutional democracy was overthrown when a military coup ended Allende's *Unidad Popular* government.[59] Less than two weeks later, the new rulers set up a special commission of pro-coup jurists charged with drafting a new constitution.[60] The commission worked for the next five years at a rather slow pace, but eventually framed a very detailed document that drew from the constitutions of Western European nations, in particular those of Spain, Germany, and France.[61]

The model of constitutionalism held by Jaime Guzmán, the most influential drafter on the commission, was heavily conditioned by a conception of democracy as an inevitable, but rather dangerous, regime—one that any modern society should have but that was susceptible to manipulation by demagogues to the detriment of private property rights. Guzmán called his conception of democracy "protected democracy"[62] (*democracia*

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56. *Compare* ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION 274–88 (2002) (describing the formal separation of powers between the Junta and the executive under the 1980 constitution and citing several examples of the Junta opposing and defeating initiatives proposed by the executive), *with id.* at 49–51 (describing the governmental structure before the 1980 constitution, when the Junta exercised plenary executive and legislative powers).

57. *See id.* at 293–302 (recounting the Constitutional Court's ruling and the Junta's decision to abide by the court's ruling).

58. Tribunal Constitucional [T.C.] [Constitutional Court], 24 septiembre 1985, "Proyecto de Ley Organica Constitucional sobre el Tribunal Calificador de Elecciones" [The Constitutional Laws Regarding the Qualification of the Electoral Tribunal], Rol de la causa: 33, sentencia, GACETA DE LOS TRIBUNALES [G.T.] vol. 3, pp. 153, 159–61.

59. BARROS, *supra* note 56, at 36, 123.

60. *Id.* at 47 & n.24.

61. *See id.* at 223–24 (explaining the impact of the French and German constitutions on the new Chilean constitution); Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, *in* COURTS IN LATIN AMERICA 99, 107 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (noting that Spain, Germany, and France "have historically served as the models for Chile's constitutional law scholarship").

62. Carlos Huneeus, *Technocrats and Politicians in an Authoritarian Regime: The 'ODEPLAN Boys' and the 'Gremialists' in Pinochet's Chile*, 32 J. LATIN AM. STUD. 461, 462 (2000).

protegida) and thought that the only model of constitutionalism consistent with it would prevent contingent majorities from changing the fundamental aspects of the political regime designed during the authoritarian period (a moment of technical rationality in Guzmán's view).[63] Although this conception of democracy and constitutionalism has some Madisonian resonances, it came from a very different intellectual tradition, one that blended Spanish nineteenth-century traditionalism, which was highly skeptical of liberal democracy, with Catholic Thomist thought.[64]

A crucial aspect of the model that Guzmán had in mind was that the institutional architecture built by the military regime would persevere once democracy returned. Because he had seen how easily the political system of Spanish head of state Francisco Franco had been dismantled after Franco's death in 1975, Guzmán wanted to make sure that the same would not happen in Chile.[65] The best hope, he thought, was to introduce a powerful and constitutionally autonomous body (whose members could not be impeached) with the ability to strike down bills in violation of the constitution. Of course, the Constitutional Court was just one of an array of institutions designed to prevent the dismantling of the system under democratic rule. Other measures developed for these purposes included the designation of nonelected senators by a number of public institutions (including a National Security Council originally integrated by the commanders in chief of the armed forces), the introduction of a special type of legislation that could be reformed only by a supermajority of four-sevenths of the members of congress, and the creation of an electoral system geared to promote a tie in both houses of congress.[66]

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63. *See* RENATO CRISTI, EL PENSAMIENTO POLÍTICO DE JAIME GUZMÁN: AUTORIDAD Y LIBERTAD [THE POLITICAL THINKING OF JAIME GUZMÁN: AUTHORITY AND LIBERTY] 94 (2000) (identifying protection as one of the goals of Chile's governmental transformation, as noted in the regime's founding documents).

64. *See* Belen Moncada, Book Review, 28 REVISTA CHILENA DE DERECHO [CHILEAN J. RIGHTS] 201, 201–02 (2001) (reviewing CRISTI, *supra* note 63) (recognizing the influence of Thomist thought in Guzmán's intellectual development and his skepticism of deliberative democracy); *cf.* CRISTI, *supra* note 63, at 63, 162 n.2 (distinguishing between Guzmán's conception of private property, which is aligned with that of Hobbes and Locke, and Thomist philosophy, but recognizing the metaphysical value of Thomism to Guzmán and his adherence to traditionalism).

65. CARLOS HUNEEUS, THE PINOCHET REGIME 230 (Lake Sagaris trans., 2007).

66. *See* Javier Couso & Alberto Coddou, *Las asignaturas pendientes de la reforma constitucional chilena* [*The Pending Subjects of the Chilean Constitutional Reform*], *in* EN NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE [IN THE NAME OF THE PEOPLE: DEBATE ABOUT CONSTITUTIONAL CHANGE IN CHILE] 191, 198 (Claudio Fuentes ed., 2010) (describing the "Organic Laws," which require a supermajority to be enacted, modified, or abrogated); Alejandro Foxley T. & Claudo Sapelli, *Chile's Political Economy in the 1990s: Some Governance Issues*, *in* CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES 393, 418 (Guillermo Perry & Danny M. Leipziger eds., 1999) (observing the legislative indecisiveness that resulted from the 1980 constitution due to electoral systems and the imposition of divided government); Claudio Fuentes, *Élites, opinión pública y cambio constitucional* [*Elites, Public Opinion and Constitutional Change*], *in* EN NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO

Given the model of constitutionalism that the second Constitutional Court was to serve, it was expected that the court would actively strike down bills violating either the structure of government left behind by the authoritarian regime or the fundamental rights—especially private property—of individuals. In other words, the second Constitutional Court was expected to be the watchdog of the authoritarian constitutional design when the inevitable return to democracy happened.

In terms of the legal philosophy consistent with the model of constitutionalism introduced by the protected-democratic model, Guzmán seemed to expect a sort of constitutional positivism, i.e., an approach to constitutional adjudication that regarded the document's text and history as the only source of interpretation. In other words, Guzmán and the other framers of the constitution of 1980 did not expect a change in the legal culture of those who would be at the Constitutional Court during the democratic era. The mechanical application of the letter of the constitution was expected to be enough to discipline the interpreters.

2. The Second Constitutional Court in the Era of Democratic Recovery.—The second Constitutional Court's role during the first fifteen years of the transition to democracy turned out to be quite different from what the former regime leaders had anticipated. Indeed, to the surprise of those who expected the Constitutional Court to be an activist one—striking down every piece of legislation that touched the legal architecture left by the authoritarian regime—the court showed a great degree of deference to the legislature.[67] This unexpected result can be explained as follows: although General Pinochet and the Junta tried to ensure that the Constitutional Court was composed of people loyal to the regime, that three of its seven members were also justices of the more politically neutral supreme court meant that the Constitutional Court was not completely filled with judges loyal to the authoritarian regime.[68]

Aside from the moderating effect exercised by these members of the supreme court—who were deferential not merely due to their relative political neutrality but, more fundamentally, due to a deeply entrenched formalistic legal culture that was hostile to judicial interference with legislated law—the reason for the passivity exhibited by the second Constitutional

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CONSTITUCIONAL EN CHILE, *supra*, at 45, 52 (discussing the provision for designation of nonelected senators).

67. *See* HILBINK, *supra* note 23, at 207 ("Judges demonstrated little proclivity to enforce—much less develop—constitutional limits on the exercise of public power."); Couso, *supra* note 27, at 217–18 (describing the judiciary's loss of autonomy and dependency on the executive during the Junta); Huneeus, *supra* note 44, at 100–01 (noting that the judiciary has been reluctant to review legislation and to limit governmental power).

68. *See* Lisa Hilbink, *The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment*, 62 POL. RES. Q. 781, 790 (2009) (highlighting that integration of supreme court justices into the Constitutional Court was intended to depoliticize constitutional adjudication).

Court in the first decade and a half of Chile's democratic transition (1990–2005) was that its intervention was made unnecessary by the existence of a significant number of senators appointed by the military regime before leaving power. This effectively gave the political heirs of the regime control over the senate, which forced the new democratic government coalition (*La Concertación de Partidos por la Democracia*) to negotiate every piece of legislation it wanted to pass with the opposition. Of course, we have no way of knowing what would have happened with the second court during those years of transition if the coalition had been in control of both houses of congress.

A further explanation for the relative passivity of the Constitutional Court during this period is that the leaders of the *Concertación* coalition respected the rules set by the constitution in terms of the limits of administrative action and the domain of legislation, making the intervention of the Constitutional Court to police these matters unnecessary.

C. The Third Constitutional Court: 2005–Present

In 2005, after fifteen years of demands by democratic administrations, the political heirs of the authoritarian regime finally introduced a set of long-overdue amendments to the constitution of 1980.[69] In particular, the political parties that had supported Pinochet's regime agreed to end the institution of unelected senators[70] and to eliminate the constitutional rule that prevented the president from asking for the resignation of the commanders in chief of the armed forces and the *Carabineros* of Chile's national police force.[71] While the political elite and public opinion were focused on the aforementioned reforms, a small group of constitutional scholars designated by the political parties was busy at work expanding the powers of the Constitutional Court in a dramatic way, by supplementing its already important powers with concrete and a posteriori control of the constitutionality of legislation. In addition to increasing the court's formal powers, the reforms eliminated the justices of the supreme court from the Constitutional Court's membership.[72] Both the expansion of the Constitutional Court's powers and the exclusion of supreme court judges went mostly unnoticed by the very members of congress who

69. *See* Claudio A. Fuentes, *A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990–2000*, 89 TEXAS L. REV. 1741, 1756–57 (2011) (describing numerous changes in the 2005 reform that curtailed the power of the military and the executive).

70. For a discussion of the end of the system of appointed senators and political motivations related to this reform, see Fredrik Uggla, *"For a Few Senators More"? Negotiating Constitutional Changes During Chile's Transition to Democracy*, LATIN AM. POL. & SOC'Y, Summer 2005, at 51, 66–67. This institution had become very hard to defend in a country that had made enormous progress in its democratic transition. Besides, given that some of the unelected senators were actually appointed by the executive branch—which had been in the hands of the opponents of the military regime for fifteen years—the institution was rather neutral in its political impact.

71. Fuentes, *supra* note 69, at 1756.

72. Couso & Hilbink, *supra* note 61, at 110.

would later ratify an increase in the Constitutional Court's powers that evidently meant a decrease in their own powers.

Underlying the drafters' consensus over the expansion of the powers of the Constitutional Court, a crucial aspect of this process was the growing influence of a model of constitutionalism that is often referred to in Spain and Latin America as "neoconstitutionalism."[73] This concept of the constitutional state regards strong and activist adjudication of constitutional rules and principles, found in domestic constitutions as well as in international human rights law, as the *sine qua non* of constitutionalism. Furthermore, this model of constitutionalism advocates the direct application by the courts of an ever-expanding set of constitutional rights—not only civil and political, but also social, cultural, and economic.

As has been pointed out elsewhere,[74] the combined effect of the new review powers granted to the Constitutional Court by the 2005 amendment, the removal of the supreme court justices from its membership, and the increased influence of the neoconstitutionalist ideology among its justices resulted in an unprecedented willingness by the Constitutional Court to actively strike down legislation deemed contrary to the constitution. These changes also increased the court's willingness to identify fundamental rights implicit in the text of the constitutional charter or in international human rights law.[75] Furthermore, in recent years, the Constitutional Court has started to cite nondomestic sources in its jurisprudence, including international treaties and judicial decisions by international and foreign courts.[76]

As a result of the dynamic just mentioned and some of the court's rulings, the court has started to be at the center of public controversy. Whereas it was largely unknown to the bulk of the population only a few years ago, this controversy has increased awareness of the court to the point of it becoming a household name. This explains its increasing relevance in the policy-making process for matters as varied as heath care, tax policy, and gay rights. Thus, in just a handful of years, the Constitutional Court has transformed itself from a rather insignificant institution into a central player in Chile's political system. This represents a significant mutation from both the model of constitutionalism prevalent before the military coup of 1973 and the model of protected democracy advocated by Jaime Guzmán and other

73. *See id.* at 100–01 & n.3 (defining "neoconstitutionalism" and describing its effect on judicial institutions in Chile).

74. *See, e.g., id.* at 117 ("Th[e] impressive shift from deference to activism in the constitutional court can be traced back to . . . the constitutional reform of 2005, which . . . effected a major change in the membership of the court as well as in its jurisdiction and caseload. . . . The new imprint of the constitutional court can be appreciated in its . . . disposition to engage in value-laden and rights-based interpretation of constitutional law . . . and its willingness to rule against the government's preferred policies . . . .").

75. *Id.*

76. *Id.* at 118–20 & n.39.

jurists involved in the constitution-drafting process promoted by General Pinochet's dictatorship.

IV. Conclusion

In this Article, I have argued that the different models of democracy present in Latin America—liberal democracy, direct democracy, radical democracy, multiethnic democracy, and deliberative democracy, among others—are affiliated with different models of constitutionalism. Furthermore, each model of constitutionalism promotes distinct institutional arrangements. Therefore, there are some institutions that are simply incompatible with some forms of democratic governance.

I have also argued that, although from an external point of view one can identify different forms of constitutionalism, from a normative perspective only some of the paradigms of constitutionalism competing for acceptance by Latin Americans deserve to be called "constitutionalism." Thus, a system that accepts the total control of the judiciary by the executive branch, as happens in some of the radical-democratic processes underway in the region, is not "constitutional." Of course, this does not mean that all radical-democratic governments are necessarily opposed to ideals such as separation of powers, judicial independence, and personal freedoms of association and expression. But if historians are right when they assert that the weight of the past looms large in Latin America, there should be a great deal of skepticism regarding charismatic leaders that promise to end all troubles if given full political power—and lengthy periods in government—to do so.

The experience of Chile's recent constitutional history and, in particular, that of its Constitutional Court shows how, even in a country generally regarded as a model of orderly democratic transition and great economic expansion, there has been a great deal of disagreement among its elites and population about what counts as democracy or constitutionalism and about what should be the right balance between democratic self-government and the judicial protection of fundamental rights. Indeed, the tumultuous trajectory of Chile's Constitutional Court throughout the periods of democratization, dictatorship, and democratic transition suggests that institutions such as these necessarily absorb ideologies and practices that profoundly impact their behavior from surrounding political, ideological, and juridical environments.

The experience of Chile's Constitutional Court over the last forty years also shows the crucial role that political and legal ideologies play in constitutional drafting, mutation, and interpretation—tasks that are, of course, always combined with strategic behavior. Indeed, aside from the strictly political factors, ideas about democracy and constitutionalism were always in the background of the remarkable changes experienced by this institution in its nature, role, and impact on the country's political process.

Grafting Social Rights onto Hostile Constitutions

Roberto Gargarella*

Introduction: The New Law Over the Old

An old metaphor used to understand legal reforms describes current law as a large and tranquil lake, and legal reforms as leaves that fall onto that lake. These reforms, like leaves, rest atop the existing law (the peaceful lake) and seem, at first, to be alien to it. For a long time, the new law and the old seem like distinct bodies and each maintains its own identity. Similarly, the leaves float on the lake, unharmed, as though they have not realized their contact with the lake. However, time passes and, little by little, the makeup of the new law changes—the leaves give in—and the interior architecture of the reform begins to lose strength. Little by little, reforms that seemed like foreign bodies to the old law begin to modify their texture to resemble that of the law on which they rest. Time passes and the reforms, like damp leaves, no longer appear to be distinct bodies. Now, the old law and the new, just like the lake and the fallen leaves, create one body.

However, are these images really appropriate for thinking about the links that are created, slowly, between old and new laws? A cursory look at this metaphor suggests a somewhat quick and nonconfrontational adaptation between the established body and the newly arrived one. The metaphor suggests that it is just a matter of time until the process ends happily, with the smooth integration of one part with the other, after both have given in and abandoned their initial resistance. However enticing this view of the way links form between current and new laws may be, a critical look at the process suggests different results.

In effect, it is important to note that the metaphorical image suggests a relationship in which the old law, as a dominant body, establishes a clear role of predominance over the body that arrives. This does not imply that reforms do not, like the fallen leaves, have some impact on the current law. Nor does it refute the more interesting observation that the mass of reforms can generate significant change in the long run, much like a multitude of leaves can have a significant impact on the lake upon which they fall. Nonetheless, nothing that has been said should prevent us from highlighting the unequal character of the link established between the dominant body and the one resting on it. It is the latter that suffers the greater impact—radically greater—and quickly adopts the former's structure. It is this special weight of the greater body, older and more vigorous, that I wish to emphasize. In

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other words, the metaphor does not refer to a relationship between equals, but to the collision of two unequal forces where the weaker of the two will suffer the main impact.

In the following pages, I will focus on this process of unequal legal integration where, in principle, all indications suggest that existing legal practices tend to impose their force on new ones. To do this, I will consider perhaps the most important example, in terms of mixture of different legal traditions, that is offered by the Latin American region: the incorporation of social rights into the framework of constitutions that were hostile to the social demands creating those rights.

I. The Entrance of the Social Question in Latin America

The majority of Latin American constitutions, I will assume here, arose from a liberal–conservative pact, consolidated in the mid-nineteenth century—a pact that would exclude, remarkably, the most radical political sectors, which advocated for a more social constitutionalism.[1] At the beginning of the twentieth century, the serious political, economic, and social crises of the early years found immediate translation into the constitutional order.[2] The way in which constitutionalism attempted to dissipate these crises was by incorporating the social questions that had been marginalized in the previous century into the old constitutions.[3] The beginning of this reformist wave was distinctly characterized by the approval of the Mexican constitution in 1917,[4] which was followed by the constitutions of Brazil in 1937,[5] Bolivia in 1938,[6] Cuba in 1940,[7] Ecuador in 1945,[8] and Argentina[9] and Costa Rica in 1949.[10]

Thus, what was put in motion was an attempt, perhaps slightly cautious, to graft institutions associated with the radical constitutional model onto a

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1. *See* ROBERTO GARGARELLA, THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860, at 16–19 (2010) (chronicling waves of radical liberalism in nineteenth-century Latin America that ended in a compromise between upper-class liberals and conservatives).

2. *See* TULIO HALPERIN DONGHI, THE CONTEMPORARY HISTORY OF LATIN AMERICA 158–246 (John Charles Chasteen ed. & trans., Duke Univ. Press 1993) (1966) (elaborating on the political, economic, and social changes throughout Latin America in the early twentieth century).

3. *See* GARGARELLA, *supra* note 1, at 246 (noting that a number of Latin American countries incorporated new social rights into their constitutions in the early twentieth century).

4. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.); *see also* GARGARELLA, *supra* note 1, at 246 (marking the Mexican constitution of 1917 as the starting point of constitutional reform in Latin America).

5. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTIUTION] 1937.

6. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.] 1938.

7. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CUBA CONST.] 1940.

8. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] 1945.

9. CONSTITUCIÓN NACIONAL [CONST. NAC.] 1949.

10. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [COSTA RICA CONST.] 1949.

body of opposite character, a product of the original liberal–conservative pact. The result of that operation was, as could have been anticipated, extremely problematic. Social rights ended up being transformed into "programmatic rights";[11] in other words, social rights were considered objects to be pursued by the political branches, and not as individual or collective rights that were necessarily judicial.[12]

We find that, at least for many decades, the social rights incorporated into Latin American constitutions since the beginning of the twentieth century were not implemented by political branches of government because they did not find support—and, in fact, seemed to face rejection—from the judicial powers.[13]

This is, without a doubt, an extraordinary constitutional phenomenon that warrants an explanation. How can it be that so many constitutional articles remained dormant for so many years? From what we understand, it had much to do with the ways in which the "constitutional graft" happened. In what follows, I will try to reflect on the problems created through "grafting," such as that which took place when social rights were incorporated into Latin American constitutions.

II. Three Questions for Constitutional Theory

The operation of constitutional grafting—in this case, the attempt to incorporate a radical social profile into a liberal–conservative model—creates significant questions for constitutional theory. In the face of these complexities, I will explore three of the many questions that are possible. The first relates to the impact that such grafts have on the constitutional structure; the second to the ways in which to execute "translations" amongst different constitutional models (and "languages"); and the third to the phenomenon of "dormant clauses," which remain judicially inactive for decades.

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11. "Programmatic rights" are rights that are "aspirational" in nature and are not directly operative through the courts. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527–28 (1992).

12. *See* Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 13, 26 (Roberto Gargarella et al. eds., 2006) ("In Latin America, judicial abstinence in relation to social rights has been justified by the argument that references to social rights in the constitution are directed at the political branches . . . ."); *see also* R. Shep Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. (SYMPOSIUM ISSUE) 325, 327 (1996) (stating that programmatic rights are enforced through the creation of public programs rather than through private action). *But see, e.g.*, *id.* ("[Programmatic rights] are the product of both congressional enactment and extensive judicial interpretation . . . .").

13. *See* Christian Courtis, *Judicial Enforcement of Social Rights: Perspectives from Latin America*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 169, 179 (discussing the traditional lack of judicial responsiveness regarding certain social rights).

A. On the Possibilities of a Successful Constitutional Graft: Internal Impact and Crossed Impact

The first question that I will deal with leads us to look at the impact of constitutional reforms within the internal dynamic and organization of the reformed constitution.

There are at least two types of influences that it makes sense to distinguish and examine, given that all constitutions contain two parts: a dogmatic part that includes a declaration of rights, and an organic part that divides and organizes power. On the one hand, it is logical to focus attention on the way the reform inserted in a certain section of the constitution (for example, the section organizing power) impacts the internal structure of that same section. This is the "internal impact." On the other hand, it also makes sense to explore the way in which the reform inserted in a certain section of the constitution (for example, a reform in the area of rights, or a reform in the area of the organization of power) impacts the other section. This is the "crossed impact." In what follows I will be exclusively concerned with the impact that reforms in the rights sections tend to have over the section dedicated to the organization of power.

The impact of reforms to the organization of power can vary based on many factors, including the degree to which the reform in question is comprehensive, whether the reform operates on a more consolidated or less consolidated structure, and whether the reform can transcend the text of the constitution. Of the multiple possible forms, here I will address one of the most typical forms taken by Latin American reforms with crossed impact. As anticipated, it relates to reforms carried out in the area of rights—through the introduction of social rights—and the impact of these on the organic section of the constitution.

One way to begin thinking about the possible impact of these constitutional reforms is through a series of persistent reflections that were carried out about the subject, now years ago, by Argentinian jurist Carlos Santiago Nino.[14] Nino was interested in calling attention to the paradoxical reality that followed the then-habitual modifications of Latin American constitutions—modifications that were destined to expand the list of existing rights in order to annex new social rights. The Argentinian jurist detected a problem in these reforms, which were unquestionably made by groups that were more advanced or progressive and more favorable to social change. The problem had to do specifically with the crossed impact of these changes—in this case, the impact of the introduction of these new social rights on the organization of power.[15] For Nino, it was clear that, upon the

14. Interviews with Carlos Santiago Nino, Dir., Ctr. for Int'l Studies, in Buenos Aires, Arg. (1985–1993). The comments throughout this section are based primarily on these interviews.

15. *See* CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 12 (1996) ("In studying both existing constitutions and the ideal constitution, it becomes apparent that there is a possibility that substantive claims which are a priori valid may conflict with the results of

incorporation of new social rights, progressive forces would fall into a paradoxical position. Contrary to what these forces hoped, by acting in this way they transferred additional powers to the judicial branch[16]—the branch furthest from electoral or popular control and, in Jeffersonian terms, the least republican of the branches.[17]

In the face of this paradox, Nino questioned the rationality and appropriateness of introducing new social rights aimed at strengthening the power of the people and the capacity for action and decision by society's most marginalized groups. Was this the hoped-for result of similar constitutional reforms? Or was it that they, in reality, threatened to undermine even further the power of disadvantaged groups? It can be said that the doubts raised by Nino revealed, above all, the lack of reflection by many constitutional activists motivated to defend the rights and interests of those who are worse off.

Of course, Nino may or may not have been right in calling into question the ultimate progressive character of the expansion of social rights. Perhaps, in certain contexts (e.g., in the face of a radically corrupt legislative branch), it could make sense to strengthen the judiciary in this way. Most importantly, it could make sense to include such rights at a constitutional level, given what that can symbolize as a gesture oriented at the empowerment of the most forgotten or downtrodden groups (independent of what this recognition might mean in terms of the distribution of constitutional power). However, of interest now is what reflection about the case does to encourage us to think about the analysis of constitutional reforms. Through his inquiries, Nino helped us see that the traditional reforms carried out in the dogmatic section do much more than expand the existing list of rights. Whether intended or not, this type of reform is not neutral on the subject of the organization of power. As such, and in order to evaluate its impact, we need to look beyond the boundaries of the demarcated section on rights, asking ourselves about the impact of the reform on the distribution of power among the different branches of government.

In the case examined here—that of social rights—the idea would be that today, given the mode in which we think about rights and act in relation to them, making the rights section any more robust would imply a transfer of

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legitimate procedures. In other words, rights recognized as belonging to the liberal dimension of constitutionalism may conflict with the results of democratic procedures that constitute the participatory dimension of constitutionalism.").

16. As Jeremy Waldron maintained in a recent work about social rights, the introduction of these social commitments in the form of rights is a quite obvious extension "to tilt matters decisively towards judicial rather than legislative or executive processes." Jeremy Waldron, *Socioeconomic Rights and Theories of Justice* 28 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-79, 2010). Normally, "administration or enforcement" of rights is delegated to the judicial branch. *Id.*

17. Letter from Thomas Jefferson to John Taylor (May 28, 1816), *in* THOMAS JEFFERSON: POLITICAL WRITINGS, 206, 208 (Joyce Appleby & Terence Ball eds., 1999) (comparing the republican features of the government, and calling the judiciary "seriously anti-republican").

power to the judicial branch.[18] This would not require the judicial power to take active measures in the implementation of these rights or to flex its muscles before the political branches of government. The inactivity of a majority of judges in this respect does not deny the existence of their potential to put such rights in practice, something that in fact has occurred.[19] Judges may enforce rights unexpectedly in the face of any demand.

As a result of this type of analysis, it is possible that a certain constitutional reform may not be desirable given the redistribution of power it will generate within the constitutional structure, or given that it could be carried out in another way considering the foreseeable internal tensions a new institution will cause.

Having said this, let us think about the internal impact of reforms—that is, the way in which a reform to one section impacts the internal structure of that same constitutional section. As an example, think of the introduction of a constitutional court or magistracy council within constitutions already endowed with a designated judicial organization under the authority of a supreme court. When reflecting on this type of reform and evaluating its efficacy, it is not enough to pay attention to the way in which the new institution is organized or how it works. That is, it is not enough to ask important questions such as whether it will be adequately staffed or financed. It is also particularly important to ask how the new judicial institution will interact with the other constitutional institutions that comprise the extant framework.

Certain questions turn out to be particularly revealing and promising in this respect. For example, what institution previously carried out the functions that the new institution—call it X—will now carry out? What institution will have its operative capacity or decisional authority affected by X's arrival? These inquiries are important in principle, much beyond what practice may reveal their answer to be. The point is that when it comes time to promote a reform in the organic part of the constitution, the main

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18. *See* NINO, *supra* note 15, at 196 (noting that "the democratic process cannot be the last resort for the protection of individual rights, since the main function of rights is to contain majoritarian decisions," and therefore, mechanisms such as judicial review exist outside the political process to protect those rights); Megan J. Ballard, *The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil*, 17 BERKELEY J. INT'L L. 230, 234 (1999) (explaining that Brazil's 1988 constitution "grants novel individual and social rights and strengthens the judiciary's capacity to protect these rights," but that this, combined with other factors, allows "socially oriented judges to impair the government's efforts to embed Brazil more firmly in the global economy"); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 147–48 (1992) (offering international human rights and Indian constitutional jurisprudence as examples of how the judiciary can protect interests underlying social rights).

19. *See, e.g.*, Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 AM. U. INT'L L. REV. 101, 110–11 (2006) (noting that Argentinian "judges can . . . exercise their constitutional review powers to enforce social rights," and providing as an example a 2000 decision that upheld a lower court's order for the national government to "grant timely and appropriate medical treatment").

resistance to newly arrived institution X can come from within the existing constitutional structure. That is to say, it is foreseeable that the organic reform may be affected by resistance from an existing entity or individual—for example, from a public official—that is directly impacted by the introduction of the change in question. It is not unforeseeable, in this sense, that the more institutions and public servants are affected by the change, the greater resistance the newly adopted institution will have to face.

A good illustration of this phenomenon can be found in the example of the so-called train wreck in Colombia, which pitted the old Colombian supreme court against the Constitutional Court introduced by the constitution of 1991.[20] Both institutions maintained for years—and still maintain—a relationship of rivalry and tension, which started with the birth of the latter and which has yielded persistent disputes over power as well as a noxious competition between the two courts.[21] A similar example is offered by Argentina and the tensions that have arisen between the old supreme court and the magistracy, which was introduced by the 1994 constitutional reform.[22] Beyond the design problems of each of these institutions and the fact that conflicts might have been minimized had their competencies been more clearly delineated, the truth is that the types of conflict that resulted were foreseeable from the moment that contemplation of the new institutions began. This is true even though events clearly suggest that such conflicts were not actually foreseen. The failure to anticipate these conflicts suggests how little attention is paid to what I call the internal impact of reforms.

1. Convergences and Tensions Between Different Constitutional Models.—In the preceding pages, I have examined different ways in which a constitutional reform tends to impact the underlying constitutional structure that is itself undergoing reform. However, the examples I held up as related to particular constitutional reforms—the introduction of a magistracy council and the expansion of the list of rights—can and should be made more general. This is due to the knowledge we have accumulated in relation to the existence of different constitutional models.

In effect, I have already made reference to different models of constitutional organization, which I call—following the language of the

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20. *See* Everaldo Lamprea, *When Accountability Meets Judicial Independence: A Case Study of the Colombian Constitutional Court's Nominations*, 10 GLOBAL JURIST 1, 16 (2010), *available at* http://www.bepress.com/gj/vol10/iss1/art7 (referring to conflict between the supreme court and the Constitutional Court as a "train wreck" or "*Choque de Trenes*").

21. Felipe Saez, *The Judiciary*, *in* COLOMBIA: THE ECONOMIC FOUNDATION OF PEACE 897, 897–905 (Marcelo M. Guigale et al. eds., 2003) (discussing the establishment of the Constitutional Court, the activist role it assumed , and resulting tensions with the supreme court).

22. *See, e.g.*, Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 417–18 (2007) (describing common criticisms of the magistracy council in the decade following its creation including the slow process of selection, removal of judges, and the political influence of the president in the selection process).

era—conservative, radical, and liberal. We know that in the constitutional history of the Americas, there have been constitutions of a conservative tone (e.g., Chile in 1823;[23] Chile in 1833;[24] Colombia in 1843;[25] Ecuador in 1869[26]), a radical tone (e.g., Pennsylvania in 1776,[27] Apatzingán in 1814[28]), and a liberal tone (e.g., Colombia in 1853,[29] Colombia in 1863[30]). Additionally, many constitutions have displayed a "mixed" tone (of particular relevance are liberal–conservative constitutions such as those of Argentina in 1853,[31] Mexico in 1857,[32] and Paraguay in 1870[33]).

Here we should consider briefly the likelihood of success of constitutional reforms oriented at modifying the structure of the existing constitutional model. Clearly, the case of reforms that introduced social rights in the old constitutions of the Americas is especially interesting in this

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23. *See* Roberto Gargarella, *Towards A Typology of Latin American Constitutionalism, 1810–60*, 39 LATIN AM. RES. REV. 141, 143–44 (2004) ("[M]oral perfectionism was clearly embodied in the [Chilean] Constitution of 1823 . . . by the creation of a 'conservative senate' in charge of controlling 'national morality and habits' as well as overseeing the creation of a strict 'Moral Code,' both of which aimed at regulating the moral life of Chile's inhabitants . . . . [I]ndividual rights were contingent upon their accommodation within the higher or preeminent a priori principles.").

24. *Id.* at 144–45 (noting that the Chilean constitution of 1833 was conservative and included significant presidential authority including the ability of the president to suspend the constitution and most civil rights).

25. *Id.* at 145 (noting that the 1843 Colombian constitution "was written by extreme conservatives").

26. *See* PETER V. N. HENDERSON, GABRIEL GARCÍA MORENO AND CONSERVATIVE STATE FORMATION IN THE ANDES 240 (2008) (characterizing the 1869 constitution as authoritarian and indicative of a shift away from classical liberalism in Latin America).

27. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 83–85 (1998 ed. 1998) (discussing the revolutionary movement in Pennsylvania and the ascendance of political outsiders who in 1776 "captured control of the convention that wrote the most radical constitution of the Revolution").

28. *See* Gargarella, *supra* note 23, at 146 ("The constitution that probably best fits the radical ideal is Mexico's 1814 Constitution of Apatzingán, written by the revolutionary priest José María Morelos y Pavón.").

29. *See* DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 108 (1993) (treating the 1853 constitution that established universal male suffrage as an achievement of the country's Liberal party despite their initial reservations).

30. *See* JORGE P. OSTERLING, DEMOCRACY IN COLOMBIA: CLIENTELIST POLITICS AND GUERRILLA WARFARE 68 (1989) (reporting that the 1863 constitution was "federalist, ultraliberal, and totally lay in character").

31. *See* THEODORE LINK & ROSE MCCARTHY, ARGENTINA: A PRIMARY SOURCE CULTURAL GUIDE 63 (2004) (recognizing that the same constitution established Roman Catholicism as the state religion but also promised religious freedom); WILLIAM SPENCE ROBERTSON, HISTORY OF THE LATIN-AMERICAN NATIONS 237 (1922) (stating that the 1853 constitution "was an attempt to harmonize two tendencies which had struggled for domination—the federalistic and the centralistic").

32. *See* HALPERIN DONGHI, *supra* note 2, at 128–29 (describing the creation of Mexico's 1857 "reform" constitution).

33. *See* FED. RESEARCH DIV., LIBRARY OF CONG., PARAGUAY: A COUNTRY STUDY 161 (Dennis M. Hanratty & Sandra W. Meditz eds., 2d ed. 1990) (describing the constitution of 1870 as "more democratic than the two previous constitutions," but emphasizing the great authority afforded to the president).

sense. Here we speak of the introduction of reforms to the liberal–conservative constitutional model that were originally excluded from said compact, that is, the introduction of radical or republican reforms. The question can be discussed in a more general sense. Specifically, what possibility is there of successful reform when the aim is to modify, in this way, the constitutional structure in force? More precisely, what possibility is there of successfully grafting institutions belonging to a certain constitutional tradition onto a constitutional body organized according to the parameters of a different or opposing tradition?

One possible way to begin the aforementioned reflection would be to examine some of the facts that we know regarding the different constitutional traditions in the region. So far, I have referenced conservative, radical, and liberal constitutional models. The first, as we know, can be defined by its combination of political elitism and moral perfectionism (the model that, in Latin America, signified power concentration in the executive as well as religious imposition).[34] The radical model can be characterized—in sharp contrast with the conservative model—as a Rousseauian model distinguished by political majoritarianism.[35] The liberal model—which sought to mediate between the other two models—stands out for its defense of a balanced political system (versus the excesses of strong presidents and concentrated majorities) and its assertion of the religious neutrality of the state.[36]

Taking this panorama into account—and this is what I am interested in highlighting—it is possible to recognize the existence of areas of partial convergence and conflict among the different models. We have known of such agreements and disagreements throughout our study of history, but we are able to anticipate and explain them by paying attention to the areas of conflict and existing tensions between these various schemes. The intersections range from the common anti-majoritarianism of liberals and conservatives,[37] to the shared rejection of liberal neutrality on the part of conservatives and radicals,[38] to the habitual resistance that liberals and radicals jointly

34. *See* Gargarella, *supra* note 23, at 142–46 (noting that conservative constitutions are characterized by moral perfectionism, often rooted in Catholicism, and political elitism that included a concentration of power in the executive branch and in a senate populated by wealthy citizens).

35. *See id.* at 142 (characterizing the radical model as one "anchored in political majoritarianism").

36. *See id.* (characterizing the liberal model as one that "emphasize[s] the limitation of powers and moral neutrality").

37. *Compare* BUSHNELL, *supra* note 29, at 108 (documenting the fears of nineteenth-century Colombian liberals regarding universal male suffrage), *with* Gargarella, *supra* note 23, at 142 (characterizing conservative constitutional models as elitist).

38. *See, e.g.*, Gargarella, *supra* note 23, at 142 (explaining that while conservatives favor moral perfectionism and radicals favor moral populism, liberals prefer moral neutrality).

presented when faced with the religious authoritarianism so common in Latin America.[39]

In short, the possibility of a successful transplant is increased when the institutions being introduced are part of the constitutional model in force (e.g., institutions with a liberal character over a constitutional scheme that is also liberal). For example, one might introduce a new comptroller's office, say, "Auditor General of the Nation" or "Tribunal of Accounting," within an existing checks-and-balances scheme. The likelihood of success is also increased when the institutions that are introduced form a part of a distinct constitutional model, but in areas where both models are compatible. This could occur, for example, with the introduction of liberal reforms that tend to limit the power of controlling authorities within a conservative institutional scheme when the reforms are seen as clearly hostile to a radical political majoritarianism. To illustrate this by example, one might examine a case where the judiciary is given the power to conduct constitutional review and to invalidate laws deemed unconstitutional, an option considered typically countermajoritarian. Such a constitutional change could be well received both by a liberal constitutionalism and a conservative one, if both are suspicious of legislative power and especially if the conservatives suspect that the government may have a particular influence in the nomination of members of the highest court.

Meanwhile, the most difficult grafts would occur in connection with efforts to merge institutions belonging to different constitutional models in areas where they tend to conflict. Introducing social rights into a liberal–conservative scheme would be one example of this, given that social constitutionalism was expressly rejected by both liberals and conservatives during constitutional conventions in the nineteenth century. Moreover, social constitutionalism requires an institutional framework that challenges the current order, and is characterized by institutions more responsive to popular demand. An institution of this sort is a far cry from the models that either liberals or conservatives would be willing to support.

Another example of interest to Latin America would be institutions designed to emphasize mechanisms for direct democracy within a constitutional model hostile to civic participation. Once again, here we can anticipate that tensions will run high as a result of attempting to combine institutions whose aspirations are contradictory in principle. Moreover, we might predict for such cases that the president in power will boycott or undermine those attempting to implement reforms that would affect the president's authority.

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39. *See* Otto Maduro, *Christian Democracy and the Liberating Option for the Oppressed in Latin American Catholicism*, *in* THE CHURCH AND CHRISTIAN DEMOCRACY 107–09 (Gregory Baum & John Coleman eds., 1987) (identifying anticlerical attitudes and support for laicism with both liberals and even more radical elements on the left).

Ultimately, recognizing the existence of differing constitutional traditions and analyzing their areas of connection and tension can be helpful when attempting to discern whether a given right will transplant successfully.

B. Translations Between Different Constitutional Models

The second problem I identify—typical of the method used when attempting to incorporate social rights into Latin American constitutions—is related to issues of what I will call "translation." To examine this type of issue, I begin with the understanding mentioned above: that it is not easy to accomplish "blending" between different constitutional models. Nonetheless, as I have pointed out, said blends are facilitated in areas where different models intersect. For example, conservative and liberal constitutions often have countermajoritarian leanings, and this makes them, in many ways, compatible.[40] Additionally, this suggests that a number of institutional arrangements can be well supported by both constitutional structures.

The translation problem appears when I attempt to reconcile institutions associated with areas where the models in play conflict. For example, as I have stated, liberals and conservatives have celebrated relatively successful constitutional pacts (successful, at least, in terms of the stability they have reached). We also know that there are many areas of accord between the two models, and that these areas have made it possible for those pacts to enjoy success. For instance, the two models share a common commitment to a list of restricted rights,[41] an emphasis on the protection of property rights,[42] and an institutional scheme with a countermajoritarian outline.[43] Nevertheless, liberals and conservatives disagree profoundly in other aspects. For example, they differ sharply regarding what powers they consider it necessary to transfer to the executive branch. The conservatives consistently supported an extreme concentration of political power, while the liberals commonly fought against this, certain that such a concentration threatened their entire constitutional structure.[44] Here we have a grave problem in translation. In the case of a majority of Latin American countries, the issue

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40. *See* Roberto Gargarella, *The Constitution of Inequality: Constitutionalism in the Americas, 1776–1860*, 3 INT'L J. CONST. L. 1, 11 (2005) (arguing that the many Latin American constitutions of the early to mid-1800s reflected "conservative tendencies [that] were manifested in a countermajoritarian drive that advocated the concentration of power in the executive"); Gargarella, *supra* note 23, at 150 (stating that the liberal model involves the implementation of "countermajoritarian measures").

41. *See* Gargarella, *supra* note 23, at 143–51 (discussing the different rights restrictions supported by the liberal and conservative models).

42. GARGARELLA, *supra* note 1, at 193 ("Clearly, liberals' strong commitment to property rights creates ample space for agreement between liberals and conservatives: they both took the support of property rights as one of their priorities.").

43. *See supra* note 40 and accompanying text.

44. *See* Gargarella, *supra* note 23, at 144 (positing that conservatives historically favor centralized political power to enforce a moral code); *id.* at 149 (explaining that liberals equated centralized political power with tyranny).

was whether one could incorporate the fundamental conservative demand for a greater concentration of power within the liberal, American-type constitutional scheme that was being adopted, along with its system of checks and balances. This was a significant translation problem that was resolved, in most cases, by "unbalancing the checks and balances"[45] through the ceding of additional powers to the executive branch. These powers converted the executive into a *primus inter pares*. In principle, this peculiar graft was very problematic—a poorly made translation—and, according to some (though I do not insist upon it here), it came to be a cause of the frailty that accompanied the system from that moment on. This ceding of power to the executive became the Achilles' heel of a scheme that was, in terms of stability, generally successful.[46]

Having said this, we can return to the example cited in the prior subpart, referring to the introduction of social rights. We have here another case, more serious in appearance, of a failed blending between schemes. To begin this analysis, it is worth noting that many of the essential compromises of a particular constitutional model are often interrelated; that is, they need each other (for this reason I speak about models in general terms). Schematically, we could say that the following are found within the fundamental building blocks of the radical model: (1) a political organization that is open and responsive to participation by the people; (2) a rather egalitarian economic structure; and (3) citizens endowed with "civic virtue," which in this case means, primarily, that they are motivated to actively participate in politics.[47] These pieces were linked together and mutually dependent on one another. The objective was collective self-government, and this required a virtuous citizenry.[48] To this end, political institutions were created that were open to,

45. *See* Bert A. Rockman & Eric Waltenburg, *The American Constitution, the State, and Executive Prerogative*, *in* CROSSING BORDERS: CONSTITUTIONAL DEVELOPMENT AND INTERNATIONALISATION 81, 100 (Florian Grotz & Theo A.J. Toonen eds., 2007) (discussing how executive power in the United States has grown since the Constitution was adopted).

46. *See* GARGARELLA, *supra* note 1, at 221–22 (describing how compromises between liberals and conservatives ensured political stability but led to the "gradual corrosion" of the liberal system of checks and balances, a tendency toward more concentrated power and stronger executives, and the engulfment of liberals by their conservative allies); *cf.* JUAN J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, & REEQUILIBRATION 72–73 (1978) (hypothesizing that the "zero-sum character" of presidentialism—as opposed to parliamentarian systems, in which outcomes can be divided—introduces pressures into Latin American democracies to create constitutional safeguards against executive power, and tha these safeguards "lead to constitutional conflicts that weaken the system, endanger its legitimacy, and frustrate presidents who feel that they have a direct, popular, plebiscitarian mandate").

47. *See* Gargarella, *supra* note 23, at 146 (discussing the radical commitment to wide public participation in government and the consequent strengthening of the house of representatives, the most "popular branch of power"); *id.* at 148 (noting the revisions to the status quo involved in the radicals' program, which included a substantial division of land, and noting the radicals' "concern with the 'cultivation' of a virtuous citizenship").

48. *See* Gargarella, *supra* note 40, at 3 (stating that the radical model was defined by "egalitarian impulses" that achieved "expression through a strong commitment to collective self-government").

and encouraged, political participation. At the same time, radicals proposed to organize the economy in a way that encouraged the generation of collectivist behaviors and discouraged purely self-interested behavior.[49] The absence of any of the pieces threatened to put the entire structure at risk. For example, if the general scheme was maintained, but the political framework was such that it closed off participation by the people, the institutional scheme would invite social unrest, and thus plunge the entire system into crisis. Similarly, if the institutions remained open to and supportive of participation by the people, but within a context of profound inequality, they risked undermining the entire participatory process that they otherwise attempted to encourage. Those most affected by the existence of inequality in this context would have great difficulty dedicating their energies to politics instead of ensuring their immediate subsistence.

The problem that arises upon the constitutional incorporation of social rights is in the same vein as the problems mentioned above. Any of the radicals who advocated higher social engagement in the constitutional order during the nineteenth century would have seen what was done in the twentieth century—namely, the inclusion of a list of social rights in liberal–conservative constitutions—as uninteresting, if not simply offensive.[50] For those who felt as Artigas of the Banda Oriental did,[51] or, better yet, as Ponciano Arriaga, the president of Mexico's 1857 constitutional convention did[52]—that the constitution ought to be "the law of the land" (which is to say, that constitutional reform should be accompanied by a profound reform that redistributed land ownership)—the mere incorporation of a list of social rights would have sounded nothing short of ridiculous. What relevance would said list of written rights have when the aforementioned men were working toward bringing about socioeconomic changes that included, but at the same time largely transcended, the drafting of a constitution?

The difficulties inherent to this operation (the introduction of social demands from radicals into constitutions that were not sympathetic to them) were many. Primarily, such modest constitutional reforms were not accom-

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49. *See* LINZ, *supra* note 46, at 38–39 (describing the radical position that economic equality was an indispensable precondition of self-government); *see also* Gargarella, *supra* note 23, at 148–49 (discussing radical proposals in various Latin American countries involving substantial redistributions of land).

50. *See* Gargarella, *supra* note 23, at 147–48 (noting that radicals subordinated individual rights to a defense of the "will of the majority," and that "the radicals' concern with the 'cultivation' of a virtuous citizenship further reinforced the idea that their project was incompatible with autonomous individual choice").

51. *See id.* at 148 (noting that like José Artigas, who proposed a plan for land redistribution, the radicals called for a "substantial revision of the status quo, proposing, for example, a radical redistribution of land").

52. *See id.* at 149 ("Central to the [constitutional] debates, then, was land redistribution, so much so that the president of the convention, Ponciano Arriaga (*'el liberal puro'* [*'the pure liberal'*]), summarized the reformists' position when he stated that the entire constitution should be seen as the legal expression of land reform: the constitution, he said, is 'la ley de la tierra' ['the law of the land'].").

panied by additional measures that were capable of sustaining the radicals' old claims. This is not to say that the liberal–conservative leadership should have transformed its constitution into a radical one, nor that they should have assumed that giving in to radical demands was necessary before they could give life to a radical scheme. Further, this does not suggest that the pieces of one constitutional model must all fit together in only one fashion, nor that they are unable to arrange themselves in different ways, or with other pieces, if they are to take on a life of their own. Instead, the point is that each constitutional model incorporates a certain internal logic that is far from arbitrary. Keeping this in mind, the radicals might reasonably argue that it was difficult to sustain the social reforms that they had proposed at the time, if at that moment they did not count on a mobilized society ready to defend the strong measures of change promoted. The constitution, they might add, was capable of modestly collaborating in said task; nonetheless, it happened that those in charge of the reform had not taken any conclusive steps in that direction—just the opposite.

Indeed, it is almost impossible to imagine any success for the radical reconstruction proposals that were presented, when, ever since the new constitutional conventions, not only had the social mobilization required by the reforms not been encouraged, but concentrated power remained—supported by the political and social elite who were hostile to the progress of radical initiatives.[53] In institutional terms, was it conceivable, for example, that the judiciary would be the vanguard in the social battle over expanded social rights when it operated within a framework where the citizenry's access to the courts was extremely closed off? It is difficult to imagine a less favorable institutional context for this feature of social content to flourish.

The last point that will be made regarding the failure in principle of this grafting operation (perhaps the most important point of all) has to do with the way in which the liberal–conservative leadership decided to incorporate the social demands that radicals had been advocating for decades. The method chosen was to translate these potent, vigorous, and radical social demands into the liberal language of rights.[54] In this manner, the radicals' demands, which largely exceeded the constitutional text, were reduced to an especially limited constitutional formula. Transformed into social rights, the demands were now tightly bound, practically immobile, and sat within a narrow and stifling mold that had almost nothing in common with the pattern that the radicals, in their time, had used to make sense of—and give permanence to—their political and constitutional demands.

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53. I have previously discussed the victory of liberal thought over radical reforms. *See generally* Gargarella, *supra* note 23, at 149 (noting that liberal theory "had a decisive influence on the development of American constitutionalism" and was attractive compared with radical or conservative alternatives).

54. *See id.* (suggesting that liberals distinguished their platform from the radical position by proposing an equilibrium of power, basic rights, and the protection of individual autonomy).

What was left in the end was such a weak attempt at constitutional change that some might even call it a mere act of demagoguery or hypocrisy, that is to say, a way of committing through a series of actions known to be difficult to undertake due to innate shortcomings.

C. *Dormant Clauses*

The desolate outlook described above calls for an important clarification that could be very useful to reflect on a more general concept encompassing the constitution, rights, and legal reforms: the concept of "dormant clauses." To briefly summarize, in the previous pages we determined that it is important to take into account the methods of carrying out constitutional reform. Constitutional reforms commonly involve modification of a text that establishes long-lasting institutions. Existing institutions or constitutional practices will not be expected to be neutral in the face of new institutional additions. They can aid or, more commonly, resist the arrival of such changes, if the implemented reforms are not taken seriously. Of course, there is no magic formula that will allow us to predict what must be or must not be done in such situations, but criteria exist that allow us to anticipate when a certain reform is off to the wrong start. The special example of social rights illustrates the material difficulties (and political irresponsibilities) that tend to accompany the difficult process of constitutional reconversion.

In the end, we are talking about a case of an addition that was (foreseeably) considered to be a failure at the outset. Such affirmation is supported by a long-standing consensus that pointed to the many decades during which social rights fell into a constitutional slumber, cast aside on the desks of judges throughout all of Latin America who considered those rights as merely programmatic or not directly operative.[55]

A situation like the one described can help strengthen a common position that tells us that these new constitutions, as generous as they might be regarding the rights they affirm, turn out to be "pure poetry"—text that is disengaged from its application in real life. But even then, for some, the inclusion of such clauses at a constitutional level is a negative decision for the existence of the constitutional text given that the repeated—if not inevitable—failure to meet those social mandates ends up undermining the authority and legitimacy of the constitution.[56] Could it be that the incorporation of such social clauses was an error? Could it be that Latin Americans

55. *See supra* note 13 and accompanying text.

56. *See* Carlos Rosenkrantz, *La pobreza, la ley y la Constitución* [*Poverty, Law and the Constitution*], *in* EL DERECHO COMO OBJETO E INSTRUMENTO DE TRANSFORMACIÓN [THE LAW AS AN OBJECT AND INSTRUMENT OF TRANSFORMATION] 241, 246 (Seminario en Latinoamérica de Teoría Constitucional y Política ed., 2003) (arguing against the inclusion of economic rights at a constitutional level given the concern that courts' failure to accomplish great redistributions of wealth would undermine their power and central role in democracy).

erred in their overwhelming alignment with the cause of constitutionalizing social rights?

The first doubts in the face of these questions arise when we note that toward the end of the twentieth century, those legally relegated social rights began to awaken from their slumber. The same judges who time and time again refused to recognize judicial suits to enforce or implement these constitutionalized social rights, began to open their doors and accept suits they had previously rejected.[57] This striking and notable situation begs us to ask an additional question: Why had social rights, after lying dormant for such a long time, slowly awakened almost half a century later?

The explanations for these changes are diverse: the growing internalization of the law;[58] the increasing weight of exigent international human rights treaties;[59] the development of a complex and dense dogmatic reflection on this subject matter (critical of the status quo);[60] the emergence of larger suits (channeled outside the political entities, disfavored by a disappointing practice);[61] and the implementation of legal reforms (in particular, clauses pertaining to legal standing) destined to facilitate access of the most disadvantaged to the tribunals.[62] All of these elements, among others, combined to provide structure to a changing reality where social rights no longer necessarily appeared as second-rate rights.

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57. *See* Courtis, *supra* note 13, at 170 (showing increasing willingness among Latin American judges to enforce social rights).

58. *See, e.g.*, Ariel E. Dulitsky, *La aplicación de los tratados sobre derechos humanos por los tribunales locales: un estudio comparado* [*The Application of Human Rights Treaties by Local Tribunals: A Comparative Study*], *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] 33, 74 (Martín Abregú & Christian Courtis eds., 1997) (discussing the growing tendency in Latin America toward openness to international law given constitutional recognition of international norms and dialogue between local courts and international monitoring bodies).

59. *See* Courtis, *supra* note 13, at 169 (describing the "widespread ratification of international human rights treaties" as one of two important developments in the field of human rights enforcement).

60. *See* Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 61, 64 ("[P]rogressive Latin American jurists turned a critical eye, both on themselves as a disciplinary community, as well as on the other central actors in the legal drama . . . .").

61. *See, e.g.*, José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 185 (describing the use of the class action suit in Brazil against mostly private providers of health and education services).

62. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86 (Colom.) ("Every person has [recourse to] the action of *tutela* to claim before the judges . . . the immediate protection of their fundamental constitutional rights . . . ."); *id.* art. 87 ("Any person may come to the judicial authority to make effective the compliance with a law or administrative act."); *id.* art. 92 ("Every natural or juridical person may solicit from the competent authority the application of penal or disciplinary sanctions derived from the conduct of public authorities."); COSTA RICA CONST. art. 48 ("Every person has the right to the recourse of habeas corpus . . . and to the recourse of *amparo* to maintain or reestablish the enjoyment of other rights conferred by this constitution . . . .").

In the face of this new context, judges began recognizing that they had diverse alternatives to the dichotomy that had dominated until then: implementing or not implementing a right (e.g., a suit for access to housing).[63] Judges could opt to give orders to the other branches, making it clear that the other branches were violating the constitution, and suggesting different options that could be considered; request public hearings to collectively discuss how to resolve situations of complex litigation; or define time frames in which the political power ought to find solutions to all the problems under review, among other remedies.[64]

And here again, an important fact arises that is worth noting. The countries that appear to fall the furthest behind in this slow march toward public recognition of social rights appear to be those that, for one reason or another, more strongly resisted the incorporation of those social demands into the bodies of their constitutions. Examples that stand out include the austere Chilean constitution,[65] and most notably the United States, whose Constitution is completely silent on the subject of social rights, and has been described as a truly "negative" constitution.[66]

One wonders how irrational that initial proposition was, decades ago, to incorporate rights into a constitution that did not appear amenable to the novelties being added. Is it not appropriate to speak of a failed graft? Is it that, contrary to what I suggested just a few paragraphs ago, the constitutionalization of social rights ended up being a victorious strategy in the long term?

The answer, one could say, is nuanced. In light of everything, it is clear that those involved in a constitutional reform like the one described (defending the incorporation of social rights into the constitution) became involved for very diverse, and at times contradictory, reasons. Without a doubt, there were constituents who undertook the task with the goal of easing what they saw as a growing social conflict; others did so thinking textual changes would never produce practical results; others participated due to

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63. *See* Gargarella, *supra* note 12, at 27 (arguing against judicial abstinence from enforcing rights, and suggesting that "other equally or even more attractive theories of democracy require judges to deal with social rights in a completely different manner").

64. For further discussion of the need for diverse options for judicial enforcement of social rights, see Siri Gloppen, *Courts and Social Transformation: An Analytical Framework*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 12, at 35, 51–56.

65. *See* Mark Ensalaco, *In with the New, Out with the Old? The Democratising Impact of Constitutional Reform in Chile*, 26 J. LATIN AM. STUD. 409, 416–17 (1994) (noting that the Chilean constitution of 1980 included few limits on state sovereignty and a "vague obligation to respect 'essential rights which emanate from human nature'").

66. Judge Posner has called the United States Constitution

> a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, *not to secure them basic governmental services.*

Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (emphasis added) (citations omitted).

mere hypocrisy or populism. At the same time, there were traditional participants who believed in what they were doing and trusted the collective strength of the constitutional changes. Whatever the rationales, one could say that a constitutional modification like the one mentioned took place, for the most part, with a certain irresponsibility considering the magnitude of the purpose sought. Of course, it was not easy to foresee all the implications that would result from the type of reform that was proposed. Meanwhile, it was clear that a sufficient level of intellectual reflection had been achieved that could have helped avoid problems like the ones that resulted from the reforms in this case.

But what is there to say about the dormant clauses mentioned? First of all, let us clarify that today is not the era of consolidated social rights; instead, it is the beginning of a phase where, typically, more judges are open to the idea of hearing suits to implement social rights (or at the very least, not predisposed to discard nonenforceable rights).

With that said, it would be worth referencing some general points that are particularly important in the discussion of constitutional reform. First of all, it makes sense to recognize that, beyond what has been pointed out, some reforms can be worth the struggle, even when the initial response to the reforms is not favorable. Such a gamble could result in a sense of constitutional duty adopted by the community—a duty that is, symbolically, far from a minor legal change. Some have begun to speak, in that sense, of an *aspirational constitutionalism* as a way to account for this different manner of thinking about the constitutional question: a constitution should not be seen as just a catalog of rights and duties, but also as a tool to demonstrate the utopia or ideal sought to be reached.[67]

Second, the incorporation of certain ambitious constitutional clauses could be a safe bet on the future, in pursuit of a change in current sociopolitical conditions that block the development or the consolidation of the new commitments. Moreover, it could be an intelligent way of intervening in time, starting to create the conditions for turning diverse coalitions into dominant ones. In this way, the modified constitution could serve to enact changes in the incentive structure of the principle actors involved in the relevant reform. For example, by recognizing that their demands are backed by constitutional sources, certain individuals could begin working together in pursuit of their rights or certain groups could begin to mobilize socially for the same.

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67. *See* Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 299 (2003) ("*Aspirational Constitutionalism* refers to a process of constitution building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint.").

Finally, I would make a point in favor of the gamble for certain dormant clauses—that is to say, the gamble in introducing new constitutional clauses that, it would appear, are not in a condition to prosper and develop in the short term. What is at play here is none other than what appears to have been locked into the whole idea of "universal rights" from their origins. Perhaps, at the time when universal rights were first invoked, some people invoked them with the sole purpose of advancing their own interests, without comprehending the effect on others, or in any case, focused primarily on securing benefits for themselves. However, the universal invocation in favor of the adoption of rights holds extraordinary power given those abuses that it explicitly authorizes. Those who insist—but not in a selfish manner—on the importance of universal rights, do so backed by the consensus that usually surrounds the idea that this "has to do with a demand for something that we all deserve" (who could oppose such a claim?). It could be, as usual, that not everyone is in the same position to take advantage of the benefit sought in the moment that a request is granted. It could be that some individuals benefit much more than others, even when the benefit is characterized as universal. However, the law tends to get its revenge in such situations. It tends to be the case that, as time goes on, original social conditions vary substantively, and those who were not initially in a position to take advantage of what others enjoyed, are suddenly positioned to demand their share. Ultimately, the gamble on clauses that, in principle, could turn out to be dormant clauses is not rare and is certainly not irrational. Instead, it is all too common and is deeply entrenched in the history of modern rights.

Of course, none of this completely dissolves objections like the ones examined above. It could be preferable to have a constitution that is more austere than baroque or unnecessarily overloaded. It makes sense not to demand too much of the constitution, so as not to generate undue risk of loss of authority within it. Nothing justifies, above all, the degree of irresponsibility, ignorance, or disengagement displayed by many who participated in constitutional reform. Despite that, the things that have been pointed out here could be useful to show that the gamble on clauses that we know will not take effect immediately could be a very rational and reasonable bet—a way to show confidence in the future and, above all, the remarkable power that the nucleus of constitutional rights holds: rights that come to life after some time, like leaves that once again look like leaves, when the water that appeared to be drowning them has subsided.

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Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution

Carlos Rosenkrantz*

I. Introduction

In a constitutional emergency, protecting the aspirations of the constitution may require either public decisions that restrict personal constitutional rights or temporary suspension of constitutional procedures in favor of more expedient alternatives. Constitutional emergencies pose practical problems that are difficult to resolve. Indeed, constitutional emergencies require us to think about the institutional mechanisms that allow us to gain expediency without irreversibly risking arbitrariness or power concentration. But constitutional emergencies are also interesting theoretically. Constitutional emergencies defy liberal notions that power appropriately derives not from force or threats but from predetermined rules to which the *demos* consents.[1] The expediency we need at times of crisis suggests that the derivation of power from prior consent should be reversed. The first thing we seem to need during emergencies is to have a decision made, and this requires power more than anything else. During emergencies, authority cannot be the source of power, as liberals would like it to be. Rather, power is the source of authority.

Few contemporary authors have attempted to provide responses to practical and theoretical problems posed by constitutional emergencies. Some have suggested that, when the executive declares a state of emergency, we can prevent the executive from acting arbitrarily and assure the priority of law over power only if judges resist any attempt by the executive to restrict individual rights or to circumvent the normal procedures of lawmaking.[2] I dissent. We should solve the challenges of constitutional emergencies through crafty institutional designs that (1) provide adequate incentives for the executive to refrain from capricious use of emergency powers and to use emergency powers only when strictly necessary for the common good and

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1. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 278 (Peter Laslett ed., Cambridge Univ. Press ed. 1988) (1690) ("[A]ll Men are naturally in [a] State [of nature], and remain so, till by their own Consents they make themselves Members of some Politick Society.").

2. *See infra* Part IV.

(2) protect the value of law *qua* law for society. In Part II, I will review the Argentinian judicial record to show that, at least in Argentina, judges have been unable to restrain the executive's use of emergency powers adequately or consistently. In Part III, I will try to explain this judicial record to show that certain attributes of the judiciary will always make it very difficult for judges to police the executive's use of emergency powers. In Part IV, I will present my view of the value of law *qua* law to demonstrate why the institutional proposal I offer in Part V does not make law subservient to power. In Part VI, I will show that my proposal does not undermine the value of law and, therefore, should not be rejected out of respect for the value of law. Finally, in Part VII, I will offer succinct concluding remarks.

II. The Judicial Record

A. The State of Siege

Many Latin American constitutional drafters were heavily influenced by liberal thinkers[3] and therefore rejected provisions for the regulation of emergencies.[4] In Argentina, the power of the government to suspend individual rights and liberties was explicitly included in almost all of the state's fundamental texts. The constitutions of 1819 and 1826 allowed the government to take emergency measures restricting rights.[5] The 1853 constitution was influenced by the experience of anarchy in the preceding thirty years and by the Chilean constitution of 1833, which was one of the first Latin American constitutions to provide for a congressional proclamation of a state of siege.[6] The 1853 constitution allowed congress, in case of internal commotion, and the senate, in case of foreign attack, to declare a state of siege and to suspend individual rights provided that the constitution or authorities created thereby were in danger.[7]

From 1854 until 2001, the state of siege was declared fifty-seven times.[8] During the first decades of institutional history, the Argentinian courts

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3. *See, e.g.*, Jorge Precht Pizarro, *Laity and Laicism: Are These Catholic Categories of Any Use in Analyzing Chilean Church–State Relations?*, 2009 BYU L. REV. 697, 698 ("Just like all Latin-American nations, Chile's constitutional development was greatly influenced by liberal tendencies.").

4. The 1811 Venezuelan constitution, the 1818 Colombian constitution, and the 1824 Mexican charter all lacked broad emergency powers. Gabriel L. Negretto & José Antonio Aguilar Rivera, *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 CARDOZO L. REV. 1797, 1803 (2000).

5. The constitution of 1819 allowed the authorities to restrict individual liberties in extraordinary circumstances. Art. 122, CONSTITUCIÓN DE LAS PROVINCIAS UNIDAS EN SUD AMÉRICA [CONST. PROV. UN.] (1819). The constitution of 1826 gave the congress this power. Art. 174, CONSTITUCIÓN DE LA REPÚBLICA ARGENTINA [CONST. REP. ARG.] (1826).

6. Negretto & Rivera, *supra* note 4, at 1805.

7. Arts. 23, 53, 67(26), CONSTITUCIÓN NACIONAL [CONST. NAC.] (1853).

8. MARIO D. SERRAFERO, EXCEPTOCRACIA: ¿CONFÍN DE LA DEMOCRACIA? INTERVENCIÓN FEDERAL, ESTADO DE SITIO Y DECRETOS DE NECESIDAD Y URGENCIA [EXCEPTOCRACY: ENDS OF

managed to monitor the government and restricted the list of rights that could be suspended during states of siege. In 1893, for instance, in *Alem*,[9] the supreme court decided that the president could not issue an order to detain a recently elected senator because the senator's congressional immunities protected him even after the state of siege was declared.[10] The court reasoned that the state of siege was aimed at sustaining the constitutional system.[11] Incarceration of a senator would change the balance of power in the senate and could never be conceived of as a measure in favor of the constitution.[12] In *Alvear*,[13] the supreme court stated that the powers granted to the executive should be interpreted restrictively because the state of siege was always regarded as an exceptional measure.[14]

In 1931, the restrictive trend changed. That year, in *Bertotto*,[15] decided only a couple of months after the first *coup d'état* in Argentinian history, the supreme court held that, in addition to physical liberty, freedom of the press could also be restricted.[16] In 1959, in *Sofía*,[17] a case initiated when the police prohibited a political rally concerning the situation of political detainees in Paraguay, the supreme court held that the right to make political assembly was also subject to suspension during an emergency.[18] It added that courts cannot review the factual assertions made by the executive to justify the declaration of the emergency itself.[19] In 1970, in *Primera Plana*,[20] the court upheld a government ruling that executive decrees and institutional acts adopted during states of siege were constitutional if a true state of emergency existed.[21] In March 1976, the military overthrew the democratic government led by Peron's widow.[22] In 1977, the military government claimed that the guerrilla movement, whose strength was cited as the most important reason

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DEMOCRACY? FEDERAL INTERVENTION, STATE OF SIEGE, AND DECREES OF NECESSITY AND EMERGENCY] 75 (2005).

9. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/12/1893, "Leandro N. Alem / recurso interpuesto," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1895-54-432).

10. *Id.* at 463.

11. *Id.* at 455.

12. *Id.* at 455–56.

13. CSJN, 3/3/1933, "Alvear, Marcelo T. de / recurso de hábeas corpus," Fallos (1933-167-267).

14. *Id.* at 317.

15. CSJN, 11/3/1931, "Bertotto, José Guillermo / recurso de hábeas corpus," Fallos (1931-160-104).

16. *Id.* at 113.

17. CSJN, 22/5/1959, "Sofía, Antonio y otro / recurso extraordinario," Fallos (1959-243-504).

18. *Id.* at 520.

19. *Id.*

20. CSJN, 3/3/1970, "Primera Plana c. la Nación (Poder Ejecutivo Nacional) / demanda de amparo," Fallos (1970-276-72).

21. *Id.* at 82.

22. Juan E. Mendez, *Significance of the* Fujimori *Trial*, 25 AM. U. INT'L L. REV. 649, 650–51 (2010).

for the coup, had lost its steam and was, according to the government, totally destroyed.[23]

In 1978, at the peak of military political power, and in response to prior cases of intrusions upon liberty, the supreme court changed its doctrinal line again. Thus, in *Zamorano*,[24] the supreme court ruled against the government's decision to keep a detainee under house arrest and upheld his constitutional right to leave the country, as mandated by article 23 of the constitution.[25] The court stated that the actions of government during states of siege were always reviewable, that the reasons offered by the executive in ordering a detention were subject to strict scrutiny by courts, and finally that the government should provide detailed reasoning to justify its actions during states of siege.[26] Further, the supreme court stated that the mere invocation of general statements about states of emergency (i.e., that an association for the purpose of organizing nonviolent opposition to an official policy may facilitate the mobilization of revolutionary violence) would be insufficient.[27] Further, in 1979, the supreme court decided *Timerman*,[28] where it determined that the detention of a world-famous journalist was clearly arbitrary since there was no relationship whatsoever between the causes of the state of siege and the government's reasoning justifying Timerman's detention.[29] Finally, in 1985, the supreme court decided *Granada*,[30] ruling that during an emergency the executive could curtail liberties in a limited way for a short period of time.[31] The court also noted in a very strong tone that emergency measures restricting personal liberty were always constitutionally suspect and their validity was entirely conditioned upon their brevity.[32]

B. The Power of Congress

Parallel to the augmentation of the power of the president during the state of siege—notwithstanding the progressively stronger opposition of the supreme court, especially in cases where personal liberty was involved—the supreme court incrementally expanded the ability of congress to infringe economic rights during constitutional emergencies even without declaring a state of siege.

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23. Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 LAW & SOC. INQUIRY 481, 521 (1995).

24. CSJN, 9/8/1977, "Zamorano, Carlos Mariano / recurso de hábeas corpus," Fallos (1977-298-441).

25. *Id.* at 443, 445–46.

26. *Id.* at 444–45.

27. *Id.* at 445.

28. CSJN, 17/9/1979, "Timerman, Jacobo / recurso de hábeas corpus," Fallos (1979-301-771).

29. *Id.* at 781–83.

30. CSJN, 3/12/1985, "Granada, Jorge Horacio / recurso de hábeas corpus en su favor," Fallos (1985-307-2284).

31. *Id.* at 2311–12.

32. *Id.* at 2309.

Until 1922, Argentinian courts endorsed a libertarian *Lochner*[33]-type approach. In 1903, the supreme court decided *Hileret & Rodríguez c. Provincia de Tucumán*,[34] where it rejected a statute approved by a provincial legislature aimed at regulating the price and production of sugar.[35] The court held that regulating production would lead to regulating all industrial activity of the nation, undermining individual rights and making government "the regent of industry and commerce, [and] the umpire of capital and private property."[36] In *Ercolano c. Lanteri Renshaw*,[37] the supreme court, invoking the social function of property, validated a law that established maximum prices for urban leases.[38] However, in *Horta c. Harguindeguy*,[39] the court rejected the possibility of retroactive application of the law,[40] and in *Mango c. Traba*[41] explicitly rejected the setting of maximum prices, arguing that a restriction on property rights could only be justified during moments of dire necessity.[42]

This somewhat restricted view of emergency powers changed when the country confronted its first great systemic economic crisis after the economic collapse of 1930. In 1934, the supreme court changed its precedent and decided *Avico c. de la Pesa*,[43] in which, citing the American case of *Home Building & Loan Association v. Blaisdell*,[44] it held that a statute that imposed upon mortgages a three-year moratorium on payments and foreclosures and capped interest rates at 6% per year was perfectly constitutional.[45] The court found that the statute was constitutional because (1) there was an emergency, (2) the rights in question were restricted by a valid law, (3) there was proportionality between the emergency and the measures taken to overcome it, (4) the restriction was momentary, and (5) the restriction did not attack property itself but only delayed the enforcement of the remedies available to its holder.[46]

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33. Lochner v. New York, 198 U.S. 45 (1905).

34. CSJN, 5/9/1903, "Hileret y Rodríguez c. la Provincia de Tucumán / inconstitucionalidad de la ley provincial," Fallos (1907-98-20).

35. *Id.* at 25–26, 31, 35–36.

36. *Id.* at 51.

37. CSJN, 28/4/1922, "Ercolano, Agustín c. Lanteri Renshaw, Julieta / consignación," Fallos (1922-136-161).

38. *Id.* at 170.

39. CSJN, 21/8/1922, "Horta, José c. Harguindeguy, Ernesto / consignación de alquileres," Fallos (1922-137-47).

40. *Id.* at 61.

41. CSJN, 26/8/1925, "Mango, Leonardo c. Traba, Ernesto / recurso extraordinario interpuesto por desalojo," Fallos (1925-144-219).

42. *Id.* at 223–24.

43. CSJN, 7/12/1934, "Avico, Oscar Agustín c. de la Pesa, Saúl C. / recurso extraordinario," Fallos (1935-172-21).

44. 290 U.S. 398 (1934).

45. *Avico*, Fallos (1935-172-21, 41, 77).

46. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Avico, Oscar Agustín c. de la Pesa, Saúl C. / recurso extraordinario," 6/9/1934, Fallos (1935-172-21, 33–

Notwithstanding the previous cases, the judiciary reversed course in the 1980s and put limits on emergency measures adopted by congress. In 1986, the supreme court decided *Rolón Zappa*,[47] a case in which a teacher claimed that Laws 18,037 and 21,864, which devised a system to protect pensions against inflation, violated the Teacher's Act and articles 14 *bis* and 17 of the constitution.[48] The government agency in charge of administering pensions argued that the pension system was under an emergency, such that if the pensions accrued as plaintiff argued, the pension system itself would become bankrupt, thereby affecting all other pensioners.[49] The supreme court held that it was a congressional responsibility to adopt remedies to prevent the bankruptcy of the pension system, and that the court could not adopt a decision restricting the rights of pensioners.[50]

In 2003, Hugo Ávalos sued Alejandro Czumadewski for damages resulting from a car accident that had caused the death of Ávalos's father.[51] Ávalos also sued the defendant's insurer, the Caja Nacional de Ahorro y Seguro (CNAS), a state-owned insurance company in liquidation under the terms of an emergency regime approved by congress that protected the company's assets and imposed restrictions on its creditors.[52] The appellate court decided for the plaintiff.[53] Czumadewski then appealed to the supreme court, arguing that article 61 of Law 25,565 had extended the protection previously approved by congress to those who, like himself, had bought insurance policies with the CNAS.[54] In 2007, the supreme court affirmed.[55] The supreme court expressly adopted the opinion of the attorney general, which stated that even when emergency considerations related to the circumstances of the financial constraints of the state may justify restrictions upon creditors of the CNAS, it was not apparent that said considerations should

35), *adopted by Avico*, Fallos (1935-172-21, 77–78); *see also* Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 135 (2008) (discussing *Avico* as a "constitutional transplant" of *Blaisdell*, and laying out the *Blaisdell* requirements for a moratorium to be constitutional).

47. CSJN, 30/9/1986, "Rolón Zappa, Víctor Francisco / jubilación," Fallos (1986-308-1848).

48. *Id.* at 1850–51, 1853.

49. *Id.* at 1853. The claim was real. A couple of days after the decision, the president issued an emergency decree temporarily suspending the execution of decisions against the pension system. Decree No. 2196/86, Nov. 28, 1986, [26041] B.O. 5.

50. *Rolón Zappa*, Fallos (1986-308-1848, 1855–56).

51. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Ávalos, Hugo Mariano c. Czumadewski, Alejandro / ejecución de sentencia-incidente civil," 31/10/2006, pt. II, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=275748&fori=REA01125-401, *adopted by* CSJN, 11/7/2007, "Ávalos, Hugo Mariano c. Czumadewski, Alejandro / ejecución de sentencia-incidente civil," Fallos (2007-330-2981), slip op. at 1, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=270084&fori=REA01125-400.

52. *Id.* pts. I, II, IV.

53. *Id.* pt. I.

54. *Id.* pt. II.

55. *Ávalos*, Fallos (2007-330-2981), slip op. at 1.

also apply to the plaintiff.[56] The court reasoned that the invocation by congress of emergency considerations was not enough to justify the release of the defendant's obligations, when the benefits of said release would not accrue to the general public but rather to a particular subgroup of it.[57]

C. *Emergency Decrees*

Finally, the third area in which constitutional emergencies had a great impact was the power of the president to enact decrees with legislative content. The 1853 Argentinian constitution, even though it provides for a very strong presidency, was emphatic in the division of powers, and it did not allow the president to overcome the jurisdiction of congress other than in those circumstances in which the state of siege was declared.[58] For some time, courts were strong defenders of the principle of division of powers. For instance, in 1863, in *Ramon Rios*,[59] the supreme court ruled that a decree issued by the executive that overtook faculties of congress was constitutionally invalid since each one of the three departments of government is "independent and sovereign" in its sphere, and therefore its powers are "peculiar and exclusive."[60]

During the following years, the supreme court transitioned away from the requirements imposed by the division-of-powers model to a rather lax authorization to the president to surpass congress in cases of emergency.[61] Some scholars were strongly opposed to the constitutionality of emergency decrees, but others, based upon an interpretation of article 23 of the constitution, argued that the president, as the chief of the administration and the government, had the power to issue emergency decrees when that was required to preserve the "survival of the state."[62] In 1990, the supreme court had the opportunity to decide a case where an emergency decree was challenged. During President Menem's tenure, amidst a terrible economic

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56. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Ávalos, Hugo Mariano c. Czumadewski, Alejandro / ejecución de sentencia-incidente civil," 31/10/2006, pt. V, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=275748&fori=REA01125-401, *adopted by Ávalos*, Fallos (2007-330-2981), slip op. at 1.

57. *Id.* pt. IV.

58. *See* Art. 86(19), CONST. NAC. (1853) (authorizing the president to declare a state of siege with the consent of the senate *or* in the case of foreign attack). For discussion of the circumstances in which a state of siege can be declared, see *supra* note 7 and accompanying text.

59. CSJN, 4/12/1863, "Ramon Rios y otros / sentencia criminal," Fallos (1864-1-32).

60. *Id.* at 36–37.

61. *See, e.g.*, 1 GERMAN J. BIDART CAMPOS, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO [ELEMENTAL TREATY OF ARGENTINIAN CONSTITUTIONAL RIGHTS] 206–07 (1986) (explaining the late-nineteenth-century changes to the balance of powers and related attempts to limit individual rights under such circumstances, and characterizing the declaration of an emergency as a political act without judicial oversight).

62. *See, e.g.*, *id.* at 202 (recognizing the use of emergency powers in cases of internal disruption and related constitutional norms under article 23).

crisis, the supreme court in *Peralta*[63] validated Decree 36/90 that altered payments on deposit certificates.[64] The supreme court ruled that Decree 36/90, even when intruding upon the jurisdiction of congress, was constitutional because (1) there was a real and grave risk that jeopardized the survival of the state, (2) there was an urgent need to take measures to counteract that risk that required a celerity difficult to obtain in a complex and divisive body like congress, and (3) congress had not legislated otherwise.[65]

In 2000, there was a move away from *Peralta* and other cases that had allowed the president to issue decrees based upon emergency considerations. Early that year, the supreme court decided *Risolía de Ocampo c. Rojas*,[66] in which it found unconstitutional an emergency decree designed to protect the system of public transportation of Buenos Aires.[67] The decree suspended the execution of courts' decisions against bus companies and their insurers, and determined that the amounts owed to plaintiffs for tort cases should be paid in sixty monthly installments.[68] The supreme court recognized that it was true that the public transportation system and the insurance market were in crisis, that the breakdown of the public transportation system would negatively impact the general welfare, and therefore that the immediate adoption of extraordinary measures was required and justified.[69] However, the supreme court held that the economic crisis, by itself, did not justify the restriction of the constitutional rights of plaintiffs because there was no risk of a general economic disarray or danger to the survival of the nation.[70]

By the end of 2001, the supreme court changed direction again. Argentina faced a catastrophic economic crisis with interest rates in pesos spiraling beyond 600%, and a run on deposits almost crumbled the financial system.[71] The president issued Decree 1570/01 to reorder the economy, avoid the collapse of the financial system, and pacify the country ravaged by a deep social crisis.[72] Later, in January 2002, congress approved Law 25,561, declaring a public emergency in "social, economic, administrative,

63. CSJN, 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía - B.C.R.A.) / amparo," Fallos (1990-313-1513).

64. *Id.* at 1521, 1556; *see* Spector, *supra* note 46, at 136 (noting that Decree 36/90 "converted time deposits into public bonds" in order to reduce public debt).

65. *Peralta*, Fallos (1990-313-1513, 1539, 1541).

66. CSJN, 2/8/2000, "Risolía de Ocampo, María José c. Rojas, Julio César y otros / ejecución de sentencia (incidente)," Fallos (2000-323-1934), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=118247&fori=RER00094.341.

67. *Id.* at 5–6.

68. Decree No. 260/97, Mar. 20, 1997, [28611] B.O. 1.

69. *Risolía de Ocampo*, Fallos (2000-323-1934), slip op. at 4–5.

70. *Id.*

71. *See* Horacio Spector, *Don't Cry for Me Argentina: Economic Crises and the Restructuring of Financial Property*, 14 FORDHAM J. CORP. & FIN. L. 771, 777–78 (2009) (comparing Argentina's 2001 economic crisis with America's Great Depression, and noting that interest rates in pesos reached 689% overnight).

72. Decree No. 1570/01, Dec. 1, 2001, [29787] B.O. 1.

financial and currency exchange matters."[73] Congress ended the convertibility of the peso, which from 1991 had guaranteed to every holder of Argentinian currency its conversion into dollars on a one-to-one basis.[74] Shortly thereafter, the president issued Decree 214/02, which adopted measures to address the emergency.[75] It was ordered that, among other things, deposits in banks and all other dollar-denominated debts be "pesified" and paid at maturity in pesos at an exchange rate of 1.40 pesos per dollar deposited or owed (plus an inflationary correction depending on whether the debtor was a financial institution or an individual).[76] At that time, the exchange rate was floating around 2.80 pesos per dollar, which meant that the pesification of debts cost many creditors (most of the nation, given that most long-term economic transactions were denominated in dollars) half to two-thirds of their financial wealth.[77]

In 2002, the attorney general disclosed that more than 200,000 injunctions had been filed against the emergency measures taken by the government.[78] Lower courts were generally opposed to the constitutionality of Decree 214/02 and therefore ordered banks to pay creditors in dollars. However, the supreme court in *Bustos c. Estado Nacional*,[79] after some of its members had been replaced,[80] recognized that the economic emergency justified the costs imposed upon creditors and decided that the decree was not constitutionally prohibited, even though the decree restricted remedies for vindicating property rights—which was the outer limit of previous emergency regulation—and the nature of those rights.[81]

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73. Law No. 25561, Jan. 6, 2002, [29810] B.O. 1.

74. *See* Spector, *supra* note 71, at 778 (explaining that the Argentinian congress enacted the Public Emergency and Exchange Regulations Reform Law 25,561 to remedy the economic crisis and end the convertibility system).

75. Decree No. 214/02, Feb. 3, 2002, [29830] B.O.

76. *Id.* arts. 2–3.

77. Spector, *supra* note 71, at 778–79.

78. *Id.* at 773.

79. CSJN, 26/10/2004, "Bustos, Alberto Roque y otros c. Estado Nacional y otros / amparo," Fallos (2004-327-4495), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=209491&fori=REB00139.391.

80. *See* Spector, *supra* note 46, at 142 (noting that the *Bustos* court included new members). In two cases decided prior to *Bustos*, *Smith* and *Provincia de San Luis*, the supreme court ruled against the pesification scheme. CSJN, 5/3/2003, "San Luis, Provincia de c. Estado Nacional / acción de amparo," Fallos (2003-326-417), slip op. at 38, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=175125&fori=ORS00173-385; CSJN, 1/2/2002, "Smith, Carlos Antonio c. Poder Ejecutivo Nacional o Estado Nacional / sumarísimo," Fallos (2002-325-28), slip op. at 10, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=154700&fori=PVB00032.381; *see also* Spector, *supra* note 46, at 141–42 (describing the court's actions). Some commentators have speculated that these decisions might have been motivated by the judges' desire to avoid impeachment proceedings. *See, e.g.*, Spector, *supra* note 71, at 786 (noting that the *Smith* decision was an "apparent preemptive strike" by the court's judges to deter their own impeachment).

81. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Bustos, Alberto Roque y otros c. Estado Nacional / amparo," 22/10/2004, pts. X to XI, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=209490&fori=REB00139.390, *adopted by* CSJN, 26/10/2004, "Bustos, Alberto Roque y otros c. Estado Nacional / amparo," Fallos (2004-327-

Curiously, in 2008, the supreme court in *Benedetti c. P.E.N.*[82] turned away from *Bustos*.[83] The plaintiff's husband had bought a pension plan denominated in dollars, and, after his death, the plaintiff, the only heir, asked the insurance company to pay the pension in dollars.[84] The insurance company argued that Decree 214/02 had pesified all debts and therefore the pension should be paid in pesos, which represented a substantial cut in the pension.[85] The supreme court held that insurance companies were heavily regulated, that the right to cash the pension was protected by article 14 *bis* of the constitution, that the pensioner had denominated the pension plan in dollars to protect its purchasing power, and that it was not possible to transfer the costs of the pesification from the insurance company, which would need more pesos to pay the dollar-denominated pension to the pensioner because the insurance company had willingly assumed the risks of a long-term contract.[86] The court sided with the plaintiff and declared Decree 214/02 unconstitutional.[87]

In March 2009, along the lines of *Benedetti*, the supreme court decided *Álvarez c. Siembra Seguros*.[88] Plaintiff had bought a private retirement plan denominated in dollars and asked the insurance company for payment in said

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4495), slip op. at 3, 15, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=209491&fori=REB00139.391; *Bustos*, (2004-327-4495), slip op. at 4–5.

Sebastian Elias, in probably the best article ever written about the financial crisis in Argentina and the way the judiciary reacted to it, argues that *Bustos* was overturned in *Massa*. José S. Elias, *"Massa" y la saga de la pesificación: lo bueno, lo malo y lo feo* [*"Massa" and the Pesification Saga: The Good, the Bad and the Ugly*], Jurisprudencia Argentina [J.A.] (2008-II-1326) (citing CSJN, 27/12/2006 "Massa, Juan Agustín c. Poder Ejecutivo Nacional – dto. 1570/01 y otro / amparo ley 16.986," Fallos, (2006-329-5913)). Elias's view is that even when in *Massa* the supreme court did not explicitly declare Decree 214/02 unconstitutional, that unconstitutionality was necessarily implied since the holding of *Massa*—according to Elias the court ordered the financial institution to pay its depositors something close to the full amount deposited—contradicted the holding in *Bustos*. *Id.* at 1330, 1339, 1346–47. I disagree. My view is that *Massa* does not contradict *Bustos* since both *Massa* and *Bustos* made it possible for the financial institution to pay substantially less than it was contractually owed (and for that matter much less than the supreme court had allowed the debtor to pay in *Avico*). As Elias admits, however, even in *Massa* the defendant did not have to pay the full amount of the deposit (although it was ordered to pay the plaintiff something close to that) because the contractual interests accrued during the intervening years were not taken into account for the calculation of the debt. *Id.* at 1339, 1346–47. Failing to award the plaintiff the interest payments, which by that time were probably as large as the principal itself, could only be explained if we assumed that Decree 214/02 was constitutional.

82. CSJN, 16/9/2008, "Benedetti, Estela Sara c. Poder Ejecutivo Nacional / amparo," Fallos (2008-331-2006), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=294135&fori=REB01694-391.

83. *See id.* at 10 (declaring Decree 214/02 unconstitutional).

84. *Id.* at 1–2.

85. *Id.* at 2.

86. *Id.* at 2, 10.

87. *Id.* at 10.

88. CSJN, 3/3/2009, "Álvarez, Raquel c. Siembra Seguros de Retiro S.A. / ordinario," Fallos (2009-332-253), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=307851&fori=REA00858-420.

denomination once he reached retirement age.[89] The insurance company, as in *Benedetti*, argued that Decree 214/02 had "pesified" all debts and therefore that payment was complete if made in pesos.[90] The supreme court found that there was no difference between a pension plan and a private retirement plan, and therefore, it did not find reasons to depart from its precedent in *Benedetti* declaring Decree 214/02 unconstitutional and ordering defendant to pay the retirement plan in full in dollars.[91]

III. The Explanation of the Judicial Record

A. The Three Lines

What are the lines or directions, if any, of the rather inconsistent record of Argentinian courts with respect to cases in which the government has tried to restrict individual rights or circumvent constitutional procedures? Is it possible to make sense of this apparently contradictory story? These are important questions in themselves, but they are particularly important for us because their answers will help us understand what we can expect from judges and whether judges may be the solution to the empirical and theoretical problems that constitutional emergencies introduce.

We can group decisions made by courts into three different lines of rationales that could sustain the decisions as good law in years to come.[92] These three lines were never explicitly stated by any intervening court. Instead, they emerge as guiding principles in various decisions. The three lines are the following:

1. More deference should be granted to the government in economic emergencies than in security emergencies.
2. More deference should be granted to the government when the emergency is systemic than when the emergency is local.
3. More deference should be granted to the government when the emergency has just started than when the emergency has been ongoing for a significant period of time.

The First Line is nothing but a compact way of expressing the diverse treatments that judges and the supreme court have given to emergencies caused by security reasons vis-à-vis emergencies caused by economic ones. As I mentioned in subpart II(B), in *Avico*, the supreme court validated a three-year mortgage-payment moratorium and a ceiling of 6% for interest rates.[93] In *Peralta*, the supreme court found constitutionally permissible a restructuring of all financial credits for up to ten years and a substitution of

89. *Id.* at 20 (Fayt, J., concurring).

90. *Id.* at 20 (Fayt, J., concurring).

91. *Id.* at 1; *see also id.* at 20 (Fayt, J., concurring).

92. I deliberately speak of "lines" here because the decisions taken by the supreme court lack the required specificity to constitute juridical doctrines in the strictest sense.

93. *See supra* notes 45–46 and accompanying text.

the original financial debtor for the state.[94] And, finally, in *Bustos*, the court upheld (by way of pesifying all credits) a straight reduction of the capital owed.[95]

In each of these three cases, the background circumstances, at least as described by the supreme court, were increasingly problematic, thereby justifying increasingly heavier restrictions. The court determined that the emergency measures in *Avico* were required to prevent "disastrous consequences for the economy and its financial stability."[96] In *Peralta*, the court suggested that the emergency measures were necessary not only for the needs of the economy but also in order to "prevent a situation that presented a grave social risk."[97] The *Bustos* court warned against a future of "primitivism and rusticity" in the country if the banks were allowed to go bankrupt.[98] The use of emergency economic powers have come to constitute a rather permanent governmental device, not only in third-world countries but also in already developed ones.[99] Big losses for creditors are tolerated by countries with a strong tradition of respect for property rights,[100] but beyond that, the progeny of economic-emergency cases in Argentina show that the supreme court progressively legalized deeper encroachments on property rights during economic emergencies. This is a rather curious result because in the realm of emergencies due to security concerns, courts have been moving in the direction of fewer infringements on liberty.[101] Indeed, from *Granada* on, it seems clear that the court will not allow restrictions on liberty that do not satisfy the "brevity" requirement.[102] From *Bustos* on, it is also

94. *See supra* notes 63–65 and accompanying text.

95. *See supra* notes 75–81 and accompanying text.

96. CSJN, 7/12/1934, "Avico, Oscar Agustín c. de la Pesa, Saúl C. / recurso extraordinario," Fallos (1935-172-21, 77).

97. CSJN, 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía - B.C.R.A.) / amparo," Fallos (1990-313-1513, 1539).

98. CSJN, 26/10/2004, "Bustos, Alberto Roque y otros c. Estado Nacional y otros / amparo," Fallos (2004-327-4495), slip op. at 14, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=209491&fori=REB00139.391.

99. *See, e.g.*, Brian F. Crisp, *Presidential Decree Authority in Venezuela*, *in* EXECUTIVE DECREE AUTHORITY 142, 161–64 (John M. Carey & Matthew Soberg Shugart eds., 1998) (discussing the "near permanent" suspension of economic liberties in Venezuela between the 1960s and 1990s); Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 259 (2000) (arguing that the post-New Deal expansions of federal power in the United States were permanent extensions of the measures "originally promoted as temporary" and intended to combat the Great Depression).

100. *Cf.* Norman v. Balt. & Ohio R.R., 294 U.S. 240, 291–92, 313–16 (1935) (finding that losses for creditors possessing gold-denominated bonds were permissible and upholding a law prohibiting clauses in private contracts requiring payment in gold).

101. *See, e.g.*, *supra* notes 30–32 and accompanying text.

102. *See* CSJN, 3/12/1985, "Granada, Jorge Horacio / recurso de hábeas corpus en su favor," Fallos (1985-307-2284, 2309) (declaring that in order to be valid, an act providing for the suspension of rights requires that the suspension be brief).

clear that if the circumstances are hard enough, the court may allow property owners to endure uncompensated losses.[103]

As to the Second Line, the holdings of cases like *Rolón Zappa*, *Risolía de Ocampo*, and *Ávalos* show that for the supreme court, considerations of economic emergencies have less bite when they are invoked to cure damages that are local as opposed to systemic. Indeed, in *Rolón Zappa*, *Risolía de Ocampo*, and *Ávalos*, the supreme court invalidated laws that were beneficial only to certain individuals or groups but not to the general public.[104]

The Third Line explains *Benedetti* and *Alvarez*. *Benedetti* and *Alvarez* were both decisions in clear tension with *Bustos*. In these three cases, the defendants were financial institutions—banks in *Bustos* and insurance companies in *Benedetti* and *Alvarez*—and therefore the rationale invoked by the court to sustain Decree 214/02 in *Bustos* should have been used to decide for the defendants in *Benedetti* and *Alvarez* as well.

Emergency decrees sanctioned in 2001 and 2002 had pesified not only the debts but also the credits of the financial system in what was known as "asymmetric pesification."[105] Since the financial system's credits had been pesified, the government argued that the pesification of debts was the only way to prevent the collapse of the entire financial system.[106] In *Bustos*, the supreme court accepted the argument and reckoned that if the debts of the financial system were not pesified as mandated by Decree 214/02, banks would go bankrupt, provoking a future of "primitivism and rusticity."[107] Now, insurance companies, like banks, were mere financial intermediaries: they could only pay their debts provided that they could collect their credits. Furthermore, the supreme court in *Rinaldi c. Guzmán Toledo*[108] pesified a private debt, even when the systemic reasons favoring the pesification of credit did not apply.[109] Notwithstanding the powerful similarities among

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103. *See supra* notes 79–81.

104. The *Rolón Zappa* court invalidated Laws 18,037 and 21,864 because the rationale of these laws was to preserve the teachers' pension system as opposed to, for instance, the general functioning of the economic system. *See supra* notes 47–50 and accompanying text. Similarly, the *Ávalos* court invalidated article 61 of Law 25,565 because its protection of an insured party did not provide the public benefits that justified protecting the insurer. *See supra* notes 51–57 and accompanying text. The *Risolía de Ocampo* court rejected Decree 260/97 because the emergency that it addressed did not threaten to cause general economic disarray. *See supra* notes 66–70 and accompanying text.

105. *See* Spector, *supra* note 71, at 778 (describing the rate system as "asymmetric pesification" because restricting the exchange rate to well below the free-market exchange rate was a bane to banks, but a boon to local and foreign corporations).

106. *See supra* notes 75–76 and accompanying text.

107. *See supra* notes 79–81, 98 and accompanying text.

108. CSJN, 15/03/2007, "Rinaldi, Francisco Augusto y otro c. Guzmán Toledo, Ronal Constante y otra / ejecución hipotecaria," Fallos (2007-330-855), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=251060&fori=RHR00320-420.

109. *Id.* at 1–2, 25. In *Rinaldi*, the supreme court reasoned that the lender would have unfairly enriched itself if paid in dollars. *Id.* at 20. The argument is both factually and normatively problematic since, as a result of the declining purchasing power of pesos, many assets like real

Bustos, *Rinaldi*, *Benedetti*, and *Alvarez*, the court declared Decree 214/02 unconstitutional.[110] Although the court did not admit as much, I suggest that it was motivated by the fact that the crises in question were seven years past and the economy had been growing solidly for over five years in a row. The supreme court did not side with defendants simply because the emergency had been declared many years ago and the collapse of the financial system feared in 2002 did not occur.

B. Can Legal Theory Explain These Decisions?

The three lines are the directions taken by judges in their rulings. But beyond the way judges have decided, what can explain their decisions? Why have courts, as a general tendency, deferred to the government in the way they did in the many cases presented in the previous subpart? What explains the cases where courts held against the government?

David Dyzenhaus attributes it to "constitutional positivism," as he dubs the view according to which the only source of law is the legislature,[111] because it is in the legislature where collective judgments about the common good are best made.[112] The resistance to identifying what is binding as law by reference to wider considerations than those that could be acceptable to the authors of the norms in question is, according to Dyzenhaus, a core positivist idea that one is forced to maintain if, as positivism claims, legal rules can only be recognized by their source.[113]

In a thorough study of the judiciary during the dark years of military rule in Argentina and of the way in which the judiciary reacted to the emergency justifications the military juntas invoked to restrict rights and liberties, Mark Osiel argued that judges (in particular supreme court judges) were

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estate were negotiated in dollars. *See id.* at 45 (Argibay, J., dissenting) (noting that the mortgage at issue was negotiated in dollars). Further, there was no indication that the enrichment of the lender would have been unfair since there was a market for loans denominated in pesos, and thus if the parties had agreed upon a loan in dollars, the risk of devaluation of the peso was a risk assumed by the debtor. *See id.* at 45 (Argibay, J., dissenting) (asserting that the loan agreement contained clauses showing that the debtor had knowledge of the possibility of devaluation of the peso).

110. CSJN, 16/9/2008, "Benedetti, Estela Sara c. Poder Ejecutivo Nacional / amparo," Fallos (2008-331-2006), slip op. at 10, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=294135&fori=REB01694-391; *see also* CSJN, 3/3/2009, "Álvarez, Raquel c. Siembra Seguros de Retiro S.A. / ordinario," Fallos (2009-332-253), slip op. at 1, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=307851&fori=REA00858-420 (applying the holding of *Benedetti*).

111. In addition to the legislature, we could add the constitutional convention as another source of law without betraying Dyzenhaus's ideas.

112. DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 68 (2006).

113. *See id.* at 95 (describing the logic of Justice McHugh of the Australian supreme court in *Al-Kateb v. Godwin* (2004) 208 ALR 124).

inspired by legal realism.[114] He claimed that even when it was true that the court expressed its views with positivist rhetoric, it did so in order to somehow favor liberty simply because such rhetoric allowed the court to uphold preexisting rights under positivist Argentinian law.[115] Osiel claims that while the judiciary had some small victories, it eventually failed precisely because its decisions were couched in positivist rhetoric that deprived them of the theoretical basis to build resilience against executive intimidation.[116] Additionally, Osiel argues that positivism reduced the scope of the regime's misconduct and made it "appear much narrower than the natural law critique [would have] permit[ted]."[117] If resistance to oppressive law was to have any significant effect, Osiel argues, it was necessary for the court to favor "a more thoroughgoing critique of the regime's first principles[, which] ... would have required an invocation of general moral principles, of natural law."[118]

It is logically possible that sometimes positivist ideas may explain judicial capitulation to wicked legal regimes. Robert Cover may have been right when he blamed legal positivism for making it possible for northern judges to refrain from enforcing the Fugitive Slave Acts,[119] and it may be the case that in Argentina positivist rhetoric limited the efficacy of the courts. However, it is also logically possible that, as argued by many legal philosophers, positivism in the long run may better serve the cause of democracy and human rights than its philosophical contenders,[120] since dissociating law from any moral connection may prevent rulers from

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114. *See* Osiel, *supra* note 23, at 519 ("[T]he most significant feature of this judicial recalcitrance is the extent to which it operated almost entirely within the regime's own preferred jurisprudential form—legal realism.").

115. *See id.* at 523 ("[T]he Court was led to uphold the rights of citizens under sources of positive law that antedated the military seizure of power, even when the apparent purpose of a military measure was precisely to eliminate such rights.").

116. *See id.* at 524–26 (noting that the judiciary framed its decisions against the junta in light of positivist law rather than natural law, leading to narrower criticisms and outcomes that were more palatable to the junta). Lon Fuller also claims that it is reasonable to suggest that positivism was helpful to the Nazi Party's drive toward dictatorship in Germany. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 657–59 (1958). According to Osiel, historians have repeatedly shown the suggestion that particular legal philosophies are more or less prone to support authoritarian governments to be "empirically false." Osiel, *supra* note 23, at 495.

117. Osiel, *supra* note 23, at 525.

118. *Id.* at 551–52.

119. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 121–22 (1975) (describing how the prevalence of positivist legal thinking in the United States restricted the possibilities for a liberal judicial response to the Fugitive Slave Act of 1850).

120. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (asserting that establishing a firm rule of decision can embolden judges to protect individual rights); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 688–91 (1991) (arguing that rules and rule following suppress authoritarian impulses and are significant for maintaining separation of powers).

justifying their actions by reference to the laws they themselves enact and, in this way, make it more difficult for them to narcotize their people.[121]

C. *Can Facts About the Judiciary Explain These Decisions?*

From the discussion of the Argentinian cases above, it follows rather obviously that Argentinian jurisprudence has not comported with the conceptual underpinnings of positivism. Neither Dyzenhaus's nor Osiel's explanations are sufficiently nuanced to provide an account of the judicial record in emergency situations. This is no wonder since it seems very unlikely that a complex reality could be explained merely by juridical ideals.

Judges are trained and expected to adjudicate claims between the state and its subjects when the state aims to carry out decisions that seem to violate individual rights or, conversely, not to carry on policies that seem to be required by individual rights. Judges are also trained and expected to adjudicate claims between individuals whose rights conflict with one another in particular circumstances. As a consequence of their institutional training, judges develop a certain viewpoint, which for simplicity I will call the "View from Rights." The main tenet of the View from Rights is that all judicial conflicts can be successfully adjudicated on the basis of rights. This tenet rests on two assumptions. The first is that each individual right may be successfully interpreted, using the tools of textual analysis, drafter's intent, and traditional forms of interpretation. The second is that these rights may be ordered into a coherent whole on the grounds of their relative importance.

Now, a constitutional emergency is a circumstance in which the very nature of the problem we confront seems to displace the View from Rights. We are in an emergency precisely when we find that reasoning confined by the View from Rights may jeopardize, if not the rights themselves, other important explicit or underlying aspirations of the constitutional text. Obviously, there are cases in which the claim that we are in a constitutional emergency may be fraudulent or an attempt to legitimize sheer power. Moreover, one may think that constitutional emergencies are an empty category. But, if one believes, as I do, that constitutional emergencies exist,[122] it is because one suspects that the View from Rights is not fertile

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121. *See, e.g.*, Liam Murphy, *The Political Question of the Concept of Law*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 371, 389–92 (Jules Coleman ed., 2001) (arguing that citizens living under a legal system in which law is overtly coupled to morality are more likely to acquiesce to any enacted rules, even rules that are actually immoral).

122. Sanford Levinson and Jack Balkin share this view, going so far as to identify three types of constitutional crises:

> Type one crises arise when political leaders believe that exigencies require public violation of the Constitution. Type two crises are situations where fidelity to constitutional forms leads to ruin or disaster. Type three crises involve situations where publicly articulated disagreements about the Constitution lead political actors to engage in extraordinary forms of protest beyond mere legal disagreements and political protests: people take to the streets, armies mobilize, and brute force is used or threatened in order to prevail.

enough to solve all the problems we may face or that the explicit or underlying aspirations of a constitution might be at stake in some situations.

The judiciary is not the place to find dexterity. Judges are not prone to view the conflicts they have to adjudicate from what we may call a "Foundational Point of View." The Foundational Point of View is more encompassing than the View from Rights since, in addition to a view of the underlying purpose of each of the individual rights involved and the rules that either order rights according to their relative importance or accommodate them into a coherent whole, it provides us with the highest visibility to the foundational aspiration of the constitution—more precisely, the aspiration to constitute a *demos* committed to the realization of its defining common ends (which in the Argentinian case are enshrined in the constitution's preamble). The difficulty for judges operating under the Foundational Point of View is the product of neither judges' deficient legal philosophy nor of their own personal weaknesses or limitations. Rather, it is a by-product of deep institutional factors related to the way in which courts are equipped and the mold in which they have functioned so far.

The judges' epistemic constraints are among the most prominent difficulties that affect the judiciary. Indeed, in most cases, judges simply lack the information or the time required to make an educated judgment from a point of view wider than the one they usually occupy in their day-to-day job.[123] Judges are, as recognized by the dissent in *Provincia de San Luis*, unable to do justice in cases requiring great "technical and factual complexity" or to handle "the examination of intricate financial and banking problems" required by cases like *Bustos*.[124] Furthermore, and connected with judges' epistemic restrictions, judges typically adjudicate cases that are canonically binary, in which a plaintiff sues a defendant for a solution to his claims and wants to obtain a remedy entirely from the defendant himself. This binary mode of functioning ill prepares judges to deal with situations in which the very nature of the problem prevents the defendant from providing the solution entirely by himself. Indeed, in cases like *Bustos*, where the cause of plaintiff's inability to honor its obligation "transcended the particular economic situation of each . . . [bank and] acquire[d] the dimension of a systemic crisis,"[125] judges find it very difficult to find the right solution since it really depends on a change of background

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Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 714 (2009).

123. *See* Osiel, *supra* note 23, at 547 n.238 ("Because he has limited time, energy, and imagination, the average judge is simply unable to derive a good-faith argument of rule, principle, or social policy for every conceivable result in most disputes that come before him.").

124. CSJN, 5/3/2003, "San Luis, Provincia de c. Estado Nacional / acción de amparo," Fallos (2003-326-417), slip op. at 162 (Belluscio, Boggiano, & Maqueda, JJ., dissenting), *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=175125&fori=ORS00173-385.

125. CSJN, 26/10/2004, "Bustos, Alberto Roque y otros c. Estado Nacional y otros / amparo," Fallos (2004-327-4495), slip op. at 12, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=209491&fori=REB00139.391.

circumstances or the administration of all-encompassing solutions that are well beyond the reach of any given defendant.[126]

Judges are aware of the impediments created by their epistemic and functional predicament. Thus, the Argentinian supreme court said in *Peralta*, echoing Holmes in *Lochner*, that judges are called to adjudicate, not to administer or to fix the economic policies of the public powers.[127] Judges also know that when the government invokes emergency considerations, a lot turns on the outcome.[128] In an emergency, as the supreme court has said, judges have to decide in an "extraordinary situation that hovers over the economic social order, with its burden of accumulated troubles, in the form of scarcity, poverty, penury or indigence, and creates a state of necessity that must be put to an end."[129] Indeed, in emergency cases, judges suffer an additional pressure to decide given the magnitude of the questions involved. This was recognized in *Galli*,[130] in which it was decided that pesification of the public debt was constitutional.[131] In *Galli*, Justice Zafforoni and Justice Lorenzetti, in a joint decision, argued that the emergency decree "weakens the commitment to law and contracts" and "destroys every calculation of risks and restricts economic functioning."[132] Nevertheless, they sustained the pesification emergency decrees, arguing that "prudence prevents the revision of the rationale offered by the government."[133]

The third fact is more parochial than the previous two. Judges in Argentina lack a supporting legal culture that could serve as an Archimedean

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126. *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871, 873 (N.Y. 1970) (confessing the limits on judicial relief stemming from the inability of the courts to fashion a holistic solution to problems of environmental degradation and the incapacity of the defendant to singlehandedly develop cleaner methods in the cement industry).

127. *See* CSJN 27/12/1990, "Peralta, Luis Arcenio y otro c. Estado Nacional (Mrio. de Economía - B.C.R.A.) / amparo," Fallos (1990-313-1513, 1552) (recognizing that there was a need for government action to address the economic condition, but stating that the court's function was not to decide on the remedy but rather to determine the necessity and reasonableness thereof); *accord* Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory . . . . [T]he accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution . . . .").

128. *See, e.g.*, Gerard D. Magliocca, The Gold Clause Cases and Constitutional Necessity 5–6 (Jan. 19, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707175 (asserting that the Supreme Court in Perry v. United States, 294 U.S. 330 (1935), "struggled with what to do when their best interpretation of the Constitution—that the United States could not devalue its own debt—would lead to chaos").

129. Spector, *supra* note 46, at 137 (quoting *Peralta*, Fallos (1990-313-1513, 1549)).

130. CSJN, 5/4/2005, "Galli, Hugo Gabriel y otro c. PEN ley 25.561 -dtos. 1570/01 y 214/02 / amparo sobre ley 25.561," Fallos (2005-328-690), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=221850&fori=REG02181.391.

131. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Galli, Hugo Gabriel y otro c. PEN ley 25.561 -dtos. 1570/01 y 214/02 / amparo sobre ley 25.561," 16/2/2005, pt. VII, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=221849&fori=REG02181.390, *adopted by Galli*, Fallos (2005-328-690), slip op. at 1.

132. *Galli*, Fallos (2005-328-690), slip op. at 28–29 (Zaffaroni & Lorenzetti, JJ., concurring).

133. *Id.* at 28.

point to sustain their resistance to the government.[134] Further, in Argentinian history there are not many instances of judges who successfully managed to convince other judges that their views are constitutionally correct and that those views therefore deserve to be adopted as sound precedent.[135] We certainly have some great dissents,[136] but (unfortunately) dissents rarely manage to become the official narrative of what our law is. In short, judges lack the incentives to adopt the hard alternative of resistance to the government.

Finally, judges know that they are incapable of solving systemic problems. The most that courts can do is prevent the government from doing whatever it wants or exhort the government to take some measures that courts find legally required. Generally, however, courts lack the resources and the authority required to organize courses of public action. Indeed, as shown in *Verbitsky*,[137] courts cannot require the government to use "specific strategies" to solve the problem at hand but may only require that the government take certain needs into account or to design some mechanism to protect certain individual rights affected by government action. In *Verbitsky*, the plaintiff brought a habeas corpus claim on behalf of all those detained in the overpopulated provincial commissaries and asked the court to take measures to ease detention conditions.[138] The supreme court ordered the province of Buenos Aires to inform the supreme court of any measures taken to ease the detention conditions.[139] The court further exhorted the province to conduct a dialogue where all those involved in the case could cooperate in the search for a solution respecting the rights of the detainees.[140]

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134. For example, the decisions of the Argentinian supreme court between 1976 and 1995 show strong evidence of strategic defection—in which "[t]he character of decisions depends not on the judges' sincere reading of the law, but on their ability to adjust their interpretation of the law in light of the values and preferences of the incoming government." Gretchen Helmke, *The Logic of Strategic Defection: Court–Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 296–98, 302 (2002).

135. The inability of judges to convince their colleagues is epitomized by the supreme court's decisions regarding the constitutionality of punishing the ownership of drugs for personal consumption. In 1978 in *Colavini* the supreme court declared the punishment constitutional, in 1986 in *Bazterrica* unconstitutional, in 1990 in *Montalvo* constitutional again, and in 2009 in *Arriola* unconstitutional again. CSJN, 25/8/2009, "Arriola, Sebastian y otros / causa no. 9080," Fallos (2009-332-1963), slip op. at 24, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=318764&fori=RHA00891-440; CSJN, 11/12/1990, "Montalvo, Ernesto Alfredo p.s.a inf. ley 20.771," Fallos (1990-313-1333, 1356–57); CSJN, 29/8/1986, "Bazterrica, Gustavo Mario / tenencia de estupefacientes," Fallos (1986-308-1392, 1462); CSJN, 28/3/1978, "Colavini, Ariel Omar / inf. ley 20.711 (Estupefacientes)," Fallos (1978-300-254, 269–70).

136. *E.g.*, CSJN, 7/12/1934, "Avico, Oscar Agustín c. de la Pesa, Saúl C. / recurso extraordinario," Fallos (1935-172-21, 79–97) (Repetto, J., dissenting); CSJN, 28/4/1922, "Ercolano, Agustín c. Lanteri Renshaw, Julieta / consignación," Fallos (1922-136-161, 180–93) (Bermejo, J., dissenting).

137. CSJN, 3/5/2005, "Verbitsky, Horacio / hábeas corpus," Fallos (2005-328-1146), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=222651&fori=RHV00856-381.

138. *Id.* at 1.

139. *Id.* at 54.

140. *Id.*

These four facts about the judiciary explain the three lines courts have adopted in cases in which the government invoked emergency considerations to restrict rights or circumvent constitutional procedures. Obviously, we should not expect to find pieces of judicial discourses to confirm this claim since judicial reasoning is often left unstated. However, it is not difficult to show that these four facts explain the way judges have decided. Judges will be more deferential to the government during economic emergencies than during security emergencies simply because economic emergencies (1) pose conflicts with rights granted for the greater good—property, for instance—that are less tractable from the View from Rights,[141] (2) open up problems of wider scope than those opened up by security emergencies, and thereby, more turns on the outcome in economic emergency cases, (3) have a weaker line of precedent with which to restrain the power of government, and (4) require the organization of immediate alternatives to prevent the frustration of the constitutional ideals at stake that judges are incapacitated to provide for.

The Second Line, according to which more deference should be granted to the government when the emergency is systemic and less when the emergency is local, is also explainable by the facts about the judiciary mentioned above. Local emergencies open up problems of narrower scope than those opened up by systemic emergencies, and therefore, intervention in local emergencies is less taxing for judges than intervention in systemic ones. Moreover, given the narrower scope of local emergencies, less turns on the outcome of the ways in which judges decide.

Finally, the Third Line, according to which more deference should be granted to the government when the emergency has just started than when the emergency is about to end, seems to be a natural corollary of the way in which courts are structured and the way in which judges perform their jobs. Indeed, recent emergencies open up problems of wider scope with higher epistemic uncertainties and impose heavier burdens on judges because more turns on the outcome.

IV. The Point of Law

If the only point of law was its contribution to individual rights, the above explanations for why judges uphold emergency decisions would be rather discomforting. A judicial record determined by structural

141. I am presupposing the plausibility of the explicating power of a distinction between rights that are granted entirely or almost entirely for the sake of the individual—liberty and the right of personal freedom, for instance—and rights that are granted to the individual for the sake of the greater good—property, for instance. One may resist the idea that property rights are granted to the individual for the sake of the greater good. You may argue that the right to property is a natural right. I am inclined to think such a claim can only be true in cases of personal property, but I find it difficult to reckon that the right to the use of our financial wealth, for instance, is categorically identical to our right to participate in the election of our government, to publish our ideas in the press, or to assemble.

considerations will make law's contribution to justice less significant than it could be otherwise since, it seems, judges and courts are the best forum for the realization of rights.[142] Indeed, if judges' decisions were the causal consequences of the way in which the judiciary works, it would not be very realistic to expect judges to be more militant in their defense of individual rights where emergency considerations are invoked, at least when the emergencies in question are economic, systemic, and new.

Dyzenhaus, the author with whom I take issue in this Article, thinks that law's worth is subservient to the value of rights and justice. He claims that the "rule of law," understood as the "rule of substantive principles," has normative priority over the "rule by law," understood as the view that government action is "in compliance with the rule of law" so long as there is "legal warrant" for the action.[143] Dyzenhaus accepts Hobbes's dictum that authority, not truth, makes law.[144] Therefore, he may feel improperly described as someone whose conception of law's worth is reduced to its contribution to the realization of rights and justice. Dyzenhaus claims that, on the one hand, legal authority, to be such, has to accept the moral and constitutive constraints of the rule of law, and on the other, the content of the rule of law has to be capable of being enforced respecting, among other things, "the equality of all of those who are subject to the law."[145] Both views are clear symptoms that, for Dyzenhaus, the ideal embodied in law, "legality" as he calls it, is substantive in nature (as opposed to procedural) and as such presupposes that law's value is primarily connected with rights and justice.[146]

Is the value of law exhausted by its contingent contribution to rights and justice and, therefore, should we be concerned by the resistance of judges to stopping the government from infringing upon our rights? Or, given that law is also valuable because it allows us to attain other important desiderata, should we not be dismayed at the lack of resistance by judges if we can find alternative institutional arrangements that also contribute to the realization of

142. *See, e.g.*, Demings v. City of Ecorse, 377 N.W.2d 275, 278–79 (Mich. 1985) ("[T]he courts are the best protectors of individual rights including enforcement of the right to fair representation." (citing Vaca v. Sipes, 386 U.S. 171, 182 (1967))); Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 318 (1990) ("The Court best effectuates its role by enforcing widely shared rights which are at risk from widespread, recurring governmental wrongdoing."); Book Note, *Natural Law and the Constitution*, 101 HARV. L. REV. 874, 878 (1988) (reviewing GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION (1986)) ("[T]he judiciary is logically the branch best suited for protecting rights and realizing ideals . . . .").

143. *See* David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2011, 2018 (2006) (defining rule of law and rule by law, and asserting that "one cannot have rule by law without the rule of law").

144. DYZENHAUS, *supra* note 112, at 12.

145. *Id.* at 12–13.

146. *See id.* at 7, 12–14 ("[A]ny plausible conception of the rule of law is one that both links procedural constraints to substantive values and requires that all three branches of government regard themselves as participating in a common project of realizing those values.").

said valuable desiderata? If this is the case, which other desiderata does law help us obtain? I have elsewhere defended the idea that law's value is associative.[147] That is, we value law (and we grant to it normative authority *qua* law somehow independent from its contingent contribution to rights and justice) because we value the particular kind of relationship that emerges among those that are bound by the law.[148]

The relationship among those bound by law that confers value to the law could be procedural; more precisely, it is the relationship that exists among subjects of the law when they are able to cooperate together in the common enterprise of collective self-government.[149] Others may defend the idea that the relationship in question is substantive and may assert that it exists among those that are bound by the law if their interests count equally under law.[150] I have suggested that both views, the first entirely procedural and the second entirely substantive, are somehow lacking and need to be complemented by one another.[151] Since a legal community is a particular association tied together both by the aspiration to build a common destiny, as the first view presupposes, and by the aspiration to provide for the interests of all of its members, as the second view suggests, the kind of relationship that should sustain the value of law should not be just procedural or just substantive, but a principled mix of both. Law's value should reside in its ability to create the relationship that exists among those that are bound by the law when they manage to count twice—first, as "makers" or authors of the law and second as "matter" or beneficiaries of it.

One should not despair, as Dyzenhaus does,[152] if judges defer to political authorities in emergency cases. Whatever the risk to rights and justice that less militant judges may create—which is debatable—there may be institutional arrangements different from courts that allow us to increment

147. *See* Carlos Rosenkrantz, *La autoridad del derecho y la injusticia económica y social* [*The Authority of Law and the Economic and Social Injustice*], 6 REVISTA DISCUSIONES [J. DISCUSSIONS] 17, 31–41 (2006), *available at* http://bibliotecadigital.uns.edu.ar/scielo.php?script=sci_arttext&pid=S1515-73262006000100003&lng=es&nrm=iso (arguing that law has value in allowing individuals to associate as a community and to enact mutually acceptable systemic change despite their differing views of which moral obligations exist and what gives value to life).

148. *Id.*

149. *See* Jürgen Habermas, *Multiculturalism and the Liberal State*, 47 STAN. L. REV. 849, 852 (1995) (emphasizing the priority of popular sovereignty over individual substantive rights since "addressees of law must be in a position to see themselves at the same time as authors of those laws to which they are subject").

150. *See, e.g.*, Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 64 (1985) (characterizing legal systems as involving a "good faith attempt" by lawmakers "to issue laws they believe to be just or in the common good").

151. *See* Rosenkrantz, *supra* note 147, at 36 (theorizing that a political community results from a combination of the procedural desire to shape a common destiny together and the conviction that community more easily provides substantive satisfaction of individual interests).

152. David Dyzenhaus, *The Puzzle of Martial Law*, 59 U. TORONTO L.J., 1, 56–57, 61 (2009) (arguing that since the point of a state is the dignified treatment of individuals subject to the law, judges who in times of emergency minimize the protection of substantive rights while emphasizing empty procedural formalities engage in "legitimizing a sham").

law's value *qua* law, help us gain expediency (something of great importance in constitutional emergencies), and protect rights as much as possible. With all the preceding in mind, I turn from legal theory to institutional and political design.

V. The Romans Had the Solution

Bruce Ackerman has offered an ingenious institutional mechanism of checks and balances for times of crisis that does not depend on the activism of judges to work.[153] His basic idea is to strengthen the legislative supervision of the president's inherent emergency powers (outside of some insulated zones of protected liberties—torture is a taboo, he claims[154]—where the president cannot act no matter what), requiring that the emergency measures be endorsed at incrementally shorter times by an escalating cascade of supermajorities in congress.[155] The "supermajoritarian escalator" seems to avert the danger of excessive decisionism, since it disaggregates the hurdles that the American President has to pass in order to have his views of how to solve the constitutional emergency enacted into valid law.[156]

Whatever its merits for the United States, the supermajoritarian escalator is not a good recipe for a country like Argentina. Ackerman's proposal has a very dysfunctional aspect since it attempts to reduce arbitrariness at the cost of offering minorities opportunities for strategic conduct. Indeed, the supermajoritarian escalator allows minorities to block the president, even when animated by disreputable reasons: for example, the inability of the president and the party in office to solve the constitutional emergency could improve a minority's chances of a better electoral performance.

The opportunities for strategic conduct that the supermajoritarian escalator affords different groups may be of no relevance in a country with a strong consensual political culture where every important political actor prioritizes compromise above her own political aspirations or ideals. But strategic conduct is very significant in a divisive country like Argentina, where there are very confrontational political parties and a wide and deep programmatic disagreement,[157] which makes it difficult for political actors to join in a common course of action. Indeed, we should try, as the Romans did, to reduce the incentives to abuse emergency powers by creating

153. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047–53 (2004).

154. *Id.* at 1073.

155. *Id.* at 1047–53.

156. *See id.* at 1048 (describing how the requirement for escalating legislative supermajorities would prevent a bare majority from normalizing emergency powers).

157. *See* Leslie F. Anderson, *Of Wild and Cultivated Politics: Conflict and Democracy in Argentina*, 16 INT'L J. POL., CULTURE & SOC'Y 99, 100 (2002) ("In Argentine politics one can still see wild and savage vestiges of authoritarianism struggling side by side with newer varieties of political and social behavior . . . .").

institutions that impose costly ex post controls on the official allowed to wield emergency powers.[158]

In contemporary debate about emergency powers, many have paid close attention to the figure of the Roman dictator. Dictators were appointed by a consul provided that the senate had already recognized the need to appoint a dictator, and the dictator's authority ended when he fulfilled his task or the time fixed in his appointment had elapsed.[159] The dictator did not have the power to change the constitution.[160] Dictators were used by the Roman republic to combat external enemies, to put down civil insurrections, and, from 376 BCE onwards, to fulfill a number of functions when the accustomed remedies were insufficient.[161] For example, dictators took over some consular duties, like holding elections and ceremonial games, reading the auspices, and so on.[162] In general, the dictator could not pass legislation, though there were some dictators that did so.[163]

Much less attention has been paid to another Roman practice, the *senatus consultum ultimum.* Machiavelli and Rousseau both mentioned it in their studies of dictatorship[164] but few other authors interested in the study of emergency have paused to investigate the pros and cons of this institution. The *senatus consultum ultimum* was a decision by the senate to authorize the consul to do whatever he deemed necessary to protect the republic and to eradicate the threat that menaced it.[165] The consul, then, would have ample power to solve the emergency, but he would be subjected to an ex post facto evaluation of his performance[166] that, in some cases, ended with criminal charges, such as when Cicero was found guilty for violating due process in ordering the execution of some of the Catilinarias conspirators.[167]

The Roman way of dealing with emergencies—both the dictator and the *senatus consultum ultimum*—has been praised for reducing the incentives of those officials with the power to declare emergencies to abuse the emergency

158. *See, e.g.*, Ackerman, *supra* note 153, at 1046 (noting that Roman consuls entrusted with appointing a temporary dictator in times of crisis were not allowed to select themselves as dictator).

159. *See* NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 125–26 (2009) (explaining the process of appointing the Roman dictator).

160. *See id.* at 120–21, 126–27 (indicating that the Roman dictator was not historically understood to have the power to change the constitution).

161. *See id.* at 124–25 (describing the various roles of the Roman dictator).

162. *Id.* at 125.

163. *See id.* at 120–21, 126–27 (elucidating the historical understanding of the scope of the Roman dictator's power and citing examples of dictators who passed legislation).

164. *See* NICCOLÒ MACHIAVELLI, *Discourses on the First Ten Books of Titus Livius*, *in* THE PRINCE AND THE DISCOURSES 99, 204 (Christian E. Detmold trans., Random House 1950) (c. 1517) (describing the Roman practice of granting emergency power to the consuls instead of a dictator); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 171, 173 (Maurice Cranston trans., Penguin Books 1968) (1762) (noting that giving emergency powers to the consul was one of the methods of dictatorship in Rome, and providing the example of when Cicero was granted such powers).

165. LAZAR, *supra* note 159, at 147.

166. *Id.* at 148.

167. *Id.*

powers for their own benefit.[168] Indeed, what Ferejohn and Pasquino have called the "heteroinvestiture"—that is, the fact that the official in charge of the emergency could not declare the emergency himself and that he was appointed by someone else—prevented the self-serving declaration of an emergency.[169] But the institution of the *senatus consultum ultimum* had an additional virtue because subjecting the consul to an ex post evaluation of his job reduced the risk that the dictator would act arbitrarily without affording strategic political actors the ability to interfere with the solution to the crisis.

Let us return to Argentina. The current Argentinian constitution allows the president to issue emergency decrees during exceptional circumstances if it is impossible for congress to comply with the established procedure for enacting laws, provided that the president does not issue decrees regulating political parties or criminal, tax, or electoral matters.[170] Article 99(3) requires that emergency decrees be signed by all the members of the cabinet and by the chief of cabinet,[171] a non-elected official appointed by the president and removable by the joint decision of the majority of both houses of congress.[172] In addition, the constitution requires the chief of cabinet to send to the Permanent Joint Congressional Committee the emergency decrees issued by the president for consideration.[173] The Joint Congressional Committee, in turn, is required to submit the decrees to both houses of congress within ten days for discussions and vote.[174]

The way in which the Argentinian constitution regulates emergency decrees is probably one of the worst in Latin America. Like the supermajoritarian escalator,[175] the Argentinian regulation has the potential to create deadlocks since, according to article 99(3), emergency decrees cannot survive without the cooperation of congress.[176] Moreover, article 99(3) does not even have the positive aspects of the supermajoritarian escalator since it does not in any way prevent the president from using the emergency powers capriciously.[177] Indeed, nothing in the constitution deters the president from using emergency powers in an unjustified way if he has the required majorities in one of the houses of congress.

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168. *See id.* at 128–29 ("In a different vein, the structure of informal incentives heavily favored good behavior on the part of dictators.").

169. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 227 (2004).

170. Art. 99(3), CONST. NAC.

171. *Id.*

172. *Id.* arts. 99(7), 101.

173. *Id.* arts. 99(3), 100(13).

174. *Id.* art. 99(3).

175. *See supra* notes 153–56 and accompanying text.

176. Art. 99.3, CONST. NAC.

177. *Compare id.* (codifying a procedure for the president to issue emergency decrees that lacks ex post incentives to encourage good behavior by the president in issuing emergency decrees), *with* LAZAR, *supra* note 159, at 147–48 (describing the *senatus consultum ultimum* and concluding that the device "relie[d] on . . . accountability after the fact").

Furthermore, the Argentinian regulation is particularly myopic because, in Argentina, congress has had to control the president. Due to particular features of Argentinian politics, congress had enormous difficulties in making the president comply with the law.[178] Given the strong party discipline that characterizes Argentinian politics and the robust political and institutional power of the presidency in our constitutional regime, it is illusory to think that the president will be controlled by his own political allies in congress.

There is much to learn from the Roman way to deal with emergencies. Indeed, inspired by the Romans, we could offer an institutional design that prevents, or at least minimizes, arbitrariness and decisionism without opening new opportunities for strategic action by political parties. Consider the following variant of article 99(3): the chief of cabinet, who according to the Argentinian constitution has to sign all emergency decrees issued by the president, could be censured and replaced by a new nominee appointed by the majority of the lower house with a tenure equal to the duration of the emergency decree or up to the next general election, whichever is shorter. This proposal would subject the president to a costly ex post facto control. Indeed, the president would pay a rather high price if she were deprived of the chief of cabinet she chose. Given the constitutional responsibilities of the chief of cabinet from then on, the president would have to negotiate all her major political decisions, including the budget, with someone that most likely does not share her political agenda.

Now, the ex post facto control I propose here—which should minimize the risk of arbitrariness and decisionism—does not come with the problems of the supermajoritarian escalator. My proposal clearly deters strategic behavior by the opposition. Indeed, the majority of the lower house, the group that according to my proposal has the ability to censure the chief of cabinet, only has the right to censure the chief of cabinet if it proposes a replacement. This "constructive veto" of the chief of cabinet has a great disciplinary aspect, since it forces the majority of the lower house to become part of the government and, with it, to take governmental responsibilities and to share in the fate of the government and the president. The majority of the lower house will govern through the chief of cabinet appointed by them, and it will have stronger incentives to reach productive agreements with the president and her party—at least stronger incentives than those it has under a supermajoritarian escalator where congress could just veto all presidential initiatives without paying any price for doing so. The constructive veto will make it very unlikely that the majority of the lower house will act only

178. *See* Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, *in* INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA 161, 165–66 (Arend Lijphart & Carlos H. Waisman eds., 1996) (explaining that because the Argentinian presidents do not need legislative confirmation of appointments and can enact decrees unilaterally, among other things, the legislature's power is limited).

guided by its more sinister purposes, since if it does so it runs the risk of dying by its own medicine.

Furthermore, my proposal of costly ex post facto control could be supplemented so as to obtain the most important aspiration behind Ackerman's supermajoritarian escalator. Indeed, the attractiveness of the supermajoritarian escalator is that by progressively granting to fewer people the power to evaluate the use of the emergency powers, more minorities will be protected against exploitation. This is not a negligible feature. Indeed, the protection of minorities is one of many reasons for having a constitutional democracy. My proposal provides for a superminoritarian escalator: when the emergency measures adopted by the president and the chief of cabinet last more than a given amount of time, at incrementally shorter times and each time a smaller minority—provided that it had opposed the use of the emergency powers from the start—could censure the chief of cabinet and appoint a replacement up to the duration of the emergency measures or the next general election. This addition, I think, gives my version of article 99(3) the ability to minimize the arbitrariness in which the president and the majorities may feel tempted to indulge in circumstances of dire need. The superminoritarian escalator empowers those who are more in need of power—the smaller minorities—and works as a shield that protects them from the tyranny of the majority.

This ex post facto control mechanism has many interesting advantages and fares better than alternative proposals. To start with, it is better than Dyzenhaus's dependence on judges—remember that Dyzenhaus insists that judges should always be able to review emergency decisions.[179] The ex post facto control mechanism does not require that judges do something that, at least in Argentina, they have not been able to do in the past. Judges have only a minor role in the scheme I suggest. Their role is limited to enforcing the provisions of the constitution that allow the appointment of the chief of cabinet, first by the majority of the lower house and then by smaller minorities each time if the emergency measures last.

Further, my proposal would relieve us of the problem of policing the declaration of emergencies. Indeed, most modern proposals—for instance, the idea of having an emergency board that declares the emergency[180]—have

179. *See* DYZENHAUS, *supra* note 112, at 4 (proposing that "judges have a constitutional duty to uphold the rule of law," even in emergency times when there "seem to be legislative or executive indications to the contrary").

180. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1856–65 (2010) (proposing a variety of potential solutions to the problem of "constitutional dictatorship," among which they mention an independent executive agency authorized to issue a formal declaration of emergency); Rachel Goodman, Note, *Imagining a Federal Emergency Board: A Framework for Legalizing Executive Emergency Power*, 85 N.Y.U. L. REV. 1263, 1265 (2010) (offering an "administrative body authorized to decide whether a qualifying emergency exists, thereby legalizing executive action rationally related to that emergency").

the problem of ensuring that the declared emergency is a real one. My proposal would not create that problem because it would deter the president from declaring an emergency that is not real since, by doing so, she could pay the high price of having to share her government with a chief of cabinet she might not like.

Finally, the ex post facto control mechanism I suggest here could contribute to the relationship whose existence makes law valuable. It would empower the opposition to the president to share with her in the government, establish an institutional structure that makes the existence of consent among political actors more likely, and involve more people in making the law.

VI. The Theoretical Problems Resolved

As I said in the Introduction, constitutional emergencies are interesting because they challenge our theoretical convictions—more precisely, they force us to rethink deeply held liberal beliefs. Constitutional emergencies seem to show that only power, not law and justice, makes our political communities able to endure moments of deep crisis. Therefore, power, not law and justice, the critics of liberalism would argue, should be granted the central place in the pantheon of our political virtues. This is, I think, the core of Schmitt's view,[181] and its importance lies in the fact that, if pre- and super-legal power are the ultimate sources of authority (rather than legal authority the ultimate source of power), the liberal view of the community as an association tied together by the aspiration to build a common destiny and to provide in common for the interests of all is doomed. We would be ultimately justified in, as Kant would have put it, taking the law into our own hands to do what each one of us thinks best meets our own understanding of what our political community happens to need.[182]

There is an obvious way in which liberalism could try to countenance Schmitt's challenge, and it is by arguing that during emergencies law still rules, since the power exercised by constitutional authorities during crises also derives its authority from law itself. It is law that enables the president or congress to adopt emergency measures that differ in procedure and substance from those that may be adopted by them during normal times. Constituted authorities are enabled by law to act, as it is best to obtain the expediency required to respond to emergencies. This being so, the only distinction between decisions adopted at normal times and those adopted at times of crisis is that the latter may go through, so to speak, short-cut procedures and may vary in substance. Notwithstanding these two differences, both types of decisions are equal, legally speaking, and could

181. *See, e.g.*, Dyzenhaus, *supra* note 143, at 2006 (contrasting Carl Schmitt's view that "[a] state of emergency is a lawless void . . . in which the state acts unconstrained by law" with the liberal view that desires "a world where all political authority is subject to law").

182. *See* Daniel M. Crone, *Historical Attitudes Toward Suicide*, 35 DUQ. L. REV. 7, 27 (1996) (summarizing three formulations of Kant's "categorical imperative").

thereby aspire to the same authoritativeness, since both are authored by the *demos* aiming at the realization of justice.

The dualist response, following Ferejohn and Pasquino, which suggests that there are two tracks of lawmaking—one for normal times and the other for emergencies—and that emergency laws authorized by the legal system are still valid, seems to be especially convincing where emergency measures are, as in Argentina, authorized explicitly by the constitution. When included in the constitutional text, emergency measures cannot undermine the liberal project because, after all, they are legally authorized. However, the idea that a constitutional provision "legalizes" emergency measures cannot by itself be a devastating argument for Schmitt's challenge, since it is not altogether clear that a legal authorization by itself can make what is authorized legal in something more than a merely formal sense.

This is precisely Dyzenhaus's view. He thinks that to legally authorize the executive, or congress for that matter, to exercise discretion during emergencies is not enough to protect the priority of law over power; therefore, it is not enough to save the liberal project from Schmitt.[183] A legal authorization of this sort will be merely a veneer of control on the political, a facade of legal priority, because what the executive or congress may approve will not necessarily be law but only an expression of executive (or congressional) will.

Dyzenhaus sees Schmitt's challenge as particularly poignant because, for him, law's value is about substance.[184] If one sees law's only point as its contribution to the realization of rights and justice, one will find it very difficult, as Dyzenhaus does, to accept the relaxation of the constraints and safeguards that we usually allow during constitutional emergencies—especially the relaxation of judicial review. In addition, one will encounter great difficulty reconciling law's aim with the idea of dual tracks of lawmaking. Said relaxation and dual tracking for legislation may prevent law from contributing as much as it could to the realization of justice and rights. But if we were to move away from the idea that law's worth is entirely conditioned upon its instrumentality in the realization of rights and justice and accept that law also has an associative value for its contribution to the particular relationship that exists among those bound by law, we could accept the dualist response. Dualism does not necessarily represent a smoke screen that covers the abdication of law to power but instead the recognition that the lawmaking process may need to adapt itself to the surrounding

183. *See* Dyzenhaus, *supra* note 143, at 2025 ("[A] clear statement rule is normatively vacuous unless judges presume that until the legislature tells them otherwise, the rule of law is fully operative. . . . [Judges must] reach conclusions that preserve the rule of law to the greatest extent possible . . . to avoid permitting the executive to operate with the form and thus legitimacy of the rule of law without being constrained by its substance.").

184. *See id.* (expressing concern with "permitting the executive to operate with the form and thus legitimacy of the rule of law without being constrained by its substance").

circumstances and that it may do so without losing what makes it a valuable way of organizing our communal life.

VII. Conclusion

There is an alternative approach to constitutional emergencies to that advanced by Dyzenhaus. Under this alternative approach, which is sometimes called "extralegalism" and which some authors attribute back to Locke,[185] emergency powers should be left "extralegal," so to speak, without constitutional or legal regulation and only subject to the control of the people. Obviously, a concluding Part is not the proper place to do justice to views on complex constitutional matters. However, here I do want to emphasize something about my own approach, for which extralegalism serves as an enlightening counterpoint. I have argued that the best way to respond to constitutional emergencies is through institutional arrangements like the *senatus consultus ultimum* that deter politicians from using emergency powers unless absolutely necessary. One of the arguments in support of my proposal lies in part in the recognition that other proposals for regulating the use of emergency powers expect too much from judges. Extralegalism, however, does not expect too much from judges, and extralegalists support the idea that emergency powers should be reviewed not by judges but instead by a mobilized citizenry. Given that extralegalism does not trust judges, more needs to be said for one to accept my version of article 99(3) rather than simply leave emergency powers unregulated in order to prevent their misuse. The hedge that my version of article 99(3) provides over extralegalism, and over proposals of judicial intervention for that matter, is that, while extralegalism relies on citizens in circumstances in which it is quite unlikely that they would have the information required to make an educated decision, my version grants the decision-making power to the one most qualified to know what to do in the dire circumstances of constitutional emergencies—more precisely, the president.

185. *See, e.g.*, Ross J. Corbett, *The Extraconstitutionality of Lockean Prerogative*, 68 REV. POL. 428, 429–30 (2006) (discussing the use of "extralegal power" under one common interpretation of Locke).

The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges

Rodrigo Uprimny*

Since the mid-1980s, Latin America has seen an intense period of constitutional change, as almost all countries either adopted new constitutions (Brazil in 1988,[1] Colombia in 1991,[2] Paraguay in 1992,[3] Ecuador in 1998[4] and 2008,[5] Peru in 1993,[6] Venezuela in 1999,[7] and Bolivia in 2009,[8] among others) or introduced major reforms to their existing constitutions (Argentina in 1994,[9] Mexico in 1992,[10] and Costa Rica in 1989[11]). The new Brazilian constitution of 1988 can be viewed as the starting point of this phase of reforms, which is still developing. Obviously there are important national differences. However, despite these national differences, this wave of constitutional reforms in Latin America seems to have some common features.

Despite the intensity of the recent constitutional changes in Latin America, I know of no text that has tried to systematically examine the common features of the development of constitutionalism in the region. There are important reflections on the constitutional evolutions of some specific countries, such as the works of Boaventura de Sousa Santos on Ecuador and Bolivia.[12] Other studies examine some aspect of Latin American

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1. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION].
2. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).
3. CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [PARA. CONST.].
4. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR 1998 (superceded 2008).
5. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.].
6. CONSTITUCIÓN POLÍTICA DEL ESTADO REPÚBLICA DEL PERU [PERU CONST.].
7. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [VENEZ. CONST.].
8. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.].
9. CONSTITUCIÓN NACIONAL [CONST. NAC.] (amended 1994).
10. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); *see* Jose Luis Soberanes Fernandez, *Mexico and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 435, 448–50 (discussing the 1992 amendments to the Mexican constitution).
11. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [COSTA RICA CONST.]; *see also* Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA, 47, 49–50 (Rachel Sieder et al. eds., 2005) (discussing the 1989 amendments to the Costa Rica constitution).
12. *See, e.g.*, BOAVENTURA DE SOUSA SANTOS, REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR [REFOUNDING THE STATE IN LATIN AMERICA: PERSPECTIVES FROM AN EPISTEMOLOGY OF THE SOUTH] 8–10 (2010) (analyzing the

constitutionalism, such as openness toward the recognition of collective rights for indigenous communities[13] and for international human rights law.[14] Finally, other studies compare the tension and harmony between constitutional reforms and state reforms driven by international financial institutions.[15] This Article aims to partially fill this gap, with the obvious limitations of trying to summarize constitutional changes that have been profound and complex in only a few pages. The purpose, then, is to point out the common trends and significant differences among recent Latin American constitutional changes in order to characterize these reforms and establish the main challenges to the construction of strong democracies in the region.

The above considerations explain the structure of the Article. Part I presents changes in the dogmatic parts of several Latin American constitutions in order to consider, in Part II, major changes in the organic provisions. These two Parts are essentially descriptive, emphasizing the coincident trends of reforms in different countries. By contrast, Part III includes more reflections and analysis. There, I attempt to characterize the basic features of this constitutional development and discuss whether the national differences are so profound that they lead not to national nuances, but instead to diverse constitutional tendencies in a region with different orientations. The Article

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constitutions of Bolivia and Ecuador within the context of legal sociology and a new "Epistemology of the South").

13. *See, e.g.*, Raquel Z. Yrigoyen Fajardo, *Aos 20 anos da Convênio 169 da OIT: balanço e desafios da implementação dos direitos dos povos indígenas na América Latina* [*20 Years of ILO Convention 169: Balance and Challenges of Implementing the Rights of Indigenous Communities in Latin America*], *in* POVOS INDÍGENAS: CONSTITUIÇÕES E REFORMAS POLÍTICAS NA AMÉRICA LATINA [INDIGENOUS COMMUNITIES: CONSTITUTIONS AND POLITICAL REFORMS IN LATIN AMERICA] 9, 31–32 (Ricardo Verdum ed., 2009) [hereinafter POVOS INDÍGENAS] (assessing quantitatively the constitutional provisions affecting indigenous communities in Latin America).

14. *See, e.g.*, Carlos M. Ayala Corao, *La jerarquía constitucional de los tratados relativos a derechos humanos y sus consecuencias* [*The Constitutional Status of Human Rights Treaties and Their Consequences*], *in* DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS: MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL [INTERNATIONAL HUMAN RIGHTS LAW: REPORT OF THE VII IBEROAMERICAN CONGRESS OF CONSTITUTIONAL LAW] 37, 37 (Ricardo Méndez Silva ed., 2002) [hereinafter DERECHO INTERNACIONAL] (tracing the evolution of international human rights in the constitutions of Latin American countries); Pablo Luis Manili, *La recepción del derecho internacional de los derechos humanos por el derecho constitucional iberoamericano* [*The Reception of International Human Rights Law by Latin American Constitutional Law*], *in* DERECHO INTERNACIONAL, *supra*, at 371, 371 (examining Latin American constitutional provisions concerning international human rights). *See generally* LA APLICACIÓN DE LOS TRATADOS DE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] (Martín Abregú & Christian Courtis eds., 1997).

15. *See, e.g.*, Rodrigo Uprimny, *Agendas económicas de modernización del Estado y reformas constitucionales en América Latina: encuentros y desencuentros* [*Economic Agendas of Modernization of the State and Constitutional Reforms in Latin America: Encounters and Misunderstandings*], *in* LOS PROCESOS DE CONTROL ESTRATÉGICO COMO PILARES DE LA MODERNIZACIÓN DEL ESTADO [THE PROCESSES OF STRATEGIC CONTROL AS PILLARS OF MODERNIZATION OF THE STATE] 191, 191–220 (Martha Lucía Rivera & Diego Arisi eds., 2007) (describing recent economic reforms in Latin America resulting from proposals by international financial organizations, and explaining the interaction between those reforms and constitutional reforms within the region).

concludes with some brief reflections on the possible significance of these constitutional changes and the challenges they pose to democracy and constitutional thinking.

I. Variations in Dogma: Recognition of Diversity, Expansion, and Protection of Individual and Collective Rights

A brief review of recent constitutional reforms shows that despite obvious national differences, most reforms share some common features such as the ideological principles of the state and the regulation of rights and duties of citizens. First, most reforms and new constitutions significantly change the understanding of national unity: they emphasize that unity is not accomplished by a homogenization of cultural differences, as some constitutional projects in prior decades tried to affect,[16] but by a sharp appreciation of differences and a greater approval of pluralism in all its forms.[17] As a consequence, many constitutions begin to define their nations as multiethnic and multicultural, and establish the promotion of diversity as a constitutional principle.[18] This is why we are facing a form of diversity constitutionalism.

Second, Latin American constitutional reforms generally tend to overcome certain religious tendencies in the legal systems of many countries that granted important privileges to the Catholic Church. New constitutions, when they are not clearly secular, tend to recognize equality between different religions, including indigenous religions.[19] The recognition of ethnic and cultural diversity is then accompanied by the inclusion of diversity and religious equality.

Third, and directly related to the above, the constitutional reforms give special protection to groups that have been traditional targets of

16. *See* Donna Lee Van Cott, *Latin America: Constitutional Reform and Ethnic Right*, 53 PARLIAMENTARY AFF. 41, 43 (2000) (explaining that, prior to the reforms in the 1990s, the constitutions of Latin America contained "official rhetoric [that] proclaimed the homogeneous nature of Latin American societies, based on the assumption that the distinctive cultural traits and identities existing in colonial Latin America had been integrated into a new hybrid type through miscegenation and assimilation").

17. *See id.* ("Seven Latin American constitutions contain sections . . . recognising the multiethnic, pluri-cultural and/or multi-lingual nature of their societies.").

18. *See, e.g.*, BOL. CONST. art. 1 (declaring that Bolivia is constituted as a state of "Pluri-National Communitarian Law" that is inter-cultural and founded on cultural pluralism); C.F. art. 215 (Braz.) (declaring that the state shall foster appreciation for and diffusion of cultural manifestations); C.P. art. 7 (Colom.) ("The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation."); PERU CONST. art. 2(19) (providing a right to ethnic and cultural identity); VENEZ. CONST. pmbl. (announcing the goal to establish a multiethnic and multicultural society).

19. *See, e.g.*, C.P. art. 19 (Colom.) (declaring all religious faiths and churches to be "equally free before the law"); PERU CONST., art. 2(3) (granting religious freedom and stating that people of all faiths are free to publicly exercise their faith).

discrimination, including indigenous and black communities.[20] Some countries even grant these groups special rights and differentiated citizenship by establishing special districts for their political representation, recognizing their languages as official languages, and granting them autonomy and proper judicial power in their territories so that they may resolve conflicts according to their worldviews.[21] Therefore, according to some analysts, these reforms not only move toward a pluralist idea of national identity but also incorporate elements and forms of differentiated and multicultural citizenship.[22]

This trend toward the recognition of diversity and the granting of special rights for indigenous communities is even more radical in the recent Bolivian and Ecuadorian constitutions, both of which suggest the existence of a nation of peoples or a multinational state, and constitutionalize conceptions from indigenous tradition.[23] Furthermore, these constitutions strengthen the recognition of autonomy of indigenous peoples to manage their affairs.[24] According to some analysts, this more radical orientation on the issue of nationality and the recognition of indigenous peoples makes the Bolivian and Ecuadorian constitutions part of a distinct and emerging constitutionalism.[25] These constitutional shifts differ from recent changes in other Latin American countries in that the changes go beyond the scope of liberal constitutionalism—even in its multicultural and multiethnic form—

20. *See* Peter Wade, *Identity, Ethnicity, and "Race," in* A COMPANION TO LATIN AMERICAN HISTORY 420, 486–89 (Thomas H. Holloway ed., 2008) (listing and discussing the constitutional reforms made in Latin American countries for the protection of indigenous and Afro-Latin people).

21. Colombia's constitution of 1991 was the first to recognize the application of justice by indigenous communities according to their customary law, but within limits that harmonize the state jurisdiction with the indigenous jurisdiction. C.P. art. 246 (Colom.). This regulation was followed by the constitutions of Bolivia, Ecuador, Paraguay, Peru, and Venezuela. BOL. CONST. art. 2; ECUADOR CONST. art. 57; PARA. CONST. art. 63; PERU CONST. art. 149; VENEZ. CONST. arts. 119–126. For a critical discussion of the scope and limits of the recognition of autonomy rights of indigenous people, see Anthony Stocks, *Too Much for Too Few: Problems of Indigenous Land Rights in Latin America*, 34 ANN. REV. ANTHROPOLOGY 85 (2005).

22. *See* Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 370–77 (1994) (discussing differentiated citizenship rights).

23. *See, e.g.*, BOL. CONST. art. 306 (stipulating that the economic model should be oriented to the well-being of all Bolivians); ECUADOR CONST. arts. 10–15 (recognizing respectively rights to peoples, nationalities, and nature, and rights of good life).

24. *See* ROBERT ANDOLINA, NINA LAURIE & SARAH A. RADCLIFFE, INDIGENOUS DEVELOPMENT IN THE ANDES: CULTURE, POWER AND TRANSNATIONALISM 241 (2009) (highlighting the "indigenous territorial administration" proposed under the new Bolivian constitution); *id.* at 50 (noting that "Ecuador's 1998 constitution recognized indigenous rights to collective territory, autonomy, and indigenous justice systems").

25. *See* Robert Albro, *Confounding Cultural Citizenship and Constitutional Reform in Bolivia*, LATIN AM. PERSP., May 2010, at 71, 72 (describing the approach of Bolivia's constitution to plurinational culture as "unprecedented" and recognizing that "[t]he extent of the historical transformation represented by Bolivia's radically multicultural constitution . . . should not be dismissed"); Marc Becker, *Correa, Indigenous Movements and the Writing of a New Constitution in Ecuador*, LATIN AM. PERSP., Jan. 2011, at 47, 60 (discussing how the Ecuadorian constitution is unique in being Latin America's first constitution to recognize a plurinational state).

and move toward a different constitutional form that is multinational, intercultural, and experimental.[26]

Fourth, almost all of the reforms are very generous in recognizing constitutional rights for the nation's inhabitants: the reforms incorporate demo-liberal political and civil rights (such as privacy, due process, freedom of expression, or the right to vote); widely established economic, social, and cultural rights (such as education, housing, and health); and even collective rights (such as the right to the environment).[27] In this regard, the Ecuadorian constitution is novel in that it not only recognizes previously unenumerated individual rights—e.g., the right to water[28]—but also recognizes the rights of nature, or *Pacha Mama*.[29] In addition, the new constitutions of Ecuador and Bolivia strengthened the wide recognition of collective rights for indigenous peoples much more than most other Latin American countries.[30]

Latin American countries have also differed in the mechanisms used to recognize individual rights. In some cases, such as Argentina, the mechanism is the direct and explicit constitutionalization of numerous human rights treaties.[31] In other countries, such as Brazil, the mechanism is to directly define and establish individual rights in the constitution.[32] Other constitutions, such as those of Colombia and Venezuela, use both mechanisms—not only constitutionalizing certain human rights treaties, but also establishing a comprehensive bill of individual rights directly in the constitution.[33] Regardless of the legal mechanism used, the trend and the results are similar: a considerable extension of constitutionally recognized rights beyond the previous constitutional texts.

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26. *See* DE SOUSA SANTOS, *supra* note 12, at 77, 123–28 (observing that changes are experimental); Agustín Grijalva, *O Estado Plurinacional e Intercultural na* Constituição *Equatoriana de 2008* [*The Multinational and Intercultural State in the Ecuadorian Constitution of 2008*], *in* POVOS INDÍGENAS, *supra* note 13, at 115–32 (observing that changes are multinational and intercultural).

27. *See, e.g.*, C.F. art. 6 (Braz.) (guaranteeing rights to health, nutrition, labor, and housing); ECUADOR CONST. arts. 66, 71 (guaranteeing rights to education, housing, health, and environmental sanitation).

28. ECUADOR CONST. art. 12.

29. *Id.* art. 71 ("Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes."). While the constitution provides a right to nature as a formal, legal subject, the implications of this recognition are not yet clear.

30. *Compare* BOL. CONST. art. 2 (guaranteeing autonomy and self-determination for indigenous peoples), *and* ECUADOR CONST. art. 57 (enumerating the rights of indigenous communities, peoples, and nations), *with* CONST. NAC. (Arg.) (lacking guarantees and declarations for indigenous peoples), *and* C.P. (Mex.) (lacking guarantees and declarations for indigenous peoples).

31. *See* Art. 75(22), CONST. NAC. (Arg.) (incorporating various human rights treaties and stating that they are to be understood as complementing the rights and guarantees of the Argentinian constitution).

32. *See* C.F. arts. 5, 8 (enumerating individual rights).

33. *See* C.P. arts. 11–15, 93 (Colom.) (enumerating many specific rights, and incorporating international human rights treaties ratified by Colombia); VENEZ. CONST. arts. 23, 43–129 (giving ratified treaties the same legal weight as the constitution, and listing myriad individual rights).

A fifth common feature of Latin American constitutional reforms is the openness of the domestic legal system to international human rights law, particularly the special and privileged treatment of human rights treaties.[34] This special treatment has led to the application of international human rights standards by national courts through mechanisms such as the "constitutional block," which has acquired a special meaning in Latin America.[35]

Sixth, the recognition of multiculturalism (or even multinationalism) and the competence of indigenous jurisdictions, along with openness to international human rights law, has resulted in heightened pluralism in Latin America.[36] This heightened pluralism has led to the erosion of both the traditional system of legal sources and the central role played in the past by law and government regulation within national legal systems.[37]

Seventh, many constitutions express a strong commitment to equality, not only prohibiting discrimination on grounds of race, gender, and other factors, but also ordering special affirmative action policies to make equality real and effective.[38] In particular, several reforms explicitly set terms of equality and nondiscrimination between men and women, meaning that Latin American constitutionalism authorizes—or even requires—the adoption of certain gender approaches in public policy and legal developments.[39]

Eighth, the generous recognition of rights of various traditions—liberal, democratic, and socialist—led several countries to use ideological formulas similar to those developed in postwar European constitutionalism as the framework of new Latin American legal organizations.[40] The use of this

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34. *See* Ayala Corao, *supra* note 14, at 44–48 (observing the relationship between international human rights treaties and providing examples where international human rights norms have a superior value to the internal rights); Manili, *supra* note 14, at 371, 408 (discussing the prevalence of international human rights law and, for example, the references in the Venezuelan and Guatemalan constitutions to international human rights law).

35. *See* RODRIGO UPRIMNY YÉPES, BLOQUE DE CONSTITUCIONALIDAD, DERECHOS HUMANOS Y PROCESO PENAL [CONSTITUTIONAL BLOCK, HUMAN RIGHTS AND CRIMINAL PROCEDURE] 53–62 (2006) (discussing the adoption and integration of international human rights treaties within Latin American constitutions).

36. Yrigoyen Fajardo, *supra* note 13, at 26, 28.

37. *Id.* at 27.

38. *See, e.g.*, Art. 37, CONST. NAC. (Arg.) ("Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system."); C.P. art. 40 (Colom.) ("The authorities will guarantee the adequate and effective participation of women in the decision levels of the Public Administration.").

39. *See, e.g.*, C.F. art. 7, cl. XX (Braz.) ("[T]he following are the rights of urban and rural workers: . . . protection of the job market for women through specific incentives, as provided by law[.]").

40. *See* FERRAN REQUEJO COLL, LAS DEMOCRACIAS: DEMOCRACIA ANTIGUA, DEMOCRACIA LIBERAL Y ESTADO DE BIENESTAR [THE DEMOCRACIES: TRADITIONAL DEMOCRACY, LIBERAL DEMOCRACY AND THE WELFARE STATE] 128–43 (1990) (chronicling the transition from a liberalist to a social welfare model in Europe and the United States); Rodrigo Uprimny, *Constitución de 1991, estado social y derechos humanos: promesas incumplidas, diagnóstico y perspectivas* [*1991 Constitution, Social State and Human Rights: Unfulfilled Promises, Diagnosis and Prospects*], *in*

legal definition of state was not mechanical; it not only has significant national variations, but also incorporates varying nuances of the framework expressed in Europe in the 1950s.[41] For example, some texts incorporate the idea that the nation is not only a social state subject to the rule of law but also one of justice and rights, apparently to emphasize the importance of finding a just social order that covers all rights.[42] Other texts, such as the constitutions of Ecuador and Bolivia, introduced a search for new definitions of the type of state, leaning away from European traditions, and instead introducing their own search for constitutional formulas.[43]

Ninth, most of the reforms attempted to ensure that fundamental rights would have practical effects instead of being merely rhetorical, which explains why protection and warranty mechanisms of such rights were extended. Thus, many reforms created forms of direct judicial protection of rights—such as the writ for legal protection of fundamental rights (*acción de tutela*)[44]—or strengthened existing mechanisms.[45] Several countries also created or reinforced constitutional justice.[46] Additionally, most of the new

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EL DEBATE A LA CONSTITUCIÓN [THE DEBATE OVER THE CONSTITUTION] 55, 63–66 (2002) (explaining that social welfare is an integral part of the legal model embodied in the 1991 constitution). While there is not a direct translation of this concept into English, it represents a state that respects the rule of law but also recognizes social or welfare rights. This is commonly referred to as *Estado social de derecho* in Spanish, *Etat social* in French, or *sozialer Rechtsstaat* in German.

41. *See, e.g.*, C.F. art. 1 (Braz.) (identifying human dignity as a founding principle of the state); C.P. art. 1 (Colom.) (stating that the country is founded on respect of human dignity); PARA. CONST. art. 1 (recognizing human dignity as a founding principle); VENEZ. CONST. art. 2 (identifying social responsibility as a value of the state and noting the preeminence of human rights).

42. *See, e.g.*, C.F. art. 3 (Braz.) (listing the development of a just society and the eradication of social inequity as chief goals of the republic); VENEZ. CONST. arts. 1–2 (declaring that Venezuela is a social state of law, founded on the values of "freedom, equality, justice, and international peace").

43. *See supra* notes 23–26 and accompanying text (discussing the unique constitutional structure of Ecuador and Bolivia).

44. A *tutela* is a complaint that any citizen can bring before any judge in order to seek an immediate injunction against actions or omissions of any public authority that the citizen claims violated his fundamental constitutional rights. For example, article 86 of the Colombian constitution of 1991 created the writ for legal protection of fundamental rights as a mechanism for direct protection, and other mechanisms, such as class actions, for the protection of collective rights. C.P. art. 86 (Colom.). The Brazilian constitution incorporated a number of rights-protection instruments, such as the *mandado de segurança*. C.F. art. 5, cl. LXIX (Braz.).

45. *See, e.g.*, C.P. art. 214.2 (Colom.) (preventing the suspension of human rights and fundamental freedoms during states of exception); *see also* Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT'L L. 139, 147 (1992) (describing the restrictions placed on presidential powers to suspend fundamental rights).

46. For a systematic view of the structures of constitutional justice and rights protection in Latin America, see generally NORBERT LÖSING, LA JURISDICCIONALIDAD CONSTITUCIONAL EN LATINOAMÉRICA [CONSTITUTIONAL JURISPRUDENCE IN LATIN AMERICA] (Marcela Anzola Gil trans., 2002).

constitutions created forms of ombudsmen (under various names), who are responsible for the promotion and protection of human rights.[47]

Finally, most of the reforms proposed reassessment of the economic role of the state. On this point, it is not easy to find a common trend in the various constitutions, as there are significant national differences. For example, texts like the Peruvian constitution—which was made under the Washington consensus[48]—tend to contain more pro-market mechanisms, while texts like the Ecuadorian or Bolivian constitutions significantly strengthen the state's role in the economy and even have anticapitalist trends.[49] However, the amended texts and new constitutions do not have complete clarity on this point. In fact, many constitutions—like the Colombian constitution of 1991—contain features that both expand and reduce government intervention and redistributive functions.[50]

II. Changes in Participation Mechanisms and in the Institutional or Organic Parts

The constitutional reforms of the last two decades also brought significant changes in both the mechanisms for citizen participation and the political and territorial organization of Latin American nations. First, most reforms were driven by the idea of expanding and strengthening democracy and citizen participation. Therefore, the reforms sought not only to restore representative democracy—itself momentous in overcoming military dictatorship—but also to create new spaces for citizen participation. The reforms achieved this in two different ways: first, through the recognition and expansion of direct-democracy mechanisms such as popular consultations and referendums;[51] and second, through the creation of citizen bodies to

47. *See, e.g.*, Art. 86, CONST. NAC. (Arg.) (stating that the ombudsman is an independent authority and outlining his or her mission, appointment, term length, and removal); C.P. arts. 281–282 (Colom.) (establishing an ombudsman in the Public Ministry and detailing his or her selection, term length, and functions); PARA. CONST. arts. 276–277 (specifying the responsibilities, appointment, length of term, and removal of the ombudsman); PERU CONST. arts. 161–162 (outlining the qualifications, method of selection, term length, and duties of the ombudsman).

48. *Cf.* Susan C. Stokes, *Democratic Accountability and Policy Change: Economic Policy in Fujimori's Peru*, 29 COMP. POL. 209, 211–12 (1997) (noting that future Peruvian president Alberto Fujimori, under whom the 1992 Peruvian constitution was formed, ran on a platform that borrowed heavily from the Washington consensus).

49. *See* DE SOUSA SANTOS, *supra* note 12, at 57–65 (discussing how the process of constitutional transformation in Ecuador and Bolivia inspired anticapitalist politics).

50. *Compare* C.P. arts. 49–51 (Colom.) (granting rights to housing and free healthcare for children), *with id.* art. 336 (Colom.) (restricting the government's ability to create monopolies).

51. For example, the Colombian constitution incorporates the plebiscite, the referendum, the popular consultation, the open forum, and the mandate recall. C.P. arts. 103–106 (Colom.). Likewise, the Venezuelan constitution provides for citizen participation through the election of public officials, the referendum, the popular consultation, the mandate recall, the legislative initiative (constitutional and constituent), the open forum, and the assembly of citizens. VENEZ. CONST. art. 70. In Ecuador, the popular consultation and the mandate recall are enshrined in articles 103 through 107 of its constitution. ECUADOR CONST. arts. 103–107. For a discussion of the rise

control public affairs (e.g., associations of users to oversee the management of public services).[52] In this regard, the Bolivian and Ecuadorian constitutions are significantly different, as they stimulate new forms of participation—which seek to overcome the limitations of liberal democracy—and incorporate the recognition of the community democracy developed by indigenous peoples.[53]

Second, several constitutions endeavored to explicitly recognize some form of specialized and autonomous electoral organization to ensure greater fairness and transparency of electoral processes.[54] In this sense, recent reforms have tended to reflect what some have called a Latin American model of electoral organization, in opposition to the European model where there is no independent electoral organization.[55]

Third, almost all of the constitutional reforms strengthened the process of decentralization. The number of local officials elected by popular vote was increased, and local authorities were assigned new powers, especially regarding social spending.[56] Additionally, mechanisms to economically empower local authorities were finally established, due in large measure to the transfer of resources from central to local governments.[57] However, it should be noted that the strengthening of territorial autonomy provoked intense debates in some constitutional processes. This was the case in Bolivia, where the debate revolved around the centralized management of money coming

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of direct democracy in the recent constitutional processes in Latin America, see Monica Barczak, *Representation by Consultation? The Rise of Direct Democracy in Latin America*, 43 LATIN AM. POL. & SOC'Y 37, 38 (2001).

52. *See, e.g.*, C.P. art. 318 (Colom.) (authorizing city councils to establish local administrative boards to oversee and control the provision of municipal services); VENEZ. CONST. arts. 184.1, 184.2, 184.6 (mandating the delegation of control over public works projects, social programs, and public services to community and neighborhood groups).

53. *See* BOL. CONST. art. 30 (recognizing the right of indigenous peoples to elect representatives in accordance with their own norms and procedures); ECUADOR CONST. art. 57 (recognizing the right of indigenous peoples to develop their own forms of social organization).

54. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 95 (Chile) (establishing the *Tribunal Calificador de Elecciones* [Elections Qualifying Court] to make independent determinations in election disputes); ECUADOR CONST. arts. 218–222 (establishing the *Consejo Nacional Electoral* [National Electoral Council] and the *Tribunal Contencioso Electoral* [Electoral Dispute Settlement Court], both of which have independent legal status and administrative, financial, and organizational autonomy).

55. *See* Jesús Orozco Henríquez, *The Mexican System of Electoral Conflict Resolution in Comparative Perspective*, 2 TAIWAN J. DEMOCRACY 51, 52–54 (2006) (comparing the "overwhelmingly Latin American" model of specialized electoral courts with various other electoral conflict resolution systems).

56. *See* Eliza Willis et al., *The Politics of Decentralization in Latin America*, 34 LATIN AM. RES. REV. 7, 11 tbl.1 (1999) (noting whether local and provincial officials of various Latin American nations are elected or appointed); *id.* at 13 tbl.2 (compiling revenues and expenditures as a percentage of the total for central, state, and local governments in various Latin American nations both before and after decentralization); *id.* at 25, 34 (describing new powers and responsibilities given to local governments in Argentina and Colombia).

57. *See id.* at 13 tbl.2 (illustrating the increase in local and state government spending as a percentage of total government spending in several Latin American countries).

from the exploitation of natural resources, where oil-rich regions like Santa Cruz faced the centralized claims of the government of Evo Morales and the indigenous movement.[58] This conflict threatened the viability of the constitutional process.[59]

Fourth, the reforms sought to reinforce public bodies that control state or public affairs, strengthening the autonomy of these bodies and their ability to audit and monitor. For example, the Venezuelan constitution established a whole new branch of power, the so-called citizen power, which includes bodies of control.[60] Meanwhile, the Colombian constitution established a set of controlling bodies, such as the Public Ministry (Procurator General and Defender of the People) and the Controller General.[61] These control institutions play a dual role in the reform processes because they serve as horizontal mechanisms of accountability seeking a better balance of powers,[62] and also as vertical forms of accountability that strengthen the ability of citizens to claim their rights.[63]

Fifth, in all constitutional processes in the region, this strengthening of monitoring bodies was accompanied by a common element: an effort to strengthen the judicial system. This strengthening of the judicial system was done not only to increase efficiency of crime prosecution and conflict resolution[64] but also to increase judicial independence, which was seen (correctly) as extremely poor throughout the region.[65] For the latter purpose,

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58. *See* John Lyons, *Bolivia Vote Likely Won't End Stalemate, Undermining Stability*, WALL ST. J., Aug. 11, 2008, at A6 (describing the conflict between Bolivia's president and the wealthy eastern provinces over the control of natural gas revenue).

59. *See id.* (describing the drafting of Colombia's new constitution as a "bloody affair" accompanied by violent clashes).

60. VENEZ. CONST. art. 273.

61. C.P. arts. 267, 275, 281 (Colom.).

62. *See* Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 61 (1994) ("In institutionalized democracies, accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official.").

63. Some of these control institutions, especially the Procurator General's Office and the Defender of the People, act before political bodies as spokespersons for the claims of individuals. *See* C.P. art. 277 (Colom.) (granting the Procurator General the power to intervene in judicial proceedings and render annual reports to congress); *id.* art. 282 (allowing the Defender of the People to intervene in criminal and civil actions, and present bills and reports to congress).

64. *See* Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas, *Las cifras de la justicia* [*The Statistics of Justice*], *in* ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA [JUSTICE FOR ALL? THE JUDICIAL SYSTEM, SOCIAL RIGHTS AND DEMOCRACY IN COLOMBIA] [hereinafter ¿JUSTICIA PARA TODOS?] 319, 377–80 (Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas eds., 2006) (discussing efforts to increase the efficiency of the criminal justice system in Colombia).

65. *See* Roberto Gargarella, *Recientes reformas constitucionales en America Latina: una primera aproximacion* [*Recent Constitutional Reforms in Latin America: A First Approximation*], 36 DESAROLLO ECONÓMICO [ECON. DEV.] 971, 972 (1997) ("Without a doubt, one of the most important concerns of the new regional constitutionalism was to ensure great judicial independence."). An example may be illustrative of the situation. In Argentina, independence was

a common mechanism was the attempt to remove the direct interference of the executive in the nomination and promotion of judges by creating autonomous management bodies for the judiciary.[66] These bodies, partly responsible for the selection of judges, are often referred to as high councils of the judiciary.[67] The strengthening of the judiciary sought not only to increase efficiency and independence, but also to attribute to this branch new responsibilities for the protection and guarantee of human rights and for the control of possible arbitrary actions of any political body.[68]

These processes of strengthening supervisory bodies and strengthening the judiciary were accompanied in many countries by a more comprehensive strategy to redesign the political system in order to achieve a better balance between state agencies and the traditional branches of government.[69] This type of reform would allow the country to overcome the excesses of presidential power. Therefore, a sixth significant result of constitutional reformation was a tendency to reduce certain presidential powers and to increase the level of control and decision-making authority wielded by the congresses.[70] This moderation of presidentialism was, however, limited, as none of the Latin American countries opted for parliamentary formulas.[71]

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deeply affected by the dictatorship and de facto governments, which supreme court judges many times justified via the so-called de facto doctrine. *Id.* Even during the periods of civilian rule, the government "systematically changed the composition of the majority of judges in the court, so as to always guarantee judicial leadership favorable to the preferences of the political regime in power (as was the case in 1947, 1955, 1958, 1966, 1973, 1983, and 1990)." *Id.*

66. *See* Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas, *Justicia, democracia y violencia en Colombia: la evolución del sistema judicial en las últimas dos décadas* [*Justice, Democracy and Violence in Colombia: The Evolution of the Judicial System During the Last Two Decades*], *in* ¿JUSTICIA PARA TODOS?, *supra* note 64, at 265, 310–13 (outlining the Colombian judiciary's move towards autonomy).

67. *See id.* (discussing the role played by the High Council of the Judiciary).

68. *See* JUAN CARLOS CALLEROS, THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA 40 (2009) (observing that judicial independence protects the rights of the citizenry by fostering an impartial judiciary that can check the other branches of government); ENCYCLOPEDIA OF WORLD CONSTITUTIONS 273 (Gerhard Robbers ed., 2007) ("The constitution of Ecuador gained more clout in 1996 when a Constitutional Court was created and given the power of judicial review of the constitutionality of all laws and administrative acts of all branches of government.").

69. *See* J. Mark Payne & Juan Cruz Perusia, *Reforming the Rules of the Game: Political Reform*, *in* THE STATE OF REFORM IN LATIN AMERICA 57, 60 (Eduardo Lora ed., 2007) ("In addition, decentralization has resulted in greater political, financial, and administrative autonomy for subnational levels of government, driven primarily by changes in the methods used for selecting subnational officers . . . .").

70. *See, e.g.*, JORGE I. DOMÍNGUEZ, DEMOCRATIC POLITICS IN LATIN AMERICA AND THE CARIBBEAN 81 (1998) (describing constitutional amendments in Colombia, Nicaragua, and Argentina, which increased checks on presidential power and "granted greater prerogatives to legislatures").

71. The only country where a possible transition to a parliamentary system was vigorously discussed was Brazil, but the formula was rejected in a referendum a few years after the constitution was adopted. *See* Lei No. 8.624, de 24 de Fevereiro de 1993, COL. LEIS REP. FED. BRASIL, 185 (2): 281–83, Fevereiro 1993 (Braz.) (codifying and setting the date for the 1993 national referendum to determine the form of government, including whether it should be a parliamentary or presidential system); *see also* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT

Additionally, the constitutions of the region reserved enormous powers for the president compared to the classic presidential model, such as that found in the United States.[72] Moreover, efforts to limit presidential supremacy and rebalance power were accompanied, paradoxically, by a general tendency to endorse the possibility of immediate presidential reelection (especially to choose charismatic rulers), as was the case in Argentina with Menem,[73] in Brazil with Cardoso,[74] in Peru with Fujimori,[75] in Colombia with Uribe,[76] and in Venezuela with Chávez.[77] These examples illustrate that efforts to restrain excessive presidential power in Latin America ended up being fairly moderate. Additionally, there are divergent processes regarding balance of powers and the relationship between the state and the economy, as some constitutional texts expressly sought to strengthen the presidential power. A significant example of this approach is the Ecuadorian constitution.[78]

A seventh aspect of the recent constitutional processes in Latin America at the institutional level is the tendency to recognize the existence of autonomous state agencies responsible for technical functions of regulation—especially in economic matters[79]—that did not fit within the classical power division. The recognition of autonomous state agencies in addition to the

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DEMOCRACY 8 (David Butler & Austin Ranney eds., 1994) (noting that the referendum results clearly favored a presidential over a parliamentary system by a 69% to 31% margin). However, a number of academics advocated the virtues of parliamentarism during the 1990s. *See, e.g.*, Rodrigo Uprimny, Op-Ed., *La crisis boliviana y la opción del parlamentarismo* [*The Bolivian Crisis and the Parliamentary Option*], SEMANA, Apr. 3, 2005, http://www.semana.com/opinion/crisis-boliviana-opcion-del-parlamentarismo/85625-3.aspx (suggesting the possible benefits of a parliamentary system).

72. Gargarella, *supra* note 65, at 978.

73. *See* John M. Carey, *The Reelection Debate in Latin America*, *in* LATIN AMERICAN DEMOCRATIC TRANSFORMATIONS: INSTITUTIONS, ACTORS, AND PROCESSES 79, 79 (William C. Smith ed., 2009) (listing Menem as the second Latin American president, after Fujimori, to enact a constitutional reform to secure reelection).

74. *See Brazil on Borrowed Time*, ECONOMIST, Nov. 8, 1997, at 37 (discussing the constitutional amendment that enabled Cardoso's reelection).

75. *See* STEFANIE MANN, PERU'S RELATIONS WITH PACIFIC ASIA: DEMOCRACY AND FOREIGN POLICY UNDER ALAN GARCÍA, ALBERTO FUJIMORI, AND ALEJANDRO TOLEDO 149 (2006) ("In 1993, the Peruvian constitution was manipulated to make a third re-election of Fujimori possible . . . .").

76. *See* Carey, *supra* note 73, at 79 ("Colombian President Alvaro Uribe negotiated a reelection amendment, then won a second term in a landslide in May 2006.").

77. *See id.* ("In 1999, newly elected Venezuelan president Hugo Chávez convoked a constituent assembly that declared itself sovereign, displaced the sitting congress, and drafted a new charter of government that extended the presidential term from five to six years and allowed for consecutive reelection. President Chávez stood for reelection the next year . . . .").

78. *See* KINTTO LUCAS, WE WILL NOT DANCE ON OUR GRANDPARENTS' TOMBS: INDIGENOUS UPRISINGS IN ECUADOR 5 n.7 (2000) ("In 1998 the popularly constituted National Constituent Assembly of Ecuador . . . introduced a series of constitutional reforms intended to tip the balance of power away from congress and towards the executive . . . .").

79. *See, e.g.*, C.P. arts. 267–268 (Colom.) (creating the Office of the Controller General and granting it "administrative and budgetary autonomy" to regulate the treasury and the economy); VENEZ. CONST. art. 318 (establishing the Venezuelan Central Bank, and charging it with stabilizing the national monetary system and harmonizing fiscal and monetary policy).

strengthening of control bodies and electoral organizations came with an attempt to reformulate and overcome the classical theory of the three branches of power: executive, legislative, and judicial.[80] These developments have not involved an abandonment of the idea of division of powers as an essential element of constitutionalism but instead have raised the possibility of providing other branches of power—as do the Venezuelan and Ecuadorian constitutions[81]—or of creating autonomous bodies that do not pertain to the traditional powers of the state.

III. Common Constitutional Trends and National Diversities

It is worth asking whether we are facing common trends among Latin American countries or if there are significant national differences. Moreover, we should examine whether the constitutional changes contribute to stronger and deeper democracies in the region.

A. Common Trends: A Transformative, Egalitarian, Participatory, and Pluralist Neoconstitutionalism?

It is possible to detect, at a more abstract level, certain common and novel traits of the Latin American constitutional orders in recent years. First, all systems show a commitment to some form of rule of law and constitutionalism—one that is both theoretical and practical. In the past decade, there have been no military uprisings, save the failed attempt to overthrow Chávez in 2002 and the coup in Honduras in 2009.[82] Several presidents have been ousted—including on several occasions in Ecuador and Bolivia—however none as a result of military intervention as in the past but through other mechanisms such as popular uprisings.[83] This consolidation of civil governments may seem like a minor achievement, but it implies a profound change in the Latin American political and institutional reality if one takes into account the frequency of military dictatorships in the region during the nineteenth and twentieth centuries. To some extent, Latin America is now enjoying its first true wave of constitutionalism.

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80. *Cf.* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997) (arguing that the adaptive nature of modern administrative law makes it both irreconcilable with traditional notions of institutional legitimacy and better positioned to capture the will of the people in a post-industrial democracy).

81. *See, e.g.*, ECUADOR CONST. art. 217 (forming the electoral branch of the government, charged with protecting the political rights of the citizenry); *id.* arts. 217–224 (describing and empowering the electoral branch of government); VENEZ. CONST. art. 273 (creating the Republican Ethics Council, which enforces the citizen power).

82. *See* Stephen Johnson, Op-Ed., *Chavez is Gone! No, He's Back!*, WALL ST. J., Apr. 15, 2002, at A16 (commenting on the failed military coup in Venezuela); Paul Kiernan et al., *Coup Rocks Honduras*, WALL ST. J., June 29, 2009, at A1 (reporting on the ouster of Manuel Zelaya by the military).

83. *See* Kiernan et al., *supra* note 82, at A8 (reporting on the ouster of Manuel Zelaya by the military); Mary Anastasia O'Grady, Op-Ed., *Ecuadorans Say "No Mas" to Gutierrez*, WALL ST. J., Apr. 22, 2005, at A13 (commenting on the congressional removal of President Lucio Gutierrez).

Second, a new and common trend in Latin American constitutionalism is the recognition and appreciation of pluralism and diversity in almost all fields. As we saw, this constitutionalism is indigenously guided, multicultural, or even multinational.[84] Additionally, it is a constitutionalism that fosters various economic forms: the market and state exist next to communal forms of economic production.[85] And, as already indicated, this constitutionalism leads to some legal pluralism, even at the level of legal sources.[86]

Third, and directly related to the above, the recent Latin American constitutionalism is also new in that it is aspirational or transformative with a strong egalitarian matrix. Indeed, it seems clear that the constitutional processes sought to deepen democracy and combat social, ethnic, and gender exclusion and inequality. In that sense, most of the reforms, using the terminology of Ruti Teitel, led to texts that are forward-looking rather than backward-looking.[87] Rather than trying to codify the existing power relationships, the constitutions outline a model of society to build going forward. In this sense they are, in the terminology of authors such as Mauricio García, "aspirational" constitutions[88] or, in the terminology of Boaventura Santos, "transformative" constitutions because they propose inclusive societies capable of bringing democracy and benefits to traditionally excluded sectors of Latin American societies by promising some level of rights and welfare for all.[89]

The transformative nature of recent Latin American constitutionalism has generally taken two tracks. First, the constitutions are rights rich, given that the recognition of collective, economic, social, and cultural rights—especially if they have legal protection—contributes to greater social equality and democratic transformation.[90] Second, the constitutions also posit that the transformation to a more just society is made through an extension of democratic participation mechanisms, for which they have built—in addition to

84. *See supra* note 18 and accompanying text.

85. *See, e.g.*, BOL. CONST. art. 30 (granting indigenous groups the right to practice their own economic system).

86. *See supra* note 36 and accompanying text.

87. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2056 (1997) ("In the prevailing contemporary paradigm, there is a strong claim for linkage between meaningful political change and constitutional change. The constitutional ideal is forward-looking; the purpose is to put the past behind and to move to a brighter future.").

88. *See* Mauricio García Villegas, *El derecho como esperanza: constitucionalismo y cambio social en América Latina, con algunas ilustraciones a partir de Colombia* [*Law as Hope: Constitutionalism and Social Change in Latin America, with Some Illustrations from Colombia*], *in* ¿JUSTICIA PARA TODOS?, *supra* note 64, at 201, 209–27 (surveying the benefits, costs, merits, and criticisms of "aspirational constitutionalism").

89. *See* DE SOUSA SANTOS, *supra* note 12, at 107–11 (summarizing transformative constitutionalism as observed in South America).

90. *See supra* notes 27–33 and accompanying text.

representative democracy—new spaces for democratic deliberation and mobilization.[91]

These two transformative vocations (the expansion of democratic participation and the recognition of new constitutional rights) explain two new features of recent Latin American constitutionalism: first, an effort to rethink and reformulate democracy, and second, Latin America's adoption of strong constitutional or neoconstitutional forms. On the one hand, many constitutions, without rejecting representative democracy, have tried to overcome it by providing spaces and new institutions of democratic participation. Citizens, in addition to electing and recalling representatives, may make decisions by direct means such as referendums, plebiscites, or popular initiatives.[92] Moreover, several constitutions, including more recent ones like those of Bolivia and Ecuador, have recognized and strengthened community forms of democracy—a trait closely linked to the autonomy of indigenous and other ethnic communities.[93] Therefore, some authors speak of forms of "demodiversity" or "intercultural democracy" that juxtapose representative democracy with a participatory and communal democracy, creating "one of the most advanced constitutional formulations in the world."[94]

On the other hand, another way of achieving the transformative efficiency of constitutions has been by strengthening their legal force. In fact, most of these constitutions aspire to be texts that effectively govern life in society, which is why they include constitutional justice mechanisms to ensure that the rights and welfare promises they make are not mere rhetoric, but are regulatory mandates with practical efficiency.[95] In that sense, the constitutional reforms of the 1990s introduced Latin America to what some authors call "neoconstitutionalism,"[96] or what others have dubbed "states of constitutionally based rights" (as opposed to "states of legislatively based rights").[97] We are thus facing strong forms of constitutionalism.

Finally, all of these features also explain certain common and formal characteristics of recent Latin American constitutions and their considerable extension in terms of comparative law. These new constitutions are not only more extensive than those they abolished but also, in general, are much more

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91. *See supra* Part II.

92. *See supra* note 51 and accompanying text.

93. *See supra* note 53 and accompanying text.

94. *See* DE SOUSA SANTOS, *supra* note 12, at 76–83 (discussing the development of pluralist constitutionalism and intercultural democracy in Bolivia and Ecuador).

95. *See supra* text accompanying notes 87–91.

96. *See, e.g.*, Miguel Carbonell, *Prólogo: Nuevos tiempos para el constitucionalismo* [*Prologue: New Times for Constitutionalism*], *in* NEOCONSTITUCIONALISMO(S) [NEOCONSTITUTIONALISM(S)] 9, 9–12 (Miguel Carbonell ed., 2003) (identifying the emergence of neoconstitutionalism in the recent past).

97. *See* Luigi Ferrajoli, *Pasado y futuro del estado de derecho* [*Past and Future of the State of Law*], *in* NEOCONSTITUCIONALISMO(S), *supra* note 96, at 13, 14, 20–22 (juxtaposing the traditional "state of legislatively based law," where those in power control the law, with the modern "state of constitutionally based law," where the law controls those in power).

extensive than the constitutions of other regions of the world, particularly those of developed capitalist regimes.[98]

B. Possible National Differences Between Merely Re-legitimized Constitutionalism and Genuinely Transformative Constitutionalism

The above features, which are common to many recent Latin American constitutional processes, give current systems a family likeness. It is thus possible to talk about contemporary Latin American constitutionalism as distinctive from previous Latin American systems or other forms of constitutionalism in the contemporary world. Therefore, I believe the similarities outweigh the differences among recent Latin American constitutional processes. Yet, I recognize that this is a controversial thesis since it is clear that there are significant national differences; if the differences are emphasized, one could speak of different theories of constitutionalism in the region. It is convenient then to explain these differences.

Schematically, we can differentiate the developments by taking into account (1) the general purpose and logic of the constitutional processes; (2) specific contents and orientations of the constitutions adopted; and (3) the impact of, and social and institutional practices derived from, these processes. With regard to the purpose of constitutional processes, it may be possible to distinguish between the more foundational constitutional processes that consciously tried to make a break with the past (e.g., Paraguay, Venezuela, Ecuador, and Bolivia) and the more transactional or consensual processes that sought to correct the defects of existing institutions while retaining some of their traditional elements (e.g., Argentina, Mexico, and Costa Rica).[99] In terms of constitutional contents, two themes seem to differentiate national trends: the relationship between the state and the economy, especially the market, and the issue of diversity and autonomy of ethnic communities. So on the one hand, it is possible to distinguish between more market-friendly Washington-consensus constitutions, such as the Peruvian

98. *See* Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 122–23 (2008) (recognizing the degree of economic and social rights in Latin American countries compared to less extensive provisions in the United States, and further noting that Latin American states are at the "forefront" of providing judicial access for rights violations); *see also* Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT'L & COMP. L. 1, 11–12, 107–08 (2004) (recognizing the awareness of social issues, human rights, and economic problems that new Latin American constitutions have engendered, and arguing that these constitutions are longer and more detailed than their counterparts in the post-Soviet republics). *But see* Esquirol, *supra*, at 76–77 (arguing that new Latin American constitutions are not more likely to reform economic life and the rule of law than their predecessors).

99. *Compare* DE SOUSA SANTOS, *supra* note 12, at 94–95 (summarizing the constitutional reforms in Bolivia and Ecuador as "revolutionary processes of a new type"), *with* MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 202–03 (2000) (describing how reforms in Argentina and Bolivia were influenced by political considerations, elites' interests, and a desire for institutional stability).

constitution, and more interventionist constitutions that (according to some views) propose an agenda that overcomes capitalism, like the Ecuadorian and Bolivian constitutions.[100] This is obviously not a minor difference, as the regulation of the relationship between state, society, and economy is an essential decision of the polity.

On the other hand, with the recognition of ethnic diversity, it is possible to find at least three different types of constitutionalism. Systems like those in Chile, Uruguay, and Costa Rica tend to maintain a liberal pluralism and do not recognize special rights for ethnic communities.[101] Others, like Colombia, tend to foster forms of multiethnic and multicultural constitutionalism, especially through the jurisprudence of the Constitutional Court.[102] Finally, the recent Ecuadorian and Bolivian constitutions go even further by establishing multinational and intercultural states.[103] These constitutions show significant national differences. There are still Latin American states that have not adapted their constitutions to new legal developments concerning indigenous peoples (including International Labor Organization Convention No. 169).[104] Constitutions that have advanced in this field may be characterized as "indigenous constitutions,"[105] yet there are

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100. *Compare* MOISÉS ARCE, MARKET REFORM IN SOCIETY: POST-CRISIS POLITICS AND ECONOMIC CHANGE IN AUTHORITARIAN PERU 3, 38 (2005) (observing that in 1990, "[President] Fujimori launched an extreme variant of the economic program that is advocated by the so-called Washington consensus" and, in 1993, the Democratic Constitutional Congress "crafted a new constitution that ... provided the legal framework for a market economy"), *with* DE SOUSA SANTOS, *supra* note 12, at 94 (noting the emergence of socialist economies in Bolivia and Ecuador).

101. *See* Cott, *supra* note 16, at 42–43 (noting that Uruguay's constitution guarantees fewer rights than do the post-1990 constitutions of eight other countries); *Voices from Costa Rica: Interviews by Andrew Reding*, 3 WORLD POL'Y J. 317, 317 (1986) (stating that "Costa Rica has enjoyed a long history of political pluralism"); Press Release, Special Raporteur on Human Rights of Indigenous People Addresses Commission on Human Rights, U.N. Press Release HR/CN/1079 (Aug. 8, 2004) ("Chile still has not undertaken [constitutional] reform in [the area of indigenous rights] and has not yet ratified the Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO)."); Roque Roldán Ortiga, *Models for Recognizing Indigenous Land Rights in Latin America* 7 (The World Bank Environment Department, Biodiversity Series Paper No. 99, 2004), *available at* http://siteresources.worldbank.org/BOLIVIA/Resources/Roque_Roldan.pdf ("Costa Rica does not have specific norms on indigenous peoples in its Constitution ....").

102. *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 80 & n.164 (1999) (describing the input of indigenous communities into the content of Colombia's constitution and the Constitutional Court's jurisprudence protecting these communities).

103. *See supra* notes 23–26 and accompanying text.

104. In a quantitative exercise, Raquel Yrigoyen assesses the percentage and diversity of constitutional provisions affecting indigenous peoples in Latin American countries—from those open to the indigenous such as Colombia and Ecuador, to very tough constitutions such as Chile and Uruguay. Yrigoyen Fajardo, *supra* note 13, at 31–34. For the provisions of the Convention, see Int'l Labor Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (June 27, 1989), *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169.

105. *See* Grijalva, *supra* note 26, at 116 (lauding Ecuador's move to formally recognize indigenous rights on a constitutional level); Silvina Ramírez, *Sete problemas do novo constitucionalismo indigenista: as matrizes constitucionais latino-americanas são capazes de*

significant differences among them. It is different to recognize certain differentiated citizenship rights in the context of a multiethnic, yet still unitary, national state—such as the Colombian constitution of 1991 and the Ecuadorian constitution of 1998[106]—than it is to establish a multinational state, which recognizes the self-determination of indigenous peoples.[107]

Finally, in terms of the impact, efficiency, and effectiveness of these reforms, performing an assessment is very difficult. It appears that none of the reforms were completely useless, yet none were radically transformative either. But countries differ not only in terms of the impact intensity of their constitutional reforms but also in the development of their constitutional texts. In certain countries, the impact of constitutional reforms has been more political, such as in Bolivia.[108] In other countries, like Colombia and Costa Rica, constitutional reforms have led to a new kind of judicial activism (especially from the constitutional courts) which has led to an important judicialization of politics; that is, many issues that used to be decided by the congress and the government are now decided by courts, so courts have a more direct influence over policies and politics.[109]

So there are important national differences that might lead one to think that there are two basic trends of national constitutional evolution in the region: in some countries, reforms have resulted in a truly new and transformative form of constitutionalism; in other countries, reforms or new constitutions have operated essentially as mechanisms for restoring the legitimacy of existing social and political orders, which remain unequal and exclusionary.

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garantir os Direitos dos Povos Indígenas? [*Seven Problems of the New Indigenous Constitutionalism: Are Latin Americans Able to Guarantee the Rights of Indigenous Peoples Through the Constitutional Matrix?*], *in* POVOS INDÍGENAS, *supra* note 13, at 213, 216 (giving examples of Brazil's effort to incorporate indigenous rights, including constitutional reforms, the ratification of ILO Convention 169, and the adoption of the U.N. Declaration on the Rights of Indigenous Peoples).

106. *See* C.P. art. 330 (Colom.) (granting indigenous councils the power to exercise various functions, subject to the constitution and the laws of the country); ECUADOR CONST. art. 57 (granting indigenous peoples the power to self-govern, subject to the limitations of the constitution and international agreements).

107. *See* Grijalva, *supra* note 26, at 121–23 (examining the national and multinational states created by constitutional provisions granting rights to indigenous people and communities); Ramírez, *supra* note 105, at 217 (examining constitutional provisions providing differentiated citizenship rights for indigenous communities).

108. *See supra* text accompanying notes 53, 93, 103 (describing protections of indigenous peoples in the Bolivian constitution and the constitutional establishment of a multinational state).

109. Rachel Sieder et al., *Introduction* to THE JUDICIALIZATION OF POLITICS OF LATIN AMERICA, *supra* note 11, at 1–2.

IV. Academic and Political Challenges of the New Latin American Constitutionalism

The recent constitutional development in Latin America poses significant political and academic challenges: (1) its originality and relevance, that is, whether the constitutional changes are able to respond to the democratic needs of the region; (2) its consistency, that is, whether there are insurmountable contradictions between the constitutions' components, whether the reforms are complementary elements, or whether the reforms are elements with significant but surmountable tensions; and (3) its effectiveness. These three challenges refer in turn to an academic challenge: the importance of accompanying these constitutional processes with an engaged theoretical reflection that strengthens the democratic potential of these reforms and reduces both the risk of the reforms being seen as authoritarian and the risk of the reforms systematically failing to fulfill their promises.

A. The Relevance or Irrelevance of the Reforms

A recurring constitutional debate in Latin America, dating back to the time of independence, concerns the authenticity of our constitutional processes; that is, whether institutions and systems have adapted to the social and political challenges of our nations, or whether our constituents have tried to copy institutions or ideas that may work in other contexts but are ineffective or produce adverse effects in our complex realities.[110] Obviously, these reforms are not about avoiding the use of comparative law or attempting certain institutional or regulatory transplants. It is natural for a country to try to learn from the constitutional experiences of others. The genuine question is whether constitutional considerations and proposed projects respond to the fundamental problems of society, even if the ideas and institutions are borrowed from other countries.

I assert that the recent Latin American constitutionalism is relevant because it has tried to address some of the fundamental problems of our societies—such as the precariousness of the rule of law;[111] the profound diversity and social and ethnic heterogeneity;[112] the weakness of the judiciary;[113] the persistence of forms of discrimination and of social, ethnic,

110. See, e.g., Simón Bolívar, Address Delivered at the Second National Congress of Venezuela in Angostura (Feb. 15, 1819), in 1 Selected Writings of Bolívar 173, 179–80 (Harold Bierck, Jr., ed., Lewis Bertrand trans., 2d ed. 1951) ("Does not L'Esprit des lois state that laws should be suited to the people for whom they are made; that it would be a major coincidence if those of one nation could be adapted to another; that laws must take into account the physical conditions of the country, climate, character of the land, location, size, and mode of living of the people; that they should be in keeping with the degree of liberty that the Constitution can sanction respecting the religion of the inhabitants, their inclinations, resources, number, commerce, habits, and customs? This is the code we must consult, not the code of Washington!").

111. *See supra* notes 27–30 and accompanying text.

112. *See supra* notes 23–26 and accompanying text.

113. *See supra* notes 64–68 and accompanying text.

and gender inequality;[114] and the massive violation of fundamental rights of the population[115]—all in the context of a globalized world with increasing environmental challenges. The formulas adopted may be controversial and inconsistent, as will be shown in the following subpart. However, with varying national intensities, there certainly has been an admirable constitutional-experimentation effort. This effort deserves to be analyzed and discussed.

B. The Consistency or Inconsistency of Constitutional Reforms

The constitutional reform efforts have not always been consistent, and the new Latin American constitutionalism is experiencing great tensions due to the simultaneous adoption of constitutional practices that may seem attractive when considered separately in the abstract but, when combined, can reinforce authoritarian tendencies in the region. For example, the adoption of forms of direct democracy like referendums or plebiscites (to overcome deficiencies of purely representative democracy) are important. However, if such changes are accompanied by a strengthening of presidential power—under the logic that it is necessary to strengthen a unified will capable of overcoming inequalities and exclusions—the combination can be explosive and negative, as it stimulates negative forms of democratic Caesarism. I therefore believe that Latin American constitutionalism must still overcome its tendency to engage in *caudillismo* (warlordism) and hyperpresidentialism if the region wants to achieve genuine mechanisms of participatory democracy.

Other fields involve no serious contradictions but do face tensions that deserve a systematic reflection. Due to space constraints, I will only briefly examine two momentous tensions: (1) the tension between different forms of democracy and (2) the tension that may arise from the desire to achieve both a strong and legally protected constitutionalism and strong democratic participation. As explained above, several recent constitutions incorporate different forms of democracy: representative, direct, and communal. At the same time, according to the distinction proposed by Nancy Fraser, these constitutions also seem to enshrine different principles of justice by seeking greater social equality and distributive justice (especially in the form of social rights) while also establishing recognition justice (especially in relation to indigenous peoples).[116] These different forms of democracy and principles of justice may come into strong tension, as illustrated by recent clashes between Ecuadorian President Correa and indigenous peoples regarding the

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114. *See supra* notes 19–22, 38–39 and accompanying text.

115. *See supra* notes 45–47 and accompanying text.

116. *See* Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age*, 212 NEW LEFT REV. 68, 69 (1995) (proposing a redistribution-recognition model to conceptualize "cultural recognition and social equality").

exploitation of mineral resources in indigenous territories.[117] Accordingly, a theoretical and practical challenge for the new Latin American constitutionalism is how to coordinate these various forms of democracy and justice.

Further tension arises when constitutions articulate a form of neoconstitutionalism and simultaneously stimulate democratic participation, as these efforts seem to point in opposite directions. Neoconstitutionalism is characterized by enhanced judicial protection of a very dense charter of rights, which results in constitutional court judges deciding issues that were previously discussed in democratic spaces.[118] Thus, it seems difficult, yet not impossible, to achieve strong constitutionalism along with both strong democratic deliberation and participation.

A brief typology of constitutional democracies, partly inspired by the theoretical models created by Roberto Gargarella,[119] sheds light on the difficulty in this field of new Latin American constitutionalism. Following Gargarella, the two critical variables to characterize different constitutional thought are (1) how much the constitutions recognize and protect fundamental rights, and (2) how much space the constitutions grant to democratic participation in order to make collective decisions. Crossing the two variables, we get four views on constitutional democracy that are synthesized in Table 1.

Table 1. Forms of Constitutional Democracies

		Democratic Participation and Deliberation	
		Weak	**Strong**
Recognition and Protection of Constitutional Rights	**Weak**	**I.** Conservative Constitutionalism	**III.** Republican and Radical Constitutionalism
	Strong	**II.** Liberal Constitutionalism	**IV.** New Latin American Constitutionalism?

117. *See* Carlos Zorrilla, *Ecuador: Correa Looks to Reopen Unpopular Mining Project in Junin*, INT'L LAND COALITION (Mar. 20, 2010), http://www.commercialpressuresonland.org/press/ecuador-correa-looks-reopen-unpopular-mining-project-junin (discussing the indigenous population's struggle against the national mining company).

118. *See* Luis Prieto Sanchís, *Neoconstitucionalismo y ponderación judicial* [*Neoconstituionalism and Judicial Review*], *in* NEOCONSTITUCIONALISMO(S), *supra* note 96, at 123, 124–31 (explaining the role played by the judiciary in a state of constitutionally based rights).

119. Gargarella, *supra* note 65, at 977–79.

In box (I), we find conservative constitutional thought, which, due to a perfectionist view of politics and fear of public participation, is characterized by a weak recognition of both constitutional rights and citizen participation. In box (II), we have liberal constitutionalism, which vigorously recognizes constitutional rights due to its commitment to personal autonomy but shares with the conservatives the fear of strong citizen participation. Box (III) reflects the radical republican position, which resembles the philosophy of Rousseau[120] and is characterized by a strong invocation of popular sovereignty that should not be inhibited by constitutional rights. Republicans therefore favor strong democratic participation and deliberation at the expense of weakened recognition and protection of constitutional rights. As we see, the expectation of the new Latin American constitutionalism seems to achieve a strong judicial protection of rights accompanied by strong democratic participation and deliberation. This model is not impossible, but it is difficult. One way to explore this idea is to develop a theory of constitutional justice for Latin America, which involves an exercise of judicial protection of rights that would promote, but not undermine, democratic participation and discussion.

C. The Inefficiency of the Reforms

The foregoing analysis shows the tensions inherent in the new Latin American constitutional designs. Another equally important consideration is the actual effectiveness of these constitutional processes, which correlates with the effectiveness of the legal systems in Latin America. These constitutions are normative in nature and full of aspirations, yet their promises have not necessarily been fulfilled. To the contrary, the distance between what is stated in these constitutions and the social and political reality of our countries is very substantial. In that sense, Latin America continues to maintain the tradition—as noted by several theorists decades ago—of adhering to constitutional form in theory, but struggling to carry it out in practice.[121]

Two of the most notable examples of this discrepancy are the socioeconomic problem of overcoming poverty and inequality, and the political problem of controlling presidential abuse of power. Most of the new constitutions explicitly promote social equality and poverty reduction,

120. *See* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 329 (1991) (describing Rousseau's conception of popular sovereignty as requiring the sacrifice of individual rights in exchange for full political participation).

121. *See* KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 58 (1975) ("Where there is some gap between the law on the books and the law in practice in all countries, that gap is notoriously large in Latin America."); Ángel Ricardo Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475, 486 (1999) (referencing a contradiction between valid and effective law whereby Latin American constitutions promise rights that citizens rarely enjoy in practice).

yet the results have generally been—with few exceptions—very poor.[122] Additionally (and paradoxically), this new constitutionalism, which sought to overcome authoritarianism and *caudillismo*, has resulted in the strengthening of the presidency and the emergence of new forms of dictatorship in certain countries, which seems very problematic when trying to reach deep democracies.[123]

D. The Challenges for a Progressive Constitutional Thought

Despite its defects, recent Latin American constitutionalism is a commendable effort of democratic creativity. But these efforts are also full of tensions and unfulfilled promises due to their lack of effectiveness. This situation could be linked to a fact raised by some analysts: despite the presence of notable intellectuals in some constituent processes, such as Alvaro Garcia Linera in Bolivia, the truth is that there has been a major disconnect between the development of progressive constitutional thought in the region and the constituent debates. No theory accompanies the efforts of constitutional reform and the implementation of the promises contained in the texts. This is the academic challenge: to create a critical mass of progressive constitutional thought that is committed to deepening democracy in the region, that—in dialogue with experience and traditions from other regions of the world—accompanies Latin American constitutional processes in their course, and that seeks to reduce the risk of autocratic rule and strengthen the democratic potential of Latin America's institutional experimentations. It is possible, as Boaventura Santos noted, that the needed academy might be a rear-guard academy rather than an avant-garde one.[124] In other words, we need a committed academy that accompanies the process without trying to guide it. Regardless, academic reflection seems essential.

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122. *See* Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 15 (2006) (referring to the failure of Latin American constitutions adopted in the wake of independence to meaningfully regulate political life).

123. *See* Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT'L L. 246, 327 (2011) (asserting that the Argentinian executive has remained strong relative to the other branches through use of decrees, public spending, and appointments); *cf.* Gabriel L. Negretto, *Shifting Constitutional Designs in Latin America: A Two-Level Explanation*, 89 TEXAS L. REV. 1777, 1804 (2011) ("These governance problems have justified the need to reform constitutions in directions that do not seem mutually consistent, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary, while increasing the legislative powers of presidents.").

124. DE SOUSA SANTOS, *supra* note 12, at 9–10.

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Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina

Paola Bergallo*

The judicial enforcement of social rights has been a distinctive feature of the process of constitutionalization in Latin America over the last two decades.[1] By the late 1990s, in countries such as Argentina, Brazil, and Colombia, courts were already calling on governments and private actors to recognize and protect so-called second-generation rights.[2] In the face of this new phenomenon, scholars initiated a transnational dialogue that continues to this day. At the early stages of this conversation, critics of social rights constitutionalization, as well as supporters of the exclusive political enforceability of social rights, confronted a growing camp of advocates and scholars strongly committed to allowing courts to have a role in bringing social rights to bear.[3] While normative and doctrinal approaches shaped the initial exchanges, a new generation of studies has more recently invited a shift toward the empirical exploration of concrete and localized experiences.[4]

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1. Latin American and continental scholars have coined the term *neoconstitutionalism* to describe this process. *See generally* NEOCONSTITUCIONALISMO(S) (Miguel Carbonell ed., 2003).

2. Ángel Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 191 (2008) (characterizing second-generation rights as economic, social, and cultural rights, including "the right to work, to unionize, to subsistence, to housing, to health, to education, and to culture").

3. For an early version of this conversation, see generally VICTOR ABRAMOVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [SOCIAL RIGHTS AS REQUIRED RIGHTS] (2002); Fernando Atria, *¿Existen derechos sociales?* [*Do Social Rights Exist?*], 4 DISCUSIONES [DISCUSSIONS] 15 (2004) (Arg.), *available at* http://bib.cervantesvirtual.com/FichaObra.html?Ref=15570; Carlos Bernal Pulido, *Fundamento, concepto y estructura de los derechos sociales: Una crítica a "¿Existen derechos sociales?" de Fernando Atria* [*Foundation, Concept, and Structure of Social Rights: A Critique of "Do Social Rights Exist?" by Fernando Atria*], 4 DISCUSIONES [DISCUSSIONS] 99 (2004) (Arg.), *available at* http://bib.cervantesvirtual.com/FichaObra.html?Ref=15573; Carlos Rosenkrantz, *La pobreza, la ley y la constitución* [*Poverty, the Law and the Constitution*] (Seminario en Latinoamérica de Teoría Constitucional y Política [Latin Am. Seminar on Constitutional and Political Theory], Paper No. 15, 2002), *available at* http://digitalcommons.law.yale.edu/yls_sela/15.

4. *See generally* DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA [SOCIAL RIGHTS: JUSTICE, POLITICS, AND ECONOMICS IN LATIN AMERICA] (Pilar Arcidiácono, et al. eds., 2010).

The new works have shed increasing light on different dimensions of social rights justiciability, its effects and impacts, and the conditions for its compliance and implementation.[5] Diverse methodological approaches and theoretical frameworks have guided these contributions. In-depth investigations of single structural cases,[6] or of the judicialization of specific rights,[7] have resulted in more nuanced and less assertive claims about the legitimacy of courts and their capacity to generate social change. Ultimately, the new research has consistently shown mixed results depending on the type of social rights enforced, the style of the litigation (i.e., structural, collective, or individual), the litigants, the remedies ordered, and the political and institutional background against which the litigation took place. Findings suggest that while in some instances judicialization has fostered dialogue and inter-branch cooperation,[8] in other instances regressive effects may be surpassing the benefits of allowing courts a role in the enforcement of social rights.[9]

Recent works that have centered on the adjudication of right-to-health suits extensively illustrate these claims. Studies like the one conducted by Yamin and Parra on a case in the Colombian Constitutional Court,[10] and Ferraz's inquiries into the extent of the Brazilian individualized approach to

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5. *See, e.g.*, SIRI GLOPPEN ET AL., COURTS AND POWER IN LATIN AMERICA AND AFRICA 1 (2010) (examining the accountability function exercised by higher courts in Latin America and Africa). The new Latin American research contributed to the tradition of studies produced in the United States, such as MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) and GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

6. CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, CORTES Y CAMBIO SOCIAL [COURTS AND SOCIAL CHANGE] 13 (2010) (discussing Judgment T-025, the Colombian Constitutional Court's 2004 landmark decision that declared a "state of unconstitutionality" regarding more than three million refugees displaced by the violence in the country).

7. Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE 100, 119–32 (Varun Gauri & Daniel M. Brinks eds., 2008) (considering the judicialization of health rights and education rights in Brazil).

8. Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 402 (2007) (arguing that courts should have a role in the interpretation and enforcement of socioeconomic-rights guarantees because "[i]n cooperative constitutional understandings, majoritarian political processes are often subject to serious blockages, such that very strong judicial deference to the legislature . . . will tend to produce results that fall far short of a fully inclusive and responsive constitutional ideal").

9. *See, e.g.*, Hoffmann & Bentes, *supra* note 7, at 141–43 (discussing the recent success and prevalence of individual access-to-medicine and access-to-treatment cases, but noting an appreciable difference in access to justice between middle class and indigent plaintiffs and the phenomenon of successful litigants "queue-jumping" and thereby impacting vulnerable and indigent nonlitigants).

10. 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, 432 (2010) (parsing the effects of Judgment T-760/08, a July 2008 Colombian Constitutional Court decision "examin[ing] systemic failures in the regulation of the health system, re-assert[ing] the justiciability of the right to health, and call[ing] for significant restructuring of the health system based on rights principles").

right-to-health claims,[11] exemplify the two extremes of a continuum in the judicialization of health policies with contrasting approaches and impacts: the structural case for comprehensive health-system reform on the one hand, and the accumulation of individual demands for varieties of health care supplies on the other.

This Article seeks to contribute to the dialogue inspired by these more contextualized and institutionally oriented works by evaluating them against the adjudication of health policies in Argentina. Moreover, the Article seeks to explore variations in the cooperative effects of domestic litigation by examining dimensions absent from recent regional studies on the right to health. With that aim in mind, the Article profiles fifteen years of right-to-health litigation about access to HIV/AIDS treatment in the Argentinian health care system, which combines public and private insurance and spending. In Argentina, national, provincial, and municipal health departments are in charge of public health services operating under a universal-access principle, but in practice, these services are used by poor uninsured patients.[12] A parallel contributory system is composed of a set of social health funds—known as *obras sociales* (OSSs)—organized by activity and run by unions,[13] and private health insurance funds—known as *empresas de medicina prepaga* (EMPs).[14] Because the litigation for enforcement of the right to health has been directed against public health services, OSSs, and EMPs, the HIV/AIDS treatment litigation offers an interesting setting for

11. Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS., no. 2, 2009 at 33, 33 (analyzing the growing trend of Brazilian right-to-health litigation characterized by individualized claims to treatment).

12. These services are mainly supplied through public hospitals and, more recently, through primary care centers. *See* JAMES W. MCGUIRE, WEALTH, HEALTH, AND DEMOCRACY IN EAST ASIA AND LATIN AMERICA 128–48 (2010) (detailing the history of public health services and health care policy in Argentina).

13. There are different types of OSSs. National OSSs are run by unions with presence across jurisdictions. Armando Barrientos & Peter Lloyd Sherlock, *Reforming Health Insurance in Argentina and Chile*, 15 HEALTH POL'Y & PLAN. 417, 417 (2000); *Argentina—Empresas de Salud y Medicamentos* [*Argentinian Health and Drug Companies*], GOBIERNO DE LA REPÚBLICA DE ARGENTINA, http://www.argentina.gov.ar/argentina/portal/paginas.dhtml?pagina=614. Provincial OSSs are created for public provincial employees. Barrientos & Sherlock, *supra*, at 417. Other OSSs pertain to specific groups of public employees, including the army and the judiciary. WORLD BANK, ARGENTINA: FROM INSOLVENCY TO GROWTH 74 (1993).

14. EMPs offer private insurance plans. As of 2007, approximately 10% of the population made voluntary contributions to EMPs, either directly or by supplementing their OSS contributions. Ernesto Báscolo, *Características institucionales del sistema de salud en la Argentina y limitaciones de la capacidad del Estado para garantizar el derecho de la salud de la población* [*Institutional Characteristics of the Health System in Argentina and Limits on the Capacity of the State to Guarantee Health Rights of the Population*], *in* LAS CAPACIDADES DEL ESTADO Y LAS DEMANDAS CIUDADANAS: CONDICIONES POLÍTICAS PARA LA IGUALDAD DE DERECHOS [THE CAPACITY OF THE STATE AND CITIZEN DEMANDS: POLITICAL CONDITIONS FOR EQUAL RIGHTS] 95, 97 (Isidoro Cheresky ed., 2008), *available at* http://www.undp.org.ar/docs/Libros_y_Publicaciones/Capacidades%20del%20Estado%20y%20Demandas%20Borrador%20PNUD.pdf.

contrasting the policy impacts of vertical and horizontal applications of social rights.[15]

The research proposed in the following pages relies on several sources of empirical data. It is based, first, on a database of HIV/AIDS cases comprising all of the decisions published or referenced from 1995 to 2010 in Argentina's main national legal periodicals, court databases, and national newspapers (the Database).[16] Second, the data stems from congressional antecedents, news published from 1995 to 2010 in the three national newspapers regarding right-to-health claims for HIV/AIDS treatment, and a selection of court dockets. Third, for an anecdotal perspective on the effects of the litigation, the Article draws on twenty interviews conducted in winter 2009 with former directors of the *Programa Nacional de Lucha contra los Retrovirus Humanos* [The National Program for the Fight Against HIV/AIDS] (Program), lawyers and representatives of plaintiff nongovernmental organizations (NGOs), court officers and judges, and experts and social scientists specializing in the study of HIV/AIDS in Argentina.[17]

This Article begins by profiling fifteen years of HIV/AIDS treatment cases, distinguishing the effects of early litigation from the cases that followed from the increased institutionalization of policies mandating universal treatment for the disease. The distinctions between these two periods provide the matrix for framing the exploration of direct and indirect effects of the litigation vis-à-vis the political blockages and governance capacities and deficits that have characterized the expansion of access to HIV/AIDS medicines for the last fifteen years.

As I further elaborate on in the Conclusion, the trajectory of access-to-HIV/AIDS-treatment litigation in Argentina could be seen as shifting from vertical suits, initiated in 1996 for direct provision of drugs by the federal government, to horizontal individual cases filed in the last decade seeking compliance with private duties to provide care. The case study suggests that early vertical–collective and horizontal–individualized enforcements of the right to health both inspired policy changes. As this Article shows, this early litigation promoted a cooperative style of judicial intervention where courts helped to foster tenuous forms of interbranch coordination of the regulation and organization of public and private treatment supply.[18] Similarly,

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15. For a discussion on the distinction between the horizontal and vertical effects of individual rights, see Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003). Gardbaum explains that "[t]hese alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal)." *Id.* at 388.

16. The only prior systematic gathering of data on HIV/AIDS treatment cases was published in 2005. Marta A. Macias et al., *VIH/SIDA en la jurisprudencia y en los medios de prensa [HIV/AIDS in the Jurisprudence and the Press]*, Jurisprudencia Argentina [J.A.] (2005-IV-979).

17. Interviews are on file with the author. Where interviewees requested confidentiality, they will be identified using letters.

18. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 3 (2004) (supporting judicial review's role of

individual first-generation cases horizontally enforcing the right to health against private funds played a role as antecedents to important legislative reforms.[19] In the litigation that followed these initial claims, however, neither collective nor individualized demands for treatment supplies showed much capacity to generate greater interbranch coordination or effect deeper policy changes.[20] Moreover, given the shift in the litigation toward individual claims and the resultant need to relitigate the same rights, this second phase of judicial intervention leaves open questions about courts' capacity to correct beneficiary, interpolicy, and intrapolicy inequalities.

I. A Typology of the HIV/AIDS Treatment-Litigation

As illustrated by Figure 1 below, the prevalence of AIDS in Argentina increased between 1991 and 1997 and has gradually stabilized in recent years.[21] Pursuant to the reports of the National Health Department (NHD), by December 2009, there were a total of 29,886 patients under treatment.[22] Additionally, in the last four years, the NHD received approximately 5,000 reports annually of new diagnoses of HIV.[23] In 2008, the annual rate of HIV infection was 13 per 100,000 inhabitants.[24] For that same period, health services across the country received notice of about 1,700 new AIDS cases per year, resulting in an AIDS prevalence rate of 4.4 per 100,000 inhabitants.[25] The AIDS mortality rate also stabilized at 1,400 deaths annually.[26] The epidemic continues mainly to affect people in large urban centers with a male-to-female ratio of 1.7 HIV infections from 2007 to 2009.[27]

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furthering constitutional debate in the legislature and other forums); Daniel M. Brinks & Varun Gauri, *A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World*, *in* COURTING SOCIAL JUSTICE, *supra* note 7, at 303, 343 (advocating an interbranch coordination process where courts advance social rights in the legislature by highlighting new concerns and goals in a judicial forum); Dixon, *supra* note 8, at 393 (applying a theory of dialogue between the courts and legislature to socioeconomic rights, and advocating that in this context, courts adopt only weak rights or remedies).

19. *See infra* Part II.

20. *See infra* Part III.

21. For a description of governmental and social reactions to HIV/AIDS between 1982 and 1990, see MÓNICA PETRACCI & MARIO PECHENY, ARGENTINA: DERECHOS HUMANOS Y SEXUALIDAD [ARGENTINA: HUMAN RIGHTS AND SEXUALITY] 215–26 (2006), *available at* http://www.cedes.org/descarga/CEDESArgentina_sexualidad.pdf.

22. MINISTERIO DE SALUD [MINISTER OF HEALTH], PRESIDENCIA DE LA NACIÓN [PRESIDENCY OF THE NATION], No. 27, BOLETÍN SOBRE EL VIH-SIDA EN LA ARGENTINA [BULLETIN ON HIV-AIDS IN ARGENTINA] 3 (2010).

23. *Id.* at 27.

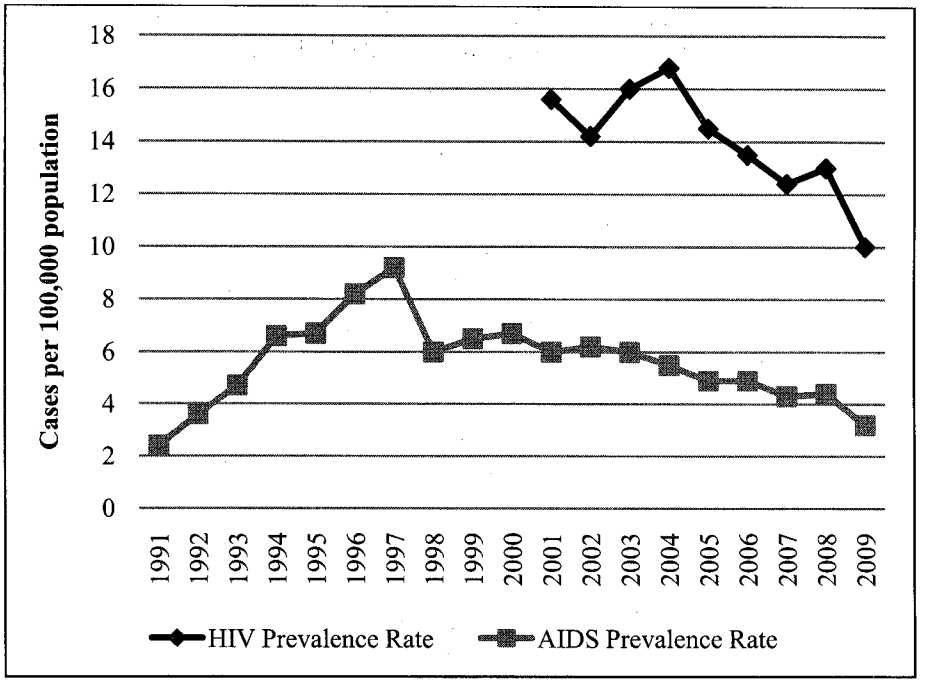
24. *Id.* at 3.

25. *Id.*

26. *Id.*

27. *Id.*

Figure 1. HIV/AIDS Prevalence Rates, 1991–2009



Source: MINISTERIO DE SALUD [MINISTER OF HEALTH], PRESIDENCIA DE LA NACIÓN [PRESIDENCY OF THE NATION], No. 27, BOLETÍN SOBRE EL VIH-SIDA EN LA ARGENTINA [BULLETIN ON HIV-AIDS IN ARGENTINA] 7 (2010).

Even if in hindsight the country's capacity to deal with the disease finally led to its stabilization, the history of the fight against HIV and AIDS has been a complex and relentless one. This was especially the case in the period from 1982, when the first cases of AIDS were reported,[28] to 1997, when the government changed its erratic approach to fighting the disease.[29]

Though the use of courts has been a latent resource for patients at different stages of this process, the literature often avoids it. The lack of official data on the numbers of right-to-health cases and the unavailability of information on the litigation brought by patients demanding HIV/AIDS medication also precludes an assessment of the extent of patients' reliance on courts for the adjudication of their demand for treatment.[30] However, upon

28. Mabel Bianco et al., Human Rights and Access to Treatment for HIV/AIDS in Argentina 14 (1998) (unpublished manuscript), *available at* http://www.aidslex.org/site_documents/T044E.pdf.

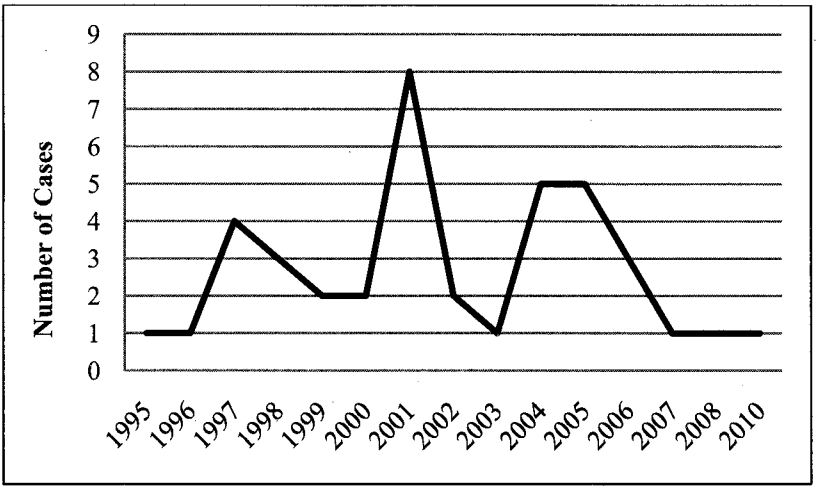
29. *See id.* at 7–11 (chronicling legislation affecting access to HIV/AIDS treatment in Argentina throughout the 1990s, and noting that "[i]n 1997 by virtue of Resolution 346, the Ministry of Health and Social Welfare changed the HIV/AIDS medicine purchase and distribution system," which "de-centralized the distribution of medicines" in the country).

30. I have attempted to profile the extent of this litigation in Paola Bergallo, *Courts and the Right to Health in Argentina: Achieving Fairness Despite Routinization in Individual Coverage*

examination of the secondary literature and the most publicized cases, I was able to build a Database with forty cases providing some indicia about the HIV/AIDS treatment claims that have reached the courts from 1995 to 2010.[31] In all of these cases, courts refused providers' attempts to reject coverage or recognized claimants' demands for treatment.

Even if the cases are just a piece of a larger phenomenon for which quantitative contours cannot be defined, Figure 2 shows the continuity over the last fifteen years of HIV/AIDS patients' recourse to federal and provincial courts in search of their treatment needs. Because the cases retrieved in the Database do not account for all cases filed, Figure 2 is not representative of the extent of the litigation. It suggests, however, a possible trend in the annual evolution of cases, which picked up during the 2001 crisis and has apparently fallen off since 2006.

Figure 2: Number of HIV/AIDS-Treatment Decisions or Cases, 1995–2010



The forty cases included in the Database were presented as individual or collective *amparos*[32] argued on a right-to-health basis. With the exception of

Cases?, *in* LITIGATING THE RIGHT TO HEALTH (Siri Gloppen & Alicia Ely Yamin eds., forthcoming 2011).

31. I generated the forty data points from a collection of all decisions or news about them included in EL DERECHO, REVISTA JURIDICA LA LEY , and LEXIS NEXIS JURISPRUDENCIA ARGENTINA from 1995 to 2010, the databases of selected precedents of the Cámara Nacional de Apelaciones Especial Civil y Comercial de la Capital Federal [National Court of Special Civil and Commercial Appeals of the Federal Capital], the database of the Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], and the three main national newspapers (CLARÍN, LA NACIÓN, and PÁGINA/12). The Database is on file with the author.

32. The *amparo* is an injunctive procedure for the protection of constitutional rights. *See* GUSTAVO MAURINO ET AL., LAS ACCIONES COLECTIVAS: ANÁLISIS CONCEPTUAL, CONSTITUCIONAL Y COMPARADO [THE COLLECTIVE ACTIONS: CONCEPTUAL, CONSTITUTIONAL,

the *Hospital Británico* case,[33] the cases were demands for HIV/AIDS treatment brought by patients (thirty-three cases) or NGOs (six cases) against OSSs, EMPs, or the national or provincial programs for free treatment supply.

The cases can be classified following Gauri and Brinks's description of the relationships among the state, providers, and patients in social rights claims as "triangular."[34] As illustrated by Figure 3, different relationships connect (1) the state and patients, (2) the state and providers, and (3) the providers and patients. The cases in the Database reveal that, corresponding to Gauri and Brinks's model,[35] in the practice of enforcing legally mandated universal access to HIV/AIDS treatment, Argentinian courts have confronted three categories of cases. First, "Provision Cases" are those in which patients asked for the direct provision of treatment from state institutions. The Database reflects that these cases took two different forms during the given period: Federal Provision Cases against the Program, and Provincial Provision Cases against the provincial programs in charge of the primary free supply of HIV/AIDS treatment guaranteed by the federal government.[36]

A second category of cases connects patients and private providers: "Obligation Cases." These are instances of courts horizontally enforcing the right to health—what Clapham has called "the privatization of constitutional rights."[37] Against the backdrop of the two-tiered structure of the Argentinian

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AND COMPARATIVE ANALYSIS] 75–83 (2005) (discussing the *amparo* and recounting the process of adopting an *amparo* provision during the 1994 constitutional reforms).

33. The *Hospital Británico* case was filed by a group of private funds challenging the constitutionality of Law 24,754, which defined EMPs' duties to cover HIV/AIDS treatment. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2001, "Hosp. Británico de Buenos Aires c. M.S. y A.S. / acción de amparo," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2001-324-754), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=131413&fori=RHH00090.340.

34. *See* Varun Gauri & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, *in* COURTING SOCIAL JUSTICE, *supra* note 7, at 1, 9–11 (asserting that there are three groups involved in the distribution of social services—the state, service providers, and clients—and describing the legal relationships among these groups).

35. These relationships correlate to those identified by Brinks and Gauri. Brinks & Gauri, *supra* note 18, at 303, 307–08 ("[O]ne can usefully classify [social and economic] rights into those that relate to three sets of duties: *Provision*—imposing a duty on the state to pay for or provide a service directly; *regulation*—modifying the regulatory environment by imposing (or removing) state-enforced duties on providers; and *obligation*—modifying the provider–recipient relationship by imposing (or removing) a duty on the provider that the recipient herself must enforce.").

36. An example of a Federal Provision Case is CSJN, 1/6/2000, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social—Estado Nacional / amparo ley," Fallos (2000-323-1339), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=117500&fori=RHA00182.340. An example of a Provincial Provision Case is Cámara 1a de Apelaciones en lo Civil y Comercial [CApel.CC] de Bahía Blanca, sala 2 [First Civil and Commercial Court of Appeals of Bahía Blanca, panel 2], 9/2/1997, "Hosp. Leónidas Lucero, C., C. y otros c. Ministerio de Salud y Acción Social de la Provincia de Buenos Aires," Revista Jurídica Argentina—La Ley [L.L.] (1997-LLBA-1122).

37. *See* Helen Hershkoff, *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, *in* COURTING SOCIAL JUSTICE,

contributory health sector, these cases are brought against different types of OSSs and EMPs and compel courts to enforce private obligations established either in the regulatory framework defining OSSs' and EMPs' duties for coverage, or in the contracts between beneficiaries and their funds.

A third type of case, which in a few instances accompanied a right-to-health Provision or Obligation Case, corresponds to what Gauri and Brinks have identified as "Regulatory Cases."[38] In these cases, court intervention directly generates some form of regulation of public or private insurers and providers.[39] In the claims for HIV/AIDS treatment contained in the Database, however, there were no decisions exclusively demanding the regulation of insurers or providers. The parties requested that the court regulate PMO coverage duties to migrants in only one of the Provision cases.[40] That court granted coverage to the immigrant plaintiffs but refused to reach the issue of coverage duties to all immigrants.[41] The absence from the Database of Regulatory Cases seems to suggest that HIV/AIDS patients did not seek judicial recourse for more structural and systemic claims in this area.

supra note 7, at 268, 271 n.21 (citing Andrew Clapham for his use of the phrase "privatization of constitutional rights").

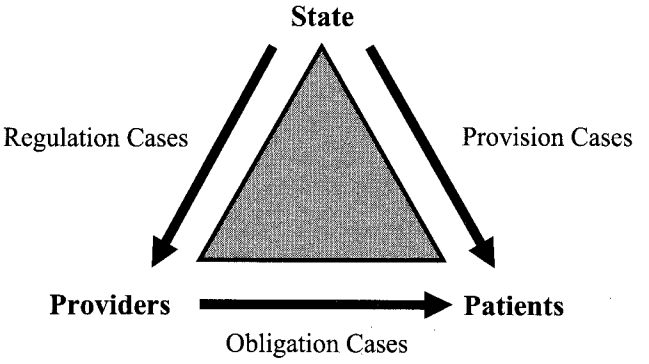
38. *See* Gauri & Brinks, *supra* note 34, at 10 (defining regulatory cases as those adjudicating duties between the state and service providers).

39. *Id.*

40. In the *EAG* case, the parties requested that the court clarify coverage duties, but the court declined to deal with the regulatory claim. CNCiv. y Com., sala III, 29/10/2002, "EAG y otros c. Ministerio de Salud de la Nacion / amparo," no. 8.972/01.

41. *Id.*; *cf.* Brinks & Gauri, *supra* note 18, at 331–32 ("[I]n many instances in which the courts are unwilling to impose new duties of provision on the state, they will still respond to demands that a particular policy (or its absence) unduly harms the protected interests of a particular group.").

Figure 3. Gauri and Brinks's Triangular Shape for Social Rights Litigation



Source: Varun Gauri & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, *in* COURTING SOCIAL JUSTICE 100, 119–32 (Varun Gauri & Daniel M. Brinks eds., 2008)

II. The First Generation of HIV/AIDS Treatment Cases: From Legislative Promises to a National Policy for the Supply of HIV/AIDS Drugs

The roots of the litigation on access to HIV/AIDS treatment trace back to 1990 when, after several years of restrictive biosecurity policies, the congress adopted Law 23,798, the *Ley de Lucha contra el SIDA*,[42] a pioneer rule for Latin America. The new statute symbolized an important step away from prior blatantly discriminatory initiatives.[43] Among other things, it declared the fight against AIDS a national interest; mandated the establishment of a comprehensive national policy for its diagnosis, treatment, and prevention; and appointed the NHD as the body in charge of applying the law in coordination with provincial health authorities.[44]

The adoption of the new statute laid the groundwork for the implementation of a national policy to strengthen the erratic initiatives that preceded its passage. However, the institutionalization of a national policy to

42. Law No. 23798, Sept. 14, 1990, [26972] B.O. 2.

43. *See* Juan Carlos Tealdi, *Responses to AIDS in Argentina: Law and Politics*, *in* LEGAL RESPONSES TO AIDS IN COMPARATIVE PERSPECTIVE 377, 384 (Stanislaw Frankowski ed., 1998) (recounting a scandal resulting from news coverage of a policy of discrimination around the time of Law 23,798's passage); Organización Panamericana de la Salud, [OPdS] [Pan-American Health Organization], *Digesto de Leyes Nacionales y Provinciales de la República Argentina sobre VIH/SIDA* [*Digest of National and Provincial Laws of the Republic of Argentina about HIV/AIDS*], at 5, 68, OPdS Pub. No. 45 (1997), *available at* http://www.ops.org.ar/publicaciones/pubOPS_ARG/pub45.pdf (arguing that the purpose of Argentinean AIDS law is to protect the population against discrimination and to respect the confidentiality of those diagnosed with the disease).

44. Law No. 23798, arts. 1, 3, 4.

fight the disease was confronted with several challenges. Initial obstacles arose primarily from ideological tension from two strategies of the Menem administration—an alliance with conservative sectors of the Catholic Church and the broad reform agenda inspired by the Washington consensus—that pushed against the development of a robust national and universal policy against AIDS.[45]

A. Political Blockage and Implementation Gaps in the First Years of the Menem Administration

During the first three years of the Menem administration, the process of implementing a policy to combat AIDS and offer free treatment was marked by confrontations between two groups within the administration: those pushing to create a national policy and those fiercely opposing all legislation concerning the disease. In the beginning, opposition voices—primarily from conservative figures linked to the Catholic Church[46]—dominated the discussion; however, by April 1992, those awaiting the establishment of a national policy seemed to have something to celebrate. After a scandal involving the treatment of prisoners living with AIDS,[47] Menem replaced Avelino Porto and appointed César Aráoz the new head of the NHD.[48] In trying to show distance from his predecessor, Aráoz quickly promised to take AIDS seriously.[49] Among other measures, he announced a plan to introduce preventive initiatives (including mandatory sexual education in schools), discussed the free distribution of condoms, and launched a media campaign.[50] He also relaunched the Program with USD23 million in reserve funds.[51]

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45. *See* Carlos Santiso, *Gobernabilidad democrática y reformas económicas de segunda generación en América Latina* [*Democratic Governance and Second-Generation Economic Reforms in Latin America*], 8 REVISTA INSTITUCIONES Y DESARROLLO [INSTITUTIONS & DEV. REV.] 325, 343–45 (2001), *available at* http://ceder.ulagos.cl/gestiondesarrollo/gobernabilidadyreformas.pdf (describing the "important tension" between the neoliberal economic reforms of Carlos Menem under the Washington consensus and "political consolidation"); PETRACCI & PECHENY, *supra* note 21, at 172–73 (discussing Menem's conservative right-to-life policies associated with the Catholic Church).

46. Menem's commitment to the Church was epitomized by his alignment with the Vatican at United Nations' conferences in the 1990s. *See* PETRACCI & PECHENY, *supra* note 21, at 176–77 (describing the policies proposed by Menem at U.N. conferences and the relationship of those policies to the Church's positions).

47. Tealdi, *supra* note 43, at 384.

48. Carlos H. Acuña & Mariana Chudnovsky, *Salud: Análisis de la dinámica político–institucional y organizacional del área materno infantil* [*Health: Analysis of the Political–Institutional and Organizational Dynamics in the Area of Juvenile Pregnancy*] 24 (Centro de Estudios para el Desarrollo Institucional [CEDI] [Ctr. for the Study of Institutional Dev.], CEDI Working Paper No. 61, 2002), *available at* http://faculty.udesa.edu.ar/tommasi/cedi/dts/dt61.pdf.

49. Tealdi, *supra* note 43, at 385.

50. *Id.*

51. *See id.* at 385–86 (discussing Julio César Aráoz's announcement that he would start "the anti-AIDS campaign that was never carried out in the country"); *id.* at 387 (mentioning that the budget for the Program was USD23 million in 1993). Pursuant to Resolution 18/1992, the Program

Despite signs of an initial reformative promise, ideological tensions within the Menem administration came to a head in early 1993 when the Secretary of Health, Alberto Mazza, replaced Aráoz.[52] Mazza's appointment signaled the triumph of conservatives within the Menem Administration[53]—a turn with upsetting implications for health reforms and HIV/AIDS policies. A few months after Mazza replaced Aráoz, the Program established by the latter had already begun to encounter restrictions on financing for treatment supplies used in combatting opportunistic diseases affecting 1,200 AIDS patients.[54] Due to lack of payment, pharmaceutical companies began to discontinue their provision of drugs.[55] In September 1993, Mazza appointed a new director of the Program, Laura Astarloa, who headed it until December 1999.[56]

At this point, in addition to Church antagonism, another important source of ideological blockage had begun to hinder the implementation of Law 23,798. By the time of the statute's approval in 1990, former President Alfonsín's plans to integrate and nationalize the overfragmented Argentinian health system[57] had been defeated and were to be replaced by social-sector reforms promoted by the World Bank and the Inter-American Development Bank.[58] Those reforms led to fiscally oriented initiatives aimed at reducing public health expenditures and improving efficiency through competition

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would develop preventive and control measures while guaranteeing the provision of treatment to patients. Res. no. 18/1992, Oct. 1, 1992, [27526] B.O., *invalidated by* Res. no. 2145/2006, Oct. 12, 2006, [31016] B.O. 49, *available at* http://www.ops.org.ar/publicaciones/pubOPS_ARG/pub50.pdf.

52. *See* Juan Carlos Tealdi, *Las respuestas legales y políticas al sida en la Argentina* [*The Legal and Political Responses to AIDS in Argentina*], 2 BIOÉTICA Y BIODERECHO [BIOETHICS & BIOLAW] 41, 48–49 (1997) (Arg.) (describing Aráoz's difficulties with the Church's position against certain efforts to educate the public about the AIDS epidemic and his replacement in 1993).

53. *See id.* (recognizing political changes arising from pressure placed on political officials by religious groups and a belief that Mazza would not defend public sector interests).

54. *Id.* at 49.

55. *Id.*

56. *Id.*

57. For a discussion of President Alfonsín's proposal, see MCGUIRE, *supra* note 12, at 138. Actually, the first version of the original bill was approved by the House in September 1988—three months before congress passed Laws 23,660 and 23,661—and was the last legislative attempt to model a universal health insurance system. *Cf.* Guillermo Alonso, *Vida, Pasión y ¿Muerte? del Seguro Social de Salud Argentino* [*Life, Passion, and Death? of the Social Health Insurance System*], 11 PERFILES LATINOAMERICANOS [LATIN AM. PROFILES] 157, 161 (1997) (Mex.) (describing the elements of personal choice involved in the deregulation of the health insurance system, suggesting the failures of efforts to create a universal system). *See generally* Desarrollo local y regional: hacia la construcción de territorios competitivos e innovadores [Local and Regional Development: Toward the Construction of Competitive and Innovative Territories], July 10–12, 2002, *Descentralización fiscal en Argentina: Restricciones impuestas por un proceso mal orientado* [*Fiscal Decentralization in Argentina: Restrictions Imposed by a Misguided Process*], 18, U.N. Doc. LC/BUE/R.252 (Aug. 2002) (by Oscar Centrángolo & Francisco Gatto) (recounting the legislative history of creating a health system in Argentina).

58. Peter Lloyd-Sherlock, *Health Sector Reform in Argentina: A Cautionary Tale*, 60 SOC. SCI. & MED. 1893, 1894–96 (2005).

within the social-health sector.[59] With that aim in mind, the administration implemented reforms including privatization, decentralization, and the establishment of *Plan Médico Obligatorio* (PMO), a basic health plan defining coverage duties.[60]

The first years of Mazza's tenure were devoted to implementing these reforms, which meant clarifying contributory providers' HIV/AIDS treatment coverage duties.[61] To do so, at the behest of legislators from the opposing Radical Party, congress passed Law 24,455, in which congress articulated the duty of OSSs to cover treatment for HIV/AIDS as part of the PMO and established a federal government subsidy of such costs.[62] Additionally, those years were characterized by the almost total absence of national preventive policies, which many construed to be the result of the opposition successfully mounted by the Church.[63]

Despite the growing number of people contracting the disease, by 1996, the fight against HIV/AIDS clearly was not a priority in the shrinking public health agenda. The establishment of extended prevention policies through national information campaigns or sex education seemed unthinkable as Mazza even considered rejecting international funds offered to fight the disease.[64] Prospects for expanding the number of people that could now be treated with recently discovered antiretroviral drugs (ARVs) were bleak given the budgetary cuts suffered by the Program that year.[65] Moreover, coordination problems between national and incipient provincial programs

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59. *See id.* at 1897 (describing 1995 reform proposals that sought full competition in the health sector and enacted reforms that recognized workers' freedom to select their insurance).

60. Susana Belmartino, *Una Década de Reforma de la Atención Médica en Argentina* [*A Decade of Reform of Medical Care in Argentina*], 1 SALUD COLECTIVA [COLLECTIVE HEALTH] 155, 164 (2005).

61. *See* Enrique Visillac, *1983–2007: La salud en democracia* [*1983–2007: Health in Democracy*], BOLETIN DE TEMAS DE SALUD DE LA ASOCIACIÓN DE MÉDICOS MUNICIPALES DE LA CIUDAD DE BUENOS AIRES [NEWSLETTER OF HEALTH TOPICS OF THE ASSOCIATION OF DOCTORS OF THE CITY OF BUENOS AIRES] (Aug. 2007), http://www.medicos-municipales.org.ar/bts0807.htm#3 (describing the Argentinian health system and Mazza's role in defining coverage in the system generally).

62. Law No. 24455, Mar. 1, 1995, [28098] B.O. 1; *see* Bianco et al., *supra* note 28, at 10 (noting that the opposition party was the source of this legislation and the disagreements that emerged as to the scope of coverage—such as those involving mental health treatment for HIV/AIDS patients).

63. *See* Mónica Petracci et al., *A Strategic Assessment of the Reproductive Health and Responsible Parenthood Programme of Buenos Aires, Argentina*, 13 REPROD. HEALTH MATTERS 60, 62 (2005) ("The pressure from the Catholic Church . . . with regard to sexual and reproductive rights blocked any possibility of a national law being considered."); *see also, e.g.*, Tealdi, *supra* note 52, at 48, 49–50 (describing the Church's opposition to a video to educate children about sexual choices and potential health consequences).

64. *See* Tealdi, *supra* note 52, at 387 (discussing how Mazza refused to promote the use of condoms and clean syringes even though the World Bank offered to loan $20 million for AIDS prevention if the government accepted those conditions).

65. Interview with Interviewee A, Former Dir., Programa Nacional de Lucha contra los Retrovirus Humanos [The Nat'l Program for the Fight Against Human Retroviruses], in Buenos Aires, Arg. (June 4, 2009).

were gradually becoming more acute, resulting in restricted access to treatment for patients outside Buenos Aires.[66]

Compounding the problem were ideological and managerial shortfalls within the public programs and the OSSs' reluctance to cover treatment as mandated by Law 24,455.[67] The situation was even worse for patients of social funds not regulated by such law and for patients of EMPs left to the arbitrary coverage decisions of their unsupervised insurers.[68]

B. Litigation Enters the Scene: The First Cases

While the difficult process of implementing universal coverage unfolded, the constitutional reform of 1994 laid the foundation for the employment of a set of legal tools that would facilitate the use of new strategies by patients and their organizations. Indeed, the 1994 constitutional amendments provided the opportunity for the exercise of proactive initiatives by patients who could now resort to judicial enforcement of a constitutionally protected right to health.[69] The 1994 reforms included the expansion of social rights protections, in particular those corresponding to the right to health, through the incorporation of references to "a healthy and balanced environment fit for human development"[70] and consumers' rights "to the protection of their health, safety, and economic interests."[71] Moreover, article 75 defined congress's duty to legislate in keeping with a social justice agenda and to provide certain specific health protections on the basis of equality.[72] The right to health was further defined by several references to human rights treaties included under article 75(22).[73]

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66. *Id.*

67. *Id.*

68. *Id.*

69. *See* Enrique Peruzzotti & Catalina Smulovitz, *Social Accountability: An Introduction*, *in* ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 3, 14 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006) (stressing the importance of the development and incorporation in constitutional reforms of new legal instruments to "improve the defense of the rights of ordinary citizens and their access to justice").

70. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.].

71. *Id.* art. 42.

72. *Id.* art. 75(19). Article 75(2) requires that the distribution of nationally levied taxes be "based on principles of equity and solidarity[,] giving priority to the achievement of a similar degree of development, of living standards and equal opportunities throughout the national territory." *Id.* art. 75(2). Article 75(8) mandates the annual allocation of the budget following the principles set forth in article 75(2). *Id.* art. 75(8). Article 75(19), known as the "progress clause," authorizes congress to take actions conducive to "economic progress with social justice." *Id.* art. 75(19). Article 75(23) lists among congress's powers the mandate "[t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons." *Id.* art. 75(23). The last paragraph of article 75(23) includes a reference to the country's commitment to maternal and infant health. It requires congress to create a special and integral social security system to serve this goal. *Id.*

73. *Id.* art. 75(22).

The reforms also introduced a number of new procedural resources, such as the *amparo colectivo*, a procedural mechanism for the collective enforcement of constitutional rights.[74] These and other legal enabling factors, extensively discussed in the literature on the transformation of the role of courts,[75] most certainly contributed to creating a context for the judicialization of disputes over access to HIV/AIDS treatment.

It was at this point that litigation began to play a role in the fight for universalizing treatment. The first individual case seeking access to medicines publicized in legal periodicals was litigated in 1995.[76] Even though the opinion contained no citations to the constitution or its legal framework and did not reveal much about the court's reasoning, courts began to invoke it as precedent to protect privately insured patients who, at the time, were often denied treatment based on the alleged absence of a general legal duty to treat HIV/AIDS patients.[77]

The following year, 1996, marked an important point in the struggle against AIDS, as a group of activists from the main civil-society organizations working to combat HIV/AIDS began to coordinate strategies to foster universal access to ARVs for patients.[78] One of the proactive strategies in which some members of the group were involved consisted of the promotion of legislation clarifying the duty of private funds to cover HIV/AIDS treatment.[79] Interestingly enough, the resulting bill, which would become

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74. GUSTAVO MAURINO ET AL., LAS ACCIONES COLECTIVAS: ANÁLISIS CONCEPTUAL, CONSTITUCIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO [COLLECTIVE ACTIONS: CONCEPTUAL, CONSTITUTIONAL, PROCEDURAL, JURISPRUDENTIAL AND COMPARATIVE ANALYSIS] 77 (2005).

75. *See, e.g.*, Catalina Smulovitz, *Judicialization in Argentina: Legal Culture or Opportunities and Support Structures?*, *in* CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 242–43 (Javier A. Couso et al. eds., 2010) (discussing *amparos* as one of the changes that modified the institutional structure to promote judicialization).

76. Juzgado Nacional de Primera Instancia [1a Inst.] [National Court of First Instance], 25/9/1995, "T.C.A. c. Promed S.A. / amparo," J.A. (1996-I-405).

77. *See* Sandra M. Wierzba, *Protección de datos de salud en procesos judiciales* [*Protection of Health Data in Judicial Processes*], 22 REVISTA JURIDÍCA: ÓRGANO INFORMATIVO DEL PODER JUDICIAL DEL ESTADO DE NAYARIT [LEGAL J.: INFO. OFF. JUD. POWER ST. NAYARIT] 15, 19 & n.20 (Mex.), *available at* http://www.tsjnay.gob.mx/tribunal/revistas/revista22.pdf (citing *T.C.A. c. Promed S.A.* as one of the many cases that effectively ordered hospitals to provide care and medicine to AIDS patients).

78. Interview with Mabel Bianco, Former Dir., Programa Nacional de Lucha contra los Retrovirus Humanos [The Nat'l Program for the Fight Against Human Retrovirus], in Buenos Aires, Arg. (May 29, 2009); Interview with Interviewee B, Att'y, in Buenos Aires, Arg. (June 17, 2009). Participants in the meetings included prominent advocates from the gay and women's movements and lawyers with human rights and health backgrounds. Interview with Interviewee B, *supra*.

79. María del Carmen Moreau de Banzas, Silvia Vazquez, and Cristina Guevara, three house members of the Radical Party then leading the opposition, initially conceived of the project. The legislators sought the opinions of members of the group and collaborated with lawyers in the design of the statute. Interview with Mabel Bianco, *supra* note 78; Interview with Interviewee B, *supra* note 78. *See also* C.D. Rep. 18, 46a. Reu.—20a Ses. D.S. 11/20–21/87 (identifying legislative supporters of the measure).

Law 24,754,[80] was the first bill to be passed by congress regulating the coverage duties of EMPs, to that point an extremely underregulated subsector of the health care system.[81] It should be noted that despite the isolation and lack of elaboration in the *T.C.A.* case discussed above, interviewees claimed that the case played an important role in the passage of Law 24,754.[82]

C. *First-Generation Provision Cases: The* Benghalensis[83] *Litigation*

Even if the approval of Law 24,754 did not end the debate over private funds' duty to cover treatment, by the end of 1996, it represented a major victory for the advocates finally beginning to put in motion more proactive initiatives. The second litigation-based strategy developed by activists in spring 1996 resulted in the *Benghalensis* case—a pioneer Provision Case, not only for what it meant for the expansion of access to HIV/AIDS treatment, but also for its innovative approach to a type of problem not seen at the time as judicially actionable.[84]

During 1996, troubles accessing free treatment from the Program intensified.[85] Meanwhile, the number of patients had doubled and the budget had been reduced by two-thirds.[86] After several meetings and discussions among advocates and lawyers, on November 29, 1996, the group finally filed suit against the NHD and the Program, requesting compliance with Law 23,798, the constitution, and human rights treaties recognizing a right to health.[87] The case was filed by eight organizations but excluded the

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80. Law No. 24754, Dec. 23, 1996, [28555] B.O. 1.

81. Paul M. Rodriguez & Daniela A. Arnus, *Judicial Protection Against Health:* Femeba Quilmes *Medical Circle "Can Defend,"* JADDREAMER.COM (Nov. 17, 2005), http://www.jadeddreamer.com/judicial-protection-against-health-femeba-quilmes-medical-circle-can-defend/index.html. The bill extended to EMPs the duty to cover HIV/AIDS treatment for social funds, as specified in Law 24,455, and was passed by the house and the senate in less than ten days, when it become Law 24,754. *Cf.* S. Rep. 14, 78a. Reu.—31a Ses. D.S. 11/28/96 (identifying date of senate consideration of the legislation and scope of coverage). It was directly considered on the floor of the house on November 20 and 21, 1996 and defended by the informant member on the grounds that it was going to reduce public spending, ultimately providing treatment for unprotected patients of EMPs. C.D. Rep. 18, 46a. Reu.—20a Ses. D.S. 11/20–21/87. The senate, which also considered it on the floor, rapidly approved the bill. S. Rep. 14, 78a. Reu.—31a Ses. D.S. 11/28/96. For a discussion of the current state of regulation and recent efforts to reform EMPs, see *"Las prepagas tienen privilegios excepcionales," sentenció el moyanista Plaini*, LA NACIÓN (Arg.), Apr. 18, 2011, http://www.lanacion.com.ar/1366581-las-prepagas-tienen-privilegios-excepcionales-sentencio-el-moyanista-plaini.

82. Interview with Mabel Bianco, *supra* note 78; Interview with Interviewee B, *supra* note 78.

83. CSJN, 1/6/2000, "Asociación Benghalensis y otros c. Estado Nacional / amparo," Fallos (2000-323-1339).

84. Despite its relevance in the configuration of a new style of litigation, the case has been scarcely studied. As an exception, see Bianco et al., *supra* note 28, at 13 (discussing the *Benghalensis* litigation in the context of the development of the right to HIV/AIDS health care in Argentina).

85. *See id.* at 12 (chronicling indicia of worsening conditions for AIDS patients in 1996, including budget cuts and rising rates of infection).

86. *Id.*

87. Bianco et al., *supra* note 28, at 13.

Comunidad Homosexual Argentina, which, though part of the group, could not join in the suit because it lacked authorization to operate.[88]

In less than a week, Judge Rodríguez de Vidal granted a preliminary injunction ordering the NHD to supply viral-load tests, Vademecum, and ARVs.[89] The following year, on November 19, 1997, the judge signed her decision confirming the terms of the preliminary injunction and ordering the NHD once more to comply with Law 23,798 and the constitution.[90] The decision was appealed by the NHD, but a few months later, on March 5, 1998, the court of appeals upheld the judgment of the lower court.[91] Finally, on June 1, 2000, the supreme court also found for the plaintiffs.[92] In drafting the opinion adopted by the majority of the court four years after the filing of the suit, the attorney general recognized the fundamental character of the right to health.[93] He also acknowledged the interconnectedness of the right to health and the right to life.[94] The decision cited several constitutional clauses and grounded its conclusions in references to international human rights treaties that provide for the duty to respect, protect, and fulfill the right to health.[95] Additionally, the court relied on the international commitments assumed by Argentina upon the signing of these human rights instruments.[96]

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88. *Benghalensis*, Fallos (2000-323-1339). The Argentinian supreme court upheld the denial of the organization's petition to be registered as a nonprofit organization in 1991. CSJN, 22/11/1991, "Comunidad Homosexual Argentina c. Resolución Inspección General de Justicia / personas jurídicas," Fallos (1991-328-1491).

89. Interview with Judge Rodríguez Vidal, Presiding Judge, *Benghalensis* Litigation, in Buenos Aires, Arg. (June 3, 2009). Judge Vidal's decision on December 5, 1996 granted a preliminary injunction ordering the provision of (a) the supplies needed to test patients, (b) all of the drugs provided for in the basic Vademecum established on May 13, 1994, and (c) all the drugs approved by the ANMAT between 1995 and 1996, even if they had not been incorporated into the 1994 Vademecum. This was specially to address the supply of ARVs. *Id.*

90. *Id. See also* Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Asociacion Benghalensis y otros c. Estado Nacional / amparo," 22/2/1999, pts. II to IV, *adopted by Benghalensis*, Fallos (2000-323-1339) (discussing the granting of the injunction and subsequent attempt to enforce compliance); *El Estado, obligado a atender el SIDA* [*The State is obligated to pay attention to AIDS*], LA NACIÓN, June 2, 2000, http://www.lanacion.com.ar/nota.asp?nota_id=19161 (Arg.) (reporting on the supreme court's decision in *Benghalensis* and providing the history regarding Judge Rodriguez de Vital's granting of a preliminary injunction).

91. Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal [CNFed.] [National Court of Appeals on Federal Administrative Litigation], sala I, 5/03/1998, "Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social—Estado Nacional / amparo," no. 33.629/96.

92. *See* Victor Abramovich & Laura Pautassi, *Judicial Activism in the Argentine Health System: Recent Trends*, 10 HEALTH & HUM. RTS., no. 2, 2008 at 53, 57, 65 n.25 (discussing the history of the *Benghalensis* case).

93. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Asociacion Benghalensis y otros c. Estado Nacional / amparo," 22/2/1999, pt. V, *adopted by Benghalensis*, Fallos (2000-323-1339).

94. *Id.*

95. *Id.*

96. *Id.* pt. V (acknowledging that the National Court of Appeals in Federal and Administrative Litigation had expressed that the state had an obligation to combat AIDS per various constitutional mandates, pacts with constitutional status, and statutes).

Finally, the court laid out the grounds for developing an interpretation of federal rules in the realm of health and defined the government's duty to coordinate policies between the national and provincial governments.[97] Even though the judgment specifically concerned the enforcement of Law 23,798, it was an important precedential step in the development of the court's doctrines regarding federalism and health policies.[98] The court expressly considered the NHD's allegations that courts could not review the administrative decision to reassign budgetary lines.[99] In doing so, the court found that both the constitution and Law 23,798 required the allocation of resources to meet the commitments set forth therein and that the breach of this duty represented a violation of the constitution.[100] From a remedial point of view, the order was simple. It mandated the supply of treatment without distinguishing patients covered under the Program from those not yet covered by it. The court assessed neither the criteria used by the existing Program to allocate resources among patients nor the criteria used to distribute certain types of drugs.

The case remained opened from 1996, when the judge granted the first preliminary injunction, to 2001, when she issued the last individual injunction.[101] During that period, the judge received several petitions directly from patients seeking access to ARVs, and she included them as parties to the case.[102] Similarly, lawyers and advocates of NGOs involved in the case helped file claims from patients around the country,[103] and advocates in Buenos Aires referred local patients searching for treatment to local lawyers.[104]

D. Impacts of the Benghalensis *Litigation*

In the process being implemented, the *Benghalensis* litigation impacted several dimensions of public policy regarding provision of free treatment.

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97. *Id.* pt. XI.

98. *See* Walter F. Carnota, *Rights and Politics in Argentine Social Security Reform*, 44 AUSTRALIAN J. POL. SCI. 115, 122 (2009) (stating that the Argentinian supreme court "became sensitive to issues relating to a right to health" evidenced by *Benghalensis*); *see also* Maria Gracia Andia, Disadvantaged Groups, the Use of Courts, and Their Impact: A Study of Legal Mobilization in Argentina Through the LGBT Movement 15 (Aug. 23, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664178 (stating that *Benghalensis* "is extremely central because the Court's decision states that the National State is the guarantor of the country's population health").

99. Opinión del Procuración General de la Nación [Op. of the Nat'l Att'y Gen. Office], "Asociación Benghalensis y otros c. Estado Nacional / amparo," 22/2/1999, pt. XII, *adopted by Benghalensis*, Fallos (2000-323-1339).

100. *Id.*

101. In June 2001 alone, the judge granted 11 individual preliminary injunctions to provide treatment. Interview with Judge Rodríguez Vidal, *supra* note 89.

102. Interview with Mabel Bianco, *supra* note 78; Interview with Judge Rodríguez Vidal, *supra* note 89.

103. Interview with Interviewee B, *supra* note 78.

104. *Id.*

As suggested by Mæstad, Rakner, and Ferraz's impact matrix, the effects of the right-to-health litigation can be observed at the individual, policy, and societal levels.[105] The impact of the case on the individuals that joined the collective litigation was clear, since receiving an order from the judge implied that treatment would be provided within the following forty-eight hours.[106] Moreover, interviewees pointed to the significant expansion during 1997 of the number of patients covered under the national Program as a direct effect of the case.[107] For that year the number of patients receiving free treatment escalated from 400 in July to 1,413 by November.[108]

However, the effects of *Benghalensis* extended beyond the patients actually involved in the case and those incorporated into the Program as a result of its expansion during 1997. As described below, together with the 1997 receipt of international funds used to set up the LUSIDA program,[109] the litigation represented an important tool to confront the ideological blockage that had complicated the implementation of Law 23,798; contributed to the transformation of the political agenda regarding treatment for HIV and AIDS previously plagued by administrative inaction; and significantly redefined the Program and its coordination with its provincial counterparts.

First, according to the director of the Program, the litigation was key to dismantling the internal ideological blockage within the NHD cultivated earlier by Mazza.[110] As stated by one interviewee working for the NHD at the time, once the case and the subject were in the media, the Ministry began to yearn for "a week without having to hear about AIDS."[111] The media's coverage of the litigation may have contributed to expanding public awareness of the NHD's deficient policies. Indeed, press coverage of the HIV/AIDS litigation in Argentina began with *Benghalensis* and was repeated each time an access-to-treatment case was at stake.[112]

Second, the case impacted policy priorities within the Program and set in motion several initiatives that redefined its existing rules, scope, design, and operation, both at the national level and in coordination with provincial

105. Ottar Mæstad, Lise Rakner & Octavio Ferraz, *Assessing the Impact of Health Rights Litigation: A Comparative Analysis of Argentina, Brazil, Colombia, Costa Rica, India, and South Africa*, *in* LITIGATING THE RIGHT TO HEALTH, *supra* note 30.

106. What is more, in other cases, the press has reported that judges had to travel to providers' facilities to demand compliance with the court orders. Mónica Galmarini & Fabián Debesa, *Un juez reclamó personalmente drogas antisida para una mujer* [*A Judge Personally Asked for Anti-AIDS Drugs for a Woman*], CLARÍN.COM, Mar. 2, 2005, http://edant.clarin.com/diario/2005/03/02/sociedad/s-02601.htm.

107. Interview with Mabel Bianco, *supra* note 78; Interview with Interviewee A, *supra* note 65.

108. Bianco et al., *supra* note 28, at 21.

109. Interview with Mabel Bianco, *supra* note 78; Interview with Interviewee A, *supra* note 65.

110. Interview with Interviewee A, *supra* note 65.

111. *Id.*

112. *See, e.g.*, *El Estado, obligado a atender el SIDA* [*The State, Obligated to Attend to AIDS*], LA NACIÓN, June 2, 2000, http://www.lanacion.com.ar/19161-el-estado-obligado-a-atender-el-sida (reporting on the *Benghalensis* case).

policies. During 1998, the Program experienced an important increase in the allocation of financial resources, USD19 million to USD70 million.[113] These budgetary changes were accompanied by other reforms, including the creation of a new system for the decentralized delivery of drugs through hospitals.[114]

From a policy-making perspective, *Benghalensis* not only reduced political blockage within the NHD, but also helped strengthen the institutional design and the organization of a policy for the free supply of ARVs to patients from different jurisdictions of the country. Ultimately, as an interviewee put it, the litigation helped to turn a unitary program operating exclusively in Buenos Aires into a federal one with increasing presence across several jurisdictions.[115]

Lastly, the case was relevant for its innovative use of legal tools that would continue to forge significant changes in the system. To begin with, the case helped define the contours of the still unregulated *amparo colectivo*. The court's recognition of standing for a group of NGOs that was not accompanied by an "affected" individual as a party to the case represented a true experiment. In that sense, the decision in November 1996 to bring a collective case without including a single individual claimant was itself a risky idea. Moreover, the *amparo colectivo* was only a two-year-old tool, and there were few precedents to predict what courts would do with the device. Even more uncertainty surrounded the estimation of the final costs of litigation in the case of a defeat, an important concern for recently created NGOs experiencing resource constraints. The case was litigated when the public-interest litigation movement was still in its infancy.[116] From a doctrinal standpoint, the supreme court's decision was also relevant because the decision was one of the first to establish acceptance of the justiciability of the right to health.

Table 1 sums up the effects discussed above and includes examples of concrete impacts that together exemplify instances of interbranch cooperation (instilled by the *Benghalensis* litigation) between the courts and the administration.

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113. Bianco et al., *supra* note 28, at 13.

114. *See id.* at 13, 21 (reporting that "the supply of medicines was largely regularized" after the 1998 budget increase, and detailing the subsequent distribution of drugs through multiple channels, including several hospitals).

115. Interview with Interviewee A, *supra* note 65.

116. For a comprehensive description of the evolution of the use of courts as instruments of reform in the context of one of the main human rights organizations, see generally CENTRO DE ESTUDIOS LEGALES Y SOCIALES [CTR. FOR LEGAL & SOC. STUDIES], LA LUCHA POR EL DERECHO: LITIGIO ESTRATÉGICO Y DERECHOS HUMANOS [THE FIGHT FOR RIGHTS: STRATEGIC HUMAN RIGHTS LITIGATION] (2008) (analyzing many of the more than 100 cases tried by the Center).

Table 1. The *Benghalensis* Litigation and Its Effects

Effects / Case	Individual	Policy	Political and Ideological	Legal
***Benghalensis* Case**	Increased litigants' access to ARV. Increased number of individuals covered by the Program.	Regulatory gaps: Incorporated ARV into the Program's Vademecum. Coordination gaps: Resolution768/1998 defining the coordination of national and provincial policies. Budgetary gaps: Increase in the budget to USD70Million. Managerial gaps: Resolution 346/1997 changed the procedure for the purchase of ARVs.	NHD: Dismantled internal ideological blockages. Media: Dissemination of information on public policies.	Right to health, a fundamental right. International commitments. Federalism and coordination. Right to health is justiciable. Broad standing for *amparo colectivo*.

As a final point, the *Benghalensis* case represented the first instance of a strand of Provision Cases that would be litigated at least partly on the grounds defined by the supreme court's decision in *Benghalensis*.[117]

III. A Second Generation of Right-to-Health Claims for HIV/AIDS Treatment

As of 1997, both newspapers and legal periodicals reflected the emergence of new cases demanding the continued supply of free ARVs that both public and contributory providers had begun to limit for different reasons.[118] According to the Database, the number of published cases

117. *See* CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Acción Social—Secretaría de Programas de Salud y Banco de Drogas Neoplásicas," Fallos (2000-323-3229), slip op. at 7, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=125162&fori=RHC00823.352 (citing *Benghalensis* as affirming the state's obligations concerning the right to health).

118. *See, e.g.*, *Ordenan normalizar la entrega de medicamentos a enfermos de SIDA* [*Court Orders Normalization of Provision of Drugs to AIDS Patients*], LA NACIÓN, July 13, 2001, http://www.lanacion.com.ar/319516-ordenan-normalizar-la-entrega-de-medicamentos-a-enfermos-

including parties seeking or disputing access to treatment from 1997 to 2010 totals thirty-eight. Provision Cases after 1997 are part of a new generation of litigation because they evolved against the backdrop of a Program that was already implementing important institutionalization efforts, inspired by the *Benghalensis* litigation, to offer free ARVs.[119] Second-generation Obligation Cases can be considered part of a new cohort of cases because, after the passage of Laws 24,455 and 24,754, cases were litigated against the background of legal rules defining contributory funds' duties for coverage.

A. Second-Generation Provision Cases

The Provision Cases included in the Database total fourteen, nine of which were Provincial Provision Cases and five of which were Federal Provision Cases. In all of these cases, plaintiffs successfully sought the satisfaction of their right to access ARVs from publically run programs. Second-generation Provision Cases were filed either by individuals or groups as a reaction to the discontinuation of treatment.

These cases are associated with concrete deficits in the operation of national and provincial policies supplying free ARVs, which would result in a breach of provision duties. Such policy gaps emerged, first, from the budgetary constraints affecting the Program beginning in 1997, before the changes from the *Benghalensis* injunction led to the increase of financial resources.[120] At this point, some of the cases, such as *A.C.*[121] or the *Leónidas Lucero*[122] litigation, reflect basic coordination problems between national and provincial administrations that became apparent with the increase in the number of patients and the insufficient allocation of resources during early 1997.[123]

Second, beginning in 2000, Provision Cases also emerged in the context of continuity and adaptability deficits experienced by the Program that led to difficulties in the purchase of drugs.[124] These cases coincided with a new

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de-sida (Arg.) (discussing a court order to normalize drug delivery to members of the Welfare Projects of the City of Buenos Aires (OSBA) suffering from HIV); *SIDA: otra prepaga es obligada a cubrir los gastos de un paciente* [*AIDS: Another Health-Care Provider Is Required to Cover the Cost for a Patient*], LA NACIÓN, Oct. 31, 1998, http://www.lanacion.com.ar/116162-sida-otra-prepaga-es-obligada-a-cubrir-los-gastos-de-un-paciente (Arg.) (discussing a case where the court ordered a health-care provider to cover the costs of treatment for an AIDS patient).

119. Interview with Interviewee A, *supra* note 65.

120. Interview with Mabel Bianco, *supra* note 78; Interview with Interviewee A, *supra* note 65; Interview with Interviewee B, *supra* note 78.

121. CSJN, 24/10/2000, "Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Acción Social—Secretaría de Programas de Salud y Banco de Drogas Neoplásicas," Fallos (2000-323-3229), slip op. at 7, *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=125162&fori=RHC00823.352.

122. CApel.CC de Bahía Blanca, sala 2, 9/2/1997, "Hosp. Leónidas Lucero, C., C. y otros c. Ministerio de Salud y Acción Social de la Provincia de Buenos Aires," L.L. (1997-LLBA-1122).

123. Interview with Interviewee A, *supra* note 65.

124. Interview with Mabel Bianco, *supra* note 78.

shortage of the medicines provided by the Program that originated around the time of the presidential succession from Menem to De la Rúa in December 1999.[125] That year, after Menem lost the election, the NHD was virtually paralyzed.[126] The bids that should have been organized to sustain treatment and supplies were delayed,[127] and by early 2000 the shortages were already severe in spite of the fact that the Program had more financial resources than ever, with a total budget of $70 million.[128] These obstacles, which resulted in part from a lack of foresight within the former administration, were compounded later by the failure of the administration to anticipate the cost consequences of the first year of enforcement of new patent regulations scheduled for 2000.[129] Once the new intellectual property framework went into effect, the cost of patented ARV drugs skyrocketed.[130] When health officials opted for the purchase of generics, new confrontations arose between the administration and patients.[131] Moreover, as evidenced in the filings within the *Benghalensis* docket, some patients' organizations went back to court that same year to guarantee access to the brand-drug Kaletra, which had been replaced by generics purchased by the NHD.[132]

Third, beginning in 2001, another set of Provision Cases reached the courts in the context of the unfolding deep economic crisis that culminated later that year in the resignation of President De la Rúa.[133] At this point, new

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125. *See* MARCOS NOVARO, ARGENTINA EN EL FIN DE SIGLO: DEMOCRACIA, MERCADO Y NACIÓN (1983–2001) [ARGENTINA AT THE END OF THE CENTURY: DEMOCRACY, MARKET, AND NATION (1983–2001)] 555 (2009) (describing the shortage of medicine during the presidential transition).

126. Interview with Mabel Bianco, *supra* note 78.

127. *Esta semana pueden agotarse los medicaentos para enfermos de sida* [*This Week May Exhaust Drugs for AIDS Patients*], PÁGINA 12 (Arg.), Dec. 1, 2000 (describing the failure of the Memem administration to organize bids for the purchase of AIDS medication).

128. *See Argentina: AIDS Treatment Interrupted*, INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N (Sept. 18, 2000), http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/partners/793.html (considering problems that arose in 2000 related to public access to drugs in Argentina, even though the budget for "AIDS-related expenditures" was approximately $70 million at the time); Marta García Terán, *Reclaman por el costo del tratamiento* [*Reclaiming the Cost of Treatment*], LA NACIÓN, Dec. 1, 2000, http://www.lanacion.com.ar/43136-reclaman-por-el-costo-del-tratamiento (Arg.) (referring to instances of shortages of treatment supplies in local markets).

129. Gabriela Navarra, *Marca registrada* [*Trademark*], LA NACIÓN, Mar. 22, 2000, http://www.lanacion.com.ar/221228-marca-registrada (Arg.) (discussing the impact on prescription drug prices of the implementation of patent regulations).

130. *Id.*

131. *See Argentina: AIDS Treatment Interrupted*, *supra* note 128 ("Activists are demanding that the Argentinian government take immediate action to resolve the irregularities in drug delivery, guarantee and standardize the quality of ARV medication . . . and stop compromising the health and lives of some of its most physically vulnerable inhabitants.").

132. *Id.*

133. *See* Patrice M. Jones, *Leadership Crisis Adds to Argentina's Misery: Country Already Struggling Through Economic Turmoil*, CHI. TRIB., Dec. 1, 2002, *available at* http://articles.chicagotribune.com/2002-12-01/news/0212010457_1_peronist-party-buenos-aires-argentine-president-carlos-menem (summarizing the situation in Argentina that led to the resignation of President De la Rúa).

individual and collective Provision Cases grew out of financial cuts to the public health sector as a whole. As suggested by the number of cases filed during 2001, the decision to suspend the provision of ARVs was the rule rather than the exception within the different subsectors of the health system.[134] Moreover, toward the end of 2001, in the face of monetary devaluation, drug prices soared and purchasing treatment became even more difficult for providers.[135]

The national chaos that began in December 2001 significantly altered the supply of public health services in the following months. By February 2002, when the new head of the NHD took control of the Program, the shortage of drugs was intensifying and the need to organize new bids was urgent.[136] However, the *Sindicatura General de la Nación* [National General Syndicate] in charge of internal-accounting supervision would not authorize the acquisition of drugs at the prices available in March 2002.[137] Under these circumstances, a few days before the declaration of a national health emergency on March 13, a group of patients accompanied by the lawyers at the Center for Legal and Social Studies (CELS) filed suit, demanding the continued supply of ARVs for patients with HIV/AIDS.[138]

The *A.V.*[139] litigation, as it was called, was introduced on behalf of a number of patients,[140] and CELS was also a party.[141] The judge immediately granted an injunction ordering the NHD to continue provision of treatment.[142] With the NHD's new purchases, the provision of treatment gradually improved.[143] However, in spite of the commitment shown by the NHD, the first months of the case were difficult. Shortages continued throughout the

134. The Database shows nine cases in 2001.

135. *See* Patrice M. Jones, *Argentine Leader to Devalue Peso: Duhalde Seeks to Reform Banks, Regulate Prices*, CHI. TRIB., Jan. 5, 2002, *available at* http://articles.chicagotribune.com/2002-01-05/news/0201050150_1_devaluation-resignation-of-president-fernando-peso (describing the impact of currency reform on drug prices).

136. Interview with Carolina Fairstein, Att'y, Centro de Estudiados Legales y Sociales [CELS] [Ctr. of Legal and Soc. Studies], in Buenos Aires, Arg. (June 3, 2009).

137. *Id.*

138. For a detailed account of the background of this case, see CENTRO DE ESTUDIOS LEGALES Y SOCIALES, EL DERECHO A LA SALUD EN LA LUCHA CONTRA EL VIH-SIDA: UN EXAMEN DE LA POLÍTICA PÚBLICA Y LOS RECURSOS PRESUPUESTARIOS [THE RIGHT TO HEALTH IN THE FIGHT AGAINST HIV/AIDS: AN EXAMINATION OF PUBLIC POLICY AND BUDGETARY RESOURCES] 28–29 (2005).

139. 1a Inst., 27/2/2004, "A.V. y otros c. Ministerio de Salud de la Nación / amparo," Expte. No. 3223/02, slip op.

140. *See* CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 138, at 28–30 (explaining that the suit was brought based on the complaints of two beneficiaries of the National Program, but because of the effect of the situation on all beneficiaries, it was brought as a class action).

141. Interview with Carolina Fairstein, *supra* note 136.

142. *Id.*

143. *Id.*

end of the year, and CELS moved for the judge to fine culpable officers of the NHD, a motion the judge granted on December 2, 2002.[144]

As the months passed, patients began to arrive at CELS in search of new court orders for the continuation of treatment. According to the lawyers, patients were apparently receiving the recommendation to go to CELS directly from officers in charge of the supply of treatment.[145] In the chaos that hit the country during the first months of 2002, obtaining a court order became a prerequisite to continued treatment under Argentina's free public programs.[146] Between that time and late 2003, CELS filed, in this same case, petitions for court orders for treatment for forty-nine individuals with different needs ranging from ARVs to special imported drugs for opportunistic diseases.[147]

The *A.V.* case was widely covered by the press and remained open until 2005, when the court of appeals ratified the lower court's judgment, a decision challenged by the NHD and still pending before the supreme court.[148]

Finally, the Database includes four Provincial Provision Cases decided since 2002, where patients have had to litigate to obtain free treatment under provincial programs in Córdoba and Buenos Aires. In those cases, judges issued injunctions for the continued supply of medicines where logistical problems had arisen in the purchase of drugs.[149] The last of these claims, filed in 2010, requested treatment, food, and housing services for a girl with the disease.[150] There, courts construed the injunction to include the plaintiff's demands.[151]

B. Second-Generation Obligation Cases

Obligation Cases, brought against different contributory providers by plaintiffs seeking horizontal enforcement of the right to health, represent twenty-five out of the forty cases in the Database. While seven cases were brought against private funds, seven cases were litigated against the national OSS; six against provincial OSSs; three against the Programa de Atención

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Cámara Federal de Apelaciones [CFed.] de Córdoba [Federal Court of Appeals of Córdoba], sala A, 10/05/2006, "F Maca 250171," L.L. (2007-A-255); CFed. de Rosario, sala B, 16/05/2006, "Fernández, Germán v. Ministerio de Salud," no. 874/92, slip op.; Cámara Nacional de Apelaciones en lo Civil y Comercial Federal [CNApel.CC] [National Court of Federal Civil and Commercial Appeals], Sala 1, 10/05/2005, "Chianalino Marina Lorena c. Estado Nacional / amparo," no. 16.507/04, slip op.; Tribunal Familia [Trib. Fam.] de Mar del Plata [Family Court of Mar de Plata], 28/05/2010, n. 2, "G. G. / medidas cautelares," Lexis no. 70061224, slip op.

150. *G.G.*, Lexis no. 70061224, slip op.

151. *Id.*

Médina Integral (PAMI)—the functional equivalent to Medicaid; and two against other OSSs.

The Obligation Cases examined usually alleged a failure to comply with statutory duties to provide coverage. These cases represent a reaction to three situations: the first group of cases, litigated from 1997 to 1998, emerged because EMPs disputed the constitutionality of Law 24,754, opposing congress's mandate that the EMPs honor claims for ARVs.[152] In all of these cases, judges upheld the mandate based on the recognition of a constitutional right to health.[153]

A second group of claims involved the national OSSs' parallel legal obligation to cover treatment, which the government would reimburse through the subsidies established in a redistributive fund pursuant to Law 24,455. The litigants demanded OSS compliance with a legal duty that, in some cases, OSSs were failing to satisfy due to financial constraints or mismanagement of resources. Cases within these categories include, for instance, *NN v. OSDE y Ministerio de Salud*,[154] decided in 1997, and *R.D., J.S. v. Obra Social de la Unión Obrera Metalúrgica*,[155] with EMP and OSS defendants, respectively. These cases emerged where alternative supervising mechanisms under which patients could claim treatment were unavailable or not working properly.

In a third group of Obligation Cases, patients sought horizontal enforcement of the right to health when rules were either absent or unclear in scope. Specifically, where provincial OSSs or other OSSs were excluded from the social health sector regulated by Law 24,455, social funds had often denied their duty to cover or continue treatment.[156] Courts reacted by applying the rules for national OSSs to provincial OSSs by analogy, grounding their reasoning in the constitutional protection of the right to health.[157]

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152. Estudio Ymaz Abogados, *Sida, droga y prepagas. Inconstitucionalidad de la ley 24.754* [*AIDS, Drugs, and Prepayment Plans: The Unconstitutionality of Law 24.754*], BOLETÍN INFORMATIVO, No. 8, July 1999, at 4 (summarizing EMPs' argument that Law 24,754's mandate to cover AIDS treatment unconstituonally interfered with the private health insurers' autonomy).

153. *See, e.g.*, Cámara Nacional de Apelaciones en lo Civil de la Capital Federal [CNCiv.] [National Court of Civil Appeals of the Federal Capital], sala F, 23/10/1997, "S/N c. Tecnología Integral Médica / amparo," El Derecho [E.D.] (1997-177-144).

154. CNCiv., 23/12/1997, "s/n c. OSDE s/ amparo-sumarísimo," E.D. (1997-176-483). In 2001, the supreme court considered a case on this subject. CSJN, 13/3/2001, "E., R.E. c. Omint S.A. de Servicios / recurso extraordinario," Fallos (2001-324-677), slip op., *available at* http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarHjFallos&falloId=67212.

155. 1a Inst., 8/9/1999, "R.D., J.S. v. Obra Social de la Unión Obrera Metalúrgica / medida autosatisfactiva," J.A. (2001-II-452).

156. *See, e.g.*, CNCiv., *OSDE*, E.D. (1997-176-483) (recognizing the duty to cover costs for AIDS treatment and finding that the OSS denied that treatment).

157. *See id.* (noting that national law requires the provision of medical treatment for AIDS patients, and applying that law to the OSS defendant).

C. *The Effects of Second-Generation Cases*

While *Benghalensis* represented a turning point in expanding access to HIV/AIDS treatment for patients in the public health system, none of the subsequent cases resulted in similarly significant policy impacts. Even though courts continued to cooperate in fostering access to HIV/AIDS treatment until recently, the cases initiated after 1997 have not been linked by interviewees or secondary sources to the promotion of relevant reforms.[158]

In any event, the cases in the Database show that the recourse to courts continued after 1997, even in a context of higher budgets, better defined rules, and less flawed policies than a couple of years earlier. Moreover, the cases in the Database expose the need to relitigate certain claims more than once and show courts repeating the argumentative and remedial style of the early decisions, without much innovation.

Second-generation cases are also characterized by patients and their representative organizations filing simple compliance Provision Cases requesting coverage and seeking the enforcement of existing legislation. Second-generation litigation was less often caused by ideological blockage and incomplete commitments to universalize treatment—common features of first-generation cases. In addition, judges exclusively mandated the provision of treatment for an individual or a group of patients in these cases, while avoiding recognition of the collective dimensions of the right to health at stake in each.[159]

An overview of second-generation cases further shows the absence of demands for more structural or systemic approaches to health system deficits or, more specifically, to the multiple policy and regulatory gaps that gave rise to the persistent need for litigation. With the exception of Provision Cases such as *A.V.*, second-generation suits share some traits with right-to-health litigation demanding other drugs and treatments, which has increasingly reached the courts since the late 1990s. Furthermore, in the very few instances in which litigants individually or collectively formulated an aggregate demand concerning the management of health services, the courts never abandoned their practice of adjudicating these demands as simple individual claims for breach of statutory and constitutional duties, thereby avoiding recognition of the collective and aggregated potential effects of the cases.

Perhaps because these cases were ostensibly about enforcing simple coverage rules, judges never reached the causes behind administrative inaction or the violation of the right to health. This is epitomized by the cases

158. As we shall see, the *A.V.* litigation might be an exception to this claim.

159. This type of dynamic is not unique to Argentinian health law. *See* William M. Sage, *Relational Duties, Regulatory Duties, and the Widening Gap Between Individual Health Law and Collective Health Policy*, 96 GEO. L.J. 497, 502 (2008) (characterizing U.S. health law in general as having developed around private interactions, and "public health law" as having little connection to the institutions that supply or fund the medical profession).

adjudicated around the time of the deep crisis of 2001–2002, where litigation accumulated with other demands in the context of a national health emergency. In their decisions in these cases, judges either avoided referring to the emergency or referred to it only to emphasize its inadequacy as an excuse for the failure to comply with a fundamental constitutional right.[160] Lastly, judges seldom discussed the disparate enforcement of right-to-health claims inherent in a horizontal approach to their adjudication, nor did they consider the systemic deficits inspiring noncompliance—namely, regulatory, coordination, monitoring, management, and budgetary gaps. In fact, that courts failed to recognize their responsibility to mediate access to treatment for HIV/AIDS was symptomatic of the problems within the Argentinian health system as a whole, and seemed to be a striking feature of courts' enforcement of these and other right-to-health claims from 1997 to 2010.[161]

IV. Lessons from Fifteen Years of HIV/AIDS Treatment Litigation

The prior Parts profiled the different stages of litigation by HIV/AIDS patients and their representative organizations over the course of the last fifteen years. I have distinguished the two eras of right-to-health litigation in both Provider and Obligation Cases. Beyond the concrete individual effects of the cases, I have also offered evidence of the broader policy and legal impacts of the litigation—effects that, while clearly acknowledged in a few initial cases, seem harder to identify in those filed after 1997.

With respect to their content, the judgments retrieved in the Database suggest that in both stages of the litigation, courts relied on similar reasoning and simple remedies, such as injunctions, to order the supply of treatment for individuals or groups. In none of the cases did the parties or the courts discuss the lack of preventive or promotional policies within the public health system. Moreover, decisions in second-generation cases do not show much change in terms of courts' express articulation of, or reference to, the collective dimensions of the right to health, its content, or the budgetary constraints under which it operates within different subsectors of the health system. Nor did the cases contemplate the broader background of systemic failures of the health institutions and policies from which the Provision and Obligation Cases emerged. With very few exceptions, such as the *Benghalensis* or the *A.V.* cases brought by NGOs as part of broader strategies—and to a certain extent, even in those cases—judgments have maintained a simple structure limited to ascertaining the violation of a right, without defining its minimum content or a rationality test for administrative conduct. Furthermore, courts have only developed jurisprudence on the coordination duties of the federal

160. *See, e.g.*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 138, at 30 n.103 (explaining that the court in *A.V.* rejected the government's argument that an emergency could justify its public health failings).

161. For a profile of the litigation for other health services, see generally Bergallo, *supra* note 30.

and provincial authorities in a small number of cases. Finally, as we have seen in the second generation of the litigation, judges have almost never made reference to the types of treatment prescribed, their absolute or relative costs, effectiveness, or quality; nor do they reference the need to import expensive drugs not available in the country. It is particularly telling that in neither generation did decisions allude to political blockage or to any of the regulatory, monitoring, coordination, or managerial gaps that provided the need to resort to courts.

Table 2. Effects of HIV/AIDS Litigation in Argentina by Type of Litigation

Effects / Type of Litigation	Political Blockage	Governance Capacities
Horizontal 2nd Generation Cases	N/A	(−) Regulatory Gap (−) Monitoring Gap
Vertical 2nd Generation Cases (*A.V.*)	N/A	(−/+) Coordination Gap
Horizontal 1st Generation Cases (*T.C.A.*)	(+) Congressional Action	(+) Regulatory Gap (+) Monitoring Gap (OSS, not EMP)
Vertical 1st Generation Cases (*Benghalensis*)	(+) NHD Reactions	(+) Regulatory Gap (+) Coordination Gap (+) Monitoring Gap (+) Managerial Gap (budgetary and organizational gaps)

Table 2 and the preceding Parts suggest that cases have had varied impacts at different points over the fifteen-year span examined. Both individual and collective cases, as well as vertical and horizontal cases, have shown variations in their capacity to surmount political blockage and governance incapacities in the realization of the commitment to guarantee universal access to treatment. This finding clearly supplements available comparative research contrasting structural with individual cases in right-to-health litigation,[162] revealing that impacts can vary within the same family of

162. *See, e.g.*, Mæstad, Rakner & Ferraz, *supra* note 105, at 10 (offering "plausible explanations for this apparent discrepancy in enforcement between collective (including structural) and individual cases").

cases, depending on the time and the institutional background against which plaintiffs resort to courts.

In the concrete case of HIV/AIDS treatment, the first generation of vertical enforcement litigation, namely the *Benghalensis* case, helped dismantle the prevalent ideological blockage behind the postponement of serious policies addressing AIDS. *Benghalensis* also contributed to the confrontation of the public administration's governance incapacities in the exercise of its stewardship functions, inspiring significant changes in national coordination with the provinces and the logistics for the delivery of treatment, among others. Prior to *Benghalensis*, individual cases such as *T.C.A.* and the work of groups of advocates had also inspired legislative reforms defining private funds' duties.

However, after 1998, when the initial barriers behind administrative and legislative inaction finally began to come apart, both individual and collective recourse to the courts in vertical and horizontal Provision and Obligation Cases limited the efficacy of curtailing discontinuities of drugs by public and contributory providers. At this point, recourse to courts somehow lost its cooperative potential beyond the mere order to supply treatment, without significantly affecting the more systematic problems causing the shortages. Neither interviewees nor secondary sources recognized these cases as major instruments that inspired larger reforms. Instead, most of the reforms adopted in the last decade have been attributed to other factors.

On the other hand, while second-generation cases unquestionably contributed to the expansion of access to treatment both from the individual standpoint and from the point of view of certain groups of patients participating in the cases, the effects of courts' intervention remained confined to the situation of the particular plaintiffs, as in the traditional bipolar style of private law cases. As one of the interviewees put it, at this point the litigation caused the Program to function as no more than a "drugstore," and the perpetuation of this litigation may have exacerbated intrapolicy inequalities. In other words, the reinforcement of a curative impulse potentially generated less efficient and equitable results.[163] If one takes into account Gauri and Brinks's warning,[164] this litigation may have fostered interpolicy inequities

163. Interview with Mario Pecheny, Soc. Scientist, in Buenos Aires, Arg. (June 2, 2009). Concentration on the fight for access to treatment may have shifted the allocation of resources and the focus of state policies to the delivery of drugs, to the detriment of prevention and promotion interventions necessary to counteract the progress of the disease. *See* Laura Rocha, *Polémica por el fin del proyecto Lusida* [*Controversy Over the LUSIDA Project*], LA NACIÓN, Dec. 10, 2001, http://www.lanacion.com.ar/nota.asp?nota_id=357997 (Arg.) (describing the four-year history of the LUSIDA program and its possible shutdown). In practice, for several years these interventions remained the sole competence of LUSIDA, a program established thanks to donors' funding. *See Promueven la detección precoz del virus del SIDA* [*Promote Early Detection of AIDS Virus*], LA NACIÓN, Apr. 29, 1998, http://www.lanacion.com.ar/95046-promueven-la-deteccion-precoz-del-virus-del-sida (Arg.).

164. *See* Brinks & Gauri, *supra* note 18, at 336, 340 (stating that private and individual litigation, like the medication litigation occurring in Brazil, "carr[ies] greater risk of producing

affecting the prioritization of public investment in other diseases impacting less privileged groups. These groups' demands may have thus received less attention and resources as a result of the bias towards the better resourced, better publicized struggle at issue in this Article. Finally, in the context of the massive inequalities that result in the disparate situation of patients within different subsectors of Argentina's health care system, the litigation may have also intensified pervasive inequalities in benefits.

beneficiary inequality" and "operates at times as a rationing device, in which claims are denied to all except those who have the resources to retain a private lawyer").

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Harming the Poor Through Social Rights Litigation: Lessons from Brazil

Octavio Luiz Motta Ferraz*

I. Introduction

The constitutionalization of social and economic rights, although still a contentious issue in some countries, is no longer as controversial and exceptional a practice as it once was. Several constitutions around the world currently recognize, in varying formulations, one or more so-called social and economic rights such as health, education, work, housing, food, and water.[1] But one of the common effects of constitutionalization, the increase of litigation invoking these rights (I shall call it "judicialization"), remains a highly contentious subject. Constitutional theorists disagree on whether it is appropriate for courts to adjudicate these rights,[2] and those who support courts' involvement disagree about how far adjudication should go (often

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1. *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 177 (2005) (including a categorical listing of constitutions that include various socioeconomic provisions); Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. COMP. ECON. 103, 107 tbl.2 (2008) (listing the indices of constitutional commitment to social rights); Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 30–34 (2003) (relating the importance of Latin Americans in the inclusion of social rights in the 1948 Universal Declaration of Human Rights); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523–26 (1992) (comparing and contrasting the rights that have been accepted in the United States and other Western countries).

2. *Compare* Flavia Piovesan, *Impact and Challenges of Social Rights in the Courts*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 182, 184 (Malcolm Langford ed., 2008) ("[A] failure by the State to implement constitutional dictates, particularly those related to social rights, can be considered an unconstitutional act and subject to judicial review."), *with* Aryeh Neier, *Social and Economic Rights: A Critique*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 283, 284 (Henry J. Steiner et al. eds., 3d ed. 2008) ("The concern I have with economic and social rights is when there are broad assertions . . . . There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.").

along a spectrum that goes from procedural to substantive review, or from weak to strong review).[3] I shall call this the "justiciability debate."[4]

The recent literature in English has overwhelmingly focused on the South African Constitutional Court and has been mostly critical of its perceived deferential approach, which is based largely on the traditional administrative law model of reasonableness review.[5] For those critics, such an approach renders social and economic rights meaningless and represents an abdication by the judiciary of its constitutional duty to protect these rights. In their view, once social rights are constitutionalized, courts should determine their content and enforce them assertively without being too worried about a duty of deference to the political branches.[6]

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3. *Compare* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 708, 757 (2001) (summarizing debate over strong versus weak review by saying "individual rights are either supreme law, entrenched and enforced by an unreviewable judiciary or they are ordinary law changeable by legislative majority"), *with* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 248 n.11 (1995) (contending that modern constitutional scholarship "tends to reject the claim that the problem of democratic debilitation is a serious one").

4. *See also* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 123 (2008) ("[I]t is possible to structure adjudication of positive human rights in a way [that] strengthens rather than detracts from democracy."); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 163 (2008) (discussing the development of weak-form systems of judicial review and their relation to the enforcement of social and economic rights, utilizing cases from the South African Constitutional Court); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 391 (2007) (developing a theory of "constitutional dialogue" regarding the South African Constitutional Court's approach to judicial enforcement of socioeconomic rights).

5. *See* Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?," in* RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 33, 37 (Henk Botha et al. eds., 2003) (making a "descriptive claim, that the Constitutional Court has proceduralised its adjudication of socio-economic rights, because it leans toward seeing for itself a formal, structural or procedural, rather than a substantive role in adjudicating these rights"); Sandra Liebenberg, *Adjudicating Social Rights Under a Transformative Constitution*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 2, at 75, 90 (noting that critics of "reasonableness review" have argued that it "amounts essentially to an administrative law model, and that insufficient attention is paid to the substantive standards that should guide the determination as to whether the State has met its obligations in relation to socio-economic rights"); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151, 154 (2009) (observing that the South African Constitutional Court's critics' primary objection to the court's deferential socioeconomic rights jurisprudence is that this deference weakens those rights); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 139–40 (2008) (lamenting the South African Constitutional Court's refusal to define minimum essential levels of socioeconomic rights).

6. The literature on pre- and post-constitution South Africa is now vast. *See, e.g.*, DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 237 (2007) (advocating a two-stage analysis and claiming that it could improve the inadequate "reasonableness" inquiry developed by the South African Constitutional Court for adjudicating social rights issues); EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES (Danie Brand & Sage Russell eds., 2002) (compiling articles that describe the content of different socioeconomic rights from the South African perspective); Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional*

Participants on both sides of the justiciability debate rely mostly on theoretical arguments about the legitimate role of courts in a democracy and on abstract discussions of their institutional capacity.[7] Very little, if anything at all, is said about the actual effects of justiciability on the ground. I believe this is an important omission. In my view, there is no a priori legitimate role for courts in a democracy with respect to the adjudication of social and economic rights, at least where these rights have been constitutionalized as rights and not as directive principles of state policy. Courts' legitimate role hinges strongly, in my view, on whether they can do a good job, i.e., on whether they can contribute to the protection of social and economic rights.

In this Article, I try to shed light on the justiciability debate from this different, more empirical perspective. My focus is the burgeoning, yet much less known, jurisprudence of the Brazilian courts and the empirical data that is gradually becoming available on the actual effects of that jurisprudence. For over ten years now, the Brazilian judiciary, led by its Supreme Federal Tribunal (STF), has consistently adopted an assertive stance in the adjudication of some social and economic rights, particularly education and health.[8] Unlike its South African counterpart, it has not shied away from determining the content of these rights and from issuing mandatory injunctions to compel the state to immediately provide the corresponding goods and services to litigants. This seems to be exactly the role that some social rights supporters want the judiciary to play, and many commentators

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Questions: In the Interest of Justice?, 3 INT'L J. CONST. L. 39, 64 (2005) (summarizing the South African Constitutional Court's approach to the jurisprudence of socioeconomic rights); William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969–Present*, 39 TULSA L. REV. 597, 598 & nn.5–6 (2004) (stating that "'social rights' are features of most of the world's constitutions" and listing South Africa as an example); Sandra Liebenberg, *Needs, Rights and Transformation: The Adjudication of Social Rights in South Africa*, *in* (MIS)RECOGNITION, SOCIAL INEQUALITY AND SOCIAL JUSTICE 177 (Terry Lovell ed., 2007) (exploring the relationship between a jurisprudence of social rights and the transformative goals of the South African constitution); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 15–18 (2003) (discussing the justifications for opposing the constitutionalization of social rights and citing a South African case as an example); Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882, 891–96 (2004) (analyzing three recent key decisions by South Africa's Constitutional Court that vindicate the court's role as an enforcer of social rights); Theunis Roux, *Understanding* Grootboom*—A Response to Cass R. Sunstein*, 12 CONST. F. 41, 41 (2002) (critiquing Cass Sunstein's interpretation of the Constitutional Court's decision in *Grootboom*, in which it adopted "what is in effect an 'administrative law model of socio-economic rights,' . . . giving courts the power to order government to 'devote more resources than it otherwise would' to the regulatory problem at issue").

7. *See, e.g.*, Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973) (presenting two theoretical models of the role of the judiciary in answering constitutional questions); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 75 (2007) (arguing that justiciability doctrine is "fundamentally misconceived" in view of the role of the courts in a constitutional democracy).

8. *See* Octavio L.M. Ferraz, *Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa* 13 (August 20, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458299 (noting the high rate of success for claimants in Brazilian health-rights cases since 1998).

have indeed applauded the Brazilian court's assertive approach.[9] However, if one looks at those cases more closely and carefully—particularly from the empirical perspective I am suggesting—it is at best debatable whether this assertive judicialization enhances the protection of social rights.

To illustrate my point, I focus mostly on the judicialization of the right to health, on which a significant amount of empirical data has been collected recently. Most of my arguments, however, apply to other social and economic rights as well, and I believe they are relevant for other jurisdictions with similar contexts, legal cultures, and structures. My main contentions are these: (1) when pushed to enforce some social rights assertively, courts have a tendency (and an incentive) to misinterpret these rights in an absolutist and individualistic manner; (2) such interpretation unduly favors litigants (often a privileged minority) over the rest of the population; (3) given that state resources are necessarily limited, litigation is likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities; and (4) contrary to the contention of some scholars, enhancing access to courts would not solve the problem. My suggestion, based on these arguments, is that social and economic rights might be better protected when courts refrain from trying to enforce those rights assertively, as some social rights supporters expect and pressure them to do.

I am not arguing, I hasten to clarify, that social and economic rights should never be constitutionalized. In fact, nothing in my argument provides direct support against constitutionalization per se—although it might, indirectly, when the type of judicialization I criticize is shown to be an inevitable consequence of constitutionalization and to lead to a worse overall protection of these rights than would otherwise obtain had they not been constitutionalized.[10] I am also not arguing that courts are inherently

9. For a recent article in English by a leading Brazilian activist defending judicialization, see Piovesan, *supra* note 2, at 182. *See also* Octavio Luiz Motta Ferraz, *Health Inequalities, Rights, and Courts: The Social Impact of the "Judicialization of Health" in Brazil*, *in* LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 1, 25 (Alicia Ely Yamin & Siri Gloppen eds., 2011) [hereinafter Ferraz, *Social Impact*] (finding numerous changes in judicial behavior necessary to allow health litigation to have a positive social impact in Brazil); Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. J. 33, 34 (2009) [hereinafter Ferraz, *Right to Health*] (arguing that the Brazilian interpretation of the right to health, and the litigation model it encourages, is potentially detrimental to health equity); Florian F. Hoffman & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE 100, 100 (Varun Gauri & Daniel M. Brinks eds., 2009) (examining the origins and impact of litigation for health and education rights in Brazil); José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 185, 185 (Roberto Gargarella et al. eds., 2006) (asserting that democratization in Brazil took place with the support of the judicialization of social rights).

10. This seems to be the argument previously put forward by Frank Cross. *See generally* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001). Although my analysis echoes some of the points made by Cross, it differs from his analysis in an important respect. According to him, "[f]or positive constitutional rights to make sense, the advocates have to explain

incapable of adjudicating social rights appropriately. The South African Constitutional Court is a good example, in my view, that they are capable.[11] Rather, my argument is that in some places, such as Brazil (and perhaps other countries with similar contexts, legal cultures, and structures), the judicialization that followed constitutionalization has likely been detrimental (and certainly not helpful) to furthering the interests that social and economic rights are supposed to protect. Social rights supporters should therefore be wary of automatically viewing justiciability as an indispensable ally of constitutionalization.

This Article proceeds in three additional Parts. In Part II, I argue that whether courts should enforce social rights (the legitimacy question) cannot be abstractly evaluated independent of the actual consequences that justiciability produces on the ground in terms of protecting these rights. In Part III, I use the experience in Brazil with the so-called judicialization of health to illustrate and evaluate justiciability. I conclude, as already anticipated above, that we have enough cause to doubt whether the effects of justiciability are benign and perhaps should even advocate that social rights be taken away from Brazilian courts. In Part IV, I put forward a final argument against social rights justiciability as a potential vehicle for protecting the rights of the poor in highly unequal and inegalitarian countries, even where courts are genuinely willing to help the poor (an assumption that I claim should not be taken for granted).

II. Legitimacy and the Actual Effects of Justiciability

Supporters of social rights justiciability depart from an argument that, at first sight, seems rather plausible. They claim that the political decision to include social rights as "rights" in the constitutional document does away with the concerns of legitimacy raised by opponents of justiciability.[12] If the majority of people gave an express mandate through their highest law to the judiciary to enforce social rights, then courts should proceed without any fear of encroaching into the reserved sphere of the political powers of the state, i.e.,

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why courts would do a better job of providing minimally adequate welfare support than would the legislative and executive branches." *Id.* at 920. This seems to assume that constitutionalization can have no independent positive effect on legislatures and executives that might outweigh the negative effects of judicialization, which I do not believe Cross proves to be the case. If constitutionalization influences the political branches to adopt measures that enhance the enjoyment of these rights, as I believe was the case in Brazil and could potentially be the case elsewhere (including the United States, which is the sole focus of Cross's concern), the negative effects of judicialization would have to outweigh those positive effects for constitutionalization to be unjustified.

11. For a defense of the South African Constitutional Court's reasonableness approach, see Octavio L.M. Ferraz, *Poverty and Human Rights*, 28 OXFORD J. LEGAL STUD. 586, 588, 603 (2008).

12. Indeed, this is the position taken by the South African Constitutional Court. *See In re Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at 800 para. 77 ("In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.").

of violating the principles of democracy and separation of powers. The thrust of this position is illustrated by a short passage in a judgment by the South African Constitutional Court in the famous *Treatment Action Campaign (TAC)*[13] case: "In so far as [social rights adjudication] constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."[14]

The weight of this argument, however, is much less than justiciability supporters seem to believe. It does, of course, refute radical positions against social rights justiciability based solely on "pure" legitimacy concerns, i.e., that social and economic issues such as health and education are matters of policy with which courts should *never* interfere.[15] This objection does not survive the constitutionalization of social rights as "rights." Yet constitutionalization does not completely eliminate all concerns with legitimacy either. How courts should go about discharging their constitutional mandate to adjudicate social rights remains an important and debatable question even after constitutionalization.

This question of "how" has two distinct, interrelated aspects. One touches upon the idea of intrusiveness. There are different types of scrutiny utilized by courts when adjudicating social rights, ranging from more procedural (and thus less intrusive) to more substantive (and thus more intrusive). On the purely procedural side lies the traditional administrative law model of procedural propriety (due process). In these types of cases, courts do not interfere with the substance of the decisions made by the political branches but rather make sure that these decisions have followed appropriate procedures, such as affording a fair hearing. The famous American case *Goldberg v. Kelly*[16] is a good example of this approach. At the other end of the intrusiveness spectrum, courts define the content of social and economic rights and modify decisions of the political branches that fail to coincide with the judicial definition. The Brazilian right to health cases discussed later in this Article are of this sort.[17] In between these two extremes are intermediate cases where courts do not completely modify political decisions in their substance yet go beyond mere procedural defects, such as cases in which a benefit conferred to a class of citizens is extended to another group. These

13. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

14. *Id.* at 755 para. 99.

15. *See* D.M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475, 482 (1992) (positing that a court could never interfere with a government program adopted pursuant to a socioeconomic constitutional right); *see also* Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 377 (1988) (maintaining that political and social rights should never be judicially enforced).

16. 397 U.S. 254, 261–66 (1970) (holding that due process requires a pre-termination evidentiary hearing before the discontinuation of welfare assistance).

17. *See infra* notes 58–66 and accompanying text.

include the South African case of *Khosa*,[18] where the court extended social benefits available to nationals to foreigners who had permanent residence and paid taxes in South Africa, and the American cases of *Murry*,[19] *Moreno*,[20] and *King v. Smith*,[21] where courts prevented the legislature from excluding certain groups from social benefits.[22] The reasonableness approach applied in cases such as *Grootboom* and *TAC* are also in this intermediate category.[23] There, the courts went so far as to declare that the housing and health policies of the state were unreasonable for overlooking particularly vulnerable groups—homeless people and babies at risk of contracting HIV. However, they did not mandate a particular policy in *Grootboom*, nor did they mandate a particular implementation schedule or the amount of resources to be spent in either *Grootboom* or *TAC*.

But this formal classification of types of scrutiny, although relevant, cannot itself determine whether the role of courts is legitimate or not. It is true, of course, that the more substantive the review, the more controversial it becomes in terms of legitimacy.[24] To evaluate legitimacy appropriately, however, one has to go beyond this formal categorization of scrutiny and investigate the effects that each type of scrutiny is producing on the ground, i.e., in the protection of the interests recognized by the constitutional norm. If it could be shown that some or all types of court interference lead to outcomes that are more harmful than helpful to the protection of interests

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18. *Khosa v. Minister of Soc. Dev.* 2004 (6) SA 505 (CC) at 535–42 paras. 68–89.

19. U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 514 (1973) (declaring unconstitutional a provision of the Food Stamp Act that withheld food stamps from indigent households that happened to contain an individual whom another non-indigent taxpayer claimed as a dependent).

20. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (invalidating an amendment to the Food Stamp Act that excluded "hippies" and other households of unrelated persons from the program).

21. 392 U.S. 309, 333–34 (1968) (striking down an Alabama law that denied federally funded aid to children whose mother cohabitated with a man to whom she was not married).

22. Intrusiveness can also vary depending on the strength of the remedy granted by the court, ranging from weak remedies such as declaratory relief to strong remedies such as injunctions. *See* TUSHNET, *supra* note 4, 33–36 (contrasting "strong-form" and "weak-form" judicial review). I am not concerned in this Article with so-called weak remedies.

23. *See Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 762–64 paras. 124–133 (S. Afr.) (deferring to the government to implement a comprehensive policy in order to ensure the national effort to combat the HIV/AIDS pandemic complies with the constitution); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 86 para. 96 (requiring the state to act in order to meet the requirements of § 26 of the constitution, including "the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need").

24. *See* TUSHNET, *supra* note 4, at x–xi (observing that reasonable people often dispute the correctness of the conclusions that courts reach in judicial attempts to interpret and apply the underlying meaning of constitutional bills of rights); Michelman, *supra* note 6, at 17 (characterizing judicial enforcement of constitutionally protected social rights as "comfortably kosher" if this enforcement only entails, for example, deciding whether municipal land-use laws are "reasonable"); Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 124 (2001) (conveying judicial enforcement critics' argument that courts are not equipped to make socioeconomic-program-implementation decisions that would require them to apply extensive knowledge of the programs or to make value judgments).

recognized in constitutional social rights norms, then the courts' prima facie claim to legitimacy derived from constitutionalization would seem to be seriously undermined. It might even be argued, depending on how negative the effects of judicialization are, that the constitution should be reformed to remove social rights from the courts.[25]

It might be objected that this approach, which links legitimacy so closely to the consequences of justiciability, is too contingent. It does not establish whether justiciability is legitimate as a matter of principle, as some commentators seem to believe it is. Wojciech Sadurski, for instance, has claimed that legitimacy and rights protection "are conceptually and politically distinct questions," and that "we might consider [judicial review] to be legitimate but regrettable from the point of view of rights."[26]

It seems implausible to me, however, to maintain the legitimacy of justiciability even when, in any of its potential forms mentioned above, it is proven to consistently lead to a worse situation in terms of rights protection than nonjusticiability would.[27] Surely, what justifies the judicial power to review political decisions is the probability that the practice of judicial review can improve these decisions.[28] This does not mean, of course, that all individual decisions have to achieve that aim, but rather that the practice itself is, on average, able to improve things.

But my main argument in this Article does not depend on accepting that legitimacy and effectiveness are linked. One could perhaps still hold that justiciability is legitimate in principle but, given its incurable ineffectiveness (or harmful effects) in practice in some countries, should be abandoned as a pragmatic move.[29]

If the approach I suggested above is correct, a verdict on whether social rights justiciability should be encouraged or rejected (for principled or pragmatic reasons) is strongly context dependent and hinges on a wealth of empirical data that, I admit, might be rather difficult to collect and analyze,

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25. Others have made pragmatic claims against justiciability. *See* Cross, *supra* note 10, at 920 (warning that relying on the judiciary to uphold socioeconomic rights could be "disastrous" since, historically, courts have not adequately concerned themselves with socioeconomic inequality); Sunstein, *supra* note 24, at 124 (relaying judicial enforcement critics' argument that allowing socioeconomic rights to be justiciable could undermine efforts to protect these rights, since courts lack the resources to properly enforce these rights, and since the citizens to whom these rights belong would no longer be able to have as much control over the rights through the democratic process).

26. Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, 276 (2002).

27. *See, e.g.*, Ferraz, *Right to Health*, *supra* note 9, at 38–40 (arguing that justiciability of the right to health in Brazil has failed to improve health equity in that country).

28. *See* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227, 230–31 (2010) (stating that "the prominent theories purporting to justify judicial review are instrumentalist," and that under these theories, "judicial review is justified to the extent that it is likely to bring about *contingent* desirable consequences").

29. For a purely pragmatic argument, see Cross, *supra* note 10, at 862 ("[E]conomic and political barriers . . . prevent positive rights from being actualized effectively.").

especially for lawyers. This should be no reason, however, to abandon the approach. Rather, we should strive to get access to as much data as possible and come to provisional conclusions based on the available data. In the next Part, I apply the model just suggested using empirical data on the judicialization of health in Brazil.

III. The Judicialization of Health in Brazil and Its Consequences

Brazil is internationally recognized as a success story in the fight against AIDS due to its state-funded drug distribution program set up by the government in the 1990s.[30] What is less well-known is that many HIV-infected Brazilian citizens were and are given HIV drugs due to court orders and not through federal, state, or municipal government programs, which are very large but not fully comprehensive due to resource limitations.[31] The impact of these court orders is significant. Estimates of the Federal Ministry of Health for the state of São Paulo, the most densely populated state in Brazil with close to 40 million people,[32] show that BRL85 million (approximately USD43 million)—the equivalent of 30% of the overall budget for high-cost drugs and more than 80% of the original budget for AIDS drugs—was spent in 2005 to comply with injunctions ordering the funding of new AIDS drugs not included in the government's health policy for more than 10,000 individuals.[33]

This same pattern, which became prominent with AIDS drugs litigation in the late 1990s and early 2000s, has now spread to several other conditions, including diabetes, hypertension, rheumatoid arthritis, cancer, eye diseases,

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30. *See A Regional Success Story: Sharing Knowledge to Tackle HIV and AIDS*, DEP'T FOR INT'L DEV., http://www.dfid.gov.uk/casestudies/files/south-america/brazil/brazil-hiv-regional.asp (citing a figure of 600,000 people living with HIV and AIDS in Brazil, compared to the figure projected in the mid-1990s of 1.2 million HIV infections by 2000). For a brief account of the program and how its success depended on the participation of civil society, see Jane Galvão, *Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Public Health*, 95 AM. J. PUB. HEALTH 1110, 1112–13 (2005).

31. *See* Tatiana Wargas de Faria Baptista et al., *State Responsibility and Right to Health in Brazil: A Balance of the Branches' Actions*, 14 CIÊNCIA & SAÚDE COLETIVA [SCI. & PUB. HEALTH] 829, 836 (2009) (discussing the prominent role of the Brazilian judiciary in supplying medicine for HIV/AIDS and other diseases, which was necessitated "at least in part [by] the deficiencies of Public Administration").

32. *Censo 2010: população do Brasil é de 190.732.694 pessoas* [*Census 2010: Brazil's Population Is 190,732,694 People*], INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA [BRAZ. INST. GEOGRAPHY & STAT.] (Nov. 29, 2010), http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=1766&id_pagina=1.

33. Fabiane Leite, *Estados tentam barrar remédios via Justiça* [*States Try to Stop Treatment Through Justice*], FOLHA DE S. PAULO [SÃO PAULO SHEET], Oct. 3, 2005, *available at* http://www.gestospe.org.br/web/noticias/conteudo1/?conteudo=151451403&autenticacao=0,79048; *see also* MINISTÉRIO DA SAÚDE [BRAZ. MINISTRY OF HEALTH], O REMÉDIO VIA JUSTIÇA [TREATMENT THROUGH JUSTICE] (2005), *available at* http://www.aids.gov.br/sites/default/files/o_remedio_via_justica.pdf (presenting a study of 400 cases conducted by the Brazilian National STD and AIDS Programme).

and many others.[34] According to the most recent and still incomplete estimates, there are at least 40,000 lawsuits yearly against the Brazilian government in which claimants rely, almost always successfully, on the right to health, generating growing administrative burdens and significant costs to the already strained Brazilian public health system ("SUS," or Unified Health System).[35]

Public opinion about this phenomenon, referred to as the "judicialization of health," is divided into two highly polarized camps. On one side, there are those (mostly lawyers and health-related pressure groups), who applaud judicialization as a legitimate vindication of the constitutional right to health so often violated by the political branches.[36] On the other side, we find those (mostly congressmen and public health officials) who decry judicialization as an incompetent and illegitimate interference by courts on the realm of politicians and public health experts.[37] As I have argued above, neither of these extreme positions can be supported in the abstract, i.e., without further empirical inquiry into the actual consequences of judicialization. In the following subparts, I describe and analyze in more detail the Brazilian model of judicialization and its actual consequences.

A. Defining the Right to Health

The inquiry I am proposing, as is readily apparent, is fraught with difficulties. One of the difficulties lies in the very definition of the content of social rights in general, and the right to health in particular. It is not clear from the constitutional norm alone which specific treatments, equipment, and medicines individuals are entitled as a corollary to the right to health. These norms are often vague and indeterminate, and the Brazilian constitution is no exception. Here are the two most relevant provisions addressing the right to health:

> Art. 6. Education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.[38]
>
> Art. 196. Health is the right of all and the duty of the state and shall be guaranteed by social and economic policies aimed at reducing

34. Ferraz, *Right to Health*, *supra* note 9, at 35–36.

35. *See* Ferraz, *Social Impact*, *supra* note 9, at 10–12 (discussing the social impact of the volume of right-to-health litigation).

36. *See id.* at 1–2 (discussing the Brazilian judiciary's expansive interpretation of the right to health).

37. *See* Ferraz, *Right to Health*, *supra* note 9, at 34 (suggesting that the courts might be worsening the country's already pronounced health inequities); Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 861–62 (2009) (explaining that the Brazilian courts' decisions ordering the government to provide necessary medical treatment have been characterized as "excessive judicialization of the right to health").

38. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6.

> the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.[39]

Indeterminateness is, of course, not a fatal obstacle to justiciability. But it does pose an important difficulty for it and for our task of evaluating its effects.[40] How can we establish if courts are doing a good job when they grant all sorts of treatment, equipment, and medicines to litigants if it is unclear whether the constitutional right to health includes these goods?

One option is to claim that this high indeterminacy is in itself a sufficient reason for courts to not get involved in any thoroughly substantive form of scrutiny. It is for the political branches, democratically elected, to decide the substantive content of the right to health; courts should, at most, simply control the procedural propriety of these decisions and prevent irrational and discriminatory implementations of the constitutional norm. Rather than decide if individuals have rights to particular treatments or goods, courts should make sure that whatever decision is made follows proper criteria of fairness, transparency, and rationality, as they did in *Soobramoney*[41] and had been doing in Brazil before 1997.[42]

Although I think this view is plausible in countries that have not constitutionalized social rights, or have done so expressly as nonjusticiable directive principles, it does seem implausible in countries where these rights are now part of the constitutional document. That approach would render the constitutional provisions recognizing social rights largely superfluous, since fairness, transparency, and rationality are well-established principles of administrative law that would apply irrespective of the inclusion of social

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39. *Id.* art. 196.

40. Some commentators seem to underestimate this problem. Michelman, for instance, dismisses the problem very quickly by saying, "'Reasonableness' is not, in any legal discourse known to me, a nonjusticiable standard (or are negligence law and general clauses beyond the pale?), and the remedy for violation, if found, would be a simple prohibitory injunction." Michelman, *supra* note 6, at 17. This seems to me an unwarranted oversimplification. In negligence cases, one is not dealing with complex polycentric issues of the sort involved in social rights adjudication, such as the housing policy discussed in Michelman's article.

41. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

42. *See, e.g.*, ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 3 (Julian Rivers trans., Oxford Univ. Press 2002) (1986) (setting forth a theory in which "the jurisprudence of constitutional rights sets itself the task of giving rationally justifiable answers to constitutional rights questions"); NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY 117–23 (2008) (proposing procedural constraints for priority setting among health needs that involves making the rationales for limit-setting decisions publicly available and ensuring that these rationales are ones that "fair-minded people can agree are relevant for appropriate patient care under resource constraints"); CASS R. SUNSTEIN, DESIGNING DEMOCRACY 221–37 (2001) (analyzing the *Grootboom* court's decision and praising its approach as "respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met").

rights in the constitution.[43] When social rights are constitutionalized, it seems possible for courts to go further. The difficult question, of course, is *how much* further?[44] The following description of the jurisprudence of the Brazilian courts, which changed radically from very deferential to very assertive, might help us shed light on this question.

B. The Brazilian Jurisprudence on the Right to Health: From Nonjusticiable Programmatic Norms to Justiciable Individual Rights

For some time, it was largely agreed that the 1988 constitutional norms recognizing social and economic rights did not have an immediate effect, but were rather "programmatic," i.e., were aimed at the political branches and depended, for their full efficacy, on the adoption of legislation specifying the details of their implementation.[45] As a consequence, they were seen as inappropriate for direct adjudication by the courts. The following passages from the Rio de Janeiro court of appeals in right-to-health cases in the mid- and late 1990s illustrate this position:

> Programmatic norms established in the Federal Constitution do not give rise to individual rights of citizens to claim from the state high cost medicines, at the expense of other patients, equally needy. When complying with its public health obligations the administration must attend to the more pressing interests of the population.[46]
>
> Given scarcity of resources, the State cannot privilege one patient over hundreds of others, also needy, who accept the limitations of the state machinery. The Judiciary cannot, to protect the litigant, intrude in the public administration's policy aimed at attending to the population.[47]

This approach significantly resembles the one adopted by the South African Constitutional Court in *Soobramoney*, which was heavily criticized

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43. *Cf.* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 118 (2006) (noting that the Administrative Procedure Act "greatly enhanced the administrative state's transparency, formal rationality, and procedural fairness").

44. *See* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1888 (2001) (embracing the argument that social citizenship rights must become part of the constitutional framework to provide all citizens with a fair opportunity to participate in democratic decision making, but acknowledging that "[h]ow substantial the role of courts is in defining and enforcing these rights is a separate question").

45. *See* Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J.L. & TRADE AMERICAS 291, 292–93 (2000) ("Many of [the Brazilian constitution's] provisions . . . are not self-executing. They either require complementary legislation to fill in certain missing elements, or they are programmatic, mandating directives for substantive legislation and regulations.").

46. T.J.R.J.-1, Trial No. 1998.004.00220, Relator: Des. Antonio Lindberg Montenegro, 17.12.1998, DIÁRIO DA JUSTIÇA DO ESTADO DO RIO DE JANEIRO [D.J.R.J.], 06.05.1999, 3047, 3047.

47. T.J.R.J.-8, Ap. Civ. No. 1994.001.01749, Relator: Des. Carpena Amorim, 20.10.1994, D.J.R.J., 07.02.95, 1, *available at* http://srv85.tjrj.jus.br/ConsultaDocGedWeb/faces/ResourceLoader.jsp?idDocumento=0003FF57AF6F13F6DC434CD5C9E438D328F27CC402423511.

by social rights supporters. In that case, an individual in need of renal dialysis challenged the decision of the local hospital to not provide him with the needed treatment due to insufficient resources.[48] The Constitutional Court refused to overturn the administrative decision based on the following reasoning:

> The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[49]

The concerns of both the Brazilian and South African courts were well expressed in another passage of *Soobramoney*: "[T]he danger of making any order that the resources be used for a particular patient [is that it] might have the effect of denying those resources to other patients to whom they might more advantageously be devoted."[50]

Yet, as has been persuasively argued by many critics, these decisions seem to render the constitutional norms establishing social and economic rights meaningless.[51] These critics urge the courts to adopt a more assertive stance.[52] So far, the South African court seems resistant to these forceful calls. Despite having moved towards more substantive review in later cases such as *Grootboom*, *TAC*, and *Khosa*, it is still far from the truly substantive approach urged by its critics.[53] Its Brazilian counterpart, on the contrary, has

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48. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at 769 para. 1.

49. *Id.* at 776 para. 29.

50. *Id.* at 776 para. 30.

51. *See* BILCHITZ, *supra* note 6, at 136 ("[T]he approach adopted by the [Constitutional Court] attempts to circumvent the task of providing content to socio-economic rights . . . ."); Pieterse, *supra* note 6, at 896 ("Primarily, doubt has been expressed as to the adequacy of the Constitutional Court's 'reasonableness test' in fostering a coherent approach to social rights . . . [that] translates into tangible benefits for rights-bearers as a group.").

52. *See* BILCHITZ, *supra* note 6, at 234 (suggesting that where there is a violation of socioeconomic rights, the courts should not "abdicate their role of providing content to these rights," but rather, they should "declare the existence of such a violation and . . . use innovative orders . . . to require the other branches of government to explain how they propose to deal with the violation").

53. In fact, some claim that the court has moved backwards with its decision in *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) at 53–54 paras. 166–169 (holding that the city's free water plan was reasonable and not a violation of the constitutional right of access to sufficient water under § 27 of the constitution). *See, e.g.*, Murray Wesson, *Reasonableness in Retreat? The Judgment of the South African Constitutional Court in* Mazibuko v. City of Joh[a]nnesburg, 11 HUM. RTS. L. REV. (forthcoming 2011) (manuscript at 1–2), *available at* http://hrlr.oxfordjournals.org/content/early/2011/03/25/hrlr.ngr002.full.pdf ("Although *Mazibuko* has not yet attracted the level of commentary that accompanied its forebears, there is a perception that it marks a retreat from the Constitutional Court's earlier decisions in *Government of the*

succumbed to the pressure (or temptation, depending on how one looks at it) and has completely abandoned the deferential approach of the mid-1990s expressed in the decisions quoted above.[54] Since 1997, it has been consistently applying a highly assertive and substantive model of review in which the content of the right to health is defined by the judiciary against the will of the political branches and forcefully imposed upon them through mandatory injunctions.[55]

It is important to note at this juncture that the Brazilian judicial system does not operate under a rule of stare decisis (with very few exceptions).[56] The courts have therefore decided hundreds of similar, if not identical, cases involving the right to health, and nothing prevents any court, from the *Supremo Tribunal Federal* (STF) to the lower courts, from changing this approach at any time. But the jurisprudence of social rights has been remarkably consistent so far for almost fifteen years, establishing a kind of de facto binding precedent in a case decided in 1997 and ever since quoted with approval in many decisions adjudicating the right to health.[57]

This paradigmatic case involved a man, João Batista Gonçalvez Cordeiro, who suffered from a rare disease called Duchenne's muscular dystrophy.[58] This is a genetic degenerative disease that affects muscular cells and progressively leads to the death of the patient.[59] At the time (mid-

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Republic of South Africa v Grootboom, Minister of Health v Treatment Action Campaign and *Khosa v Minister of Social Development.*" (footnotes omitted)).

54. *See* Ferraz, *Right to Health*, *supra* note 9, at 35–36 (describing the adoption of a stricter judicial standard in the 1990s and the related rise in claimant success against the government).

55. *See generally* Ana Márcia Messeder et al., *Mandados judiciais como ferramenta para garantia do acesso a medicamentos no setor público: a experiência do Estado do Rio de Janeiro, Brasil* [*Can Court Injunctions Guarantee Access to Medicines in the Public Sector? The Experience in the State of Rio de Janeiro, Brazil*], 21 CADERNOS DE SAÚDE PÚBLICA [J. PUB. HEALTH] 525 (2005) (documenting the high number of mandatory injunctions granted by Brazilian courts in right-to-health cases).

56. *See* Anna Silvia Bruno, *Bringing Uniformity to Brazilian Court Decisions: Looking at the American Precedent and at Italian Living Law*, 11 ELEC. J. COMP. L. 1, 6 (2007), http://www.ejcl.org/114/art114-3.pdf (contrasting the *Súmula vinculante* with stare decisis).

57. There are a minority of judges in lower courts and in courts of appeals across the country who disagree with the prevailing interpretation and often reject right-to-health claims. In the STF, however, the interpretation has so far been unanimous, with the exception of a couple of cases judged by Justice Ellen Gracie in which she seemed to adopt a dissenting interpretation restricting the right to health (she has since reverted, however, to the prevailing interpretation). *See* Daniel Wang & Fernanda Terrazas, *Decisões da Ministra Ellen Gracie sobre medicamentos* [*Decisions by Justice Ellen Gracie About Medicines*], SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO [BRAZ. SOC'Y PUB. L.] (July 19, 2007), http://www.sbdp.org.br/artigos_ver.php?idConteudo=66 (reviewing Justice Gracie's judicial opinions about health and medicines).

58. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, DIÁRIO DA JUSTIÇA [D.J.], 17.04.1998, 64, 65.

59. *See* Nathalie M. Goemans et al., *Systemic Administration of PRO051 in Duchenne's Muscular Dystrophy*, 364 NEW ENG. J. MED. 1513, 1514 (2011), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMoa1011367 ("Duchenne's muscular dystrophy is an X-linked recessive muscle disorder, affecting 1 in 3500 newborn boys. Patients have severe, progressive muscle wasting, leading to early death. The disease is caused by mutations in the dystrophin gene (DMD),

1990s), there was no approved therapy for the condition in Brazil or elsewhere, but there was one private clinic in the United States, called Cell Therapy-Research Foundation, which guaranteed total cure through cell-transplantation therapy.[60] The total cost of the treatment, including transportation, accommodation, and food, came to USD63,806,[61] about twenty times Brazil's nominal GDP per capita.[62] Relying on his constitutional right to health, Cordeiro brought a lawsuit to force the state to fund his treatment in America. The lower court judge issued the requested mandatory interim injunction and ordered the government's compliance within forty-eight hours.[63] The state's lawyers used all possible appeals to no avail but finally reached the STF, the highest court in Brazil for constitutional matters. Among technical legal arguments—including the impropriety of expenditures without the formal procedures of legislative budgetary allocations, and technical medical arguments on the experimental character of the treatment involved—the state raised the following (expected) argument of resource limitations:

> If the interpretation adopted in the previous decision is maintained, not only those suffering from Duchenne's muscular dystrophy will have the benefit. If the duty of the state to promote health entails a right to funding of treatment (experimental or not) not provided by the state services according to legislation, then it follows an unlimited right of all Brazilian citizens to the best, most expensive and most advanced treatment available in the world to any illnesses—many treated more effectively abroad—which would be very generous, but not feasible.
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> . . . .
>
> Given the limited resources of the State, within which the programs and policies for the health of the population as a whole are established by legislation, complying with this decision will mean a risk for the health and life of thousands of poor patients who need urgent treatment . . . .[64]

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leading to disruption of the open reading frame, dystrophin deficiency at the myofiber membrane, and continued fiber degeneration." (endnotes omitted)).

60. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, D.J., 17.04.1998, 64, 65.

61. *Id.*

62. *See* U.N. Statistics Division, National Accounts Main Aggregates Database, Per Capita GDP in US Dollars: All Countries for All Years, http://unstats.un.org/unsd/snaama/dnlList.asp (last modified Dec. 2010) (reporting Brazil's nominal GDP per capita as USD2,564 in 1993 and USD3,602 in 1994).

63. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, D.J., 17.04.1998, 64, 65.

64. *Id.* at 70.

The STF upheld the lower court's decision.[65] In doing so, it put to rest the doctrine of constitutional "programmatic," "nonjusticiable" norms still influential at that point, and dismissed any concerns of resource scarcity as irrelevant to the determination of the content of constitutional rights. The following passage of the decision became the hallmark of the prevalent jurisprudence on the right to health, and is repeated in hundreds of later decisions finding in favor of the plaintiff and ordering the state to provide all sorts of health goods:

> Between the protection of the inviolable rights to life and health, which are subjective inalienable rights guaranteed to everyone by the Constitution itself (art. 5, caput and art. 196), and the upholding, against this fundamental prerogative, of a financial and secondary interest of the State, I believe—once this dilemma occurs—that ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health . . . .[66]

Under the prevailing jurisprudence of the Brazilian courts, therefore, courts see right-to-health litigation as a conflict between two competing and discrete interests. On one side, there is an individual's right to life and health; on the other side, there is the financial interest of the state. This entails a balancing exercise in which, in the view of the courts, the right of the individual must always prevail, irrespective of its costs. The Brazilian courts have thus effectively established an absolute right to the satisfaction of any health needs that individuals can prove they have—let us call this the right to "maximum health attention."

C. *What Is Wrong with the Right-to-Health Jurisprudence of Brazilian Courts?*

As I claimed above,[67] the abstract norm that recognizes the right to health in article 6 of the Brazilian constitution can yield no clear and precise answer on the content of that right in terms of the specific health goods (treatments, equipment, etc.) to which individuals are entitled. The main obstacle is the problem of resource availability. The precise specification of what an individual should be entitled to under the right to health depends on the intractable problem of allocating limited resources among competing health needs, for which there is no correct answer at present (and perhaps there will never be).[68] Under such conditions of epistemic and normative

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65. S.T.F., Recurso Extraordinário [Extraordinary Remedy] No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1409.

66. *Id.* at 1418.

67. *See supra* subpart III(A).

68. *Cf.* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18 (1978) ("Tragic choices come about in this way. Though scarcity can often be avoided for some goods by making them available without cost to everyone, it cannot be evaded for all goods. In the distribution of scarce goods society has to decide which methods of allotment to use, and of course each of these

uncertainty, many would claim that the democratic process is, in principle at least, a better equipped and more legitimate process with which to make these decisions.[69]

But I also suggested that, at least in countries where the right to health has been constitutionalized with no express bar on courts to adjudicate it, courts should in principle be able to exercise a more robust role in ensuring that the political branches respect these norms. Forbath properly argues that what he calls "welfare rights" (among which I believe the right to health is included) are highly indeterminate but that their "range of plausible meanings" is more definite than that of what he calls "social citizenship rights."[70] It is along these lines that I believe courts could, in principle, practice a legitimate form of adjudication. A total lack of attention to social rights or discriminatory implementation of these rights, for instance, would clearly not be within the range of plausible meanings of the constitutional norm. Moreover, courts could potentially go beyond these blatant cases of infringement of the constitutional norm and review the reasonableness of public policies without substituting their preferences for those of the political branches. The South African cases of *Soobramoney*, *Grootboom*, and *TAC* are all good examples of that approach.[71] What courts should not do, despite the insistent calls of social-rights supporters, is try to determine the precise content of these rights in terms of specific individual entitlements, as the Brazilian courts have been doing.

1. The Right to Health as an "Absolute Right."—The first, and probably most important, mistake of the majority of Brazilian courts is to interpret the right to health in a way that effectively turns it into an absolute right.[72] As seen above, the current, overwhelmingly prevalent interpretation regards the right to health as an "inviolable" and "inalienable" right, a "fundamental prerogative," inextricably linked to the right to life and thus

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methods—markets, political allocations, lotteries, and so forth—may be modified, or combined with another.").

69. *See* ALEXY, *supra* note 42, at 341 ("For if law does not contain an adequate standard, then deciding about the content of social constitutional rights is a matter of politics. But this means that under the principles of the separation of powers and democracy, determining the content of social constitutional rights does not fall within the competence of courts, but of the 'legislature directly legitimated by the people[.']" (footnotes omitted)).

70. *See* Forbath, *supra* note 6, at 636 ("What it means to ensure that no member of the community is homeless or without adequate shelter is not self-evident; but the range of plausible meanings is vastly more definite and exigent than what it means to ensure 'decent work' for all, or to sustain every member as 'a competent and respected contributor to political[,] . . . social, and economic life at large.'" (alteration in original) (citation omitted)).

71. *See supra* notes 23, 48–50 and accompanying text.

72. It is important to notice here that this interpretation is only applied, paradoxically, when individual litigation is at stake. In collective lawsuits the courts stress the non-absolute character of the right to health and the plaintiff (typically the attorney general's office) often loses. *See* Hoffmann & Bentes, *supra* note 9, at 144 (noting the high success rate of individual claims as opposed to the common rejection of collective claims).

never to be set aside or even limited by "a financial and secondary interest of the state."[73] Interpreted in this manner, the right to health becomes a right to any health good (treatment, equipment, etc.) that an individual can prove she needs, irrespective of its cost. It is an absolute right to *maximum health attention*. Not even highly developed countries would be able to afford it. To defend such a right in middle-income countries like Brazil is therefore utterly unreasonable.

So when Brazilian courts, based on this inadequate interpretation of the right to health, grant individuals certain treatments and equipment that political actions have not included in the public health system, they are clearly not doing a proper job. They are not simply substituting their own views of how scarce resources should be allocated for those of the political branches; they are doing so based on irrational criteria, i.e., an absolute right to maximum health attention.

An important and appropriate judicial task is to engage the intractable problem of resource allocation by forcing the political branches to be more transparent and justify their decisions in light of the legal concepts of nondiscrimination and reasonableness. However, the courts are not even contributing to that discussion. The problem of limited resources is simply dismissed as a "secondary interest of the state."

This approach, which has been applied consistently for nearly fifteen years now and shows no sign of subsiding,[74] provides enough reason, in my view, for a justified exclusion of social rights from the purview of Brazilian courts. The nefarious consequences it produces, as shown below, make the case stronger.

2. The Privileged-Litigant Minority and Its Unreasonable Demands from the Public Health System.—If a significant portion of right-to-health cases decided against the state by the Brazilian judiciary concerned elementary, low-cost health goods for the most disadvantaged groups of the Brazilian population, the expansive interpretation and assertive stance of the courts would be perhaps less objectionable. It is plausible to argue that in a reasonably wealthy but highly unequal country like Brazil (GDP per capita around USD10,000)[75]—where the richest 10% of the population amasses more than fifty times the income of the poorest 10%,[76] where the infant mortality rate of the poorest 20% is nearly three times higher than that of the

73. S.T.F., Recurso Extraordinário [Extraordinary Remedy] No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1409, 1418.

74. *See supra* notes 8–9 and accompanying text.

75. *The World Factbook: Brazil*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/br.html (last modified Apr. 6, 2011).

76. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 282 (2007), *available at* http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf. In the U.S. this ratio is about 16, in Sweden 6, and in Japan 4.5. *Id.* at 281.

richest 20%,[77] and where a large part of the population does not yet have access to basic sanitation and primary health care[78]—the public health system should prioritize the basic needs of the most disadvantaged. If their most basic health needs, e.g., basic sanitation, primary health care, and ordinary drugs such as antibiotics, are not satisfied, then it is arguable that the policy of the state is prima facie unreasonable in the sense proposed above. I say "prima facie" because not even this more restricted right to a *minimum* of health attention should be automatically enforced by courts, as I will argue in more detail in the concluding Part of this Article. For now, it suffices to say that the scenario just imagined, where litigation is trying to guarantee the basic health needs of the most disadvantaged, does not represent any significant portion of the judicialization of health in Brazil to date.

On the contrary, there is empirical evidence showing that the vast majority of cases are for high-cost medicines, such as new types of insulin for diabetes and new cancer drugs. The most recent and comprehensive study analyzed all 23,003 lawsuits currently active (with ongoing orders favoring claimants) in the state of São Paulo.[79] It found, confirming previous studies, that 66.1% of the suits involved medication (22.3% of that being insulin for diabetes), and 30.5% involved materials and equipment such as insulin pumps and gastric tubes.[80] Some of the drugs claimed have not been incorporated in the public health system for cost-effectiveness reasons (such as analog insulin),[81] while others are not even available in the Brazilian market.[82] In terms of costs, these latter imported drugs represent the bulk of the expenditure generated by litigation—over 78.4% according to recent estimates by the Ministry of Health.[83]

It is not difficult to guess who benefits from this type of litigation. It would be highly surprising if those families at the bottom of society, where

77. *Id.* at 255.

78. *See* Harvey Morris, *Water and Sewage: Taps Turn On but There's Trouble with the Pipes*, FIN. TIMES, May 6, 2010, http://www.ft.com/cms/s/0/dba87ed0-571c-11df-aaff-00144feab49a.html (reporting that only 42% of Brazilians are linked to a sewage system and that only 32.5% of the waste is treated); *cf. Flawed but Fair: Brazil's Health System Reaches Out to the Poor*, 86 BULL. WORLD HEALTH ORG. 248, 248 (2008), *available at* http://www.who.int/bulletin/volumes/86/4/08-030408.pdf (observing that rural areas in Brazil continue to experience long queues at hospital emergency departments, beds spilling into corridors, and a scarcity of doctors and medicine).

79. Michel Naffah Filho et al., *S-Codes: um novos sistema de informaçgões sobre ações judiciais da Secretaria de Estado da Saúde de São Paulo* [*S-Codes: A New System of Information on Lawsuits of the State Department of Health of São Paulo*], 84 BEPA 18, 27 (2010), *available at* http://www.saude.sp.gov.br/resources/gestor/informacoes_de_saude/gais/bepa_84_gais_7.pdf.

80. *Id.* at 27.

81. Interview with Maria Cecilia Correa, Dir. of Litigation Dep't, Secretariat of Health of the State of São Paulo, in São Paulo, Braz. (July 2009).

82. Cláudia Collucci et al., *Ações por remédios caros favorecem ricos, diz estudo* [*Lawsuits for Expensive Drugs Favor the Rich, Study Says*], FOLHA DE S. PAULO [SÃO PAULO SHEET], July 24, 2010, *available at* http://www.anapar.org.br/index.php/noticias/57-acoes-por-remedios-caros-favorecem-ricos-diz-estudo-.

83. *Id.*

living conditions are worst and health needs are greatest (where basic sanitation is not available and infant mortality is highest), were litigating for these high-tech, state-of-the-art drugs, procedures, and equipment. As expected, there is instead a high concentration of right-to-health litigation in the richest states, cities, and districts of Brazil. In a recent study of litigation against the federal government, it was found that of the 4,343 accumulated lawsuits during the years studied (2005–2009), 85% originated in the most developed states of the south and southeast, even though their population represents just 56.8% of the country's total population.[84] The least developed states of the north and the northeast, with 36% of the Brazilian population, accounted for only 7.5% of the lawsuits.[85] When the United Nations' Human Development Index (HDI) is used, the correlation becomes even clearer: the ten states with the highest HDI (above 0.8) have generated 93.3% of lawsuits, whereas the other seventeen states with the lowest HDI (below 0.8) together have originated only 6.7% of lawsuits.[86] The same pattern occurs in most studies of litigation against states and municipalities.[87]

The explanation for this high concentration of litigation in developed states, cities, and districts is hardly surprising: access to courts and lawyers is beyond the means and reach of most poor Brazilians. Given this profile in which most litigation focuses on health attention that cannot be regarded as a priority for a resource-constrained public health system operating in a highly unequal country, and which mostly benefits a small minority who is able to use the court system to its advantage, the case for taking social rights away from the Brazilian courts seems rather strong.

IV. Why More Pro-poor Judicialization Is Not a Solution

I have claimed so far that those who believe that social rights should improve the living standards of the poor—and, through that, diminish the significant inequalities prevalent in countries like Brazil and South Africa—have enough reason to argue against an assertive and substantive role for courts in adjudicating these rights. As the Brazilian experience indicates, when courts succumb to the pressure (or incentives) to "give teeth" to constitutional norms that recognize social rights, they end up transforming a collective and intractable issue of resource allocation among the numerous competing needs of the population into a bilateral dispute between single,

84. Ferraz, *Social Impact*, *supra* note 9, at 12–13.

85. *Id.* at 13.

86. *Id.* at 13–14.

87. *Id.* at 14. According to a recent study of 170 cases brought against the municipal government of São Paulo in 2005 seeking drugs based on the right to health, 63% of the claimants lived in areas with low levels of "social exclusion," while 67% relied on the services of private lawyers. Fabiola Sulpino Vieira & Paola Zucchi, *Distortions to National Drug Policy Caused By Lawsuits in Brazil*, 41 REVISTA DE SAÚDE PÚBLICA [REV. PUB. HEALTH] 1, 4 tbl.1, 5–6 (2007), *available at* http://www.scielo.br/pdf/rsp/v41n2/en_5587.pdf. These data suggest that the intuitive hypothesis that the judicial channel is being "captured" by the middle classes is rather plausible.

needy individuals and a recalcitrant, stingy, and corrupt state. When the situation is framed in such a way, the overwhelming incentive is to satisfy the individual litigant's needs over the state's, irrespective of the consequences (and costs) involved. Given that resources are necessarily limited, such "protection" can be dispensed only to some individuals (the litigating minority) at the same time and at the expense of the needs of others (the nonlitigating majority). When litigants are already privileged in terms of living standards—as they tend to be, given that access to courts is costly in most places—social rights litigation serves to reinforce these privileges rather than improve the living standards of the poor or diminish inequalities.

This conclusion is not going to be easily accepted by those who passionately believe in courts as an important and indispensable contributor to social justice. They will likely hold on to their position and try to either refute my diagnosis, or claim that the pathology is curable through improvements in access to justice and in the jurisprudence of the courts. In this Part, I want to put forward a final argument against social rights justiciability as an effective strategy to help the poor, an argument that holds even if these two anomalies of the prevailing Brazilian model could be corrected, i.e., if access to courts became miraculously open to the poor and successful litigation focused on guaranteeing a decent minimum to the poor rather than an absolute maximum to a privileged minority.

The main obstacles here would be the highly unequal distribution of wealth that prevails in countries like Brazil, and the lack of normative and political consensus that social rights are supposed to radically change this situation (i.e., the lack of a strong egalitarian ethos). In highly developed and equal societies, where a strong egalitarian ethos prevails, the guarantee of a decent minimum of social goods to everyone is not only affordable but also largely uncontroversial and already a reality for most people.[88] The occasional interference of courts to extend this guarantee to excluded minorities is so rare and minor that no plausible challenge of illegitimacy can be raised. It would cause no major disarray in the budgetary allocations of the state or in the prevailing patterns of wealth distribution. The German Constitutional Court's recognition of a right to what it called an "existential minimum" can be seen in this light.[89] It does not significantly impact the overall resources

88. *See, e.g.*, Interview by Erik Owens with Grete Brochmann, Professor, The Inst. for Soc. Research, Oslo, in Chestnut Hill, Mass. (Apr. 10, 2008), *available at* http://www.bc.edu/content/dam/files/centers/boisi/pdf/s08/BrochmannQ-and-A_--Rev2--.pdf (stating that citizens of Norway are "guaranteed a minimum standard of living if [they] can't work" and that "support for the welfare state has not gone down in the Scandinavian countries").

89. *See* Christian Courtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK Y.B. U.N. L. 317, 330 (2007), *available at* http://www.mpil.de/shared/data/pdf/pdfmpunyb/12_courtis_11.pdf (stating that the German Federal Constitutional Court and the Federal Administrative Court have decided that there are "positive state obligations to provide an 'existential minimum' or 'vital minimum[,'] comprising access to food, housing and social assistance to persons in need").

available for the state to allocate through the political process or require significant additional resources to be raised through taxation.

But in countries like Brazil and South Africa, with intermediate levels of economic development and, importantly, with a historically high degree of economic and social inequality, even the guarantee of a decent minimum of social goods to everyone would demand massive transfers of resources from the rich to the poor, a measure that enjoys neither moral nor political consensus. It would not be economically impossible, however, since Brazil and South Africa are high-middle-income countries with GDP per capita around USD10,000.[90] The obstacles are of a different nature. No widespread agreement exists on the moral correctness for such massive redistribution and, perhaps even more problematic, political resistance to redistribution from powerful interest groups would be overwhelming. Recent political history provides a stark illustration of this. From 2002 to 2010, Brazil was ruled by a president, Luiz Inacio da Silva ("Lula"), whose main professed aims had always been the eradication of poverty and massive redistribution of wealth among the Brazilian population.[91] Despite having made important relative progress in both areas[92]—especially through a program of small conditional grants to families who keep their children in school and attend medical appointments (the Bolsa Familia program),[93] and through raising the minimum wage[94]—Brazil remains, after his eight years in power, one of the most unequal countries in the world.[95] Most importantly, no significant changes have been made to address inadequate social spending or the highly regressive taxation system,[96] leaving the structural causes of inequalities untouched. This is, of course, a problem in most Latin American

90. *The World Factbook: Brazil*, *supra* note 75; *The World Factbook: South Africa*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html (last modified April 6, 2011).

91. *See* John Otis, *Huge Debt Keeps Brazil's Lula from Being a Working-Class Hero*, HOUS. CHRON., Nov. 23, 2003, at 1A (chronicling Lula's "promises to redistribute land, roll back hunger and create 10 million jobs").

92. *See* Gay Seidman, *Brazil's 'Pro-poor' Strategies: What South Africa Could Learn*, 72/73 TRANSFORMATION: CRITICAL PERSP. ON S. AFR. 86, 86 (2010), *available at* http://muse.jhu.edu/journals/transformation/v072/72.seidman.pdf (reporting a marked reduction in poverty and inequality in Brazil from 2001 to 2006).

93. *Id.* at 96.

94. *Id.* at 99.

95. *The World Factbook: Brazil*, *supra* note 75 (reporting a Gini index of 56.7, which represents the tenth-most unequal distribution of family income of any country).

96. *See* Julia E. Sweig, *A New Global Player: Brazil's Far-Flung Agenda*, 89 FOREIGN AFF., Nov.–Dec. 2010, at 173, 174 (characterizing Brazil's rich as "poised to give up more" wealth due to the regressive nature of the taxation system); Angel Gurría, *Towards a Fiscal Policy for Development: Launch of Latin American Economic Outlook 2009*, ORG. FOR ECON. CO-OPERATION & DEV. (Oct. 28, 2008), http://www.oecd.org/document/27/0,3746,en_2649_33973_41616731_1_1_1_1,00.html (exemplifying inadequate social spending through the lower spending and performance levels of the education sectors of Brazil and other Latin American countries as compared to OECD countries).

countries, vividly captured in the following passage of a recent report by the Organisation for Economic Co-operation and Development:

> In a region where the wealthiest 10% of the population receive 41% of total income, and the poorest 10% obtain just 1%, the impotence of tax systems to reduce inequalities is particularly dramatic.
>
> In 2007, Latin America was the region of the world in which the wealth of the richest families (i.e.[,] those with over US[D]1 million of liquid savings) grew most; but 360 million Latin American people continue to live with purchasing power of under US[D]300 per month.
>
> The paradox is that in many of the region's countries, social security spending remains highly regressive and is one of the chief obstacles to exploiting the redistributive potential of fiscal policy.
>
> The quality of essential public goods, such as health, security or education, also fails to respond to the region's development needs, and does not make citizens feel a commitment towards the State.[97]

To make this example more specific, let us look at the housing problem in Brazil. According to recent official data, there are sixty million people (about one-third of the population) living in inadequate conditions in Brazil, of which almost seven million live in very precarious and insalubrious slums.[98] It is not implausible to suggest that if the normative and political consensus were present, Brazil could provide, in the short or medium run, all of those people (or at least the seven million in slums) with some decent minimum standard of accommodation. The question is, when the egalitarian ethos is not present, is it reasonable to expect that courts will ever have the will or the power to bring about this radical change through judicial orders?

It seems to me that change through judicial action is unlikely. Judges are among those who benefit most from the unequal distribution of wealth in Brazil (they are the highest paid public servants)[99] and have no historical

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97. Gurría, *supra* note 96.

98. Maria da Piedade Morais et al., *Monitorando o direito à moradia no Brasil (1992–2004)* [*Monitoring the Right to Housing in Brazil (1992–2004)*], POLÍTICAS SOCIAIS: ACOMPANHAMENTO E ANÁLISE [POLITICAL SCIENCE: COMPANION AND ANALYSIS], Feb. 2006, at 230, 237, *available at* http://www.ipea.gov.br/sites/000/2/publicacoes/bpsociais/bps_12/ensaio4_monitorando.pdf.

99. The Brazilian constitution establishes that the highest salary in the Brazilian public service is that of the justices of the Supreme Federal Tribunal. C.F. art. 37, cl. XI. This salary, which is set by legislation, is currently BRL26,723 monthly (approximately USD16,700). Mariângela Gallucci, *Juízes federais marcam greve por reajuste de 14,79%* [*Federal Judges Arrange Strike for 14.79% Readjustment*], O ESTADO DE S. PAULO [STATE OF SÃO PAULO], Mar. 29, 2011, *available at* https://conteudoclippingmp.planejamento.gov.br/cadastros/noticias/2011/3/29/juizes-federais-marcam-greve-por-reajuste-de-14-79. The lowest paid judges in the federal courts of Brasilia earn BRL19,955 monthly. *See* Carolina Brígido, *Aumentos em serie no Judiciario* [*Increases in Pay Scale in the Judiciary*], O GLOBO DE BRASIL [BRAZ. GLOBE], Sept. 24, 2009, *available at* InfoTrac, File No. CJ208305401 (situating substitute judges at the bottom of the judicial pay scale and reporting a proposed increase in their salaries from BRL19,995 to BRL21,766). Although the salaries of lower court judges vary a lot from state to state, they are not much lower than those of federal judges. *See* Carolina Brígido, *STF eleva teto de juizes estaduais* [*Supreme Federal Tribunal*

record of complaining, or being minimally uncomfortable, about this situation.[100] Raising taxation on those who, like judges, are among the top 1% of income earners in Brazil, in order to fund the social rights of the poor would likely muster little support from the judiciary. It is not absurd to suggest that right-to-health litigation has been so "successful" in great part due to its insignificant effects on redistribution from the rich to the poor. But let us assume that this important motivational barrier could be overcome.

In 2009, Lula's government announced a program setting aside in the budget BRL10 billion in order to provide subsidized loans so that citizens earning between zero and ten times the minimum wage could build their own houses ("Programa Minha Casa, Minha Vida").[101] Should not the right to housing in the Brazilian Constitution mean that everyone has an enforceable right to minimally decent housing—a right that the state is violating through this clearly insufficient policy that leaves behind six million individuals? Should courts not step in as they have been doing in the field of health and assertively order the state to enforce at least this more plausible "decent minimum"?

That would be inadequate, in my view, for several reasons. I have already observed that satisfying even these minimum levels would require a significant redistribution of resources from the rich to the poor. I do think that this is morally required, yet I am doubtful that this is a majoritarian view in Brazilian society, even among the poor. Moreover, even a willing government would face enormous difficulties in rapidly changing the regressive and inegalitarian tax and spending policies currently in place. More politically feasible and less controversial (however limited) is the route adopted by Lula's government: focusing on economic growth and redistributing on

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Raises Ceiling for Judges], O GLOBO DE BRASIL [BRAZ. GLOBE], Mar. 1, 2007, *available at* InfoTrac, File No. CJ159968304 (relating a decision by the Supreme Federal Tribunal to increase the maximum salary for state judges to BRL24,500). According to one study, income distribution in Brazil stood as follows in 2008: classes "A" and "B" (with household income above BRL4,561), represented 15.52% of the population; class "C" (regarded as the middle class, with income between BRL1,064 and BRL4,561), represented 51.89%; and classes "D" and "E" (with income below BRL1,064), represented 32.59%. Marcelo Cortes Neri, *The New Middle-Class*, FUNDAÇÃO GETÚLIO VARGAS [GETÚLIO VARGAS FOUNDATION], 5, 23 tbl.6 (Aug. 5, 2008), http://www3.fgv.br/ibrecps/M3/ M3_MidClassBrazil_FGV_eng.pdf. Within class "A," according to another study, those families earning above BRL16,600 represent 1% of the population. *Pobreza e riqueza no Brasil metropolitano* [*Poverty and Wealth in Metropolitan Brazil*], COMUNICADOS DO IPEA [IPEA NOTICES], Aug. 2008, at 2, 9 fig.8, *available at* http://www.ipea.gov.br/sites/000/2/destaque/ estudoVF2.pdf. If one considers that judges earn the above-mentioned salaries on their own (i.e., not counting potential income from other members of their families), they are clearly within the top 1%, and probably even higher.

100. On the contrary, they often complain and strike to enhance their salaries even further. The most recent example is the strike by federal judges for a 14.79% increase in their salaries as a constitutional right. Gallucci, *supra* note 99.

101. *See* Leslie Richards, *Affordable Housing Boom in Brazil Gathers Pace*, REAL EST. ARTICLES (Sept. 13, 2009), http://www.realestatearticles.org/affordable-housing-boom-in-brazil-gathers-pace/ (reporting that "the numbers of individuals signing up for the scheme [were] soaring" within three months of its launch).

the margins through more modest programs such as the family grant and the housing policy.[102] The political success of such a strategy was confirmed with the election of the current president, Dilma Rousseff, who is from Lula's party, in 2010.[103]

So, even if poor people had effective access to the courts and started to litigate en masse to demand their minimum social rights, and even if courts were as receptive to their claims as they are to those of middle class right-to-health litigants (a highly unlikely combination of events, as already noticed), their mandatory injunctions would soon face a brick wall due to lack of political will and normative consensus on radical egalitarian measures. No court, however willing, would have the power to overcome that obstacle.

V. Conclusion

The empirical data shows that health litigation in Brazil has clearly not benefited the poor. It has by and large benefited a minority of individuals who are able to access lawyers and courts to force the state to provide expensive treatment that the public health system should not provide under any plausible interpretation of the constitutional right to health. There is no reason to believe that this pattern does not apply to other social rights that could be judicialized in a similar way; for example, there is evidence that a similar problem is happening in education.[104]

In fields where social rights (such as housing) are not of interest to the middle classes, not much judicialization takes place.[105] If it did, however, it is very likely that courts would be neither willing nor able to adopt an assertive stance similar to what they have done in the field of health. This is because enforcement of such rights would demand a radical redistribution of wealth for which there is no current normative or political consensus in Brazilian society. Neither judges, legislators, public administrators, nor probably even the poor would support such radical measures.

Insisting that courts should adopt an assertive role in social rights adjudication in order to protect the poor is therefore unjustified. As much as

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102. *Cf.* JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 80–84, 87 (2002) (pointing out that the International Monetary Fund believes that poverty should be fought through economic growth and not distribution of existing wealth through policies such as those favoring land reform and competition).

103. *See* Joe Leahy, *Rousseff Puts Focus on Industrial Policy*, FIN. TIMES, Apr. 12, 2011, at 6 (recognizing that Rousseff and her predecessor Lula both belong to the left wing Worker's Party).

104. Daniel Wei Liang Wang, *Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF* [*Resource Scarcity, Cost of Rights, and the "Reserve of the Possible" Clause in Brazilian Supreme Federal Tribunal Case Law*], 8 REVISTA DIREITO GV [GETÚLIO VARGAS L.J.] 539, 539 (2008), *available at* http://www.scielo.br/pdf/rdgv/v4n2/a09v4n2.pdf.

105. *See, e.g.*, Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* (World Bank Policy Research Working Paper Series, Paper No. 5109, 2009), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2009/11/03/000158349_20091103104346/Rendered/PDF/WPS5109.pdf (describing the inequality of legal mobilization between the poor and middle class in India with regard to public interest litigation).

social rights supporters (like me) might wish to eradicate poverty and inequality from our societies, this depends strongly on the political will to radically change the inegalitarian ethos that supports the current regressive taxation structure and expenditure policies of the state, not on the unlikely will and ability of courts to do so.[106] We should spend more time and effort trying to change that ethos than putting our faith in social rights litigation.

106. My thesis seems to resemble that put forward by Goodwin Liu recently in an interesting article in the context of the United States:

> [T]he judicial role I envision is one that cannot get off the ground without strong footholds established through the political process. The main implication of my thesis is not that the current policy landscape is fertile with litigation targets, but instead that it will remain barren until we reinvigorate public dialogue about our commitments to mutual aid and distributive justice across a broad range of social goods. Courts can elevate the legal status of distributive norms, but only when those norms have already found some expression in the institutions, policies, and practices of our public culture. This conception of legal evolution is one in which legislative enactments, as much if not more than judicial decisions, "contribute to a complex process by which fundamental law evolves with a strong connection to the people and popular needs."

Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 268 (2008).

Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America

César Rodríguez-Garavito*

At 9:00 a.m. on Friday, July 12, 2009, Nilson Pinilla, then president of the Colombian Constitutional Court,[1] stepped onto the platform of the tribunal's courtroom in the heart of Bogotá. Flanked by two other justices, he took the floor before the nearly 300 of us who were packed into the room—lawyers, activists, grassroots leaders, journalists, government officials, and academics—and opened a hearing that had no precedent in Colombian or Latin American constitutionalism.

Throughout the entire day, Luis Alfonso Hoyos, the director of the agency in charge of attending to the approximately five million internally displaced persons (IDPs) by Colombia's armed conflict,[2] was on the stand publicly testifying about what the government had done and failed to do for the displaced population. While Hoyos fired off statistics and PowerPoint slides in response to questions posed by the court and the nongovernmental organizations (NGOs) in attendance, from inside the courtroom we could hear the shouts of displaced persons in the contiguous Bolívar Plaza protesting the lack of state attention to their cause.

The path that led up to the hearing started five years earlier when, in January 2004, the Colombian Constitutional Court (CCC) aggregated the constitutional complaints (*tutelas*) of 1,150 displaced families and handed

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1. *Nilson Elías Pinilla Pinilla*, CORTE CONSTITUCIONAL DE COLOMBIA [CONSTITUTIONAL COURT OF COLOMBIA], http://www.corteconstitucional.gov.co/lacorte/pinilla.php.

2. *See* CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO (CODHES) [CONSULTANCY FIRM FOR HUMAN RIGHTS AND DISPLACEMENT], ¿CONSOLIDACIÓN DE QUÉ? INFORME SOBRE DESPLAZAMIENTO, CONFLICTO ARMADO Y DERECHOS HUMANOS EN COLOMBIA EN 2010 [CONSOLIDATION OF WHAT? REPORT ON DISPLACEMENT, CONFLICT AND HUMAN RIGHTS IN COLOMBIA IN 2010] 8 (2011) (stating that over five million Colombians were internally displaced over the past twenty-five years); *Gobierno cumple meta de 40 mil hectáreas de coca erradicadas* [*Government Meets Target of 40,000 Hectares of Eradicated Coca*], ACCIÓN SOCIAL: AGENCIA PRESIDENCIAL PARA LA ACCIÓN SOCIAL Y LA COOPERACIÓN INTERNACIONAL [ACCIÓN SOCIAL: PRESIDENTIAL AGENCY FOR SOCIAL ACTION AND INTERNATIONAL COOPERATION], http://www.accionsocial.gov.co/contenido/contenido.aspx?catID=127&conID=1081 (describing Luis Alfonso Hoyos as the director of the *Acción Social* agency in Colombia).

down its most ambitious ruling in its two decades of existence: Judgment T-025 of 2004.[3] In this decision, the CCC declared that the humanitarian emergency caused by forced displacement constituted an "unconstitutional state of affairs;" that is, a massive human rights violation associated with systemic failures in state action.[4] As the complaints that reached the court from all corners of the country showed, there was no serious and coordinated state policy for offering emergency aid to IDPs,[5] nor was there reliable information on the number of IDPs or the conditions they were facing.[6] Moreover, the budget allocated to the issue was clearly insufficient.[7] To eradicate the root causes behind this state of affairs, the court ordered a series of structural measures that as we will see, spawned a lengthy implementation and follow-up process that continues today.[8]

Judgment T-025 was not the CCC's first structural decision declaring an unconstitutional state of affairs.[9] Since 1997, the court has handed down seven decisions of this kind, in greatly varying circumstances including noncompliance with the state's obligation to affiliate numerous public officials to the social security system,[10] massive prison overcrowding,[11] lack of protection for human rights defenders,[12] and failure to announce an open call for public notary nominations.[13] In other decisions, the CCC has aggregated different *tutela* actions and has ordered long-term structural remedies without

3. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op. at 1), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm.

4. *Id.* at 80–81.

5. *Id.* at 67–68.

6. *Id.* at 67, 73.

7. *Id.* at 75–80.

8. *Id.*

9. For an analysis of the CCC's doctrine of "unconstitutional states of affairs," see generally César Rodríguez Garavito, *Más Allá del Desplazamiento, o Cómo Superar un Estado de Cosas Inconstitucional* [*Beyond Displacement, or How to Overcome an Unconstitutional State of Affairs*], *in* MÁS ALLÁ DEL DESPLAZAMIENTO: POLÍTICAS, DERECHOS Y SUPERACIÓN DEL DESPLAZAMIENTO FORZADO EN COLOMBIA [BEYOND DISPLACEMENT: POLICIES, RIGHTS AND OVERCOMING DISPLACEMENT IN COLOMBIA] 434 (César Rodríguez Garavito ed., 2009). This work discusses the court's criteria for declaring the existence of an unconstitutional state of affairs and suggests judicial guidelines for assessing governmental responses to such situations and eventually declaring that they have been overcome. *Id.*

10. C.C., febrero 2, 2000, Sentencia SU-090/00 (slip op. at 1), *available at* http://www.corteconstitucional.gov.co/relatoria/2000/SU090-00.htm; C.C., julio 27, 1999, Sentencia T-535/99 (slip op. at 5), *available at* http://www.corteconstitucional.gov.co/relatoria/1999/T-535-99.htm; C.C., marzo 5, 1998, Sentencia T-068/98 (slip op. at 1–2), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-068-98.htm; C.C., noviembre 6, 1997, Sentencia SU-559/97, (slip op. at 1–2), *available at* http://www.corteconstitucional.gov.co/relatoria/1997/SU559-97.htm.

11. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 1), *available at* http://www.corteconstitucional.gov.co/ relatoria/1998/ T-153-98.htm.

12. C.C., octubre 20, 1998, Sentencia T-590/98 (slip op. at 4), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-590-98.htm.

13. C.C., mayo 26, 1998, Sentencia SU-250/98 (slip op. at 3), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/SU250-98.htm.

formally declaring an unconstitutional state of affairs. It did so most recently in Judgment T-760[14] of 2008, which resolved twenty-two complaints about systemic failures in the health care system.[15]

In this Article, I focus on the CCC's decisions in these situations, which I dub "structural cases." I characterize these cases as judicial proceedings that (1) affect a large number of people who allege a violation of their rights, either directly or through organizations that litigate the cause; (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.[16]

I posit that this variety of judicial activism, although particularly visible in the CCC's jurisprudence, is part of an emerging trend in Latin America and other regions of the global south. Embodied most clearly by judicial intervention in structural cases that address widespread violations of socioeconomic rights, this type of progressive neoconstitutionalism has unfolded with different names and features in different parts of the global south.[17] Among the best-known examples is the jurisprudence of the Supreme Court of India, which has addressed such fundamental social problems as hunger and illiteracy; these judgments have been accompanied by the creation of judicial consulting commissions that monitor the

14. C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

15. *Id.* at 9–10.

16. Although the CCC has not explicitly drawn on comparative constitutional law to develop its jurisprudence on unconstitutional states of affairs, there are similarities between the jurisprudence of the CCC and the doctrines of structural injunctive remedies in common-law jurisdictions such as India, South Africa, and the United States. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976) ("[P]ublic law litigation will often, at least as a practical matter, affect the interests of many people. Much significant public law litigation is therefore carried out through the class action mechanism . . . ."); Danielle Elyce Hirsch, *A Defense of Structural Injunctive Remedies in South African Law*, 9 OR. REV. INT'L L. 1, 3–4 (2007) (discussing the use of structural injunctions as remedies in South Africa); 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, 109 (Malcolm Langford ed., 2008) (discussing the "continuing mandamus" approach of the Indian supreme court "where the Court keeps the case on board over a length of time for ensuring the implementation of its directions"); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (discussing public law relief in the United States, which has moved toward "*experimentalist* intervention" that "combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability").

17. *See* César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, *in* LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 156, 164–65 (Yves Dezalay & Bryant G. Garth eds., 2011) (noting the rise of progressive neoconstitutionalism and its impact on judicial activism and institutional reform in Latin America).

implementation of the judgment.[18] Similarly, the South African Constitutional Court has become a central institutional forum for promoting rights such as housing and health, and for obligating the state to take actions against the economic and social legacy of apartheid.[19] The South African Constitutional Court has also elicited international attention in judicial and scholarly circles, as demonstrated by the interest in the court by U.S. and European scholars and the reliance on its jurisprudence in U.S. and European constitutional theory.[20]

In Latin America, judicial activism on socioeconomic rights (SERs) has become increasingly prominent over the last two decades under different rubrics, including "strategic litigation,"[21] "collective cases,"[22] and American-style "public interest law."[23] In countries as different as Brazil and Costa

18. *See* Muralidhar, *supra* note 16, at 109–10 (asserting that the Supreme Court of India's remedies are creative in the public interest litigation context because the court is concerned with the importance of causes to the public at large); Shylashri Shankar & Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, *in* COURTING SOCIAL JUSTICE 146, 146 (Varun Gauri & Daniel M. Brinks eds., 2008) ("In the last two decades, the higher judiciary in India transformed non-justiciable economic and social rights such as basic education, health, food, shelter, speedy trial, privacy, anti-child labor, and equal wages for equal work into legally enforceable rights.").

19. *See* SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 45, 80–81 (2010) (describing the role of the South African courts in enforcing socioeconomic rights in the 1996 South African constitution); Jonathan Berger, *Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education*, *in* COURTING SOCIAL JUSTICE, *supra* note 18, at 38, 39 (focusing on instances where "poor people" in South Africa have brought litigation under their rights of access to health care services and education); Sandra Liebenberg, *South Africa: Adjudicating Social Rights Under a Transformative Constitution*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 16, at 75, 81–96 (discussing significant South African socioeconomic-rights cases addressing "rights to land and housing, health care services, and social security").

20. *See, e.g.*, SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 169–70 (2008) (discussing the court's *Grootboom* decision as it relates to the synergistic approach to activism); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 219 (2004) (discussing an opinion by the South African Constitutional Court holding that social and economic rights are "'at least to some extent'" justiciable); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 391–93 (2007) (analyzing the *Grootboom* decision).

21. *See, e.g.*, *Strategic Litigation as a Tool for the Enforceability of the Right to Education: Possibilities and Obstacles*, ASOCIACIÓN POR LOS DERECHOS CIVILES [ASSOCIATION FOR CIVIL RIGHTS], 1 (May 20, 2008), http://www.redligare.org/IMG/pdf/litigio_estrategico_educacion-ingles.pdf (noting that the Association for Civil Rights has been using strategic litigation as a tool for social change for over a decade).

22. *See generally* GUSTAVO MAURINO ET AL., LAS ACCIONES COLECTIVAS: ANÁLISIS CONCEPTUAL, CONSTITUCIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO [CLASS ACTIONS: ANALYSIS CONCEPTUALLY, CONSTITUTIONALLY, PROCEDURALLY, JURISPRUDENTIALLY AND COMPARATIVELY] (2005) (offering a strategic overview of legal mechanisms for collective legal suits, with an emphasis on Brazil, Colombia, and the United States).

23. *See, e.g.*, Felipe González Morales, *El trabajo clínico en materia de derechos humanos e interés público en América Latina* [*The Clinical Work Concerning Human Rights and Public Interest in Latin America*], *in* ENSEÑANZA CLÍNICA DEL DERECHO: UNA ALTERNATIVA A LOS MÉTODOS TRADICIONALES DE FORMACIÓN DE ABOGADOS [THE CLINICAL EDUCATION OF RIGHTS: AN ALTERNATIVE TO THE TRADITIONAL METHODS OF LEGAL TRAINING] 175, 176 (Marta

Rica, courts have decisively shaped the provision of fundamental social services such as health care.[24] In Argentina, some courts have undertaken structural cases and experimented with public mechanisms to monitor the implementation of activist judgments such as *Verbitsky*,[25] on prison overcrowding, and *Riachuelo*,[26] on environmental degradation.[27]

The literature on the justiciability of SERs has multiplied in proportion to the proliferation of activist rulings, both in Latin America and elsewhere.[28] Two angles of analysis have dominated this scholarship. First, some key contributions have concentrated on making a theoretical case for the justiciability of SERs in light of the demands of democratic theory and the reality of social contexts marked by deep economic and political inequalities.[29]

Villarreal & Christian Courtis eds., 2007) (discussing the achievements of legal clinics focusing on human rights and public interest law); Stephen Meili, *Staying Alive: Public Interest Law in Contemporary Latin America* 5 (Univ. Minn. Law Sch. Legal Studies Research Paper Series Paper No. 09-48, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518002 ("One of the most striking aspects of . . . public interest lawyering in Latin America is the way in which it has grown in both size and scope in the past 15 years.").

24. *See* Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 47, 59 (Rachel Sieder et al. eds., 2005) (noting that state coverage for AIDS drugs became readily available after Costa Rica's Constitutional Court recognized a constitutional right to state-funded medical care in the 1990s); Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. J., no. 2, 2009 at 33, 35 (discussing the "epidemics of litigation" on the right to health in Brazil).

25. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, "Verbitsky, Horacio / hábeas corpus," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-1146), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=222651&fori=RHV00856-381.

26. CSJN, 8/7/2008, "Mendoza, Beatriz Silvia y otros c. Estado Nacional y otros / daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza – Riachuelo)," Fallos (2008-331-1622) (Arg.), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=289823&fori=ORM01569-40B.

27. *See* CENTRO DE ESTUDIOS LEGALES Y SOCIALES, LITIGIO ESTRATÉGICO Y DERECHOS HUMANOS: LA LUCHA POR EL DERECHO [STRATEGIC LITIGATION AND HUMAN RIGHTS: THE FIGHT FOR RIGHTS] 191, 193–94, 194 n.225 (2008) (referencing the enactment of legal reforms in response to *Verbitsky*); Carolina Farstein, Gabriela Kletzel & Paola García Rey, *En Busca de un Remedio Judicial Efectivo: Nuevos Desafíos para la Justiciabilidad de los Derechos Sociales* [*Searching for Effective Judicial Remedies: New Challenges to the Justiciability of Socioeconomic Rights*], in DERECHOS SOCIALES: JUSTICIA, POLÍTICA Y ECONOMÍA EN AMÉRICA LATINA [SOCIAL RIGHTS: JUSTICE, POLITICS, AND ECONOMICS IN LATIN AMERICA] 27, 55 (Pilar Arcidiácono, Nicolás Espejo Yaksic & César Rodríguez-Garavito eds., 2010) (discussing (1) the court's order in *Mendoza* directing federal, provincial, and local officials to design and implement a plan to cleanup the Riachuelo River, and (2) the creation of a basin authority to implement the plan).

28. For a global survey of the practice and literature on SER litigation, see generally SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 16, which compiles essays providing critical analysis of some two thousand judgments and decisions from twenty-nine national and international jurisdictions.

29. *See, e.g.*, Rodolfo Arango, *La justiciabilidad de los derechos sociales fundamentales* [*The Justiciability of Fundamental Social Rights*], 12 REVISTA DE DERECHO PÚBLICO [J. PUB. L.] 185, 186 (2001) (Colom.) (reconstructing the conceptual foundations of SER on the basis of a theory of subjective rights that takes into account the material conditions that are necessary for the effective enjoyment of rights); DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION

Second, a number of works have entered into the discussion from the perspective of human rights doctrine, which has given greater precision to judicial standards for upholding SERs and boosted the utilization of these rights with judicial organs and supervisory bodies at both the national and international level.[30]

These perspectives have considerably advanced the conceptual clarity and the justiciability of SERs. Nevertheless, the almost exclusive emphasis on the production phase of judgments has created an analytical and practical blind spot: the implementation stage of rulings. For this reason, we do not have systematic studies on the fate of activist decisions after they are issued.[31] What happens to the orders contained in these judgments once they leave the courtroom? To what extent do public officials follow the judgments and adopt new courses of conduct in order to protect SERs? What impact do the rulings have on the state, civil society, social movements, and public opinion? Ultimately, do they contribute to the realization of SERs?

I will consider these questions in this Article. To help unpack the black box of the implementation of SER rulings, I will proceed in two steps. I will begin by laying out an analytical framework for understanding the effects of such decisions. Thus, in Part I, I offer a typology of effects and discuss the methodological implications for sociolegal studies on judicial impact.

Against this analytical background, in Part II, I turn to an explanatory question: what accounts for the different levels of impact of SER rulings? Why do some decisions have deep and multifarious effects, while others remain on paper? Since the fate of judicial decisions hinges on responses from a wide array of actors—e.g., the postjudgment strategies of activists and litigators, governmental reactions to court orders, and the role of the courts in

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AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 115–17 (2007) (describing a "thin" rights-based theory of judicial review, under which the principle of the "equal importance" of individuals would sometimes require courts to provide welfare support to indigent individuals, even where the democratic majority would have preferred not to do so).

30. VÍCTOR ABRAMOVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [SOCIAL RIGHTS AS ENFORCEABLE RIGHTS] 37–47 (2002) (offering a systematic overview of legal sources and doctrines supporting the justiciability of socioeconomic rights); Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 16, at 3, 6–9 (narrating the historical development of economic and social rights in conjunction with the human rights movement).

31. There are at least two notable exceptions regarding the implementation of activist rulings. *See* Daniel M. Brinks & Varun Gauri, *A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World*, *in* COURTING SOCIAL JUSTICE, *supra* note 18, at 303, 320–34 (studying a host of factors in the implementation of rulings on social and economic rights, including what factors cause the targets of litigation to comply and the direct and indirect beneficiaries of activist rulings); Rodrigo Uprimny & Mauricio García-Villegas, *Corte Constitucional y emancipación social en Colombia* [*Constitutional Court and Social Emancipation in Colombia*], *in* EMANCIPACIÓN SOCIAL Y VIOLENCIA EN COLOMBIA [SOCIAL EMANCIPATION AND VIOLENCE IN COLOMBIA] 463, 491–509 (Boaventura Santos & Mauricio García eds., 2004) (detailing a study of the practical effectiveness of Colombian Constitutional Court decisions vindicating social rights and their impact on social movements).

the implementation phase—multicausality makes these questions intractable unless the analysis is restricted to a specific set of variables. I thus focus on the factors that are within the court's purview. All other things being equal, there is a question of concern: what types of judicial decisions are more likely to have a broader impact on the fulfillment of SERs? Or, in prescriptive terms, what can courts do to enhance the impact of their rulings on SERs?

To empirically ground my analysis, I draw on evidence from a comparative study of the impact of the CCC's rulings in structural cases. The pivotal case study resulted from a collaborative project with Diana Rodríguez-Franco, which examined in detail the first six years of the implementation of Judgment T-025.[32] I contrast the relatively high impact of T-025 with the more modest effects of two other structural rulings: T-153[33] and T-760. T-153 was the 1998 decision wherein the CCC declared that the dire situation of detainees in overcrowded prisons amounted to an unconstitutional state of affairs.[34] Although the court issued a number of short-term orders aimed at addressing the gravest administrative and budgetary flaws underlying prison overcrowding, it stopped short of establishing any meaningful monitoring mechanism. This omission helps explain the decision's overall low impact. To show contrast with T-153, I also analyze T-760, a more recent ruling on the right to health. Albeit not formally using the doctrine of unconstitutional states of affairs, the T-760 court issued a set of structural injunctive remedies and launched an ambitious monitoring process not unlike that of T-025.[35] These actions were taken in order to nudge the government to address long-standing administrative and legislative bottlenecks that crippled the health-care system and overwhelmed courts with thousands of patients' petitions for basic medications and treatment.[36] Nevertheless, the monitoring quickly lost steam, and the decision has had only a moderate impact, one which ranks in between those of T-025 and T-153.

In line with the structure of this Article, my argument is twofold. First, I claim that in order to capture the full range of effects of court decisions, impact studies need to enlarge the conventional theoretical and methodological fields of vision. In addition to the direct material effects of court orders—those effects that follow immediately from the *enforcement* of the

32. CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA [COURTS AND SOCIAL CHANGE: HOW THE CONSTITUTIONAL COURT TRANSFORMED FORCED DISPLACEMENT IN COLOMBIA] (2010).

33. C.C., abril 28, 1998, Sentencia T-153/98 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm.

34. *Id.* at 74–75.

35. C.C., julio 31, 2008, Sentencia T-760/08 (slip op. at 200–03), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

36. *Id.* at 195–200.

court order—attention should be paid to the broader impact, which includes equally important indirect and symbolic effects. Based on case study evidence, I posit that the potential range of relevant effects includes—in addition to governmental action specifically mandated by the court—the reframing of socioeconomic issues as human rights problems, the strengthening of state institutional capacities to deal with such problems, the forming of advocacy coalitions to participate in the implementation process, and the promoting of public deliberation and a collective search for solutions on the complex distributional issues underlying structural cases on SERs.

Second, with regard to court-controlled factors that may enhance a given ruling's overall impact, two important factors are (1) the type of orders and (2) the existence and nature of the court's monitoring. I argue that impact is likely to be higher when courts engage in "dialogic activism"[37] through two institutional mechanisms. First, dialogic rulings set broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies. Orders of this nature are not only compatible with the separation of powers principle but also can bolster the overall efficacy of a given decision. Second, a dialogic approach to SER cases encourages participatory follow-up mechanisms—public hearings, court-appointed monitoring commissions, and invitations to civil society and government agencies to submit relevant information and participate in court-sponsored discussions—which both deepen democratic deliberation and enhance the impact of court interventions.

I. The Blind Spot in the Debate over the Justiciability of Economic and Social Rights: The Impact of Rulings

A. The Effects of SER Rulings: An Analytical Framework

Well-established interdisciplinary literature on courts and social transformation offers a useful conceptual and methodological framework to assess the effects of the recent wave of litigation and judicial activism on SERs. The literature has explored the impact of prominent judicial decisions on a variety of topics, including gender equality in the job market,[38] racial discrimination,[39] and prison overcrowding.[40] From different perspectives,

37. *See* Dixon, *supra* note 20, at 393 (describing the dialogic model of enforcing socioeconomic rights).

38. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 1–2 (1994) (discussing the Supreme Court's decision in *County of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), which allowed women who alleged sexual discrimination through disparities in wages between different positions to sue under Title VII, but asserting that the decision had little direct impact on gender-based pay equity).

39. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39 (1991) (discussing several different authors' views on how Brown v. Board of Education, 347 U.S. 483 (1954), affected the Civil Rights Movement and race relations in the U.S.).

these studies have theorized and empirically evaluated the outcomes of the "rights revolution"[41] and the corresponding "juristocracy"[42] embodied by judges' growing intervention in fundamental political and social questions.

Judicial-impact studies can be classified into two groups, depending on the type of effects on which the studies focus. On the one hand, some authors concentrate their attention on judicial decisions' direct and palpable effects. Adopting a neorealist perspective, which views law as a set of norms that shapes human conduct, they apply a strict causality test to measure the impact of judicial interventions: a judgment is effective if it has produced an observable change in the conduct of those it directly targets.[43] For example, the question of determining Judgment T-025's effects would be resolved by analyzing its impact on the conduct of government authorities in charge of public policy on forced displacement and, ultimately, by evaluating its consequences for IDPs.

The seminal work of this approach is that of Rosenberg on the effects of the *Brown v. Board of Education*[44] decision from the U.S. Supreme Court.[45] Contrary to the conventional view on *Brown*, which saw the decision as revolutionizing race relations in the U.S. and contributing to the birth of the civil rights movement in the 1960s, Rosenberg's empirical study concluded that the judgment had little effect and that the faith placed in courts as mechanisms for social change was a "hollow hope."[46] In his view, it was the political mobilization of the 1960s and the resulting antidiscrimination legislation (and not the structural judicial decision) that achieved racial desegregation.[47]

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40. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 4 (1998) (using the prison reform cases as an illustration to construct a theory of judicial policy making).

41. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 1–2 (1998). Epp defines the time period of the "rights revolution" as lasting from 1961, when the Supreme Court decided *Monroe v. Pape*, 365 U.S. 167 (1961)—which allowed civil lawsuits against state officers—to the late 1960s, when the Court became "the guardian of . . . individual rights." *Id.*

42. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004). Hirschl defines "juristocracy" as the expansive judicial power that resulted from constitutional reforms shifting power from representative institutions to the judiciaries. *Id.*

43. *See* MCCANN, *supra* note 38, at 290 (explaining that in neorealist social science, "[c]ausality is presumed to initiate with discrete judicial agents and is assessed by the degree to which it imposes coercive or moral force *on* the general citizenry").

44. 347 U.S. 483 (1954).

45. ROSENBERG, *supra* note 39, at 39.

46. *See id.* at 156 ("While it must be the case that Court action influenced some people, I have found no evidence that this influence was widespread or of much importance to the battle for civil rights.").

47. *See id.* at 52 (comparing the extent of school desegregation following *Brown* to that following the enactment of the 1964 Civil Rights Act, and concluding that "[t]he actions of the Supreme Court appear irrelevant to desegregation . . . . Only after [Congress passed civil rights legislation] was there any desegregation of public schools in the South.").

On the other hand, authors inspired by a constructivist conception of the relationship between law and society[48] have criticized Rosenberg and the neorealists for focusing only on judgments' direct, material effects. According to these critics, law and judicial decisions generate social transformation not only when they induce changes in the conduct of the groups and individuals directly involved in the case, but also when they produce indirect transformations in social relations or when they alter social actors' perceptions and legitimize the litigants' worldview.[49] Returning to the example of Judgment T-025, beyond its direct, material effects, it is possible that the decision has generated equally important indirect or symbolic effects. For example, it may have contributed to changing public perception of the urgency and gravity of forced displacement in Colombia, or it may have legitimized the claims and reinforced the negotiating power of human rights NGOs and international human rights agencies that had been pressuring the Colombian government to do more for the IDPs.

The preeminent work employing the constructivist approach is McCann's study on the effects of the legal strategies used by the feminist movement in fighting for wage equality in the United States.[50] McCann's findings suggest that litigation and judicial activism's indirect effects may be more important than the direct effects that neorealists focus on.[51] Thus, "[a]lthough judicial victories often do not translate automatically into desired social change, they can help to redefine the terms of both immediate and long-term struggles among social groups."[52]

These conceptual differences go hand in hand with methodological disagreements. Neorealists' epistemological positivism implies a nearly exclusive emphasis on quantitative research techniques that allow measurement of direct material effects. This is evident in impact studies inspired by the law and economics movement, whose conclusions tend to share Rosenberg's skepticism, as illustrated by the economic literature on the CCC's activism.[53]

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48. *See, e.g.*, Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 815–16 (1987) (formulating a constructivist theory of the legal field that views laws as a set of mutually constitutive set of institutions and symbols).

49. *See id.* at 837–39, 848 (characterizing the law as an "'active' discourse" capable of receiving universal recognition and thus is the "quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular").

50. *See* MCCANN, *supra* note 38, at 48 (describing the feminist movement's legal mobilization, which consisted of general legal action that led to effective political organization).

51. *See id.* at 90–91 ("While lawyers, litigation, and legal discourse were hardly the sole or even the primary 'causes' of pay equity movement development, they did provide a very fundamental catalyzing force in the evolution of active struggle.").

52. *Id.* at 285.

53. *See, e.g.*, SERGIO CLAVIJO, FALLOS Y FALLAS DE LA CORTE CONSTITUCIONAL: EL CASO DE COLOMBIA 1991–2001 [FAULTS AND FAILURES OF THE CONSTITUTIONAL COURT: THE CASE OF COLOMBIA 1991–2001], at 19–44 (2001) (lambasting the CCC for its intervention in financial markets and the economy in general); SALOMÓN KALMANOVITZ, LAS INSTITUCIONES Y EL DESARROLLO ECONÓMICO EN COLOMBIA [INSTITUTIONS AND ECONOMIC DEVELOPMENT IN

In contrast, the constructivist approach widens the range of research strategies to include qualitative techniques that capture a given decision's indirect and symbolic effects; these are placed on equal footing with such quantitative techniques as analyses of social indicators and measurement of press coverage before and after the decision. One such technique is the use of in-depth interviews with public officials, activists, and members of the beneficiary population. These interviews examine the decision's impact on those individuals' perceptions of their situations and the strategies used to affect their situations.

To clarify and highlight the difference between these two perspectives, I have constructed a typology of the effects under consideration, which is illustrated in Table 1.

Table 1. Types and Examples of Effects of Judicial Decisions

	Direct	**Indirect**
Material	Designing public policy, as ordered by the ruling	Forming coalitions of activists to influence the issue under consideration
Symbolic	Defining and perceiving the problem as a rights violation	Transforming public opinion about the problem's urgency and gravity

On the one hand, as shown by the table's horizontal axis, rulings can have direct or indirect effects. Direct effects include court-mandated actions that affect participants in the case, be they the litigants, the beneficiaries, or the state agencies that are the targets of the court's orders. In the cases under consideration, the direct effects of the CCC's structural rulings included the government's decision to declare a state of economic emergency in late

COLOMBIA] 153–69 (2001) (criticizing the CCC for favoring public-service users, debtors, and trade unions during times of economic crisis). I have previously analyzed the confrontation between economists and constitutional lawyers over judicial activism in Colombia. *See generally* César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest over Judicial Reform in Latin America*, *in* LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION 156 (Yzes Dezalay & Bryant G. Garth eds., 2011).

2009, which allowed it to issue a series of decrees ostensibly aimed at repairing the crisis of the health care system and complying with some of the court's orders in Judgment T-760.[54] Similarly, to comply with T-153's main order, the government's planning council issued a document laying out a policy strategy for dealing with prison overcrowding.[55]

Indirect effects include all kinds of consequences that, without being stipulated for in the court's orders, nonetheless derive from the decision. They affect not only the parties to the case but also other social actors. For instance, structural injunctive remedies often prompt sympathetic state agencies and NGOs to seize the opportunity opened up by the decision and to become involved in the follow-up process above and beyond what the court had initially contemplated. For instance, a proactive Ombudsman's Office in Colombia put pressure on the government to undertake prison reform in the aftermath of the decision on prison overcrowding,[56] while several NGO coalitions formed to advocate health care reform under the example of T-760.[57]

On the other hand, as represented by the table's vertical axis, judicial decisions can generate material or symbolic effects.[58] The former category entails tangible changes in the conduct of groups or individuals. Symbolic effects consist of changes in ideas, perceptions, and collective social constructs relating to the litigation's subject matter. In sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case.[59]

For instance, when judicial interventions attract media coverage, the interventions may shape the understanding that both the media and the public have of the issue under consideration. This was the case with T-760, which

54. Interestingly, the government's decree declaring the emergency (and the resulting decrees that reformed key components of the health care system) were subsequently struck down by the CCC on grounds that the administration could not resort to state-of-emergency legislation to fix policy failures caused by its own negligence, including its inaction vis-à-vis the structural injunctions of Judgment T-760. C.C., abril 21, 2010, Sentencia C-252/10 (slip op. at 164–65, 189), *available at* http://www.corteconstitucional.gov.co/relatoria/2010/C-252-10.htm.

55. Interview with Patricia Ramo, Ombudsman's Office Delegate for Criminal and Prison Policy, in Bogotá, Colom. (Oct. 22, 2010).

56. *Id.*

57. For an example of such a coalition, consider Así Vamos en Salud. *Seguimiento al cumplimiento de las órdenes impartidas en la Sentencia T-760 de 2008* [*Monitoring the Compliance with the Orders Issued in Judgment T-760 of 2008*], ASÍ VAMOS EN SALUD, http://www.asivamosensalud.org/index.php?option=com_content&view=article&id=224%3ASentencia+T-+760+de+2008&catid=36%3ALecturas+sugeridas&Itemid=1 (last updated Sept. 11, 2009) (recognizing the organization's interest in monitoring compliance with Sentencia T-760/08).

58. MAURICIO GARCÍA VILLEGAS, LA EFICACIA SIMBÓLICA DEL DERECHO [THE SYMBOLIC EFFECTIVENESS OF LAW] 237–61 (1993) (expounding upon various degrees of symbolism in the law, spanning from expressive acts (mostly symbolic) to substantive acts (mostly material)).

59. *See* Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273, 273 (1986) (offering "an image of culture as a 'tool kit' of symbols, stories, rituals, and world-views, which people may use in varying configurations to solve different kinds of problems").

prompted the reframing of the health care issue in Colombia.[60] My content analysis of news and opinion pieces published in the country's two main press outlets indicates that before the CCC's decision, the most frequent frame for speaking about the issue was one of "institutional crisis" (which was dominant in 60% of the pieces published between 2004 and mid-2008). The reframing process can be clearly seen at work in the press coverage following the decision: between mid-2008 and late 2010, the press framed the large majority (72%) of the pieces in terms of the "right to health."[61]

As the table portrays, the intersection of these two classifications gives rise to four types of effects: direct material effects (formulation of a policy ordered by the court); indirect material effects (intervention of new actors in the debate); direct symbolic effects (reframing of media coverage); and indirect symbolic effects (the transformation of public opinion on the matter).

With this typology in mind, let us return to the contrast between the neorealist and constructivist approaches. While neorealists center on direct material effects, i.e., on the ruling's *enforcement*,[62] constructivists consider all four types.[63] This explains why a judgment can be seen as ineffective by the neorealists and as effective by the constructivists, to the extent that what is seen as impact for the latter group includes a broader set of effects.

In this vein, a neorealist analysis would conclude that virtually all landmark cases in SER jurisprudence have had little impact. Consider, for instance, the well-known South African Constitutional Court ruling on the right to housing in the *Grootboom* case.[64] The fact that the plaintiff, Irene Grootboom, died in a shack while waiting for a decent house eight years after winning the case would suggest that the ruling was in vain, as its expected direct material effects failed to materialize.[65] This conclusion, however, ignores important outcomes of the case. For instance, it misses the multiple indirect material and symbolic effects produced by the *Grootboom* ruling, from the flood of similar litigation whereby communities in different parts of South Africa managed to fend off eviction to the creation of emergency housing policies.[66]

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60. *See* Thomas C. Tsai, *Second Chance for Health Reform in Colombia*, 375 LANCET 109, 109 (2010) ("[T]he spirit of T-760 . . . advocates for a re-examination of how health resources in Colombia have been traditionally allocated to provide for an equitable and effective health insurance system . . . .").

61. The two media outlets included in the study were the daily *El Tiempo* and the weekly *Semana*.

62. *See supra* notes 43–47 and accompanying text.

63. *See supra* notes 48–52 and accompanying text.

64. *See Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 79 (finding that the housing rights of people living in informal settlements in Cape Town had been violated).

65. Pearlie Joubert, *Grootboom Dies Homeless and Penniless*, MAIL & GUARDIAN ONLINE (Aug. 8, 2008), http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless.

66. *See* Elisabeth Wickeri, Grootboom*'s Legacy: Securing the Right to Access to Adequate Housing in South Africa?* iii (N.Y. Univ. Sch. Law Ctr. for Human Rights & Global Justice, Econ., Soc. & Cultural Rights Series, Working Paper No. 5, 2004), *available at* http://

My study of the impact of the CCC's structural decisions finds empirical support for the constructivist approach. Indeed, my case studies suggest that indirect and symbolic effects may have legal and social consequences that are just as profound as the decision's direct material effects. These various forms of judicial impact have been most visible in the seven-year monitoring process of Judgment T-025, which illustrates the above-mentioned typology.

B. The Effects of SER Rulings: The Case of Judgment T-025

In T-025, the CCC laid down three main orders. First, it mandated that the government formulate a coherent plan of action to tackle the IDPs' humanitarian emergency and to overcome the unconstitutional state of affairs.[67] Second, it ordered the administration to calculate the budget that was needed to implement such a plan of action and to explore all possible avenues to actually invest the amount calculated on programs for IDPs.[68] Third, it instructed the government to guarantee the protection of at least the survival-level content ("essential core") of the most basic rights—food, education, health care, land, and housing.[69] All of these orders were directed to all relevant public agencies, including national governmental entities and local authorities.[70]

After seven years, what effects have these and subsequent orders had? Interviews with key actors, content analysis of press coverage, participatory observation of court-sponsored meetings and hearings, and data from the extensive paper trail left by this case substantiate the existence of six major effects, as represented in Table 2.

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www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom%27s%20Legacy.pdf ("[D]espite the absence of sweeping change for South Africans . . . *Grootboom* provided a powerful tool for communities").

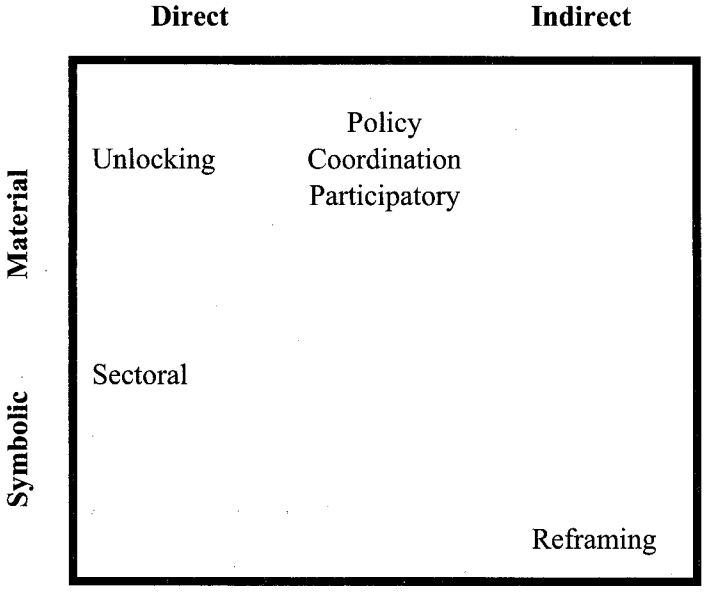
67. C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 96), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm.

68. *Id.*

69. *Id.* at 99–108.

70. *Id.*

Table 2. Effects of Judgment T-025



Source: Adapted from CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA [COURTS AND SOCIAL CHANGE: HOW THE CONSTITUTIONAL COURT TRANSFORMED FORCED DISPLACEMENT IN COLOMBIA] (2010).

1. Unlocking effect.—T-025's immediate effect was to shake up state bureaucracies in charge of attending to the displaced population.[71] By ordering the government to draft a coherent policy to protect the rights of IDPs and by setting deadlines for progress, the CCC used SERs as "destabilization rights"[72]—leverage points for breaking institutional inertia and prompting the government into action. Thus, in terms of the above typology, this was a direct material impact of the ruling.

Several interviewees highlighted this effect. For instance, the attorney in charge of IDP issues at the Ombudsman's Office explained how the lingering deadlines to report back to the court served as an effective nudge for the relevant government agencies. He recalled that "in interagency preparatory meetings prior to follow-up meetings with the court, national and local law enforcement officials would state that they had to hurry because they were going before the court or because they would miss the court's

71. *Id.* at 50–52.

72. *See* ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530–35 (1987) (outlining the theory of "destabilization rights").

deadline."[73] As we will see, the court kept the pressure on the government through follow-up orders and meetings, which further nudged the government into action.[74] Thus, as a newspaper editorial put it in 2007, the judgment

> was key in energizing the attitude of the government. Periodic orders from the court, which opened the process for contempt complaints against government officials—as well as critical reports from the Attorney General, the Comptroller, and the Ombudsman on the failures of implementation—have kept the pressure on the government to fulfill its obligations.[75]

2. Coordination effect.—The structural policy failures underlying the IDPs' humanitarian emergency stemmed not only from the inaction of relevant institutions but also from the lack of coordination among them.[76] In instructing those institutions to collaborate on the design, financing, and implementation of a unified policy on IDPs, the CCC promoted this type of coordination, both among agencies directly targeted by the decision and among agencies indirectly related to the case. Hence, as represented in Table 2, this was a material effect with direct and indirect manifestations.

In the words of a Ministry of Education official, "the ruling told us to put our own house in order. And it allowed us in government to solve who does what, and to determine which tasks need to be carried out collaboratively by everyone."[77] Although far from perfect, the result is a functioning interagency coordination committee that meets regularly and reports back to the court.[78]

3. Policy effect.—Judgment T-025 has had a sizable impact on the design of a long-term national policy on IDPs, as well as on the establishment of mechanisms to implement, fund, and monitor the program. Indeed, one year after the judgment, in direct response to the court's first order, the government issued the National Plan for Comprehensive Care for People Displaced by Violence.[79] Interestingly, although this development

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73. Interview with Hernando Toro, Coordinator, Ombudsman's Office of Attention to Displacement, in Bogotá, Colom. (Jan. 22, 2009).

74. *See* RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 84–90 (detailing the court's mechanisms for holding the government accountable for the requirements of T-025).

75. Editorial, *El año de los desplazados* [*The Year of the Displaced*], EL TIEMPO, May 21, 2008, http://www.eltiempo.com/archivo/documento/CMS-4200986.

76. *See generally* RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 142–68 (describing the lack of coordination at the national level, within local authorities, and between central and local authorities).

77. Interview with Janeth Guevara Triana, Coordinator of Well-Being and Soc. Sec. of Teachers and Dirs., Ministry of Educ., in Bogotá, Colom. (Feb. 5, 2009).

78. Interview with Luis Domingo Gómez, Coordinating Committee Member, Ministry of the Environment, in Bogotá, Colom. (Jan. 11, 2009).

79. L. 250, febrero 7, 2005, DIARIO OFICIAL [D.O.] 45816 (Colom.).

is significant on its face, it also reveals the symbolic consequences of the ruling, as the government explicitly adopted the language and the legal framework of the court's "rights approach" (*enfoque de derechos*) in this and subsequent policy documents and regulations[80]—hence the intermediate location of this effect in Table 2.

Moreover, T-025 had a direct impact on the government's allocation of funds for programs for IDPs, due to the court's second order. Indeed, the ruling prompted the administration to triple the budget allocated to these programs in 2004 and has had a steady upward effect on the budget since that time.[81] The 2010 national budget for IDP programs, albeit still insufficient, was more than ten times that of 2003.[82]

4. Participatory effect.—The follow-up process to T-025 has opened up judicial proceedings and policy making to a broad range of governmental and nongovernmental actors. This key material effect has been partly the direct product of the ruling and partly an indirect, unexpected consequence of it. From the beginning, the CCC's orders directly involved not only the core government agencies responsible for IDPs—the Ministry of the Interior and *Acción Social* (the agency in charge of antipoverty programs)—but also all others with related responsibilities at the international, national, and local levels.[83]

Interestingly, an indirect outcome of the judgment was the formation of civil-society organizations and coalitions to participate in the monitoring process. NGOs such as *CODHES*, *DeJuSticia*, and *Viva la Ciudadanía* joined efforts with grassroots organizations, sectors of the Catholic Church, and academia to found a coalition specifically geared to contribute to the implementation of T-025: the Monitoring Commission on Public Policy on Forced Displacement.[84] In a striking boomerang effect, the CCC subsequently acknowledged the commission as party to the follow-up procedures and relied heavily on the data and recommendations that the commission submitted.[85] Thus, although it was not officially appointed as such by the

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80. *See id.* at 2 (listing *enfoque de derechos* as one of the guiding principles of the National Plan).

81. ACCIÓN SOCIAL, DESPLAZAMIENTO FORZADO EN COLOMBIA [FORCED DISPLACEMENT IN COLOMBIA] 7 (2011), *available at* http://www.accionsocial.gov.co/documentos/Retornos/CIDH%20Desplazamiento%20Forzado%20en%20Colombia%20Marzo%202010%20para%20Cancilller%C3%ADa1.pdf.

82. *See id.* (identifying the budget allocations for IDPs in Colombia from 1999 through 2010).

83. *See, e.g.*, C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 108–33), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm (directing a variety of agencies to take steps to comply with the goals of the order).

84. RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 32, at 119–20.

85. Although the court has not issued an official declaration making the commission a party, it has effectively acknowledged it as a party. *See, e.g.*, C.C., mayo 4, 2007, Auto 109/07 (slip op. at 64–69), *available at* http://www.corteconstitucional.gov.co/relatoria/Autos/2007/A109-07.htm (adopting indicators proposed by the commission to measure governmental progress in the

CCC, the commission has, in practice, played a role similar to that of the monitoring committees set up by the Indian supreme court to oversee the implementation of its decision.[86]

As explained below, the CCC has encouraged engagement by, and dialogue among, state agencies and civil-society organizations through hearings and periodic petitions for information, thus promoting the type of dialogic judicial activism that I argue can enhance the impact of SER rulings.

5. Sectoral effect.—Every SER ruling targets specific sectors of the population as beneficiaries, be it homeless citizens vindicating their right to decent housing, as in *Grootboom*; disgruntled patients asking courts to make their right to health real, as in T-760; or detainees in overcrowded prisons going to court to demand decent conditions of incarceration. A key question, therefore, is what effects a given ruling has on the conditions of that specific social sector. In this case, has T-025 contributed to the amelioration of the socioeconomic situation of the Colombian IDPs?

There is no definitive answer to this question, as attempts to answer are riddled with methodological difficulties. Specifically, one of the defining traits of systemic policy failures is the lack of reliable data on the conditions of the victimized population. Indeed, this was one of the reasons why the CCC declared an unconstitutional state of affairs in T-025.[87] Thus, we lack a baseline for making comparisons with the IDPs' socioeconomic situation after the decision.

However, because the above-mentioned civil society, the Monitoring Commission on Public Policy on Forced Displacement, collects quality survey data, it is at least possible to have a sense of the evolution of the conditions of the IDPs after the judgment. The latest figures show that the situation has changed little: although access to education and health care has dramatically improved, benefitting nearly 80% of IDPs,[88] conditions with

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fulfillment of IDP rights); C.C., enero 26, 2009, Auto 008/09 (slip op. at 67–74), *available at* http://www.corteconstitucional.gov.co/RELATORIA/Autos/2009/A008-09.htm (notifying the commission of the court's decision to maintain the declaration of an unconstitutional state of affairs in light of insufficient progress in governmental compliance with T-025).

86. *See* Muralidhar, *supra* note 16, at 110 (stating that the Indian supreme court has enlisted the help of such institutions as the National Environment Engineering Research Institute to submit reports and recommendations).

87. *See* C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 58), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm (noting that the lack of adequate information about zones that are fit for housing construction has frustrated the objectives of the program and generated resentment in some neighborhoods, and ordering the government agencies to provide the necessary information about existing measures so that the government could weigh the correct balance between security and economic assistance in order to provide adequate living conditions for IDPs).

88. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE EL DESPLAZAMIENTO FORZADO [MONITORING COMMISSION ON PUBLIC POLICY ON FORCED DISPLACEMENT], SEPTIMO INFORME DE VERIFICACÍON SOBRE EL CUMPLIMIENTO DE DERECHOS DE LA POBLACIÓN EN

regards to all other SERs continue to be unsatisfactory. To illustrate, 98% of IDPs live in poverty, only 5.5% have adequate housing, and only 0.2% of displaced families received the legally mandated emergency humanitarian assistance in the months immediately following their forced displacement.[89] Moreover, forced displacement continues at exorbitant levels: 280,000 people were uprooted in 2010, bringing the total number of persons displaced in Colombia in the past twenty-five years to over five million, the largest forcibly displaced population in the world.[90]

As suggested by the location of this type of impact in Table 2, court decisions can also have symbolic effects on the beneficiary social sector, as their members and organizations adopt the language of the law to frame their future claims. This was evident in interviews and participant observation with leaders of the IDP population, whose discourse was peppered with allusions to the technical language of the court. Terms such as *tutela* (constitutional action), *auto* (follow-up injunction), or *audiencia* (hearing) often become intertwined with personal stories of uprooting and radical deprivation.[91]

6. Reframing effect.—Symbolic reshaping extends beyond the right holders targeted by the ruling. Through T-025 and the follow-up process, the CCC has helped to reframe the issue of forced displacement—once considered a side effect of armed conflict—as a human rights problem requiring an immediate reaction. This is an indirect consequence of the ruling, in that it concerns a group of actors much broader than the IDPs, from the media to international human rights agencies to the public at large.

Content analysis of press coverage on forced displacement offers a hint about the operation of this effect. Whereas in the period prior to the judgment (2000–2003), the press covered displacement mostly through the frame of "armed conflict," in the subsequent period (2004–2010), legal categories have come to dominate press coverage of the issue. Indeed, forced displacement is discussed mostly in pieces whose dominant frame is "human rights violations" or "lack of compliance with the law."[92]

In sum, beyond the specifics of T-025, the empirical analysis of its effects illustrates a general point: judicial activism with regard to SERs may

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SITUACIÓN DE DESPLAZAMIENTO [SEVENTH VERIFICATION REPORT ON COMPLIANCE WITH THE RIGHTS OF DISPLACED POPULATIONS] 87 (2008).

89. *Id.* at 55, 133, 150.

90. CODHES, *supra* note 2, at 8.

91. Interview with Anonymous, ADACHO [Association of Displaced Afro-Colombians of the Chocó Province], in Quibdó, Colom. (July 24, 2008); Interview with Eusebio Mosquera, Founder, AFRODES [National Association of Displaced Afro-Colombians], in Geneva, Switz. (Aug. 9, 2009).

92. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's* Ley de Justicia y Paz, 28 MICH. J. INT'L L. 49, 56 (2006) (observing the "human rights violations," including "forced displacements," resulting from armed conflict in Colombia).

have consequential impacts that go well beyond the direct and material consequences following from the court orders. And these impacts become visible with the aid of an expanded analytical and methodological toolkit.

This is not to suggest, of course, that structural rulings on SERs in general, and T-025 in particular, produce the whole range of effects, nor that when they do have an impact, the impact is substantial. Indeed, the results of T-025 have been mixed. While some of its effects (such as the unlocking and reframing effects) have been profound, others (such as the sectoral and coordination effects) have been moderate.

Nonetheless, the breadth and depth of T-025's effects remain striking when compared to those of other structural rulings by the CCC and other tribunals. What accounts for this variation? Why have decisions like T-025 had greater impact than others, like T-153 or T-760? In the following Part, I argue that institutional mechanisms associated with dialogic judicial activism provide useful clues to answer these questions.

II. Judicial Impact and Dialogic Activism

A. An Empirical Case for Dialogic Activism

Inspired by decisions like T-025 and *Grootboom*, a growing literature in comparative constitutionalism has extolled rulings that, in addition to protecting SERs, promote democratic deliberation. Proponents of this type of dialogic activism aim for an intermediate path between judicial restraint and juristocracy.[93] While defending the justiciability of SERs, they criticize rulings that, by imposing detailed policies and programs, encroach upon the purview of the executive and legislative branches and close off opportunities for public debate on the underlying socioeconomic issues.[94]

Thus far, the case for dialogic activism has rested on democratic theory and constitutional law. In response to the classic objection against judicial activism—that it allegedly lacks democratic legitimacy and violates the separation-of-powers principle—constitutional scholars and theorists of deliberative democracy have cogently demonstrated the democratic credentials of judicial interventions that elicit collaboration among the different branches of power and promote deliberation on public issues.[95] On the other

93. *See, e.g.*, Dixon, *supra* note 20, at 393 (arguing for "a commitment to constitutional 'dialogue' as the most desirable model of cooperation between courts and legislatures in the enforcement of socioeconomic rights").

94. *See id.* at 407 (positing that where courts uphold rights-based claims with sweeping effects without employing the dialogic approach "the relationship between judicial review and democracy will tend to become far less certain").

95. *See, e.g.*, Víctor Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR - INT'L J. ON HUM. RTS. 181, 196–205 (2005) (characterizing typical ways in which the judiciary oversees compliance with legal standards and thus participates in a dialogue of sorts with other branches of government); Roberto Gargarella, *Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?*, *in* DELIBERATIVE DEMOCRACY AND

hand, in critical engagement with overly expansive understandings of the role of courts, scholars have pointed out the shortcomings of court-imposed policies that circumvent the channels of democratic representation and deliberation.[96] Together, these and other contributions have made a case for dialogic activism on grounds that it deepens democratic legitimacy in constitutional regimes committed to decent standards of economic well-being.[97]

Here I want to make a different yet complementary case for dialogic activism's ability to enhance courts' impact on the fulfillment of SERs. This argument addresses the other classical objection against activism—that courts lack the requisite institutional capacity to deal with complex socio-economic issues and enforce their rulings.[98]

Upon close examination, it becomes clear that this line of critique identifies judicial activism with a specific variety of court interventions. In terms of Tushnet's criteria for distinguishing "strong" judicial remedies from "weak" ones[99]—that is, the breadth of orders and the extent to which orders are compulsory and peremptory—the critique assumes that activist courts opt for strong remedies that not only set a course for addressing policy failures but also determine the minutiae of the new policies.[100] What the critics have in mind is the kind of activism that marked American jurisprudence from the 1950s through the 1980s, characterized by rulings ordering particular policy and institutional reforms. As exemplified by many judicial interventions seeking to reform the dysfunctional U.S. prison system, judges

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ITS DISCONTENTS 233, 244–48 (Samantha Besson & José Luis Martí eds., 2006) (discussing examples of ways in which courts can intervene to implement social rights that are "fully respectful of the authority of the legislature" and "honor . . . their commitment to democracy"); Rodrigo Uprimny Yepes, *Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court*, *in* JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 355, 386 (Fons Coomans ed., 2006) (observing that the implementation of judicial decisions on SERs depends, among other factors, on "judicial mechanisms to guarantee their effective compliance, put forth in consensual contexts, which social movements . . . can politically appropriate and include in a legal strategy that forms part of their wider political struggle").

96. *See, e.g.*, Gargarella, *supra* note 95, at 237–39 (collecting authorities by authors and judges who argue for reduced participation of the judiciary in enforcing social rights); Rodríguez-Garavito, *supra* note 17, at 175–78 (describing the clash and ultimate stalemate between the supporters of progressive neoconstitutionalism, notably the Colombian Constitutional Court, and supporters of neoliberal economics); Sabel & Simon, *supra* note 16, at 1017 (noting the criticism that in SER cases in which the remedy entails institutional restructuring, courts may lack the information necessary to supervise such restructuring).

97. *See, e.g.*, Dixon, *supra* note 20, at 394 (celebrating "the potential for a constitutional judiciary to enhance the overall inclusiveness and responsiveness of a constitutional democracy").

98. *See* ROSENBERG, *supra* note 39, at 21 ("Courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.").

99. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21 (2008) ("Courts exercise strong-form judicial review when their interpretive judgments are final and unrevisable.").

100. *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 4–7 (1977) (criticizing decisions of United States federal courts that imposed complex or highly specific remedies in a deviation from the courts' traditional judicial role).

not only declared the existence of a structural violation of prisoners' rights, they also sought to address the violation through detailed orders on matters as specific as the number of guards that should be hired and details about the designs of prison facilities.[101] This is the same variety of activism seen in some of the CCC's rulings of the 1990s. For instance, in a 1999 decision, the CCC not only declared unconstitutional the national system of housing finance but also set detailed parameters of new legislation, which the court ordered congress to produce in order to replace the extant system.[102]

Further, critics tend to take for granted the process of implementation that is predominant in these rulings. It is a closed and top-down process, which tends to feature courts imposing specific policy alternatives on impermeable bureaucracies and interest groups resistant to change. Under these conditions, it is unsurprising that the courts' institutional capacities are insufficient to enforce their judgments, as is demonstrated by empirical studies on this type of monologic activism.[103]

In practice, detailed top-down orders generate transformations much less ambitious than those envisioned by the courts, largely because of resistance from vested interests and because of the legal and technical limitations on courts' abilities to deal with structural social problems. A telling case is the above-mentioned CCC ruling, C-700/99,[104] which sought to replace the national system of housing finance with a court-designed one.[105] Although the Colombian congress complied with the court's order to pass a bill establishing a new mortgage system, the myriad technical complexities of implementation, coupled with organized resistance from the financial sector, diluted the ruling into thousands of individual suits that mortgage debtors have fruitlessly brought before civil courts to have debts refinanced as ordered by the CCC.[106] In light of this, the CCC itself has backtracked in its more recent jurisprudence on housing finance, which has further eroded the implementation of its original decision.[107]

Evidence of the limited effects of monologic activism and concerns about democratic credentials do not undermine judicial activism per se, as defenders of judicial restraint would have it. Nor do these effects call into question the justiciability of SERs at large. However, these effects do call

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101. *See* FEELEY & RUBIN, *supra* note 40, at 13–14 (detailing the rise of prison-reform cases and the extent of court intervention).

102. C.C., septiembre 16, 1999, Sentencia C-700/99 (slip op. at 67), *available at* http://www.corteconstitucional.gov.co/relatoria/1999/C-700-99.htm.

103. *See, e.g.*, ROSENBERG, *supra* note 39, at 52 (noting the lack of progress in desegregating southern schools in the years following *Brown*).

104. C.C., septiembre 16, 1999, Sentencia C-700/99 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/1999/C-700-99.htm.

105. *Id.* at 67.

106. Interview with William Jiménez, Attorney, in Bogotá, Colom. (Oct. 14, 2010). Mr. Jiménez represents banks in mortgage-collection suits.

107. *Id.*

for a reconstruction of the theory and practice of court interventions in structural socioeconomic issues, in order to address the above-mentioned objections through dialogic activism.

B. The Workings of Dialogic Activism

Whether a given SER judgment is more or less dialogic depends on the court's choices with regards to three components of the ruling: substantive content, remedies, and monitoring mechanisms. The decision's substantive content relates to whether and to what extent the court declares that there has been a violation of a justiciable SER. As explained, this declaratory stage is the focus of most of the jurisprudence and literature on the justiciability of SERs. In terms of Tushnet's typology of judicial approaches to SERs, the choice that a court faces at this juncture is whether to affirm the justiciability of an SER in the case at hand, and, if it finds for the plaintiff, how strongly to interpret the scope of the plaintiff's rights. Thus, activist rulings, of both the monologic and dialogic varieties, entail the affirmation of "strong rights."

With regard to remedies, whereas monologic judgments involve precise, outcome-oriented orders, dialogic judgments tend to outline procedures and broad goals and, in line with the principle of separation of powers, place the burden on government agencies to design and implement policies. In terms of Tushnet's criteria to distinguish "strong" judicial remedies from "weak" ones—that is, the breadth of orders and the extent to which orders are compulsory and peremptory—dialogic remedies tend to be weaker.[108]

Missing from Tushnet's typology is a third component, monitoring, which is factually and analytically distinct from remedies. Regardless of the strength of their decisions' rights and remedies, courts face the choice of whether to retain supervisory jurisdiction over the implementation of those decisions. Dialogic decisions tend to open a monitoring process that encourages discussion of policy alternatives to solve the structural problem detected in the ruling. Unlike monologic judicial proceedings, the minutiae of the policies arise during the course of the monitoring process, not in the judgment itself. Dialogic courts often issue new decisions in light of progress and setbacks in the process and encourage discussion among actors in the case through deliberative public hearings.[109] As noted, this constitutional dialogue involves a broader spectrum of stakeholders in the

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108. Given my focus on structural rulings that mandate positive actions by the executive or the legislature, I do not dwell on negative remedies here, i.e., those that order elected authorities to abstain from a given course of action found to violate an SER, such as disproportionately taxing the poor. A deeper discussion of the topic is provided by Rodrigo Uprimny. *See* Uprimny, *supra*, note 95, at 381 (discussing types of judicial decisions, and clarifying that "negative remedies are judicial enforcements of prohibitions").

109. The T-025 decision itself provides a prime example of this process. *See supra* subpart I(B).

monitoring process. In addition to the court and state agencies directly affected by the judgment, implementation involves victims whose rights have been violated, relevant civil-society organizations, international human rights agencies, and other actors whose participation is useful for the protection of the rights at issue, including grassroots organizations and academics.

This threefold characterization allows for an assessment of the monologic or dialogic character of a given ruling or court. The most dialogic decisions in structural cases involve a clear affirmation of the justiciability of the right in question (strong rights); leave policy decisions to the elected branches of power while laying out a clear roadmap for measuring progress (moderate remedies); and actively monitor the implementation of the court's orders through participatory mechanisms like public hearings, progress reports, and follow-up decisions (strong monitoring).

There are stark differences among activist courts (and among decisions of the same court) on each of the three dimensions. For example, the South African Constitutional Court has tended to adopt a combination of strong rights, weak remedies, and no monitoring. In iconic cases such as *Grootboom* and *Treatment Action Campaign*,[110] it has chosen not to set deadlines or follow-up proceedings for enforcement.[111] In contrast, the Indian supreme court has traditionally resorted to a mixture of strong rights, strong remedies, and strong monitoring mechanisms;[112] however, its recent, more dialogic jurisprudence can be better characterized as a combination of strong rights, moderate remedies, and strong monitoring.[113] In the middle are decisions such as *Riachuelo*, which concerned river basin pollution in Argentina and had a mix of strong rights, weak remedies, and weak monitoring.[114]

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110. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

111. *See id.* at 750, 763 (declaring a violation of the right to health of HIV and AIDS patients because of access barriers to antiretroviral medication but declining to set forth a blanket approach for enforcement or a deadline for compliance); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 86–87 (requiring the government to implement and supervise measures to provide shelter but declining to set a timetable for such implementation).

112. *See* Muralidhar, *supra* note 16, at 109 (summarizing jurisprudence that recognizes explicit rights, including a right of education flowing from the right to life; that requires compliance on a timetable; and that allows the court to exercise a "continuing mandamus" whereby it keeps the case active to ensure implementation of its directives).

113. *See* Abhinav Chandrachud, *Dialogic Judicial Activism in India*, THE HINDU (July 18, 2009), http://hindu.com/2009/07/18/stories/2009071852820800.htm (observing that the court's rights jurisprudence has extended from the rights of the impoverished to public administration and that its opinions have become foundations for dialogue and transparency, although this development may undermine enforceability).

114. *See* Farstein, Kletzel & García Rey, *supra* note 27, at 59–60 (recognizing the success of the *amparo* process in compelling the cleanup of the Riachuelo basin and the delegation of authority to implement the cleanup plan to an authority created by congress).

Do these differences have a bearing on judicial impact? Evidence from the comparative case study of the CCC's rulings suggests that they do. I turn to this evidence in the next subpart.

C. *The Impact of Dialogic Activism*

The three key structural rulings of the CCC share a strong rights approach. The foundational decision, T-153/98, was a strong condemnation of prison overcrowding for violating detainees' basic rights; the court also decisively affirmed the justiciability of these rights.[115] Similarly painstaking accounts and condemnation of massive SER violations can be found in the subsequent rulings on IDPs (T-025/04) and health care (T-760/08).[116]

With regard to remedies, however, a sharp break is evident between earlier rulings and more recent jurisprudence. In T-153, the CCC adopted the strong-remedies approach by handing down detailed orders for the government to (1) immediately suspend a contract for the renovation of one of the largest prisons in Bogotá; (2) formulate, in three months, a comprehensive plan for the renovation of existing prisons and the construction of new ones, which was to be executed within a four-year period; and (3) put an end, in four years, to the confinement of detainees under trial in the same prisons as convicted detainees.[117]

As noted, the T-025 court adopted a more procedural, dialogic approach by leaving it to the government to decide the content of IDP programs and the requisite funding for carrying them out.[118] At the same time, however, it set stringent deadlines and handed down an outcome-oriented order requiring the government to begin protecting the most basic rights of IDPs in the short term (within six months).[119] Thus, in terms of the above classification, this decision entailed moderate remedies.

A similarly moderate, intermediate approach to remedies is evident in the more recent decision on health care. Most of the decision's orders are means-oriented, mandating that the government formulate a contingency plan to deal with the impending bankruptcy of the health care system,

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115. *See* C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 77), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm (describing the Colombian prisons as contributing to a "systematic [violation] of the most fundamental human rights").

116. *See* C.C., julio 31, 2008, Sentencia T-760/08 (slip op. at 172–76), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm (discussing issues with access to service when patients cannot afford to pay and recognizing a fundamental right to health); C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 59–62), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm (recounting, among other things, the lack of human rights protections and the 80% poverty rate among IDPs, and finding that the situation violated constitutional rights).

117. C.C., Sentencia T-153/98 (slip op. at 83).

118. *See* C.C., enero 22, 2004, Sentencia T-025/04 (slip op. at 100), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm (affirming the competency of a domestic institution for designing and implementing a plan to improve the condition of IDPs).

119. *Id.* at 102.

create administrative protocols for resolving patients' complaints, and establish mechanisms to efficiently oversee private healthcare providers.[120] The relative weakness of these orders is offset by stringent deadlines and a strong injunction ordering the government to unify the basic coverage for patients in the private and the public health care systems, as mandated by a 1993 law that has not been implemented.[121]

Finally, with regard to monitoring, T-025 stands apart from the other rulings. Over the course of seven years, it has engendered twenty-one follow-up public hearings involving a wide array of governmental and nongovernmental actors, as well as nearly 100 follow-up decisions whereby the CCC has fine-tuned its orders in light of progress reports.[122] The CCC has thus put in place a remarkably strong monitoring process.

In contrast, the earlier approach of T-153 did not include any court-sponsored monitoring mechanisms. Instead, the court limited itself to asking the Ombudsman's Office and the Inspector General's Office to oversee the decision's enforcement.[123] Likewise, the T-760 court, despite having outlined in the decision a monitoring mechanism akin to that of T-025, has largely remained passive: it has not held public hearings, has failed to promote meaningful citizen participation, and has limited its follow-up injunctions to petitions for information from the government.[124] Weak monitoring, therefore, has characterized these two cases.

Table 3 sums up the comparison among the three cases, as well as the results of above-mentioned impact analysis.

120. C.C., Sentencia T-760/08 (slip op. at 60–61).

121. *Id.* at 195, 200–03 (citing L. 100/93, diciembre 23, 1993, D.O. (Colom.)).

122. *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 360 (2010) (recounting the "legislative-style hearings" conducted with NGOs and the court's "numerous" orders as to funding and other issues concerning implementation of T-025).

123. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 78), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm.

124. *See* Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431, 459 (2010) (recognizing that the success of implementation will depend on the court's ability—to date unexercised—to conduct public hearings and to engage the citizenry). One exception to the court's passivity is a follow-up decision that ordered the government to immediately comply with the court's previous order to unify coverage for underage patients in the public and the private health care systems. C.C., diciembre 15, 2009, Auto 342A/09 (slip op. at 18–19), *available at* http://www.corteconstitucional.gov.co/relatoria/Autos/2009/A342A-09.htm.

Table 3. Comparison of CCC's Structural Rulings

	Rights	Remedies	Monitoring	Impact
T-025/2004	Strong	Moderate	Strong	High
T-760/2008	Strong	Moderate	Weak	Moderate
T-153/1998	Strong	Strong	Weak	Low

Although a larger sample of cases is needed to extract firm conclusions, this comparison offers useful hints on the relationship between dialogic activism and judicial impact. The results suggest that dialogic rulings such as T-025 hold out the prospect for greater overall impact on the fulfillment of SERs,[125] whereas monologic rulings such as T-153 are likely to have lower impact. In between these two extremes are different combinations of rights, remedies, and monitoring that are likely to have a moderate impact.

Additional research is also needed to unpack the specific mechanisms underlying the judicial impact of dialogic rulings. I hypothesize that dialogic rulings have greater impact because they address the two key practical obstacles to the implementation of structural decisions: political resistance and institutional capacity. As for the former, structural injunctions on SERs naturally elicit resistance from powerful sectors with vested interests in the status quo. In the cases under consideration, these sectors included private health care providers and pharmaceutical companies reaping huge profits from thousands of lower court rulings ordering the government to pay for brand-name medicines,[126] indifferent public officials in sclerotic bureaucracies responsible for programs on IDPs,[127] and negligent or corrupt personnel in the overcrowded prison system.[128]

By empowering a broader range of stakeholders to participate in monitoring, courts unleash direct and indirect effects that may help the

125. I use here a synthetic assessment of the rulings' impact, which aggregates the four types of effects—direct, indirect, material, and symbolic—discussed above.

126. *See* Yamin & Parra-Vera, *supra* note 124, at 442 ("[C]ritics pointed to a perverse alliance between pharmaceutical companies, doctors, and judges in judicially-stimulated corruption that led to expensive pharmaceuticals being conceded to patients" (footnote and internal quotation marks omitted)).

127. *See* RODRÍGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 32, at 81 & nn.12–13 (naming some of the institutions and officials responsible for the deficiencies, and listing various common excuses they had given to IDPs who sought help and were denied).

128. C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 74–75), *available at* http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm (noting that when the negligence of prison administration officials violates fundamental rights, or where there are serious and continuous violations of the law by authorities, those affected have a right to protection).

courts overcome political resistance. The main effect is the direct involvement of political actors, such as human rights NGOs, reform-oriented public agencies, and grassroots organizations that are likely to adopt the ruling's implementation as part of their own agenda and thus become a source of countervailing power against the status quo. Moreover, orders of this nature may prompt the formation of political coalitions in support of the court or elicit media coverage that magnifies the material and symbolic effects of the case. As noted, this was the case after T-025, the decision that prompted the foundation of a civil-society monitoring commission that has turned into a key ally of the court as well as a provider of valuable information and recommendations.

Second, the mechanisms of dialogic activism may help courts address institutional shortcomings in dealing with complex socioeconomic issues. One does not have to be a legal formalist to concede that courts lack the technical knowledge, personnel, and resources (let alone the legitimacy) to find and implement solutions to problems as complicated as forceful displacement or lack of access to essential medicines.

This does not mean, however, that courts cannot provoke and moderate a dialogue among public authorities and civil-society actors on these issues in the face of massive policy failures and violations of SERs. By calling on not only government officials but also a wide variety of actors with relevant knowledge—e.g., leaders and members of the beneficiary population, academic experts, and international human rights agencies—dialogic courts may promote a collaborative search for solutions, or at least a public discussion on alternative courses of action.[129] Direct and indirect effects potentially stemming from this dialogue include unlocking policy processes, improving coordination among disconnected state agencies, and creating public policies framed in the language of rights.

T-025 provides an interesting illustration of these effects. A particularly useful feature of the monitoring process has been the collaborative formulation of progress indicators on the fulfillment of the IDPs' rights. Through an iterative, multiyear process that has included numerous follow-up court orders and proposals by governmental and nongovernmental agencies, the CCC adopted a list of twenty quantitative, rights-based indicators to assess progress.[130] These indicators have provided a shared monitoring framework for all the stakeholders, as well as a tool for the court to fine-tune its follow-up injunctions in response to evidence on the evolution of policies and the situation of IDPs.

In sum, by combining the rights, remedies, and monitoring mechanisms of dialogic activism, courts may offset some of the political

129. *See* Sabel & Simon, *supra* note 16, at 1025 (recounting the involvement of a broad group of community stakeholders in a dialogic approach to improving public school financing after lawsuits were filed in Kentucky and Texas).

130. *See* Rodríguez Garavito, *supra* note 9, at 460–73 chart 3.

and institutional shortcomings that render their interventions ineffectual in complex distributional issues and enhance the courts' overall impact on the fulfillment of SERs.

III. Conclusion

Over the last two decades, Latin American courts, activists, and scholars have developed legal theories, strategies, and doctrines aimed at fulfilling the promise of socioeconomic rights in contexts marked by massive deprivation and unacceptable inequalities. Together with similar developments in other regions of the global south, those legal innovations have been fundamental contributions to comparative constitutionalism and international human rights.

Missing from the literature and the jurisprudence in Latin America and elsewhere is a systematic reflection on the actual impact of SER rulings. In this Article, I have contributed to addressing this question by tackling the question of impact from two angles. First, I offered an analytical and methodological framework aimed at capturing the full range of effects of court rulings. I argued that, in addition to the direct material outcomes that courts and analysts tend to focus on, judicial impact includes a broader array of indirect and symbolic effects that can be as consequential for the fulfillment of SERs as those directly stemming from court orders. I illustrated this broader typology of effects with evidence on the multifarious impacts of the most ambitious structural ruling of the Colombian Constitutional Court: T-025 of 2004.

Second, I inquired into the features of courts' decisions that can have bearing on the overall impact of the decisions. I singled out the strength of the judgments' (1) declaration of rights, (2) remedies, and (3) monitoring. I further hypothesized that dialogic rulings—characterized by strong rights, moderate remedies, and strong monitoring—are likely to have the greatest overall impact on the fulfillment of SERs. I illustrated this hypothesis with findings from a comparative study of the impact of the Colombian Constitutional Court's three key structural decisions on SERs.

Additional research is needed to test these findings and hypotheses. Promising avenues are studies with a larger sample of cases as well as cross-national comparisons. These and other research strategies hold out the promise of opening the black box of the postjudgment phase of SER cases.

The need for this type of analysis is particularly pressing because the issue of impact ranks high on the minds of litigators and judges alike. After all, having a concrete impact on improved access and quality of goods and services—such as decent housing or health care—is what drives litigators and activists to resort to the courts in the first place. Similarly, if their rulings had no practical consequences, courts would be ill-advised to incur the considerable institutional costs associated with their activist rulings on SERs, especially in structural cases that entail protracted negotiations and tensions

with the government agencies responsible for implementing them. Once the dust has settled from a case, the question lingering on everyone's mind is this: was it worth the effort?

Transcript: Social and Economic Rights and the Colombian Constitutional Court†

Manuel José Cepeda-Espinoza*

Thanks for the invitation to discuss these very fascinating topics. It is difficult for me, having been a justice of the Constitutional Court of Colombia, responsible for the decisions that have been mentioned by the panel, to give specific comments on what was said about Colombia or to discuss the other very interesting papers.

I prefer to share with you some basic topics, about the way to classify decisions and to relate these decisions to the impact they produce, because the three papers address this relationship in different ways. This relationship is important, but before going into it, one should take into account two aspects of context that would explain the differences between countries. The first is the institutional context and the second is the political context.

Let us start with the institutional context in which a court exercises its functions. I think that one of the specific features of the Colombian situation is the degree of independence of the constitutional court in the political system. We have a very strong tradition of judicial independence, and the court has built on this independence.

The other crucial institutional difference is that the constitutional court in Colombia has a very broad jurisdiction that permanently involves the court in structural problems because the court not only decides on concrete cases but has to face judicial review in the abstract of all kind of statutes approved by congress. When the court looks at these statutes, it looks at them from a structural perspective. Abstract judicial review calls for a structural perspective to address the challenges raised against a statute beyond a concrete individual case. In addition, the jurisdiction of the court is open to all *tutela* cases decided in the country since all judicial *tutela* decisions must be sent automatically to the court. Thus, the court has had a lot of opportunities to intervene in the enforcement of social rights. Colombia is a smaller country than Brazil but, per year—in 2008 when the court intervened—there were at least 80,000 *tutelas* that had reached the court concerning health.[1] This happens every year. So, the justices are sensibilized to the issues and also, as

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1. EDGARDO JOSÉ MAYA VILLAZÓN, INSPECTOR GEN. OF COLOM., SISTEMA DE SALUD EN COLOMBIA [HEALTH SYSTEM IN COLOMBIA] (2010).

new cases arrive frequently, they can adjust their judicial interventions to the problems they see are causing the violation of the right to health.

A third very important institutional aspect is *tutela* itself. *Tutela* is of course a cousin of *amparo*, but it has very specific characteristics that are relevant for this discussion. *Tutela* is flexible. It may be surprising to note that the two structural cases that were mentioned, the IDP case[2] and the health case,[3] the so-called two structural cases, were not litigated on a collective approach. Neither of the litigators asked for structural remedies, they were instead litigated as individual cases. However, since *tutela* is flexible, the court was able to accumulate all the individual cases, wait until the cases showed several dimensions of the problem causing the violation of rights, then require evidence from the government and transform governmental agencies that were not parties to the cases in the beginning into parties to the case. So the court, in a certain way, can build the case. In this sense, it is a very powerful court.

Another example of flexibility is what César Rodríguez-Garavito called monitoring. Monitoring is not specifically provided by *tutela* regulations, but the court can interpret some aspects of *tutela* regulations in order to retain its jurisdiction over the enforcement of its decisions. After issuing the final decision, the court can say: this is not really the final decision; I will retain my jurisdiction and continue issuing decisions to implement my initial orders. This is a very specific institutional aspect, I believe, of the Colombian situation.

The second element of context is political, of course. One should look at the relative legitimacy of the relevant actors. And in the Colombian context, the court enjoys a great deal of legitimacy, and judicial activism is considered legitimate in the political process. Why? This is a very tough question, but I just would say that our *Marbury v. Madison*, our first case in this matter, dates from 1887.[4] It was rendered by the supreme court, who was the constitutional judge at the time. And since this date, more than 100 years of uninterrupted judicial review has been taking place in Colombia—very strong decisions were rendered in the 1930s, in the 1960s, in the 1980s, and these decisions were complied with. Thus, Colombia had a century old tradition of active uninterrupted judicial review at the moment the constitutional court was created in 1991.

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2. IDP refers internally displaced persons by Colombia's armed conflict. *See* César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEXAS L. REV. 1669, 1669–70 (2011). The IDP case refers to Judgment T-025 of 2004, Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm.

3. The health case refers to Judgment T-760 of 2008, C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

4. MANUEL JOSÉ CEPEDA-ESPINOSA, POLÉMICAS CONSTITUCIONALES [CONSTITUTIONAL CONTROVERSY] 6 (2007)

The other key aspect of the political context that one should take into account is the relative power between the economic techno-bureaucracy and the lawyers. We are in a permanent debate with economists in Colombia because economists design public policies, even public policies that concern social rights. This debate has evolved in different phases, and one should fit the IDPs decision and the health decision as part of this debate in the Colombian context.

I give two aspects of the decisions to show that. First the IDP decision, T-025[5] of the year 2004. In this decision, the court, moved forward in the debate with economists concerning budgetary restrictions. It decided not to order to spend a penny. The court did not order the government to spend a specific amount of money. The court instead ordered the government to make an estimate of how much money the government would have to spend to protect IDPs' rights. If this amount turned out to be excessive, the court said, the Government could publicly say that it would regress in the protection of rights. That is why in the beginning, IDPs were angry with the decision. IDPs now support the decision, but at the beginning IDPs were angry with the decision because they said, "everything is wonderful, but you authorized the government to regress." So IDPs waited one year after the deadline given by the court ended to see what the government would say. And the government said: "okay, I made my estimate, it's a lot of money, I will spend it, I will not regress." And only then, IDPs supported the decision and agreed to engage in promoting its enforcement. I remember a phone call from a leader of the IDPs, who I happened to meet in an academic encounter. He called me and said that after some days of deliberation the main organizations dedicated to advocate in favor of IDPs had decided to support the decision rendered by the court and would work to implement it. Why did the court take this approach to public spending needed to protect IDPs rights? To address the very difficult problem of economic costs in the protection of rights and conciliate budgetary restrictions and constitutional restrictions.

In the second decision, T-760[6] of 2008, the health structural decision the court moved forward in this debate. In this decision, the court issued several complex orders, but there is one that I want to underline. The court ordered that whatever reform was adopted for the health care system to comply with the decision rendered by the court, it should be financially sustainable. Thus, the court was very concerned with the financial sustainability of the health system. I do not want to imply that these economic concerns are not important; of course they are important! And the system, at least in the Colombian context, was failing. The court intervened, of course to protect the right to health, ordered equality in health, ordered the adoption of all kind

5. C.C., enero 22, 2004, Sentencia T-025/04 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm.

6. C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm.

of deep measures by the competent regulatory agency, but the court also ordered the reforms adopted by the competent authorities to be financially sustainable. I think these elements of the context are important.

The second basic idea that I want to share, are criteria to classify the decisions that protect socio-economic rights after these tensions are taken into account. I think that we should try to avoid placing the decisions in fixed categories or boxes. The decisions are best seen as in a continuum, where there are degrees of intervention and kinds of intervention, I will only highlight the basic criteria for this classification. First, the object of the decision rendered by the court . I think that individual and structural dichotomies are useful, but T-025 and T-760, the IDPs decision and the health decision, are more than structural, they are systemic. In the T-760 decision, the court had to address the whole health system, for example. It did not focus on one aspect which reflected a structural problem of the system; it looked at the whole health system and how it works. I would label this decision as a "systemic sectorial decision." The IDPs decision is different. The IDPs decision is trans-sectorial. All state agencies had to do something with IDPs, but they were not acting. And thus, it is a very complex decision in which the court could not give orders to a single ministry or a single state agency, but had to involve the whole state in the protection of IDPs. So the object of the decision rendered by the court is a very important criterion for classification: what is the object of the decision, how structural it is, and whether it even reaches the level of a systemic decision.

The second criterion concerns how rights are protected. In both decisions, the court did not protect one right. Even the health case is not a decision only concerning health; it is also a decision concerning equality. In this decision the court ordered that the health plan that protected the middle classes should be equalized to the health plan that protected the poor. Because the poor, as the Brazilian and Colombian experiences have demonstrated, do not access justice easily. The court ordered an equalization of the plans so that the poor receive health without the need to access the courts, because the health plan protects them automatically. So this decision was also sensitive to the perverse effects of focused and individualized judicial intervention, when systemic issues are not addressed by the judges. But the systemic approach was accompanied in decision T-760 by individual orders which protected each plaintiff, in addition to the systemic orders.

I would thus suggest two categories to analyze the kinds of protection of rights given by the court in structural or even in systemic cases. The first, I will call "simple procedural gradualism." It consists in a gradual protection, which is *procedural* in the sense that it invites dialogue, and is *simple* in the sense that it recognizes that the problem is too tough and it needs time.

The Colombian decisions go beyond simple procedural gradualism. The protection offered by the court, I will call "biting substantive progressiveness." It is progressiveness in the sense that the court recognizes that rights are not absolute, and that one should develop and expand the pro-

tection of the right within certain limitations. Second, there should always be an advancement, but an advancement accompanied by proof of progress. And third, it is progressiveness towards an outcome, and thus outcomes are defined in terms of the effective enjoyment of rights. So it is not any kind of gradualism. Rather, it is a progression directed towards a clearly defined aim, which is in turn defined in terms of effective enjoyment of rights.

It is also *substantive* progressiveness because the court in all these cases also protected the individual. The court did not say: "okay, thank you very much for bringing the case, but, as happened in the very significant South African case mentioned,[7] I will address the general issue, and, sorry, you will not receive the concrete protection of your socio-economic rights." In all these cases the court protected the individual plaintiffs and granted the *tutela* to them. But in addition, it is *substantive* too because the court fixed standards that substantially define the content and the scope of the rights. For example, in the health decisions as I mentioned, the court ordered a unification of the health plans not as a fusion of both, but with the redesign of the health plans to build a basic common health plan that did not discriminate against the poor and was financially sustainable. And it's *biting* because the court imposes costly decisions, prompts regulatory action, orders administrative changes, and resolutions of that kind, of course, bite.

The third criterion is how the judge relates to public policies. In the field of socioeconomic rights, obviously public policies are very important. Of course, a constitutional judge should take into account separation of powers issues as have been mentioned. Nevertheless, beyond the separation of powers issues, there is the question of what should the judge do in the face of evident failures in policy making and policy implementation. The judge cannot replace the competent authority in policy making or implementation. The Colombian constitutional court did not do that. In these decisions, the court orders rationality: it orders the policy maker to define objectives, relate means to objectives, develop policies and regulations, and build institutional capacity to do what the policy maker wants to achieve. In this sense, it requires rationality. But it is not any kind of rationality; it is "transparent rights-based rationality." The court orders the policy maker to look at the objective of the existing policy and answer this question: did all the policy making and policy implementation really result in the protection of a right or not? So it tries to link public policies to a rights approach. Moreover, it is not only rights based rationality, but it is *transparent* rights-based rationality in the sense that the court requires the relevant agencies to put over the table specific reasons for doing one thing and not another, to justify the decisions on precise concrete information, and to even recognize errors, difficulties, and barriers, and to inform how they will be overcome.

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7. *See* Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS L. REV. 1643, 1648 (2011) (discussing *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC)).

Fourth, concerning remedies, I think that the key thing is whether the orders are what I call "targeted transformative." Are the orders targeted with precision towards the regulatory bottlenecks, those issues which give rise to the deadlocks that impinge on the enjoyment of social rights, or are they not? There is a big difference between the IDPs decision and the health decision in this respect. The IDPs decision is very broad, and initially was not targeted to fix key specific aspects in order to achieve transformative effects, because the evidence available to the court was too general. This is why afterwards the court had to do a very concrete and specific follow up and rendered targeted transformative orders after the initial judgment. The health decision also needs careful and sustained follow up, but it is more targeted towards the main problems that were identified with the healthcare system, since the initial judgment.

Fifth, I think that concerning the political process, the democratic process, the reaction of the political agencies and the role of civil society, the key aspect of these decisions is that they try to empower civil society; but they empower civil society and the concrete interest in a very specific way. I call it "empowered decisional participation." The court does not see, in these cases, judicial intervention as something that should be contrast with the political process. On the contrary, judicial intervention is a way to mobilize the political process, but to mobilize it in a way in which participation is not only linked to the very specific party's interests in the case or the IDPs organizations or health organizations, but that promote a broader participation in the decision making that will lead to the fulfillment of the orders of the court. So in the decisional aspect, it is decisional participation because the court orders the participation to be focused on the decisions needed to protect the right and thus should be adopted by the competent authorities. And it is empowered decisional participation because the court not only looks at access of the interested organizations to the decisional process, or to the opportunities for these participations so that they are timely and effective, but the court also unleashes a more technical participation. In the IDPs case, for example, the IDPs transformed their claims from asking whatever they thought optimum to whatever they thought feasible based on new technical expertise acquired by the IDPs. The court invited IDPs to organize in one commission with the academics and with other organizations that defended their rights, and invited this commission to elaborate very technical surveys about the effective enjoyment of rights. And in this way, the IDPs were empowered technically to establish a dialogue with the planning department, with the most technical agencies of the government, in an equal footing, not only politically but in terms of knowledge.

And finally, although it may sound as a paradox, I would call this kind of judicial decision making "prudent activism." Of course there is an activism of the intervention, of the judge, but this activism is an activism that has elements of prudence. The court does not try to fix the problem, it leaves the fixing of the problem to the competent agencies. It does not go into the

details of the remedies. It respects the competence and the processes involved, and it values financial restrictions. And finally, it is aware of the political dynamics derived from the judicial intervention. So there is an element of prudence in this activism.

I wanted to address some considerations concerning impact, but time is up, so thank you very much.

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Latin American Presidentialism in Comparative and Historical Perspective

José Antonio Cheibub,* Zachary Elkins** & Tom Ginsburg***

Since the time of Aristotle, comparative scholars have developed various alternative typologies to classify constitutional systems.[1] One paradigmatic scheme focuses on executive–legislative relations. Some systems,[2] we are told, are "presidential," in which a directly elected president serves a fixed term as both head of state and head of government. Others are "parliamentary," in which a legislative majority determines who will lead the government and for how long. A third model combines features of the two and is called "semi-presidential."[3]

Each of these models of "government type" has an archetype: The United States is seen as the quintessential presidential system,[4] the United Kingdom as the parliamentary model,[5] and France as the semi-presidential model.[6] The models are also seen as systemic, in that each implies a certain institutional configuration. So, presidential systems are thought to include a host of features (e.g., an executive veto) that are not typically found in

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1. *See, e.g.*, Roberto Gargarella, *Towards a Typology of Latin American Constitutionalism, 1810–60*, 39 LATIN AM. RES. REV. 141, 142 (2004) (characterizing early Latin American constitutions as conservative, majoritarian, and liberal).

2. Patterns of executive–legislative relations are sometimes referred to as "forms" or "systems" of government. Scholars sometimes even summarize constitutions on the basis of these differences (e.g., labeling constitutions as either presidential or parliamentary), an indicator of the centrality of these features to constitutional structure more generally.

3. There is no consensus among scholars on the definition of forms of government, particularly with respect to semi-presidentialism. For a thorough review of the concept of semi-presidentialism and the definitional controversies therein, see Robert Elgie, *The Politics of Semi-Presidentialism*, *in* SEMI-PRESIDENTIALISM IN EUROPE 1, 1–14 (Robert Elgie ed., 1999).

4. *See* Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2127 (2002) ("Presidential systems are defined by the separate elections of the legislature and the head of the government (the president) and by the fixed term of the president. The United States is the classic example of such a system, and indeed is the longest enduring democratic presidential system in the world." (footnotes omitted)).

5. *See* Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303, 1317 (2009) ("The classic model for representative democracy is the British parliamentary system from 1867 through the United Kingdom's joining the European Union.").

6. Elgie, *supra* note 3, at 2–3 ("[In 1970], according to Duverger, the list of semi-presidential regimes comprised three Western democracies, Austria, Finland, and France . . . .").

parliamentary systems.[7] In turn, heads of government in parliamentary systems are thought to be vested with powers that their counterparts in presidential systems do not have (e.g., decree power or legislative initiative).[8]

In a recent paper, we have argued that the conventional categories are *not* systemic in this sense.[9] Indeed, we found that stereotypes regarding presidentialism and parliamentarism are just that—stereotypes. When we looked at the distribution of several presumably systemic features, we found that only one of them could be described as a distinctive feature of one system or the other.[10] Our findings are captured by the following empirical insight from our analysis: *The century or region in which a constitution was written is a better predictor of institutional similarity (with respect to the studied features) than is its classification as presidential, parliamentary, or semi-presidential.*[11] The categories have a degree of internal cohesion, but not nearly as much as one would expect for categories that are thought to represent a fundamental and guiding set of choices for constitutional designers, especially given the tremendous scholarly literature built around them.[12]

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7. Thomas Weishing Huang, *The President Refuses to Cohabit: Semi-Presidentialism in Taiwan*, 15 PAC. RIM L. & POL'Y J. 375, 380 n.29 (2006) ("[P]residentialists argue that the existence of presidential independent powers, particularly the power to veto legislation, makes it a presidential system.").

8. *See* Charles Wallace Collins, *Constitutional Aspects of a National Budget System*, 25 YALE L.J. 376, 376 (1916) ("[In] the parliamentary system of government[,] the executive possesses the right of legislative initiative, actively participates in legislation on the floor of the legislature, and through the prime minister as party leader controls the legislative output.").

9. José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, Beyond Presidentialism and Parliamentarism: On the Hybridization of Constitutional Form 20 (Feb. 28, 2010) (unpublished manuscript) (on file with the Texas Law Review). Other scholars have made similar arguments. *See generally* Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531 (2009) (emphasizing functional similarities between the two types); André Krouwel, *Measuring Presidentialism and Parliamentarism: An Application to East European Countries*, 38 ACTA POLITICA 333 (2003) (arguing for the analysis of Eastern and Central European nations on a continuum of presidentialism rather than on a categorical basis).

10. Cheibub, Elkins & Ginsburg, *supra* note 9, at 26.

11. *Id.* at 25.

12. *See, e.g.*, TORSTEN PERSSON & GUIDO TABELLINI, THE ECONOMIC EFFECTS OF CONSTITUTIONS (2003) (discussing the empirical correlations of economic effects with different forms of government); Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, *in* 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY 3 (Juan J. Linz & Arturo Valenzuela eds., 1994) (discussing the role that parliamentary and presidential political institutions play in shaping democratic decisions); Scott Mainwaring, *Presidentialism, Multipartism and Democracy: The Difficult Combination*, 26 COMP. POL. STUD. 198, 222 (1993) ("[T]he combination of presidential government and a multiparty system is problematic."); Matthew Soberg Shugart & Scott Mainwaring, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate*, *in* PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 12 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) [hereinafter Shugart & Mainwaring, *Rethinking the Terms of the Debate*] (defining presidential democracy in contrast to parliamentarism and analyzing the performance and effectiveness of presidential regimes); Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism Versus Presidentialism*, 46 WORLD POL. 1 (1993) (arguing that parliamentarism is a more supportive constitutional framework for consolidating democracy than presidentialism); *see also* Albert, *supra*

One implication of this insight is that scholars need to explore alternative conceptualizations of executive–legislative relations. The distinction between assembly-confidence governments[13] and directly elected, fixed-term governments represents an important dimension—but only *one* dimension—in a clearly multidimensional conceptual space. In this Article, we explore this multidimensionality in the context of Latin America. Latin America provides a useful context for exploring variety within constitutional forms because of its monotypic history: since the emergence of the first independent states in the region early in the nineteenth century, the region has been dominated by the presidential model.[14] Indeed, of the former Spanish and Portuguese colonies in the Americas, the only country that adopted a lasting nonpresidential constitution was Brazil, from 1824 to 1891.[15] This apparent uniformity presents an opportunity to examine internal diversity within a single overarching category of presidential systems.

When we explore the architecture of executive–legislative relations in Latin America, it becomes clear that region matters as much as government type in predicting the distribution of constitutional provisions. Latin American presidentialism, while sharing a fair number of features with the U.S. archetype, is very much its own breed. What appears to distinguish the Latin American variety is a high degree of what we might summarize as executive lawmaking powers. Specifically, Latin American constitutions are uniquely inclined to empower presidents to decree laws, initiate legislative proposals, and exert powers in emergency conditions. None of these powers is stereotypical of presidentialism—indeed, some of them are thought to be elective attributes of parliamentarism. Yet they are undeniably important powers with potentially significant consequences for political stability and the quality of democracy. Indeed, it may well be that the dimension of *executive lawmaking authority* is found to be as important as the executive-selection features that distinguish presidential and parliamentary constitutions.

I. The Shadow of the U.S. Constitution

We begin with a historical elaboration of the influence of the U.S. Constitution on Latin American constitutionalism as a way of orienting the discussion. The influence of the U.S. Constitution in Latin America was undoubtedly significant in the early nineteenth century. Among others,

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note 9, at 531 ("Parliamentarism and presidentialism are commonly, and correctly, set in opposition as distinguishable systems of governance that exhibit distinguishable structural features.").

13. *See* JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 36–37 (2007) (defining *assembly confidence* as a political system in which the government's authority is constrained by the continued approval and confidence of the legislative assembly).

14. *See infra* notes 32–42 and accompanying text.

15. *See* Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 840–42 (2009) (describing the legislative power under the 1824 constitution as parliamentary and noting that the 1824 constitution was Brazil's "most enduring").

Venezuela's constitution of 1811, Mexico's of 1824, Argentina's of 1826, and Ecuador's of 1830 drew significantly on the American model.[16] Even when not adopted, American institutions were part of the mix of models considered. Argentina's constitution of 1853 was particularly close to the U.S. model, so much so that Argentinian judges routinely drew on U.S. constitutional jurisprudence in interpreting their own constitution for more than a century.[17] Indeed, there was so much borrowing that the great liberator Simón Bolívar was "moved to condemn the 'craze for imitation.'"[18]

To be sure, the U.S. model was only one of several on offer. Latin American elites were fully acquainted with enlightenment thought and drew on eclectic sources, including French and British thought and, notably, the 1812 Constitution of Cádiz, the embodiment of Spanish liberalism.[19] Nevertheless, several features of the U.S. model were particularly attractive. Federalism was the leading example, as it helped accommodate traditions of regional and municipal autonomy within the Spanish empire and served as an attractive model for rural elites fearful of domination by urban centers.[20] Venezuela's 1811 document drew directly and self-consciously on the United States' federal model.[21] Federalist thought was even influential in countries where it was not sustained, such as Chile.[22] As various independent states sought to combine into larger entities, federalism was a natural model. The Central American Federation, which encompassed much of that region from 1823 to 1840, was explicitly federal and drawn from the U.S. model.[23] Gran Colombia, which encompassed the territory of today's Colombia, Venezuela, Panama, and Ecuador from 1819 to 1831, was also a federal republic.[24] Today, Argentina, Brazil, Mexico, and Venezuela remain federal states.[25]

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16. Donald L. Horowitz, The Federalist *Abroad in the World*, *in* THE FEDERALIST PAPERS 502, 505 (Ian Shapiro ed., 2009); Robert J. Kolesar, *North American Constitutionalism and Spanish America: "A Special Lock Ordered by Catalogue, Which Arrived with the Wrong Instructions and No Keys"?*, *in* AMERICAN CONSTITUTIONALISM ABROAD 41, 53–54 (George Athan Billias ed., 1990); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 15 (2006).

17. Kolesar, *supra* note 16, at 53–56. For a thorough discussion of this topic, see JONATHAN M. MILLER, BORROWING A CONSTITUTION: THE U.S. CONSTITUTION IN ARGENTINA AND THE HEYDAY OF THE ARGENTINE SUPREME COURT (1853–1930) (forthcoming 2012).

18. Horowitz, *supra* note 16, at 505 (quoting BERNARD BAILYN, TO BEGIN THE WORLD ANEW 146 (2003)).

19. Kolesar, *supra* note 16, at 42–43; *see also* Zachary Elkins, *Diffusion and the Constitutionalization of Europe*, 43 COMP. POL. STUD. 969, 984 (2010) (comparing the influence of different constitutional models on constitutions in Europe to that process in Latin America).

20. Kolesar, *supra* note 16, at 43–44.

21. *Id.* at 43.

22. *See id.* at 51 ("[D]uring the early years of independence, . . . North American constitutional principles came to be closely associated with federalism in Chile.").

23. Horowitz, *supra* note 16, at 505. For background on the Central American Federation, see LYNN V. FOSTER, A BRIEF HISTORY OF CENTRAL AMERICA 134–51 (2000).

24. *See* DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 51–52 (1993) (describing the process by which Gran Colombia became a federal republic).

25. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 26 (2009).

Judicial review was also an American export. Many constitutions in the region adopted explicit provisions empowering the courts to exercise the power of judicial review, a power only implicit in the United States Constitution.[26] To be sure, there were limitations on its exercise. In the widely borrowed Mexican institution of *amparo*, courts could not strike a statute even if they found it unconstitutional; they could only correct its application in particular cases.[27] It is not surprising that, until the emergence of democracy in the late twentieth century, Latin American courts were hardly vigorous in using their powers of review;[28] but the similarity in constitutional form nevertheless set the region apart from other parts of the world.

Other institutions were adopted but then discarded. The right to bear arms existed in many early Latin American constitutions, but by the turn of the twentieth century it had almost been eliminated.[29] The electoral college was influential in early constitutions and survived perhaps longer than it should have, remaining in place in Argentina until 1995.[30] These modifications over time may have reflected a process of updating or modernization, as nations experimented with institutions and found that some worked while others did not.[31]

One of the major borrowings was, of course, the presidency. After a nonnegligible period of experimentation, Latin American countries stabilized under presidential constitutions in the nineteenth century.[32] The choice of a presidential form of government may perhaps be accounted for simply by the fact that it was a model that was available. At independence, Latin American countries were struggling with the same fundamental problem with which leaders of the newly independent United States struggled after 1776: how to constitute executive authority in a context where the monarch was no longer the ruler. Parliamentary government had not yet been codified as such and was in the process of emerging out of recently constitutionalized European monarchies.[33] Parliamentary constitutions in Europe emerged after a gradual

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26. *See* Keith S. Rosenn, *Judicial Review in Latin America*, 31 OHIO ST. L.J. 785, 785 (1974) ("A region of chronic political instability and short-lived constitutions with a civil law tradition would appear most infertile soil for the seeds of *Marbury v. Madison* to take root. Yet all of the Latin American republics, with the exception of the Dominican Republic, provide for some form of judicial review." (footnotes omitted) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

27. *Id.* at 796.

28. *See id.* at 791–808 (surveying the historical development of mechanisms for raising constitutional questions within Latin American countries).

29. ELKINS ET AL., *supra* note 25, at 27 & fig.2.2.

30. Horowitz, *supra* note 16, at 505.

31. ELKINS ET AL., *supra* note 25, at 28.

32. CHEIBUB, *supra* note 13, at 150.

33. *See* Adam Przeworski et al., *The Origins of Parliamentary Responsibility*, *in* COMPARATIVE CONSTITUTIONAL DESIGN (Tom Ginsburg ed., forthcoming 2011) (manuscript at 150, 156–61) (on file with authors) (detailing the rise of parliamentary monarchies in Europe and tracing the "shift of the power to appoint governments from the crown to elected assemblies").

period of negotiation between the monarch and the nobles, in which the parliament ultimately displaced the monarchy as the center of effective governance.[34] In Latin America, by contrast, initial governments, whether revolutionary or not, emerged from a system of monarchy in which a single individual sat at the center of the political system.[35] Even Simón Bolívar, who cloaked his critique of federalism in a general reaction to borrowing from North America, was an admirer of the presidency as a model of a nonhereditary yet strong executive.[36] Thus, the drafters of presidential constitutions in nineteenth-century Latin America did not choose between the presidential and parliamentary models available today, but between a monarchy (headed by a hereditary leader) and a republic (headed by leaders with no claim to heredity).[37]

At that time, the United States represented the most successful republic and one that had emerged under similar circumstances.[38] France, after all, had not yet been able to settle upon a stable and coherent model of republican government.[39] Adoption of a presidential formula was perhaps a foregone conclusion.

At the same time, the *initial* choice of presidentialism does not necessarily explain the endurance of that model. After all, many other institutions were discarded over time through processes of amendment and constitutional replacement. There are reasons, however, to suppose that basic constitutional frameworks—such as the one embodied in the procedures for the selection of the executive—are subject to strong inertial factors. These broad institutions structure the expectations of the actors operating under them and, in order for them to be changed, actors must be willing to leap into the unknown. At the same time, constitutions serve as focal points and are rarely written on a blank slate; previous documents often serve as a template, even if changes are made to address issues identified as leading to crisis in prior systems of government. Thus, in spite of frequent

34. *See id.* at 156–57 (noting that although "[c]onstitutional monarchs were chief executives . . . who governed with the advice and consent of their ministers[,] . . . there were many instances in which parliamentary majorities forced monarchs to dismiss or accept governments against their will" and that "[t]he power of the parliaments stemmed from their control over legislation, particularly budgets").

35. *See id.* at 175–76 (describing the development of constitutions in Portugal and Spain and noting the central role of the monarch in each nation).

36. Kolesar, *supra* note 16, at 50.

37. CHEIBUB, *supra* note 13, at 151.

38. *See* Kolesar, *supra* note 16, at 44 (noting that the "social and economic success of the United States" prompted Latin American drafters to consider the principles embodied in the U.S. Constitution); *id.* at 58 ("North American constitutionalism was influential precisely because it embodied values and addressed needs shared by many [Latin] Americans.").

39. The first stable republican government in France emerged in 1875. *See* ELKINS ET AL., *supra* note 25, at 169 ("The constitution that emerged [in 1875] was a compromise that combined a strong chamber of deputies elected by universal suffrage and an upper house composed of senators selected by local notables or appointed for life terms. Combining both popular and conservative impulses, these institutions nevertheless facilitated the dominance of republicanism . . . .").

constitutional replacements in Latin America[40] that in theory would have provided many opportunities to reconsider presidentialism, and in spite of the existence of explicit and vigorous attempts to reform it,[41] the presidential form of government has survived and shows no signs that it will be abandoned any time soon.[42]

This does not mean, however, that when adopted by Latin American countries, presidentialism was taken as a package deal. If it is true that Latin American countries borrowed the presidential solution from the United States, it is not correct to assume that they also borrowed the set of ancillary institutions that structure the powers of the president and the specific ways in which the president is to interact with the legislature. Even if some such ancillary institutions were borrowed, they too might evolve over time to create new variants of presidentialism that bear little resemblance to the U.S. model. Finally, it could be the case that presidential systems are sufficiently internally diverse such that the overall category is hiding important variation. These are empirical questions that have not, to our knowledge, been systematically examined before. It is our purpose in this Article to do just that in the context of Latin America. We approach the issue of government type by examining several internal features that are seen to be essential components of presidential systems. It is to this issue that we now turn.

II. The U.S. Constitution as the Archetype of Presidentialism

As we stipulated above, scholars who focus on the study of political systems see presidential and parliamentary types as representing systems of institutions. As put by Moe and Caldwell, "Presidential and parliamentary systems come with their own baggage. They are package deals."[43] The precise list of attributes that is supposed to be associated with each system is subject to some variation. Some of these attributes may be accidental, while others may follow from the logic of presidential governance. Tsebelis, for example, asserts that "[i]n parliamentary systems the executive (government) controls the agenda, and the legislature (parliament) accepts or rejects proposals, while in presidential systems the legislature makes the proposals

40. *See infra* Appendix A.

41. *See* Scott Mainwaring & Matthew Soberg Shugart, *Introduction* to PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA, *supra* note 12, at 1, 2 (discussing the efforts of Brazil, Argentina, Colombia, Chile, and Bolivia to shift away from a presidential form of government).

42. We note, of course, that some prominent and recent episodes of constitutional design took up the issue of presidentialism versus parliamentarism, including Argentina in 1993 and Brazil in 1988. For a discussion of frequent replacement of constitutions by these two countries and others, see ELKINS ET AL., *supra* note 25, at 26.

43. Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171, 172 (1994) (Ger.).

and the executive (president) signs or vetoes them."[44] Others emphasize the following as key attributes of political systems: decree power,[45] emergency rule,[46] veto power,[47] legislative initiative,[48] cabinet formation,[49] and the power to dissolve the assembly.[50] This last feature is so closely linked with parliamentarism that some even include it as a defining attribute.[51]

The United States Constitution represents the archetypical presidential system in the sense that it is the model that represents, often implicitly, discussions of separation-of-powers systems. What defines the U.S. Constitution as presidential is that the executive is popularly elected and does not need the confidence of the legislature in order to remain in office.[52] Other features of the U.S. presidential system may or may not be unique and include the following: First, the U.S. President is unable to dissolve the assembly.[53] Second, the President lacks explicit lawmaking powers and has

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44. George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 325 (1995).

45. *See, e.g.*, Lee Kendall Metcalf, *Measuring Presidential Power*, 33 COMP. POL. STUD. 660, 663 tbl.1 (2000) (citing Timothy Frye, *A Politics of Institutional Choice: Post-Communist Presidencies*, 30 COMP. POL. STUD. 523 (1997)) (including the power to "[i]ssue[] decrees in non[-] emergencies" among Frye's twenty-seven listed presidential powers).

46. *See, e.g.*, BRIAN LOVEMAN, THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA 5–6 (1993) ("Latin American constitutions almost always included provisions for 'emergency powers,' . . . to be used in times of internal strife or external threat.").

47. *See, e.g.*, Albert, *supra* note 9, at 542–43 (characterizing the presidential veto in the U.S. Constitution as a legislative power).

48. *See, e.g.*, José Antonio Cheibub, *Making Presidential and Semi-presidential Constitutions Work*, 87 TEXAS L. REV. 1375, 1386–88 (2009) (noting that "[a]lmost all presidential constitutions give some legislative powers to the presidency," including the "exclusive power to introduce legislation in some specified areas").

49. *See, e.g.*, Metcalf, *supra* note 45, at 660, 663 tbl.1 (citing Frye, *supra* note 45) (including the power to "[a]ppoint[] senior officers" among Frye's twenty-seven listed presidential powers).

50. *See, e.g.*, Krouwel, *supra* note 9, at 339, 342–45 (distinguishing presidential, semi-presidential, and parliamentary systems on several dimensions, including the ability of various political actors to dissolve the legislature).

51. *See, e.g.*, Stepan & Skach, *supra* note 12, at 3 (including the executive's ability to dissolve the legislature as one of two "fundamental characteristics" of a "pure parliamentary regime").

52. *See* U.S. CONST. art. II, § 1, cl. 1–3, *amended by* U.S. CONST. amend. XII (providing for a fixed presidential term of four years and popular election of the president through the electoral college).

53. *See* U.S. CONST. art. II, *amended by* U.S. CONST. amend. XII & XXV (defining the powers of the executive, which do not include the power to dissolve Congress). Although the power to dissolve the assembly is often considered to be an essential, even defining, feature of the separation of powers system, we do not take this position. Dissolution powers originated in monarchies and are compatible today with all forms of democratic constitutions. Just as there are presidential constitutions that allow dissolution under certain circumstances, there are parliamentary ones that do not. *Compare* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] 2008, art. 148 (listing certain circumstances under which the president can dissolve the national assembly), *with* Przeworski et al., *supra* note 33, at 158 (noting Norway as an exception to the general rule that, in countries operating under a constitutional monarchy, kings can dissolve parliaments).

no constitutional power of executive decree.[54] Third, the President has formal, albeit modest, emergency powers.[55] Fourth, the President lacks the formal ability to initiate legislation but has the power to veto legislation, even if the veto can be overridden.[56] Fifth, the President has the ability to dismiss the cabinet without direct legislative involvement.[57] Sixth, the President has the power of pardon.[58] Seventh, the President is subject to explicit term limitations, although those limits were not formalized until 1951.[59] Eighth, the legislature has explicit powers of oversight over the President.[60] These presumably elective features of presidentialism are the focus of our inquiry.

We are aware that some of these features are not necessarily descriptive of how the U.S. presidential system works de facto. Some of the constraints presidents face might result from informal rather than formal limitations. For example, the two-term limit for presidents had long been observed before it was formalized by the Twenty-Second Amendment.[61] If presidents are formally prevented from setting the legislative agenda, it is not hard for them to find willing legislators to sponsor their bills. On the other hand, if the formal constitution provides for a president devoid of strong constitutional powers, in practice the U.S. President hardly seems weak (or, at least, seems to have gained strength over the years). The expansion in the scope and frequency of executive orders[62] and the ongoing debate about executive powers in times of war attest to this perception.[63] Our goal, however, is to investigate whether the constitutional documents crafted in Latin America correspond to the

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54. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

55. *See infra* note 78 and accompanying text.

56. *See* U.S. CONST. art. I, § 7, cl. 1–2 (stating how legislation may be introduced by the House and the Senate, and laying out the President's veto power).

57. *See* Myers v. United States, 272 U.S. 52, 164 (1926) (holding that the President's power to appoint officers entails the power to remove them, but that the Appointments Clause does not require the Senate's consent to the removal).

58. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

59. Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1819, 1834–35 (2011) (discussing the development of informal presidential term limits and the eventual ratification of the Twenty-Second Amendment).

60. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 5 (granting the House the power to impeach executive officials); *id.* art. I, § 3, cl. 6 (granting the Senate the power to try all impeachment cases); *id.* art. II, § 2, cl. 2 (limiting the President's power to make treaties and appointments to those made "with the Advice and Consent of the Senate").

61. *See* Ginsburg, Melton & Elkins, *supra* note 59, at 1834–35 (explaining that George Washington's service of only two terms led to the creation of an "unwritten constitutional norm").

62. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 84 & fig.4.1, app. at 189–91 (2003) (demonstrating the increase in "significant executive orders" during the twentieth century across a diverse set of policy categories).

63. *See* Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, 91 IOWA L. REV. 993, 996–97 & nn.2–4 (2006) (discussing the debate over executive powers as one between pro-President scholars, who stress the importance of strength and flexibility in an executive, and pro-Congress scholars, who argue that a legislative check on the President's foreign-policy power encourages democratic accountability).

archetypical U.S. model of a constitutionally weak president. It may be that Latin American presidents look, on paper, very much like their North American counterparts, in which case we would be tempted to think of presidentialism in a somewhat more systemic light. On the other hand, it is very possible that drafters of Latin American constitutions have sculpted a kind of presidentialism that bears a strong regional cast, which deserves more systematic description. How presidents stray from their constitutional prerogatives is, again, a matter that is left open.[64]

III. Latin American Presidentialism

To what degree can we speak of a Latin American style of presidentialism? Can we identify features of executive–legislative relations that are distinctly Latin American or distinctly *non*-Latin American? How closely do Latin American constitutions follow the United States archetype, or for that matter, other relevant models such as the Spanish 1812 (Cádiz) constitution? Is there, as Loveman claims, a set of provisions unique to the Latin American constitutions that enables the tyranny that has so frequently surfaced in these countries?[65]

Our basic sources are the constitutional documents themselves. We use the data assembled by the Comparative Constitutions Project (CCP), a comprehensive inventory of the provisions of written constitutions for all independent states between 1789 and 2006.[66] Collection of the data is ongoing, and for purposes of this Article, the dataset includes 647 of the 835 constitutional systems identified by Elkins, Ginsburg, and Melton.[67] Elkins, Ginsburg, and Melton include a large number of questions in their survey instrument, many of which have to do with the powers of the executive and the legislature.[68] It is this set of questions that constitutes the basic information we use here.

The period from independence through the end of the 1870s was one of intense constitutional experimentation in Latin America. From 1810 through 2007, the nineteen Latin American countries that exist today designed a total of 231 constitutional systems, 111 of which were written before 1880.

64. We thank John Ferejohn for forcing us to clarify this point.

65. *See infra* note 80 and accompanying text.

66. COMPARATIVE CONSTITUTIONS PROJECT, http://www.comparativeconstitutionsproject.org. For details on the conceptualization and measurement of constitutions and constitutional systems, see *Conceptualizing Constitutions*, COMPARATIVE CONSTITUTIONS PROJECT, http://www.comparativeconstitutionsproject.org/conceptualizingconstitutions.htm.

67. A constitutional system consists of a constitution and all its amendments before the constitution is formally suspended or replaced. We use only one event per system in this analysis—typically a new constitution in the first year of its adoption.

68. *See* Zachary Elkins, Tom Ginsburg & James Melton, *The Comparative Constitutions Project: A Cross-National Historical Dataset of Written Constitutions (Survey Instrument)*, COMPARATIVE CONSTITUTIONS PROJECT, 18–81 (May 11, 2010), http://www.comparativeconstitutionsproject.org/files/surveyinstrument.pdf (devoting sixty-four pages to questions about the powers of the executive and the legislature).

Appendix A provides some sense of the population and our sample. Our sample includes 193 of the 231 systems, or 81%. The thirty-eight constitutions missing from our sample tend to be concentrated in the early years after independence.[69] Of the 111 systems adopted (and discarded) before 1880, our sample includes seventy-nine systems—roughly four-fifths of that population. These early years are precisely the years of institutional vacuum that followed independence, when there was the highest degree of constitutional experimentation. That this population of systems is underrepresented in our sample implies that our estimate of intraregional diversity may be biased towards increased homogeneity in the first decades of the nineteenth century.

We start by considering a set of thirteen attributes, ten pertaining to powers allocated to the executive and three to powers allocated to the legislature. Regarding the executive, we consider the following powers: to issue executive decrees, to assume emergency powers, to propose constitutional amendments, to propose the budget law, to initiate regular legislation, to veto legislation, to issue pardons, to appoint and dismiss the cabinet, and to dissolve the legislature. Regarding the legislature, we consider the legislature's power to remove individual ministers, to exercise oversight over the executive, and to override the executive veto (assuming the constitution provides for such veto).

Appendix B presents the proportion of Latin American constitutions with selected executive–legislative provisions over time. For the temporal dimension, we divide the region's history into five eras: (1) a period of economic and political disorganization (independence through 1870); (2) the period of agro-export development, during which most countries in the region were integrated into the international economy as exporters of raw material and importers of industrialized goods (1870–1918); (3) the period of crisis of the export model and emergence of import-substitution industrialization (1919–1945); (4) the period of dominance and then decline of import-substitution industrialization (1946–1979); and (5) the period of democratization and economic reforms (1979–2007).

This table displays a remarkable evolution in executive powers across Latin American constitutions. Let us start, however, with the less remarkable features of the table. Given that most Latin American constitutions have been presidential, it is not surprising that the number of constitutions that allow presidents to dissolve the legislature is relatively small. This number, however, is not trivial: overall, there have been seventeen Latin American constitutions that allowed the executive to dissolve the legislature; of these, eleven are classified as presidential. Equally unsurprising is the fact that close to 90% of the constitutions written since independence have granted the

69. Of the thirty-eight cases not sampled, thirty-two are constitutions that were written before 1860.

executive the power to freely appoint and dismiss the cabinet. And virtually every Latin American constitution grants emergency power to the executive (although there is considerable variation regarding the specifics of this power, as we will see below). Finally, many constitutions have established relatively strong legislatures, at least when it comes to oversight of the executive (a feature that has been almost universal since 1870), removal of individual ministers (about one-half of all Latin American constitutions so allow), and override of an executive veto (almost all of the post-World War II constitutions provide for it).

The remarkable development, in our view, is the increase in provisions that grant the executive some lawmaking powers. A high proportion of executives have always been given decree powers in Latin American constitutions, but twentieth-century constitutions rendered this provision almost universal (although, again, there is considerable variation in the specifics of this power, as we will see below). Equally prevalent has been the executive's veto power: close to 90% for the whole period and universal for the post-1979 period. But, whereas less than 10% of the constitutions written in the nineteenth century allowed the executive to propose constitutional amendments, the proportion in the post-1979 period has soared to 90%. Although less dramatic, a similar pattern is evident with respect to the executive's capacity to initiate ordinary legislation and to propose budget legislation.

Thus, we see some convergence in Latin American constitutions in the sense of an expansion of the powers of the executive, particularly executive lawmaking powers. At the same time, powers that were relatively common in earlier constitutions either did not change much or have expanded in more recent times. This pattern can be observed in Appendix C, which plots the proportion of constitutions in force that provide for a given power. This convergence includes the features normally associated with presidential constitutions—the executive's power to appoint and dismiss the cabinet, and the inability to dissolve the legislature. One preliminary observation may be that the data suggest a contemporary pattern of Latin American constitutionalism that combines a strong legislature with a president possessing strong lawmaking powers. This contrasts with the earlier pattern of strong legislatures with presidents possessing few or no lawmaking powers.[70]

How unique is this pattern with respect to other presidential constitutions? Is the evolution of Latin American constitutions toward broader legislative power for the executive a region-specific development, or

70. Interestingly, the earlier pattern has been identified by Shugart and Carey as a configuration *conducive* to regime survival, while the current configuration is viewed by them as detrimental to successful governments. MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES 277 (1992). A test of this proposition is beyond the scope of this Article, but we note that the earlier period was associated with instability in constitutional form. *See supra* text accompanying note 69.

is it part of an overall trend, if not in all constitutions, at least in presidential constitutions outside Latin America? Appendix C, which also plots the Latin American trend against the trend in non-Latin American presidential systems, provides some answers to this question. Note that we plot the non-Latin American systems starting in 1940; before that time, there are not enough cases in that subgroup to justify any sort of generalization.[71] In eleven of the thirteen provisions plotted in Appendix C, we observe significant separation between the Latin American and non-Latin American presidential systems (panels 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, and 13). Six of these eleven differences are in the direction of more executive power for Latin American presidents compared with non-Latin American ones (panels 2, 5, 10, 11, 12, and 13); two additional differences are in the direction of more power to the Latin American legislatures over the executive compared with non-Latin American ones (panels 6 and 8). Only in provisions to dissolve the legislature do non-Latin American presidents appear to have an edge in power (panel 1), although this edge is seemingly disappearing. Furthermore, four of the five items in which Latin American presidents exhibit comparatively high power are provisions that can be broadly characterized as lawmaking powers—powers that are, in a sense, shared with the legislatures (panels 10, 11, 12, and 13).

We can explore these comparisons in more aggregate fashion by assessing the similarity between any two constitutions across dimensions of executive–legislative relations. We calculate this quantity simply by computing the proportion of the thirteen features that we considered in Appendix B for which any two constitutions agree (in that they both either include or exclude the provision in their constitutions). Appendix D describes the mean of these measures across various subgroups (all presidential constitutions, Latin American presidential constitutions, non-Latin American presidential constitutions, and non-Latin American, non-presidential constitutions). On average, any two constitutions in the data share nine of thirteen provisions for a score of 0.68. The first thing to note is that presidential systems in general are a more coherent category than either parliamentary or semi-presidential systems. Latin America accounts for the vast majority of presidential systems before 1945; indeed, it is possible that the overall coherence of the presidential category is driven by the similarity of constitutions within the region. After 1945, there is increasing divergence between Latin American and other presidential systems. Non-Latin American presidential

71. Before 1940, there were nine presidential constitutions outside of Latin America: the United States (1789), Haiti (1843 and 1935), France (1848), Germany (1919), Lithuania (1938), Liberia (1847), and the Philippines (1899 and 1935). Since 1940, there have been eighty presidential constitutions written in countries outside of Latin America. Note that the 1919 German constitution did not explicitly provide for a directly elected president, and for this reason it is not classified as a semi-presidential constitution. For the classification of constitutions as presidential, parliamentary, and semi-presidential, see generally Cheibub, Elkins & Ginsburg, *supra* note 9.

systems exhibit the same level of coherence as non-presidential systems after 1945, while presidential systems within the region seem to be becoming more similar.

The similarity between Latin American constitutions and the United States Constitution is not particularly high, relative to other models. The two other models that influenced Latin American constitution makers after independence were France's constitution of 1791 and Spain's 1812 (Cádiz) constitution.[72] Both of these constitutions (as well as their close cousins, the Portuguese constitution of 1822 and the Norwegian constitution of 1814) carved out a subordinated position for the monarch in an otherwise-republican document and represented the leading alternative model.[73] Latin American constitutions are not especially similar to any one of these documents. The mean similarity between Latin American constitutions across the sample and each of these documents is not significantly different from the mean similarity of any two constitutions. Thus, even though Latin Americans ultimately settled on the form of government conceived by their North American brethren—a president popularly elected for a fixed term in office—they did not necessarily adopt the same ancillary provisions regarding the specific allocation of powers between the executive and the legislature. This suggests that the adoption of presidentialism in Latin America was less the product of automatic or mechanistic borrowing from the U.S. Constitution and more the adoption of a particular institutional solution discovered by the North Americans to the problem that Latin Americans were facing: how to establish a national executive once the monarch had been removed. Nevertheless, the executive that they designed had as much in common with the Spanish Prime Minister as it did with the U.S. President.

IV. Executive Lawmaking Power as a Signature Feature of Latin American Presidentialism

To the extent that Latin American constitutions represent a distinct breed of presidentialism, the distinction is manifested in the strong lawmaking power that they vest in the president. By lawmaking power, we mean here the powers of emergency, decree, and the initiation of constitutional amendment and legislation. We examine these provisions in some detail below.

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72. *See* LOVEMAN, *supra* note 46, at 54 (acknowledging newly formed Latin American nations' incorporation of rights and liberties from the Cádiz constitution and French Revolutionary ideals).

73. *See* JOHN A. HAWGOOD, MODERN CONSTITUTIONS SINCE 1787, at 49–58 (Fred B. Rothman & Co. 1987) (1939) (comparing the Portuguese, French, Spanish, and Norwegian constitutions of the era, and noting the limits on the monarch's powers in each); LOVEMAN, *supra* note 46, at 40–45 (describing the limited role of the Spanish monarch under the Cádiz constitution).

A. Emergency Powers

A word is in order as to why we consider emergency powers to be legislative in nature. First, periods of emergency rule generally allow for the temporary delegation of considerable powers—including those normally vested in the legislature—to the executive.[74] The easier it is to declare a state of emergency, the more likely it will be that the executive will predominate and in some cases even usurp legislative authority strategically. Second, the executive may be able to act without legislative authorization, as Ferejohn and Pasquino recognized in their study distinguishing between constitutional and legislative models of emergency powers.[75] In their legislative model, ordinary legislation facilitates emergency power, and so there is not a true "regime of exception"[76] outside constitutional constraints.[77] But much depends on the specific assignment of powers to declare an emergency and then to legislate during one.

The U.S. Constitution provides for relatively narrow emergency powers. The relevant clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[78] By contrast, Bolivia's 1851 emergency provision imagines broader powers for the president ("to assume extraordinary faculties") but also requires the consent through countersignature of all ministers of state in order to establish emergency conditions.[79] This is a model with a legal constraint, but it does not fit the legislative model fully because the legislature has no involvement. According to Loveman, it is precisely these sorts of expansive emergency provisions that

74. *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 217 (2004) ("The legislative model handles emergencies by enacting ordinary statutes that delegate special and temporary powers to the executive."); Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation*, 3 INT'L J.L. CONTEXT 275, 275 (2007) ("'Emergency powers' describes the expansion of governmental authority generally . . . , and the transfer of important 'first instance' lawmaking authority from legislatures to executive officials, in emergencies.").

75. Ferejohn & Pasquino, *supra* note 74, at 211–21.

76. *See* LOVEMAN, *supra* note 46, at 6 (establishing that many Latin American constitutions contained provisions allowing the invocation of "regimes of exception," wherein executive authority would be expanded, and constitutional protections, rights, and liberties would be temporarily voided).

77. *See* Ferejohn & Pasquino, *supra* note 74, at 219 ("[B]ecause the legislature—the part of the government closest to the people—actively delegates authority to the executive, the exercise of that power is more constrained and legitimate and is even, indeed, amplified and made more efficient by the fact that this exercise is supported by the legislature and, presumably, by the people.").

78. U.S. CONST. art. I, § 9, cl. 2.

79. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA [BOL. CONST. 1851] Sept. 21, 1851, art. 76, cl. 26.

have threatened the political stability in the region almost from the beginning.[80]

Nevertheless, emergency provisions vary in important ways across Latin American constitutions. Appendix E, which reports the proportion of constitutions that contain various emergency provisions, demonstrates some of this variation. The variation spans at least three dimensions: (1) the identity of the actors (in addition to the executive) involved in the process of declaring the existence of an emergency situation; (2) the conditions under which emergency can be declared; and (3) limitations on the actions taken under emergency conditions. The last two rows of Appendix E present, respectively, the proportion of constitutions that require the legislature to play *some* role in the process of declaring an emergency (i.e., it must approve, or at least be consulted before, the declaration of an emergency), and the proportion of constitutions that explicitly specify the conditions under which an emergency may be declared. Across these dimensions, we focus on four specific aspects of emergency provisions: (1) the participation of the legislature in the emergency process; (2) the reference to internal security reasons as a justification for emergency powers; (3) the explicit provision for the suspension or restriction of rights during emergency; and (4) the prohibition of constitutional amendments during emergency rule.

Several patterns are worth noting. The first is that almost all presidential constitutions contain emergency provisions, whereas 73.6% of parliamentary and 81.0% of semi-presidential constitutions do. Indeed, every Latin American presidential constitution written since independence contains a provision for the executive to declare an emergency, compared with 94.4% of non-Latin American presidential constitutions.

The role of the legislature in the process of emergency declaration is smaller in presidential constitutions than it is in either parliamentary or semi-presidential ones. Only 19.0% of Latin American presidential constitutions require that the legislature approve the state of emergency, and an additional 1.9% require that the legislature at least be consulted, whereas 43.5% of non-Latin American presidential constitutions require some form of legislative participation (approval or consultation). There is a trend toward increasing the participation of legislatures in declaring emergencies, but this trend is weaker in presidential constitutions in Latin America than elsewhere: of the more recent (post-1979) constitutions, 36.8% of Latin American presidential constitutions require legislative participation, while 55.9% of non-Latin American, non-presidential constitutions do.

It is likely that the criteria stipulated in a constitution for identifying an emergency tell us something about the flexibility of the executive's power under these conditions. We can speculate that constitutions that limit

80. *See* LOVEMAN, *supra* note 46, at 6–9 (stating that while the clauses granting emergency powers "did not cause violence and dictatorship," they "are the constitutional foundation for tyranny almost everywhere in Latin America today").

emergencies to natural disasters are less flexible than ones that allow for emergencies for public security reasons. Further, we can speculate that constitutions that allow for emergencies in response to *internal* security issues are particularly broad, since they do not require an external trigger such as an invasion. We find that reference to internal security reasons as a justification for the state of emergency is more common in presidential than it is in parliamentary or semi-presidential constitutions; it is more common in Latin American than in non-Latin American presidential constitutions; and although it has become more common in all constitutions over the years, it is considerably more common in Latin American presidential than in non-Latin American, non-presidential constitutions. Emergency rule seems easier to invoke in Latin America than it does elsewhere.

Presidential and parliamentary constitutions are equally likely to contain an explicit provision allowing for the suspension or restriction of rights during emergency rule. Among presidential constitutions, however, those in Latin America are considerably more likely to allow for the suspension of rights than those outside of Latin America. The proportion of Latin American presidential constitutions with such a provision has hovered around 90% in the post-World War II period.

Finally, only a small proportion of all constitutions explicitly forbid legislative dissolution or constitutional amendments during emergency rule. It is not surprising that this proportion is much smaller in presidential than in parliamentary and semi-presidential constitutions, since assembly dissolution by the executive is not a common item on the ordinary menu of presidential powers outside assembly-confidence systems.[81] Latin American presidential constitutions, however, are about one-fifth as likely as non-Latin American presidential constitutions to contain a provision prohibiting legislative dissolution under emergency rule. We do not know if this distinction reflects the fact that a Latin American presidency is particularly empowered vis-à-vis the legislature (because it is free to dissolve the assembly) or disempowered (because it is never allowed to dissolve the assembly and so the constitution is silent about the rule during emergencies), but it is at least possible that the former is the case. To summarize, Latin American presidential constitutions are relatively less likely to require some form of legislative participation for the activation of emergency powers; more likely to permit internal security concerns as justifying the state of emergency; and more likely to explicitly allow for the suspension or restriction of rights. This is largely consistent with Loveman's claims.[82] It seems unlikely, however, that the presence of these provisions exhibits any causal relationship with the instability that has

81. *See* CHEIBUB, *supra* note 13, at 10 (remarking that the threat of dissolution is "absent, by design," from presidential constitutions); *cf.* Ginsburg, Melton & Elkins, *supra* note 59, at 1816 (noting that in popular-election systems, the legislature and executive are constituted independently, while in assembly-confidence systems, either branch can dissolve the other).

82. *See supra* note 80 and accompanying text.

characterized Latin American republics since independence, as Loveman suggests. Some of the features that might have been conducive to providing incentives for executive unilateral action—such as the lack of legislative involvement, the suspension of rights, and the reference to internal security—are relatively new developments; the early constitutions, which according to Loveman provided the foundations of tyranny in the region, did not possess all of these provisions.

B. Decree Powers

Executive decree powers give the executive the ability to issue binding rules with the force of law and are an important feature of modern governments,[83] being found in about two-thirds of all constitutions. The design of decree powers varies widely across cases, as illustrated in Appendix F, and their rationale and distribution depends on the broader political system: about 70% of both semi-presidential and presidential constitutions provide such power for the executive, while only half of parliamentary systems do so. In systems with fused governmental powers (parliamentary and some semi-presidential constitutions), the decree power for the executive is usually conceived as the exercise of delegated power from the legislature. The legislature, therefore, is frequently designated as the body that must approve an executive decree in those systems. In contrast, only 27.0% of presidential constitutions designate the legislature as the approving body of executive decree powers. Instead, such systems often require that the executive approve the decree, meaning in practical terms the cabinet in most cases. This is consistent with a conception of separation of powers and the notion of a discrete realm of executive lawmaking.

In neither system is it the case that executives are unconstrained in their ability to issue decrees. In fact, the difference between the three systems almost disappears when we consider whether the constitution specifies that some governmental body—be it the legislature or the cabinet—must approve executive decrees. The numbers (not shown in the Appendix) are 68.3% for presidential constitutions and 73.2% for both parliamentary and semi-presidential constitutions.

In keeping with the logic of fused powers and delegated authority, parliamentary and semi-presidential constitutions are twice as likely as presidential constitutions to stipulate that, once issued, executive decrees are immediately effective. Presidential constitutions are significantly more likely than parliamentary and semi-presidential constitutions to require that the approving body (the legislature or the cabinet or both) approve the decree before it becomes effective. Thus, at least in this respect, the executive is

83. *See* John M. Carey & Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms?*, *in* EXECUTIVE DECREE AUTHORITY 1, 9, 15–19 (John M. Carey & Matthew Soberg Shugart eds., 1998) (defining *decree* as "the authority of the executive to establish law in lieu of action by the assembly," and discussing its appeal as a component of democratic government).

more constrained in presidential than in parliamentary and semi-presidential constitutions.

When it comes to the validity of the decree, there are two basic situations. In the first, the decree, once issued, is permanent unless it is explicitly rejected by the legislature; in the second, the decree expires after its pre-specified duration period unless it is explicitly extended by the legislature. The first situation favors the executive: the decree becomes the status quo and the legislature must act in order to change it. The second situation favors the legislature: the status quo ante is restored unless the legislature prefers the situation generated by the decree. The biggest difference we observe across systems is that presidential constitutions are less likely to specify who must act, and in what way, once the executive decree is issued: only 18.4% of presidential constitutions (as compared with 36.5% of parliamentary and 28.3% of semi-presidential) clearly state what must ensue after the decree is issued.[84] This, of course, allows for a degree of ambiguity, the result of which cannot be specified in the abstract. Our guess is that the lack of specification is a problem for the working of these constitutions.

As with emergency powers, some features of executive decree regulation seem to characterize a particularly Latin American model of presidentialism. First, constitutions with executive decree power are more frequent in Latin American presidential constitutions than in non-Latin American presidential constitutions. While almost half of non-Latin American presidential constitutions render the executive decree immediately valid upon issuance, only a small fraction (5.7%) of Latin American presidential constitutions do the same. However, when not left unspecified (as 42.7% of Latin American constitutions do), 46.8% of Latin American presidential constitutions require the action of the approving body before the decree becomes effective. This implies a routinization of presidential decree making, though we do not know the extent to which these formal constraints actually serve to prevent presidents from pursuing their preferred policies. Finally, Latin American presidential constitutions are far more likely (87.9%, as compared to 44.0% for non-Latin American presidential constitutions) to leave the issue of decree validity unspecified, remaining silent about what happens once the decree is issued. To the extent that the decree changes the status quo and the constitution is silent as to whether the status quo ante can be restored, we believe that this lack of regulation tends to favor the executive—though it is hard to be sure in the absence of more detailed information on de facto practices.

84. These numbers refer to the sum of the rows labeled "Permanent, unless repealed" and "Naturally expires, unless extended" in Appendix F.

C. *Constitutional Amendment and Initiation of Legislation*

It is not surprising that most constitutions provide some mechanism for their amendment.[85] But not all of them allow the executive to propose such amendments. As we can see in Appendix G, only 43.2% of the world's constitutions that specify amendment procedures allow the executive to propose constitutional amendments. This proportion is considerably higher in semi-presidential than in parliamentary and presidential constitutions; among presidential constitutions it is higher in non-Latin American constitutions, although almost 90% of the more recent post-1979 Latin American presidential constitutions allow the president to propose constitutional amendments.

In addition to constitutional amendments, a large proportion of constitutions provide for a legislative process involving budget bills. Again, this is not surprising since the budget is probably the most important piece of legislation that comes regularly before a legislative body. It is interesting to observe, however, that even though a large proportion of presidential, parliamentary, and semi-presidential constitutions provide for an explicit legislative process around the budget bill, almost half of presidential constitutions allow the executive to initiate the budget bill, compared to less than one-fifth of parliamentary and semi-presidential constitutions. Moreover, Latin American presidential constitutions are almost twice as likely as non-Latin American presidential constitutions to allow the executive to initiate budget bills. This is true for all historical periods and has increased in the more recent periods.

It is commonly argued that presidential constitutions do not provide a constitutional mechanism to break deadlocks or impasses between the legislature and the executive when they emerge.[86] The fixed nature of the legislative and executive terms, it is argued, deprives political actors of the opportunity to remove the government constitutionally when a crisis emerges.[87] Yet, as Appendix G indicates, at least when it comes to the budget, a large proportion of constitutions stipulate what should happen in case a budget is not approved. Whereas it is true that presidential constitutions—as compared to parliamentary and semi-presidential—are least likely to specify the default situation in case the budget bill fails, over half of these constitutions still do so. In presidential constitutions, the practice is to either adopt the previous year's budget or to adopt the budget that

85. In our sample, there are nine out of 444 (representing 1.99%) constitutions that do not explicitly provide for a revision mechanism; two are presidential, six are parliamentary, and one is semi-presidential. None of these is in Latin America.

86. *See, e.g.*, Shugart & Mainwaring, *Rethinking the Terms of the Debate*, *supra* note 12, at 32 (observing that constitutional mechanisms for resolving these kinds of conflicts are of "doubtful democratic legitimacy").

87. *See, e.g.*, *id.* at 30 (explaining that while most presidential systems with fixed executive terms have provisions for impeachment, "they offer less flexibility in crisis situations because attempts to depose the president can easily endanger the regime itself").

was proposed by the executive. Other solutions, including adopting the budget proposed by the legislature, are less commonly adopted.

As to the other types of laws—organic laws, finance, tax, and spending bills—a considerably smaller proportion of constitutions specify a legislative process to approve them, and among those that do so, the proportion that allows for the executive to initiate them is also relatively small, with the exception of spending bills. There is no discernible pattern across regime type and region when these processes are considered together. The only noticeable thing is that post-World War II constitutions are more likely to specify legislative processes around these various bills, and when they do so, they are more likely to allow the executive to initiate them.

Thus, the trend we identified earlier regarding increasing powers of legislative initiative granted to presidents in Latin America is primarily due to the fact that, in this region, presidents are allowed to set the agenda when it comes to constitutional amendments and budget laws. These are probably the two most important regular legislative activities in any political system, and granting the executive such powers is of great significance in terms of overall political impact. In short, the executive is a legislative leader in Latin America.

V. Is Presidential Lawmaking Desirable?

Our analysis has emphasized the concentration of lawmaking authority in the executive, a trend that has occurred over time in many political systems, but one that we have argued has been especially pronounced in Latin America. This is of course a major departure from the Montesquieuan conception of separated powers, in which lawmaking is done by the legislature and the only role of the executive is to *execute* the laws.[88] Such a conception was highly influential for the American founders, whose design of a constitutional scheme shaped the approach of subsequent constitution makers.[89] In the eighteenth century, the separation of powers scheme was

88. *See* M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 162–63, 172 (J.V. Pritchard ed., Thomas Nugent trans., Fred B. Rothman & Co. 1991) (1914) (noting that the legislative power enacts the laws and the executive carries out all functions of the state not reserved to the judiciary, but that the executive "has no other part in the legislative [power] than the privilege of rejecting").

89. *See* Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 91 (2004) ("Montesquieu especially influenced the American Founders on the concept of separation of powers."); Susanna Frederick Fischer, *Playing Poohsticks with the British Constitution? The Blair Government's Proposal to Abolish the Lord Chancellor*, 24 PENN ST. INT'L L. REV. 257, 283 (2005) ("Montesquieu's views on the separation of powers are at least somewhat familiar to most Americans, because his writings had such a profound influence on some of the American Founders."); Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 780 (2006) (book review) ("[T]he Constitution, . . . and the American people, were fully committed to government by elected representatives, an independent judiciary, [and] separation of powers more generally . . . , thanks in large part to the influential writings of [the] liberal French thinker, Montesquieu."). For a discussion of the influence of the American founders on other constitutional drafters, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 634–42

seen as normatively attractive to prevent tyranny.[90] We thus must ask whether the erosion of this separation, particularly through the agglomeration of lawmaking power in the executive, enables tyranny. We also should try to understand why the agglomeration has occurred, so as to consider whether there are offsetting normative advantages.

In understanding the positive question of why the concentration of power has occurred, one can distinguish two broad positions that are not completely incompatible. One argument is that the concentration of lawmaking authority in the executive is a response to the exigencies of modern government. The other is that the concentration reflects a self-conscious power grab by the executive. These positions have very different normative implications: if we think concentration of lawmaking authority is functional in some sense, then it is obviously more attractive than if it merely reflects the self-aggrandizement of one branch.

Consider first the functional argument. With the rise of the administrative state, the scope of government activity has dramatically increased, with a need for regulation that can respond to changing conditions in technically complex areas. The executive is the head of the administration, which is staffed with bureaucrats who have the relevant policy expertise to make such decisions. Thus, the apparent concentration of lawmaking authority in the executive hides a dispersion of power within the larger administrative state. But the fact of administrative lawmaking is a necessary response to complexity.

This argument helps one to understand why we would observe the expansion of legislative initiative within the executive branch. Experts who are charged with solving problems and adjusting regulations to changing circumstances may want to be proactive in lawmaking and not simply wait for the generalist legislature to take the lead. A presidential initiative is an acknowledgement of the fact that it is the executive that will make the relevant decisions about the content of regulation.

Similarly, the expansion of executive decree power may in part reflect the need for technical regulation that every political system faces. Whether under delegated authority from the legislature or under powers assigned directly to the executive, the modern administrative state requires that the technical details of complex regulatory schemes be made by experts. Decree authority is one mode of such lawmaking.

The concentration of lawmaking in the presidency in particular provides for another functional advantage: accountability. In the United States, it has

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(2000); George Athan Billias, *Introduction* to AMERICAN CONSTITUTIONALISM ABROAD, *supra* note 16, at 1, 1–6.

90. *See* Douglas W. Kmiec, *Debating Separation of Powers*, 53 REV. POL., 391, 393 (1991) (book review) (describing how the delegates of the Constitutional Convention of 1787 relied on Montesquieu's notion of separation of powers to "devise a check upon legislative dominance that would not itself devolve into tyranny").

been argued that the rise of the so-called "plebiscitary presidency" has changed the structure of the office.[91] Presidents are typically the only figures elected by a national constituency and hence are more likely to reflect the preferences of the median voter.[92] Congress, in contrast, is seen as responding to myriad local interests, and hence it is not expected to produce policies truly in the national interest.[93] Furthermore, policy in Congress is produced through a complex process of committees, vote trading, and negotiation across houses, which makes it difficult to assign responsibility for any particular policy. When a single individual holds responsibility, the public clearly knows whom to blame or credit for policies. Executive lawmaking, in this view, facilitates accountability.

In contrast with these functional accounts, some have asserted that the concentration of authority in the presidency reflects a naked power grab. This is the view associated with Loveman and others who argue for the continuing relevance of the *caudillo* tradition in Latin America.[94] These scholars emphasize the use of the emergency power by Latin American presidents.[95] The emergency power, they show, has long been used to take power from the legislature and leads to periods of executive tyranny.[96] The assignment of decree power to the executive, in this view, also comes at the expense of the legislature, in that the executive can use that power not only with regard to the technical details of delegated lawmaking, but also for setting the broad outlines of policy.[97]

A full evaluation of these competing positions is beyond the scope of this Article, but we lean toward the view that there is something quite functional about the expansion of executive lawmaking authority. There are two reasons for our view. First, we observe the increasing power of single

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91. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1224–31 (2006) (contrasting the modern plebiscitary vision of the presidency with the early Federalist vision, and surveying the modern scholarship and judicial conclusions regarding the structural implications of a plebiscitary presidency).

92. *See* INS v. Chadha, 462 U.S. 919, 948 (1983) (observing that the President brings a "national" perspective to the legislative process); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.").

93. *Chadha*, 462 U.S. at 948 (citing Myers v. United States, 272 U.S. 52, 123 (1926)).

94. LOVEMAN, *supra* note 46, at 398; *see also* R.A. HUMPHREYS, TRADITION AND REVOLT IN LATIN AMERICA AND OTHER ESSAYS 220 (1969) ("[T]he caudillo tradition survives. Political creeds exist, and some of them are increasingly important.").

95. *See, e.g.*, LOVEMAN, *supra* note 46, at 5–6 ("Latin American constitutions almost always included provisions for 'emergency powers,' or 'extraordinary powers' . . . [that] might be exercised by presidents . . . .").

96. *See, e.g.*, *id.* at 6 ("[N]ormal constitutional protections were suspended, rights and liberties were temporarily voided, and the government's authority was greatly expanded.").

97. *See id.* at 21 ("[O]rdinary government procedures for legislation, administration, and judicial decision making may be replaced temporarily with special methods for making and implementing public policy.").

individuals even in pure parliamentary systems, where scholars have spoken of the presidentialization of the office of prime minister—a phenomenon that has resulted from the structure of political parties and the ubiquity of media coverage of politics.[98] This suggests that there is indeed something to the argument that having a single individual at the center of the political system enhances accountability. Second, the argument about tyranny is largely rooted in historical experience rather than contemporary reality. It assumes that long-run institutional patterns of behavior are enduring. For much of Latin American history, this was an understandable position. But we are now in an era of widespread democratic government in Latin America, with all the countries of the region observing formal norms of democracy. The trend toward democracy has accelerated since the 1980s, which covers part of the period in which we find enhanced powers of executive lawmaking. We do not assert that the two phenomena are causally related, but their contemporaneous occurrence suggests prima facie that democracy is not incompatible with expanded executive lawmaking. One can contrast the presidential systems in Africa, which form the bulk of our comparison group and in which democratic norms are much less frequently observed. As a normative matter, then, we believe the Latin American presidential pattern is one to be celebrated rather than condemned.

VI. Conclusion

We have analyzed the formal features of executive power in Latin America, a region long understood to be one amenable to strong executive rule. We have demonstrated that, although the presidency was inspired by the American model, other models were equally influential in structuring the precise contours of executive and legislative power in the region. We have also seen increasing convergence within the region along important dimensions of executive–legislative relations. We can thus speak of a Latin American model of presidential power that includes a powerful role in legislation as well as extensive emergency rule. This distinguishes the Latin American presidency from those in other regions of the world.

Our analysis has several implications for the study of comparative law and politics. First, it calls attention to geography as an important predictor of constitutional design. Second, our analysis emphasizes change rather than continuity and convergence over time. This approach contrasts with the recent emphasis in comparative law on "legal origins" as determinants of

98. *See* Thomas Poguntke & Paul Webb, *The Presidentialization of Politics in Democratic Societies: A Framework for Analysis*, *in* THE PRESIDENTIALIZATION OF POLITICS 1, 5–6 (Thomas Poguntke & Paul Webb eds., 2005) (explaining that the degree to which presidentialization occurs in any system, including parliamentary ones, depends on a range of factors including "changes in the social structure and the media system").

contemporary outcomes.[99] Finally, while the legal-origins analysts emphasize the importance of French law in Latin America,[100] our account shows that at a constitutional level, the influence of Spain and the United States was also significant in the early years. But while the legal-origins school argues for long-range consequences of initial choices, we observe a gradual process of constitutional updating in which constitutions within the region grow more similar to each other, and a move away from the models from which they were initially drawn.

99. *Cf. generally* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (examining the origins of legal rules covering the protection of corporate shareholders and creditors in forty-nine countries, as well as the quality of their enforcement).

100. *See id.* at 1118 ("When the Spanish and Portuguese empires in Latin America dissolved in the nineteenth century, it was mainly the French civil law that the lawmakers of the new nations looked to for inspiration.").

Appendix A. Available and Missing Latin American Constitutions by Decade

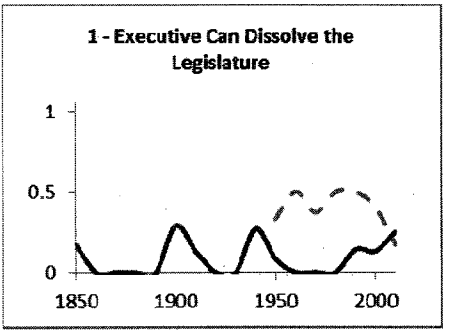
Country	1810s	1820s	1830s	1840s	1850s	1860s	1870s	1880s	1890s	1900s	1910s	1920s	1930s	1940s	1950s	1960s	1970s	1980s	1990s	2000s	Total
Argentina	(1)	1			1																3
Bolivia		1	3 (1)	1	1	2	2	1					1	2		2					17
Brazil		1							1				2	1		1		1			7
Chile		3	1									1						1			6
Colombia	(1)		2	1	2	1		1											1		9
Costa Rica		(1)		3 (1)	1	1	1				1			1							10
Cuba										(1)			1 (1)	1	1 (1)		1				7
Dominican Republic		(1)		(1)	3	2 (1)	6	2 (1)	1	2		4	1	2	1	4			1	1	34
Ecuador			2	1 (1)	2	2	1	1	1	1		1		2		1	1	1	4		22
El Salvador		(1)		1 (1)	(1)	1	2	3					1		1			1			13
Gran Colombia		(1)																			1
Guatemala		(1)		(1)	1		1							1	1	1		1			8
Honduras		(1)	(1)	(2)		1	1	1	1	1		1 (1)	1		1	1		1			15
Mexico	(1)	2	1	1	1						1										7
Nicaragua		(1)	(1)	(1)	2				1	1	1		1 (1)	1	1		1	1			14
Panama										1				2			1				4
Paraguay	1			1			1							1		1			1		6
Peru	(1)	2 (2)	2		1	2						1	1				1		1		14
Venezuela	(2)	(1)	1		2	1	1	1	2	3	2	4	2	1	1	1			1		26
United Provinces of Central America		(1)	(1)																		2
Uruguay		(1)	1								1		1		1	1					6
Total	7	22	17	17	18	14	16	11	7	10	6	13	14	15	9	13	5	7	9	1	231

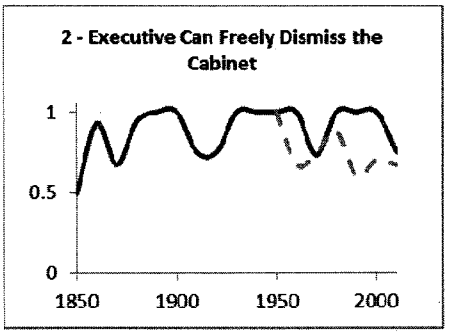
Note: Numbers in (parentheses) represent missing constitutions.

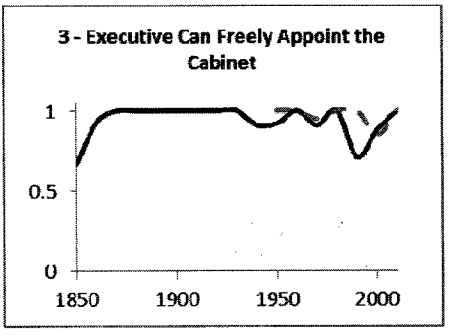
Appendix B. Percentage of Latin American Constitutions with Executive–Legislative Provisions by Year of Promulgation

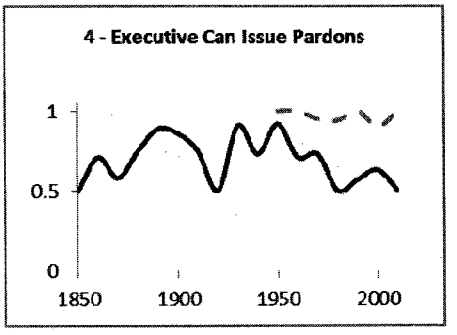
	Overall	Pre-1870	1870–1918	1919–1945	1946–1979	Post-1979
Executive can dissolve the legislature	9.5	6.4	6.2	17.2	6.3	20.0
Executive can freely dismiss the cabinet	89.5	82.5	91.3	96.6	90.6	95.0
Executive can freely appoint the cabinet	95.3	95.2	100.0	96.6	93.8	85.0
Executive can issue pardons	72.1	63.5	78.3	82.8	78.1	60.0
Executive has veto power	89.5	92.1	82.6	79.3	96.9	100.0
Legislature has oversight powers over the executive	90.0	77.8	95.7	93.1	96.9	100.0
Legislature can remove individual ministers	53.7	61.9	34.8	55.2	62.5	55.0
Legislature can override executive veto	85.8	88.9	78.3	75.9	93.8	95.0
Executive has emergency power	99.0	98.4	100.0	96.6	100.0	100.0
Executive can initiate constitutional amendments	23.7	7.9	4.4	27.6	37.5	90.0
Executive can initiate ordinary legislation	69.0	52.4	65.2	69.0	87.5	100.0
Executive can propose budget	42.1	19.1	21.7	51.7	81.3	85.0
Executive has decree powers	77.3	63.5	71.7	100.0	81.3	95.0
Number of constitutions:	190	63	46	29	32	20

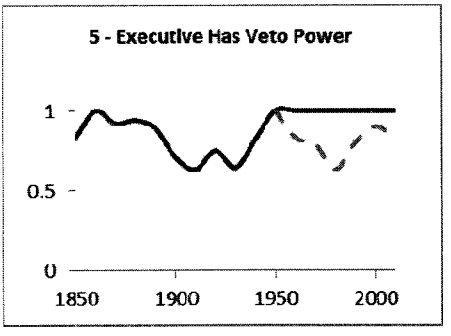
Appendix C. Trends of Executive–Legislative Provisions in Latin American and Non-Latin American Presidential Systems

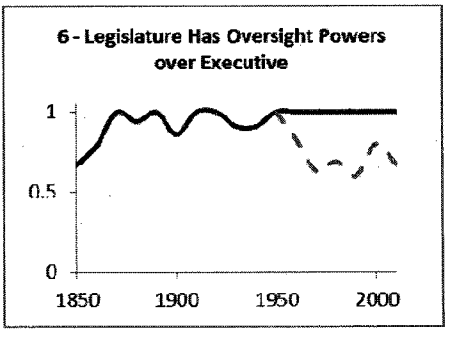


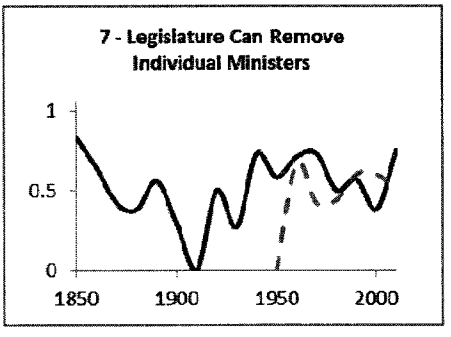


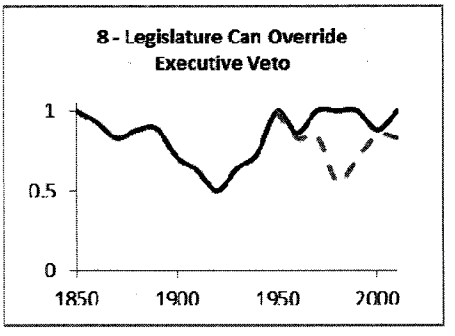


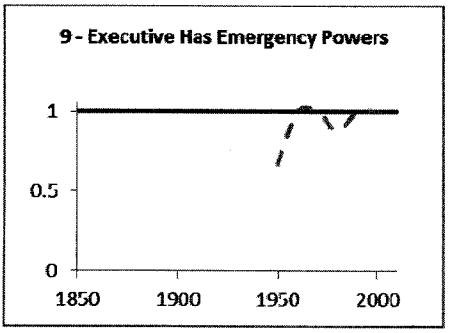


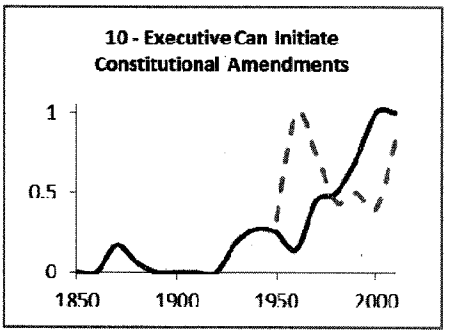


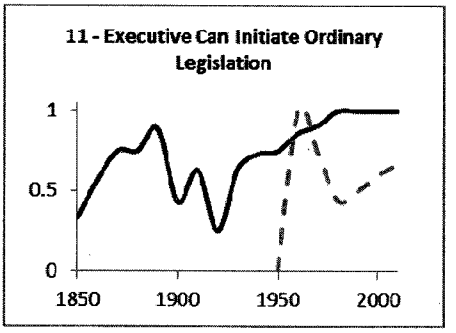


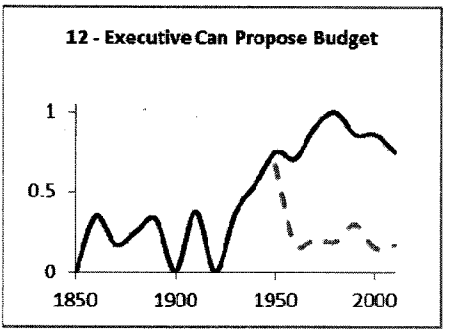


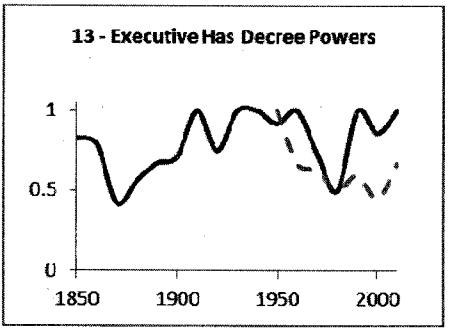












Solid line = Latin American constitutions
Dashed line = non-Latin American constitutions

Appendix D. Similarity Between Constitutions with Respect to Executive–Legislative Features

	Presidential			Non-Presidential	
Era	All	Latin American	Non-Latin American	Same system*	Different system*
Pre-1870	0.74	0.75	0.70		
	990	820	6		
1870–1918	0.74	0.75			0.43
	990	946			45
1919–1945	0.69	0.73	0.61	0.63	0.61
	528	378	10	106	744
1946–1979	0.66	0.78	0.65	0.63	0.58
	2,145	406	666	2,965	7,770
Post-1979	0.66	0.82	0.64	0.66	0.61
	1,431	120	703	2,088	6,491
All	0.68	0.73	0.63	0.64	0.59
	29,403	12,403	3,570	10,626	59,652

Universe: Constitutional dyads (1789–2007). Cells represent the mean proportion of features that match between two constitutions (above) and the number of dyads (below).

*"System" refers to the classification of constitutions as presidential, parliamentary, or semi-presidential.

Appendix E. Regulation of Emergency Provisions in Constitutions that Grant Emergency Powers to the Executive, 1789–2007

					Presidential		Latin American Presidential					Non-Latin American, Non-Presidential				
	All	Presidential	Parliamentary	Semi-presidential	LA	Non-LA	Pre-1870	1870–1918	1919–1945	1946–1979	Post-1979	Pre-1870	1870–1918	1919–1945	1946–1979	Post-1979
Constitutions with emergency provisions	87.2	98.0	73.6	81.0	100.0	94.4	100.0	100.0	100.0	100.0	100.0	91.7	90.0	65.0	75.3	83.8
Body that approves emergency declaration:																
Legislature must approve	27.4	25.1	33.7	39.7	19.0	36.5	7.3	18.2	15.2	25.9	31.6	9.1	11.1	24.2	25.0	44.1
Constitutional council must approve	14.5	18.9	12.4	8.8	22.8	11.8	31.7	18.2	23.2	18.5	26.3	6.1	11.1	16.1	10.3	8.6
Legislature must be consulted	6.3	4.1	6.7	22.1	1.9	8.2	2.4	2.3	1.8	0.0	5.3	3.0	0.0	1.6	10.3	12.9
Emergency can be declared:																
In case of external war/aggression	52.4	63.4	48.3	54.4	67.1	56.5	51.2	75.0	65.2	63.0	84.2	18.2	38.9	33.9	40.5	53.8
For internal security reasons	44.0	58.4	28.1	39.7	64.6	47.1	58.5	72.7	66.1	48.2	79.0	24.2	33.3	33.9	25.0	37.6
In case of natural disaster	16.8	21.0	23.6	19.1	22.2	18.8	2.4	4.6	8.0	37.0	84.2	0.0	11.1	6.5	6.9	30.1
In situations of general danger	27.2	37.9	30.3	10.3	42.4	29.4	39.0	29.6	36.6	51.6	63.2	6.1	11.1	17.7	19.8	19.4
Economic emergency	5.0	5.4	10.1	0.0	5.7	4.7	0.0	0.0	0.9	14.8	21.1	0.0	0.0	1.6	6.9	5.4
Left to nonconstitutional law	1.8	0.8	3.4	4.4	0.0	2.4	0.0	0.0	0.0	0.0	0.0	0.0	0.0	1.6	2.6	4.3
Not specified	12.9	7.4	23.6	16.2	4.4	12.9	2.4	6.8	5.4	3.7	0.0	0.0	5.6	11.3	2.6	18.3
Restrictions on emergency powers:																
Rights can be suspended or restricted	49.6	60.1	58.4	45.6	69.0	43.5	29.3	75.0	59.8	88.9	94.7	15.2	38.9	38.7	37.1	57.0
Legislature cannot be dissolved	6.6	4.5	10.1	19.1	1.9	9.4	2.4	0.0	1.8	3.7	0.0	0.0	0.0	0.0	12.1	11.8
Constitution cannot be amended	1.8	1.2	2.3	7.4	1.3	1.2	0.0	0.0	0.0	3.7	5.3	0.0	0.0	0.0	2.6	4.3
No restrictions are imposed	4.5	5.8	3.4	1.5	5.7	5.9	7.3	6.8	6.3	0.0	10.5	3.0	5.6	1.6	6.9	1.1
Legislature plays a role	32.6	28.8	38.2	58.8	20.9	43.5	9.8	20.5	22.2	25.9	36.8	12.1	11.1	38.5	31.9	55.9
Specification of conditions	65.7	77.8	62.9	66.2	82.9	68.2	75.6	84.1	81.5	85.2	94.7	27.3	50.0	50.0	54.3	66.7

Note: Entries represent the percentage of constitutions in each category (column) that provide for a given feature (row).

Appendix F. Regulation of Decree Powers in Constitutions that Grant Decree Powers to the Executive, 1789–2007

					Presidential		Latin American Presidential					Non-LA Pres.	
	All	Presidential	Parliamentary	Semi-presidential	LA	Non-LA	Pre-1870	1870–1918	1919–1945	1946–1979	Post-1979	1946–1979	Post-1979
Constitutions with executive decree powers	65.4	70.2	52.1	71.4	78.5	55.6	63.4	70.5	100.0	81.5	94.7	61.5	51.3
Decree Implementation													
Effective immediately once issued	17.3	17.8	41.3	41.7	5.7	48.0	0.0	3.2	0.0	18.2	11.1	41.7	60.0
Effective following a specified period during which an approving body can repeal it	1.1	1.7	0.0	3.3	0.8	4.0	0.0	0.0	0.0	0.0	5.6	4.2	5.0
Effective only after approval from the approving body	19.2	37.4	23.8	18.3	46.8	14.0	61.5	41.9	51.9	40.9	33.3	16.7	5.0
Not specified	27.5	37.9	38.1	43.3	42.7	26.0	34.6	51.6	44.4	36.4	44.4	25.0	30.0
Decree validity													
Permanent, unless repealed	7.3	8.0	12.7	10.0	4.0	18.0	3.9	3.2	0.0	4.6	11.1	16.7	20.0
Naturally expires, unless extended	10.5	10.3	23.8	18.3	3.2	28.0	0.0	0.0	0.0	18.2	0.0	25.0	35.0
Not specified	47.0	75.3	46.0	56.7	87.9	44.0	96.2	90.3	92.6	77.3	77.8	45.8	40.0
Decree approving body													
Executive	23.6	44.8	28.6	33.3	55.7	18.0	76.9	61.3	51.9	50.0	27.8	20.8	10.0
Legislature	24.8	27.0	61.9	51.7	19.4	46.0	7.7	9.7	22.2	36.4	27.8	37.5	60.0
Not specified	20.6	26.4	30.2	33.3	26.6	26.0	19.2	29.0	29.6	18.2	38.9	25.0	30.0
Executive is authorized to issue decrees . . .													
That pertain to war or conflict	5.8	12.1	6.4	13.3	12.9	10.0	7.7	6.5	11.1	18.2	27.8	8.3	0.0
During states of emergency, exception, siege, or urgency	17.6	24.7	44.4	4.0	24.2	26.0	7.7	12.9	25.9	50.0	33.3	25.0	30.0
On matters of foreign policy	0.8	0.0	3.2	3.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
When the legislature is not in session	11.1	12.1	28.6	11.7	10.5	16.0	7.7	6.5	14.8	18.2	5.6	16.7	10.0
Left explicitly to constitutional law	6.1	9.2	7.9	8.3	10.5	6.0	0.0	9.7	14.8	13.6	16.7	12.5	0.0
Not specified	21.4	33.9	19.1	31.7	35.5	30.0	50.0	25.8	44.4	27.3	27.8	20.8	40.0

Note: Entries represent the percentage of constitutions in each category (column) that provide for a given feature (row).

Appendix G. Constitutions that Grant Legislative Initiative to the Executive, 1789–2007

					Presidential		Latin American Presidential					Non-LA Pres.	
	All	Presidential	Parliamentary	Semi-presidential	LA	Non-LA	Pre-1870	1870–1918	1919–1945	1946–1979	Post-1979	1946–1979	Post-1979
Constitution provides for:													
Constitutional amendments	98.0	99.2	95.0	98.8	100.0	97.8	100.0	100.0	100.0	100.0	100.0	97.4	97.4
Budget laws	78.6	75.4	78.5	88.1	75.3	75.6	46.3	77.3	81.5	96.3	94.7	84.6	71.8
Organic laws	18.8	14.9	9.9	42.9	11.4	21.1	0.0	6.8	3.7	22.2	42.1	15.4	28.2
Finance laws	20.5	12.1	32.2	28.6	8.2	18.9	2.4	11.4	3.7	18.5	5.3	12.8	25.6
Tax laws	29.6	23.8	44.6	25.0	20.9	28.9	17.1	22.7	18.5	29.6	15.8	20.5	38.5
Spending laws	19.4	14.9	34.7	10.7	11.4	21.1	2.4	15.9	11.1	18.5	10.5	18.0	23.1
If the constitution allows for it, the executive can propose:													
Constitutional amendments	43.2	34.2	36.5	79.5	22.2	55.7	4.9	2.3	25.9	29.6	89.5	65.8	52.6
Budget laws	32.9	47.1	19.0	14.9	58.8	26.5	42.1	29.4	63.6	84.6	88.9	27.3	25.0
Organic laws	8.2	10.8	0.0	8.3	11.1	10.5	0.0	0.0	0.0	0.0	25.0	0.0	18.2
Finance laws	22.6	36.7	20.5	8.3	30.8	41.2	0.0	0.0	**	40.0	**	40.0	50.0
Tax laws	17.9	18.6	20.4	9.5	9.1	30.8	0.0	0.0	0.0	12.5	66.7	50.0	26.7
Spending laws	35.2	48.7	26.2	22.2	61.1	36.8	**	28.6	66.7	80.0	100.0	57.1	22.2
In case of the legislature's failure to pass a proposal, the budget defaults to:													
Executive's proposal	9.3	10.7	6.3	9.5	7.6	16.2	0.0	0.0	4.6	23.1	11.1	15.2	17.9
Executive's proposal, if proposed prior to failure	12.8	11.4	11.1	27.3	12.9	5.6	0.0	0.0	7.1	27.3	12.5	0.0	14.3
Previous year's budget	33.2	32.1	28.4	41.9	30.3	35.3	5.3	32.4	31.8	42.3	33.3	45.5	28.6
Other	14.9	9.1	23.2	18.9	4.2	17.7	0.0	0.0	9.1	7.1	5.6	24.2	10.7

Note: Entries represent the percentage of constitutions in each category (column) that provide for a given feature (row).

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A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990–2010

Claudio A. Fuentes*

Introduction

Establishing an enduring constitution is a daunting task, particularly outside western Europe and North America.[1] While in some societies, politicians willingly limit their future powers by defining constraints to their actions in a written agreement, in other societies, the challenge is quite the opposite; we observe constant negotiation regarding what the shape of the political system will be. This Article explores the political dynamics responsible for transforming the rules of constitutional reform in a political system.

Theory tells us that political actors are willing to create and follow rules because they want to reduce transaction costs and decrease uncertainty about any given outcome.[2] Theoretically, politicians should be willing to abdicate full sovereignty as they consider how long-term planning would promote national stability.[3] Moreover, political actors may fear the permanent effect of unwise decisions. According to Elster, constitutions serve two goals: protecting individual rights, and putting limits on majority decisions in order to avoid certain changes.[4] This is why constitutions explicitly make changes highly difficult, even defining some realms as unconstitutional.[5]

In a democratic context, constitutionalism should solve the tension between popular participation (the rule of the majority) and political uncertainty. Theoretically, constitutions protect citizens from "particularism and myopia which can easily result from unchecked popular rule."[6] As

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1. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 10 (2009).

2. *See* Jon Elster, *Introduction* to CONSTITUTIONALISM AND DEMOCRACY 1, 8–9 (Jon Elster & Rune Slagstad eds., 1988) (explaining that part of the reason a political assembly would give up part of its sovereignty is that "[t]he expected stability and duration of political institutions is an important value in itself" and that "if nothing could ever be taken for granted, there would be large deadweight losses arising from bargaining and factionalism").

3. Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 2, at 195, 216–17, 222–23.

4. Elster, *supra* note 2, at 3.

5. *See id.* at 3–4 ("The latter function is served in several ways: by declaring certain changes unconstitutional; by making the process of change so complicated and demanding that few proposals will be able to clear the hurdles . . . .").

6. *Id.* at 13. Other authors suggest that constitutionalism is inherently antidemocratic because the essential function of a constitution is to remove certain decisions from the democratic process. *See, e.g.*, Holmes, *supra* note 3, at 196 (quoting Justice Robert Jackson's statement that some

Holmes points out, constitutional precommitment is a useful device for forestalling the temptation to engage in collective self-destruction.[7]

Yet, constant changes in national constitutions challenge the assertion that actors are willing to give up their power in order to reduce political uncertainty. What is the explanation for the apparently "self-destructive" logic some countries face when political actors are constantly trying to redefine constitutions? Latin America provides a particularly fruitful jumping-off point because it stands out as one of the most active regions in terms of constitutional replacement and amendment.[8]

This Article observes the dynamics of constitutional reforms in Chile and challenges some of the prevailing assumptions provided by the literature. In the case of Chile, democratic authorities inherited a constitution that included stringent mechanisms for reform. However, between 1989 and 2010, the Chilean constitution experienced two major moments of reform (1989 and 2005),[9] and the Chilean congress passed 24 reforms, affecting 76% of the articles contained in the constitution (91 of 120 articles).[10] By some measures, these reforms had an impact on approximately 140 different critical areas.[11] In the last twenty years, the executive and legislative branches introduced 342 bills in congress, an average of 17 proposals per year.[12] How can we make sense of such intense activity in a country that has neither experienced dramatic changes in the balance of power between political forces nor implemented particularly flexible institutional structures?

Contrary to the overall trend toward the complete replacement of constitutions in Latin America over the last two decades, Chile is one of the few countries in which the political elite opted for a strategy of gradually reforming the constitution inherited from the military regime. While most recently-democratized countries within the region have experienced public debates on the subject (through popular consultations, referenda, national

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"fundamental rights may not be submitted to vote," and opining that from this perspective, constitutionalism is essentially antidemocratic). Still, others suggest that constitutional restraints can be democracy-reinforcing; courts and other institutions may be empowered as watchdogs in the democratic process. *E.g.*, *id.* at 197.

7. Holmes, *supra* note 3, at 239.

8. *See* James L. Busey, *Observations on Latin American Constitutionalism*, 24 AMERICAS 46, 48 (1967) ("[I]n many instances Latin American constitutions are extremely fragile, and subject to frequent and easy change.").

9. *See* Claudia Heiss & Patricio Navia, *You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*, 49 LATIN AM. POL. & SOC'Y 163, 172–85 (2007) (describing the 1989 and 2005 reforms to the Chilean constitution).

10. *See infra* Table 3.

11. Claudio Fuentes, *Elites, opinión pública y cambio constitucional* [*Elites, Public Opinion and Constitutional Change*], *in* EN NOMBRE DEL PUEBLO: DEBATE SOBRE EL CAMBIO CONSTITUCIONAL EN CHILE [ON BEHALF OF THE PEOPLE: DEBATE ON CONSTITUTIONAL CHANGE IN CHILE] 45, 55–66 (Claudio Fuentes ed., 2010) (detailing some of the areas affected by the reforms).

12. *See infra* Table 3.

conventions, or a combination of the three),[13] in Chile, constitutional reform has involved a relatively small segment of the political elite.[14]

This Article aims to highlight some of the causal mechanisms involved in this constant attempt to reshape constitutions. On the one hand, this Article confirms some of the arguments concerning the politics of constitutionalism. For instance, Ackerman as well as Elkins, Ginsburg, and Melton have argued that inclusion is a key factor driving stability; the more inclusive the process of drafting or amending a constitution, the more stable that document will be.[15] Given the inherited character of the Chilean constitution, important segments of the political elite have expressed a sustained discomfort with the arrangement imposed by Pinochet.[16] In addition, disloyalty toward the constitution increases when the mechanisms for amendment do not include relevant segments of society.[17]

At the same time, this Article attempts to clarify some of the causal mechanisms suggested by the literature. Indeed, scholars have examined a rich set of variables explaining constitutional replacement and amendment. Among the most popular factors explaining replacement are key junctures such as transitions to democracy, diffusion of political ideas, relevant changes in the balance of political power, and the emergence of new political actors.[18] Among the variables explaining amendments (or the lack thereof) are party fragmentation; power-sharing and electoral-sharing institutions; and other institutional features, such as constitutional adjudication and independence of courts.[19]

In this Article, I emphasize two central features. First, I focus on the asymmetries of power between the executive and legislative branches, adding a causal mechanism to the story. Presented with an opportunity for change, the executive branch employs important institutional and political tools, such as promoting agreements and pushing certain reforms, both for intervening in and affecting the political process.

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13. *See* Carlos Santiago Nino, *The Debate over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L.J. 635, 636–37 (1992–1993) (noting a scheduled referendum on government structure in Brazil, a proposed constitutional convention in Peru, institutional reform proposals in Uruguay, and "continuous public debate on constitutional reform" in Argentina).

14. *See infra* Table 7 (indicating that there were only twenty-seven key players in the 2005 reforms).

15. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 274–75 (1991); ELKINS ET AL., *supra* note 1, at 78–79.

16. *See* Fuentes, *supra* note 11, at 54–55 (noting the discontent among the political elite regarding the current constitutional arrangement, leading to both the the 1989 and 2005 reforms).

17. *See* ELKINS ET AL., *supra* note 1, at 82 (noting that inclusion leads to more groups having a stake in constitutional changes).

18. *See id.* at 134–39 (explaining the results of their model, which measured the effects of environmental factors on constitutional duration).

19. Gabriel L. Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America 32–33 (Nov. 26, 2010) (conference paper) (on file with author).

The second feature involves veto players. Rather than examining the actual change in the balance of power, I focus on actors' expectations concerning change. In bargaining over the rules of the game, political actors are constantly trying to anticipate the impact that some changes may have on the future distribution of power. Therefore, actors adopt forward-looking strategies when considering constitutional amendments.

This Article is comprised of four Parts. Part I is a brief review of the literature concerning constitutional change. Part II introduces the central features of the Chilean case study. Part III examines the factors driving constitutional change in Chile. Finally, some general conclusions are outlined in Part IV.

I. Constitutional Change

Constitutional change should be particularly uncommon because we may expect constitutional structures to be reformed only in exceptional times. Constitutional change is also curious given the fact that constitutional provisions impose strict barriers to avoid superfluous changes to the document (supermajority requirements, veto points, etc.).[20] Theory tells us that institutions are created in order to lower political transaction costs, to solve principal–agent problems through the creation of structures of accountability and incentives, to solve historically embedded conflicts within a given society, or to serve a combination of these purposes.[21] As one may expect, self-enforcing mechanisms make institutions very resistant to change. Change would have to come from the margins and only as an exception to the rule.[22]

However, constitutional norms are not static, and in practice, we observe important levels of replacement or amendment across various regions. Negretto observes that Latin America has experienced higher rates of constitutional replacement than Western Europe but that the number of amendments is higher in current constitutions in Western Europe than in those in Latin America.[23]

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20. *See, e.g.*, U.S. CONST. art. V (requiring two-thirds of both houses of Congress and three-fourths of the states to ratify a constitutional amendment); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 60 (Braz.) (prohibiting amendments abolishing, *inter alia*, individual rights or the separation of powers).

21. For a good summary of the arguments about the creation of institutions and the economic and sociological approaches to deciphering institutional changes, see MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 20 (2000).

22. *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 142 (2004) (describing four sources of institutional resilience to change: coordination problems, veto points, asset specificity, and positive feedback).

23. For instance, between 1789 and 2001, Latin America (composed of eighteen countries) saw 192 constitutions enacted (an average of 10.7 constitutions per country) with a mean duration of 22.7 years. Negretto, *supra* note 19, at 42. In contrast, western Europe (composed of 16 countries) enacted 51 constitutions (3.2 constitutions per country on average) with a mean duration of 76.6

In trying to explain constitutional change, some authors have suggested that the cultural tradition of constitution building in Latin America increases the tendency toward constant reform.[24] According to this argument, reforms do not usually entail a social process of legitimizing debates before the public, as often happens in the United States.[25] By the 1960s, constant changes in Latin American constitutions were being attributed either to the importation of ideas from other countries or to the fact that framers had little contact with their socioenvironmental needs.[26] Busey agrees that "most Latin American constitutions were . . . foreign and rather artificial importations" but goes further by stressing the problem of institutional design.[27] According to Busey, inconsistency within documents made political systems unstable.[28] But then, what is it that makes political actors choose "bad" institutions?

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years. *Id.* The number of amendments in current constitutions (2001) is 1,971 in Western Europe and 141 in Latin America. *Id.* at 43. Negretto considers "replacement" to be when a constitution is enacted by a popularly elected constituent assembly. *Id.* at 22. He considers "amendments" to be the number of reforms a constitution experiences per year of life since enactment, as he is interested in the amendment rate. *Id.* at 7. By defining these key terms, Negretto implicitly recognizes their ambiguousness—distinctions can be made by counting the number of articles reformed, issues changed, and omnibus measures in a given year. Thus, for Negretto, the amendment rate in a given year ranges from a minimum of zero to a maximum of one.

24. *See, e.g.*, Russell H. Fitzgibbon, *The Process of Constitution Making in Latin America*, 3 COMP. STUD. SOC'Y & HIST. 1, 1 (1960) (describing the Creole philosophers, the subsection of the population that drafted many of the original Latin American constitutions, and their enthusiasm for drafting idealistic constitutions).

25. Fitzgibbon, for instance, suggests that

> [the Latin American approach is] to make new constitutions the product of reason, to base them upon what ideally ought to be. Hence, in some respects, they are anticipatory, and particular provisions may, for many years, lack supporting legislation or even the popular approval to make them effective. In the United States, on the contrary, constitutional changes customarily represent long-debated and finally crystallized public opinion; it is natural that the latter approach should give the appearance of a more practical and enforceable document.

Russell H. Fitzgibbon, *Constitutional Development in Latin America: A Synthesis*, 39 AM. POL. SCI. REV. 511, 522 (1945); *cf.* Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 530, 532 (1999) ("Constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy. . . . [T]he insistence that only Western frameworks are legitimate and that certain constitutional and institutional structures are superior and applicable to all societies . . . is problematic at best and disastrous at worst.").

26. *See* Busey, *supra* note 8, at 54 ("Specialists are in general agreement . . . that for the most part Latin American constitutions . . . are exotic foreign importations and [that] their framers had little contact with their own environmental reality . . . .").

27. *See id.* at 59–60 (examining the institutional flaws present in the constitutions themselves).

28. *Id.* Inconsistency within constitutional arrangements is, according to Busey, the core of the problem:

> The documents themselves include built-in conflicts of meaning and intent. They are likely to grant powers to executive and centralized authority which are enough to assure the establishment of dictatorships, with or without other causal factors; and the unsatisfactory, self-defeating content of the documents themselves would be reason enough for frequent change.

Id. at 60.

Elkins, Ginsburg, and Melton have provided one of the most systematic accounts of comparative analysis, proposing three factors to explain constitutional longevity: inclusion, flexibility, and specificity.[29] Although they recognize that external shocks may provoke new political settlements, they argue that three critical structural features may promote stability.

The first characteristic is inclusion: "[C]onstitutions whose provisions are publicly formulated and debated will more likely be able to generate the common knowledge and attachment essential for self-enforcement."[30] Thus, the way a constitution is drafted, approved, and enacted seems to be essential to its survival. This implies that some interest groups may see their interests projected in constitutional clauses. The issue here is that a large majority of citizens should be reflected in the final arrangement.

The second factor is flexibility.[31] Constitutions should contain some mechanisms to moderate either extreme flexibility or rigidity. It is difficult to find the correct balance, but the overall point is that constitutions must include certain mechanisms that allow for the adjustment of fundamental rules in response to changing conditions.

Finally, Elkins, Ginsburg, and Melton suggest that greater levels of specificity in a constitution "will tend to enhance rather than hinder endurance. A constitution covering more topics will tend to incentivize more interest groups toward enforcement, whereas depth helps them develop shared understandings of what the constitution requires and allows."[32] In short, constitutions are more likely to endure when they are flexible, detailed, and able to induce interest groups to invest in their process.[33]

Observing the case of Latin America, Negretto provides a complex model in which contextual, institutional, and political factors explain change.[34] In his model, the degree of electoral inclusion and pluralism,[35]

29. ELKINS ET AL., *supra* note 1, at 73.

30. *Id.* at 78.

31. *Id.* at 81.

32. *Id.* at 88.

33. *Id.* at 89. Case-study analysis presented by the authors suggests that while specificity is not always a necessary condition for endurance, inclusion seems to be a required condition at some level. *Id.* at 206.

34. Negretto, *supra* note 19, at 28–29.

35. *Id.* at 23. Within this variable, Negretto considers electoral formula, electoral cycle, presidential term, and reelection rules. *Id.* at 23–24.

separation of powers,[36] amendment rigidity,[37] and constitutional adjudication[38] may explain replacement and amendment.

Negretto and other authors have claimed that, at least in the case of Latin America, context matters because transitions to democracy, institutional crises, and relevant shifts in partisan contexts are likely to trigger constitutional replacement rather than constitutional amendment.[39] The enactment of new constitutions is more likely, particularly "when countries had no previous democratic experience or when the pre-authoritarian constitution is no longer regarded as a legitimate and effective instrument of government by both democratic leaders and citizens."[40] Looking at the relationship between constitutional and regime changes worldwide, Elkins, Ginsburg, and Melton suggest that "a small, but significant, minority of regime transitions are accompanied by constitutional replacement and, likewise, a small minority of constitutional replacements coincide with regime transition."[41]

Other conditions may affect constitutional replacement. Negretto suggests that the risk of constitutional replacement decreases with the existence of power-sharing institutions, the strength of constitutional adjudication, and the frequency of amendments.[42] According to Negretto, "constitutional replacement[] depends on the type of events that trigger constitutional change and on the capacity of political actors to adapt the constitution to changing environments by means of amendments or judicial interpretation."[43]

Amendments are likely to increase when party-system fragmentation is either very low or very high, as long as amendment procedures are flexible.[44] In other words, if amendment procedures are rigid, amendments are expected to decrease.[45] But "as the number of parties in the system increase[s], there may be more demands for constitutional adaptation through amendment. At the same time, however, a higher level of party system fragmentation should lead to a lower rate of amendment if the amendment procedure is

36. *Id.* at 24. Negretto considers congressional structure (unicameral versus bicameral), presidential veto, and judicial independence. *Id.*

37. *Id.* at 24–25. Negretto determines the degree of rigidity in constitutional amendments by observing the threshold of votes required in congress to pass an amendment proposal and the number of actors whose consent is necessary to pass an amendment (veto points). *Id.* at 25.

38. *Id.* at 25–26. Negretto uses an index adding the number of different types of instruments for constitutional review specified in the constitution, considers whether the instrument has general effects, and considers whether it is open to every citizen. *Id.*

39. *Id.* at 26; *see, e.g.*, ELKINS ET AL., *supra* note 1, at 60.

40. Negretto, *supra* note 19, at 15.

41. ELKINS ET AL., *supra* note 1, at 59–60.

42. Negretto, *supra* note 19, at 23.

43. *Id.* at 32.

44. *Id.* at 17–18, 20, 30.

45. *Id.* at 30.

stringent."[46] Finally, it seems that replacement and amendment are inversely correlated.[47] That is, the risk of constitutional replacement decreases as the rate of amendment increases, which may be related to the flexibility of the adapting institutions to changing environments.[48]

At the risk of oversimplifying the main arguments proposed by the literature, scholars have suggested contextual, institutional, and political factors to explain constitutional change. External shocks may trigger change, but certain institutional and political conditions should also be considered. Institutionally, we should observe the levels of flexibility within a constitutional framework as well as whether the framework allows for power-sharing institutions. Politically, we should look at the way constitutions are framed, the distribution of power among political and social forces (including the influence of interest groups), and the level of fragmentation within the political system.

II. Constitutional Reforms in Chile

Lack of inclusion is a powerful force for promoting change. The less inclusive an arrangement is perceived to be, the more political actors will seek to change the status quo. Bruce Ackerman argues that there is a first moment, a "constitutional moment," in which decisions are made by the people.[49] This moment rarely occurs, and typically under three conditions: first, a politically partisan movement must convince an extraordinary number of their fellow citizens of their proposed initiative; second, opponents must have the opportunity to organize their forces and express their views; third, the proponents must convince a majority of the population "to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for 'higher lawmaking.'"[50]

If none of these conditions is present, it is reasonable to expect that political actors will try to modify the status quo either because they want to increase their power gains (to remain in power or to obtain reelection) or because they have concerns about the long-term legitimacy of the political system as a whole.[51] Independent of actors' motivations, we should expect that in cases where constitutions are imposed by a minority, a relevant trend toward the modification of the status quo is likely to occur.[52]

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46. *Id.*

47. *Id.* at 32.

48. *Id.* at 32–33.

49. ACKERMAN, *supra* note 15, at 307.

50. *Id.* at 6.

51. *See* Negretto, *supra* note 19, at 10–12 (explaining that political actors seek constitutional changes because existing institutions no longer serve the interests of those who have the power to change them, or because of the dysfunctional performance of existing political institutions).

52. *See* ACKERMAN, *supra* note 15, at 6 (arguing that the first step in creating a constitutional moment requires convincing a large majority of people to take a position seriously, a task that

The problem is that the forces of change do not always manifest themselves in the same way. In Chile, Pinochet's constitution was enacted in 1980 and imposed several antidemocratic features, including appointed senators,[53] veto power for the armed forces within the political system,[54] maintenance of General Pinochet as senator for life,[55] high levels of military autonomy,[56] overrepresentation of right-wing sectors within the political system,[57] and strict barriers to reform that were designed to avoid future transformations of the constitution.[58] As the 1980 constitution was designed to maintain the privileges of specific groups (right-wing parties and the military), we should expect that democratic authorities would have raised the flag of change and advocated for immediate replacement or substantial amendment to such an antidemocratic arrangement.

Instead, in Chile we observed a rather moderate and gradual process of amendment. We did not see political actors mobilizing their constituencies or calling for the abolition of such antidemocratic law immediately after the transition. Even within left-wing political parties, we observed a moderate view on the strategies toward transforming the constitution.[59] Contrary to all intuitive expectations, during the transitional period in Chile, neither political elites nor social actors addressed the subject.[60] Both opted instead for a very cautious, moderate strategy.

Within the South American context, Chile and Peru became the exceptions to the rule, as they both experienced a transition to democracy without the replacement of the authoritarian constitutional provision.[61] But what made Chile truly unique was the absence of an open debate on the subject as soon as democracy was reestablished, as happened in other countries. Even in Peru, immediately after Fujimori left power in 2000, a commission for the study of constitutional reforms was established by the provisional government.[62] Thus, although we observed reforms in Chile, they were primarily the result of an elitist bargaining process.

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would arguably be much easier in a society in which only a minority was involved in creating the constitution).

53. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 32, § 6 (amended 2005) (Chile).

54. *Id.* arts. 95–96.

55. *Id.* art. 45 (amended 2005).

56. *Id.* arts. 90–94 (amended 2005).

57. *Id.*

58. *Id.* arts. 116–119 (amended 1989).

59. *See* Patricio Silva, *Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks*, 23 J. LATIN AM. STUD. 385, 401 n.41 (1991) (recognizing a late 1970s transformation of left-wing parties with their abandonment of Leninism and valuation of democracy).

60. *Id.*

61. *See infra* Table 1.

62. Enrique Bernales, *Los caminos de la reforma constitucional en el Perú* [*The Paths of Constitutional Reform in Peru*], 2005 ANUARIO DE DERECHO CONSTITUCIONAL

Table 1. Constitutional Arrangements in South America

Origin / Mechanism	With Constituent Assembly	Congressional Reforms
Current Constitution Enacted Under Democratic Rule	Brazil (1988): A Paraguay (1992): A Colombia (1991): C A Argentina (1994): A Venezuela (1999): R A R Ecuador (1998): C A Ecuador (2008): R A Bolivia (2009): R A R	Uruguay (1967) 1996: R 2004: R
Current Constitution Enacted Under Non-democratic Regime		Perú (1993) Chile (1980) 1989: R 2005: R

Key: A: National Constituent Assembly
C: Consultation
R: Binding Referendum

Source: Gabriel Negretto, Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America, 39 BRIT. J. POL. SCI. 117 (2009); Georgetown University Center for Latin American Studies, POLITICAL DATABASE OF THE AMERICAS, http://pdba.georgetown.edu/.

Another characteristic of the Chilean case is that institutional barriers meant to hinder constitutional reform did not prevent political actors from changing the constitution.[63] Indeed, several of the intuitive conditions predicted by the literature are not present in this case: no significant social groups pressured for reforms, no relevant political party in congress used the issue as a platform for mobilizing its constituency against the 1980 constitution, no significant economic or institutional crisis affected the country, and no significant change occurred in the balance of power between the main political forces in congress from 1990 to 2010.[64] The story of constitutional reform in Chile is characterized by agreements among the elite, influence of a few academic experts, and lack of citizen engagement.

In order to make sense of the features described above—a lack of political mobilization during the transition and relevant reforms afterwards—

LATINOAMERICANO [YEARBOOK LATIN AM. CONST. RTS.] 157, 157–58 (Mex.). Even in Peru, provisional President Valentin Paniagua (2000–2001) created a Commission for the Study of the Constitutional Reform. *Id.* at 158. The national congress under Toledo's administration (2001–2006) took into consideration the conclusions from that commission and proposed a reform, which also included the consultation of a number of civil-society organizations. *Id.* at 160–61. However, the debate in congress was highly divisive as some congressional representatives thought a new "Constituent Assembly" was necessary. *Id.* at 162.

63. *See, e.g.*, Heiss & Navia, *supra* note 9, at 178 (analyzing Chile's 1989 constitutional reforms, including one that eliminated a 1980 constitutional provision requiring two consecutive congresses to approve certain constitutional changes).

64. *See infra* Table 4.

I argue that we need to analyze in greater detail who the agents of change were. And, as several authors have pointed out concerning Latin American politics, a central feature is the executive branch's dominance of the political agenda.[65] In this Article, I will demonstrate how the combination of a proactive executive branch and disciplined political parties explains Chile's gradual and highly elitist strategy of constitutional change.

But the politics of constitutional amendment also require the cooperation of players who have the power to veto. The literature asserts that change comes when the existing constitution "becomes incompatible with new political conditions, when the constitution does not serve the interests of powerful political actors, or when it fails to work as a governance structure."[66] I suggest a slightly different causal mechanism explaining actors' motivation to promote change. I assert that in some cases they are willing to accept reforms because they expect future political gains as a result of the bargaining process. The expectation of future reputational returns is a strong driving force for the promotion of change.

A. The Big Picture: Cycles of Constitutional Reforms

In Chile, the 1980 constitution established a combination of a strong executive, autonomy of the armed forces, and a complex system of checks and balances among different state institutions.[67] In the original version of the constitution, presidential powers included a presidential term of eight years without the possibility of reelection;[68] the power to dissolve the chamber once per term;[69] the power to nominate ministers, regional representatives, provincial governors, ambassadors, and mayors;[70] and the exclusive power to propose bills on issues concerning taxes, collective bargaining, social security, and the creation of new public services.[71] But at the same time, the constitution established greater levels of autonomy for

65. *See* GRINDLE, *supra* note 21, at 10 (observing that during the political and economic reforms in Latin America during the 1980s, "economic reform leaders typically introduced their reforms through the use of executive decree powers rather than though legislative processes," and that "in the throes of attempting to introduce major economic policy reforms, politicians typically concentrated power in the executive"); Gary W. Cox & Scott Morgenstern, *Latin America's Reactive Assemblies and Proactive Presidents*, 33 COMP. POL. 171, 175 (2001) ("Latin American executives typically have greater powers of unilateral action than either U.S. presidents or European prime ministers . . . .").

66. Negretto, *supra* note 19, at 10.

67. *See* Heiss & Navia, *supra* note 9, at 166–67 (outlining the basic framework of the 1980 constitution, which included an initial eight-year presidential term; a system for protected democracy that contained restrictions on political parties and labor unions; and the assignment of the military to a tutelary role, which included budgetary and administrative autonomy).

68. C.P. art. 25 (amended 2005) (Chile).

69. *Id.* art. 32, § 5 (amended 1989).

70. *Id.* art. 32, § 9 (amended 1991).

71. *Id.* art. 62, §§ 1–2, 5–6 (amended 1997).

some institutions, including the Constitutional Tribunal, the armed forces, and the Comptroller General.[72]

Moreover, the constitution aimed to diminish the influence of political parties. First, it reduced the influence of local politics by replacing elected officials with appointed mayors and allowed for the creation of local and regional development councils in which members of the armed forces and the police had guaranteed seats.[73] Second, it established a binominal electoral system, a unique device that forced all parties to collaborate with one or two established coalitions in order to obtain a seat in congress.[74] Third, it established appointed senators, thereby increasing the influence of the armed forces within the political system.[75] In the original scheme, appointed senators accounted for 25.7% of the senate.[76] Finally, former presidents who had served terms of more than six years had the right to serve as senators for life.[77]

The framers aimed to make constitutional reform extremely difficult for future authorities. For instance, in certain strategic areas, the constitution established a special supermajority requirement of either three-fifths or two-thirds for any constitutional reform.[78] Additionally, for certain chapters of the constitution, the approval of two consecutive legislatures was required.[79] Finally, the constitution established so-called *leyes orgánicas* (organic laws) that required a special three-fifths supermajority vote for approval and that

72. *Compare id.* arts. 81, 87, 93 (amended 2005) (providing that members of the Constitutional Tribunal would not be removable and would have lengthened terms of eight years; that the Comptroller General would not be removable and would retire at age 75; and that the commanders in chief of the armed forces would not be removable, although the president could call on them to retire with the consent of the National Security Council), *with* CONSTITUCIÓN DE LA REPÚBLICA DE CHILE of 1925 arts. 21, 78(a) (providing that the members of the Constitutional Tribunal would be removable by the president with the consent of the senate and would only have four-year terms and providing no limits on removability of the Comptroller General or commanders in chief).

73. C.P. arts. 101, 108–109 (amended 1997) (Chile).

74. *See id.* art. 43 (amended 2005) (providing that the chamber of deputies would be composed of 120 members and that each region would elect two senators). The 120 deputy seats are apportioned with two seats per each of the sixty electoral districts; this binomial electoral system has historically favored the two largest coalitions. *Background Note: Chile*, U.S. DEP'T OF STATE (Mar. 10, 2011), http://www.state.gov/r/pa/ei/bgn/1981.htm.

75. C.P. art. 45(d) (amended 1989) (Chile).

76. *See id.* art. 45 (amended 1989) (providing that nine senators out of a total of thirty-five would be appointed and that the remaining twenty-six would be elected from the thirteen regions). Four of these appointed senators had to either be former commanders in chief of the armed forces or former chiefs of police and were appointed by the National Security Council in which the armed forces and the police hold a majority; three were appointed by the supreme court; and two were appointed by the president. *Id.* arts. 45(b)–45(f) (amended 1989).

77. *Id.* art. 45(a) (amended 2005).

78. *Id.* arts. 116–118 (amended 1989). The 1980 constitution established a special supermajority requirement in Chapter I (Essential Basis of Institutionalism), Chapter VII (Constitutional Tribunal), and Chapter X (Armed Forces). *Id.* arts. 9, 81, 94 (amended 2005).

79. *Id.* art. 118 (amended 1989).

involved a wide range of crucial themes including institutional, political, social, and economic issues.[80]

A concrete example may help to illustrate the distortions of the political system. The constitution established that the head of the armed forces and the chief of police had fixed appointments of four years.[81] The president could not remove them without the approval of the National Security Council (NSC).[82] However, the military controlled the majority of votes in that council (four out of seven votes).[83] Two members of the NSC could call a meeting if they considered the state to be under threat.[84] Moreover, through the NSC, the heads of military institutions appointed four senators and two members of the Constitutional Tribunal.[85] Military institutions also held seats in regional and municipal development councils and the National Mining Company (Codelco).[86]

Politicians had strong incentives to alter the existing balance of power prior to the transition, but the story of reform was characterized by moderate and gradual changes. This story can be summarized in four stages. After the 1988 plebiscite in which Pinochet lost, the military regime and the opposition, *Concertación de Partidos por la Democracia* (CPD), engaged in a highly informal negotiation to reform some aspects of the constitution.[87]

The CPD, along with some of the more liberal segments of right-wing parties, organized a commission and proposed a set of essential reforms to the military regime.[88] Even though the regime invited representatives of the opposition to send their proposal to the government, the *Junta Militar* submitted only a limited set of reforms to a national referendum in July 1989.[89]

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80. *See, e.g.*, *id.* art. 63 (establishing a three-fifths supermajority vote for approval of constitutional organic laws); *id.* art. 38 (amended 2005) (stating that organic laws would control the basic organization of the public administration); *id.* art. 71 (amended 2005) (stating that organic laws would control the terms of presidential bill expedition); *id.* art. 74 (amended 2005) (pronouncing that organic laws would govern the Chilean court system).

81. *Id.* art. 93 (amended 2005).

82. *Id.*

83. *Id.* art. 95 (amended 1989).

84. *Id.*

85. *Id.* art. 81 (amended 2005); *id.* art. 45(d) (amended 1989).

86. *See* Juan Agustin Allende, *Historical Constraints to Privatization: The Case of the Nationalized Chilean Copper Industry*, 23 STUD. COMP. INT'L DEV. 55, 71 (1988) (recounting the appointment of Codelco's Chief Executive Officer by the central government and military functionaries to act in the implementation period); Brian Loveman, *Government and Regime Succession in Chile*, 10 THIRD WORLD Q. 260, 268 (1988) (identifying the military's direct representation on development councils).

87. WORLD BANK INST., CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES 396–97 (Guillermo Perry & Danny M. Leipziger eds., 1999); *see also* Heiss & Navia, *supra* note 9, at 169 ("The dictatorship . . . did not formally negotiate with the opposition.").

88. WORLD BANK INST., *supra* note 87, at 397 & n.6.

89. *See* Heiss & Navia, *supra* note 9, at 170 ("[B]ecause the Concertación could only accept or reject but not modify the dictatorship's proposed reforms, the military could maximize the number of protected democracy provisions that remained untouched. The concessions . . . fell short of what the opposition had asked for.").

These reforms included a slight reduction in the vote required for constitutional reforms in organic laws;[90] the elimination of the requirement that two consecutive legislatures approve certain chapters;[91] the elimination of the executive power to dissolve the chamber;[92] the establishment of a four-year transitional government without the possibility of reelection;[93] the incorporation of the Comptroller General in the NSC to help balance the relationship between civilians and military;[94] the elimination of the clause proscribing parties that promote "totalitarian" doctrines;[95] and an increase in the number of elected seats in the senate from twenty-six to thirty-eight,[96] reducing the proportion of appointed senators from 25.7% to 19.1%. Thus, this moderate reform allowed for the establishment of better conditions for future constitutional reforms.

90. *Id.* at 178; *see also* C.P. art. 63 (amended 1989) (Chile) (requiring three-fifths of congressional representatives in each house to approve a reform of organic laws); Law No. 18825 § 35, Junio 15, 1989, DIARIO OFICIAL [D.O.] (Chile) (amending article 63 to require four-sevenths of the congressional representatives in each house to approve a reform to organic laws).

91. *See* C.P. art. 118 (Chile) (requiring approval of a two-thirds majority of two consecutive legislatures before a constitutional amendment to certain chapters can take effect); Law No. 18825 § 52 (Chile) (repealing article 118).

92. *See* C.P. art. 32, § 5 (Chile) (permitting the president to dissolve the Chamber of Deputies once during his term); Law No. 18.825 § 16 (Chile) (abrogating article 32, § 5).

93. Law No. 18825 § 53 (Chile) (restricting the term of the first president to four years and prohibiting his reelection in the following term); *see also* Heiss & Navia, *supra* note 9, at 164 (noting that the first presidency following the reforms, "widely expected to go to the Concertación," would be limited to four years).

94. Law No. 18825 § 44 (Chile); *see also* Heiss & Navia, *supra* note 9, at 177 (asserting that this reform "curtail[ed] the armed forces majority" on the NSC).

95. *See* Law No. 18825 § 2 (Chile) (repealing article 8 of the original 1980 constitution, which declared certain political activities unconstitutional); Heiss & Navia, *supra* note 9, at 172 ("Infamous Article (Art) 8 embodied the military's vision of protected democracy.").

96. Law No. 18825 § 25 (Chile); Heiss & Navia, *supra* note 9, at 178.

Table 2. Key Moments of Constitutional Reform

Year	# of Areas	Actors	Subject (Most Relevant)
1989	56	Pinochet Regime Referendum	Presidential period (4); increased senators; balanced appointment of senators between civilians and military; acceptance of the Communist Party
1990/2003 Aylwin (3) Frei (7) Lagos (4)	14	CPD and *Alianza* Congress	Presidential period (6); terrorism; municipal elections; supreme court appointments; gender equality; mandatory preschool and secondary education; freedom of expression
2005 Lagos (1)	58	CPD and *Alianza* Congress	Elimination of "enclaves" (appointed senators, armed forces, National Security Council); executive–legislative balance of power; presidential period (4); state of exception; Constitutional Tribunal
2006–2010 Bachelet (9)	12	CPD and *Alianza* Congress	Rome Statute; regional government; voluntary voting system and electoral registration; presidential election date; quality of politics and probity; Easter Island as special territory

Notes: CPD – Concertación de Partidos por la Democracia.
Alianza – Opposition coalition.
Numbers in parentheses are the number of reforms proposed by each president.

According to the head of the technical commission of the CPD, Francisco Cumplido, several aspects remained untouched, including the electoral system, the appointment of senators, and the mechanisms for constitutional reforms.[97] The reform actually increased the military's autonomy by addressing military pensions, retirement, and budget calculations under the title of organic laws, thereby making it more difficult to approve changes to these systems.[98] Moreover, the approved proposal actually increased the vote required for reforms from three-fifths to two-thirds in certain sensitive areas such as Chapter III (constitutional rights and duties) and Chapter XIV (constitutional reform).[99]

97. CARLOS ANDRADE GEYWITZ, REFORMA DE LA CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE DE 1980 [REFORM OF THE POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE OF 1980], at 120 (1991).

98. Heiss & Navia, *supra* note 9, at 170, 179, 182.

99. *See* C.P. art. 116 (amended 1989) (Chile) (requiring a three-fifths majority vote to approve constitutional reforms); Law No. 18825 § 49 (Chile) (amending article 116 to require a two-thirds majority vote for reforms to certain chapters of the constitution).

A second critical period took place between 1990 and 2003, during the administration of the CPD-led coalition. Under the leadership of Presidents Aylwin (1990–1994), Frei (1994–2000), and Lagos (2000–2006), the CPD-led coalition promoted fourteen reforms, which included aspects concerning freedom of expression as well as political and social rights.[100]

But the most relevant reform came in 2005 during the Lagos administration, after five years of negotiation between the CPD and the right-wing coalition, *Alianza*. The change included the elimination of appointed senators, including lifelong senatorial appointments for former presidents; reforms to the states of exception; the elimination of several prerogatives of the armed forces; the addition of the power of the president to remove the head of the armed forces and the chief of police by submitting a symbolic report to congress; and the substantial reduction in the power of the NSC.[101] Moreover, reforms were enacted that affected other institutional features, including reducing the presidential term to four years without the possibility of reelection; eliminating the "extraordinary" period of sessions in congress, which reduced the power of the executive branch to control congress's legislative agenda; establishing a congressional mechanism to summon members of the cabinet; increasing powers for congress to create investigative commissions; and reforming the composition of the Constitutional Tribunal, among others.[102]

After this agreement, during the Bachelet administration, new proposals were sent to, and approved by, congress. This inaugurated a new period of reforms, which included approval of the Rome Statute,[103] a reform of regional government that permitted greater levels of decentralization,[104] a

100. Law No. 19295, Febrero 22, 1994, D.O. (Chile) (changing the presidential term to six years); Law No. 19448, Febrero 12, 1996, D.O. (Chile) (directing municipal elections); Law No. 19519, Septiembre 6, 1997, D.O. (Chile) (increasing the number of supreme court judges); Law No. 19526, Noviembre 7, 1997, D.O. (Chile) (creating new public services); Law No. 19541, Diciembre 18, 1997, D.O. (Chile) (modifying the judicial appointment process and adding qualification requirements for supreme court justices); Law No. 19597, Diciembre 24, 1998, D.O. (Chile) (modifying supreme court review of constitutional organic laws); Law No. 19611, Junio 9, 1999, D.O. (Chile) (adding the provision that "[m]en and women are equal before the law"); Law No. 19634, Septiembre 21, 1999, D.O. (Chile) (adding the provision that "[t]he state will promote kindergarten education"); Law No. 19643, Octubre 22, 1999, D.O. (Chile) (changing the presidential election process and modifying the composition requirements for the Elections Qualifying Court); Law No. 19671, Abril 19, 2000, D.O. (Chile) (making changes to congressional sessions); Law No. 19672, Abril 19, 2000, D.O. (Chile) (establishing honors for former presidents); Law No. 19742, Agosto 25, 2001, D.O. (Chile) (reforming the system of state censorship); Law No. 19876, Junio 22, 2003, D.O. (Chile) (establishing mandatory preschool and secondary education); Law No. 20050, Agosto 18, 2005, D.O. (Chile) (qualifying the unitary nature of the state).

101. Law No. 20050 §§ 20–21, 45–48 (Chile). *See generally Democratic at Last*, ECONOMIST, Sept. 2005, at 38 (discussing the constitutional reforms that President Lagos was due to sign in 2005).

102. Law No. 20050 §§ 13, 18–19, 24, 41 (Chile).

103. Law No. 20352, Mayo 26, 2009, D.O. (Chile).

104. Law No. 20390 §§ 3–5, Octubre 16, 2009, D.O. (Chile).

constitutional shift from compulsory to voluntary voting,[105] a declaration of Easter Island as a special territory,[106] and reforms regarding the quality of politics and the probity of public administrators.[107]

Thus, observing the big picture, we see two crucial moments: 1989, when congress enacted a set of relatively unsubstantial reforms that were nevertheless crucial in paving the way for future agreements, and 2005, when congress eliminated a set of authoritarian "enclaves" and reshaped certain state institutions in order to produce a slightly different balance of power more favorable to the congress and the Constitutional Tribunal. In between these two moments, we observe specific initiatives approved by congress on a range of other less important but nevertheless substantial subjects.

Another way to observe the attempts toward constitutional reform is to examine proposals sent to congress. Between 1990 and March 2010, the executive and legislative branches submitted a total of 342 bills in the form of *mensajes* by the executive branch or *mociones* by legislators.[108] An average of 17.1 constitutional reform proposals were debated in congress every year during this time.

Some characteristics of this political process are worth noting. First, the role of the executive branch in submitting and sponsoring bills is crucial within the Chilean political system. The executive branch originally submitted 71% of the proposals approved by congress. The executive branch also played a significant role in sponsoring the remaining 29% of the proposals.[109] Second, we would expect that political activity decreased following the crucial August 2005 agreement, which eliminated "authoritarian enclaves."[110] However, the figures show a rather significant increase in the number of proposals, particularly those submitted by congressional representatives.

Third, the last column of Table 3 shows that as the democratic transition evolved, crucial themes were being debated. It was during the Lagos administration that more substantial, and therefore divisive, issues were discussed in congress. This is why, on average, a proposal submitted during the Lagos administration took more than four years to be approved. Long periods of negotiations preceded the approval of the Rome Statute (eighty-five months), the reform of regional governments (seventy months), the cru-

105. Law No. 20337 § 1, Marzo 27, 2009, D.O. (Chile).

106. Law No. 20193 § 1, Junio 27, 2007, D.O. (Chile).

107. Law No. 20414 §§ 1–5, Diciembre 28, 2009, D.O. (Chile).

108. *See infra* Table 3.

109. These figures are based on analysis by the author of the 342 reform proposals submitted in congress from March 11, 1990, to March 10, 2010. These bills can be found in the bill proposal database, which is available at http://www.camara.cl.

110. *See supra* notes 101–02 and accompanying text.

cial 2005 reform eliminating the authoritarian enclaves (sixty-one months), and the elimination of the compulsory voting system (fifty-eight months).[111]

How can we make sense of this trend of reforms? The first intuitive response is that unsatisfied political elites are likely to constantly push for reform. But the political process in Chile was rather gradual. No significant reform was enacted until 2005, fifteen years after the transition.[112] Government actors and legislators clearly avoided the subject during the Aylwin administration. It is only after 2000 that we observed more significant political efforts to change the status quo.

Table 3. Constitutional Proposals Debated by Congress, 1990–2010

Period	Bills Introduced by Executive Branch	Bills Introduced by Congressional Representatives	Total Bills (Avg. by Year)	Bills Approved (Executive Initiative)	Average Time Bills Were Debated in Congress
Aylwin '90–'94	8	33	41 (10.2)	3 (3)	4.3 months
Frei '94–'00	13	78	91 (15.2)	10 (6)	20.8 months
Lagos '00–'06	8	58	66 (11.0)	8 (5)	41.8 months
Bachelet '06–'10	11	133	144 (36.0)	3 (3)	20.3 months
Total	**40**	**302**	**342 (17.1)**	**24 (17)**	**25.6 months**

Note: "Bills Introduced" are single bills submitted to congress containing one or more issue. "Bills Approved" are determined on the basis of the year in which the bill was submitted.

Changes in the political balance of power do not explain this trend. When one observes the distribution of power in congress between 1990 and 2010, the overall stability is striking.[113] As previously mentioned, any political movement seeking to create a constitutional reform must obtain at least four-sevenths of the vote in both chambers for a change to organic laws, three-fifths for a change to nine of the constitution's chapters, and two-thirds for a change to the remaining six chapters.[114]

111. These figures were calculated based on when the bills were introduced and when they were approved. The bills can be found in the bill proposal database, which is available at http://www.camara.cl.

112. *See supra* Table 2.

113. *See infra* Table 4.

114. *See supra* notes 78–80, 90 and accompanying text.

Table 4. Balance of Power in Congress, 1990–2010 (%)

	Chamber of Deputies			Senate		
	CPD	*Alianza*	*Independ.*	*CPD*	*Alianza*	*Independ.*
1990–1994	60.0	40.0	-	46.8	53.2	-
1994–1998	58.3	41.7	-	44.7	55.3	-
1998–2002	58.3	41.7	-	50.0	50.0	-
2002–2006	52.5	47.5	-	50.0	50.0	-
2006–2010	54.2	45.8	-	52.6	44.7	2.7
2010–2014	47.5	48.3	4.2	52.6	44.7	2.7

Source: Ministerio del Interior [Ministry of the Interior], Gobierno de Chile [Government of Chile], *Resultado Electoral 2009* [*Electoral Results 2009*], SITIO HISTÓRICO ELECTORAL [HISTORICAL ELECTORAL SITE], http://www.elecciones.gob.cl/; BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [NATIONAL LIBRARY OF CONGRESS OF CHILE], http://www.bcn.cl/.

Thus, several of the conditions laid out in the literature as necessary were not present. There was no significant change in the balance of power, new political actors did not emerge, and no significant economic, social, or political crisis triggered change. Moreover, according to the literature, high levels of party fragmentation plus stringent amendment procedures should lead to low rates of reform.[115] Both conditions were present in Chile, but we still observe high levels of reform.[116] In the next Part, I will endeavor to explain this unexpected outcome.

III. Explaining (Constant) Attempts to Change the Rules of the Game

Ackerman as well as Elkins, Ginsburg, and Melton are right in defining inclusion as a central feature for constitutional stability. As long as relevant actors are not included within the framing of constitutional arrangements, we may expect constant battles over the rules of the game in a given country.

But what makes political actors initiate reforms? At first glance, the case of Chile offers an intuitive response: actors who are discontented with

115. *See supra* notes 44–48 and accompanying text.

116. *See supra* Table 3 (showing the number of constitutional proposals approved during each presidential period from 1990 to 2010). David Altman defines Chile as one of the most fragmented political systems in Latin America, calculating the number of effective parties at eight. David Altman, *Continuidades, cambios y desafíos democráticos en Chile (2006–2009)* [*Continuities, Changes and Challenges of Democracy in Chile (2006–2009)*], 64 COLOM. INTERNACIONAL [COLOM. INT'L] 12, 18 (2006). However, it should be emphasized that in the Chilean political system, the electoral structure forces the establishment of two main coalitions. *Id.* at 28. In this sense, there are indirect mechanisms to force coalition discipline.

the status quo will push for change. However, a closer examination of the *contexts* in which the actors exist may illuminate the real agents of change. Asymmetries of power among actors and actors' expectations about future shifts in the balance of power are relevant and must be taken into account.

A. Passive and Proactive Executives

As several authors have pointed out, in presidential systems the executive branch plays a key role in legislative outcomes.[117] This does not imply that legislatures are irrelevant. Scott Morgenstern summarizes executive–legislative relations by suggesting that even though Latin American assemblies are primarily reactive (and presidents are essentially proactive), their relations take the form of a "bilateral veto game."[118] Presidents can choose "either to make an end run around the assembly or to join it."[119]

Concerning Chile, Peter Siavelis correctly asserts that "the president has always been an important legislator, with the ability to dominate the legislative process given his agenda-setting ability, budgetary dominance, and areas of exclusive initiative. . . . [I]n postauthoritarian Chile the president has been the most important legislative actor, and perhaps the most important legislator."[120] He adds, though, that these strong presidents need to moderate their policies as they need to satisfy coalition partners.[121]

Indeed, the executive branch in Chile enjoys strong powers, such as the exclusive initiative in all legislation involving the provision of fiscal resources, including taxation; the automatic approval of the budget if congress fails to approve it; the right to define what is being discussed in congress through the mechanism of "urgencies"; the benefit of an "extraordinary period" in which congress can debate only the proposals sent by the executive; and the access to a high level of expertise and important institutional capacities within the Ministry of the Presidency, which are used to write proposals and keep track of law-related issues.[122] Another relevant

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117. *See, e.g.*, MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 147 (1992) ("[T]he authority of the president to introduce legislation makes him or her a central player in the legislative process from the outset . . . ."); *cf.* Scott Morgenstern, *Towards a Model of Latin American Legislatures*, *in* LEGISLATIVE POLITICS IN LATIN AMERICA 1, 1 (Scott Morgenstern & Benito Nacif eds., 2002) ("[M]any recent Latin American presidents . . . have railed against obstructionist, corrupt, or ineffective legislatures. Fujimori used this excuse to close the Peruvian Congress, and Menem in Argentina and Collor in Brazil sought to govern without involving their legislatures.").

118. Gary W. Cox & Scott Morgenstern, *Epilogue: Latin America's Reactive Assemblies and Proactive Presidents*, *in* LEGISLATIVE POLITICS IN LATIN AMERICA, *supra* note 117, at 446, 446.

119. Cox & Morgenstern, *supra* note 65, at 187.

120. Peter M. Siavelis, *Exaggerated Presidentialism and Moderate Presidents: Executive–Legislative Relations in Chile*, *in* LEGISLATIVE POLITICS IN LATIN AMERICA, *supra* note 117, at 79, 83–84.

121. *Id.* at 83.

122. *Id.* at 84.

executive power is the ability of ministers and their advisors to sit in on the assembly (particularly in congressional committees) and actually solicit the support of the chamber on any given piece of legislation.[123]

Power asymmetry between branches is a relevant starting point for this analysis. It explains, for instance, the success of executive bills in comparison to that of representatives' proposals. As previously mentioned, of the twenty-four proposals approved by congress, seventeen were introduced by the executive branch and only seven by legislators.[124] Even the speed of approval is faster for executive proposals versus congressional bills (205 days versus 487 days, respectively).[125]

Executives are not always proactive, though. The use of executive powers has changed over time and therefore requires further explanation. To begin with, several political and strategic conditions made the first two post-transition democratic governments more cautious about pushing an extensive agenda of constitutional reforms. But after 2000, during the Lagos administration (2000–2006), we observed a more proactive executive branch. Although it faced a similar balance of power in congress, the behavior of the executive branch was significantly different from 1990 to 1999 than it was from 2000 to 2005. This difference is due to strategic as well as contextual conditions.

In the case of the Aylwin administration (1990–1994), a crucial concern was strategy. According to Edgardo Boeninger, Aylwin's Minister of the Presidency, one of the programmatic goals of the new authorities was the democratization of political institutions.[126] However, in his first message to the nation, Aylwin said, "[I]f we were to proceed in that manner [promoting reforms], it would produce a difficult and confrontational congressional debate with a high probability of rejection, given the signals sent by [the liberal right-wing party] *Renovación Nacional*, in the sense that [the reforms] . . . were inappropriate at this time."[127] Thus, the first democratic government chose to look for the support of right-wing parties on economic subjects (tax reform, for instance), postponing its political reform platform.[128]

There were political concerns as well. A central reform would imply taking relevant powers away from the armed forces, but the authorities were not yet willing to engage in a direct confrontation with the armed forces. Indeed, by 1984 Patricio Aylwin was convinced that the only way to promote

123. Cox & Morgenstern, *supra* note 65, at 185.

124. *See supra* Table 3.

125. Siavelis, *supra* note 120, at 87.

126. *See* EDGARDO BOENINGER, DEMOCRACIA EN CHILE: LECCIONES PARA LA GOBERNABILIDAD [DEMOCRACY IN CHILE: LESSONS FOR GOVERNABILITY] 390 (1997) (describing the primary goal of the Aylwin government as the removal of the military from its political role and the reinsertion of democratically obedient institutions into the political order).

127. *Id.* at 389.

128. *See id.* at 466–82 (chronicling the Aylwin administration's early economic, social, and tax reforms).

a peaceful transition to democracy was to avoid the question of the legitimacy of the constitution, and therefore to accept the armed forces as a veto player:

> The only advantage that [Pinochet] has over me . . . is that the constitution is ruling—whether I like it or not. This is . . . part of the reality that I accept. How can we break this impasse without anyone suffering humiliation? There is only one way: to deliberately avoid the theme of [the constitution's] legitimacy.[129]

Politically, President Aylwin chose a less confrontational strategy and accepted the relative autonomy of the armed forces. In 1990, just after Aylwin took office, Ricardo Lagos—his Minister of Education—suggested to him the idea of announcing one critical reform: the reestablishment of the presidential power to remove high-ranking officers from the armed forces.[130] President Aylwin responded that he believed "that doing something too strong was not convenient . . . at that moment."[131] Thus, during the first four years, the government opted for a strategy that combined pragmatic agreements with right-wing parties in congress and informal resolutions of conflicts with the military.[132] Left-wing parties within the coalition accepted this strategy without looking for popular support to push for reform.

The second democratic administration, Frei (1994–2000), developed a relatively similar strategy with some minor changes. After a military uprising in 1995, the government decided to signal its commitment to constitutional reforms by introducing a bill package that proposed eliminating appointed senators, modifying the Constitutional Tribunal, significantly reducing the NSC's power, and reestablishing the presidential power to remove officers from the armed forces.[133] Several months later, the

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129. RAFAEL OTANO, NUEVO CRONICA DE LA TRANSICION [NEW CHRONICLE OF THE TRANSITION] 21 (2006) (quoting Patricio Aylwin, Vice President, Partido Demócrata Cristiano de Chile [The Christian Democratic Party of Chile], Keynote Address at Inst. Chileno de Estudios Humanísticos Symposium: Un Sistema Jurídico–Político Constitucional para Chile [Chilean Inst. of Humanitarian Studies Symposium: A Judicial–Political Constitutional System for Chile] (July 28, 1984)).

130. PATRICIA POLITZER K., EL LIBRO DE LAGOS [THE BOOK OF LAGOS] 149 (1998).

131. *Id.*

132. *See* CLAUDIO FUENTES SAAVEDRA, LA TRANSICIÓN DE LOS MILITARES: RELACIONES CIVILES–MILITARES EN CHILE 1990–2006 [THE TRANSITION OF THE MILITARY: CIVIL–MILITARY RELATIONS IN CHILE 1990–2006], at 38–39 (2006) (describing how the Aylwin government compromised its goal of ensuring obedience of the military to the political order and instead focused on involving the military in decisions about foreign affairs and military technology).

133. Presidente Eduardo Frei Ruiz-Tagle, *Mensaje de S.E. El Presidente de la República con el que inicia un proyecto de reforma de la Constitución Política de la República* [*Message from H.E. the President of the Republic Initiating a Reform Project of the Political Constitution of the Republic*], BOLETÍN 1680-07, No. 146-331, at 4, 6, 7 (1995), *available at* http://sil.senado.cl/docsil/proy1293.doc; Presidente Eduardo Frei Ruiz-Tagle, *Mensaje de S.E. el Presidente de la República con el que inicia un proyecto de ley que modifica las leyes orgánicas constitutionales de las Fuerzas Armadas y de Carabineros de Chile* [*Message from H.E. the President of the Republic Initiating a Project to Modify the Organic Constitutional Laws of the Chilean Armed Forces and Police*], BOLETÍN 1682-02, No. 348-331, at 2, *available at* http://sil.senado.cl/docsil/proy1711.doc.

executive branch withdrew the proposal, as no agreement could be reached in congress.[134]

A strategic shift happened after Ricardo Lagos took office in March 2000. The political context helped him to pursue a proactive strategy of encouraging agreement with the opposition. In 1998, General Pinochet left the army and was appointed senator for life.[135] In October 1998, he was arrested in London, and in March 2000, he returned to Chile after his release on medical grounds. In his inaugural speech before congress, Lagos addressed the constitutional issue by suggesting that "[i]t is time to submit [the constitution] to an integral evaluation in order to adapt it to modern times as well as to give it all the legitimacy a supreme law of the state normally deserves."[136]

A few weeks later, the president, attempting to promote a political agreement in the senate, spoke to the president of the senate, Christian Democrat Andres Zaldívar.[137] After an informal period of political consultations with key senators from the CPD and *Alianza*, both parties agreed to submit two independent congressional bills in July 2000.[138] This was a key moment in setting the agenda for reform. While the CPD's original proposal involved the elimination of most authoritarian enclaves, *Alianza* submitted a more moderate set of reforms. Essentially, both segments agreed upon eliminating the appointment of senators, reforming the Constitutional

134. *Chile: Introductory Survey*, 2004 EUROPA WORLD Y.B. (vol. 1) 1078, 1079.

135. Fuentes, *supra* note 11, at 52.

136. Ricardo Lagos, President of Chile, Mensaje del Presidente de la Republica al Congreso Nacional [Message of the President of the Republic to the National Congress] (May 21, 2000), *available at* http://www.bcn.cl/susparlamentarios/mensajes_presidenciales/21m2000.pdf. Lagos proposed the need to eliminate appointed senators, change the binominal system, reform the Constitutional Tribunal and the National Security Council, reestablish the presidential power over the armed forces, increase legislative powers to oversee the executive branch, and promote an electoral campaign-finance system for the first time in the Chilean political history. *Id.*

137. Interview with Ricardo Lagos Escobar, Former President of Chile, in Santiago, Chile (June 1, 2010); Interview with Francisco Zúñiga, Professor of Constitutional Law, University of Chile, in Santiago, Chile (Aug. 25, 2010).

138. Interview with Gonzalo García, Advisor to the Minister of the Interior, in Santiago, Chile (Mar. 26, 2010). The CPD proposal was signed by senators Sergio Bitar, Juan Hamilton, Enrique Silva-Cimma, and Jose Antonio Viera-Gallo. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA DE LA LEY NO. 20050 [HISTORY OF LAW NO. 20050], at 28, 39 (2005) [hereinafter HISTORIA], *available at* http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf. Francisco Zúñiga and Francisco Cumplido played a significant role during the early stages of this process by helping senators in their first drafts and by actively participating in the senate discussions as experts. Interview with Francisco Zúñiga, *supra* note 137. Hernán Larraín, Andrés Chadwick, Sergio Diez and Sergio Romero sponsored the *Alianza* proposal. Press Release, Senate of the Republic of Chile, Reformas constitucionales fueron ratificadas por 150 votos a favor 3 en contra y 1 abstención [Constitutional Reforms Were Ratified by 150 Votes in Favor, 3 Against, and 1 Abstention] (July 4, 2000), *available at* http://www.senado.cl/prontus_galeria_noticias/site/artic/ 20080129/ pags/20080129124117.html.

Tribunal, increasing the legislature's oversight of the executive branch, and making probity a public duty for public servants.[139]

The CPD proposed a bill that incorporated the elimination of enclaves, the reduction of military powers, and the proposal of a proportional electoral system.[140] But the CPD introduced other topics as well, such as making national citizenship easier to attain, transitioning from a mandatory to a voluntary voting system, reducing the presidential term from six to four years, and promoting the recognition of indigenous rights.[141] The *Alianza*, in contrast, did not make any reference to military powers but did try to balance the power of the executive branch. It did this by incorporating issues such as a reduction of the executive branch's ability to transfer resources from one agency to another without congressional approval and by increasing the required supermajorities in subjects concerning public spending.[142] Moreover, it proposed reducing the scope of international law by incorporating a clause that mandated that a constitutional amendment be enacted before the president could sign an international treaty that would affect national norms.[143]

139. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 32–49.

140. *Id.* at 39–49.

141. *Id.*

142. *Id.* at 32–39.

143. *Id.* at 36.

Table 5. Agenda Represented in 2005 Proposals

	CPD Proposals	*Alianza* Proposals
Similarities in Original Proposal	• **Elimination of appointed senators** • **Modification of Constitutional Tribunal composition** • Empowerment of Constitutional Tribunal • Mechanisms to fulfill vacancies of legislators • **Increased legislative oversight of the executive branch** • Being representative as an exclusive task • Probity	
Discrepancies Negotiated in Congress	• Citizenship • **Control over the military** • Third sector (civil society, associations) • Presidential term reduction	• Regionalization
Discrepancies that Ended with No Agreement	• **Proportional electoral system** • Indigenous rights • Voluntary voting	• Presidential power to make budget transfers • Increased quorums in areas affecting public spending • Public safety definitions • International law

Source: These results are based on CPD and *Alianza* proposals submitted in congress. Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), *in* HISTORIA DE LA LEY NO. 20.050, at 5 (2005) (Bulletin No. 2.526-07), *available at* http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf; Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), *in* HISTORIA DE LA LEY NO. 20.050, *supra*, at 18 (Bulletin No. 2.534-07).

Note: Bold text represents topics traditionally considered to be "authoritarian enclaves."

Proposals were debated in the senate for more than four years, until November of 2004. On three separate occasions, different versions of the proposals were sent to the Senate Commission on the Constitution, Justice, and Legislature (SCCJL).[144] A critical juncture was reached in November 2001, when the SCCJL delivered a 600-page report addressing the basis for the agreement between the CPD and the *Alianza*.[145] In November 2004, the proposal was transferred to the Chamber of Deputies, and six months later it was sent back to the senate.[146]

144. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28; Segundo Informe Comisión de Constitución [Second Constitutional Commission Report] (Mar. 18, 2003), *in* HISTORIA, *supra* note 138, at 995; Nuevo Segundo Informe Comisión de Constitución [New Second Constitutional Commission Report] (Nov. 9, 2004), *in* HISTORIA, *supra* note 138, at 2124.

145. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28.

146. Oficio de Cámara de Origen a Cámara Revisora [Position of Chamber of Origin to Review Chamber] (Nov. 11, 2004), *in* HISTORIA, *supra* note 138, at 2168, 2439.

The constitution does not contain a provision for the type of conflicts that arose between the two chambers during the negotiation of this bill in November 2004. In order to solve this political impasse, the executive branch introduced twenty-seven presidential vetoes for those subjects upon which the two chambers did not agree.[147] Then, between June and August of 2005, the executive branch and the legislature established an informal commission to solve all pending issues.[148]

The executive branch played a crucial role in setting the agenda, promoting informal agreements on divisive issues, and proposing alternative courses of action for legislators.[149] Indeed, even though the proposals formally emerged from the senate, the executive branch took a leading role in setting the agenda by promoting specific initiatives and restricting the scope of issues to be considered on the floor.[150]

The acting government knew that any constitutional amendment would require the agreement of the opposition. The government also knew that the best place to achieve a minimum consensus was in the senate. Throughout the negotiation, the strategy of the executive branch was to narrow down the scope of issues to be addressed in deliberations.[151] In introducing the goals of the executive, Chief of Cabinet José Miguel Insulza clearly stated that the purpose of this reform is not to promote new improvements to the constitution but to take care of "what is the essential core of the original 1980 constitution, that is, the idea of a protected democracy."[152] He rejected the attempts of some CPD senators to increase the number of issues discussed in the reform—issues such as probity, freedom of expression, referendum initiatives, and other relevant subjects.[153] Insulza stated that "these issues are of great importance for the improvement of the constitution, but we need to address them once the essential philosophy has changed so that a constitution of protected democracy becomes a basic law."[154]

During the first debates at the SCCJL, some senators explicitly recognized the need to broaden the scope of constitutional reforms. Senator Edgardo Boeninger (a member of CPD), for instance, argued that if the idea was to draft a text that would endure over time, relevant issues cannot be excluded, such as the executive power to remove an officer or the reform of

147. Observaciones del Ejecutivo [Observations of the Executive] (Aug. 16, 2005), *in* HISTORIA, *supra* note 138, at 2714, 2724–29.

148. Interview with Anonymous, Constitutional Lawyer and Counselor to the Alliance for Chile, in Santiago, Chile (Aug. 18, 2010).

149. Interview with Jorge Burgos, Deputy of the Republic of Chile, in Santiago, Chile (Aug. 27, 2010).

150. *Id.*

151. *See id.* (explaining that the reforms had to be limited in order to make reform successful).

152. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 52 (statement of José Miguel Insulza).

153. *Id.* at 8.

154. *Id.*

the military justice system. "[My] concern is that after approving these reforms, new voices may emerge asking for new amendments. This would be a diminished result, a failure. . . . [T]he purpose should be to achieve stable texts which endure for long periods."[155] Moreover, Senator Jose Antonio Viera-Gallo introduced the need to regulate states of exception, an issue that was not considered in the original proposal.[156]

The executive branch followed the entire debate in congress very closely. Minister Insulza personally attended most discussion sessions in the senate, and his advisors acted as co-legislators by introducing amendments to ongoing proposals, submitting new indications, and making informal recommendations to representatives in congress.[157] Table 6 shows the number of proposals submitted to the SCCJL, where the original proposal of the constitutional reform had been outlined. Appointed senators were the most active, but the least successful, actors. The most successful institutional actors in getting proposals approved were the CPD, followed by the executive branch and the *Alianza.*

Table 6. Amendments Proposed to the First Draft of Reforms: July 2000–June 2001

N = 344	Proposed	Withdrawn	Inadmissible	Rejected	Approved
Executive	41	7	5	23	6 (14.6%)
CPD Senators	78	-	26	37	15 (19.2%)
Alianza Senators	110	1	34	59	16 (14.5%)
Appointed Senators	115	4	26	81	4 (3.4%)
Total	**344**	**12**	**91**	**200**	**41 (11.9%)**

Source: HISTORIA DE LA LEY NO. 20.050 [HISTORY OF LAW NO. 20.050] (2005), *available at* http://www.bcn.cl/histley/lfs/hdl-20050/HL20050.pdf.

The Ministry of the Interior established a team of constitutional lawyers who followed the debate in the senate closely and proposed alternatives to the discussion through formal indications to ongoing debates in different commissions.[158] Minister Insulza personally briefed the president on a regular basis, and negotiations were discussed during Sunday presidential

155. *Id.* at 63 (statement of Edgardo Boeninger).

156. *See* Discusión en Sala [Discussion in Chambers] (Sept. 3, 2003), *in* HISTORIA, *supra* note 138, at 1692, 1704–05 (statement of Senator Viera-Gallo) (recalling that he had raised the need to make amendments that had not been included in any of the previous motions and that included regulating states of exception).

157. *See* Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 703–04 (noting that Minister Insulza constantly attended Senate Commission meetings and collaborated with the members); *see also, e.g.*, Interview with Gonzalo García, *supra* note 138 (discussing García's role as an advisor in the reform process including the fact that he drafted reforms).

158. Interview with Jorge Burgos, *supra* note 149; Interview with Gonzalo García, *supra* note 138.

meetings with the executive political committee.[159] The executive branch established informal contacts with key actors in congress to negotiate agreements and propose consensual drafts on specific articles.[160] According to Deputy Jorge Burgos (CPD), a member of the Commission on the Constitution in the Chamber of Deputies,

> I debated with two very influential people, not as government officials, but as constitutionalists, as friends and as comrades [in the same political party]—[Gonzalo] García and [Jorge] Carrea, [both at the Ministry of the Interior]. . . . Yes, I had [other] advice and discussions, but particularly when indications arose in the discussion and we had to bring them 'after school,' I stayed with Gonzalo and Correa. I always informed Insulza. We also worked well with Carmona's opinions . . . .[161]

By early 2005, more than two hundred proposals were pending approval.[162] The government promoted the creation of an informal advisory group that included academic lawyers close to the CPD and the *Alianza*.[163] According to one expert, Carlos Carmona called him and said,

> why don't you form a commission with a group of constitutionalists, you interact with the [Chamber of] Deputies, and we will exchange points of view and we can promote agreement . . . . Form a commission; try to make it pluralist, and write an alternative proposal and we can present it to the House as a guide.[164]

The expert continued, "I talked with Carmona privately, and he sent it out. At that time, he chaired the Constitutional Commission. Juan Bustos and I met with him a couple times in private . . . and we had a few private, informal sessions with the Constitutional Commission . . . ."[165]

A second crucial moment came in June 2005 when the Chamber of Deputies sent the proposal back to the senate. As previously mentioned, the constitution does not contain any provision to address eventual discrepancies between the two chambers concerning constitutional amendments. The executive branch proposed the use of vetoes to solve this impasse and established an informal commission in which members of both chambers as well as the executive branch participated to achieve a final agreement.[166] As Gonzalo García—one of the Minister of the Interior's key advisors for this

159. President Lagos established a regular Sunday meeting with the Political Committee of the Cabinet (Ministers of Interior, Communications, Presidency, and Finance). Interview with Ricardo Lagos Escobar, *supra* note 137. They briefed the President on the coming week's agenda. *Id.*

160. Interview with Jorge Burgos, *supra* note 149.

161. *Id.*

162. Interview with Gonzalo García, *supra* note 138.

163. *See* Interview with Anonymous, *supra* note 148 (discussing the suggestion by Carlos Carmona that the lawyer form a group of constitutionalists to lobby and draft an alternate plan).

164. *Id.*

165. *Id.*

166. *See supra* notes 147–48 and accompanying text.

reform—explained, twenty-seven objections needed to be resolved: "And so a special procedure for sixteen vetoes was agreed upon. Some of the vetoes ended up being stylistic corrections, and some were substantive. . . . Then, new issues appeared with new demands . . . . I remember two: the extension of the freedom of expression . . . and improving the procedure respecting professional association . . . ."[167]

By drafting the final proposals through the use of vetoes, the executive branch obtained a critical advantage. This informal mechanism also allowed members of the executive branch to request the opinions of experts and other state powers. For instance, right-wing parties asked the executive branch for some of the members of the Constitutional Tribunal to have access to the final draft.[168] Gonzalo García mentioned,

> Indeed, congressional representatives delegated to us the power to write the final draft of the constitutional agreement. At some point, the opposition requested that members of the Constitutional Tribunal check one of the drafts, which was very complicated from an institutional point of view. But we accepted that proposal since right-wing parties trusted the judges' advice on the subjects we were negotiating.[169]

To convey a general idea about who the key players were, I created a ranking system based on the number of indications approved by congress during the first debate at the SCCJL, as well as actors' perceptions of who was most relevant to this reform. Fewer than thirty people—including government representatives, legislators, and experts—are recognized as key players in the reform. Interestingly, during most of the negotiation, the subject of key players was not part of the debate in the national press. In addition, very few civil-society actors were involved during the extensive process of negotiations in congress.

167. Interview with Gonzalo García, *supra* note 138.
168. *Id.*
169. *Id.*

Table 7. Key Players Within the 2005 Constitutional Reform

	Executive	Senators	Deputies	Experts
First Level	Carmona, C. Correa S. J. García, G. Insulza, J. M. Lagos, R.	Boeninger, E. Chadwick, A. Espina, A. Larraín, H. Viera Gallo, J. Zaldívar, A.	Ascencio, A Burgos, J. Bustos, J. Paya, D.	
Second Level	Vidal, F. Kleissac, J.	Diez, S. Romero, S. Hamilton, J.	Ceroni, G. Guzmán,P. Riveros, E.	Zuñiga, F. Cumplido, F. Nogueira, H. Gómez, G.

Note: This is a qualitative scale based on (a) the number of congressionally-approved bills each senator or deputy submitted, ranking them as high, medium or low; and (b) key actors' perception of each other's influence within the process based on fifteen interviews conducted with key actors.

Thus, the executive branch had institutional as well as political tools to push its agenda. Facing a change of administration in 2005 and with more than two hundred pending proposals, the government pressed for the quick closure of an agreement that omitted several of the programmatic issues that the CPD had promoted.[170]

A wide range of substantial topics was left out of the political discussion in 2000 because none of the political parties represented in congress introduced them. These topics included the revision of supermajority requirements for constitutional reforms, the existence of eighteen organic laws with supermajority requirements, the constitutional prohibition of union leaders running for public office, the elimination of the constitutional clause making abortion illegal under any circumstances, the acceptance of the death penalty in the constitution under a qualified supermajority, and the consideration of the "family" as the essential institution of the society along with the duty of the state to promote and strengthen it. The executive branch's strategy of narrowing the reform to a limited number of subjects, combined with the absence of the necessary supermajorities for approval in congress and the lack of active social support for these reforms, made it very hard for progressive forces to even suggest these proposals.[171]

170. *Id.*

171. A review of printed press during the period (2000–2005) reflects that the whole legislative process received very little media attention. Most articles were op-ed pieces by experts and congressional representatives arguing for or against very specific portions of the reforms. Active social actors did not participate in congressional debates, with three exceptions: indigenous organizations, who were invited to give their opinions concerning indigenous rights; representatives of professional associations attended some of the congressional sessions; and Colegio de Periodistas (a journalists' association) did some lobbying for specific reforms within the legislation. *See, e.g.*,

Progressive sectors of the coalition attempted, unsuccessfully, to work certain topics into the debate: more substantial reform of the electoral system;[172] constitutional recognition of indigenous rights;[173] and recognition of Chile not just as a democratic state but as a "social and democratic state, inspired in principles of freedom, equality and pluralism."[174]

One of the most sensitive areas was the reform of the electoral system. The CPD originally proposed to replace it with a proportional system of representation, but the right wing was simply not willing to discuss the topic.[175] By 2005, the CPD and the opposition in congress had still not reached an agreement regarding the subject.[176] As a way to demonstrate his own commitment to change, President Lagos began to pressure political actors to reform the electoral system.[177]

Negotiations ended with the *Alianza* accepting the transfer of the issue to the binomial system, which meant that the issue of electoral reform would no longer be considered a constitutional issue but would be addressed under the rules of organic law.[178] This changed the supermajority required for approval of an eventual reform from three-fifths to four-sevenths.[179] However, the new version of the constitution also dictates the number of deputies in the chamber.[180] As a result, any significant change to the electoral system (anything that would alter the total number of deputies) would be considered a constitutional reform and would require three-fifths of the votes.[181] In President Lagos's words,

> I did not consider it acceptable that [the reference to] the binomial system would be in the constitution. And we chose the typical Chilean way: it is not in the constitution, but changing it is as difficult

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Segundo Informe Comisión de Constitución [Second Constitutional Commission Report] (Mar. 18, 2003), *in* HISTORIA, *supra* note 138, at 995, 1001–02, 1021–33 (stating that representatives of indigenous organizations were specifically invited to speak with the Commission, and summarizing their comments); Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 255–62 (noting that the Commission heard from the heads of various professional associations); *id.* at 255, 257–58 (summarizing the comments of the College of Journalists before the Commission).

172. Discusión en Sala [Discussion in Chambers] (Nov. 14, 2001), *in* HISTORIA, *supra* note 138, at 697, 735–37 (statements of Senator Bitar).

173. Discusión en Sala [Discussion in Chambers] (Apr. 29, 2003), *in* HISTORIA, *supra* note 138, at 1437, 1460–62 (statements of Senator Gazmuri).

174. *See* Discusión en Sala [Discussion in Chambers] (June 11, 2003), *in* HISTORIA, *supra* note 138, at 1526, 1526 (introducing for discussion a version of article 4 that contained this language).

175. Interview with Jorge Burgos, *supra* note 149.

176. Interview with Gonzalo García, *supra* note 138.

177. Interview with Ricardo Lagos Escobar, *supra* note 137.

178. *Id.*

179. *See supra* note 90 and accompanying text.

180. C.P. arts. 47, 49 (Chile).

181. *Id.* art. 127.

> as if it were in the constitution. . . . What I did not like about this part is that incumbents made constitutional reforms with a calculator.[182]

Overall, during the Lagos administration the executive branch was particularly proactive about collaborating with the opposition on a legislative agreement. The administration invested the time and resources needed to reach an agreement and to advance a substantial transformation of the constitution. The executive branch acted as co-legislator, taking advantage of the political circumstances, setting the agenda, limiting the scope of topics to be discussed, and promoting agreements through formal and informal mechanisms of consensus building among political actors.

B. Expectations of the Opposition

Obviously, the outcome of the story also depended on the willingness of those with veto power to accept a change to the status quo. Why did the opposition accept the proposed constitutional changes? We already noticed that the balance of power in congress has not changed dramatically since the transition to democracy. I claim that some key actors within the right-wing opposition decided to start negotiations with the government using a "forward-looking" strategy.

The 1999 presidential election was a key moment for the opposition. In December 1999, the right-wing candidate Joaquin Lavin almost tied candidate Ricardo Lagos in the first round and trailed by 2.62% of the votes in the second round (a difference of approximately 190,000 votes).[183] At the same time, public opinion supported the reformation of the armed forces' role because the arrest of General Pinochet in London had substantially increased support for human rights and diminished military prestige.[184]

Table 8. Results of 1999 Presidential Elections (%)

	First Round (Dec. 1999)	Second Round (Jan. 2000)
Ricardo Lagos, CPD	47.96	51.31
Joaquin Lavin, *Alianza*	47.51	48.69
Other candidates	4.53	-

Source: Ministerio del Interior [Ministry of the Interior], Gobierno de Chile [Government of Chile], *Resultado Electoral 2009* [*Electoral Results 2009*], SITIO HISTÓRICO ELECTORAL [HISTORICAL ELECTORAL SITE], http://www.elecciones.gob.cl/.

182. Interview with Ricardo Lagos Escobar, *supra* note 137.

183. *See infra* Table 8.

184. FUENTES SAAVEDRA, *supra* note 132, at 120.

Programmatically, it was hard for the *Alianza* to support reforms in subjects they had defended since the beginning of the transition.[185] The *Alianza* also faced internal pressure from former collaborators of the military regime, such as UDI senator Sergio Fernandez (former Minister of the Interior), and military officers appointed as senators in 1998, such as former Chief of the Navy Jorge Martinez-Busch, former Chief of the Air Force Ramon Vega, former General Julio Canessa, and former Director of the Police Fernando Cordero.[186]

However, key leaders from both of the parties comprising the *Alianza* (*Renovación Nacional* and UDI) decided to support reforms in critical areas, such as the reduction of military power and the elimination of appointment power over senators.[187] From a political perspective, approving these reforms would put *Alianza* more in tune with overall public opinion, which had called for the reduction of military powers and demanded recognition of the human rights abuses committed during the military regime.[188] Between 2000 and 2004, three critical factors made the *Alianza* distance itself from the armed forces and particularly from General Pinochet. First, a 2001 roundtable on human rights sponsored by the government established several important recommendations.[189] One of these was that the armed forces provide more information on the location of thousands of detained citizens who had disappeared during the military regime.[190] Second, the Lagos administration established a second presidential commission on torture and imprisonment.[191] The commission's final report had a significant public impact on the national debate on human rights.[192] Finally, General Pinochet's reputation was seriously damaged after an investigation was carried out in the United States.[193] The investigation revealed that Pinochet had more than USD13 million in several bank accounts at the Riggs Bank in Washington, D.C.[194]

The *Alianza* also considered eventual shifts in the future balance of power in congress. After the initial appointment of senators by General Pinochet (nine were appointed in 1990), the balance of power gradually

185. *See id.* at 63–96 (chronicling the right wing's support for Pinochet and the military, as well as its opposition to the recognition of human rights throughout the 1990s and on into the 2000s).

186. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 576–635 (detailing the different proposals and positions taken regarding reforms to the armed forces, areas of order, and public safety).

187. *See supra* note 101 and accompanying text.

188. *See supra* note 184 and accompanying text.

189. FUENTES SAAVEDRA, *supra* note 132, at 86.

190. *Id.*

191. *See id.* at 123–24 (describing President Lagos's 2003 agenda on human rights and describing the National Commission on Political Imprisonment and Torture that was established in late 2003).

192. *Id.* at 124.

193. *Id.* at 90.

194. *See id.* (noting that the account contained the equivalent of CLP10 billion).

started favoring the center–left coalition.[195] If the trend continued, by 2005, President Lagos would have been able to appoint three of his supporters directly to the senate. Lagos, along with former President Frei, would also merit the personal right to serve as senators for life.[196] Even though this shift would not be sufficient enough to promote constitutional reforms, it would eventually give the majority of the senate to the *Concertación*.

Alianza representatives quickly understood the new political reality. In June 2000, they publicly recognized the nation's political mood: "In our opinion, ending this period of transition would allow us to respond to the message sent to us by the majority of the electorate in the last presidential elections, which is the demand to reestablish social peace in this country."[197] Following the party's new message, Senator Andres Chadwick stated that "[our political] sector has reconsidered some of its positions, as political circumstances now favor new steps [of constitutional reform]."[198]

Thus, within right-wing parties, a forward-looking decision-making process was at play. Because of the political context, the right wing was more open to reducing the power of the armed forces. It was also more open to critical reforms related to the Pinochet regime's legacy. The most sensitive of these issues was the institution of appointed senators, which the right wing was willing to eliminate as early as 2000.[199] The *Alianza*'s strategy was to accept the elimination of some authoritarian enclaves (appointed senators and reduction of military powers); increase the legislature's oversight of the executive branch; and reduce some of the executive branch's fiscal powers, such as its ability to reallocate resources.[200]

The final outcome of the reform was less than what the CPD had aimed for, but certainly more than what right-wing parties originally proposed in 2000. Overall, the outcome can be explained by the combination of a proactive executive branch and key actors within the opposition who were willing to transform the status quo.

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195. *See* Patricio Navia, *Bachelet's Election in Chile: The 2006 Presidential Contest*, REVISTA: HARV. REV. LATIN AM., Spring/Summer 2006, at 9, 9, 11 (noting that the center–left coalition "has ruled Chile since 1990 and eventually gained a majority in the senate in 2005").

196. *See* C.P. art. 45 (Chile) (providing former presidents who served six years or more the right to serve as senators for life).

197. Moción Parlamentaria [Parliamentary Motion] (June 4, 2000), *in* HISTORIA, *supra* note 138, at 5, 5 (Bulletin No. 2.536-07).

198. Informe Comisión de Constitución [Constitutional Commission Report] (Nov. 6, 2001), *in* HISTORIA, *supra* note 138, at 28, 65 (statement of Senator Andrés Chadwick).

199. Mark Falcoff, *AEI Outlook Series: Chile Moves On*, AEI ONLINE, Apr. 2000, http://www.aei.org/outlook/11413.

200. *See, e.g.*, Moción Parlamentaria [Parliamentary Motion] (July 4, 2000), *in* HISTORIA, *supra* note 138, at 5, 5–17 (motion of Senators Andrés Chadwick, Sergio Díez Urzúa, Hernán Larraín Fernández, and Sergio Romero Pizarro) (proposing constitutional reforms that, among other changes, would do away with appointed senators, eliminate appointed senators, increase legislative oversight of the executive, and ensure legal certainty for pending cases dealing with human rights and the armed forces).

IV. Conclusion

What can we learn from this case that would be relevant to building a theory of constitutional change in democratic societies? First, it is reasonable to expect that if the original constitutional structure was drafted by a minority and if this arrangement distributes power unevenly, then once there is a relevant political shift, new authorities will try to modify the status quo. But the total replacement of the constitution is not always an automatic option for democratic forces. In a transitional period, leaders may choose strategies that are less confrontational, depending on what they consider the most relevant issues to be addressed and the perceived balance of power.

Second, in presidential systems, a crucial agent of change is the executive branch. Actors within this branch have important political and institutional tools for influencing political outcomes. The Chilean case illustrates just how powerful informal and formal mechanisms are for building consensus within a highly constrained political environment.

Third, it seems that inclusion is particularly relevant at two points in the process of constitutional change: at the moment a constitution is drafted and also at any point when a constitution is amended. In Chile, an extensive but highly elitist process of reforming the constitution in 1989 and 2005 has led to a new period of reform proposals. The political actors represented in congress have initiated more intensive discussions in several areas concerning the constitution. It seems that the gradual reform strategy has a paradoxical effect; it promotes a never-ending process of redefining the rules of the game.

* * *

Shifting Constitutional Designs in Latin America: A Two-Level Explanation

Gabriel L. Negretto*

Latin American countries have been riding a massive wave of constitutional change since 1978. One aspect of the political institutions selected as a result of this process seems particularly puzzling. Reforms that promote party pluralism and consensual decision making coexist, often within the same design, with other reforms that restrict party competition and foster concentration of power in the executive branch. This Article argues that constitutional choice is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers. According to this theory, the seemingly contradictory trends of design that we observe in Latin America reflect (i) the diverse governance problems faced by new democracies and (ii) the heterogeneous interests of the actors who had influence over institutional selection. The Article provides evidence in support of this theory from the recent experience of constitution making in Latin America.

> Let us remember, then, in the first place, that political institutions (however the proposition may be at times ignored) are the work of men; owe their origin and their whole existence to human will. Men did not wake on a summer morning and find them sprung up .... Like all things, therefore, which are made by men, they may be either well or ill made; judgment and skill may have been exercised in their production, or the reverse of these.
>
> —John Stuart Mill, 1861[1]

Latin American countries have been riding a massive wave of constitutional change since 1978. One aspect of the institutions selected as a result of this process seems particularly puzzling from the point of view of an external observer. Reforms that promote party pluralism and consensual decision making coexist, often within the same design, with other reforms that restrict party competition and foster concentration of power in the executive branch. I propose that this seemingly contradictory design is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers.

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1. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 4 (Henry Regnery Co. 1962) (1861).

Recent constitutional changes in Latin America have introduced more inclusive rules for electing presidents and legislators, congressional controls over cabinets, new oversight institutions, mechanisms to strengthen judicial independence, and diverse degrees of political decentralization.[2] These are reforms that are intended to diffuse power and place limits on the partisan or government powers of presidents. Paradoxically, however, other recent reforms go in the opposite direction. From 1978 to 1993, most constitutions maintained relatively restrictive rules on presidential reelection. Since that time, however, there has been a slight but steady increase in the number of constitutions and amendments that have made the rules of presidential reelection more permissive.[3] During the last three decades, constitutional designers in Latin America have also increased the legislative powers of presidents, particularly their powers to promote legislative change.[4]

The contrasting orientations of many of these reforms reflect the diverse performance problems faced by new democracies in Latin America as they adapt to the dynamics of multiparty competition and respond to citizens' demands for better representation and public goods. Inherited majoritarian electoral rules for both presidential and legislative elections often failed to produce acceptable results in multiparty competitions.[5] The traditional concentration of power in the executive failed to provide effective protection for individual rights, and it restricted political participation and weakened the independence and power of the judiciary and oversight institutions.[6] The classic checks-and-balances model of an executive with strong reactive legislative powers but weak proactive powers proved ineffective to enable swift decisions in a context of recurrent economic instability.[7] All of these governance problems have justified the need to reform constitutions in somewhat opposite directions, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary while increasing the legislative powers of presidents.

Governance problems, however, admit different possible solutions, and there is always some degree of ambiguity surrounding the question of

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2. *See generally* Gabriel L. Negretto, *Paradojas de la reforma constitucional en América Latina* [*Paradoxes of Constitutional Reform in Latin America*], 1 J. DEMOCRACY EN ESPAÑOL 38, 41–51 (2009) (Chile) (discussing recent constitutional reforms in Latin America).

3. *See id.* at 50–51 (observing the increasing permissiveness of presidential reelection rules).

4. *See* Gabriel Negretto, *Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America*, 39 BRIT. J. POL. SCI. 117, 120–21 (2009) (demonstrating the general increase of the legislative powers of presidents both before and after 1978).

5. *See* Gabriel Negretto, *Propuesta para una reforma electoral en México* [*Proposal for an Electoral Reform in Mexico*], 14 POLÍTICA Y GOBIERNO [POL. & GOV'T] 215, 215–19 (2007) (Mex.) (explaining how plurality rules of presidential election produce undesirable results when electoral competition becomes fragmented).

6. *See* Negretto, *supra* note 2, at 38–39, 42, 46–47 (explaining how past failures of presidential democracies led to proposals of reform aimed at reducing the governmental power of presidents).

7. *See id.* at 50 (observing that recurrent economic crises in Latin America have provided presidents with an incentive to request proactive legislative powers).

precisely what design will best improve institutional performance. Albeit in varying degrees, this indeterminacy provides strategic politicians with room to propose or support those alternatives that best suit their interests or are the least damaging to them. This leads to competition and partisan conflict, which makes the relative power of reformers crucial to explaining comparative variations in constitutional choice.[8] A few constitutional reforms since 1978 have been enacted by dominant parties, which explains the occasional adoption of power-concentrating institutions.[9] But most reforms have been passed by coalitions that include at least two parties with conflicting interests.[10] Although the exact outcome would vary depending on the relative bargaining power of the actors, multiparty coalitions are likely to adopt a hybrid design that combines power-sharing and power-concentrating rules, as we can observe in many reforms adopted in Latin America during the most recent decades.

This Article starts by analyzing the scope of constitutional change in Latin America in election and decision-making rules. This is followed by a theory of constitutional choice that accounts for the potentially conflicting goals of political actors, both cooperative and distributive, in constitutional design. The third Part provides evidence in support of this theory from the recent experience of constitution making in Latin America. The Article concludes by discussing the tension between the normative goals of an optimal democratic-constitutional design and the constraints imposed by the governance problems of Latin American democracies in an unstable partisan context.

I. Constitutional Transformations in Latin America

The content of new constitutions and important amendments enacted in Latin America since 1978 reveals substantial cross-national variation in design. Variation is even greater if one considers institutional reforms implemented at the level of ordinary laws that also affect the performance of the constitutional regime. Within this diversity, however, several trends are discernible in the general orientation of reforms.

I will review the trends of design that have taken place in the area of election and decision-making rules from 1978 to 2008.[11] These rules are not the only constitutional features relevant to understanding the workings of a representative democracy. They are, however, the basic aspects of constitutional design that students of political institutions have traditionally identified

8. Gabriel L. Negretto, Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America 13 (2010) (unpublished manuscript) (on file with author).

9. *Id.* at 15.

10. *Id.*

11. For analyses of historical models of constitutional design in Latin America, see José Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEXAS L. REV. 1707 (2011).

when comparing the nature, performance, and quality of political regimes across the world.[12]

A. Election Rules

In contrast to a parliamentary regime, where the election of members of parliament determines both the composition of the assembly and the formation of government, in a presidential regime, these results depend on the separate election of the president and members of congress. The rules governing presidential and congressional elections thus affect the legislative support for the president's agenda, the incentives for coalition formation, and the degree of participation and representation of voters in elections. I will focus here on some central aspects of these rules.

1. Pluralist Rules for the Election of Deputies and Presidents.—The most widely accepted hypothesis about the effect of electoral rules on party systems is that, while plurality rule in single-member districts induces the creation and maintenance of two-party systems, majority runoff and proportional representation (PR) formulas impose fewer constraints on the number of parties that are able to compete and win office in elections.[13] From this perspective, it seems clear that electoral reform in Latin America since 1978 represents a shift from more to less restrictive rules on party competition.

Since the early decades of the twentieth century, there has been a clear trend toward replacing majority or plurality formulas with PR formulas for legislative elections in Latin America. The trend started with Costa Rica in 1913, followed by Uruguay in 1917, the Dominican Republic in 1924, and Chile in 1925.[14] By 1978, just before the expansion of electoral democracy in the region, fifteen out of eighteen countries had adopted variants of PR formulas.[15] The few countries that had not adopted PR formulas previously did so more recently. Between 1977 and 1986, Mexico replaced plurality elections with a mixed system that combines single-member plurality with multimember-district proportional elections.[16] Meanwhile, Nicaragua in

12. *See* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 2–6 (1999) (comparing constitutional regimes according to whether they concentrate or diffuse power in the electoral and decision-making dimensions); G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY 4–17 (2000) (introducing an analysis similar to Lijphart's, but with more emphasis on the impact of constitutional design on the congruence between the preferences of voters and policy makers).

13. GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 13–14 (1997) (citing MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 239 (Barbara North & Robert North trans., 1954)).

14. Negretto, *supra* note 8, at 36.

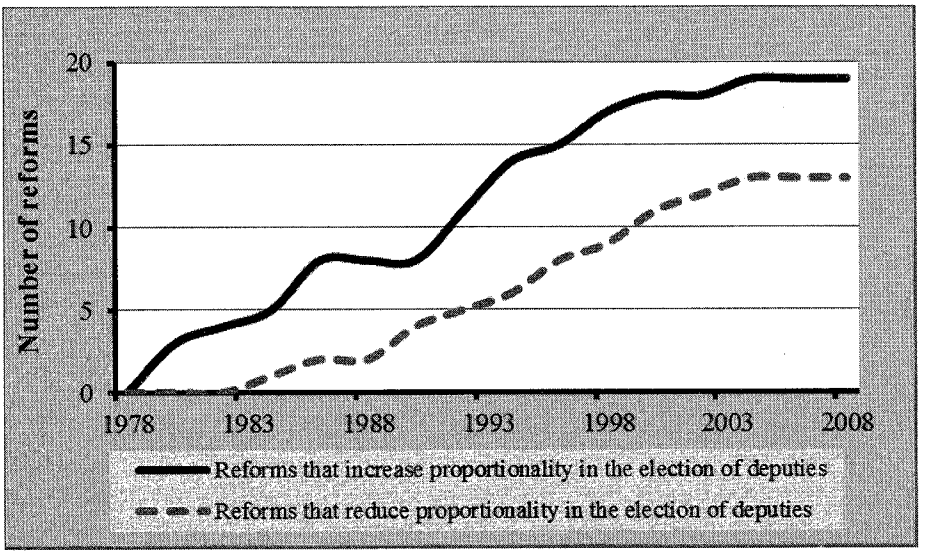
15. Negretto, *supra* note 4, at 118.

16. Gabriel L. Negretto, *La reforma electoral en América Latina: Entre el interés partidario y las demandas ciudadanas* [*The Electoral Reform in Latin America: Between Partisan Interests and*

1984 and Paraguay in 1992 adopted PR formulas for the first time.[17] As a result of these reforms, no country in Latin America currently elects legislators by a purely majoritarian system.[18]

Proportionality, of course, varies depending on the method of seat allocation, district magnitude, assembly size, and legal thresholds.[19] Mixed systems can also be more or less proportional depending on the percentage of total seats allocated by plurality and on whether PR seats are used to compensate for the concentrating effect of single-member district elections.[20] Even taking these elements into account, however, one can also observe that the election of deputies has become more proportional over time. Figure 1 illustrates the number of reforms that made the electoral system more and less proportional from 1978 to 2008.

Figure 1. Reforms to the System for Electing Deputies by Year, 1978–2008



Counting both constitutional reforms and reforms to ordinary election laws, there have been thirty-two important electoral reforms in the system for

Citizen Demands], *in* REFORMA DEL SISTEMA ELECTORAL CHILENO [REFORM OF THE CHILEAN ELECTORAL SYSTEM] 63, 88 & tbl.6, 89 (Arturo Fontaine et al. eds., 2009).

17. *Id.* at 85 tbl.4.

18. *See id.* at 84, 85 tbl.4 (identifying the proportional formulas for legislative elections in Latin American countries).

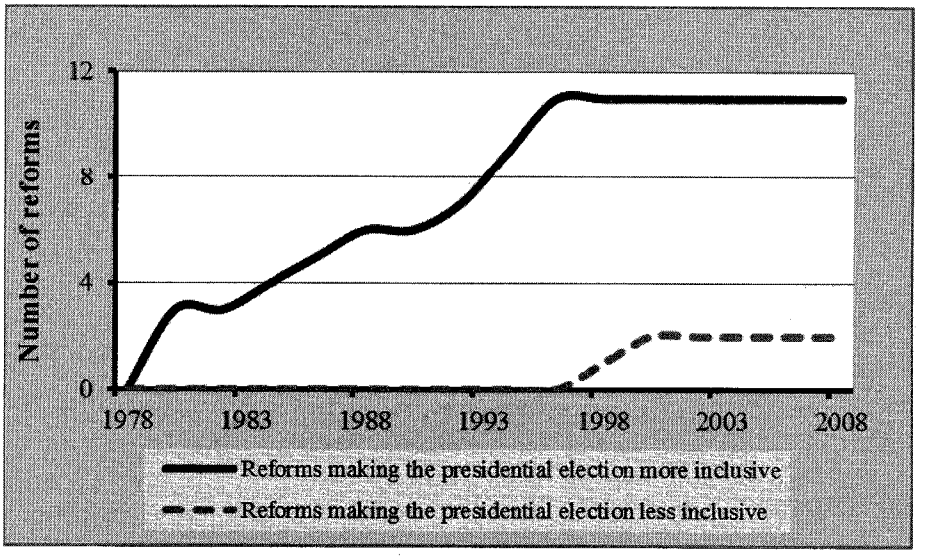
19. AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990, at 10–13 (1994).

20. For an overview of the concept and variations of mixed electoral systems, see MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2003).

electing deputies in Latin America from 1978 to 2008.[21] Most (nineteen) of these reforms increase proportionality due to the adoption of a more inclusive electoral formula, an increase in average district magnitude, or the elimination of a preexisting legal threshold.[22] The rest of the reforms (thirteen) have moved in the opposite direction, either because they adopted formulas that benefited larger parties, reduced the average magnitude of districts, or created a legal threshold for obtaining seats.[23]

The trend toward electoral inclusiveness is even more pronounced in the reforms that have affected the rules for electing presidents during recent decades. While countries experimented with various formulas for choosing executives during the twentieth century, the democratization process initiated in 1978 has brought a gradual abandoning of direct elections by simple plurality and the adoption of alternative rules, such as qualified plurality—with a minimum threshold to win in the first round—and majority-runoff formulas.[24] Figure 2 compares the number of reforms that have increased and decreased the inclusiveness of presidential-election formulas.

Figure 2. Reforms to the Formula for Electing the President by Year, 1978–2008



21. These reforms include only changes in the electoral formula to elect deputies, changes of at least 25% in the average magnitude of the districts or in the size of the lower or single chamber of congress, and changes in the legal threshold. Negretto, *supra* note 2, at 44 & 54 n.4.

22. *Id.* at 44.

23. *Id.* Electoral formulas have been ordered from least to most proportional as follows: Imperiali highest average, Imperiali largest remainders, d'Hondt highest average, Droop largest remainders, modified Saint Laguë highest average, and Hare largest remainders. THE POLITICS OF ELECTORAL SYSTEMS 589 app. (Michael Gallagher & Paul Mitchell eds., 2005).

24. Gabriel L. Negretto, *Choosing How to Choose Presidents: Parties, Military Rulers, and Presidential Elections in Latin America*, 68 J. POL. 421, 422 (2006).

Taking the last formula used in a competitive presidential election before 1978 as a reference point, there have been thirteen changes in the formulas to elect presidents from 1978 to 2008.[25] Eight of these reforms replaced simple-plurality elections with runoff elections, either with a majority or a qualified-plurality threshold.[26] In three cases, direct presidential elections by majority already existed, but the involvement of congress to determine outcomes was replaced by a second round of voting in the runoff.[27] Only two cases have shifted from less to more restrictive electoral rules: Ecuador in 1998, which adopted qualified-plurality presidential elections after having used majority runoff since 1979, and Nicaragua in 2000, which lowered the threshold of votes for winning the presidential election from 45% to 40%.[28] As a result of these reforms, by 2008, only five countries—Honduras, Mexico, Panama, Paraguay, and Venezuela—used plurality rule for electing their president.[29]

To recapitulate, electoral reforms during the last thirty years have aimed to make electoral competition and representation more inclusive, whether we analyze the different components of the system to elect deputies or presidential election formulas. This conclusion holds if we take into account electoral cycles. As of 2008, most countries (twelve) have concurrent presidential and congressional elections.[30] Concurrent elections, however, only put downward pressure on the number of parties that compete in legislative elections when presidents are elected by plurality.[31] Only three countries—Honduras, Panama, and Paraguay—have this combination, meaning that in most cases, the proportionality of the system to elect deputies is not neutralized by the "coattails effect" of the presidential election.[32]

2. Personalized Voting Systems.—Another important set of electoral rules, a set that has been subject to revision in recent years, determines the personal or partisan nature of voting in legislative elections.[33] Partisan

25. Negretto, *supra* note 2, at 43.

26. Before 1994, Argentina had an electoral-college system which, in practice, worked like a plurality system. Gabriel L. Negretto, *Argentina: Compromising on a Qualified Plurality System*, *in* HANDBOOK OF ELECTORAL SYSTEM CHOICE 110, 110–11 (Josep M. Colomer ed., 2004).

27. Negretto, *supra* note 2, at 44.

28. Negretto, *supra* note 16, at 81 tbl.2.

29. Negretto, *supra* note 2, at 43.

30. Of the ten reforms in this area between 1978 and 2007, five have increased and five have decreased the proximity of presidential and congressional elections. Negretto, *supra* note 16, at 82 tbl.3.

31. Matt Golder, *Presidential Coattails and Legislative Fragmentation*, 50 AM. J. POL. SCI. 34, 46 (2006).

32. *Cf. id.* at 35–36 (describing the coattails effect of presidential elections, whereby voters' preferences in legislative elections are linked to their presidential preferences); Negretto, *supra* note 16, at 83 (identifying the three countries with concurrent elections).

33. *See* Matthew Søberg Shugart, *Comparative Electoral Systems Research: The Maturation of a Field and New Challenges Ahead*, *in* THE POLITICS OF ELECTORAL SYSTEMS, *supra* note 23, at

voting is strong when all legislators are selected from single closed-party lists in multimember districts.[34] Personalization increases when party candidates compete under multiple closed lists, flexible lists, and open lists.[35] Personalization also increases when a proportion of legislators is elected from single-member districts.[36] Personalization of voting is important because it may foster more voter participation in candidate selection as well as increased intraparty competition and local orientation of policies.[37]

Over time, significant reforms have altered the influence of voters over candidates elected in congressional elections. By 1977, just before the beginning of the "third wave" of democratization in Latin America, most countries in the region (fourteen) used single closed lists to elect all members of the single or lower chamber of congress.[38] Only two countries (Colombia and Uruguay) used multiple closed lists, and two (Chile and Brazil) used open lists.[39] As shown in Figure 3, this trend has recently been reversed.

25, 36 (discussing the increased scholarship analyzing the effect of electoral rules on how parties are organized and how legislators interact with their constituents). The partisan or personal nature of voting also depends on internal mechanisms of candidate selection, which affect candidates for both presidential and legislative elections. *See generally* Flavia Freidenberg, *Mucho ruido y pocas nueces: Organizaciones partidistas y democracia interna en América Latina* [*Much Ado About Nothing: Party Organizations and Internal Democracy in Latin America*], 1 POLIS 91, 91–129 (2005) (Mex.) (discussing the different mechanisms of candidate selection in Latin America and how they vary across parties). Reforms in these areas, however, vary from party to party and thus do not lend themselves to cross-national comparative analysis.

34. *See* John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECTORAL STUD. 417, 424–26 (1995) (ranking closed lists as providing the least value for personal reputation as opposed to party reputation).

35. Multiple closed lists (traditionally used in Uruguay and in Colombia until 2003) allow party factions to compete against each other under the same party label. Negretto, *supra* note 8, at 40 n.19; *see also* Shugart, *supra* note 33, at 38 (describing such a system as requiring parties to submit lists of candidates to fill the seats to which the party is entitled based on election results). Flexible lists provide voters with a list and rank of candidates but voters have the option of altering the order using a preferential vote. *Id.* at 42. Open lists provide voters with only the names of candidates so that who gets elected is entirely determined by voters. *Id.* For an application of this terminology to party lists in Latin America, see DIETER NOHLEN, SISTEMAS ELECTORALES Y PARTIDOS POLÍTICOS [ELECTORAL SYSTEMS AND POL. PARTIES] 138–43, 47 (1994).

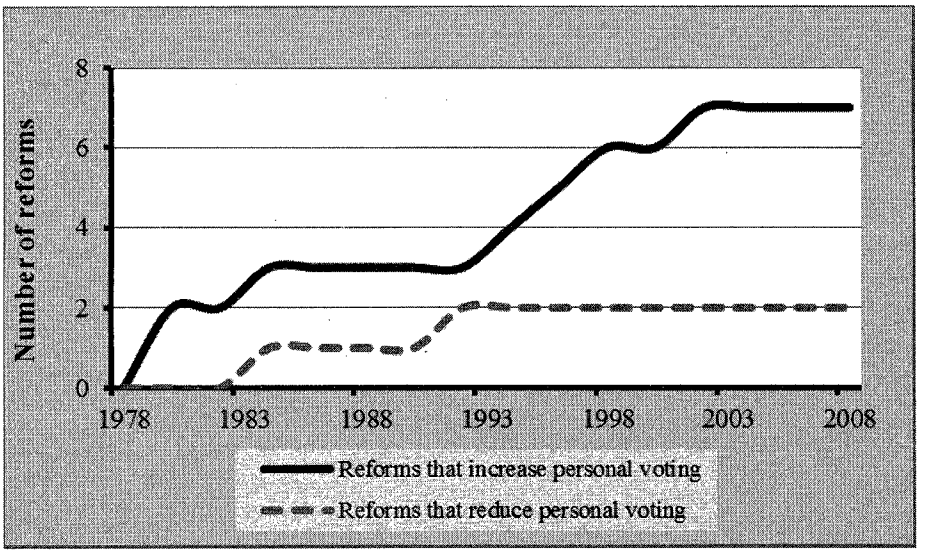
36. Negretto, *supra* note 2, at 45–46.

37. *See* Carey & Shugart, *supra* note 34, at 421–22, 430–31 (describing how, as a result of personalization, voters have a greater role in candidate selection, a party's candidates compete amongst themselves, and leaders may enact pork barrel legislation to win favor with constituents).

38. Negretto, *supra* note 8, at 41.

39. *Id.*

Figure 3. Reforms to the Partisan Nature of Voting by Year, 1978–2008



From 1978 to 2008, there have been nine reforms in this area, most of which (seven) introduced a degree of personal voting that was absent before.[40] In some cases, personalization was increased by combining single-member districts with party-list voting, in others by adopting open or flexible lists.[41] As a result of these reforms, by 2008, only six countries—Argentina, Costa Rica, El Salvador, Guatemala, Paraguay, and Nicaragua—elected all members of the single or lower chamber of congress by single closed lists.[42]

The only cases of reform that can be counted as increasing partisan voting are Colombia in 2003 and Mexico in 1986. As to Colombia, this is because single-party lists replaced multiple lists without vote pooling.[43] In Mexico, the 1986 reform expanded the number of deputies who could be elected via party lists from 100 to 200.[44] Since those deputies were previously elected in single-member districts, the reform could be considered a step toward greater partisan voting.

3. More Permissive Rules of Presidential Reelection.—The combination of inclusive electoral rules, which foster multiparty systems, with personalized voting systems, which encourage intraparty competition, suggests the emergence of more pluralistic and competitive electoral

40. Negretto, *supra* note 2, at 46.

41. *Id.* at 45–46.

42. Negretto, *supra* note 16, at 86.

43. *Id.* at 88. In spite of this, the 2003 reform maintains an important degree of personalization in that it allows parties to opt for open or closed lists, and in fact, most parties have opted for open lists since 2006. *Id.* at 88–89.

44. *Id.* at 87 tbl.5.

systems. These rules also support consensual forms of decision making by inducing negotiation both across and within parties. Other electoral reforms, however, do not move in the same direction, at least not consistently. Such is the case with the presidential reelection rule, which has recently become more permissive. Permissive rules of presidential reelection limit the rotation of individuals in the executive office and may also increase—as in consecutive reelection—the bargaining power of the president vis-à-vis legislators.[45]

In increasing order of permissiveness, reelection rules may vary from the absolute proscription of reelection to reelection after one or two terms to consecutive reelection, with or without limits. Reelection rules (perhaps along with the rules regulating presidential terms) have traditionally been among the most unstable constitutional provisions in Latin America.[46] For instance, the number of countries whose constitutions allowed consecutive reelection—one or unlimited—has successively increased and decreased between 1900 and 1960 as a result of cycles in which more permissive rules were followed by less permissive ones and vice versa.[47]

A similar instability has been visible since 1978. From 1978 to 1993, most new constitutions and amendments maintained or restored relatively restrictive presidential reelection rules, such as reelection after one term. In several cases, as in Ecuador in 1978, Guatemala in 1985, Honduras in 1982, Colombia in 1991, and Paraguay in 1992, presidential reelection was proscribed.[48] Since 1993, however, this trend has been reversed. Figure 4 illustrates the number of reforms that made presidential reelection more, and less, permissive from 1978 to 2008.

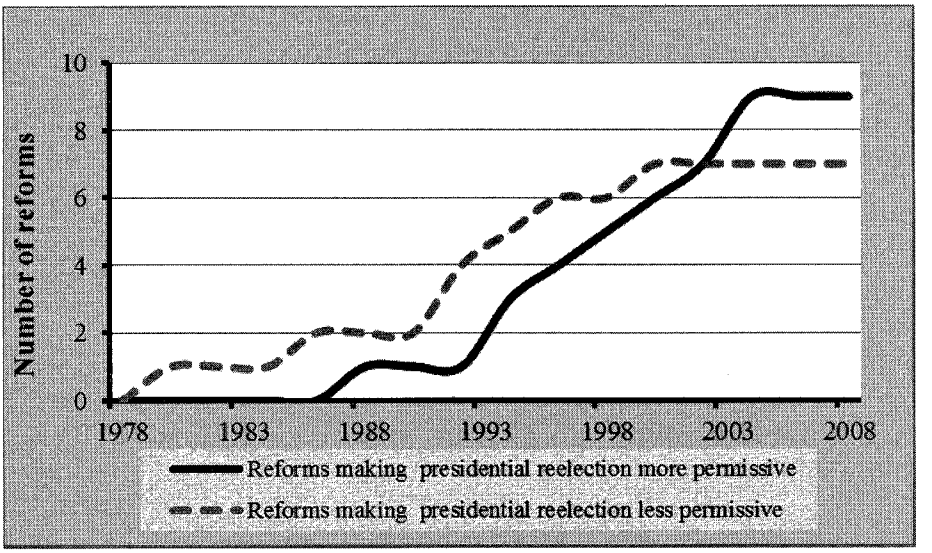
45. *See generally* John M. Carey, *The Reelection Debate in Latin America*, LATIN AM. POL. & SOC'Y, Spring 2003, at 119 (discussing the constitutional restrictions on reelection and the lifting of those restrictions in Latin America in the nineteenth and twentieth centuries).

46. Negretto, *supra* note 8, at 43.

47. *Id.*

48. *Id.*

Figure 4. Reforms to Presidential Reelection Rules by Year, 1978–2008



From a total of sixteen reforms to the rules of presidential reelection, nine have made it more permissive and seven less.[49] Although the shift toward more permissive rules of presidential reelection is recent and not pronounced, it is important to note the frequency with which pressures emerge in different countries for reforms to extend the term of the president in office, usually to replace a proscription of reelection or the rule of reelection after one term with the rule of reelection for one consecutive term.[50] These pressures suggest that the trend toward more permissive reelection rules may continue in the near future.

As the previous analysis shows, electoral rules have been anything but stable in Latin America. Yet patterns emerge within this general instability. Reforms in the formulas to elect presidents, the system to elect deputies, and the partisan nature of voting all seem to follow a pattern that goes from less to more inclusiveness, pluralism, and competition. Other areas of electoral

49. *Id.* These reforms do not include the case of Costa Rica. In 2003, Costa Rica shifted from an absolute proscription on presidential reelection to the rule of presidential reelection after two terms. *Id.* at 44 n.23. This reform, however, resulted from an interpretation by the Constitutional Court rather than from a formal amendment. *Id.*

50. In the last two years, the presidential reelection rule became more permissive in Venezuela and Bolivia. *Cf. Chavez Wins Chance of Fresh Term*, BBC NEWS (Feb. 16, 2009), http://news.bbc.co.uk/2/hi/7891856.stm (discussing results of vote to abolish presidential term limits in Venezuela); *Profile: Bolivia's President Evo Morales*, BBC NEWS (Jan. 12, 2011), http://www.bbc.co.uk/news/world-latin-america-12166905 (reporting on President Morales's victory in a referendum to extend his term). More recently, a ruling by the supreme court of Nicaragua may enable the president of the country to serve consecutive terms in spite of being prohibited since the 1995 reform. *Nicaragua Court Backs Re-Election*, BBC NEWS (Oct. 20, 2009), http://news.bbc.co.uk/2/hi/8316167.stm.

reform, however, do not move consistently in the same direction, as is the case with presidential reelection rules.

B. Decision-Making Rules

Presidential power is a multidimensional concept because it alludes to the authority of the president in her different roles as chief of party, chief of state, chief of government, and co-legislator. The two main dimensions of presidential power that constitutions regulate relate to the capacity of presidents to appoint and remove cabinet ministers and other high officials in the administration and the judiciary, and their capacity to participate and to have influence over policy making.[51] The first dimension refers to government powers; the second refers to legislative powers.

1. Greater Restrictions on the Government Powers of Presidents.— Presidents in Latin America have traditionally enjoyed a high degree of independence from congress in the formation, coordination, and change of cabinets. Since the 1850s, no constitution in the region has required the intervention of congress or one of its chambers to confirm the appointment of cabinet ministers.[52] A procedure called "parliamentary interpellation" has been part of most Latin American constitutions since the early nineteenth century.[53] This procedure, however, did not normally imply the possibility of forcing the resignation of ministers; it only provided legislators with the capacity to summon cabinet ministers to a congressional session for information about a particular policy area under their responsibility.[54]

Over time, however, several constitutions in Latin America imposed greater restrictions on the governmental powers of presidents, and this trend has grown since 1978. During recent decades, important debates took place in Brazil, Argentina, and Bolivia about the merits of shifting from a presidential to a mixed regime which would combine presidential and parliamentary principles of design.[55] No country passed such a reform, but several recent constitutional changes in Latin American countries have strengthened congressional controls over cabinets, often with the intention of introducing features of a parliamentary system within the structure of a presidential regime.[56] Figure 5 illustrates the number of reforms that have

51. Negretto, *supra* note 8, at 44–45.

52. *Id.* at 45.

53. *Id.*

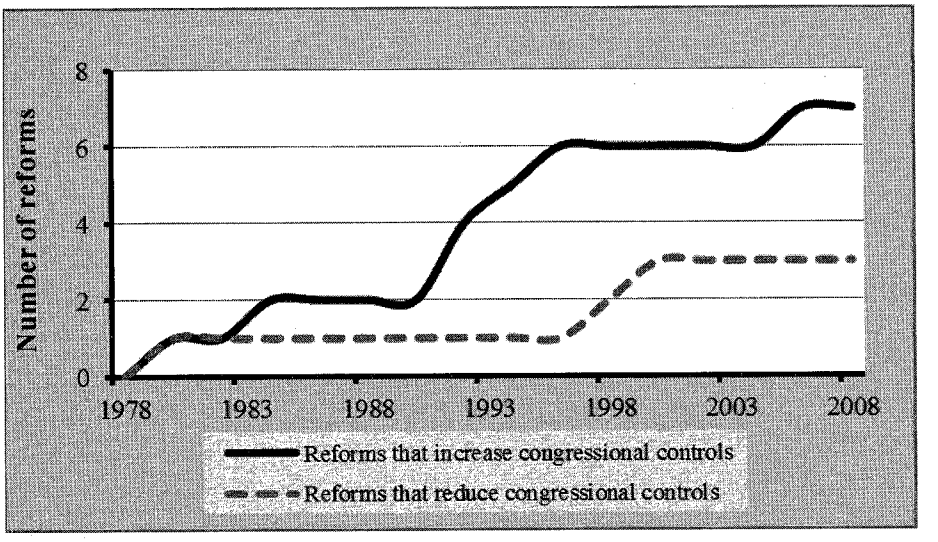
54. *Id.*

55. *See* Negretto, *supra* note 2, at 47 (summarizing debates about the adoption of semi-presidential regimes in Brazil and Argentina); René Antonio Mayorga, *Bolivia: Electoral Reform in Latin America*, *in* THE INTERNATIONAL IDEA HANDBOOK OF ELECTORAL SYSTEM DESIGN 79, 79 (Andrew Reynolds & Ben Reilly eds., 2d ed. 1997) (characterizing the Bolivian system as "parliamentari[z]ed presidentialism").

56. Negretto, *supra* note 2, at 46–48.

increased or decreased congressional controls over cabinets from 1978 to 2008.

Figure 5. Reforms to the Government Powers of the President by Year, 1978–2008



Of a total of ten reforms in this area, in seven cases the formal power of congress over cabinets has increased.[57] It was only in three cases—Ecuador in 1998, Peru in 1993, and Venezuela in 1999—that congressional power over cabinets decreased.[58] As a consequence of these reforms and the constitutions that maintained similar mechanisms inherited from previous constitutions, as of 2008, there were thirteen countries in Latin America in which the constitution provides some form of political control of cabinets by congress.[59]

The same trend can be observed in other areas of the government power of presidents. Presidents in Latin America have traditionally had the power to appoint, or at least be influential in the appointment of, local authorities, judges of constitutional courts, attorney generals, and members of oversight institutions.[60] The most important changes in these powers have been introduced since 1978, both strengthening congressional controls over

57. *Id.* at 47. I have considered as an increase in congressional power (and thus a decrease of presidential power) adopting a censure mechanism when this did not exist, making requirements for the initiation of a motion of censure less stringent, and making the censure binding when it was not previously so. Negretto, *supra* note 8, at 46 n.27. I have included the traditional interpellation mechanism only when it did not exist before the reform, as in Chile. *Id.*

58. Negretto, *supra* note 2, at 47.

59. Negretto, *supra* note 8, at 47.

60. *Cf. supra* note 2 and accompanying text.

executive appointments and removing the influence of the president altogether.

Measures of political decentralization introduced in several centralist states have deprived presidents of an important source of power and patronage.[61] Such was the case in the introduction of the popular election of all city mayors in Bolivia in 1994 and the popular election of governors in Venezuela in 1989 and Colombia in 1991.[62] The appointment powers of presidents have also been reduced as a result of reforms aimed at strengthening judicial independence. Since the 1994 reforms in Argentina and Mexico, for instance, presidents in these countries have needed the support of a qualified majority of the senate—rather than the simple majority required in the past—to appoint supreme court justices.[63] Since enactment of the 1991 Colombian constitution, the president has lacked the exclusive power to nominate candidates to the Constitutional Court.[64] Similar reforms have occurred in several countries, reducing the power of the president to appoint the attorney general, prosecutor general, and heads of oversight institutions.[65]

2. Stronger Legislative Powers for the President.—The classic checks-and-balances model of presidents with strong reactive legislative powers but weak proactive powers, inspired by the United States Constitution, prevailed in most Latin American constitutions until the early decades of the twentieth century.[66] Since then, however, a persistent trend of reforms has strengthened the powers of presidents to promote legislative change, thus moving design in an opposite direction from the reforms in the area of government powers discussed above.

Although some reforms have altered the veto powers of presidents, the most important and frequent changes introduced in the allocation of policy-making powers have occurred in the area of agenda-setting powers. These powers allow presidents to constrain the set of policy alternatives from which the assembly may choose, or the timetable according to which these choices must be made, or both. Throughout the twentieth century, the agenda-setting powers of presidents have consistently increased in five areas. Presidents have acquired exclusive authority to (1) introduce bills concerning important

61. *See* MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 3–4 (2000) (explaining that reforms to decentralize power had the effect of increasing political competition); KATHLEEN O'NEILL, DECENTRALIZING THE STATE: ELECTIONS, PARTIES, AND LOCAL POWER IN THE ANDES 4 (2005) (summarizing the shifting of power from national to local governments in certain Latin American countries).

62. O'NEILL, *supra* note 61, at 107 (Colombia), 125 (Bolivia), 175–76 (Venezuela).

63. Negretto, *supra* note 2, at 48.

64. *Id.*

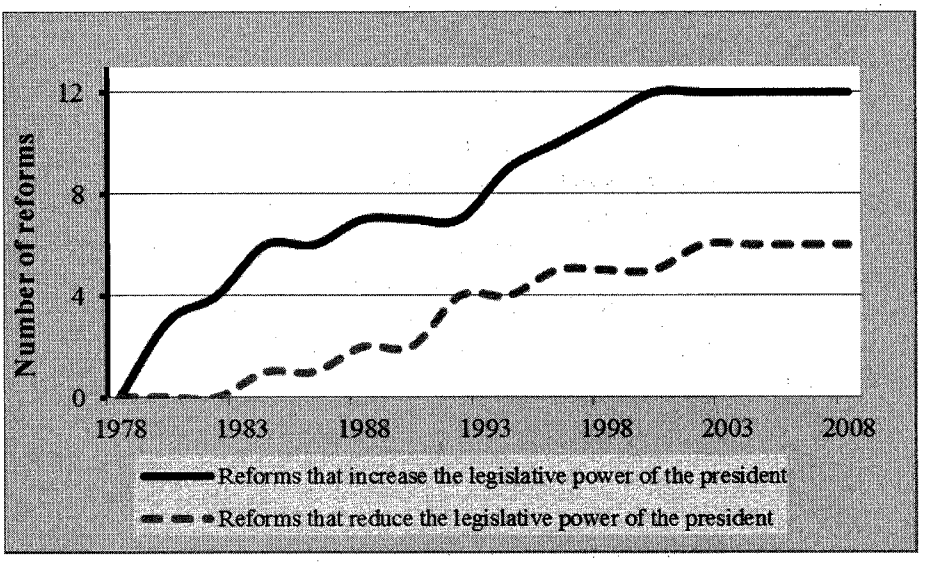
65. *Id.*

66. *See* Negretto, *supra* note 4, at 120 (noting that most presidential regimes in Latin America maintained the United States model of separation of powers at the beginning of the twentieth century).

economic and financial issues, and authority to (2) set the budget, (3) introduce bills that must be voted on in Congress within a time limit, (4) issue decrees of legislative content, and (5) submit the approval of bills to popular referenda.[67]

In 1930, only the constitutions of Chile, Colombia, and Uruguay authorized presidents to use any of these powers.[68] The number of constitutions providing for agenda-setting powers, however, increased to seven in 1940 and to ten by 1960.[69] This trend has continued throughout subsequent decades. Figure 6 illustrates the number of reforms that have increased or reduced the legislative powers of presidents between 1978 and 2008.

Figure 6. Reforms to the Legislative Powers of the President by Year, 1978–2008



Of a total of eighteen reforms during this period that altered the distribution of legislative powers between presidents and assemblies, twelve strengthened the powers of the president and only six weakened them.[70] The relative increase in the legislative powers of the president was due exclusively to the strengthening of his veto powers in only two cases: El Salvador

67. Negretto, *supra* note 8, at 48–49.

68. *Id.* at 49.

69. *Id.*

70. Negretto, *supra* note 2, at 49 tbl.5. Except for the 1995 reform in Nicaragua, however, all of the reforms that reduced the previous legislative powers of presidents (Brazil in 1988 and 2001, Colombia in 1991, Nicaragua in 1987, and Paraguay in 1992) left presidents with legislative powers that are still quite strong in the Latin American context. Negretto, *supra* note 8, at 50 n.28.

in 1983 and Uruguay in 1996.[71] All of the other cases involved strengthening at least some of his agenda-setting powers. As a result of these reforms, as of 2008, only four countries in Latin America—Costa Rica, the Dominican Republic, Mexico, and Nicaragua (after its 1995 reform)—had constitutions that did not provide presidents with any significant agenda-setting power.[72]

Just as in the case of electoral rules, then, the allocation of powers between presidents and assemblies reveals both instability and patterns of design that are not always mutually consistent. Reforms aimed at redistributing power away from the presidency and toward congress and the judiciary have coexisted—even within the same design—with reforms aimed at concentrating power in the hands of the president.

II. A Two-Level Theory of Constitutional Choice

How do we explain this amalgam of seemingly inconsistent institutions? From the perspective of an external observer, reforms that promote plural representation and consensual decision making may appear incompatible with reforms that restrict party competition and concentrate power in the executive branch. For an analysis of constitutional politics, however, the most important question is why those who participate in constitution making would have selected these institutions.

Prevailing theories of institutional choice and design do not provide clear guidance to answering this question. Cooperative theories, most of them from economics, presume that institutional designers pursue cooperative outcomes and that the distribution of resources among them is relatively unimportant for explaining institutional selection.[73] Distributional theories, usually preferred by political scientists, assume that institutional designers are exclusively concerned with the effect of institutions on their capacity to win elections and have influence over policy, so the outcome of institutional selection is primarily explained by the underlying distribution of resources and power.[74]

Cooperative theories emphasize how constitutional designers select institutions based on the collective benefits that would result from them, such as economic development, durable democracy, effective government, or political legitimacy. This view is obviously shared by accounts of constitutional choice as a process driven by impartial motivations and

71. Negretto, *supra* note 8, at 50.

72. *Id.*

73. *See* James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 7–8 (1990) (distinguishing between conflictual models, in which competition for resources is salient, and cooperative theories, which emphasize voluntary exchanges among individuals).

74. *See* JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 4 (1992) (summarizing separate theoretical models that emphasize collective benefits of social institutions to a community generally and advantages of institutional design to certain political and social groups).

theories about the effects of alternative institutions on good governance.[75] Cooperative models, however, are dominant in the economic analysis of constitutions, which assumes rational, self-interested actors.[76] A well-established tradition in public-choice theory, for instance, sees constitutions as governance structures that help citizens and political elites to mitigate obstacles to collective action, commit to cooperative agreements, and realize gains from trade.[77] This view of constitutions is also shared by a number of important political scientists working within this tradition.[78]

Distributional models, by contrast, postulate that constitution makers form preferences for constitutional rules based on whether these rules would allow them to obtain an advantage in political competition.[79] In this view, constitutional choice is bound to be a conflictive process in which resources and bargaining power are crucial for determining institutional selection.[80] Political scientists tend to favor distributional over efficiency-based explanations because the former are more able to portray the politics of institutional change—the struggle for distributive shares that institutional designers often associate with alternative designs.[81]

At first glance, distributional theories look more promising than cooperative models as general explanations of constitutional choice. There are indeed constitutional provisions, such as those that proclaim and protect basic civic rights, that benefit all members of society and have no visible

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75. *See* MARTIN DIAMOND, THE FOUNDING OF THE DEMOCRATIC REPUBLIC 8–9 (1981) ("We argue that the [U.S.] Constitution is not undemocratic and was not a retreat from democracy. Rather, it is a thoroughgoing effort to *constitute democracy*. We view the American system as seeking to reconcile the advantages of democracy with the sobering qualities of republicanism.").

76. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 65 (1985) ("*Homo economicus*, the rational, self-oriented maximizer of contemporary economic theory, is, we believe, the appropriate model of human behavior for use in evaluating the workings of different institutional orders.").

77. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 23 (1962) (arguing that constitutions should be regarded as contracts that enable individuals to leave the state of nature and to create a political order that makes possible the provision of public goods and the protection of individuals' interests); DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 63–64 (1996) (following Buchanan's idea of constitutions as contracts to realize gains from trade).

78. *See, e.g.*, Matthew Soberg Shugart, *The Inverse Relationship Between Party Strength and Executive Strength: A Theory of Politicians' Constitutional Choices*, 28 BRIT. J. POL. SCI. 1, 7–8 (1998) (arguing that legislators allocate policy-making powers to make possible the efficient provision of public goods); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 28 (1995) (explaining that "the critical *economic* role for *political* institutions [is] to provide the appropriate foundations for economic policy-making and a secure system of economic and political rights").

79. *See supra* note 74 and accompanying text.

80. *See generally* KNIGHT, *supra* note 74, at 126–51 (outlining factors contributing to institutional change and decisions confronting political and social actors that affect such change).

81. *See* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 213–14 (1990) (discussing the prevalence of institutional theories that focus on cooperative outcomes but noting that focus on political "winners and losers" is as important theoretically).

distributional consequences for institutional designers. The adoption of these rules can thus be seen as an efficient and cooperative outcome over which designers can universally agree. Members of a reform coalition may also share a preference for a constitution that includes some broad institutional features. But cooperative theories of constitutional choice tend to draw too sharp a line of demarcation between preferences for constitutional rules and preferences for distributional outcomes under those rules. Choosing a constitution is seen as selecting a cooperative structure without knowing what distributional outcomes would result once this structure is implemented.[82] In most situations, however, the objective of creating a new institution is not efficiency per se; rather, the objective is making a Pareto improvement in which distributional conflicts are central.[83]

These distributional conflicts are inevitable when institutional designers select institutions that have well-known effects on their capacity to win office and have influence over political decisions. Such is the case of key provisions of the constitution that regulate elections and decision-making procedures. Election rules determine how many actors can compete with some probability of success and who may win or lose given the expected popular vote in an election.[84] Decision-making rules, in turn, determine how many actors need to agree to make collective decisions, who has the power to make proposals, and who has the power to accept or reject them.[85] Since professional politicians cannot disregard the outcomes that these rules are likely to produce, their choice is affected by the partisan interests and relative power of institutional designers. Empirical works on constitutional change have provided a considerable amount of evidence in support of this perspective in explaining variations in electoral reform, distribution-of-powers reform, and judicial reform.[86]

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82. *See* BRENNAN & BUCHANAN, *supra* note 76, at 30 ("Faced with genuine uncertainty about how his position will be affected by the operation of a particular rule, the individual is led by his self-interest calculus to concentrate on choice options that eliminate or minimize prospects for potentially disastrous results.").

83. *See* GEORGE TSEBELIS, NESTED GAMES: RATIONAL CHOICE IN COMPARATIVE POLITICS 105 (1990) (arguing that a new political institution can embody any of a range of Pareto-efficient outcomes, and that choosing between those outcomes is a distributional issue).

84. *See* Negretto, *supra* note 4, at 123 ("[Electoral] rules determine the number of viable candidates and parties competing for office.").

85. *Id.*

86. The list of recent works associated with this perspective is long and growing. For works concerning electoral reform, see Josep M. Colomer, *It's Parties that Choose Electoral Systems (or, Duverger's Laws Upside Down)*, 53 POL. STUD. 1 (2005); Barbara Geddes, *Initiation of New Democratic Institutions in Eastern Europe and Latin America*, *in* INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA 15 (Arend Lijphart & Carlos H. Waisman eds., 1996); Negretto, *supra* note 24, at 426–29; and Laura Wills-Otero, *Electoral Systems in Latin America: Explaining the Adoption of Proportional Representation Systems During the Twentieth Century*, LATIN AM. POL. & SOC'Y, Fall 2009, at 33. For recent works concerning the distribution of powers between presidents and assemblies, see Timothy Frye, *A Politics of Institutional Choice: Post-Communist Presidencies*, 30 COMP. POL. STUD. 523 (1997); Arend Lijphart, *Democratization and Constitutional Choices in Czecho-Slovakia, Hungary and Poland: 1989–91*, 4 J. THEORETICAL

Yet, distributional theories cannot provide a comprehensive account of constitutional choice. Constitution makers are not completely free to choose the general orientation of reforms or the range of alternatives that they will consider at a given historical juncture. This range of alternatives is determined by the performance of preexisting constitutional rules in making possible the realization of a cooperative outcome. In addition, political actors are not always able to initiate constitutional changes to maximize their short-term partisan interests. Sometimes they are forced to react to exogenous shocks or endogenous processes that make maintenance of the existing constitution no longer viable or convenient.[87] In this situation, strategic politicians may have to weigh distributional goals with more systemic considerations about the impact of institutional selection on the effectiveness and quality of the political regime.

The problem of distributional and cooperative theories is logically similar in that both stem from a one-dimensional view of constitutions as either governance structures or power structures. But the nature of constitutions is complex. Constitutions work as coordinating devices that regulate long-term interactions among political actors. They provide structure to political competition, define the procedures by which politicians are able to provide public goods demanded by voters, and secure the acquiescence of the governed to the state.[88] At the same time, constitutions produce distributive outcomes, which benefit some actors more than others.[89] This dual nature of constitutions should affect the goals that politicians pursue in the selection of constitutional designs.

I propose an explanation of constitutional choice that accounts for this dual logic of institutional selection. According to this theory, constitutional choice is endogenous to the performance of preexisting constitutional structures and to the partisan interests and relative power of reformers. Given the dual nature of constitutions as cooperative arrangements and power structures, institutional designers always have some shared interest in the efficient performance of institutions and a partisan interest in the political advantage that institutions provide. These two logics of institutional selection are often compatible because they tend to work at different levels of constitutional design.

POL. 207 (1992); and Negretto, *supra* note 4. For works concerning judicial reform, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, LATIN AM. POL. & SOC'Y, Spring 2005, at 87; and Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 COMP. POL. 293 (2010).

87. Negretto, *supra* note 8, at 100.

88. *Id.* at 113; *see also* Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEXAS L. REV. 1303 (2009) (identifying questions that confront constitutional framers and explaining the process of creating an active citizenry).

89. Negretto, *supra* note 8, at 113.

At the level of broad organizational principles, political actors share an efficiency concern in the adoption of a constitution that would make possible the realization of a cooperative outcome, such as political order, government stability, effective decision making, or citizen inclusion and participation.[90] The type of cooperative outcome that constitution makers seek to achieve varies over time depending on the challenges that political actors face at particular historical junctures. The design of a constitution capable of realizing these outcomes usually elicits general agreement. At the level of specific alternatives of design, however, institutional designers have a partisan interest in the adoption of institutions that provide them and their supporting groups with a political advantage.[91] This concern over issues of distribution and redistribution (who gets what, when, and how) induces disagreement and conflict, which make power resources crucial in determining the final outcome.

The existence of different levels of constitutional design has been recognized by previous studies on constitution making.[92] Less discussed, however, is how these levels interact. The attainment of a particular cooperative outcome through constitutional design justifies the need for reform and determines its general guidelines.[93] These guidelines shape the repertoire of feasible institutional alternatives, which include precedent institutions, available foreign models, and theories of design.[94] Cooperative outcomes, however, are invariably vague, and there is more than one alternative of constitutional design for realizing them.[95] This menu of options provides strategic politicians with ample room to propose and pick those alternatives within the repertoire that are closer to their partisan interests. The manipulation of alternatives also explains why the consensus generated by the collective goals of design tends to evaporate as soon as constitution makers start discussing the specific alternatives that are proposed to realize those goals.[96]

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90. *Id.* at 101.

91. *Id.* at 13.

92. *See, e.g.*, CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787, at 14–17 (1988) (identifying a primary level of design in which regime types are selected and a secondary level where rules that order behavior within institutions are framed).

93. Negretto, *supra* note 8, at 102.

94. *See* Kurt Weyland, *Institutional Change in Latin America: External Models and Their Unintended Consequences*, J. POL. LATIN AM. (Ger.), 2009, at 37, 42–43 (discussing theories of design); *id.* at 47 (discussing foreign models).

95. Negretto, *supra* note 8, at 102.

96. *Id.* The relationship between the general, cooperative outcomes that constitutions should produce and the distributional outcomes associated with specific alternatives is similar to the relationship between valence and position issues in electoral competition. *See* Donald E. Stokes, *Spatial Models of Party Competition*, 57 AM. POL. SCI. REV. 368, 373 (1963) (defining "valence-issues" as issues uniformly liked (as economic growth) or disliked (as corruption) among the electorate, and "position-issues" as issues where the opinions of voters are divided). A valence

Given partisan conflict over institutional selection, the power resources of reformers are always crucial to explaining comparative variations in constitutional choice. Individual cases may differ, however, in the extent to which partisan interests and power are sufficient to explain a particular outcome. The theory of constitutional choice just proposed suggests that these differences depend on the events that trigger constitutional change and on the thickness of the veil of ignorance that institutional designers face at the time of choice with respect to the effects of institutions on their future political positions.[97]

If constitutions matter as structures of governance, cooperative goals and efficiency concerns about institutional performance should become more salient and constraining when constitutional change responds to an institutional crisis than when it simply follows a balance-of-power shift among political actors. An institutional crisis, often preceded by the regime's failure to provide basic public goods and to satisfy citizens' demands for reform, compels institutional designers to weigh partisan interests against efficiency considerations and to focus on the adoption of reforms that are widely believed to improve constitutional performance under the circumstances.[98] The impact of partisan interests and power on constitutional choice may also be weaker when constitution makers select institutions under high levels of electoral uncertainty.[99] This occurs when patterns of competition suddenly shift at the time of reform and the selection of institutions is distant in time from the implementation stage.[100] In these situations, which resemble the general uncertainty about institutional outcomes that cooperative theories of constitutional choice presuppose, institutional designers tend to select institutions that, within the menu of alternatives, are likely to distribute the benefits of reform in a more equal way among all of the actors involved.[101]

This theory reconciles two seemingly contradictory theories of institutional design and makes sense of the interaction between historical constraints and strategic behavior in the selection of institutions. A two-level explanation of constitutional choice also accounts for recent trends of design in Latin America. The initial calls for reform and their particular orientation often originated out of the need to improve the ability of institutions to provide public goods that voters demand. Specific alternatives of design,

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issue becomes a position issue once a specific policy is proposed to achieve a desired outcome or prevent an undesirable one. *Id.* at 374.

97. *See supra* note 95 and accompanying text.

98. *See* Negretto, *supra* note 8, at 128–29 (recognizing that, in response to crises involving the capacities of the state and popular upheaval, framers seek to "improv[e] the effectiveness or quality of the political regime").

99. *See id.* at 130–31 (recognizing that efficiency concerns become more salient during times of electoral uncertainty).

100. *Id.* at 118.

101. *Id.*

however, have been proposed and selected according to the electoral expectations and relative power of reformers at the time of choice.

III. Explaining Shifting Constitutional Designs in Latin America

In many Latin American countries, the transition to democracy fostered a retrospective assessment among both academics and politicians about what features of preexisting constitutional structures were responsible for a history of dictatorship, political conflict, and human rights abuses. As democratic regimes stabilized, debates about constitutional design began to focus more on the capacity of existing institutions to meet new challenges, such as promoting economic growth, maintaining government stability, providing public security, and achieving better representation of citizens' interests.[102]

Evaluations of this kind are crucial for explaining why institutional designers in Latin America have considered reforms to preexisting institutions and why some general options of design entered the menu of choices. Institutional designers have often agreed on the need to introduce reforms that would improve the performance of the democratic regime in making the realization of a cooperative outcome possible. Yet partisan conflicts have typically emerged about what alternative is best to achieve that goal. Some examples of recent constitutional reforms in Latin America illustrate the argument.

In the area of electoral reform, the introduction of proportionality in the system to elect deputies initially became attractive in countries where the winner-take-all effect of majoritarian formulas had in the past resulted in violence and military intervention.[103] Institutional designers, however, have disagreed about which formulas were best to replace plurality or majority elections, depending on the current and expected electoral support for their parties. While large parties tended to favor mixed or PR formulas in districts of small magnitude, small or declining parties have supported more proportional systems.[104] In more recent decades, the proposal to adopt runoff formulas of presidential election became part of debates about electoral reform due to the post-election conflicts and political instability that often resulted from using plurality rule in multiparty presidential races.[105] Larger parties, however, have tended to prefer replacing plurality with intermediate

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102. *See* Negretto, *supra* note 2, at 51 (arguing that constitutional rigidity is not appropriate in a context of social, political, and economic instability).

103. Negretto, *supra* note 8, at 53.

104. Geddes, *supra* note 86, at 30; *see also* Wills-Otero, *supra* note 86, at 47–48, 51 fig.3, 52 fig.4, 54 n.16 (noting an inverse relationship between the size of the largest political party in a country and the proportionality in its electoral system).

105. *See* Matthew Soberg Shugart & Rein Taagepera, *Plurality Versus Majority Election of Presidents: A Proposal for a "Double Complement Rule,"* 27 COMP. POL. STUD. 323, 324 (1994) (arguing that the need to prevent "the election of a rather radical president by a narrow plurality of the vote" has been a reason to opt for nonplurality formulas of presidential election).

formulas, such as qualified plurality, while small and electorally declining parties have usually favored majority runoff.[106]

In the area of decision making, in the early 1980s, many countries considered reform proposals to overcome the political instability, interbranch conflict, human rights abuses, and political corruption often associated with a presidential regime that concentrated too much power in the executive branch.[107] In a few cases, this assessment led to serious debate about the possibility of adopting a parliamentary or mixed-regime system; in most cases, however, it led to consideration of restrictions to the appointment, emergency, and government powers of presidents. But even when this reform agenda became widely accepted among political actors, the most radical proposals for redistributing power in favor of congress and the judiciary were typically supported by opposition parties and parties without governing experience.[108] In the opposite direction, the idea of strengthening the legislative powers of presidents emerged as an alternative design to provide governments with instruments of legislation in contexts of economic crisis where legislators did not have the incentives or the capacity to provide policy reforms.[109] The most power-concentrating reforms in this area, however, were usually favored by presidents and their supporting groups.[110]

In other words, in the presence of distributive outcomes, strategic political actors always tend to propose or support alternatives of reform that, within the menu of options, are closer to their partisan interests. This process induces disagreement and conflict, thus making power resources crucial in determining the final outcome. From this perspective, the identities of the actors participating in constitution making, and their interests and resources, are essential components in the comparative analysis of constitutional choice. Table 1 shows the composition of reform coalitions before and after 1978, based on a database that includes all elected assemblies that have replaced the constitution or amended it in the area of election or decision-making rules between 1900 and 2008.

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106. Negretto, *supra* note 24, at 425; *see also* Negretto, *supra* note 26, at 113–15 (showing how in Argentina, qualified plurality emerged as a compromise between the largest party's proposal to adopt plurality and the main opposition party's proposal to adopt majority runoff).

107. *See generally* Carlos Santiago Nino, *Ideas and Attempts at Reforming the Presidentialist System of Government in Latin America*, *in* PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT 128 (Arend Lijphart ed., 1992) (summarizing an initial movement toward increased presidential powers followed by reforms that strengthened legislatures).

108. *Cf.* Negretto, *supra* note 8, at 249 (reporting that constitutional reforms designed to strengthen the judiciary and congress in Argentina in 1994 were supported by the opposition party); *id.* at 387 (describing the 1997 reforms to the constitution of Ecuador and noting that "small parties without previous government experience . . . were usually the firmest opponents to reducing congressional powers").

109. *See, e.g.*, *id.* at 380–81, 393 tbl.4 (describing several proposed reforms to the constitution of Ecuador, including a proposal to enhance the president's legislative powers, as motivated by the widespread perception of congress as a corrupt and meddlesome institution).

110. *Id.* at 371.

Table 1. Features of Reform Coalitions, 1900–2008

Period	Constitutional Revisions	One-Party Coalition	Multiparty Coalition
1900–1977	28	16 (.57)	12 (.43)
1978–2008	39	6 (.15)	33 (.85)
Total	67	22	45

Source: Gabriel L. Negretto, Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America (2010) (unpublished manuscript) (on file with author).

Before 1978, 57% of elected assemblies that replaced or amended constitutions were under the control of a single party.[111] By contrast, this situation occurred in only 15% of such assemblies between 1978 and 2008.[112] This means that in more than 80% of cases in recent decades, reform coalitions have included at least two parties. Multiparty constituent bodies differ based on the partisan interests and levels of bargaining power of the actors included in the reform coalition. Other things being equal, however, the logic of choice of unilateral and multilateral constituent assemblies is expected to be markedly different.[113] This difference contributes to an explanation of the institutions adopted in Latin America since 1978.

When only one actor, usually an incumbent party, has control over constitutional design, it can adopt institutions that best reflect its interests simply by voting them into being. No deliberation or bargaining with other forces is necessary. In this situation, constitutional design would tend to concentrate electoral power in the party by means of restrictive electoral rules and government power in the president by means of weak congressional or judicial oversight. This was the case, for instance, for the reforms in Peru in 1993, Venezuela in 1999, and Ecuador in 2008, which extended the terms of presidents in office or increased their government powers, or both.[114]

By contrast, the process of institutional selection is more complex and fluid when more than one party is necessary to pass constitutional changes. If we assume that all actors share the same strategic interests or have a strictly equal veto power to prevent the preferences of opponents from being

111. *Id.* at 207.

112. *Id.*

113. *See* Negretto, *supra* note 4, at 136 (positing that weaker parties tend to seek inclusivity in electoral rules); Ríos-Figueroa & Pozas-Loyo, *supra* note 86, at 293, 298–300 (distinguishing between unilateral and multilateral constitution-making processes based on issues that confront framers); Negretto, *supra* note 8, at 153 (noting that multilateral assembles tend to opt for weaker presidential powers relating to emergency situations and interbranch conflict).

114. *See* Negretto, *supra* note 8, at 147 (reporting that the reforms increased the permissiveness of presidential reelection in all three countries); *id.* at 46–47 (noting that the reforms in Peru in 1993 and Venezuela in 1999 reduced congressional control over the president's cabinet).

adopted, then one could expect multilateral constituent bodies to enact internally consistent constitutional designs, usually emphasizing power sharing.[115] In most democratic settings, however, multiparty reform coalitions include actors with potentially conflicting interests and different levels of bargaining power.[116] For instance, in the vast majority of cases in Latin America in which more than one party has been needed to pass constitutional reforms, the party of the incumbent or future president was not only part of the coalition, but also its most influential member.[117]

In this situation, it is likely that within the range of alternatives, coalition parties that are electorally weak and do not expect to control the presidency in the near future would propose electoral rules that promote party pluralism and rotation in office, greater congressional controls over the executive, and the strengthening of judicial and oversight institutions. On the other hand, the incumbent or future president and her party are likely to propose more restrictive electoral rules, fewer controls over the executive, and the strengthening of presidential powers, particularly agenda-setting powers, to have influence over policy making in a fragmented congress. Precise predictions cannot be made because bargaining has multiple equilibrium outcomes.[118] But since no party has incentive to accept a compromise that does not improve its situation compared to the status quo,[119] the collective choice of a multiparty constituent body is likely to combine different forms of power-sharing and power-concentrating institutions. Multiparty constituent bodies, for instance, tend to opt for more inclusive electoral rules and stronger legislative powers for the president.[120] Table 2 summarizes these effects in simple bivariate regressions.[121]

115. *See* Ríos-Figueroa & Pozas-Loyo, *supra* note 86, at 293 (showing that institutions that prevent the arbitrary use of power including "autonomous judicial councils, strong constitutional adjudication organs, and autonomous prosecutorial institutions are more likely to be created by multilateral constitution-making processes").

116. Negretto, *supra* note 8, at 126.

117. *Id.* at 127.

118. *See* Negretto, *supra* note 4, at 135 (noting that multiparty reform coalitions often adopt seemingly opposite institutions within the same bargaining package).

119. *See id.* at 125 ("If these concessions improve their condition compared to the status quo, opposition parties will accept a compromise.").

120. *Id.* at 125–26, 131 tbl.1, 133 tbl.2.

121. Results do not change, however, if we control for the diffusion effects of institutions adopted in neighbor countries, inertial effects of preexisting institutions, or features of the social and economic context.

Table 2. Reform Coalitions and Constitutional Choice in Latin America, 1900–2008

Independent Variable	Dependent variables	
	Presidential election rule[b]	Legislative powers of president[c]
Size of reform coalition[a]	+[d] (0.01)[e]	+[d] (0.05)[e]
n	67	67

Source: Gabriel Negretto, *Political Parties and Institutional Design: Explaining Constitutional Choice in Latin America*, 39 BRIT. J. POL. SCI. 117 (2009).

[a]Minimum number of parties necessary to pass constitutional changes according to the decision rule in the constituent body.

[b]Ordinal variable ranging from plurality (1) to majority rule (3) of presidential election, with qualified plurality as intermediate value (2).

[c]Continuous variable ranging from 1 to 100 based on principal component analysis.

[d]Direction of effect.

[e]Statistical significance level.

Although the partisan interests and relative power of reformers always determine variations in constitutional choice, the extent to which these factors alone are sufficient to explain particular outcomes is not equal across cases. As I have argued, constitution makers are more likely to consider the constitution as a whole and moderate their demands for the sake of improving institutional performance when reforms occur in response to an institutional crisis than when reforms follow a balance-of-power shift among political actors.[122] Constitution makers are also more likely to coordinate on the selection of institutions that might benefit all of the actors involved when the level of electoral uncertainty at the time of choice is high and they cannot use their present positions to form expectations about the future.[123] This means that in order to provide a more detailed explanation of particular outcomes in constitutional choice, we need to complement the study of reform coalitions with a process-tracing analysis of the sequence of events that cause constitutional reform and of the patterns of partisan competition that shape the expectations of the actors about their future positions.

This qualitative analysis explains observable differences between cases where reforms emerged in response to a crisis of institutional performance and cases of reforms that followed a shift in the partisan context. The need to improve the performance of preexisting constitutional structures in enabling governments to provide public goods and securing the representation of

122. *See supra* notes 97–101 and accompanying text.

123. *See supra* notes 98–99 and accompanying text.

citizens' interests is always used as a justification for reform, even in cases where the presence of distributional goals is most evident.[124] The appeal to cooperative goals, however, only exerts a constraining effect on the selection of particular alternatives of reform when constitutional change responds to an institutional crisis that puts into question the future viability of the political regime.[125] In these cases, a concern for the survival of the political system may limit the ability of some actors to propose or adopt the institutions that best reflect their short-term partisan interests.[126]

When constitutional reforms emerge in response to an institutional crisis, the nature of the crisis and its perceived root contribute to an explanation of the adoption of particular institutions. A deep-rooted distrust of parties among voters, for instance, has led political elites (including leaders of centralized parties) to adopt personalized voting systems in Venezuela in 1993, Bolivia in 1995, and Ecuador in 1998.[127] The failure of the Colombian state to contain violence in the late 1980s—in spite of the strong powers of the president to do so—induced institutional designers in that country (including the incumbent president and his party) to propose strengthening the powers of congress and the judiciary in 1991.[128] The frequency of conflicts between minority presidents and opposition congresses in Ecuador led institutional designers (including members of opposition parties at the time) to support the strengthening of all forms of presidential power in 1998 as a strategy to remedy ungovernability.[129]

The level of electoral uncertainty also affects the extent to which constitution makers are able to pursue distributional goals in institutional selection. This effect is most evident when one party has exclusive control over constitutional design but is uncertain about the possibility of maintaining this position in the future. In this situation, members of a dominant party may have incentives to adopt power-sharing institutions, such as more inclusive electoral rules or greater congressional and judicial controls over the executive.[130] But electoral uncertainty also affects the choices and level of coordination that can be achieved in multiparty reform coalitions. For instance, the unusual degree of coordination around the adoption of power-sharing institutions in Colombia in 1991 resulted not only from the institutional crisis that triggered the process but also from the unexpected results of

124. *Cf. supra* note 77 and accompanying text.

125. *See supra* note 101 and accompanying text.

126. *See supra* note 86 and accompanying text.

127. Negretto, *supra* note 16, at 94.

128. *See generally* Negretto, *supra* note 8, at 299–343 (examining the reform process in Colombia).

129. *See generally id.* at 351–93 (discussing the reform in Ecuador).

130. *See, e.g.*, Finkel, *supra* note 86, at 109 (noting that Mexican reforms demonstrate that a one-party-dominant state may institute independent and powerful judicial institutions if the ruling party is uncertain of maintaining its dominant position in the future).

the constituent assembly election, which increased the level of uncertainty held by constitution makers about their future positions.[131]

Governance and politics are thus key elements for understanding both general trends and variations in constitutional design. Although these two concepts are quite general, they help explain recent constitutional transformations in Latin America. The seemingly contradictory combination of power-concentrating and power-sharing institutions in both election and decision-making rules reflects the diverse governance problems faced by new democracies in Latin America and the contrasting interests of the actors whose agreement was necessary to pass reforms.

IV. Conclusion

Cooperative and distributional theories often compete for explanations of institutional change and design. By themselves, however, these theories are unable to provide a complete account of constitutional choice. Constitutions have a dual nature; they function as structures of governance and as structures of power. For this reason, institutional designers have both efficiency concerns about the impact of constitutional choice on the effectiveness and quality of the democratic regime, and partisan concerns about the impact of constitutional choice on their personal and group interests. This means that explaining content and variation in constitutional choice demands an analysis of the performance of preexisting constitutional structures and of the partisan interests and relative power of reformers.

I have argued that these two factors explain shifting constitutional designs in Latin America. The constitutional structures that Latin American countries inherited from the nineteenth century have often failed to adapt to the dynamics of multiparty competition, provide political stability, satisfy voters' demands for better representation, or provide public goods in the context of a weak state and an unstable economy. Restrictive electoral rules have failed to produce acceptable results in multiparty competitions. Concentration of government power in the executive branch has weakened congressional and judicial oversight, rendered the protection of constitutional rights ineffective, and restricted political participation. The traditional checks-and-balances model of presidents with strong reactive legislative powers but weak proactive powers has proved ineffective for enabling swift decisions in the context of cyclical economic crises. These governance problems have justified the need to reform constitutions in directions that do not seem mutually consistent, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary, while increasing the legislative powers of presidents.

Governance problems, however, can be addressed through different reforms. Albeit in varying degrees, this indeterminacy provides strategic

131. Negretto, *supra* note 8, at 314–17.

politicians with room to propose or support those design options that are closer to their interests. This leads to competition and conflict, which make the relative power of reformers crucial for explaining comparative variations in constitutional choice. From this perspective, transformations in the partisan context and in the nature of reform coalitions are essential to account for constitutional choices in Latin America since 1978. In a few cases, constitutional reforms have been imposed by a dominant party, which explains the adoption of institutions that restrict party competition or increase the concentration of power in the executive branch. Most reform coalitions since 1978, however, have included at least two parties. These coalitions often adopt institutions that diffuse power because, in a multilateral assembly, the stronger actor is unable to impose its preferred institutions. Nevertheless, multiparty coalitions include actors with conflicting institutional preferences and different degrees of influence over institutional selection. In these cases, constitutional choice is likely to lead to a hybrid design that combines power-sharing and power-concentrating rules, such as we observe in many recent constitutional reforms in Latin America.

From the point of view of "constitutional engineering," it is not apparent whether this design has the capacity to improve the performance and quality of new democracies. A more inclusive and participatory electoral system may allow for better representation of citizens' interests while providing presidents with an incentive to form coalitions and negotiate policies. Party pluralism, however, may diminish government capacities without necessarily improving representation, particularly when parties—as is often the case in Latin America—have weak programmatic links with voters.[132] A president capable of inducing legislative change may secure the provision of national policies when legislators have neither the means nor the motives to do so. At the same time, however, a president invested with strong legislative powers may increase executive–legislative conflict and provide more opportunities for the influence of organized interests on collective decisions.

Regardless of their effects, however, one can explain the institutions selected in Latin America since 1978 by adopting the perspective of those who participate in the approval of reforms. In general, it makes sense to think that politicians have both a shared interest in adopting efficient institutions and an exclusive interest in having institutions under which they can obtain a political advantage. If this is correct, then there is no reason to expect constitutions to have a consistent design, particularly where institutional performance is deficient, the distribution of partisan power is constantly changing, and reforms are usually adopted by means of a compromise among a plurality of actors with opposing interests.

132. *See* HERBERT KITSCHELT ET AL., LATIN AMERICAN PARTY SYSTEMS 160 (2010) (arguing that programmatic structuration of electoral competition is relatively weak in Latin America).

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The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils

Andrea Pozas-Loyo* & Julio Ríos-Figueroa**

This Article studies amendment processes, their specific characteristics, and how these characteristics shape institutional design outcomes. Amendment processes are in between the extraordinary creation of new constitutions and the ordinary process of lawmaking. Our central claim is that the design of institutions through amendments is influenced by variables that do not regularly figure in the analysis of constitution making because of their bias toward new constitutions and the "politics of the extraordinary." In particular, we argue that the design of the existing institutions and the political leverage of actors that do not participate directly in constitutional reform may exert an important influence in the design of institutions created by amendments. In other words, the more institutional power and political leverage actors have, the more likely the amendment will reflect their interests, even if they do not partake of the constituent body. To explore this hypothesis, we analyze the leverage that supreme courts have to shape the amendment processes that adopt or reform judicial councils. We claim that the more powerful supreme court judges are, the more likely they will successfully influence amendments that shape the composition and functions of judicial councils in a way that serves their interests. We offer empirical evidence from all the cases of amendments that created or reformed judicial councils in Latin America.

> We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.[1]

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1. THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

I. Introduction

A nearly ubiquitous assumption of constitutional thought is that constitution-making processes are and must be extraordinary—that the circumstances and motivations that shape the framers' decisions are and must be unrelated to those that characterize ordinary politics.[2] Thus, the intromission of ordinary politics in constituent processes has been approached as an unusual and undesirable phenomenon.

Jon Elster has discussed the biases that result "when some of those who write the constitution also expect to act within it" by analyzing four episodes of French constitutional history.[3] "In this situation," Elster tells us, the constitution makers "have a clear incentive to write a large role for themselves into the document and a correspondingly weak role for their rivals."[4] Ginsburg, Elkins, and Blount tested this "self-dealing" hypothesis and found support for biases resulting from executive-centered constitution-making processes, which amount to 9% of their 460 observations.[5] Because the involvement of ordinary politics in constitution making is regularly considered marginal, the normative and positive conclusions of these studies do not seem particularly consequential. But is constitution making largely an extraordinary process?

We believe that the role of ordinary politics in constitution-making processes has been underestimated by the focus on the enactment of new constitutions and the neglect of amendment processes. This inattention to amendment processes is probably a consequence of the central role that the American constitutional tradition plays in constitutional studies, and of the extreme rigidity of the American Constitution that makes amendment processes rare events.[6] In any case, as soon as amendment processes are

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2. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 120 (1962) (distinguishing "operational" decision making from "constitutional" decision making by claiming the individual's interest is "more readily identifiable and more sharply distinguishable" from colleagues in operational decision making); THE FEDERALIST NO. 49, *supra* note 1, at 315 (noting that prior constitutions were formed in the context of danger that unified normally diverse public opinions); Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 209 (2009) (explaining the conventional view that "constitution-making is coincident with a cataclysmic event of some kind").

3. Jon Elster, Authors and Actors: Executive–Legislative Relations in Four French Constitution-Making Moments 4 (Apr. 11–13, 2003) (conference paper), http://www.yale.edu/coic/elster.doc.

4. *Id. See also* JON ELSTER, ULYSSES UNBOUND 132 (2000) (stating that "[t]he interest of the legislature is to carve out the largest possible place for itself in the machinery of government"); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380 (1995) (asserting that "[i]nstitutional interest in the constitution-making process operates when a body that participates in that process writes an important role for itself into the constitution," such as when a constituent assembly also serves as an ordinary legislature and gives "preponderant importance to the legislative branch at the expense of [the other branches]").

5. Ginsburg et al., *supra* note 2, at 205 & tbl.1.

6. *See, e.g.*, Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2004–07 (1999) (explicating how changes in American attitudes toward slavery, from the

included in the picture, the extraordinary character of constitutional politics is called into question, and the study of the role that ordinary political actors and their ordinary motivations play in constitutional design gains importance.[7]

In this Article, we focus on amendment processes and their characteristics. We argue that because amendment processes lie between constitution-making processes and ordinary lawmaking, to give account of them we need to introduce variables that have not figured in the analyses of the creation of new constitutions. We claim that the specific nature of the derived constituent power (i.e., the body that carries out amendments) makes these processes susceptible to the intromission of "ordinary politics." Specifically, the constituent power in amendment processes has a double identity. On the one hand, it is a supermajoritarian force that ought to embody the constituent popular will. On the other hand, it is an aggregate of constituted actors whose political identity and functions are defined by the constitution, who act within the constitutional frame, and who are therefore susceptible to the pressures of ordinary politics. Hence, our argument applies to the amending processes where the constituent power is comprised of constituted organs. This is the case for the vast majority of amending procedures, but there are some constitutions, like the 1994 constitution of Argentina, that prescribe an amending process where governmental organs are not involved in the constitutional changes.[8]

To study the consequences of this double identity, we focus on whether powerful supreme court judges are able to influence the choices of judicial institutions in amendment processes. We focus on the judges' capacity to shape judicial institutions for three reasons. First, supreme court judges are not members of the derived constituent power yet are important political actors. Second, there is a clear way to assess their power vis-à-vis the constituted powers that do belong to the amending body—the judges' institutional power is defined by the constitution in place at the time of

abolitionist movement to the Civil War to Reconstruction, informed the Thirteenth, Fourteenth, and Fifteenth Amendments).

7. For comparative works that consider amendment rates in the Latin American region, see generally Gabriel L. Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America (Nov. 25–26, 2010) (conference paper) (on file with authors) and Detlef Nolte, The Latin American Experiences with Constitutional Reforms Since the Transitions to Democracy (Nov. 25–26, 2010) (conference paper) (on file with authors).

8. The Argentinian constitution requires a constitutional convention to enact an amendment. Art. 30, CONSTITUCIÓN NACIONAL [CONST. NAC.]. Other constitutions, for instance the 1991 Colombian constitution, provide various amendment procedures to which our argument applies (such as amendments that involve constituted actors like the legislature) as well as others where it does not (like an amendment via referendum). *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 374, 378 (Colom.) (providing for the amendment of the constitution by the congress, by a constituent assembly, or by the people through referendum).

amendment,[9] and their political leverage depends on the fragmentation of political power.[10] Third, there is a clear way to assess the judges' preferences regarding the design of judicial institutions, particularly regarding the design of the judicial councils.[11]

We focus on amendment processes that adopt or reform judicial councils. In particular, we are interested in the councils' functions and composition. Judicial councils were first adopted in Europe in order to take away from the executive (e.g., the ministry of justice) control over the appointment and career of lower court judges.[12] In this Article, our empirical arena is the Latin American region where, unlike Europe, before the adoption of judicial councils, most supreme courts had the power to appoint lower court judges and to manage their careers.[13] While in Europe the central motivation behind the creation of autonomous and powerful judicial councils was to increase judicial independence vis-à-vis the executive, in Latin America the motivation was to block clientelistic relations between supreme court judges and lower court judges, and to promote a judicial career with clear and objective promotion and disciplinary standards.[14] Because of this particular status quo, the adoption and reform of judicial councils in the region has produced interesting political battles where the supreme courts have fought to shape the functions of the council and even to control a majority of its seats.[15] Our hypothesis is that the more institutional power and political leverage supreme court judges have, the more likely it is that the design of judicial councils adopted or modified through amendment processes will reflect the judges' preferences.

This Article is divided into four additional Parts. In Part II, we discuss why amendment processes are susceptible to the intromission of ordinary politics. In Part III, we analyze the supreme courts' influence in shaping the design of judicial councils as an instructive instance of ordinary politics in constitution-making processes and discuss the concrete causal mechanisms behind our hypothesis. Part IV offers an empirical analysis of our theoretical

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9. *See* John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-rational Deliberations*, 26 WASH. U. J.L. & POL'Y 131, 133 (2008) (noting that judges are limited by constitutional provisions, among other things).

10. *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 97 (2009) (noting that judicial power increases when "control over electoral institutions is divided").

11. *See infra* Part III.

12. LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 116 (2007).

13. Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* 4–5 (Carnegie Endowment for Int'l Peace Working Paper No. 28, 2002), *available at* http://www.carnegieendowment.org/files/wp28.pdf.

14. *Id.* at 5–7.

15. *See id.* at 15 (explaining that the Latin American courts often strongly resisted efforts to create judicial councils, and in some cases "succeed[ed] in shaping the councils to their own advantage").

claims in all the amending processes that adopted or altered judicial councils in Latin American countries from 1961 to 2010. Part V concludes and states two implications of the argument of this Article for future research.

II. Ordinary Politics in Amending Processes

The superiority of constitutional law vis-à-vis ordinary law is theoretically grounded in the dichotomy between constituent and constituted powers. Who is the author of the constitutions, or in other words, who is the constituent power? The answer to this question is one of the normative pillars of modern constitutionalism. Sieyès's answer is paradigmatic: it proceeds from the old idea that the hierarchy of laws signals the hierarchy of their authors.[16] Constitutional laws, Sieyès tells us, have the first order of precedence since they create the government, i.e., they establish the government's organization and functions.[17] Because the government is a constituted power, i.e., because its existence derives from the constitution and its actions are delimited by it, the government cannot make or change the constitution. Therefore, constitutional law is defined vis-à-vis ordinary law, and what makes it "constitutional" is that its author is the *constituent* power and not a constituted one.[18]

Now, for concrete constitution-making processes, the constituent power—the people—needs to be instantiated in a particular form. In other words, a constitution-making body needs to become the "operational form of the sovereignty of the people."[19] While the identity, legitimacy, and democratic credentials of the constitution makers vary greatly across time and space, they can all be grouped into two subsets: those whose task is to write a whole new constitution, and those whose task is to amend it. These are the original and the derived constituent powers, respectively.[20]

Given the foundational character of codified constitutions, it is not uncommon for original constitution-making processes to be presented as extraordinary events that answer to extraordinary political circumstances.[21]

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16. *See* EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 134 (S. E. Finer ed., M. Blondel trans., 1963) (positing that while "[a] body subjected to constitutional forms cannot . . . give itself another [constitution]," a nation, which "is independent of any procedure and any qualifications," may do so).

17. *Id.* at 123–26.

18. *Id.* at 124.

19. Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 49, 49 (Martin Loughlin & Neil Walker eds., 2007).

20. *See* SIEYÈS, *supra* note 16, at 131–32 (distinguishing between extraordinary representatives, whose "common will has the same value as the common will of the nation itself," and ordinary representatives, who "can move only according to prescribed forms and conditions").

21. It is worth noting that the conventional wisdom that links original constitution-making processes to great changes has been proven false: only about half of new constitutions are promulgated within three years of military conflict, economic or domestic crisis, regime change, territorial change, or coup d'état. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL

The uniqueness of the processes can then be used to legitimize the outcome. In this connection, the paradigmatic example is the American Constitution. As Wood notes, "[o]nly 'a Convention of Delegates chosen by the people for that express purpose and no other' ... could establish or alter [the] constitution."[22] According to Wood, the American Constitutional Convention was an "extraordinary invention" because "[i]t not only enabled the constitution to rest on an authority different from the legislature's, but it actually seemed to have legitimized revolution."[23]

In contrast, constitutional amendments are not vested with a halo of uniqueness. Their task is much less impressive and the identity of their authors has a somehow paradoxical nature: the identity of amendment authors is derived from the constitutional text itself, as is the identity of the constituted branches of government. However, to preserve the distinction between constituent and constituted powers, codified constitutions resort to an institutional maneuver: through supermajoritarian norms, they create a body out of constituted powers that has a new and distinct identity, but that inherits the capacity to represent the people from its constituted components.

An important consequence of such a paradoxical identity is that each individual participant in a derived constitution-making process has a double institutional identity. On the one hand, it is a member of the constituent body representing the popular will. On the other hand, it belongs to a constituted organ inserted in ordinary politics. Such a double identity makes derived constitution-making processes vulnerable to the infiltration of ordinary political motivations corresponding to an actor's constituted identity and that are exogenous to the constituent process per se.

It is noteworthy that we are not arguing that original constitution-making processes are never open to the infiltration of ordinary political motivations. As Ginsburg, Elkins, and Blount have shown, the composition of original constitution-making processes varies greatly, from a popularly elected constituent assembly with the unique purpose of drafting a new constitution, all the way to executive-led processes.[24] If, as we have argued, derived constitution-making processes are vulnerable to ordinary politics because individual constitution makers have a constituted identity, then we can expect original constitution-making processes to be infiltrated by ordinary political motivations because constitution makers may have ambitions of acquiring such a role in the postconstituent period.[25] In other words, the

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CONSTITUTIONS 134–39 (2009) (calculating that constitutional replacement is only 33% more likely in years surrounding a domestic crisis than in other years).

22. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 342 (1998) (citation omitted).

23. *Id.*

24. Ginsburg et al., *supra* note 2, at 204–05.

25. *See* Elster, *supra* note 3, at 2–4 (comparing a politician who shapes the constitution while favored to later win the presidency to a playwright that expects to act in her own play and thus writes a large role for herself).

self-serving hypothesis makes sense when there actually is a "self" that will be present both in the constituent moment and in the posterior constituted moment.[26] Thus, in original constitution-making processes, the self-serving hypothesis should work only in cases where the individuals in the constituent moment have a low level of uncertainty about their institutional identity in the ensuing constituted moment, and where they actually have the power to shape the institution in question.[27]

III. Supreme Court Judges and the Design of Judicial Councils

The concrete question this Article addresses is whether powerful supreme court judges have the capacity to shape the design of judicial councils through their political influence over the derived constituent power. We believe this question illuminates the specificities of amendment processes vis-à-vis original constitution-making processes. To support this belief, we note that while fifty years ago the judicial branch was an obscure and unfamiliar actor, today it is a central player of everyday politics in most democracies. As Hirschl claims, paraphrasing de Tocqueville, "[T]here is now hardly any moral or political controversy in these [democratic] countries that does not sooner or later turn into a judicial one."[28] Judges with constitutional adjudication power are indispensable to understanding the political dynamics of most democracies. They are political actors that the representative branches of those countries need to take, and do take, into consideration when making decisions.

When supreme court judges may impose political costs on the other constituted organs of government, those organs will take the judges into

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26. In another article, we have shown that the partisan identity of, and the bargaining among, constitution makers matters for the creation of power-diffusing institutions such as constitutional tribunals. Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 COMP. POL. 293, 296–97, 302 (2010). On the crafting of constitutional rules for selecting presidents, see generally Gabriel L. Negretto, *Choosing How to Choose Presidents: Parties, Military Rulers and Presidential Elections in Latin America*, 68 J. POL. 421, 421–33 (2006).

27. This point may seem trivial but it has interesting implications. For instance, the self-dealing hypothesis can be easily applied to executive-led constitution making but not to legislative-led processes, even if all the individuals that are part of a constituent body know that they will be members of the legislature, because it is not automatic that the individual decision-making weight of the constitution-making body will be the same as that of the future legislative body. This condition is not satisfied when the constitution-making rule is supermajoritarian, as it is in amendment processes, or when for political reasons the minority in the constituent assembly has a de facto veto over some provisions. To make this point clear, it is possible to say that while in an executive-led constitution-making process the institutional and individual identity coincide, in the legislative-led case this equivalence is lost for those individuals that will be part of the minority in the constituted legislature. In other words, the institutional self who gets the legislative power is the *majority* of the legislature, not the totality of individual legislators. So it makes sense for the individuals who will be part of the minority in the future legislature to block majoritarian self-serving decisions when they can.

28. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 169 (2004).

consideration. The power of the judges vis-à-vis the representative organs of government is determined by two central factors: (1) their constitutional powers to adjudicate conflicts involving the representative organs, and (2) the political context in which they make decisions. Notice that while the first factor is an institutional power established de jure, the second factor is a qualifier that makes us expect those powers to be effective if there is fragmentation of power in the political system.[29] In other words, if political power is not monopolized by a single group, then we can reasonably expect that the judge's influence over the other constituted organs correlates positively with her de jure constitutional review powers, given a healthy degree of independence from those political actors. For instance, the judge's influence enables us to understand why certain laws that reflect the preferences of the legislative majority do not even make it to the floor of congress: anticipation of a judicial decision declaring those laws unconstitutional.

Now, by which mechanism are our independent and dependent variables linked? In other words, how can supreme court judges with judicial review powers infiltrate their preferences into the amendment processes that create judicial councils? As we have already suggested, the answer to this question lies in the double identity of the individual members of the derived constituent power. We distinguish three concrete mechanisms: (1) In amendment processes, constitution makers belong to constituted organs, and they are (or can expect to be) parties in conflicts that the supreme court will adjudicate. Through this mechanism, supreme court judges can signal that they will impose stricter standards on those who are amending the constitution in ways the judges consider unfavorable. Thus, the judges exert influence before and during the process of constitutional reform. (2) After a successful amendment process, judges with the power of judicial review can decide that the amendment itself is unconstitutional, either because of vices during the process of reform or because of the amendment's content. Through this mechanism, judges would nullify an amendment that is contrary to their interests after the amendment was formally passed.[30] The previous two mechanisms work better in a politically fragmented context, when supreme court judges adjudicate conflicts among governmental organs with different political identities, and thus the coordination of political branches to

29. *Cf.* John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 278 (postulating that courts may only act contrary to congressional preferences "if their decisions are protected from immediate reaction by internal structural impediments within Congress").

30. This mechanism is not as rare as one might think. *See* Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 462 (2006) (recognizing cases from India and Peru in which the supreme courts have asserted the power to review the constitutionality of constitutional amendments). In Latin America, there are many examples. The one that is most interesting for our purposes is the decision by the Colombian supreme court in 1981 to declare unconstitutional the amendment of 1979 that, among other things, created a judicial council. *See infra* notes 89–90 and accompanying text.

challenge unfavorable judicial decisions is limited.[31] Hence, in fragmented political contexts, supreme court judges have political leverage vis-à-vis the members of the derived constituent body, and they are able to influence the decisions of the members of the derived constituent body via their power of constitutional review.[32] (3) In addition, supreme court judges can also influence the outcomes of amendment processes through informal mechanisms that depend on shared social networks between members of the derived constituent body and the supreme court judges. These informal mechanisms are relative to a particular political context and thus they become evident in the study of concrete cases. For instance, as we will discuss later, in Mexico's 1994 amendment processes, the supreme court was able to introduce a last-minute, obscure (but important) modification to the constitutional provision that established the judicial council.[33] The supreme court was able to secure this amendment thanks to two very influential senators who had been members of the supreme court and who were close to the current court's members and their institutional interests.[34]

The design of judicial institutions is of particular interest to supreme court judges, and thus they will have an interest in seeing their preferences enacted when constitutional amendments deal with those institutions. As we have already mentioned, in Latin America, the motivation behind the creation of judicial councils was to block clientelistic relations between supreme court judges and lower court judges, and to promote a judicial career with clear and objective promotion and disciplinary standards.[35] Thus, judicial councils are of particular importance in many Latin American countries because their adoption altered the judges' power by diminishing their administrative control over the judiciary, over the judicial careers of lower court judges, and over the judicial budget.[36] Hence, it is reasonable to

31. *See* REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 15 (2004) (contending that a competitive political environment enhances the rule of law and the power of judges as arbitrators of political conflict); GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 234 (2002) (concluding that judicial independence positively correlates with the number of "veto players," independent political actors whose agreement is required to alter policy); Matías Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 AM. J. POL. SCI. 699, 699 (2002) (theorizing that political fragmentation makes for a vigorous judiciary willing to assert itself against other government actors). *See generally* Ferejohn & Weingast, *supra* note 29, at 265–70 (modeling the strategic behavior of courts vis-à-vis legislatures).

32. To generalize our argument to other types of amendments, the influence of political actors' leverage vis-à-vis the amending body should be weighted by the costs and gains that the amendment in question is expected to bring to members of the amending body. Because the design of judicial councils in Latin American countries is not as important to the interests of the elected branches as, say, the design of the electoral system, the political leverage of supreme court judges can be expected to outweigh that of the other branches.

33. *See infra* notes 76–80 and accompanying text.

34. *See infra* note 78 and accompanying text.

35. *See supra* note 14 and accompanying text.

36. *See* HAMMERGREN, *supra* note 12, at 116 (discussing the tasks envisioned for judicial councils in Latin America).

assume that supreme court judges would try to influence the amendment processes that introduced or altered the competencies of those councils.

To analyze judicial councils, it is important to distinguish their composition and competencies. Regarding the latter, judicial councils' strengths vary depending on whether the council is capable of (1) administering the material resources of the judiciary, (2) participating in or controlling the appointment of judges at some or all levels in the judicial hierarchy, and (3) managing judicial careers through sanction and promotion mechanisms.[37] Regarding the composition of the councils, they can be dominated by judges from—or appointed by—the supreme court, by judges from all levels of the judiciary, or by persons who are external to the judiciary who can be either politicians from the elected branches or councilors nominated by other external actors such as the deans of the law schools or the members of the bar association.[38]

Tom Ginsburg and Nuno Garoupa combine both dimensions to create a typology of judicial councils.[39] At one extreme, they place councils dominated by supreme court judges that concentrate the three functions mentioned in the previous paragraph.[40] At the other extreme, they locate councils dominated by actors external to the judiciary that perform administrative tasks but do not participate in the appointment of judges or in the management of judicial careers.[41] In between, we find strong councils, in terms of competencies, that are dominated by actors external to the judiciary, councils controlled by judges from different levels of the judiciary with different levels of competencies, and so on.[42]

Judicial councils were first adopted in European countries as a means to take away from the executive branch (usually through the ministry of justice) the power to appoint judges and to influence and manage judicial careers.[43] In France, Italy, Portugal, and Spain, judicial councils are composed of judges and representatives of other branches of government and professional associations.[44] These councils' functions are to participate in judicial appointments and supervise judicial careers.[45] In contrast, Latin American

37. *See* Hammergren, *supra* note 13, at 9 tbl.1 (focusing on the same three factors in evaluating the power of Latin American judicial councils).

38. *See id.* (listing by country the composition and methods of selection for Latin American judicial councils).

39. Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53, 57–60 (2009).

40. *See id.* at 57–58 (enumerating the broad powers held by supreme court judges in the "French-Italian model" of judicial councils).

41. *See id.* at 59 (mentioning that the judicial councils in Austria and Costa Rica are confined to administrative tasks).

42. *See id.* at 59–60 (describing the idiosyncrasies of a plethora of national judicial councils).

43. HAMMERGREN, *supra* note 12, at 116.

44. Hammergren, *supra* note 13, at 2.

45. *See id.* (mentioning that the four nations' judicial councils are focused on appointments and career management rather than broad-based administration); *see also* CARLO GUARNIERI &

councils were adopted as a means to reduce the power of supreme court judges to appoint lower court judges and control their judicial careers in order to prevent clientelism, reduce corruption, and promote a judicial career with objective standards.[46]

Not only do the origins of the councils differ across the Atlantic Ocean, their composition and competencies also vary greatly. The composition of Latin American judicial councils varies considerably from country to country, to the extent that we can find examples of the three types of councils identified by Ginsburg and Garoupa.[47] Regarding competencies, Latin American councils tend to be stronger than their European counterparts because, in addition to controlling judicial appointments and managing judicial careers, councils also have control over the judiciary's material resources and, in some cases, even over the number and jurisdiction of the courts.[48]

Assuming that supreme court judges prefer to maximize their power over the judiciary's administration and over lower court judges—by controlling their careers and appointments—we can derive the following

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PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 52–66 (C.A. Thomas ed., 2002) (describing the formation and organization of judiciary councils in Italy, Spain, Portugal, and France and noting that they were "designed to preserve the independence of the judiciary").

46. *See* HÉCTOR FIX-ZAMUDIO & HÉCTOR FIX-FIERRO, EL CONSEJO DE LA JUDICATURA [THE JUDICIAL COUNCIL], 3 CUADERNOS PARA LA REFORMA DE LA JUSTICIA [HANDBOOKS FOR JUDICIAL REFORM] 34, 36, 38, 40, 42, 44–60, 67–69 (1996) (describing how judicial councils play a role in judicial disciplinary proceedings in Peru, Uruguay, Colombia, Venezuela, Panama, Costa Rica, Bolivia, Argentina, and Mexico; appointment or submission of potential judicial candidates in Peru, Colombia, Venezuela, El Salvador, Panama, Costa Rica, Paraguay, Bolivia, Argentina, and Mexico; and administration of the judicial career plan in Colombia and Costa Rica); Hammergren, *supra* note 13, at 4–5 (delineating various powers of Latin American supreme courts assumed by judicial councils). It is interesting to investigate further the reasons behind the decision to place such important powers in the supreme courts in the first place in the Latin American region. According to Linn Hammergren, "Only in Argentina and Colombia had the Ministry of Justice been responsible for judicial administration, and in both countries, the supreme court had already succeeded in reversing that practice." *Id.* at 4. Hammergren also notes that "[o]nly in Argentina and Peru did the ministry manage judicial appointments." *Id.* Hammergren continues: "Elsewhere in Latin America, the supreme court has traditionally exercised the role of governing body for the judiciary as well as that of court of last resort. . . . On the whole, Latin America's ministries of justice have been so weak that they have disappeared in a number of countries (Bolivia, Mexico, Nicaragua, and Panama)." *Id.* at 4–5 (footnote omitted); *see also* Jorge Carpizo, *Otra reforma constitucional: la subordinación del consejo de la judicatura federal* [*Another Constitutional Reform: The Subordination of the Federal Judicial Council*], CUESTIONES CONSTITUCIONALES [CONSTITUTIONAL QUESTIONS], Jan.–June 2000, at 209, 209–12 (noting that the main motivation for creation of the Mexican Federal Judicial Council was reduction of corruption and clientelism); Hammergren, *supra* note 13, at 6–7 (recognizing Latin American concern with judicial incompetence, patronage networks, and improper influence exercised via promotions).

47. *See infra* Part IV (presenting the empirical analysis used in this Article to analyze judicial councils); *supra* notes 39–42 and accompanying text.

48. *See, e.g.*, FIX-ZAMUDIO & FIX-FIERRO, *supra* note 46, at 52–53 (including in the powers of the judicial council of Costa Rica the power to handle the judicial budget and to regulate the distribution of work between courts); Hammergren, *supra* note 13, at 2 (asserting that "none [of the European councils] exercise the administrative responsibilities for the entire judiciary in the way that several Latin American councils do").

preference order for the design of judicial councils' composition and functions:

(1) A powerful council controlled by supreme court judges;

(2) A weak council controlled by supreme court judges;

(3) A weak council controlled by members of the judiciary;

(4) A powerful council controlled by members of the judiciary;

(5) A weak council controlled by politicians; or

(6) A powerful council controlled by politicians.

Powerful supreme court judges will try to influence amendment processes where judicial councils are either created or reformed in order to satisfy these preferences.

IV. The Constitutional Design of Judicial Councils in Latin America

The Venezuelan constitution of 1961 adopted the first Latin American judicial council consciously modeled on European trends (although the council was not actually formed until 1969), in the sense that it was created to manage judicial appointments, but it did not receive responsibility for judicial administration until 1988.[49] The second council in the region was adopted by the military government in Peru in 1969;[50] it was in charge of judicial appointments that had formerly been managed by the Ministry of Justice, an organ eliminated by the military.[51] It was nearly two decades until another Latin American country followed suit.[52]

Since the late 1980s, several countries have created judicial councils: Argentina, Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, and Paraguay.[53] The composition, functions, and constitutional status of these councils, however, vary considerably across time and space. For instance, whereas some councils were given considerable power, independence, and constitutional status from the moment of their creation (e.g., Mexico and Colombia),[54] other

49. Hammergren, *supra* note 13, at 3. The Venezuelan constitution of 1947 actually mentioned that "the law could establish a Supreme Council of Judges with representatives from the Legislative, Executive, and Judicial branches in order to foster the independence, efficacy and discipline of the Judicial Power," but apparently such a council was not created until more than two decades later. CONSTITUCIÓN DE LOS ESTADOS UNIDOS DE VENEZUELA [E.U. VENEZ. CONST.] 1947, art. 213.

50. Hammergren, *supra* note 13, at 3. The military governments of Brazil and Uruguay also created judicial councils. *Id.* at 13.

51. *Id.* at 3.

52. *Id.* at 4.

53. *Id.* at 9–12 tbl.1.

54. *See* Mario Melgar Adalid, *The Supreme Courts and the Judiciary Councils*, 42 ST. LOUIS U. L.J. 1131, 1134 & n.22 (1998) (delineating the powers that the Mexican constitution bestows on the Mexican judicial council); Hammergren, *supra* note 13, at 13, 41–42 (recounting the constitutional creation of the Colombian judicial council, highlighting the Colombian judicial

councils were born as organs internal to the judiciary that received no constitutional status (e.g., Costa Rica, Guatemala, and Brazil (pre-2004)).[55] Still other councils are simply mentioned in the constitution but the details of their composition and functions are left to the organic laws of the judiciary (e.g., El Salvador, Argentina, Ecuador, and the Dominican Republic),[56] although, interestingly, in some of these cases, the details of the composition and functions of the council were later constitutionalized (e.g., El Salvador and the Dominican Republic).[57] Finally, in Venezuela, the council disappeared in the constitution of 1999.[58]

Table 1 shows the year of the constitutional adoption of judicial councils in Latin America, distinguishing between original and derived constitution-making processes. For instance, the first Colombian judicial council was created through a constitutional amendment in 1979,[59] and the new Colombian constitution of 1991 also included a judicial council.[60] Table 1 does not include the countries that have created a judicial council if the council lacks constitutional status (e.g., Costa Rica, Guatemala, and Panama), but it includes the countries where the council is mentioned in the constitution even though the details of its composition and functions are left to an organic law. The argument defended in this Article directly applies to the twelve observations in the right column of Table 1, which are the judicial councils either adopted or reformed through amendment processes.[61]

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council's powers, and characterizing the Colombian and Mexican judicial councils as external to the judiciary).

55. *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 111 (2009) (recounting the independence from the judiciary enjoyed by the Brazilian judicial council that was created by a 2004 constitutional amendment); Hammergren, *supra* note 13, at 13 (describing the Costa Rican, Guatemalan, and first two Brazilian judicial councils as restricted and judicially dominated).

56. *See infra* Table 1.

57. *See* Margaret Popkin, *Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective*, *in* U.S. AGENCY FOR INT'L DEV., GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 100, 105 (rev. ed. 2002) (discussing El Salvador's judicial council and noting its "greater independence from the [supreme] court and increased responsibilities, based on constitutional reforms agreed to during the 1991 peace negotiations"); Ingrid Suarez, *A Change for the Better: An Inside Look to the Judicial Reform of the Dominican Republic*, 9 ILSA J. INT'L & COMP. L. 541, 548 (2003) (heralding the Dominican Republic's creation of the National Magistrature Council by the 1994 constitution, which was charged with making rules to govern the judiciary).

58. Rogelio Pérez-Perdomo, *Venezuela, 1958–1999: The Legal System in an Impaired Democracy*, *in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 414, 450 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

59. CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA [C.R.C.] 1886, art. 148 (Colom.) (1979).

60. C.P. arts. 254–57 (Colom.).

61. Many of these amendment processes were devoted to judicial reform per se. If other political institutions were reformed during the same amendment process, it is possible that a bargain among the members of the derived constituent power had taken place. *See* Jonathan Hartlyn & Juan Pablo Luna, Constitutional Reform in Latin America: Intentions and Outcomes 9–10 (Sept. 5–9, 2007) (conference paper), http://cablemodem.fibertel.com.ar/seminario/hartlynluna.pdf (observing that Latin American constitutional reform packages can be created by politicians' negotiation with

Table 1. Constitutional Adoption of Judicial Councils in Latin America

Country	Original Constitution-Making Process	Derived Constitution-Making Process
Argentina		1994*
Brazil		2004
Bolivia	1995	2002, 2005
Colombia	1991	1979
Dominican Republic	2010	1994*
Ecuador	1998, 2008	1993*
El Salvador	1983*	1991*, 1996
Honduras		2000
Mexico		1994, 1999
Paraguay	1992	
Peru	1979, 1993	
Venezuela	1947*, 1961	

*Council mentioned in the constitution; details of its composition and functions found in the organic law of the judiciary.

The functions and composition of judicial councils vary considerably across time and space in the Latin American region. Following Garoupa and Ginsburg, we distinguish the councils' powers to participate in the administration of the judiciary's material resources and their powers to appoint lower court judges and manage judicial careers. Appendix A shows the rich regional variation in both composition and functions of all the judicial councils with constitutional status in Latin America. For instance, there are councils with high levels of appointment powers but low levels of administrative powers (e.g., the Dominican Republic (1994), Paraguay (1992)), councils with high levels of both types of powers (e.g., Mexico (1994)), and councils with lower levels of both (e.g., El Salvador (1983, 1991)). The composition of the councils also varies, with councils dominated by supreme court judges (e.g., Mexico (1999)), councils with a majority of judges from different courts (e.g., Brazil (2004)), and councils dominated by politicians from the elected branches (e.g., Bolivia (1995, 2002, 2005)).

The argument of this Article is that the more powerful supreme court judges are, the more likely it is that they will successfully shape the design of judicial councils in amendment processes in a way that serves their interests. To assess this argument, we use an index of judicial review powers of supreme court judges as established in the constitutions that antecede the

their opponents). For instance, one party may support a reform in presidential powers in exchange for support for a judicial council.

amendment process that created or reformed the judicial council. The index of judicial review powers that can be used to influence derived constitution-making processes considers whether the constitution specifies instruments of constitutional adjudication that are good for arbitrating political conflicts (e.g., instruments that are concentrated in the supreme court, abstract or concrete, and with access restricted only for political actors).[62] All the instances of adoption or reform of judicial councils through amendments analyzed in this Article took place in contexts where no single political party controlled all the organs required to amend the constitution, making this index a valid proxy of de facto power.[63]

To assess the influence that supreme court judges exerted on the design of judicial councils, we create an index that combines the councils' composition and functions. Essentially, we consider first whether a council controls or participates in (1) the preparation and administration of the judiciary's budget; (2) decisions regarding the jurisdiction and number of courts; (3) the appointment of judges from different levels of the judiciary; and (4) the administration of judicial careers and the mechanisms for disciplining judges. Based on this index of judicial councils' functions, which adds up to nine points, we distinguish between strong and weak councils (above or below the midpoint, respectively) and we match this with the council's composition (e.g., controlled by politicians from the elected branches, composed of a majority of judges from all levels of the judicial hierarchy, or composed of a majority of judges selected by the supreme court). The resulting values range from one to six, which align with the inverted order of supreme court judges' preferences over the council's design established at the end of Part III. For instance, the index assigns a value of six if the council is strong and dominated by supreme court judges, a value of five if it is a weak council controlled by supreme court judges, and so on.

The correlation between the indexes of judicial review powers of supreme court judges and their influence over the design of the council is 0.622 (statistically significant at the 95% confidence level). There are interesting cases in our small sample (n=12). For instance, in Bolivia, where the supreme court had very low powers of judicial review because a constitutional tribunal had been delegated those powers, the design of the council

62. *See* Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America*, *in* COURTS IN LATIN AMERICA 27, 31, 40–42 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (describing the variety of instruments for constitutional adjudication contained in Latin American constitutions and categorizing the types of legal instruments according to their characteristics). In our index, if a constitutional tribunal has been created, then the judicial review powers of supreme court judges equal zero.

63. *See* Andrea Pozas-Loyo & Julio Ríos-Figueroa, *When and Why Do "Law" and "Reality" Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico*, *in* EVALUATING ACCOUNTABILITY AND TRANSPARENCY IN MEXICO 127, 135–39 & fig.5 (Alejandra Ríos Cázares & David A. Shirk eds., 2007) (predicting a higher correlation between judicial independence in law and judicial independence in reality where no one party has the power to unilaterally amend the constitution).

was the worst for supreme court judges (i.e., a powerful council controlled by politicians). In contrast, in Mexico, where the supreme court enjoyed higher powers of judicial review after the reform of 1994, the design of the council is the best for supreme court judges (i.e., a powerful council with a majority of judges nominated by the supreme court).[64]

In the remainder of this Article, we illustrate the operation of the formal and informal mechanisms through which supreme court judges influenced the amendment processes that designed the Mexican judicial council. This is a story of supreme court judges using their powers of judicial review and their informal lobbying capacities to shape the outcome of a constitutional amendment in a way that served their interests.

The Mexican judicial system, as established in the constitution of 1917, has been reformed several times. During most of the twentieth century, these reforms had a primary objective of aligning the interests of the members of the judiciary with those of the hegemonic political party that was created in the aftermath of the revolution.[65] Once the supreme court and the rest of the judiciary were successfully incorporated into the corporatist logic of the *Partido Revolucionario Institucional* (PRI), there was another series of reforms aimed at improving the administrative efficiency of the judiciary both by concentrating administrative power in the supreme court and by expanding the number of lower federal courts to deal with the ever-increasing caseload.[66] Until 1994, the Mexican supreme court was thus a powerful administrative body very much involved with the hegemonic party

64. A systematic analysis on a larger number of cases would be necessary to show more than a mere positive association.

65. *See* Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 266, 282 (Scott Mainwaring & Christopher Welna eds., 2003) (noting that Mexican presidents between 1917 and 1988 used constitutional amendments to place many substantive issues beyond judicial review and to control the supreme court through modifications to the rules for appointing and dismissing judges). A 1934 constitutional amendment provided for a six-year tenure that coincided with the tenure of the president; in 1944, once the party had become hegemonic, another amendment restored life tenure to supreme court judges—but flexible dismissal procedures rendered it largely ineffective. *Id.* at 283 tbl.9.3, 286–87.

66. *See* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 40 (2003) (explaining how the 1994 amendments to Mexico's constitution increased the supreme court's independence from the president). The culmination of this process took place in 1987 when a constitutional amendment transferred to the supreme court the power to control the material resources of the judiciary, including not only the budget, but also decisions over the number and jurisdiction of courts. Héctor Fix-Fierro, *La reforma judicial en México, ¿de dónde viene? ¿a dónde va?* [*Judicial Reform in Mexico: Where Did It Come From? Where Is It Going?*], REVISTA MEXICANA DE JUSTICIA [MEX. REV. JUST.] July–Dec. 2003, at 251, 252, 278–79. These new capacities added to the supreme court's control over the appointment and promotions of lower court judges, a prerogative that the court had enjoyed since 1917. *See* Magaloni, *supra* note 65, at 283 tbl.9.3 (indicating that the supreme court has had the power to appoint magistrates and judges since 1917).

and with weak powers of judicial review.[67] That year, however, the supreme court was delegated considerable powers of judicial review and its membership was reduced in order to increase its legitimacy and independence vis-à-vis the other branches of government.[68] The 1994 reform substantially increased the policy making and lawmaking capacities of the supreme court judges, augmenting in particular the capacities of the supreme court to adjudicate conflicts among the political actors within the executive and legislative branches of government.[69] The main political motivation behind this reform was to have a neutral arbiter to resolve political conflicts—a role that the executive (who was, simultaneously, leader of the hegemonic party and president of the country) could no longer carry out successfully in a context of increasing political fragmentation.[70]

The reform of 1994 also created a judicial council, which was delegated the enormous administrative power formerly enjoyed by the supreme court, both in terms of the administration of the judiciary's budget and also in terms of the appointment of judges and the management of their careers.[71] The political motives behind the creation of the council were, first, to make the constitutional jurisdiction the special focus of the supreme court, and second, to reduce the supreme court's corporatist management of judicial careers.[72] According to former Justice Jorge Carpizo, supreme court judges used to take turns filling a vacancy at any level of the judiciary, and the new judge's career was overseen by his "mentor" on the court, so that after some time each supreme court judge had his own loyal clientele within the judiciary.[73] Also, supreme court judges protected unprofessional and dishonest judges whom they had mentored, reasoning that public scandals damaged the reputation of the entire judiciary.[74] The corporatist logic within the judiciary

67. *See* Magaloni, *supra* note 65, at 291–92 (describing the limited constitutional powers of the Mexican supreme court prior to 1994 and suggesting that the court "tended to serve as [an] agent of the politicians").

68. *See id.* at 294 (noting that the number of judges dropped from twenty-five to eleven and detailing the "new mechanisms for the control of constitutionality" instituted by the 1994 reform).

69. *See id.* ("The Court can adjudicate controversies among different branches or levels of government . . . [such as] the executive and the legislative branches . . . .").

70. *See id.* at 295 (arguing that the new electoral pluralism after decades of PRI dominance drove the political branches to delegate increased constitutional authority to the Mexican supreme court).

71. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 94, 97, 99, Diario Oficial de la Federación [DO], 31 de Diciembre de 1994 (Mex.). *See also* Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141, 150 (1997) (explaining the creation and role of the judicial council); Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After* Presidencialismo, 4 INT'L J. CONST. L. 411, 421 (2006) (describing the restructuring and repurposing of the supreme court).

72. *See* Carpizo, *supra* note 46, at 212 (describing how the council was granted powers to designate, appoint, promote, and discipline members of the federal judiciary, and that these powers had previously allowed the supreme court to engage in "clientelism" and corruption).

73. *Id.* at 211.

74. *Id.*

reached its summit in 1993: that year, a former supreme court judge was convicted on corruption charges in connection with a case in which circuit judges had liberated a defendant charged with the rape and murder of a young girl after their "mentor" on the court asked them to do so in exchange for a sum of money paid by the defendant.[75]

The 1994 reform was debated with the scandals over the corruption and self-serving behavior of the supreme court in the background.[76] It was difficult for the supreme court to question openly the creation of an independent judicial council that would take away from its huge administrative powers.[77] However, at that time, the supreme court managed to quietly influence the content of the reform by resorting to informal mechanisms. In particular, two senators from the PRI who were in the senate's justice committee at the time of the reform were highly receptive to suggestions from the then-members of the supreme court and convinced other senators to include a provision according to which procedural decisions of the council could be revised by the supreme court (the so-called *recursos de queja*).[78] This was a seemingly harmless inclusion because the constitution still stated that decisions of the council were final,[79] but it actually proved to have huge consequences when combined with the supreme court's increased power resulting from the 1994 reform and increasing political fragmentation.[80]

Just after the 1994 reform, the new supreme court started to lobby strongly to regain control over the administration of the judiciary and of judicial careers.[81] This time the court used not only informal mechanisms but

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75. *See* Carmina Danini, *Ex-Justice Indicted on Bribery Charge*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 1993, at 8A (reporting the indictment of former supreme court judge Ernesto Díaz Infante Aranda on corruption charges); *Ex-Justice is Being Held in Bribe Case*, HOUS. CHRON., June 22, 2001, at A21 (reporting the arrest of Díaz Infante after several years as a fugitive in the U.S.). Not surprisingly, the infamous case captured the attention of the public. *Id.* The supreme court judge in question apparently served only one year of an eight-year sentence, then died in 2006. *See* Pepe Figueroa, Opinión, *Café Avenida* [*Coffee Avenue*], EL HERALDO DE CHIAPAS [CHIAPAS HERALD], Dec. 6, 2007, *available at* http://www.oem.com.mx/esto/notas/n516363.htm (criticizing the Mexican supreme court for continuing to pay Díaz Infante's pension during and after his incarceration).

76. *See* Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LATIN AM. POL. & SOC'Y 31, 36 (2007) (describing the supreme court, in the years leading up to the reform, as "just another stop in a political career").

77. The judicial council was originally composed of a majority of judges selected by lottery, which effectively took control over lower court judges away from the supreme court. *See infra* Appendix A.

78. Carpizo, *supra* note 46, at 212–13. Interestingly, the senators also happened to be ex-ministers of the supreme court. *Id.* at 213.

79. C.P., *as amended*, art. 100, DO, 31 de Diciembre de 1994 (Mex.).

80. *See* Ríos-Figueroa, *supra* note 76, at 38 (describing how the increasing political diversification in elected offices provided an incentive for the PRI to give the judiciary more political power); Arianna Sánchez et al., *Legalist Versus Interpretativist: The Supreme Court and the Democratic Transition in Mexico*, *in* COURTS IN LATIN AMERICA, *supra* note 62, at 187, 190–91 (describing the increased power granted to the supreme court by the 1994 amendment).

81. *See* Carpizo, *supra* note 46, at 210 (noting that ministers and ex-ministers of the supreme court expressed opposition to the creation of the council).

also formal ones. In particular, two judicial employees filed an *amparo* suit against a decision of the council that the supreme court accepted—despite the constitutional provision stating that decisions of the council were "final and unassailable"[82]—and decided in the employees' favor.[83] This action illustrated the fight between the court and the council, and prompted the president of the court to present a proposal for constitutional amendment to then-president Ernesto Zedillo, who, despite some important voices criticizing the proposal, submitted it to congress to formally proceed with the amendment process.[84] The pressure was successful: in 1999, a constitutional amendment changed the mechanisms for appointing judicial council members.[85] In essence, the amendment transformed the process from selection of judges from different levels by lot into a direct designation by the supreme court of judges from the district and circuit courts.[86] This effectively gave the supreme court control over the majority of the seats in the council, which essentially gave back to the courts control over the material resources of the judiciary and over the careers of lower court judges.

The important role the supreme court played in the content of the 1999 executive proposal of amendment and on its approval and enactment was explicit. In several interviews, the justices themselves openly talked about it. For instance, an article published in the national newspaper *Reforma* noted,

> [T]he chief justice, Genaro Góngora Pimentel, states that the court has been talking with several senators and that the secretary of interior has been promoting the amendment. "Secretary Labastida is optimistic; they have been doing very good work," Góngora Pimentel affirms. "I would not want to speculate on what may happen. I believe that the legislative power will have the doors open to any clarification we can make."[87]

Similar stories can be found in other countries. In El Salvador, for example, after the judicial council was constitutionally created in 1983, "the Supreme Court had successfully lobbied for modifications to guarantee that it would dominate the body. Court domination meant that the selection of judges continued much as it had occurred under direct court management."[88] An example of the second mechanism we discussed in Part III (i.e., declaring

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82. C.P., *as amended*, art. 100, DO, 31 de Diciembre de 1994 (Mex.).

83. Carpizo, *supra* note 46, at 213.

84. *Id.* at 213–14.

85. *Id.* at 214, 217.

86. *Id.* at 217. It is important to mention that the council was not backed by the members of the judiciary because, among other things, the lottery mechanism resulted in the selection of some councilors who were not well regarded by their peers. Interview with Alfonso Oñate Laborde, former minister, Council of the Federal Judiciary (Apr. 14, 2011).

87. Lorena Canales, *Recuperar el poder* [*Retrieving Power*], REFORMA [REFORM], Apr. 13, 1999.

88. Hammergren, *supra* note 13, at 38. Sixteen years later, another amendment in El Salvador produced a strong council with no judges in it. *Id.*

unconstitutional an amendment that created a council) can be found in Colombia, where in 1981 the supreme court declared unconstitutional, for procedural reasons, a constitutional amendment adopted in 1979.[89] This amendment, among other things, created a judicial council and reduced the tenure of supreme court judges from life to eight years.[90] It will also be interesting to watch the dynamic in the Dominican Republic, where the new constitution (enacted in 2010) created a judicial council in which the supreme court has more influence than what it had in the previously existing council.[91]

V. Conclusion

Constitution-making processes are often considered extraordinary events where the passions and interests of ordinary politics cede their place to "order and concord."[92] We have challenged this view by arguing that it is rooted in scholarship that mostly focuses on the creation of new constitutions (what we called original constitution-making processes) and overlooks the processes and politics behind amendments to existing constitutions (i.e., derived constitution making events). Amendment processes are considerably more susceptible to the intromission of ordinary politics because actors that participate in the derived constituent power are, at the same time, members of the constituent entity that embodies the popular will and also constituted governmental actors with ordinary political interests.

To explore the previous idea, the Article focused on amendment processes that adopted or reformed judicial councils and the influence that supreme court judges can exert upon these processes. In particular, we argued that the more powerful supreme court judges are, the more likely it is that they will successfully influence future amendments to shape the composition and functions of judicial councils in such a way as to serve the judges' interests. We collected all the instances of adoption or creation of judicial councils in Latin America since the first council was established in the region in Venezuela in 1961. We also coded the degree of power that supreme court judges enjoyed before a particular reform process took place. The empirical analysis suggests support for the argument presented in the Article in our sample of Latin American cases. In addition, the Mexican case illustrates the mechanisms through which supreme court judges influence constitution-making processes.

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89. MARIO CAJAS SARRIA, EL CONTROL JUDICIAL A LA REFORMA CONSTITUCIONAL: COLOMBIA, 1910–2007 [JUDICIAL CONTROL OF CONSTITUTIONAL REFORM: COLOMBIA, 1910–2007], at 78–83 (2008).

90. Carlos Ariel Sánchez, *La administración de justicia en Colombia, siglo XX: Desde la Constitución de 1886 a la Carta Política de 1991* [*The Administration of Justice in Colombia, 20th Century: From the Constitution of 1886 to the Political Charter of 1991*], BANCO DE LA REPÚBLICA [BANK OF THE REPUBLIC] (Apr. 2000), http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2001/136sxx.htm.

91. *See infra* Appendix A.

92. THE FEDERALIST NO. 49, *supra* note 1, at 315.

This Article has two clear implications that could be explored in future research. First, we would expect powerful judges to try to also influence amendment processes aimed at reducing their adjudicatory powers. In particular, we would expect them to use every resource at hand to block the creation of an autonomous constitutional tribunal. In that case, the causal mechanisms linking the judges' power and their capacity to influence representatives would differ from those we presented in this Article, since the threat of future adverse decisions and the declaration of unconstitutionality would not be available for supreme court judges if the tribunal was successfully created. Nevertheless, in a fragmented political context, powerful supreme court judges can block an amendment by convincing one or more of the political actors with veto power over the amendment that they are better off without that amendment (i.e., that maintaining the status quo is in their interest). If this is so, we would expect autonomous constitutional tribunals to be created (1) via an amendment when supreme court judges have low powers of constitutional review, or (2) through the enactment of a new constitution. Prima facie, this relation holds in Latin America, where all the constitutional tribunals have been created through a new constitution[93] except that of Chile in 1970 (at which time the Chilean supreme court had low powers of judicial review).

The second implication is that, in amendment processes, we would expect other social and political actors with leverage over representatives to try to influence the outcomes of amendments that affect their interests. For instance, we would expect the army to try to influence an amendment over the jurisdiction of military courts. Or we could expect the Catholic Church to try to influence an amendment that affects their interests in education, for example. We hope that this Article contributes to the understanding of the politics of amendments and that it will encourage further studies on this interesting and relatively unexplored topic.

93. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.] Feb. 6, 1995, art. 119; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102 (Braz.); C.P. arts. 239–45 (Colom.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] art. 159; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [GUAT. CONST.] art. 260; CONSTITUCIÓN POLÍTICA DEL ESTADO REPÚBLICA DEL PERU [PERU CONST.] art. 296.

Appendix A. Composition and Functions of Latin American Judicial Councils

Country	Composition		Tenure (years)	Functions	
	Judges	Non-Judges		Administration	Judicial Career
Argentina (1994)*	Three: judges from different levels of the judicial hierarchy chosen by open election; judges and lawyers can vote	Ten: six legislators; two representatives of the lawyers; one representative of the executive; one representative of academia	4	Appoints and regulates general administrators of judiciary; reviews the budget project sent by the executive; organizes education programs	Proposes candidates for judges; opens the process of removal for judges and presents the respective accusation before the disciplinary jury; applies sanctions
Brazil (2004)	Nine: all selected by different courts in the country	Six: one federal and one state prosecutor selected by the attorney general; two lawyers named by the bar association; two citizens (one appointed by deputies, the other by the senate)	2	Controls the administrative and financial situation of the judiciary; represents the Public Ministry in cases of crime against the public administration or abuses of authority	Selects, removes, transfers, and disciplines judges
Bolivia (1995) *amended in* 2002 and 2005[1]	One: president of the supreme court	Four: lawyers with at least ten years of experience; elected by two-thirds of congress	10	Elaborates and executes the judiciary's budget	Proposes candidates for supreme court (to the congress) and for lower courts (to superior courts); exercises disciplinary and regulatory power over the members of the judiciary

Bolivia (2009)	Members of the council are directly elected by the public from among the candidates proposed by the National Assembly.		6	Controls and administers the judiciary's budget and oversees its implementation	Proposes candidates for appellate courts (to the Superior Justice Tribunal) and designates judges at the district level; exercises displinary and regulatory powers over members of the judiciary
Colombia (1979)	Members of the council designate their successors. (A transitory provision established that first council members were to be designated by the president, but this reform was declared unconstitutional in 1981.)		8	Resolves conflicts of competence	Proposes candidates for lower court judges to supreme court; controls judicial careers; examines and sanctions the conduct of all judiciary employees
Colombia (1991)	Administrative chamber—Three: two named by the supreme court, one by the Constitutional Court Jurisdictional and disciplinary chamber—None	Administrative chamber—Three: named by the Council of State Jurisdictional and disciplinary chamber—Seven: elected by congress	8	Elaborates and administers judiciary's budget; resolves conflicts of competence; proposes laws related to administration of justice; creates, eliminates, merges, or moves judicial personnel posts; decides jurisdiction/number of courts	Proposes candidates for judges; administers judicial careers; examines and sanctions conduct of judges and lawyers

*Council mentioned in the constitution, but details obtained from organic laws

(cont.)

**Council mentioned in the constitution, but details obtained from the official web site of the Council

[1]In 2002, an amendment made the length of judicial council members' tenure six years instead of ten. In 2005, another amendment again increased the length of tenure to ten years. All other characteristics were not changed.

Appendix A (cont.).

Country	Composition		Tenure (years)	Functions	
	Judges	Non-Judges		Administration	Judicial Career
Dominican Republic (1994)	Two: the president of the supreme court and a member of the supreme court	Five: presidents of the republic, of the senate, and of the chamber of deputies; one senator; one deputy (from a different party than that of the president of his chamber)	[NI]	None	Evaluates and appoints candidates for the supreme court
Dominican Republic (2010)	Five: the president and a judge of the supreme court, plus one judge from the appeals, district, and peace courts (chosen by their peers)	None	5	Administration and budgetary control of the judiciary	Presents to the supreme court proposals for judges of all levels; disciplinary control over all members of the judiciary; applies and executes the evaluation instruments
Ecuador (1993)*	Mentioned in the constitution but never regulated	[no information]	[NI]	[no information]	[no information]

Ecuador (1998)*	One: the president of the supreme court or a delegate In case of tie, the president of the council can break it.	Seven: three designated by the supreme court, one by the judicial association in Ecuador, one by the deans of the law schools, one by the lawyers association, and one by the administrative and superior courts	6	Dictates their own regulations and those of other courts; approves budgetary proposals; creates new courts	Appoints judges at all levels; administers judicial careers; imposes disciplinary sanctions
Ecuador (2008)	None	Nine: six law and three administrative professionals; all selected through an open contest	6	Defines and executes policies for the improvement of the judiciary; reviews proposals for the budget of the judiciary; controls the education programs in judicial careers	Directs the process of selection of judges and members of the judiciary; administers judicial careers
El Salvador (1983)**	Five: all members of the Supreme Court of Justice	Five: three lawyers from the bar association; two teaching lawyers of the universities	[NI]	[no information]	Proposes the candidates for judges
El Salvador (1991)*	Mentioned in the constitution but never regulated	[no information]	[NI]	Organizes the school for judicial and legal training (as mentioned in constitution)	Presents lists of candidates to the supreme court and judges of all other levels (as mentioned in constitution)

*Council mentioned in the constitution, but details obtained from organic laws

(cont.)

**Council mentioned in the constitution, but details obtained from the official web site of the Council

Appendix A (cont.).

Country	Composition		Tenure (years)	Functions	
	Judges	Non-Judges		Administration	Judicial Career
El Salvador (1996)*	None	Seven: two-thirds of congress elects from lists of lawyers proposed by bar association (3), by law schools (2), by the Public Ministry (1), and by lower court judges (1)	5	Reviews budget and approves administrative decisions; organizes the school for judicial and legal training	Presents to the assembly lists of candidates to the supreme court; presents to supreme court candidates for judges of all other levels; evaluates and administers judicial careers
Honduras (2000)*	Five: the president and a judge of the supreme court; three judges from lower courts; all appointed by the supreme court	None	2	Administers all financial, material, and human resources of the judiciary; elaborates budget and all regulations	Administers and controls all aspects of judicial careers: appointment, promotion, and disciplinary measures
Mexico (1994) *amended in* 1999[2]	Four: one is the president of the supreme court; other three are selected by lot from different levels of the judicial hierarchy	Three: one designated by the executive and two by the senate	5	Prepares and administers the budget of the judiciary, except that of the supreme court; can adopt general agreements for the functioning of the whole judiciary	Designates, removes, promotes, transfers, and disciplines all federal judges

Paraguay (1992)	One: a member of the Supreme Court of Justice	Seven: one representative of the executive; one senator; one deputy; two lawyers elected by bar association; two law professors elected by peers	3	None	Presents to elected branches candidates for supreme court judges, and to the supreme court candidates for judges of all other levels; evaluates and administers judicial careers
Peru (1979)	Two: representatives of the supreme court	Five: the prosecutor general; one representative of the national and one of the Lima bar associations; two representatives of the law schools	3	None	Presents to elected branches candidates for the supreme court and the superior local courts
Peru (1993)	One: chosen by the supreme court	Six: two chosen by the bar, two chosen by other professional associations, two chosen by the deans of the national and private universities	5	None	Selects and names the judges and prosecutors of all levels, and ratifies them every seven years; sanctions and removes judges (by a direct request from the supreme court)
Venezuela (1961)	[no information]	[no information]	NI	[no information]	[no information]

*Council mentioned in the constitution, but details obtained from organic laws

**Council mentioned in the constitution, but details obtained from the official web site of the Council

[2]In 1999, there was an amendment to the appointment method of judicial council members. Since then, instead of being selected by lot, judges from lower courts are selected by the supreme court. All other characteristics were not changed.

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The Inter-American Court and Constitutionalism in Latin America

Diego García-Sayán*

More than forty years have elapsed since the adoption of the American Convention on Human Rights, which, among other advances, resulted in the establishment of the Inter-American Court of Human Rights, installed in 1979.[1] As is common in history, there have been high and low points, yet the progress the Inter-American Court has made in developing consistent human rights standards with increasing impact and usefulness is worth mentioning.

The development of international human rights law has been one of the most important legal advances of the twentieth and twenty-first centuries to date. Major international instruments and mechanisms of protection have been brought into operation at global and regional levels. Latin America has played a significant role in this evolution.

Indeed, within the Latin American forum, extremely important human rights standards have developed. Some believe that it was in Latin America, at the beginning of the sixteenth century, that the concept of what is today known as "human rights" was born when Bartolomé de Las Casas declared that all human beings are equal.[2] Latin America again played a relevant role when the two declarations on human rights, the American and the Universal, were drafted and approved more than sixty years ago.[3]

Nevertheless, the extraordinary development of international principles, norms, decisions, and organs of protection has not been reflected in a consistent manner on the domestic front. That is why some people consider that although the universalization of human rights referred to by Norberto Bobbio has been a significant development in the consolidation of the protection of

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* President, Inter-American Court of Human Rights. All translations in this Article are the author's unless otherwise indicated.

1. *See Información historia* [*Historical Information*], CORTE INTERAMERICANA DE DERECHOS HUMANOS [INTER-AMERICAN COURT OF HUMAN RIGHTS], http://corteidh.or.cr/historia.cfm (describing how the court's first meeting took place in June 1979).

2. *See* Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 289–93 (2003) (asserting that Las Casas was the prime figure in the birth of modern human rights, which occurred during the clashes following the Spanish conquest of the New World).

3. American Declaration of the Rights and Duties of Man, May 2, 1948, http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm; *see also* Carozza, *supra* note 2, at 282 ("Latin American proposals formed the first models upon which the Universal Declaration of Human Rights was drafted, and many of the rights in it were inserted or modified . . . through the intervention of Latin American Delegates . . . .").

human rights,[4] the challenge today is, essentially, the application of international commitments. In this regard, the Inter-American Court's jurisprudence plays a relevant role as a bridge of communication.

The court has been developing and fine-tuning its jurisprudence, and it is currently being manifested dynamically, particularly in the actions taken by domestic courts. Today, the binding nature of the court's judgments is not up for discussion, and for the most part, states comply with its judgments.[5] However, the most important factor is that domestic courts are increasingly adopting the court's jurisprudential criteria—the international forum is today inspiring the jurisdictional reasoning of the most relevant courts of Latin America.[6] In this way, the court's jurisprudence is multiplied in hundreds or perhaps thousands of domestic courts in cases that it would never have been able to hear directly.

The mechanisms of the Inter-American system are establishing guidelines and standards on very diverse issues. Nevertheless, the states are supposed to be the actors performing the leading role. Within the state, the judges are supposed to be the first guarantee of human rights, but at times they have been so merely in a formal sense.[7] By accepting international standards and substantive criteria that place the rights of the individual at the

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4. Martín Abregú, *La Aplicación de los Tratados Sobre Derechos Humanos por los Tribunales Locales: Una Introducción* [*The Application of Human Rights Treaties by Local Tribunals: An Introduction*], *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] 5 (Martín Abregú & Christian Cortis eds., 1997) (citing Norberto Bobbio, EL PROBLEMA DE LA GUERRA Y LA PAZ [THE PROBLEM OF WAR AND PEACE] 129 (1982)).

5. *See* Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights* 14 (N.Y. Univ. Sch. of Law Ctr. for Human Rights & Global Justice Working Paper No. 1, 2005), *available at* http://www.chrgj.org/publications/docs/wp/s05buergenthal.pdf (stating that the court has gained legitimacy since its creation and that states generally comply with its judgments); *see also* Emily Rose Johns, *Timely and Complete Compliance by Panama in Tristán Donoso Suggests Promising Direction*, THE HUMAN RIGHTS BRIEF (Feb. 12, 2011), http://hrbrief.org/2011/02/timely-and-complete-compliance-by-panama-in-tristan-donoso-suggests-promising-direction/ (noting Panama's compliance with a 2009 Inter-American Court of Human Rights judgment, and speculating that this represents a shift from Panama's previous noncompliant actions).

6. *See* Diego García-Sayán, *Una viva interacción: Corte Interamericana y Tribunales Internos* [*A Lively Interaction: Inter-American Court and National Courts*], *in* LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SILGO: 1979–2004 [THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A QUARTER OF A CENTURY: 1979–2004] 323, 350–51 (2005), *available at* http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf (describing the influence of the Inter-American Court on courts in several Latin American countries).

7. *See* Yoav Dotan, *Legalising the Unlegaliseable: Terrorism, Secret Services and Judicial Review in Israel 1970–2001*, *in* JUDICIAL REVIEW AND BUREAUCRATIC IMPACT: INTERNATIONAL AND INTERDISCIPLINARY PERSPECTIVES 190, 204 (Marc Hertogh & Simon Halliday eds., 2004) ("The primary duty of courts in democracies is to protect human rights."); *see also* JUAN CARLOS CALLEROS, THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA 136–58 (2008) (detailing situations in which Latin American "domestic judicial systems are reasonably believed to have failed, exposing considerable breaches in their capacity to protect human rights").

forefront, domestic judicial systems are legitimizing and revitalizing their role and, thereby, that of the rule of law as a core value.

I. International Standards and Domestic Law

A central element of the American Convention on Human Rights is the harmonization of domestic law and of the actions of state authorities with the provisions of a treaty. This is indicated, above all, in the provisions of article 1(1) and article 2, derived from the basic principle of the interpretation of human rights treaties, which is to ensure the maximum protection of the individual. The European Court of Human Rights has clearly interpreted that there is no place for implicit limitations;[8] the Inter-American Court of Human Rights has done the same when establishing that exceptional situations cannot be invoked to the detriment of human rights.[9]

The harmonization of international standards with the provisions of domestic law and the acts and policies of the state has fundamentally manifested in the conduct of the domestic courts. This is directly related to essential aspects of the functions of the state and its duty to organize itself in accordance with its international obligations.[10] In this regard, it is essential to determine whether the courts are establishing links with international human rights law, bearing in mind that, by their nature, the international norms and mechanisms of protection are designed to be expressed in the domestic law and order of sovereign countries.[11]

Indeed, states that by sovereign decision become parties to international human rights treaties or support the functioning of their organs of protection undertake the obligation to incorporate these commitments into their domestic law.[12] This purpose of international human rights law establishes

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8. *See, e.g.*, Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65 (1978) (holding that the text of the Convention did not allow for implicit exceptions to the prohibition on torture even when the "life of the nation" was threatened).

9. *See, e.g.*, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶¶ 42–43 (Jan. 30, 1987) (holding access to a writ of habeas corpus is required to protect human rights and could not be implicitly limited, even by a national constitution).

10. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174–179 (July 29, 1988) (stating that the American Convention on Human Rights imposed a duty on the state parties "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights").

11. *See* William J. Eisenman, *Eliminating Discriminatory Traditions Against Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System*, 17 EMORY INT'L L. REV. 133, 170–73 (2003) (describing nationally-driven capacity-building movements that replicate international standards in domestic law).

12. *See, e.g.*, American Convention on Human Rights, art. 1 ¶ 1, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . .").

the conceptual basis for its interaction with domestic law and the conduct of the different state institutions.[13]

Under article 1(1) of the Convention, the states have undertaken a twofold obligation to: (a) respect human rights; and (b) ensure their free and full exercise.[14] Regarding this "obligation to guarantee," Article 2 requires the states "to adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms."[15] The domestic courts have a central role in all of this; as part of the state apparatus, they are required to coordinate the norms and the conduct of the state authorities with the international commitments of which they are a part.[16]

From this perspective, the domestic courts have a crucial role to play as guarantors of the rights established by international undertakings, because access to the international organs of protection is subject to prior exhaustion of domestic remedies.[17] Courts also play a crucial role in the implementation of the binding decisions of an international tribunal organ such as the Inter-American Court. It is true that the "normative" component is of particular relevance, but the record shows that discrimination and lack of protection are more likely to result from the conduct of the different state apparatuses than from the formal legal rules.[18] Consequently, references to "domestic law" should be understood as applying to the actual operation of all public institutions, especially the domestic courts.

II. Judgments of the Inter-American Court and Domestic Courts

The state obligation to organize itself so that it ensures respect for human rights is required by the Convention and has been enforced by the Inter-American Court since its 1988 judgment in the case of *Velásquez-Rodríguez*.[19] More than two decades after this founding judgment, the

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13. *See* Eisenman, *supra* note 11, at 170–73 (discussing the shift in priorities from setting international norms to domestic implementation of those norms).

14. American Convention on Human Rights, *supra* note 12, art. 1 ¶ 1.

15. *Id.* art. 2. In one of its first decisions, the Inter-American Court determined, in relation to Article 2, that the state party "has a legal duty to take whatever legislative or other steps may be necessary to enable it to comply with its treaty obligations." Enforceability of the Right to Reply and Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86, Inter-Am. Ct. H.R. (ser. A.) No. 7, ¶ 30 (Aug. 29, 1986).

16. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174–179 (July 29, 1988) (imposing a duty on governments under the Convention to use all legal means to prevent human rights violations and finding that the courts had failed to meet this duty).

17. *See* American Convention on Human Rights, *supra* note 12, art. 46 ¶ 1 ("Admission . . . of a petition . . . shall be subject to the following requirement[]: . . . that the remedies under domestic law have been pursued and exhausted . . . .").

18. *See Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 183–184 (observing that a student's abduction and detainment were illegal under national law but were conducted by government authorities).

19. American Convention on Human Rights, *supra* note 12, art. 2; *see Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 ("[An] obligation of the States Parties is to 'ensure' the free

democratic demand of the people of the region has intensified in the sense that the state must comply with its obligation to assume a proactive role in the protection of human rights and not merely abstain from torturing, murdering, or kidnapping.[20]

From this point of view, it is singularly relevant that the Inter-American Court's jurisprudence is increasingly inspiring the highest courts of several countries of the region in several complex substantive matters. During its thirty years of operation, the court has adopted relevant decisions on issues such as the obligation to adopt domestic legal provisions, the obligation to investigate and punish those responsible for human rights violations, and the right to due process and an effective judicial remedy.[21] These jurisprudential developments have enormous legal and conceptual significance. Over and above the specific cases, the domestic courts have, for their part, been engines for the significant creative impact of the Inter-American Court's jurisprudence, opening a space of relativism and questioning certain classic norms of positive law that are formally in force.[22]

Consequently, without a doubt, it can be stated that important progress is being made. Increasingly, the highest courts of several countries of the region are taking inspiration from the Inter-American Court's jurisprudence and supplementing, in a conceptual manner, their national circumstances with certain developments of the Inter-American Court.[23] In this dialectic process of interaction between national and international law, the role of judges and lawyers is fundamental to ensuring that the domestic courts guarantee the implementation of international norms and standards at the domestic level.

A first step in this long and complex process was the affirmation of the thesis that international jurisdictional decisions should serve as interpretation guidelines for the domestic courts. Regarding this point of view, the pioneer decision in the Argentinian supreme court case of *Giroldi*[24] in 1995, confirming this principle, was extremely important. When referring to the Inter-American Court of Human Rights as the "ultimate guardian of rights in the region," the Constitutional Court of Peru established that it was not sufficient to have recourse to international norms, but rather that it was necessary

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and full exercise of the rights recognized by the Convention . . . [t]his obligation implies the duty . . . to organize the governmental apparatus . . . through which public power is exercised . . . .").

20. *See* Ángel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 230–31 (2008) (detailing the Inter-American Court's role in influencing state actors to recognize and uphold human rights).

21. *See infra* subparts II(B)–(C).

22. *See infra* notes 24–29 and accompanying text.

23. *See infra* notes 24–29 and accompanying text.

24. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/1995, "Horacio Giroldi y otro / recurso de casación," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-514), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=52300&fori=RHG00342.260.

to take into consideration the Inter-American Court's interpretation of those norms.[25]

Another fundamental step was taken by some of the most important courts in the region when they established the principle that the Inter-American Court's judgments were binding on all domestic courts. Thus, for example, in several judgments, the Constitutional Court of Colombia established in its consistent jurisprudence the binding nature of the Inter-American Court's decisions.[26] In this regard, the judgment of the Constitutional Court of Peru of June 19, 2007, in the action on unconstitutionality, filed by the Callao Bar Association against Law 28,642, is of particular interest.[27]

There, the Peruvian court underscored that: "the judgments of the Inter-American Court of Human Rights are binding for all public authorities, and this binding nature is not exhausted by its operative paragraphs, but extends to the *ratio decidendi*, even in those cases in which the Peruvian State has not been a party to the proceedings."[28]

Additionally, the court stressed that

> the judgments of the Inter-American Court of Human Rights, . . . and its advisory opinions on similar matters, are binding for the Peruvian State and, by forming part of domestic law under Article 55 of the Peruvian Constitution, disregard of said international decisions could result in a violation of the Constitution, or worse still, an offense committed during the course of duty, under Article 99 of the Constitution.[29]

This positive conduct of the highest courts of several Latin American countries reflects a dynamic interaction, which leads to the gradual redesign or reinterpretation of the norms of positive domestic law, even though such norms do not necessarily change at the formal level. This is an encouraging

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25. Tribunal Constitucional de Peru [TC] [Constitutional Court of Peru] Apr. 17, 2002, Cartagena Vargas, No. 218-02-HC/TC, "Fundamentos," ¶ 2, *available at* http://www.tc.gob.pe/jurisprudencia/2002/00218-2002-HC.html.

26. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], Sala Plena marzo 19, 2002, Sentencia C-200/02 (slip op. at 18), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/C-200-02.htm (mandating that interpretation of the trial procedure laws in question take into account the jurisprudence of the Inter-American Court); C.C., Sala Plena enero 19, 2000, Sentencia C-010/00 (slip op. at 48–49), *available at* http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm (recognizing and respecting the authority of rulings of the Inter-American Courts regarding freedom of expression); C.C., Sala Cuarta de Revisión de Tutelas agosto 10, 1999, Sentencia T-568/99 (slip op. at 20), *available at* http://www.corteconstitucional.gov.co/relatoria/1999/T-568-99.htm (declaring that states should refrain from legislating contrary to internally ratified treaties, using language of the Inter-American Court as support).

27. TC, Pleno Jurisdiccional, June 19, 2007, Colegio de Abogados del Callao c. Congreso de la República, No. 00007-2007-PI/TC, *available at* http://www.tc.gob.pe/jurisprudencia/2007/00007-2007-AI.html.

28. *Id.* "Fundamentos," ¶ 36.

29. *Id.* "Fundamentos," ¶ 41.

sign of the commitment to compliance with the binding decisions of the Inter-American Court.

It is of importance to illustrate this perspective via the analysis of four fundamental issues: (a) amnesties; (b) the obligation to investigate human rights violations; (c) the right to an effective remedy; and (d) nondiscrimination and the rights of indigenous peoples.

A. Amnesties

On various occasions, the Inter-American Court has indicated that amnesties constitute major obstacles to full compliance with the international obligation to guarantee human rights. In its consistent jurisprudence, the court has established that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations . . . ."[30] In *Gomes Lund et al.* ("*Guerrilha do Araguaia*") *v. Brazil*,[31] the court recalled that "in cases of grave violations of human rights, it has ruled on the incompatibility of amnesties with the American Convention in relation to Peru (*Barrios Altos* and *La Cantuta*) and Chile (*Almonacid Arellano et al.*)."[32]

The Inter-American Court's case with the greatest impact to date is the case of *Barrios Altos*—regarding so-called self-amnesty laws enacted in Peru in 1995.[33] The court ruled that

> all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[34]

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30. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 41 (Mar. 14, 2001). The court has cited *Barrios Altos* in numerous other opinions. *E.g.*, Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 5 n.1 (Mar. 1, 2005); Gómez-Paquiyauri Bros. v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 232–233 (July 8, 2004); Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 116 (Sept. 18, 2003); Trujillo-Oroza v. Bolivia, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 106 (Feb. 27, 2002); Barrios Altos v. Peru, Interpretation of Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 15 (Sept. 3, 2001).

31. Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010).

32. *Id.* ¶ 148.

33. *Barrios Altos*, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 1.

34. *Id.* ¶ 35.

The effect of this judgment is particularly interesting for two reasons. First, the steps taken in Peru to comply in full with this judgment of the court resulted in effective measures to combat the impunity of grave human rights violations. In addition, the judgment had an impact on the reasoning and conceptual development of several of the highest courts in the region in relation to the crucial issue of impunity.

The case of *Barrios Altos* confronted a heinous 1991 event during which the paramilitary group known as "Colina" murdered fifteen people in downtown Lima.[35] The court considered that the amnesty laws enacted by Fujimori in 1995

> prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.[36]

Furthermore, it established that "[s]elf-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention."[37] As a result of these considerations, the Inter-American Court established that "Amnesty Laws No. 26479 and No. 26492 are incompatible with the American Convention on Human Rights and, consequently, lack legal effect."[38] In a subsequent interpretation of the judgment, the court established that the judgment in *Barrios Altos* "has generic effects."[39]

Of special and immediate significance was the impact that this Inter-American Court judgment had in Peru. A succession of decisions by the Peruvian courts annulled the stays of proceedings resulting from amnesties in the context of major political changes. The Fujimori regime had fallen in November 2000, and the transitional government presided over by Valentín Paniagua—in which I had the honor of serving as Minister of Justice—acknowledged the state's international responsibility.[40] The only matter that

35. *Id.* ¶ 2.

36. *Id.* ¶ 42.

37. *Id.* ¶ 43.

38. *Id.* "Decides," ¶ 4.

39. Barrios Altos v. Peru, Interpretation of the Judgment of the Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, "Decides," ¶ 2 (Sept. 3, 2001).

40. Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 31 (Mar. 14, 2001) (discussing and quoting from a communication from the state's agent dated February 19, 2001).

remained was that of the self-amnesty laws, which the executive branch did not have the authority to resolve. It was the Inter-American Court that divested the laws of their legal effects.[41]

Once notified of the judgment of the Inter-American Court, the transitional government of Peru forwarded the decision to the supreme court, which on that same day sent it to several lower courts, indicating that the criminal proceedings for the events of Barrios Altos needed to be reopened due to the binding and inexorable nature of the Inter-American Court's judgment.[42] The lower courts complied. That same day, the special prosecutor requested and obtained an arrest warrant for thirteen people implicated in the killing, including two army generals.[43] The accused were detained and subjected to the corresponding criminal proceedings in the ordinary courts.[44] Another of the accused persons, former President Fujimori himself, was later tried and sentenced to twenty-five years imprisonment by the supreme court.[45]

When the Inter-American Court's judgment was received in Peru, interesting reasoning was developed in the military justice system. A few weeks after receiving the Inter-American Court's judgment, the Supreme Council of Military Justice,[46] at its two levels, decided to annul the stays of proceedings at the military tribunals and ordered that they be forwarded to the ordinary justice system.[47]

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41. *Id.* ¶ 4.

42. *See* Kai Ambos, *The* Fujimori *Judgment: A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organized Power Apparatus*, 9 J. INT'L CRIM. JUST. 137, 141 (2011) (discussing the reopening of Peruvian criminal investigations following the Peruvian supreme court's endorsement of the *Barrios Altos* decision).

43. *See* Ana Véliz, *Arrestan a miembros del grupo Colina* [*Members of Colina Group Arrested*], LA REPÚBLICA [THE REPUBLIC], Mar. 25, 2001, http://www.larepublica.com.pe/node/122875/comentario/comentario (Peru) (noting that former heads of Peruvian intelligence agencies, Julio Salazar Monroe and Juan Rivero Lazo, were among those identified in the arrest warrants); *Peru Reopens Death Squad Inquiry*, BBC NEWS, Mar. 29, 2001, http://news.bbc.co.uk/2/hi/americas/1248998.stm (stating that thirteen arrest warrants were issued by the special prosecutor).

44. *See Investigan a integrante del grupo Colina* [*Grupo Colina Member Under Investigation*], LA REPÚBLICA [THE REPUBLIC], Mar. 29, 2001, http://www.larepublica.com.pe/node/123264/comentario/comentario (Peru) (describing the investigation by anticorruption judges of Julio Salazar Monroe and Juan Rivera Lazo after their arrest).

45. Corte Suprema de Justicia de la República [Supreme Court of Justice of the Republic], Apr. 7, 2009, Casos Barrios Altos, La Cantuta y sótanos SIE [Barrios Altos, La Cantuta and Army Intelligence Service Basement Cases], No. AV 19-2001 (slip op. at 706), *available at* http://historico.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle_noticia.

46. The Supreme Counci of Military Justice is the highest body of the Peruvian military justice system.

47. *See* TC, Jan. 9, 2008, Hermoza Ríos, No. 04441-2007-PA/TC, "Atendiendo A" ¶¶ 5–7, *available at* http://www.tc.gob.pe/jurisprudencia/2008/04441-2007-AA%20Resolucion.html (describing the plenary chamber judgment of June 1, 2001, and the review chamber decision of June 4, 2001).

The reasoning of the Plenary Chamber of the Supreme Council of Military Justice is substantial and consistent. In addition to referring to article 27 of the Vienna Convention on the Law of Treaties,[48] it established that since the Peruvian State was a party to the treaty, the military justice system "must comply with the international judgment in keeping with its specific terms and in a way that makes its decisions fully effective."[49] The review chamber reaffirmed these considerations and added that the stays of proceedings ordered clearly violated "the fifth operative paragraph of the judgment of the Inter-American Court of Human Rights, which ordered the State to investigate the facts so as to determine those responsible for the human rights violations."[50]

Following these advances and the Inter-American Court's subsequent interpretation of the judgment, in which the court determined that its decisions had general effects, several of the region's courts made a series of significant decisions.

For example, when deciding the appeal for review filed by those accused of the detention and subsequent disappearance of Miguel Ángel Sandoval Rodríguez[51] perpetrated by DINA agents in 1975, the court of appeals of Santiago, Chile considered that the interpretation made by the Inter-American Court was the reliable and ultimate interpretation of the American Convention.[52] Moreover, the court of appeals explicitly assumed the Inter-American Court's interpretative parameters, citing paragraph 41 of the *Barrios Altos* judgment in its entirety.[53] Subsequently, the supreme court established that amnesty in cases of forced disappearances would only relate to the period referred to in the respective law (up until March 1978) and that amnesty was not applicable if the disappearance of the person had continued after that date.[54] More

48. Consejo Supremo de Justicia Militar [CSJM] [Supreme Council of Military Justice], June 1, 2001, No. 494-V-94 (slip op. at 5) (on file with author).

49. *Id.*

50. *Id.* at 6. The review chamber was referring to the portion of the Inter-American Court's judgment that decided that "the State of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible." Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, "Decides," ¶ 5 (Mar. 14, 2001).

51. *See* Humberto Nogueira Alcalá, *Una Senda que Merece ser Transitada: La Sentencia Definitiva de Casación de la Quinta Sala de la Corte de Apelaciones de Santiago, Rol 11.821-2003, Caso Miguel Ángel Sandoval Rodríguez* [*A Path that Deserves to be Traveled: The Final Judgment of the Appeal for Review by the Fifth Chamber of the Court of Appeals of Santiago, Roll 11.821-2003, Miguel Ángel Sandoval Rodríguez*], 9 REVISTA IUS ET PRAXIS 233, 233–36 (2003) (Chile) (discussing the implications of the case).

52. *Id.* at 235.

53. *Id.*

54. *See* Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances: The* Sandoval *Case Before the Supreme Court of Chile*, 3 J. INT'L CRIM. JUST. 469, 470–72 (2005) (describing the Chilean supreme court's rejection of defendants' argument that they should be

recently, the same supreme court annulled an acquittal in the case of *Lecaros Carrasco*,[55] invalidating the application of the amnesty law, considering that the "offense of kidnapping . . . is similar in nature to a crime against humanity, and consequently, it is not admissible to invoke amnesty as a cause for the extinction of criminal responsibility."[56]

In Argentina, there have been several developments. Two are of particular relevance. One is the judgment of the Federal Chamber of Salta of July 29, 2003,[57] and the other is the case of Julio Héctor Simón, which culminated in a very significant ruling by the Supreme Court of Argentina in June 2005.[58]

In its decision, the Federal Chamber of Salta declared that Laws 23,492 and 23,521 (*Obediencia Debida y Punto Final*) [Due Obedience and Full Stop] were unconstitutional and null and ordered the detention of the accused, Carlos Mulhall and Miguel Raúl Gentil, so that they could be questioned in the case *Cabezas, Daniel Vicente*.[59] The Inter-American Court and the judgment in the case of *Barrios Altos* were central ingredients of the Federal Chamber's reasoning.[60]

The case with the greatest impact in Argentina was, however, the case of Julio Héctor Simón, who filed a complaint for alleged unlawful deprivation of liberty before all the courts—up to the supreme court which, in June 2005, delivered a judgment of enormous importance.[61] Simón, a former federal police sergeant, had been tried for the kidnapping and subsequent disappearance in 1978 of José Liborio Pobrete Rosa and his wife, Gertrudis Marta Hlaczik, following a pre-trial detention.[62] The supreme court decided to divest the Full Stop and Due Obedience Laws of all legal effects and declared them unconstitutional.[63]

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entitled to amnesty protection because their crimes occurred between September 1973 and March 1978).

55. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 mayo 2010, "Claudio Lecaros Carrasco," Rol de la causa: 3302-2009 (Chile), *available at* http://www.poderjudicial.cl/modulos/BusqCausas/BCA_esta402.php?rowdetalle=AAANoPAAkAABTrwAAG&consulta=100&causa=3302/2009&numcua=16699&secre=UNICA.

56. *Id.*

57. Cámara Federal de Apelaciones [CFed.] [Federal Courts of Appeals] Salta, 29/7/2003, "Cabezas, Daniel Vicente y Otros s/ Denuncia - Palomitas - Cabezas de Buey," No. 27/03 (slip op.), *available at* http://www.pparg.org/pparg/carceles/salta/_b/contentFiles/Causa_Palomitas-fallo-inconstitucionalidad.pdf.

58. CSJN, 14/6/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.," Fallos (2005-328-2056), slip op., *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp?id=222714&fori=RHS01767.383.

59. CFed. Salta, "*Cabezas*" No. 27/03 (slip op. at 1).

60. *See id.* at 19 (citing *Barrios Altos* for the proposition that amnesty orders are inadmissible in cases involving grave violations of human rights).

61. CSJN, "*Simón*," Fallos (2005-328-2056) (slip op.).

62. *Id.* at 1–2.

63. *Id.* at 145–46.

The extensive reasoning in this judgment is based on the Inter-American Court's jurisprudence, with special emphasis on the *Barrios Altos* case.[64] The supreme court reasoned that *Barrios Altos* established that "nation-states have a duty to investigate violations of human rights, punish those responsible, and prevent them from claiming immunity."[65]

The Constitutional Court of Colombia, for its part, in its repeated jurisprudence has been clear about the inadmissibility of amnesties and self-amnesties. Colombian law establishes that the authors or participants in crimes of terrorism, kidnapping, and extortion may not benefit from amnesties and pardons.[66] When the constitutionality of this law was challenged, the Constitutional Court upheld the law, referring to international law and to the judgments of the Inter-American Court of Human Rights to hold that in the case of atrocious crimes, "as the Inter-American Court of Human Rights has emphasized, the granting of self-amnesties, blanket amnesties, full stop laws, or any other mechanism that prevents the victims from exercising an effective judicial remedy" is impermissible.[67]

The reasoning of this same Constitutional Court is interesting in relation to Colombia's approval of the Rome Statute of the International Criminal Court by means of Law 742 of June 5, 2002.[68] The Constitutional Court declared that this law was in accordance with the constitution.[69] Basing its decision on the jurisprudence of the Inter-American Court of Human Rights, the court reiterated,

> [T]he principles and norms of international law accepted by Colombia (Constitution, Article 9), the Rome Statute, and our constitutional law, which only allow amnesty or pardon for political crimes and following the payment of a corresponding compensation (Constitution, Article 150, numeral 17), do not admit the granting of self-amnesties, blanket amnesties, full stop laws, or any other mechanism that prevents the victims from exercising an effective judicial remedy, as the Inter-American Court of Human Rights has emphasized.[70]

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64. *Id.* at 126–27.

65. *Id.* at 111.

66. L. 733/02, enero 29, 2002, [44693] DIARIO OFICIAL [D.O.].

67. C.C., Sala Plena agosto 28, 2002, Sentencia C-695/02 (slip op. at 18), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/c-695-02.htm.

68. L. 742/02, junio 5, 2002, [44826] D.O.

69. C.C., Sala Plena junio 30, 2002, Sentencia C-578/02 (slip op. at 53), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/c-578-02.htm.

70. *Id.* at 108. In a footnote, the Constitutional Court stated,

> The Inter-American Court of Human Rights has indicated the conditions in which an amnesty is compatible with the commitments assumed by the States Parties to the American Convention on Human Rights. For example, in the case of *Barrios Altos* (Chumbipuma Aguirre et al. v. Peru), judgment of March 14, 2001, the Inter-American Court decided that the Peruvian amnesty laws were contrary to the Convention and that

In Uruguay, in 2009, the Supreme Court of Justice ruled emphatically on the Expiry Law of the State's Ability to Impose Punishment, establishing that it was illegitimate because it was

> enacted for the benefit of members of the military and the police who had committed [grave human rights violations] and enjoyed impunity during de facto regimes, and this has been declared by courts of both the international community and States that underwent similar processes to that experienced by Uruguay in the same era. Owing to the similarities of the matter under analysis and to the relevance of these rulings, they cannot be ignored when examining the constitutionality of Law [No.] 15,848, and the Court has taken them into account when delivering this judgment.[71]

B. Obligation to Investigate Human Rights Violations

The Inter-American Court's jurisprudence has been consistent in emphasizing the importance of the obligation to guarantee, which entails the obligation to prevent, investigate, and punish grave human rights violations.[72] A series of decisions has reaffirmed this state obligation.

The Constitutional Court of Colombia has repeatedly adopted this approach based on the Inter-American Court's jurisprudence. For example, in an action for protection of constitutional rights filed by an individual requiring that "a thorough investigation" be conducted into the death of her son,[73] the Constitutional Court held that "[t]hose affected have the right to know what has happened to their next of kin, as the Inter-American Court of Human Rights has established."[74] On several occasions, this same Colombian Constitutional Court has ruled on the "right to the truth" and the

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> the State was responsible for violating the right of the victims to know the truth about the facts and to obtain justice in each case in the national context.

Id. at 106 n.167.

71. Mauricio Peréz, *Histórico Fallo: La SCJ Declaró Inconstitucional a la Ley de Caducidad N. 15,848* [*Landmark Ruling: The SCJ Held Expiry Law No. 15,848 Unconstitucional*], LA REPUBLICA [THE REPUBLIC], Oct. 20, 2009, http://www.larepublica.com.uy/politica/385131-ley-violo-separacion-de-poderes (Uru.) (discussing Suprema Corte de Justicia [S.C.J.] [Supreme Court], 19 octubre 2009, "Sabalsagaray Curutchet, Blanca Stela. Excepción de Inconstitucionalidad Arts. 1, 3 y 4 de la Ley No. 15.848" (Uru.) *available at* http://www.ielsur.org/desarrollo/documentos/inconstituc_ley_15848__.pdf).

72. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

73. C.C., Sala Plena junio 15, 1994, Sentencia T-275/94 (slip op. at 4) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1994/T-275-94.htm. The petitioner's son, Nelson Joaquín Peñaranda Guerrero, was a voluntary soldier in the No. 16 Counterinsurgency Battalion of the Second Mobile Brigade. *Id.* He died on September 7, 1993, when he was shot on the premises of the No. 5 Mechanized Battalion in Cúcuta. *Id.*

74. *Id.* at 1.

"right to justice," always referring to judgments of the Inter-American Court.[75]

When examining another action of unconstitutionality—this time against Article 220, section 3, of the code of criminal procedure—the Constitutional Court reaffirmed and developed important principles relating to the obligation to investigate and punish human rights violations.[76] The petition raised the objection that when facts or evidence arose that had not been examined by the judge during the trial, the review of the judgment should not only serve to absolve the accused or declare his lack of criminal responsibility.[77] According to the petition, this would exclude "the possibility of ensuring that justice is carried out, should new facts or evidence arise that would lead to review of the judgment in order to declare a much more serious criminal responsibility and higher compensation for those who were affected by the harmful act."[78] Hence, principles such as double jeopardy and res judicata were raised:

> The Constitutional Court, referring to *Barrios Altos*, emphasized that the rights of the victims exceed mere compensation, because they include the right to the truth and that justice be obtained in the specific case. In this regard, the judgment of Inter-American Court of Human Rights of March 14, 2001, in the Barrios Altos case is of particular importance . . . wherein that Court decided that the Peruvian amnesty laws were contrary to the American Convention and that the State was responsible for violating the right of the victims to know the truth about the facts and to obtain justice in each case.[79]

The court emphasized that it had taken into consideration three different rights when examining the contested norm: the right to the truth, the right to obtain justice in a specific case, and the right to reparation of damage through financial compensation.[80] The Constitutional Court admitted the claim contained in the petition.[81]

In the case of another motion of unconstitutionality concerning an aspect of the code of criminal procedure, the Constitutional Court reaffirmed the principles established in its case law and based its reasoning on the Inter-

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75. *See, e.g.*, C.C., enero 20, 2003, Sentencia C-004/03 (slip op. at 22–23), *available at* http://www.corteconstitucional.gov.co/relatoria/2003/C-004-03.htm (citing *Velásquez-Rodríguez* for the proposition that human rights victims have a right to know the truth and *Barrios Altos* for the proposition that human rights victims have a right to know the truth and to obtain justice in their concrete case).

76. *See id.* at 38 (holding article 220, section 3 to be constitutional so long as review of cases involving grave human rights violations also includes review of acquittals and termination of proceedings against the defendant when new evidence comes to light).

77. *Id.* at 9.

78. *Id.*

79. *Id.* at 22.

80. *Id.* at 23.

81. *See id.* at 38 (finding that the state had severely breached its duty of serious and impartial investigation of the alleged violations).

American Court of Human Rights with regard to the obligation to investigate.[82] The petition highlighted the double jeopardy principle.[83] The applicants stated that the contested norm of the code of criminal procedure, which made it possible to review acquittals and subsequently declare them null, "evidently and flagrantly contradict[ed] the American Convention on Human Rights."[84]

In its decision, the Constitutional Court emphasized that "constitutional jurisprudence has been defending the criminal-procedural rights of victims and those injured by a punishable act to financial reparations, to the truth, and to justice,"[85] indicating that

> the Inter-American Court of Human Rights has stated that the victims of human rights violations have the right to the truth, justice, and reparations; consequently, the State must carry out the obligation to investigate [the] facts, punish those responsible, and reestablish, to the extent possible, the rights of the victims. In this regard, the Inter-American Court has emphasized that the investigation "must be undertaken seriously and not as a mere formality condemned to be ineffective in advance" since, [with situations] to the contrary it can be said that the State has failed to comply with the obligation to guarantee the free and full exercise of the rights of all persons subject to its jurisdiction, which would compromise its international responsibility.[86]

As is logical, this reasoning led the Constitutional Court to reject the petition's claims and to reaffirm the principles already stated in Judgment C-004 of 2003 concerning the obligation to investigate grave human rights violations, whose prevalence over the double jeopardy principle had been indicated by said court.[87]

Finally, the same Constitutional Court gave weight to the Inter-American Court's jurisprudence in declaring unconstitutional part of the definition of forced disappearance as a crime contained in article 165 of Law 599 of 2000, which promulgated the criminal code.[88] The petition chal-

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82. C.C., Sala Plena septiembre 30, 2003, Sentencia C-871/03 (slip op. at 28–29), *available at* http://www.corteconstitucional.gov.co/relatoria/2003/C-871-03.htm.

83. *See id.* at 6 (summarizing the petition's double jeopardy claims in advance of the Constitutional Court's holdings).

84. *Id.* at 6 (internal quotations omitted).

85. *Id.* at 28.

86. *Id.* at 33 (emphasis omitted).

87. *Id.* at 27 (quoting C.C., Sala Plena enero 20, 2003, Sentencia C-004/03 (slip op. at 24), *available at* http://www.corteconstitucional.gov.co/relatoria/2003/C-004-03.htm).

88. C.C., Sala Plena mayo 2, 2002, Sentencia C-317/02 (slip op. at 39–40) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/C-317-02.htm. Article 165 stated,

> Anyone who, belonging to an illegal armed group, subjects another person to deprivation of liberty in any form, followed by his concealment and the refusal to acknowledge the said loss of freedom or to provide information on his whereabouts, removing him from the protection of the law, shall be punished with 20 to 30 years'

lenged the portion of the forced-disappearance statute requiring that the private individual or the public servant perpetrating the act must belong to an illegally armed group.[89] According to the petitioner, it was not permissible that the private individual or the public servant was only punished under those circumstances.[90] In other words, the elements of the crime would not be met if the group was unarmed, if the perpetrator did not belong to a group, or if the armed group was legal.[91]

When examining the petition, the Constitutional Court cited at length the judgment of the Inter-American Court in *Godínez-Cruz*.[92] The Constitutional Court emphasized that with *Godínez-Cruz*, the Inter-American Court established that

> in principle, the State can be attributed with any violation of the rights recognized in the Convention by an act of the public authorities or of people taking advantage of the authority that they possess, owing to their official role, and even then, this does not exhaust all the situations in which a State is obliged to prevent, investigate, and punish human rights violations, or all the [situations] in which its responsibility may be entailed, as a result of a harm to those rights.[93]

In its considerations, the Constitutional Court held, based on the description of the conduct contained in the norm being contested, "the assertion of the applicant that members of the Armed Forces are excluded from being active subjects of the forced disappearance, [is not valid]."[94] Regarding the active subject of the crime of forced disappearance and the requirement that he belong to an "illegal armed group," the Constitutional Court found that this text was unconstitutional because it significantly reduced the meaning and scope of the protections of the victims.[95] In keeping with this reasoning, the Constitutional Court established that

> in accordance with the jurisprudence of the Inter-American Court of Human Rights cited above, the mere failure of the States to prevent the forced disappearances perpetrated by private individuals or to control illegally armed groups that execute these acts, implies that the respective State has not complied with its

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imprisonment and a fine of 1,000 to 3,000 monthly minimum legal wages in force and prohibited from exercising public functions and rights for 10 to 20 years.

L. 599, julio 24, 2000, D.O.

89. *Id.* at 8.

90. *Id.* at 9.

91. *Id.*

92. *Id.* at 18–20 (quoting Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 161–167 (Jan. 20, 1989)).

93. *Id.* at 21.

94. *Id.* at 33.

95. *Id.* at 34.

> obligation to prevent and punish those responsible for such acts, and consequently, merits the corresponding sanctions.[96]

In several cases, the Constitutional Court of Peru has reaffirmed fundamental principles of the obligation to investigate. For example, in the appeal after execution of judgment filed by Gabriel Orlando Vera Navarrete—who believed that he had been imprisoned arbitrarily and requested immediate release from prison—the court referred to the complex nature of the criminal proceedings against Vera Navarrete (allegedly a member of the so-called Colina Group) for the crimes of aggravated homicide, aggravated kidnapping, and forced disappearance of persons.[97] Against this background, referring to the case of *Velásquez-Rodríguez*, the Constitutional Court reaffirmed the principle of the obligation to guarantee, established both in international standards and in the Inter-American Court's judgments.[98] In the same judgment, the court developed the meaning and precise scope of the obligation to investigate based on the case of *Bulacio v. Argentina*.[99]

Thus, Inter-American jurisprudence decisively influences the radical reinterpretation of certain norms of domestic positive law. In this way, some legal guarantees are part of a dynamic process of reinterpretation, and without ceasing to be valid, they are subjected to a degree of "relativization" in their application to specific extreme situations. In summary, the norms of positive criminal law continue to be in force formally, but the courts decide not to apply them based on considerations derived from rules of international law.

Hence, positive law is reinterpreted in relation to principles that are considered to be of a higher order and that undoubtedly relate to one of the

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96. *Id.*

97. TC, Dec. 9, 2004, Vera Navarette, No. 2798-04-HC/TC, "Fundamentos," ¶ 2(b)(i), *available at* http://www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html. Vera Navarrete was also tried for his alleged participation in the Barrios Altos and La Cantuta killings.

98. *Id.* ¶ 10. The court noted,

> The obligation of guarantee has been developed in the jurisprudence of the Inter-American Court of Human Rights. Thus, in the judgment in the case of Velásquez Rodríguez, the Court indicated that the obligation of guarantee implied that the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, if possible, attempt to restore the right violated and provide compensation as appropriate for any harm resulting from the human rights violation. The obligation of the State consists in the exercises of the corresponding criminal action against those public officials, or any individual, who is allegedly responsible for the alleged violation. Hence, international human rights law ensures the protection of the rights of the individual but, at the same time, requires the intervention of criminal law against those who are responsible for the violation.

Id. (citing Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 164, 166 (July 29, 1988)).

99. TC, *Vera Navarette*, No. 2798-04-HC/TC, "Fundamentos," ¶ 19 (citing Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 110–112 (Sept. 18, 2003)).

essential components of the contemporary phenomenon of globalization: human rights.

C. *Right to an Effective Recourse*

The right to effective recourse, established in articles 8 and 25 of the American Convention, has been reinforced and developed by the domestic courts based on the Inter-American Court's decisions.[100] In this regard, the highest courts of several countries have adopted interesting decisions.

In Argentina, Fernando Daniel López had been convicted of culpable homicide and denied an appeal for review.[101] However, the National Court of Appeal on Criminal Matters agreed to hear his appeal, basing its choice on the fact that "every person who has been sentenced and convicted must have access—based on the right to defense—to a renewed examination of the question (in principle, as extensive as possible)" in the judgment in the case of *Herrera-Ulloa v. Costa Rica*.[102]

Directly related to the right to an effective recourse and due process, on July 2, 2004, the Inter-American Court handed down a judgment in the case of *Herrera-Ulloa v. Costa Rica*, declaring that the state had violated the right to judicial guarantees and consequently must annul the judgment delivered by the criminal court of the First Judicial Circuit of San José of November 1999 sentencing and convicting Mauricio Herrera-Ulloa.[103] A few weeks later, in compliance with the judgment, the criminal court ordered the cancellation of the entry in the records of Herrera-Ulloa's trial, the annulment of the imposed fine and pecuniary damages, as well as the order to publish the judgment.[104] In November 2010, the Inter-American Court closed the case because the state had complied with all aspects of the judgment by amending the code of criminal procedure, expanding the procedures for contesting judgments by incorporating the remedy of appeal of a criminal judgment, reforming the appeal for review (cassation), and enhancing the principle of oral proceedings in criminal cases.[105]

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100. *See* American Convention on Human Rights, *supra* note 12, arts. 8, 25 (establishing the right to a fair trial and the right to judicial protection).

101. Cámara Nacional de Casación Penal [C.N.C.P.] [National Court of Appeal on Criminal Matters], sala IV, 15/10/2004, "López, Fernando Daniel s/ recurso de queja," No. 4807 (slip op. at 1), *available at* http://www.pensamientopenal.com.ar/04042008/30fallo2.pdf.

102. *Id.* at 2.

103. Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), No. 107, ¶¶ 167–168, "Decides," ¶ 4 (July 2, 2004).

104. *See* Herrera-Ulloa v. Costa Rica, Monitoring Compliance with Judgment, Order of the Court, "Having Seen," ¶ 4 (Inter-Am. Ct. H.R. Sept. 12, 2005), *available at* http://www.corteidh.or.cr/docs/supervisiones/herrera_12_09_05.pdf (noting the remedial measures taken by Costa Rica in Mr. Herrera-Ulloa's case).

105. Herrera-Ulloa v. Costa Rica, Monitoring Compliance with Judgment, Order of the Court, "Resolves," ¶ 1 (Inter-Am. Ct. H.R. Nov. 22, 2010), *available at* http://corteidh.or.cr/docs/supervisiones/herrera_22_11_10.pdf.

Another interesting example relates to the judgment delivered by the Inter-American Court in the case of *Fermín Ramírez v. Guatemala.*[106] Fermín Ramírez had been sentenced to death.[107] However, the Inter-American Court declared that the Convention had been violated during the criminal proceedings and, consequently, that the punishment established by the Guatemalan courts "was arbitrary for having violated impassable limitations for the imposition of said punishments in the countries that still have it."[108] On this basis, the court determined that "[t]he State must hold, within a reasonable period of time, a new trial against Fermín Ramírez, satisfying the demands of the due process of law, with all the guarantees of hearings and defense for the accused."[109]

In January 2006, after the Supreme Court of Justice of Guatemala learned of this judgment, it ruled that "since the State of Guatemala is subject to the compulsory jurisdiction of the Inter-American Court of Human Rights, the judgments that the latter delivers concerning the interpretation and application of the American Convention on Human Rights are final and are unappealable," and decided that, in compliance with said judgment, a new criminal trial should be held for Fermín Ramírez.[110] The proceedings were held in accordance with the standards of due process, and the accused was sentenced to forty years of imprisonment.[111]

The judicial protection of human rights has been an important aspect that the Constitutional Courts of Colombia and Peru have dealt with on several occasions. The Colombian Constitutional Court developed important principles in a case involving a constitutional challenge to provisions of the country's code of criminal procedure regulating the constitutional rights of the aggrieved person in a civil action.[112] In its decision, the court reinforced

106. Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), No. 126 (June 20, 2005).

107. *Id.* ¶ 2.

108. *Id.* ¶ 79.

109. *Id.* "Decides," ¶ 7.

110. Fermín Ramírez v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, "Considering," ¶ 9 (Inter-Am. Ct. H.R. Sept. 22, 2006), *available at* http://www.corteidh.or.cr/docs/supervisiones/Fermin_22_09_06.pdf.

111. *Id.* "Having Seen," ¶ 6 (citing to Fermín Ramírez v. Guatemala, La Corte Suprema de Justicia [SCJ] [Supreme Court of Justice] Jan. 23, 2006, *available at* http://www.juridicas.unam.mx/publica/librev/rev/dialjur/cont/2/cnt/cnt14.pdf (Guat.)).

112. The petition indicated that article 137 of the code of criminal procedure violated the principle of equality with regard to access to justice, because the law granted the accused "the freedom to act directly in the defense of his case, . . . and not obligatorily through a lawyer," while it imposed on the complainant or the person adversely affected the obligation to act through legal counsel, which violated the principle of equality. C.C., Sala Plena abril 3, 2002, Sentencia C-228/02 (slip op. at 9), *available at* http://www.corteconstitucional.gov.co/relatoria/2002/C-228-02.htm. In addition, it indicated that it prevented the civil party from having any information about the judicial proceedings during the preliminary investigation stage, because he or she was not a party to the proceedings and because that information was protected by the confidentiality of the proceedings. *Id.* at 10. In the petitioner's opinion, this was contrary to articles 93 and 95(4) of the constitution. *Id.*

the principles that protect the rights of victims.[113] Citing Advisory Opinion OC-9/87, it underscored that the inexistence of an effective remedy against violations of the rights recognized in the convention constitutes a breach thereof.[114] It cited, *in extenso* the judgment of the Inter-American Court in *Barrios Altos* in order to indicate that "laws that deny victims the possibility of knowing the truth and obtaining justice are contrary to the American Convention on Human Rights."[115]

Basing its decision on the jurisprudence of the Inter-American Court of Human Rights, the Constitutional Court of Peru reaffirmed, among other aspects, the right to remedy from a competent court in the face of any act or omission that harms fundamental rights.[116] It emphasized that this right, "[a]ccording to the binding jurisprudence of the Inter-American Court of Human Rights, constitutes a central element of the American Convention on Human Rights, and consequently, access to it cannot be obstructed unreasonably or its full enjoyment and exercise prevented."[117]

The June 2007 judgment of the Peruvian Constitutional Court is especially relevant in regard to the motion of unconstitutionality filed by the Callao Bar Association against Law 28,642, which established the inadmissibility of actions for the protection of constitutional rights against decisions of the National Electoral Board.[118] The judgment declared the application admissible based on the 2005 judgment of the Inter-American Court in the case of *Yatama v. Nicaragua*.[119] To reaffirm the right to effective recourse, the court based its decision essentially on the consideration that

> as the Inter-American Court of Human Rights has established, under no circumstances (even during states of exception), can the right be disregarded of every individual to have recourse to the constitutional procedures of amparo and habeas corpus when faced with a violation of the fundamental rights recognized in the Constitution of the State, as a specific manifestation, at the domestic level, of the human right of everyone 'to a simple and prompt remedy, or any other effective recourse, before a competent court or tribunal for protection against acts that violate individual fundamental rights . . . .[120]

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113. *Id.* at 14.

114. *Id.* at 18.

115. *Id.*

116. TC, Jan. 27, 2003, Almenara Bryson, No. 1941-2002-AA/TC, "Fundamentos," ¶ 3, *available at* http://www.tc.gob.pe/jurisprudencia/2003/01941-2002-AA.html.

117. *Id.*

118. TC, June 19, 2007, COLEGIO DE ABOGADOS DEL CALLAO C. CONGRESO DE LA REPÚBLICA, No. 00007-2007-PI/TC, "Ha Resuelto," ¶ 1, *available at* http://www.tc.gob.pe/jurisprudencia/2007/00007-2007-AI.html.

119. *Id.* "Fundamentos," ¶ 22 (citing Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 174–176 (June 23, 2005)).

120. *Id.* "Fundamentos," ¶ 41.

Lastly, another relevant example comes from Mexico, where in September 2008, the supreme court decided that it was necessary to create appropriate mechanisms to ensure the existence of legal remedies to contest the constitutional reform process.[121] This decision was based on the judgment of the Inter-American Court in the case of *Castañeda Gutman v. México*,[122] among other relevant sources.[123] The Inter-American Court decided that the "real possibility of access to a judicial remedy so that the competent authority, with jurisdiction to issue a binding decision, determines whether there has been a violation of a right claimed by the person filing the action . . . ."[124]

D. Nondiscrimination and the Rights of Indigenous People

The rift between international law and the rights of indigenous people is, today, much less profound and dramatic than it was in the past. But it has been and continues to be an extremely complex problem that affects a sector of the population that has been harshly affected by a long history of oppression and exclusion.

At its inception, Inter-American justice did not focus its attention on the rights of indigenous people and the historic abuses to which they have been subjected, such as exclusion and discrimination.[125] However, indigenous communities are increasingly resorting to the international legal system to assert their rights. The first pertinent case filed before the Inter-American Court was decided in 1991.[126] It is only as of 2001 that cases of this type have begun to arrive more frequently.[127]

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121. *See* Amparo en revision 186/2008, Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Novena Época, Septiembre de 2008, slip op. at 52–57, *available at* http://www.ijf.cjf.gob.mx/cursosesp/2010/CONFERENCIAS/sentencias/revisió%20186-2008.pdf (discussing the need for remedies of constitutional violations and limitations of the amparo remedy).

122. Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 100 (Aug. 6, 2008).

123. Amparo en revision 186/2008, SCJN, at 61 (citing Castañeda Gutman v. Estados Unidos Mexicanos, Sentencia (Inter-Am. Ct. H.R. Aug. 6, 2008)).

124. *Castañeda Gutman*, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 100.

125. *See* Hurst Hannum, *The Protection of Indigenous Rights in the Inter-American System*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 323, 325 (David J. Harris & Stephen Livingstone eds., 1998) ("The mandate of the Inter-American Commission on Human Rights extends to all OAS member states, but the Commission has had no special authority or obligation to concern itself with the rights of indigenous peoples.").

126. Aloeboetoe et al. v. Suriname, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

127. *See* Diana Contreras-Garduño & Sebastiaan Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27 MERKOURIOS: UTRECHT J. INT'L & EUR. L. 4, 14–17 (2010) (Neth.) (discussing the landmark 2001 case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and subsequent collective-reparation cases that demonstrate the Inter-American Court's pioneer status when it comes to protecting indigenous communities).

Several analysts, such as Pasqualucci, consider that at the global level, the Inter-American Court of Human Rights is one of the driving forces for the progressive development of law in this area.[128] Fundamental factors, such as nondiscrimination, the right to participate in public affairs, and respect for customary law are, today, important ingredients of international human rights law.[129] As Nash has indicated,

> Although the jurisprudence of the Inter-American Court, in exercise of its contentious jurisdiction, cannot resolve every problem of the indigenous people (it is not the role of the international courts to do so), it can make a contribution, establishing the content and scope of the State's obligations in this area.[130]

In its jurisprudence, the Inter-American Court has consistently affirmed the principle of nondiscrimination, establishing that states have the obligation

> not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory.[131]

Clearly, the state has the international obligation to guarantee human rights "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition" as stipulated in article 1 of the American Convention on Human Rights.[132] The Convention also establishes the principle of equality, reaffirming that all persons "are entitled, without discrimination, to equal protection of the law."[133]

To the extent that this obligation involves the need to adapt the state's laws to the Convention, it is not merely a matter of not discriminating, but the state must also guarantee that the laws will be effective. This means not only abstaining from adopting discriminatory laws and regulations,[134] but

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128. Jo M. Pasqualucci, *The Evolution of International Indigenous Rights in the Inter-American Human Rights System*, 6 HUM. RTS. L. REV. 281, 284 (2006). Pasqualucci calls this "progressive case law." *Id.* at 281.

129. *Id.* at 286–90.

130. Claudio E. Nash Rojas, *Los Derechos Humanos de los Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos* [*The Human Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights*], *in* DERECHOS HUMANOS Y PUEBLOS INDÍGENAS: TENDENCIAS INTERNACIONALES Y CONTEXTO CHILENO [HUMAN RIGHTS AND INDIGENOUS PEOPLES: INTERNATIONAL TRENDS AND CHILEAN CONTEXT] 29, 29 (José Aylwin O. ed., 2004).

131. Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185 (June 23, 2005) (footnotes omitted).

132. American Convention on Human Rights, *supra* note 12, art. 1 ¶ 1.

133. *Id.* art. 24.

134. Pasqualucci, *supra* note 128, at 287 (citing *Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185).

also enacting the necessary legal provisions and ensuring that public institutions, in general, behave with equal respect for ethnic and juridical pluralism, as well as for nondiscrimination.[135]

From this point of view, juridical pluralism is a concept with increasing acceptance and legitimacy that the Inter-American Court applies when developing its jurisprudence in cases of this type.[136] The same is true of customary law as one of the sources of interpretation of state obligations in these matters.[137] The rights of indigenous people occupy a special place from the perspective of juridical pluralism. These rights include respect for customary law, the right to collective ownership of the land and territory, and recognition of indigenous justice, where mechanisms and procedures that differ from those of written law are applied.[138]

Individual rights are exercised in communities and they must be interpreted precisely in each specific context.[139] This is how the Inter-American Court's jurisprudence regarding the rights of indigenous peoples has developed.[140] Indeed, since its decisions relate to individual victims, the court has interpreted the provisions of the American Convention and other international instruments (such as the International Labor Organization Convention 169) in the context of indigenous peoples whose rights have been affected. The court does this both to establish the dimension of the effects on the individual right—since collective rights form part of their cultural

135. *See Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 185 (dictating that states "establish norms and other measures that recognize and ensure the effective equality before the law of each individual"); Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 51, 63 (June 17, 2005) (emphasizing that "States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population" including "their customary law, values, and customs").

136. *See, e.g.*, *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 63 (deeming it essential to effective protection of indigenous peoples' rights that states take into account "their customary law, values, and customs").

137. Pasqualucci, *supra* note 128, at 289 (citing Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151 (Aug. 31, 2001)).

138. *See* Contreras-Garduño & Rombouts, *supra* note 127, at 13 ("The protection of indigenous peoples is an area of special concern for the entities of the Inter-American Human Rights System."); Pasqualucci, *supra* note 128, at 283–84 (analyzing the indigenous rights case law of the Inter-American system, which considers matters relating to indigenous customary law, communal ancestral land rights, and the applicability of indigenous law, among other things).

139. *See* Jeffrey B. Hall, *Just a Matter of Time? Expanding the Temporal Jurisdiction of the Inter-American Court to Address Cold War Wrongs*, 14 LAW & BUS. REV. AMERICAS 679, 696–97 (2008) (discussing the Inter-American Court's use of contextual considerations in determining individual rights).

140. *See, e.g.*, *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, "Concurring Opinion of Judge Sergio García Ramírez," ¶ 15 (discussing the significance of interpreting indigenous rights in context, as supported by expert reports).

identity—and to maintain a collective perspective when granting reparations, since it is a segment of the identity that has been affected.[141]

In this regard, the 2001 judgment of the Inter-American Court in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*[142] was particularly clear. This was the first binding decision of an international court that recognized the collective right of indigenous people to ownership of land and natural resources.[143] As Anaya and Grossman indicated, "This is the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so."[144]

This judgment established the right of the Awas Tingni indigenous people to title to the land and the parallel obligation of the state to award those property titles.[145] The court established that the concept of property included the communal property of the indigenous people as defined by customary law.[146] Among other considerations, the court ruled on the communal tradition and indigenous people's special relationship with the land.[147]

The court established that the members of the Awas Tingni Community "have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities."[148] On this basis, the court determined that the state must "carry out the delimitation, demarcation, and titling of the territory belonging to the community."[149] In 2008, the Nicaraguan government awarded the community property titles to

141. *See, e.g.*, Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 87 (Aug. 24, 2010) (proclaiming that "the concepts of property and possession in indigenous communities can have a collective meaning, in the sense that possession 'does not focus on individuals but on the group and the community,'" and noting that this arises "from the culture, uses, customs, and beliefs of different peoples" and should be protected by the American Convention); Bámaca-Velásquez v. Guatemala, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, "Concurring Opinion of Judge Sergio García Ramírez," ¶ 2 (Feb. 22, 2002) (asserting that evaluation of indigenous rights "recognizes the individuality of the subject with his wide range of particularities and nuances"); *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 138 (stating pursuant to the American Convention, Nicaragua is required to implement measures for "delimitation and titling of the property of the members of the [indigenous Nicaraguan] Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community").

142. *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (expounding the significance of traditions of collective ownership for interpreting indigenous property rights).

143. S. James Anaya & Claudio Grossman, *The Case of* Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 2 (2002).

144. *Id.* at 2.

145. *Id.* at 12–13.

146. *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148.

147. *Id.* ¶ 149.

148. *Id.* ¶ 153.

149. *Id.* ¶ 153(a).

over 73,000 hectares, the matter in dispute, thus complying with that aspect of the judgment.[150]

Based on the American Convention, the concept of "human rights" is recreated in related jurisdictional decisions in which customary law, juridical pluralism, and multiculturalism are relevant ingredients. This reinforces concepts and values such as equality and nondiscrimination.

From this perspective, the relationship between state law and indigenous law occupies an important place, which will probably achieve increasing protagonism. For some, these are conflicting concepts that lead to a dualist perspective between the two orders of law.[151] In our region, for example, the Colombian sociologist, Carmen Andrea Becerra Becerra, has organized "legal pluralism" conceptually in order to understand indigenous law as a mechanism that would appear to have absolute autonomy.[152] Thus, according to Becerra Becerra, if the indigenous legal system had to abide by certain normative or institutional parameters, this would be "conditioned autonomy" or "legal ethnocentrism."[153]

This relates to an essential issue: whether a state authority, in exercising its obligation of guarantee, can or should examine an alleged violation of human rights by the indigenous authority and, above all, whether an institutional mechanism, such as a constitutional court, can become involved in this matter. As an example of conditioned autonomy that the constitutional court can review, Becerra Becerra cites the "orders issued by indigenous authorities that are considered to affect the exercise of a fundamental right, [because] they are the most evident expression of the subjection of such judicial decisions—issued under the special indigenous jurisdiction—to the provisions of higher ranking norms."[154]

The basic issue is the relationship or connection between the fundamental rights embodied in national and international norms, on the one hand, and indigenous law and authority, on the other. The Colombian

150. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Monitoring Compliance with Judgment, Order of the Court, "Having Seen," ¶ 14 (Inter-Am. Ct. H.R. Apr. 3, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/mayagna_03_04_09_ing.pdf.

151. *See* JOAN CHURCH ET AL., HUMAN RIGHTS FROM A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 52 (2003) (propounding that "it might perhaps be argued that recognition of indigenous law alongside the general law indicates legal dualism that recognises cultural diversity"); Abraham Korir Sing'Oei, *Customary Law and Conflict Resolution Among Kenya's Pastoralist Communities*, INDIGENOUS AFFAIRS, Jan.–Feb. 2010, at 16, 17 (describing how "dualism, a hybrid legal space where more than one legal or quasi-legal regime occupies the same social field," includes the existence of customary community systems alongside formal legal systems).

152. Carmen Andrea Becerra Becerra, *La jurisdicción especial indígena y el derecho penal en Colombia: Entre el pluralismo jurídico y la autonomía relativa* [*Indigenous Special Jurisdiction and Criminal Law in Colombia: Between Legal Pluralism and Relative Legal Autonomy*] 35 EL OTRO DERECHO [THE OTHER RIGHT] 213, 216 (2006) (Colom.).

153. *Id.* at 217.

154. *Id.* at 227.

Constitutional Court has established four rules of interpretation concerning the relationship between fundamental rights and the exercise of the indigenous jurisdiction:

- Greater conservation of usage and customs results in greater autonomy.
- Fundamental constitutional rights constitute the minimum necessary for the coexistence of all individuals.
- Peremptory legal norms (of public order) of the republic take precedence over the usage and customs of the indigenous communities, provided they directly protect a constitutional entitlement that is superior to the principle of ethnic and cultural diversity.
- The usage and customs of an indigenous community take precedence over positive legal norms.[155]

Becerra Becerra directly questions the Constitutional Court, indicating that by establishing these parameters, the court is "revealing . . . an ethnocentric conception of some human rights that have been decided from a westernized perspective, according to the principles of equality, individuality and freedom, thus relegating recognition of Colombia as a multicultural country to a secondary rank."[156]

From this perspective, conditioning human rights to normative and conceptual parameters would be contrary to juridical pluralism and to the principle of nondiscrimination. Hence, the central issue is whether there are certain minimums that have to be respected within the juridical pluralism of a democratic society. This problem relates to a complex issue of "weighing"[157] in the juridical system, and the corresponding theoretical framework, which cannot and must not be ideological concepts or the individual ethics of each person. The answer lies with international human rights law and the relevant interpretations that the Inter-American Court and the domestic courts can make in keeping with this body of law.

In this regard, I refer to the constitutional jurisprudence of Colombia, a Latin American country whose constitutional court has made the most significant contributions on this issue at the jurisdictional level. With good reason, Bonilla calls the Constitutional Court of Colombia "one of the most progressive juridical and constitutional frameworks in Latin America regarding multicultural matters."[158] Several analysts have stressed the importance of the Constitutional Court's Judgment No. T-349 of August

155. C.C., mayo 30, 1994, Sentencia T-254/94 (slip op. at 15–16), *available at* http://www.corteconstitucional.gov.co/relatoria/1994/t-254-94.htm.

156. Becerra Becerra, *supra* note 152, at 229.

157. "Ponderación" in Spanish.

158. DANIEL BONILLA MALDONADO, LA CONSTITUCIÓN MULTICULTURAL [THE MULTICULTURAL CONSTITUTION] 25 (2006).

1996,[159] in the case of the motion for the protection of constitutional rights filed by an indigenous person (Ovidio González Wasorna) against the General Assembly of Indigenous Councils (Cabildos), region-Chamí, and the Cabildo Mayor Único (CRIR).[160]

The judgment relates to what the claimant considered to have been a breach of his rights, while he was tried for homicide by an indigenous community.[161] When he and another man accused had been detained, they delivered themselves voluntarily to the prosecutor's office, indicating that they had received death threats from members of their community and that they had been tortured.[162] According to the case file, the claimant alleged that he had been subject to the punishment of the "stocks" and that this constituted "cruel and inhuman treatment."[163] The condemned man alleged that he had no way of defending himself because no recourse was permitted against the community's decisions.[164] Furthermore, since it was the first murder case decided by the community, according to the claimant, "there was no . . . custom or usage that could be applied based on consistent and continued use."[165] Also, he had been tried based on norms that did not precede the facts, he was not present during his trial, members of the victim's family acted as judges, and the accused was denied the possibility of presenting or contesting evidence.[166]

The Constitutional Court concluded that the indigenous community had exceeded its jurisdictional authority, and violated due process by affecting the principle of the legitimacy of the punishment.[167] When reaching this conclusion, the Constitutional Court incorporated conceptual and normative elements that go beyond indigenous law conceived as an absolute and self-sufficient mechanism. Hence, it is questionable whether the Constitutional Court's reasoning and conclusion can be classified as conditioned autonomy or juridical ethnocentrism in this case. To the contrary, it could even be considered limited and partial to conclude that this right (due process) could only have been affected by the action adopted by said indigenous authority (the

159. C.C., agosto 8, 1996 (slip op.) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1996/T-349-96.htm.

160. *See* Kimberly Inksater, Resolving Tensions Between Indigenous Law and Human Rights Norms Through Transformative Juricultural Pluralism 40 (July 28, 2006) (unpublished manuscript), *available at* http://www.justgovernancegroup.org/en/Assets/Inksater_PluralismIndigenousLaw&HumanRights.pdf ("The Court advanced the autonomy of indigenous justice significantly with the 1996 decision in *Gonzalez Wasorna v. Asamblea General de Cabildos Indigenas Region Chami y Cabildo Mayor* . . . .").

161. C.C., Sentencia T-349/96 (slip op. at 3–4).

162. *Id.* at 3.

163. *Id.* at 16.

164. *Id.* at 4.

165. *Id.* at 4.

166. *Id.* at 4–5.

167. *Id.* at 19.

General Assembly of Indigenous Councils for the Chamí region and the First Town Council).

As Bonilla indicates, this is a complex issue that causes "considerable juridical and political tension,"[168] and constitutes "one of the major challenges currently faced by democracies worldwide."[169] Nevertheless, this fact is far from being an unusual element. To the contrary, this tension is a structural part of contemporary states that requires a case-by-case response.[170] In this regard, the interaction between Inter-American jurisprudence and the opinions of the highest national courts, such as the constitutional courts, is crucial.

III. Conclusion

Tribunals such as the Constitutional Court of Colombia have faced specific situations where they have had to decide to make use of substantive instruments found in the affirmation of juridical pluralism, but within the framework of human rights laws and specifically within the approach and perspective of the corresponding Inter-American jurisprudence.

International human rights obligations establish limits to an unrestricted juridical pluralism. The challenge is to respect plurality and affirm nondiscrimination compatible with respect for international obligations. This is the common denominator within which juridical pluralism is inserted and limited, and it is reflected in the approach inferred from the decisions of the Constitutional Court—not to impose a "Western" vision, but to establish substantive criteria that the state must guarantee and society must respect.

168. Daniel Bonilla, *Los Derechos Fundamentales y la Diferencia Cultural Análisis del Caso Colombiano* [*Fundamental Rights and Cultural Difference Analysis of the Colombian Case*], UNIVERSIDAD NACIONAL DE COLOMBIA [NATIONAL UNIVERSITY OF COLOMBIA], III-3, *available at* http://www.seminario2005.unal.edu.co/Trabajos/Bonilla/Los%20derechos%20fundamentales%20y%20la%20diferencia%20cultural.pdf.

169. BONILLA MALDONADO, *supra* note 158, at 20.

170. *Id.* at 105.

The Mexican Supreme Court's (Sexual) Revolution?

Alejandro Madrazo* & Estefanía Vela**

Everybody shake it
Time to be free amongst yourselves,
Your mama told you to be discreet
And keep your freak to yourself.
But your mama lied to you all this time,
She knows as well as you and I
You've got to express what is taboo in you
And share your freak with the rest of us,
'Cause it's a beautiful thang . . .
This is my sexual revolution.
—Macy Gray[1]

This Article analyzes a recent string of cases decided by the Mexican supreme court regarding sexual and reproductive rights and involving issues such as abortion, gay marriage, adoption by same-sex couples, and transgender identity. The purpose of this inquiry is twofold. At one level, it seeks to sort out what the court has in fact said and refrained from saying about the fundamental rights involved—sexual liberty and reproductive liberty—and to contrast the disparate articulation of the court's constitutional doctrine regarding each of them. At a second level, it seeks to illustrate, through the analysis of a family of cases, how the court is struggling to define its newfound role as the entity in charge of substantively interpreting the constitution and, specifically, the fundamental rights contained therein. It proposes that the disparate articulation of the rights of sexual liberty and reproductive liberty reflects a deeper tension within the court: whether to continue in a formalistic tradition that understands the constitution as a set of rules to be applied or instead to assume a new role as the ultimate interpreter of the constitution.

I. Introduction: A New (Role for the) Supreme Court

It is commonplace to state that over the last decade or so, Mexico's supreme court has emerged as a key institution not only in Mexican law, but also in politics, government, and controversial social debates and

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1. MACY GRAY, *Sexual Revolution*, *on* THE ID (Epic Records 2001).

transformations.[2] The court has decided groundbreaking cases on key national issues that range from governance and government (including cases dealing with issues such as financial privacy, limits to executive supplements to legislative bills, antitrust law, access to information, free speech, telecommunications regulation, and due process) to contested social issues (such as abortion, emergency contraception, gay marriage, and HIV/AIDS).[3] In doing so, it has become the focus of media, political, and social attention and controversy. It has also emerged as the key institution in shaping or reshaping law and legal culture in Mexico. This was not always so.

Up until 1994, the Mexican supreme court was a rather obscure institution to which the media, politicians, citizenry, and legal scholars paid little attention. The role it played in the development of constitutional law was not substantively different from that of any lower court. It decided cases, but its decisions had little or no impact beyond the parties to the litigation: even when a law was deemed unconstitutional by the court, it was not stricken from the records but was simply held inapplicable to the successful challenger.[4]

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2. *See, e.g.*, KARINA ANSOLABEHERE, LA POLÍTICA DESDE DE JUSTICIA: CORTES SUPREMAS, GOBIERNO Y DEMOCRACIA EN ARGENTINA Y MÉXICO [FROM POLITICS TO JUSTICE: SUPREME COURTS, GOVERNMENT AND DEMOCRACY IN ARGENTINA AND MEXICO] 197 (2007) (noting the Mexican supreme court's willingness to assume political functions in addition to its judicial functions); Estefanía Vela & José Reynoso, *Estudio Preliminar: La consolidación de la democracia y los Tribunales Constitucionales* [*Preliminary Study: The Consolidation of Democracy and Constitutional Tribunals*], *in* TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA [CONSTITUTIONAL TRIBUNALS AND DEMOCRACY] XIII, XIII–XVI (2008) (discussing the important role of Mexico's supreme court in the process of effectively implementing democracy in Mexico).

3. *See* Alejandro Madrazo, *The Evolution of Mexico City's Abortion Laws: From Public Morality to Women's Autonomy*, 106 INT'L J. GYNECOLOGY & OBSTETRICS 266, 267–69 (2009) (Neth.) (describing the supreme court's decisions upholding reforms to Mexico City's abortion laws); David Agren, *Court Says All Mexican States Must Honor Gay Marriages*, N.Y. TIMES, Aug. 11, 2010, at A6 (summarizing a supreme court decision guaranteeing state recognition of same-sex marriages that are registered in Mexico City); Elisabeth Malkin, *Mexico's Court Limits Reach of Big Media*, N.Y. TIMES, June 8, 2007, at C2 (introducing the new authority of Mexican antitrust enforcers to combat market dominance and a Mexican supreme court decision involving dominance issues in the media markets); *Mexican Supreme Court Rules on HIV in Military*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 25, 2007, at 3A (reporting the supreme court's ruling that the dismissal of HIV-positive soldiers from the military was unconstitutional); Hector Tobar, *In a Supremely Unusual Trend, Mexico's Bench Taking a Stand*, L.A. TIMES, June 22, 2007, at A3 (discussing a media licensing law, which the court found to be "both a violation of the right to free speech and a hindrance to the operation of the free market").

4. This had to do with the fact that the only procedural mechanism for constitutional challenges by individuals was, until then, the writ of *amparo*, a complex, highly technical (and thus expensive) procedure originally designed in the mid-nineteenth century to petition federal courts to protect fundamental rights. The key limitations of the writ of *amparo* include very stringent requirements for having standing before the courts, the impossibility of questioning the constitutionality of the authority of the government whose laws or acts are being challenged, and a ban on third-party effects of the courts' decisions, even the supreme court's. *See* Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 107, frac. II, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.) (regarding the effects of the writ of *amparo*); Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [LA] [Legal Protection Law, Procedural Rules of Articles

A 1994 constitutional amendment overhauled the supreme court and, to a somewhat lesser extent, reformed the rest of the judiciary. It reduced the number of justices from twenty-one to eleven, removed the sitting justices and appointed new ones, expanded its constitutional jurisdiction by incorporating two new procedures allowing access to judicial review—the *acciones de inconstitucionalidad* (actions of unconstitutionality) and *controversias constitucionales* (constitutional controversies)—and generally restructured the administration of the judiciary.[5] Thus began what is officially the Ninth Era of the supreme court.[6]

The thrust of the 1994 reform sought to establish the court as a constitutional arbiter in conflicts between branches and levels of

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103 and 107 of the Constitution of the United States of Mexico], arts. 73, 74, DO, 17 de Junio de 2009 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/20.pdf (regarding standing for the writ of *amparo*); Héctor Fix-Zamudio, *Ignacio Luis Vallarta: La incompetencia del origen y los derechos políticos* [*Ignacio Luis Vallarta: The Incompetence of the Origin and Political Rights*], *in* A CIEN AÑOS DE LA MUERTE DE VALLARTA [A HUNDRED YEARS FROM THE DEATH OF VALLARTA] 19, 23–24 (Instituto de Investigaciones Jurídicas eds., 1994), *available at* http://biblio.juridicas.unam.mx/libros/3/1042/4.pdf (regarding the challenge to the constitutionality of the elected authority); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LATIN AM. POL. & SOC'Y 31, 35, 37 (2007) (noting that the court's decisions lacked effect on third parties and that the court lacked the ability to interpret the constitution until 1994).

5. Órgano del Gobierno Constitucional de los Estados Unidos Mexicanos [Constitutional Government Organ of the United States of Mexico], arts. 94, 105, DO, 31 de Diciembre de 1994 (Mex.), *available at* http://www2.scjn.gob.mx/Leyes/ArchivosLeyes/00130133.pdf. The *acción de inconstitucionalidad* granted legislative minorities of 33% as well as the Attorney General standing to challenge the constitutionality of a bill approved by a legislative majority directly before the supreme court. *Id.* art. 105. The *controversia constitucional* gave standing to all branches (executive, legislative, and state judiciaries) and levels of government (federal, state, and municipal) to challenge another branch or level of government or laws or actions that it felt impinged upon its constitutional jurisdiction. *Id.*

Technically speaking, the *controversia constitucional* already existed in Mexico; it was mentioned in the constitution but had not been regulated in a secondary norm, and historically it had been very sparsely used. Fabiola Martínez Ramírez, *Las controversias constitucionales como medio de control constitucional* [*Constitutional Disputes as a Means of Constitutional Control*], *in* 8 LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL: ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO [THE SCIENCE OF CONSTITUTIONAL LITIGATION: STUDIES IN HONOR OF HECTOR FIX-ZAMUDIO IN FIFTY YEARS AS RIGHTS INVESTIGATOR] 567, 569–70 (Eduardo Ferrer Mac-Gregor & Arturo Zaldívar Lelo de Larrea eds., 2008), *available at* http://biblio.juridicas.unam.mx/libros/6/2553/24.pdf. In 1995, the constitutional text was amended, but, more importantly, a law regulating both the *acción de inconstitucionalidad* and *controversia constitucional* procedures was enacted. Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos [Procedural Rules of Sections I and II of Article 105 of the Constitution of the United States of Mexico], DO, 11 de Mayo de 1995 (Mex.), *available at* http://www2.scjn.gob.mx/Leyes/ArchivosLeyes/8654_ TEXTO%20ORIGINAL.doc.

6. Each time a legal reform changes the structure and jurisdiction of the federal judiciary, a new *época*, or era, begins. *See ¿Qué es una época*? [*What is an Era*?], SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, available at: http://www.scjn.gob.mx/CONOCE/QUEHACE/LAJURISPRUDENCIA/Paginas/queesepoca.aspx (listing the various épocas, and the events creating them, after 1917 constitution).

government.[7] The new procedures that were set up to channel political conflicts allowed the court, for the first time in Mexican history, to strike down laws it deemed unconstitutional. The amendment did not, however, modify the writ of *amparo*, a long-standing and very limited procedure that gives ordinary citizens access to the federal judiciary when their fundamental rights are impinged upon, but does not allow striking down a law—at most, a law is simply not applied to those, and only those, who sought and won the *amparo*.[8] In other words, the court was refurbished to take on a new role as

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7. Mexico is a federal republic with three levels of government set up directly in the constitution: federal, state, and municipal (the functional equivalent of county government). C.P. arts. 49, 115, 122 (Mex.).

Traditionally, conflicts between levels or branches of government found political solutions through brokering conducted by the federal executive branch. *See, e.g.*, Beatriz Magaloni, *Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 180, 181 (Tom Ginsburg & Tamir Moustafa eds., 2008) ("[T]he ruling elite submitted to the autocratic political order based on presidential arbitration instead of fighting because the system was self-enforcing *as long as the PRI retained a monopoly on political office* and could guarantee members of the ruling elite a share of power over the long run."). Though barred from reelection, the cornerstone of the political system was the president, who was also the effective head of the party that dominated Mexican politics from 1929 until the 1990s: the Revolutionary Institutional Party (PRI). *Id.*

A series of electoral reforms, beginning in the 1960s but deepening and accelerating in the late 1970s through the late 1980s, opened up the possibility for opposition parties to gain access to a limited number of seats in both state and federal legislatures. *See* Pamela K. Starr, *Neither Populism nor the Rule of Law: The Future of Market Reform in Mexico*, 15 LAW & BUS. REV. AMERICAS 127, 129–30 (2009) (providing a historical overview of electoral reforms in Mexico). An unprecedented electoral competition in the highly questioned presidential race of 1988 resulted in the unification of a constellation of small, left-wing parties and the loss of the supermajority in congress required to reform the constitution. *See* Carol Wise, *Mexico's Democratic Transition: The Search for New Reform Coalitions*, 9 LAW & BUS. REV. AMERICAS 283, 289–90 (2003) (describing the results of the 1988 elections and mentioning the PRI's loss of the two-thirds majority required to amend the constitution). The Salinas Administration (1988–1994) saw an unprecedented growth of opposition in electoral politics, including the ascendance of right-wing party governors—specifically, from the National Action Party (PAN)—both through elections and negotiations with the PRI. *See id.* at 302 (describing the results of the 1997 elections).

The early 1990s saw unprecedented political diversification in elected offices. As opposition parties won (or negotiated) municipal and state government seats and won spaces in the legislatures, the president's capacity to arbitrate conflicts between branches and levels of governments was reduced. *See* Magaloni, *supra*, at 181–82 ("With multiparty competition emerging in the 1990s, the political order began to unravel because the president's leadership was challenged, first by opposition politicians and then by his co-partisans."). In December 1994, as Ernesto Zedillo assumed the presidency after a competitive but unchallenged election, his first act of government was to propose the constitutional amendment restructuring the federal judiciary. *See* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL'Y 295, 295–96 (1996) (describing how, only one month after taking office, Zedillo initiated a constitutional amendment to "transform[] the composition, structure, and function of Mexico's Supreme Court of Justice").

8. Ríos-Figueroa, *supra* note 4, at 35–36. The writ of *amparo* was modified through an amendment in 1999, which strengthened the supreme court by making the decisions of the administrative head of the federal judiciary, the *Consejo de la Judicatura*, subject to the court's interpretations. *Cf.* C.P. art. 94 (Mex.) (specifying that the Federal Judicial Council has no jurisdiction over the supreme court and that the Council's decisions are limited by the constitution). It also allowed the court to select cases that it considered relevant to establishing "important" and

referee when political classes came into conflict, but the tools it was equipped with to address the protection of citizens' rights remained the old and rusty ones.

The court, however, has gone beyond its role as constitutional arbiter of political conflicts and has flexed its new muscles. It has increasingly taken on cases that concern the citizenry directly. Questions that demand the articulation of fundamental rights have been brought before it, either through political actors who intentionally or unintentionally voice citizens' concerns, or through the reinvigoration of the rusty writ of *amparo* stemming from the court's newfound notoriety. The court initially focused on the concerns of government officials (be they legislative minorities or elected officeholders), some very relevant to the functioning of government,[9] some less so.[10] But its new role as constitutional referee made the court the focus of public attention to an unprecedented degree.[11] In turn, citizens increasingly sought to reach this privileged forum to voice their demands for the articulation of fundamental rights, and politicians acquiesced to using their standing in *acciones* and *controversias* to take up causes dear to their constituencies.[12]

"transcendental" criteria. *Id.* art. 107, frac. IX. This language can be interpreted to allow the court to strike down laws, though it has chosen not to exercise that power.

9. *See* Acción de inconstitucionalidad 61/2008 y sus acumuladas 62/2008, 63/2008, 64/2008 y 65/2008, Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Novena Época, 8 de Julio de 2008, slip op., *available at* http://www.scjn.gob.mx/2010/transparencia/Documents/Transparencia/Pleno/Novena%20época/2008/7_AI_61_08.pdf (ruling on provisions of federal election law); Controversia constitucional 22/2001, Pleno de la SCJN, Novena Época, 25 de Abril de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2001/Controversia%20constitucional%2022-2001%20de%20Pleno.pdf (deciding a case brought by congress against the president over a regulation interpreting the constitution).

10. *See* Controversia constitucional 5/2001, Pleno de la SCJN, Novena Época, 4 de Septiembre de 2001, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2001/Controversia%20constitucional%205-2001%20de%20Pleno.pdf (deciding a challenge brought by the head of the Mexico City government regarding time zones).

11. *See* Jeffrey K. Staton, The Impact of Judicial Public Relations on Newspaper Coverage 11–14, 18 (Aug. 23, 2004) (conference paper), *available at* http://mailer.fsu.edu/~jstaton/coverage.pdf (analyzing whether the Mexican supreme court's public relations campaign had a positive effect on media coverage of the court by discussing news coverage of the court between 1997 and 2002, and indicating that "the Mexican Supreme Court was extremely effective in calling media attention to [its] resolutions").

12. For instance, President Calderón, whose constituency is mostly a conservative middle class, has used the attorney general's standing to challenge both the decriminalization of abortion and the legalization of gay marriage and adoption. Women's rights advocates have formed alliances with both county governments and state human rights commissions to challenge state constitutional amendments that established the fetus's right to life. For more information on the abortion cases that have recently been decided or are currently pending decisions, see Estefanía Vela, *Current Abortion Regulation in Mexico* 2–3, 5–9 (CIDE División de Estudios Jurídicos, Working Paper No. 50, 2010), *available at* http://www.cide.edu/publicaciones/status/dts/DTEJ%2050.pdf (discussing the supreme court's precedents that led to further reform of abortion regulation in Mexico); Alejandro Madrazo, The Debate Over Reproductive Rights in Mexico: The Right to Choose vs. the Right to Procreation 6–20 (June 11–14, 2009) (conference paper), *available at*

The court's public notoriety has also had the (presumably unintended) consequence of transforming the role of the writ of *amparo*. Historically an obscure procedure, the *amparo* received little attention and seldom spoke to the substance of fundamental rights.[13] In recent years, however, a few high-profile *amparos* have triggered intense public debate and, more importantly, have been the occasion for the court to speak of and flesh out fundamental rights with unprecedented frequency and depth.[14]

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http://www.law.yale.edu/documents/pdf/sela/Madrazo_Eng_ConferenceVersion.pdf (analyzing both the majority and dissenting opinions in recent abortion cases).

13. This does not mean that the court has never spoken of fundamental rights through *amparos*. The court and the circuit courts (the equivalent to the federal circuit courts in the United States) have ruled *in relation* to fundamental rights when deciding an *amparo*. However, *amparos* before the supreme court and lower courts historically have been (and mostly still are) decided without taking on the substantive interpretation of fundamental rights. Although empirical studies on Mexico's courts have only recently been attempted, there are a few empirical studies that reflect this phenomenon. For instance, one study showed that the vast majority of cases before district courts were thrown out without addressing the substantive question posed to the court, in what has been labeled a policy of "deciding without solving." Ana Laura Magaloni & Layda Negrete, *El Poder Judicial y su política de decidir sin resolver* [*The Judicial Power and the Policy of Deciding Without Resolving*] 7 (CIDE División de Estudios Jurídicos, Working Paper No. 1, 2001), *available at* http://academica.mx/aleph/Documentos%20de%20Trabajo/DOCT2064372.pdf. Another study, which surveyed the court's published interpretations of due process rights during the Ninth Era, concluded that the court's interpretations regarding fundamental rights show a strong tendency toward a formalistic, not substantive, approach to constitutional norms. Ana Laura Magaloni Kerpel & Ana María Ibarra Olguín, *La configuración jurisprudencial de los derechos fundamentales: El caso del derecho constitucional a una defensa adecuada* [*The Jurisprudential Configuration of Fundamental Rights: The Case of the Constitutional Right to Adequate Counsel*], CUESTIONES CONSTITUCIONALES [CONST. QUESTIONS] (Mex.), July–Dec. 2008, at 107, 142. A broader historical (rather than empirical) survey of the court's criteria concluded that no particular constitutional theory existed informing Mexico's constitutional adjudication until at least 2002, and that the tendency of the court from 1940 until the 1994 amendment was minimalist, reducing the substantive content and the scope of the court's decisions to a minimum. JOSÉ RAMÓN COSSÍO, LA TEORÍA CONSTITUCIONAL DE LA SUPREMA CORTE DE JUSTICIA [THE CONSTITUTIONAL THEORY OF THE SUPREME COURT OF JUSTICE] 77–78 (2002). These studies indicate that, historically, the court seldom spoke substantively on fundamental rights, and when it did, it addressed only certain rights and generally did so in a superficial manner, refraining from fleshing out the meaning and scope of the rights.

14. For instance, the constitutional interpretation of due process rights was deeply transformed by the case popularly known as *Acteal*, resolved in August 2009. Juicio de amparo directo penal 9/2008, relacionado con la facultad de atracción 13/2008-PS, Primera Sala de la SCJN, Novena Época, 12 de Agosto de 2009, slip op., *available at* http://www.cursosamij.org.mx/material%20de%20apoyo/Javier%20Cruz%20Angulo/ACTEAL.pdf. It concerned an armed group of indigenous people, charged with the brutal massacre of more than forty-five Tzotzil Indians in 1997 in Chiapas. Héctor Aguilar Camín, *Regreso a Acteal III: El día señalado (Tercera y última parte, Diciembre 2007)* [*Return to Acteal III: On the Appointed Day (Third and Last Part, December 2007)*], NEXOS EN LÍNEA [LINKS ONLINE], (Aug. 8, 2009), http://www.nexos.com.mx/?P=leerarticulo&Article=748. It took nearly a decade for the perpetrators to be convicted, but the supreme court later found that most of the proof used to convict them had been either illicitly obtained (under torture) or fabricated (including the prosecution's key witness who, despite not knowing how to read or write and speaking only Tzotzil, had rendered his testimony in writing and in Spanish) and therefore void. Juicio de amparo directo penal 9/2008, relacionado con la facultad de atracción 13/2008-PS, SCJN, slip op. at 437–42, 468–85. As a result, about a third of the prisoners were released (although the rest were not because they did not argue the same defense). *Id.* at 10.

In this context, Mexico's supreme court has ruled on landmark cases that have gained international attention for putting the country at the head of the advancement of sexual and reproductive rights. Since 2007, Mexico's supreme court has sanctioned the decriminalization of first-trimester abortion and the legalization of gay marriage and adoption, and it has established the fundamental right of transgender individuals to change their officially recognized sex without public registry of their previous sex.[15] These advancements in sexual and reproductive rights are all the more notable if one takes into consideration the law regarding sexual and reproductive rights before these decisions came down. Before this wave of noteworthy cases, the court considered rape perpetrated within a marriage to be the exercise of a right (admittedly, an undue exercise, but a right nonetheless)[16] and that the possibility of terminating a pregnancy for medical reasons could be allowed insofar as the termination of the pregnancy formally remained a crime.[17] The contrast between the two extremes of this evolution in the law of sexual and reproductive rights is astounding, and one is not surprised by the recently acquired notoriety of the court. It certainly looks like a revolution in sexual and reproductive law in Mexico.

The matter, however, is less clear if one looks at the arguments that sustain the court's decisions rather than at their results. In deciding some of these cases, the court has been reluctant to articulate or even recognize the existence of certain fundamental rights. By contrast, in deciding other cases, the court has been proactive and creative in both articulating rights and fleshing them out. The result has been a disparate acknowledgement and development of the rights involved. The contrast between the different ways in which these rights have been developed through the court's decisions illustrates the tension that the court faces when it is required, or has the opportunity, to reflect upon the span and meaning of constitutional rights in

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This is arguably the most important case regarding due process, because it fleshed out, for the first time, the standards of proof for conviction in a criminal prosecution. *Id.* at 132–45. This case has already served as precedent in other high-profile cases that were recently decided by the supreme court, in what seems to be the beginning of a string of due process cases. *E.g.*, Recurso de apelación 2/2010, Primera Sala de la SCJN, Novena Época, 28 de Abril de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10000020.044.doc (popularly known as *Teresa y Alberta*); Dictamen que valora la investigación constitucional realizada por la comisión designada en el expediente 3/2006, Pleno de la SCJN, Novena Época, 12 de Febrero de 2009, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/06000030.223.doc (popularly known as *Atenco*).

15. All of these decisions are particularly noteworthy, considering that Mexico is a Latin American transitioning democracy composed primarily of Catholics. *See Principales religiones: Volumen de la población católica* [*Principle Religions: Volume of the Catholic Population*], INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA [NAT'L INST. STAT. & GEOGRAPHY], http://www.inegi.org.mx/Sistemas/temasV2/contenido/sociedad/rel03.asp?s=est&c=22438 (last modified Mar. 3, 2011) (noting that in the 2010 census, 84.2% of Mexicans self-identified as Catholic).

16. *See infra* subpart II(B).

17. *See infra* subpart II(A).

general. In its recent transition, the court has gone far, but it is still struggling to come to terms with its emerging role as a constitutional court while holding on to a long-standing tradition in which it understood itself as a court of justice within the continental tradition, ever respectful of and deferential to the text of the law.

This Article takes an initial look at the substantive interpretations of the constitution in the supreme court's decisions in an attempt to understand the struggles it is grappling with while undergoing a deep transformation. To do so, we will trace the recent evolution of two fundamental rights that have only recently become central to the court's discussions: sexual liberty and reproductive liberty. We will then reflect on what this tells us about the broader transformation that the supreme court is undergoing. The Article is divided accordingly. In Part II, we will briefly describe the cases and the opinions the court has produced regarding these rights so that the raw material is laid out for the reader to follow. Part III analyzes these opinions to identify what the court has said and what it has implied about the rights it refers to most often as "sexual liberty" and "reproductive liberty." Finally, in Part IV, we reflect by way of conclusion upon what this revolution in sexual- and reproductive-rights law tells us about the court's own evolution from a common court of law to a budding constitutional court.

II. The Cases

There are seven important cases regarding sexual- and reproductive-freedom rights in recent court history. They were selected for what they *say* regarding these rights or for what they *could have said* but did not. In this Part, all seven of these cases will be described briefly, including how they came to be heard by the supreme court and what the supreme court decided on the matter. They are presented in chronological order by date of decision, from the oldest (January 30, 2002) to the newest (August 16, 2010).

A. Ley Robles *Case*[18]

In 2000, Mexico City's legislative assembly reformed its criminal code, altering the regulation of abortion.[19] One of the reform's main points was to

18. Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf. Cases in Mexico are identified by reference to the type of procedure, the specific court deciding it, and the corresponding file number. This is, to say the least, a cumbersome way of identifying cases (resulting from the historic lack of importance of case law in Mexico's legal system). We have chosen to name the cases, so that reading the Article is more comfortable and clearer. Where popular names are widely adopted—as in this case, where the reform was named after the Mexico City mayor who promoted it—we have kept them. On other occasions we have altered the popular name—such as in the *Sexual Identity* case that is popularly known as the *Transsexuals* case—because we felt it to be misleading.

broaden the number of exceptions under which abortion was not to be punished. To rape and imprudence (i.e., accident), they added three new instances in which sanctions were not to be applied:

> [W]hen a woman is artificially inseminated without her consent, when there is a threat to the woman's health, and when there are adverse genetic and congenital conditions affecting the fetus which may result in physical or mental damage, to the extent that they put the product of conception's survival at risk.[20]

A qualified minority (at least 33%) of Mexico City's assembly challenged the reform through an *acción de inconstitucionalidad.* Specifically, they challenged the congenital-malformation exception to punishment, arguing, basically, that it violated the fetus's right to life.[21] The court upheld the reform, but for very peculiar reasons.

The court framed the question as follows: does the amendment violate the right to life of the fetus?[22] The court found the right to life to be protected from the moment of conception, based on constitutional clauses that deal with labor rights regarding maternity (for example, the right to maternity leave or a prohibition on employers requiring risky activities from pregnant women).[23] Having found that the fetus has a right to life, the court then went on to consider the criminal code. It focused on the fact that the law under scrutiny held abortion to be a criminal act even in the instances where it mandated that punishment should be withheld.[24] For the court, the fact that the conduct was not technically "decriminalized" was key.[25] The bottom line is this: the state is still sending the message that *abortion is wrong* (it is illegal); but it chooses not to punish under certain conditions as long as, the court affirmed once again, all the requisites established by the law are fulfilled.[26] The constitutionality of the reform lies in the fact that under its terms, abortion remains a crime.

Notably, the court is completely silent regarding reproductive freedom or any other fundamental right, with the exception of the right to life for the fetus.

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19. Deborah L. Billings et al., *Constructing Access to Legal Abortion Services in Mexico City*, 10 REPROD. HEALTH MATTERS 86, 87 (2002); Madrazo, *supra* note 3, at 267.

20. Vela, *supra* note 12, at 2 (internal quotation marks omitted).

21. Acción de inconstitucionalidad 10/2000, SCJN, slip op. at 15–16.

22. *Id.* at 84–85.

23. *Id.* at 100–01.

24. *Id.* at 70–71.

25. *Id.* at 71.

26. These conditions are (1) that two doctors conclude that the product of conception presents genetic or congenital conditions that (a) may result in physical or mental damage and (b) may result in risk of death *for the product*; (2) that the woman consent to the abortion; (3) that her consent was the result of a free, informed, and responsible decision; (4) that it was based, in part, on the doctors' diagnoses and objective, truthful, sufficient, and opportune information; and (5) that she have information regarding the procedures, risks, consequences, effects, and alternatives to abortion, as well as the support available to her. *Id.* at 72–74.

B. *Conjugal Rape Case*[27]

In 2005, the court's first chamber[28] decided a prickly question: whether or not forced intercourse between spouses was rape. It was not the first time the chamber resolved this issue: in 1994, it had ruled that if the sexual intercourse imposed was potentially procreative, it should be prosecuted as the crime of "undue exercise of a right," but not as rape.[29] Eleven years later, the chamber was asked to reverse its criteria, and it did.

The first time it was confronted with the matter, neither sexual nor reproductive freedom was taken to be part of the problem. In 2005, however, it was the constitutional clause stating that every person has a right to choose the number and timing of one's children (Right to Choose Clause)[30] that reversed the chamber's decision. After citing article 4, paragraph 2 of the constitution, the chamber held that even if procreation is to be considered the end of marriage,

> that cannot be interpreted as to allow one of the spouses to force the other to the carnal act . . . since [trumping marriage's purpose] is the right of every person to decide not just regarding her sexual freedom and the free disposition of her body, but to determine when the perpetuation of the species shall be attempted.[31]

With this, the chamber reversed its previous ruling and affirmed categorically that, conjugal debt or not, when one spouse imposes sex on the other, the action should be considered rape.[32]

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27. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, Primera Sala de la SCJN, Novena Época, 16 de Noviembre de 2005, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/46/0500009P.S39.doc.

28. The supreme court can function in chambers (*Sala*) or en banc (*Pleno*). Ley Orgánica del Poder Judicial de la Federación [LOPJF] [Enabling Law for the Federal Judiciary], *as amended*, art. 2, DO, 26 de Mayo de 1995 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/172.pdf. There are two chambers, each constituted of five justices. *Id.* Although the arrangement is more flexible in practice, the first chamber is responsible for hearing civil and criminal cases, while the second chamber is designated for labor and administrative cases. *Id.* arts. 10, 21. The chief justice only sits when the court decides cases en banc. *Id.* arts. 2, 10. All *acciones* and *controversias* must be decided en banc. *Id.* art. 10.

29. Contradicción de tesis 5/92, Primera Sala de la SCJN, Octava Época, 28 de Febrero de 1994, slip op., *available at* http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=187&Tpo=2. The court began its exercise asking what the end of marriage was, not what the constitution says (or what international treaties say, for that matter). *Id.* Since reproduction is understood to be the end of marriage, the court held that the spouses have a right to reproduction ("conjugal debt" or "carnal debt"). *Id.* This right, however, only implies reproductive sex (which it dubbed "normal copulation") and not sex for pleasure ("abnormal copulation"). *Id.* Therefore, if a spouse imposes, for instance, anal sex, it is rape; if the spouse, on the other hand, imposes vaginal sex, it is the undue exercise of a right.

30. C.P. art. 4 (Mex.).

31. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 61.

32. *Id.* at 63–64. One thing that has to be mentioned is the fact that the chamber completely ignored the circuit court's arguments to reverse the criteria. This is important because the circuit court—the petitioner in this case—based most of its arguments not just on sexual freedom, but on equality. *Id.* at 26–27. To the circuit court, the problem of conjugal rape was one that must have

C. *HIV and the Military Case*[33]

A member of the army was discharged after being diagnosed with HIV.[34] Upon discharge, he lost his social security coverage and was left without the means to treat his illness.[35] His discharge, however, had a seemingly solid legal basis: an article of the armed forces' social security law established that, following an HIV diagnosis, he was to be considered "useless" for military purposes and thus could be discharged.[36] The plaintiff filed an *amparo* challenge against the clause on the grounds that it was health-based discrimination.[37] Having HIV, he argued, is not a sufficient reason to consider a soldier useless, since carrying the virus does not automatically mean that one is unable to perform one's duties; if treated correctly, one can lead a regular life for years, even decades.[38]

The matter, as framed by the court, consisted of weighing and balancing two competing interests: the efficiency of the military versus a person's right not to be discriminated against because of his health.[39] For the majority of the justices, the restriction was aimed at pursuing a constitutionally valid interest: having healthy, functional soldiers.[40] In this sense, the problem was not the purpose pursued, but the way it was pursued: was this measure a good means to that end and, more importantly, was the benefit it sought greater than the harm it caused? On both accounts, the court responded negatively.[41] Since HIV does not necessarily imply being unfit for duty, this measure, the court held, cannot be understood as furthering the state's interest—at least if one considers that, along the way, soldiers are deprived of duty and their rights.[42]

Because of the way the issue was framed, it did not become a matter of sexual rights (or sexual health), but rather a case of nondiscrimination. As Ana Amuchástegui and Rodrigo Parrini noticed, the "ghost" of homosexuality did appear at several points during the plenary's discussion,[43] but those

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been resolved by appealing to equality: since there is a disparity between men and women when it comes to sex, permitting conjugal rape ensured women's (sexual) subordination to men. Regarding this, the chamber remained silent.

33. Amparo en revisión 307/2007, Pleno de la SCJN, Novena Época, 24 de Septiembre de 2007, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/07003070.002.doc.

34. *Id.* at 3–4.

35. *Id.* at 3–5.

36. *Id.* at 18, 57.

37. *Id.* at 5, 21. The constitution prohibits discrimination "motivated by . . . health conditions." C.P. art. 1 (Mex.).

38. Amparo en revisión 307/2007, SCJN, slip op. at 23.

39. *Id.* at 55–58.

40. *Id.* at 71.

41. *Id.* at 71, 78.

42. *Id.* at 80.

43. Ana Amuchástegui & Rodrigo Parrini, *Sujeto, sexualidad y biopoder: la defensa de los militares viviendo con VIH y los derechos sexuales en México* [*Subject, Sexuality and Biopower:*

interventions are not part of the opinion.[44] Strictly speaking, the court was silent on the matter of sexuality.

D. Decriminalization Case[45]

Of the six cases the court has decided concerning abortion, the most important deals with the decriminalization of first-trimester abortion in Mexico City.[46] In 2007, Mexico City's assembly once again reformed its criminal code and its health law by redefining the crime of abortion as the interruption of pregnancy after the twelfth week, and establishing that prior to that time, voluntary abortion would be part of the health services granted free of charge by the state.[47] For second- and third-trimester abortions, the reform left untouched the series of exceptions to the rule that abortions constituted criminal conduct.[48] The assembly based the reform on several

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The Defense of the Soldiers Living with HIV and Sexual Rights in Mexico], 27 ESTUDIOS SOCIOLÓGICOS [SOC. STUD.] 861, 874 (2009) (Mex.). In Mexico, the plenary's discussions are public and broadcasted through television (and later transcribed and posted online).

44. In an article analyzing the eleven cases that the supreme court resolved dealing with the discharge of members of the military for being HIV positive, Amuchástegui and Parrini acknowledge that part of the silence had to do with how the defense, and not just the court, framed the matter: it was easier, on behalf of the soldiers, to frame their problem in terms of health, social security, and labor rights than to address the sexual discrimination latent in most of their histories. *Id.*

45. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op., *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

46. *Id.* From 2000 to today, the court has solved six cases dealing with abortion: (1) Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf; (2) Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op.; (3) Controversia constitucional 54/2009, Pleno de la SCJN, Novena Época, 26 de Mayo de 2010, slip op., *available at* http://www.scjn.gob.mx/documents/pr_cc_54_09.pdf; (4) Amparo en revisión 633/2010, Segundo Sala de la SCJN, Novena Época, 22 de Septiembre de 2010, slip op., *available at* http://www.scjn.gob.mx/Micrositios/unidadcronicas/Sinopsis%20de%20Asuntos%20destacados%20de%20las%20Salas/2S-220910-SSAA-633.pdf; (5) Amparo en revisión 644/2010, Segundo Sala de la SCJN, Novena Época, 22 de septiembre de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10006440.002.doc; and (6) Amparo en revisión 687/2010, Segundo Sala de la SCJN, Novena Época, 22 de Septiembre de 2010, slip op., *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/10006870.002.doc. We group *Controversia constitucional* 54/2009 as an abortion case because it was challenged as a "chemical abortion" that violated the right to life (under state constitutional law) of the fetus. *See infra* note 78 and accompanying text.

47. Código Penal para el Distrito Federal [CPDF] [Criminal Code for the Federal District], *as amended*, art. 144, Gaceta Oficial del Distrito Federal [GODF], 16 de Julio de 2002; Ley de Salud para el Distrito Federal [Health Law of the Federal District], *as amended*, art. 16, DO, 15 de Enero de 1987 (Mex.).

48. CPDF art. 148. Again, the exceptions are: when the pregnancy is the result of rape or an artificial insemination that was not consented to; when the fetus has a congenital malformation; when the woman's health is at risk; or when the pregnancy is the result of imprudence (i.e., accident). *See supra* note 20 and accompanying text. This change—from considering abortion a crime *not to be punished* to *not considering it a crime at all*—had been implemented in 2004 and was unchallenged in court. Madrazo, *supra* note 3, at 267–68.

fundamental rights. It was deemed to be a measure that made women's right to health effective, referring to the high numbers of complications resulting from clandestine abortions.[49] The reform was also believed to make women's right to control their sexuality and reproduction effective: the decriminalization of abortion before the twelfth week of pregnancy was thought of as an advancement of reproductive freedom.[50] Women would now be able to choose on their own terms and for their own reasons. Last but not least, the reform was presented as a way to make women's right to equality effective: by making the legal interruption of pregnancy available to all, the reform ensured that there would not be an economic distinction between the women who could and those who could not get safe abortions.[51]

The decriminalization of abortion was challenged before the supreme court by both the federal attorney general's office and the head of the National Commission of Human Rights through two independent *acciones de inconstitucionalidad*.[52] The two main arguments they advanced to strike down the new law were (a) that it violated the fetus's right to life, and (b) that it violated the men's rights to procreation and to equality (because it placed the final decision entirely in the hands of women).[53]

The court decided the case in August 2008. In its plurality opinion,[54] it framed the question before it as follows:

> This case confronts us with a peculiar problem, in which the question to be answered is the opposite of the one responded to by [constitutional courts in most abortion cases elsewhere]: we must ask if the state has the obligation to criminalize a specific type of conduct, and not if the criminalization of a particular type of conduct affects or violates constitutional rights.[55]

This manner of casting the question allowed the plurality to sidestep the fundamental question of abortion cases: the existence of women's right to

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49. Iniciativa de Reforma a los Artículos 145 y 147 del Código Penal para el Distrito Federal, Que Presenta el Diputado Jorge Carlos Díaz Cuervo de la Coalición Parlamentaria Socialdemócrata [Initiative to Reform Articles 145 & 147 of the Criminal Code for the Federal District, Presented by Deputy Jorge Carlos Díaz Cuervo of the Social-Democratic Parliamentary Coalition], Diario de los Debates de la Asamblea Legislativa del Distrito Federal [Journal of the Debates of the Legislative Assembly of the Federal District], 10–11, 28 de Noviembre de 2006, *available at* www.aldf.gob.mx/archivo-8b1bb5ba4d386d700a7516ccf2ede1b4.pdf.

50. *Id.* at 12.

51. *See id.* at 11 (expressing concern at the fact that, prior to the reform, 74% of low-income women were not aware that they could terminate their pregnancies at the government's expense under certain circumstances).

52. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 1–2, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

53. *Id.* at 185–87.

54. The plurality opinion technically gathered a qualified majority of eight votes. However, seven out of those eight justices wrote concurring opinions (all except Justice Cossío, who drafted the plurality opinion). *Id.* at 207–08. Therefore, the binding force of that plurality is rather weak.

55. *Id.* at 177.

choose. Having framed the question in this manner, the court found the decriminalization of abortion to be constitutional.[56] It did so by focusing on a technical aspect of criminal law—the principle of strict legality—according to which there is no crime unless expressly and clearly stated in a written text.[57] Likewise, if the constitution does not expressly and specifically establish the legislature's obligation to criminalize a behavior, then no such obligation exists. Importantly, the assembly's defense offered that argument in its brief, although it focused mostly on women's rights and the implausibility of considering the fetus a rights holder if it was not technically a "person" according to civil law.[58] The defense explicitly invoked reproductive liberty as established in the Right to Choose Clause.[59] However, the plurality opinion provided no answer to fundamental-rights arguments.[60]

This time around, a plurality opinion held that the right to life of a fetus was not in the constitution.[61] Rather, the plurality found that the state had an obligation to promote and secure the conditions of an already existing life.[62] It found that the question of when life began remained unanswered by the constitution or the international treaties signed by Mexico.[63] With this, the court basically reversed its holding from 2002,[64] which had established that the constitution protected the right to life from the moment of conception.[65] Further—and more importantly—it held that "the mere existence of a constitutional right does not imply an obligation to criminalize a type of conduct that affects it."[66] With this, the court basically determined that enshrining the right to life (even if life begins at conception) does not imply that abortion must be criminalized. Actually, the core of its holding—that there is no constitutional mandate to criminalize abortion and thus that legislative decriminalization is constitutional—was Justice Gudiño Pelayo's concurring opinion in 2002.[67] It is remarkable that in a six-year period a

56. *Id.* at 177–85.

57. *Id.*

58. *Id.* at 55–56.

59. *Id.* at 57.

60. *Id.* at 177–85.

61. *Id.* at 175.

62. *Id.* at 174–75.

63. *Id.* at 127.

64. Acción de inconstitucionalidad 10/2000, Pleno de la SCJN, Novena Época, 29 y 30 de Enero de 2002, slip op., *available at* http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AsuntosRelevantes/2000/Acción%20de%20inconstitucionalidad%2010-%202000%20de%20Pleno.pdf.

65. *Id.* at 90–97.

66. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 176.

67. Acción de inconstitucionalidad 10/2000, SCJN, slip op. at 181–82 (Gudiño Pelayo, J., concurring).

10-to-1 majority for the constitutional right to life from conception would shift to a 3-to-8 minority.[68]

As stated above, those against the decriminalization of abortion also argued that it violated men's rights to procreation and equality, because it placed the final decision exclusively with women. The court determined that the reform was, contrary to the plaintiffs' argument, reasonable if one were to consider how pregnancy impacts men's and women's lives (women are generally the ones that deal with it) and how hard it is to establish paternity during the first trimester of a pregnancy.[69]

E. Sexual Identity Case[70]

In January of 2008, the court decided an *amparo* regarding transgender identity. The case did not involve the right to change one's name or sex, but rather the possibility of keeping one's name and sex change a private matter.[71] Although it was strictly unnecessary to decide the case on matters regarding sexuality (privacy had been the core argument of the plaintiff), the court framed its decision by distinguishing between *sex* and *gender*, assessing their relevance to a person (and society), and then constructing the rights related to sexual and gender identity and, importantly, sexual liberty and self-determination.[72]

In the end, the court established that every person has a right to a sexual identity, which includes the right to have sexual reassignment surgery (if one so chooses) and a legal sex change.[73] The court also addressed every person's right to privacy, which involves the decision of choosing what in one's life is private and what is not[74]—for instance, the revelation of a legal sex change, which ultimately rests on the person and not on the state (or anyone else).

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68. *Compare id.* at 120–22 (announcing votes in the *Ley Robles* case), *with* Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 207–08 (announcing votes in the *Decriminalization* case).

69. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 188–89.

70. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op., *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

71. *Id.* at 51.

72. *Id.* at 66–75, 86–90.

73. *Id.* at 90.

74. *Id.* at 87.

F. Emergency Contraception Case[75]

This case concerned the constitutionality of an administrative bylaw regulating the medical attention provided to female victims of sexual, family, or general violence. The bylaw obligated all medical institutions (federal and local, public and private) to give emergency contraception to rape victims and required public health institutions, after being authorized by the corresponding authority, to give medical abortions to rape victims.[76]

The bylaw was challenged by the state government of Jalisco through a *controversia constitucional* on the grounds that providing attention to victims of crime—in this case, rape—was under the jurisdiction of state criminal authorities; thus, the bylaws represented an invasion of the state's criminal jurisdiction by federal health authorities.[77] Jalisco's governor also argued that emergency contraception amounted to "chemical abortion," which was prohibited by the state constitution (which had been reformed, after the 2008 decision on abortion, to state that life was constitutionally protected from the moment of conception).[78]

The court rejected the state government's claim that the "morning-after pill" was chemical abortion on the grounds that a previous, unchallenged bylaw had referred to it as contraception, not abortion.[79] The court then focused its attention on the question of jurisdiction. It found that the state's jurisdiction pertained to treatment of victims from the perspective of criminal law, but that medical attention could be regulated by federal health authorities.[80] Furthermore, it insisted that since state criminal authorities were included in the process of giving victims access to medical abortions (they had to authorize the procedure), the bylaws did not violate Jalisco's jurisdiction.[81]

G. Same-Sex Marriage Case[82]

In December of 2009, Mexico City's assembly reformed its civil code and redefined marriage to allow same-sex marriage (and, simultaneously, though nobody seemed to notice it, same-sex *common law marriage*).[83] This

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75. Controversia constitucional 54/2009, Pleno de la SCJN, Novena Época, 26 de Mayo de 2010, slip op., *available at* http://www.scjn.gob.mx/documents/pr_cc_54_09.pdf.

76. *Id.* at 58–60.

77. *Id.* at 5.

78. *Id.* at 7.

79. *Id.* at 61–62.

80. *Id.* at 65–72.

81. *Id.* at 60–61.

82. Acción de inconstitucionalidad 2/2010, Pleno de la SCJN, Novena Época, 10 de Agosto de 2010, slip op., *available at* http://www.scjn.gob.mx/Documents/AI-2-2010.pdf.

83. In Mexico City, there are now three legal structures for recognizing couples, all accessible to both gay and straight couples: (1) civil unions (*sociedades de convivencia*), which are not just tailored for sexual couples, but for cohabitants who decide to make a contract to regulate their relationship; (2) common law marriage (*concubinato*), which is acquired with the passing of time (2

change allowed gay couples access to adoption *as married couples*.[84] The reform was challenged by the Federal Attorney General's office.[85] It argued that altering the definition of marriage violated the constitutional protection of the family,[86] which protected and promoted only the ideal family that the constituent power had in mind (a sort of originalist argument): man and woman united through marriage for the purpose of having children.[87] It also argued that allowing gay couples to adopt violated the rights of children; specifically, that permitting the adoption would place them in a disadvantaged position relative to other children (namely, those that lived with heterosexual parents).[88]

In a historic and unprecedented decision, with an overwhelming majority (nine of eleven justices), the court upheld the reform: same-sex marriage and adoption are both constitutional.[89] More important, however, were the reasons for upholding the reform. Unlike abortion (to mention one example), the court did not restrict itself to answering a question of jurisdiction (is Mexico City's assembly authorized to change the definition of marriage?), but rather based its holding on the fundamental rights involved in the case.

Regarding marriage, the court's holding rested on two rights: (1) the right to the recognition and protection of one's family, and (2) the right to the free development of one's personality. For the court, article 4, paragraph 1 of the Mexican constitution,[90] which mandates the legal protection of the family, meant that the law has to protect the family as a social reality and not as an ideal model.[91] From this perspective, same-sex marriage is a new form of relationship that demands recognition.[92]

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years of cohabitation) or when there is both cohabitation and a child in common, and which is regulated in a manner similar to marriage; and (3) marriage, in a strict legal sense. *See* Código Civil para el Distrito Federal [CCDF] [Civil Code for the Federal District], *as amended*, art. 146, DO, 26 de Mayo de 1928 (Mex.) (setting out the prerequisites for formal marriage); *id.* art. 291 *bis* (common law marriage); Ley de Sociedad de Convivencia para el Districto Federal [LSCDF] [Law on Civil Union for the Federal District], *as amended*, art. 2, DO, 16 de Noviembre de 2006 (Mex.) (civil unions).

84. In Mexico City's civil code, two types of adoptions are available: adoption by single people and adoption by couples, whether married in common law marriage or in civil unions. *See* CCDF arts. 390–391 (stating the requirements that singles and couples, respectively, must meet in order to adopt). In both cases, prior to the reform there was no specific prohibition that banned gay couples (or gay single people) from adopting.

85. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 1.

86. C.P. art. 4 (Mex.).

87. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 2–7.

88. *Id.* at 22–26, 37–47.

89. *Id.* at 142–44.

90. C.P. art. 4 (Mex.).

91. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 140.

92. The court mentioned migration, women's integration into the work force, and divorce, observing that they all alter the way family bonds are established and have to be dealt with legally. *See id.* at 89–90 (surveying the past century's changes to social reality and asserting that legislators and judges must consider these changes when shaping the law). When dealing with these societal

Recognizing same-sex marriage, the court held, not only satisfies the right to have one's family ties protected, but also can be understood as making effective the right to the free development of one's personality.[93] In this respect, the court cited its own precedent—the *Sexual Identity* case—to establish that the right to the free development of one's personality entails the choices of getting married and of having kids.[94] The court indicated that by making it possible for same-sex couples to get married, the reform enabled them to choose their life's project.[95]

Regarding adoption, the court held that the best interests of the child were to be determined case by case and not through an a priori ban on gay adoption.[96] Furthermore, it held that simply posing the question, with nothing to distinguish one couple from another but their sexual orientation, was discriminatory in itself, and thus the question could not be answered by the court.[97]

III. The Rights

What has the court told us about the rights to sexual and reproductive freedom? For one thing, the court has said that each are fundamental rights. But the depth to which the court has interpreted these rights and established their reach is quite disparate. In this Part we will reconstruct these rights, based on what the court has said about them. We will take up each right separately, although they intersect at key points, examining the intersections from the perspective of each one. We use the terms "sexual liberty" and "reproductive liberty" for brevity's sake, though the court has used several different terms.

A. A Joint Origin?

If we take a step back and look at both rights, we find that they are both initially taken up in the *Conjugal Rape* case, decided in 2005. The two

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shifts, lawmakers should not try to halt change but should give way to what individuals really want out of their lives and facilitate their fulfillment. In this respect, it is important to bear one precedent in mind: *Amparo directo en revisión 917/2009*, in which the court dealt with the reforms to the Mexico City civil code that permitted a no-fault and one-party divorce—that is, it allowed a spouse to end a marriage unilaterally, without the need for mutual agreement or proof of a fault on the part of the other spouse. Amparo directo en revisión 917/2009, Primera Sala de la SCJN, Novena Época, 23 de Septiembre de 2009, slip op. at 2, *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/publico/09009170.010.doc. In this case, the court said that allowing this change in divorce law, more than violating marriage and people's stability, allowed people to pursue what they truly wanted without a violent, long, and generally unnecessary hassle (as most divorce trials were). *Id.* at 45–46.

93. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 145.

94. *Id.* at 146–47.

95. *Id.* at 154.

96. *Id.* at 134.

97. *Id.* at 131–32.

fundamental rights take different paths in later cases, but it is interesting to look in detail at this first case, which substantively addresses them.

On this occasion, sexual liberty is first taken up as the "legal value"[98] protected by the criminalization of rape.[99] In this line, the first chamber specified that, in the past, the crime of rape was understood to protect legal values such as "personal modesty" (*pudicia*) or a woman's "honesty," but "a general consensus" held that the protected legal value today is "sexual liberty, which recognizes in a human being . . . the right to . . . sexual self-determination."[100] In this context, "sexual self-determination" refers to how one uses one's body (whether to have sex). As we shall see, this understanding of the concept of sexual self-determination will prove to be expansive in later cases.

Having set up sexual self-determination as a fundamental right in one corner, the first chamber then turned to balancing this right against its counterpart: the reproductive function of marriage.[101] As we saw, this case's precedent stated that a husband forcing his wife to have (potentially reproductive) intercourse had been deemed not the crime of rape, but an "undue exercise of a right."[102] This right, according to family law doctrine, stems from the "carnal debt" implied in a marriage contract, which in turn derives from the fact that reproduction was deemed to be the ultimate end of marriage.[103] On this occasion, however, when tackling the tension between sexual liberty and carnal debt, the first chamber established that the latter must give way to the former.[104]

The argument goes like this: even though reproduction is an end of marriage, it cannot be imposed by one party on the other because the constitution protects the right of each to "determine the moment in which the perpetuation of the species is to take place."[105] The first chamber, as we reviewed previously, based its decision on the Right to Choose Clause, which states that "every person has the right to choose in a free, responsible and informed manner the number and spacing of their children."[106] After quoting the article that explicitly establishes reproductive liberty, the first chamber stated that the right that stems from "carnal debt" presupposes, and is

98. In the continental tradition, the personal rights or social values legally protected through criminal law are referred to as a "protected legal value" or *bien jurídico protegido*.

99. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, Primera Sala de la SCJN, Novena Época, 16 de Noviembre de 2005, slip op. at 59, *available at* http://www2.scjn.gob.mx/juridica/engroses/cerrados/46/0500009P.S39.doc.

100. *Id.*

101. *Id.* at 60–61.

102. Contradicción de tesis 5/92, Primera Sala de la SCJN, Octava Época, 28 de Febrero de 1994, slip op. at 6, *available at* http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=187&Tpo=2.

103. *Id.*

104. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 63–64.

105. *Id.* at 61.

106. C.P. art. 4 (Mex.).

trumped by, the freedom "to determine, through mutual agreement and in full exercise of their sexual liberty, when they shall proceed to intercourse so as to procreate."[107]

In closing the door on "carnal debt" by recasting sexual liberty as a fundamental right and recasting reproduction not only as an obligation stemming from marriage but also as a fundamental right, the first chamber linked sexual liberty and reproductive liberty in deeper ways: sexual liberty became a spinoff of reproductive liberty, insofar as reproductive liberty is exercised through sexual liberty. The right to choose when to have children implies the right to choose when to have sex.[108] The textual grounding for the fundamental right to sexual liberty—which is understood here as what one does with one's body—is the fundamental right to reproductive liberty. Sexual liberty is protected because it is a requisite of reproductive liberty. In this sense, the freedom the first chamber constructed is the right to say no to sex (for procreation) or the right to say no to procreation (through abstaining from sex).[109]

To review, let us focus on the key features of sexual and reproductive liberties as understood in this case. First, they are closely linked rights: sexual liberty is a means to secure reproductive liberty; thus, sexual liberty is grounded on the textual reference to reproductive liberty found in article 4 of the constitution.[110] Second, sexual liberty is understood as the liberty to have or not to have intercourse, that is, it relates to what one can do with one's body, in terms of sexual activity. Lastly, however, sexual liberty is deemed to be a right that can be legitimately limited by marriage (the obligation of fidelity, for instance, is one of those limits).

B. Sexual Liberty

Sexual liberty has been considerably more developed by the court than reproductive liberty. In a very short string of cases (two, to be precise), the court has come to construct this fundamental right in a remarkably expansive manner. Let us dive into this rapid evolution.

1. The Sexual Identity Case—Sexual liberty acquired a new dimension in the *Sexual Identity* case. Here, sexual liberty became detached from its grounding in reproductive liberty and acquired a far more complex structure. The cornerstone of the court's construction of sexual liberty in this case was the concept of dignity. From it the court derived a cluster of fundamental

107. Varios 9/2005-PS, solicitud de modificación de jurisprudencia, SCJN, slip op. at 61–62.

108. It is noteworthy that the court always speaks of *when*, not *whether*, to have children. Here the court seems to assume that one *must* have children at some point if one is married and can have children. After all, it still assumes that reproduction is a valid end of marriage; the problem is in abusing it and committing a crime.

109. Clearly, because of the case brought before it, the chamber only had procreative sex in mind, and not procreation without sex or sex without procreation.

110. C.P. art. 4 (Mex.).

rights woven together in a net of complex and not always clearly discernible, yet mutually reinforcing, relations. Because of space restrictions and the abundance and complexity of the court's reasoning, we will limit ourselves to presenting only those passages that directly flesh out the right to sexual liberty.

The word *dignity* appears in the Mexican constitution. After listing a set of suspect categories—including race, religion, (sexual) preferences, and gender—the constitution includes the catch-all phrase, "and any other that attacks human dignity."[111] From this phrase and from the international treaties subscribed to by Mexico—specifically those regarding human rights—the court identifies the right that is the "basis and condition of all others: the right to always be acknowledged as a human person. Thus, from human dignity all other rights stem, insofar as they are necessary for man to integrally develop his personality."[112] Dignity means that individuals have "the right to choose, in a free and autonomous manner, their life project. . . . Hence, the recognition of the right to the free development of one's personality."[113]

The court, having moved from dignity to the free development of personality, proceeded to flesh out this last right. The right covers (at least) the freedom to marry or not; the freedom to have children or not, and if one chooses to have children, the freedom to decide when;[114] and the freedom to choose one's appearance, profession, and "sexual option."[115] It is the freedom, in other words, to be who one is (literally).

The court then stated that "human dignity [also] encompasses, among others, the rights to intimacy and one's own image . . . as well as 'the right to personal identity . . . [, that is,] the manner in which one sees oneself and projects it in society.'"[116] This last right, the court noted,

> [also implies] the right to a sexual identity, since every person sees herself and projects herself unto society also from a sexual perspective. Not just regarding her sexual orientation, that is, her sexual preferences, but, primarily, the way she perceives herself, according to her psyche, emotions, feelings, etcetera. Such an identity is composed, not just of a person's morphological aspect, but,

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111. C.P. art. 1 (Mex.).

112. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op. at 85, *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

113. *Id.* at 85–86.

114. This mention of reproductive liberty in passing is actually quite relevant. It is the first shift from understanding reproductive liberty as the liberty to choose *when* to have children—as in the *Conjugal Rape* case—to understanding it as the liberty to choose *whether* to have children.

115. Amparo directo civil 6/2008, relacionado con la facultad de atracción 3/2008-PS, SCJN, slip op. at 86–87.

116. *Id.* at 87–89.

> primordially, of a person's most profound feelings and convictions regarding her belonging to the sex she was legally assigned to at birth. According to this very personal adjustment, the individual shall live her life, not just for herself, but also for and with others. All this because, eminently, sexuality is an essential component of a person's life and her psyche; it forms part of the most personal and intimate sphere of human life. That is why sexual self-determination is transcendental to the recognition of human dignity and its full development; and that is why the constitutional protection includes a free decision regarding sexuality.[117]

The court concluded by saying that "the fundamental right to the free development of one's personality implies necessarily the recognition of the right to sexual identity and to gender identity . . . ."[118]

Thus, sexual liberty is (at least) three-pronged. It encompasses (1) sexual orientation—one's sexual preferences; (2) sexual identity—how one lives, in private and in public, and one's gender; and (3) sexual self-determination—how one models one's body. Rooted in the notion of human dignity and derived from the fundamental right to the free development of one's personality, the right to sexual liberty has now become fully fledged: it is no longer just a right that empowers people to do what they choose with their body, it also empowers them to make what they choose of their body. How one expresses one's sexuality to others is also encompassed, but that right is more robustly articulated in the *Same-Sex Marriage* case of 2010.[119]

Importantly, sexual liberty has at this point cut its mooring in reproductive liberty and now has a less textual, but far broader, base: dignity. Also, what is important is that there is an explicit recognition of the different aspects in which freedom and sexuality intersect; because of this ruling, every person has a right to choose who they want to be in terms of sex (male/female), gender (masculine/feminine), preference (attracted to males/attracted to females), relationships (married/not married), and parenting (having children/not having children; how many and when).

2. The Same-Sex Marriage Case—Sexual liberty, understood as a right derived from the right to free development of one's personality, was further construed in the 2010 *Same-Sex Marriage* decision.[120] Explicitly building on the *Sexual Identity* case, at first sight the court seemed to take its statements from precedent. But this time, the court enhanced the expressive dimension of the right.[121] The court stated that the right consists of "freely choosing

117. *Id.* at 89–90.

118. *Id.* at 97.

119. *See* discussion *infra* section III(B)(2).

120. Acción de inconstitucionalidad 2/2010, Pleno de la SCJN, Novena Época, 10 de Agosto de 2010, slip op., *available at* http://www.scjn.gob.mx/Documents/AI-2-2010.pdf.

121. Regarding decisions concerning gay rights in the United States, Laurence Tribe wrote,

how to live one's life, which includes, among other expressions, the freedom to marry or not; to have children and how many, or to not have them; to choose one's personal appearance; as well as one's free sexual option."[122]

Later in the opinion, the court took the expressive dimension of the right to a new level:

> If one of the aspects that leads the way a person projects her life and her relationships is her sexual orientation, it is a fact that, bearing the respect to human dignity, one can demand the State's recognition not only of a person's sexual orientation towards people of her same sex, but of their unions too.[123]

One is not only free to determine one's (three-pronged) sexuality and openly express it, but the state is obligated to acknowledge it. Sexual liberty has quickly evolved from the freedom not to engage in sex (i.e., the freedom to control what one does with one's body in terms of sexual activity—a freedom that admitted limitations, such as fidelity and "carnal debt") to a seemingly limitless freedom to deploy one's body as one wishes, and also to alter it and understand it freely (or as freely as can materially be done), as well as to present the body, its uses, and its meanings to the world while demanding official sanction by the state. All of this was constructed from a comparatively feeble mooring in the text of the constitution.

C. Reproductive Liberty

If a mention of dignity allowed the court to construct such a formidable edifice regarding sexual liberty, one would expect at least something similar regarding reproductive liberty, given that the text of the constitution

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> In the end, what anchors all of these decisions—from *Meyer* and *Pierce* to *Griswold* and *Lawrence*—most firmly in the Constitution's explicit text and not solely in the premise of self-rule implicit in the entire constitutional edifice is probably the First Amendment's ban on government abridgements of "speech" and "peacabl[e] . . . assembl[y]," taking those terms in their most capacious sense. For what are speech and the peaceful commingling of separate selves but facets of the eternal quest for such boundary-crossing—for exchanging emotions, values, and ideas both expressible in words and wordless in the search for something larger than, and different from, the merely additive, utility-aggregating collection of separate selves? And what is government doing but abridging that communication and communion when it insists on dictating the kinds of consensual relationships adults may enter and on channeling all such relationships, to the degree they become inwardly physically intimate or outwardly expressive, into some gender-specified or anatomically correct form? What is government doing but abridging the freedoms of speech and peaceable assembly when it insists that the language of love remain platonic or be reserved for making babies (or when that is impossible, at least going through the standard baby-making motions)?

Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939–40 (2004) (alterations in original) (footnote omitted).

122. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 153.

123. *Id.* at 156.

explicitly speaks of the right to choose whether to have children and when.[124] However, this has not been the case. The court has been notorious in avoiding a direct interpretation of article 4's Right to Choose Clause when it comes to cases dealing with reproduction. As we have seen in the first case dealing with abortion law, the court completely omitted any reference to the Right to Choose Clause and did the same when deciding the *Emergency Contraception* case.

The court explicitly invoked the Right to Choose Clause in the *Conjugal Rape* case, but the language it used consistently assumed that procreation is going to happen during marriage—the only question is when.[125] Moreover, in that case the court explicitly referred to the right to choose the number and timing of children as a right to be exercised jointly by man and wife.[126] In the *Sexual Identity* and *Same-Sex Marriage* cases, reproductive liberty is mentioned. It was even, to a limited degree, further developed, insofar as the court explicitly acknowledged that reproductive liberty includes the right *not* to have children.[127] But it does not cease to surprise that in those cases reproductive liberty was presented as rooted in the (inferred) right to the free development of one's personality and not in the explicit constitutional text.

The resistance of the court to develop a substantive interpretation of reproductive liberty and to address the meaning of the Right to Choose Clause was illustrated by the *Decriminalization* case, handed down in 2008.[128] References to the right to reproductive liberty are few and far

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124. *See supra* note 30 and accompanying text. It must be kept in mind that Mexico is rooted in a highly formalist and textualist legal culture, where judges were (until recently) considered to be the enforcers of rules, not the interpreters of principles, rights, and values. *See* Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After* Presidencialismo, 4 INT'L J. CONST. L. 411, 423 (2006) ("Traditional Mexican legal philosophy rejects the role of the judge as an expansive interpreter of the law (or of the Constitution) in keeping with modern-day policy considerations."). Such a creative deployment of interpretation is not surprising to a person trained in the common law, but it is certainly exceptional in the civil law tradition, especially in Latin America. *See generally* Alejandro Madrazo, *El formalismo: desde el derecho privado* [*Formalism: From Private Law*], *in* FUNDAMENTOS DEL DERECHO PATRIMONIAL [FUNDAMENTALS OF ESTATE LAW] 1–2 (Martín Hevia ed., forthcoming 2011) [hereinafter Madrazo, *El formalismo*] (describing the formalism associated with the civil law tradition and distinguishing it from the formalism associated with common law); Alejandro Madrazo, *From Revelation to Creation: The Origins of Text and Doctrine in the Civil Law Tradition*, MEX. L. REV., May–Dec. 2008, at 33, 65–66 [hereinafter Madrazo, *From Revelation to Creation*], http://info8.juridicas.unam.mx/pdf/mlawrns/cont/1/arc/arc3.pdf (explaining the "historical roots" of legal theories present in the civil law tradition).

125. *See supra* note 108 and accompanying text.

126. *See supra* note 107 and accompanying text.

127. Acción de inconstitucionalidad 2/2010, SCJN, slip op. at 153; Amparo directo civil 6/2008, Relacionado con la facultad de atracción 3/2008-PS, Pleno de la SCJN, Novena Época, 6 de Enero de 2009, slip op. at 86, *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/IV-11-_Amparo_Directo_Civil_62008_relacionado_con_la_facultad_de_atraccion_32008-PS_Cambio_de_nombre_en_el_acta_persona_transexual_.pdf.

128. *See supra* subpart II(D). This is not to say that the court was unanimous on the matter. As we shall see, several justices pressed for the further development of the right. *See infra* notes 138–50 and accompanying text.

between in the 1,313-page opinion. Even though all litigants invoked or proposed an interpretation of the Right to Choose Clause in the core of their arguments,[129] the court did not ground its decision on the fundamental right to reproductive liberty or shed much light on it.

There is scarce mention of women's rights in the plurality's opinion, written by Justice Cossío, which states that decriminalization of abortion by Mexico City's legislature was deemed an adequate policy to safeguard those rights.[130] The rights mentioned, however, are freedom over one's own body, the right to health, and the right to life. There was no explicit mention of reproductive liberty. Ironically, the Right to Choose Clause was taken up by the plurality opinion, but only when addressing the issue of a *man's* right to choose the number and spacing of his children.[131]

In their challenges to the law, the Human Rights Commission and the Attorney General argued that even if the decriminalization of abortion was deemed constitutional in the abstract, the regulation at hand impermissibly imposed upon the (putative) father's right to be a father, insofar as the woman could decide to terminate the pregnancy without his consent.[132] For the plaintiffs, the right to procreation, when it comes to women, implies exclusively the freedom to choose whether or not to engage in sexual conduct. Once coitus has taken place, whatever happens after it (e.g., pregnancy), the "right to procreation" means only the right to protect the pregnancy from third parties, for women.[133] For men, obviously, that is precisely when the right comes in with force: pregnancy is also protected from the pregnant woman, for she cannot have an abortion because a man's procreative freedom would be trumped unless he participated in the decision-making process.

It is only in responding to this interpretation by the plaintiffs that the court took up the Right to Choose Clause. The plurality began its response by recasting the issue as a question of reasonableness, rather than a direct impingement upon the man's reproductive rights: "The core of these arguments is to make evident the lack of reasonableness of the decriminalization, and not a direct challenge to its inequality."[134] After this, the court made three affirmations that matter for our purposes.

The court first separated sexual freedom from reproductive freedom. The plaintiff's vision, it held, reduces sex to procreation (sexual freedom to reproductive freedom), ignoring the fact that there are many dimensions of

129. For a detailed account of the interpretations of the Right to Choose Clause put forth by the litigants, *see* Madrazo, *supra* note 12, at 6–20.

130. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 76, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf.

131. *Id.* at 187–90.

132. *Id.* at 185–86.

133. *Id.* at 7.

134. *Id.* at 185.

sexuality that have little or nothing to do with procreation.[135] Second, the court affirmed that "the right to be a father or mother" is not a right to be exercised jointly, but individually.[136] Third, by referencing individual adoption as a way to exercise reproductive freedom, it recognized that reproduction is not only biological, but legal as well: one can become a parent (and exercise one's reproductive right) through sex or through adoption.[137] Other than these three ideas, the plurality's opinion remains silent on reproductive liberty.

The absence of direct engagement with reproductive liberty is criticized in several of the concurring opinions. It is there, where a precedent cannot be formed, that we find strong statements regarding reproductive liberty.

Justice Góngora, for instance, let us know that he was "in favor of incorporating issues related to the human and fundamental rights of women regarding sexual and reproductive rights, for they are the doorway to the recognition of true equality and the full exercise of citizenship."[138] Also, he complained that the plurality opinion did not take seriously the motives for decriminalization expressed by Mexico City's congress.[139] He stated that "the right to procreation is an exercise in liberty that should not be interfered with, much less imposed through criminal law."[140]

Justice Valls (in charge of drafting both the *Sexual Identity* and *Same-Sex Marriage* opinions) linked reproductive liberty with both the right to health and the right to free development of one's personality and then stated that "the right to reproductive self-determination implies the minimum intervention regarding the State in a woman's decisions over her body and her reproductive capacity, since it's a very personal decision for a woman to terminate a pregnancy . . . ."[141] Furthermore, he stated: "sexual and reproductive rights are . . . the foundation of the rights to equality and gender equity . . . ."[142]

Justice Franco held that articles 1 and 4 of the constitution recognize "a right exclusive to women, which is the right to self-determination in matters of maternity. It is a right exclusive to women for, in my opinion, it is one

135. *Id.* at 187–90.

136. *Id.* at 187–88.

137. *Id.*

138. Voto concurrente que formula el Ministro Genaro David Góngora Pimentel [Concurring Opinion of Góngora, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 10.

139. *Id.* at 11.

140. *Id.* at 23.

141. Voto concurrente que formula el Ministro Sergio A. Valls Hernández [Concurring Opinion of Valls, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 1, 10.

142. *Id.* at 10.

with their personal liberty . . . ."[143] He then went on to speak of the state's responsibility for making sure that a woman's decision about whether to be a mother is an informed one.[144]

Justice Sánchez Cordero held that "in matters of gestation men are not equal to women, and it is through the subjection to control through the criminal law that [the latter] are devalued as persons and reduced to instruments of procreation, which makes discrimination evident, when it is only they that are criminally punished."[145]

Finally, Justice Silva Meza was most vociferous in reproaching the silence in the plurality's opinion regarding women's rights in general and reproductive liberty in particular. He explicitly stated that the majority of the justices emphasized women's rights in their interventions, yet this was not taken up in the final ruling.[146] He held it "indispensable" to identify the rights involved in order to determine the constitutionality of decriminalization, which he proceeded to do: "The fundamental rights of women involved in the conflict in question are life, health, equality, nondiscrimination, sexual and reproductive liberty, self-determination and intimacy."[147] He referred to the Right to Choose Clause, emphasizing the state's obligation to provide education and birth control methods.[148] He asserted that "the State, although it has undertaken family planning policies, has not yet done so sufficiently and efficaciously enough so that couples can decide in a free and responsible manner the number and spacing of their children."[149] In direct reference to the clause, he stated:

> Hence, if the State has not fulfilled its constitutional obligation (article 4) to educate in sexual and reproductive matters, and has been lacking in guaranteeing full access to birth control methods . . . it cannot reproach an irresponsible exercise of reproductive freedom, through the absolute criminalization [of abortion].[150]

The result from the *Decriminalization* case is baffling. The plurality opinion spoke as little as it could about reproductive liberty and did so only to address the question of men's reproductive rights. In doing so, it advanced (minimally) the articulation of the right to reproductive liberty, clearly stating

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143. Voto concurrente que formula el Ministro José Fernando Franco González Salas [Concurring Opinion of Franco, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 8.

144. *Id.* at 16.

145. Voto concurrente que formula la Ministra Olga Sánchez Cordera de García Villegas [Concurring Opinion of Cordera, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 16.

146. Voto concurrente que formula el Ministro Juan N. Silva Meza [Concurring Opinion of Meza, J.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, SCJN, slip op. at 1–2, 5.

147. *Id.* at 9–10.

148. *Id.* at 19.

149. *Id.*

150. *Id.*

that it need not be exercised jointly. However, when one takes into account the 8–3 majority by which the decriminalization of abortion was declared constitutional and, furthermore, looks at the strong pronouncements of the concurring justices, one is disconcerted. Moreover, if one takes into consideration that not one but three cases (the *Ley Robles*, *Decriminalization*, and *Emergency Contraception* cases) have been decided specifically based on reproductive-rights and reproductive-health policy with solid majorities, and what is more, that reproductive liberty has explicit, textual anchorage in the constitution, disconcertment turns into amazement. But if we contrast the creativity with which the court has consistently articulated sexual liberty with the stinginess with which it has spoken of reproductive liberty, one begins to wonder if the court suffers from a collective multiple personality disorder.

IV. The Court

Going beyond the analysis of these two specific fundamental rights, what does this tell us about the court in general? In this Article, we have traced a series of cases that speak to interrelated issues—the body, sexuality, reproduction, family, intimacy, autonomy, and dignity—and analyzed the construction of two related fundamental rights that stem from them. What we have seen is two very different attitudes taken by the court to address similar and interrelated matters regarding similar and interrelated rights—three if we include the minority of the *Decriminalization* and *Same-Sex Marriage* cases.

On one hand, we find a creative and activist court conjuring up the right to sexual liberty from little more than a word or two. The court has constructed a right from feeble textual grounding in the constitution. Originally derived from the Right to Choose Clause, sexual liberty has come to be grounded in a very abstract and highly undetermined value: dignity. Dignity is mentioned almost in passing in the text of the constitution, but it is read into the constitution as the overarching constitutional value from which all rights stem, as noted in the *Sexual Identity* case. From dignity, the court derives intimacy and free development of one's personality; from the latter the right to one's identity, and specifically the right to one's sexual identity. This in turn is fleshed out in different and fertile directions: it means one is free to do what one wishes with one's body, but also to make what one wishes *of* one's body; it empowers one to choose sexual preference and gender identity. The free development of one's personality also entails choosing marriage (or not) and having children (or not). It even entails the right to demand that the state recognize and sanction all of these choices.

It is a robust, creative, expansive interpretation of the constitutional text. It is also an interpretation of the constitution that builds upon its precedents, adding layers of depth and articulating details at each turn. We can discuss and disagree as to whether the court's argumentation is well structured or solid, or correctly accounts for the text and its history. But what is relevant is

that the court is approaching the constitution as a set of values—changeable, but meaningful—that are to be interpreted and constructed to expand fundamental rights.

Importantly, the cases involving reproductive liberty are not linked together by the court: the court does not use its own precedents, following in a long historic tradition in which the reasoning that set precedents is irrelevant for future cases. In contrast, the cases involving sexual liberty build heavily on each other: here the court extensively refers to and quotes its own precedents, and elaborates upon them.[151]

On the other hand, we find an evasive, minimalist court that avoids speaking of the right to reproductive liberty whenever possible. Instead of a right derived indirectly from vague and abstract passages of the constitution, we are dealing with a right that is clearly and expressly stated: the right to choose the number and spacing of one's children. Nonetheless, the court systematically ignores it (*Ley Robles* case), or it sidesteps the matter by recasting the question before it in terms of a technical legislative issue (*Decriminalization* case) or as a question of federalism and tacit acceptance (*Emergency Contraception* case). Even where the court speaks of the right directly, it does so to address the fringes, not the core, of the situations that the right to reproductive liberty would normally be seen to protect: a man's right to veto a woman's abortion (*Decriminalization* case), or a woman's right to sexual liberty (i.e., not to be raped) within marriage (*Conjugal Rape* case). When it does speak of the core, it does so incoherently: the *Decriminalization* case involves seven different concurring opinions and spans over 1,300 pages. This does not seem like a court concerned with speaking to the citizenry—women in particular—about their rights.

There are many potential explanations for this disparity in addressing such similar rights. From the perspectives of political science or gender studies, there is much to say here. But independent of what explains the court's split-personality disorder, we are concerned with the type of court that is in front of us.

If we go back to the political and historical juncture at which the court finds itself, one hypothesis that must be considered is that we are observing a court in the midst of a complex transition. The court is in tension with its old court-of-law self—a court charged with deciding cases, rather than solving social or political problems, through the application of all-or-nothing rules. Whether these are jurisdictional rules, technical rules of how the criminal law can be enacted, or rules stating that one cannot be forced to reproduce, matters little. The key aspect of this court is that it sees rules, not principles

151. For more on the importance of the court's use of precedents and how they influence its work, see generally Magaloni Kerpel & Ibarra Olguín, *supra* note 13.

or values that can be deployed multidirectionally in creative, nuanced, and changing ways.[152]

152. We have in mind something roughly akin to Ronald Dworkin's classic contrast between rules and principles. *See* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 25–26 (1967) (distinguishing *rules*, which apply in an "all-or-nothing" fashion, from *principles*, which "state[] . . . reason[s] that argue[] in one direction, but do[] not necessitate a particular decision"). In the reproduction cases, the court has looked for rules: all-or-nothing solutions to the cases. It has articulated the legal issues through basic yes-or-no questions—"Must the assembly criminalize abortion?" or "Can the federal authorities regulate emergency contraception for rape victims?"—that call for rules to be solved. *See supra* subpart III(C). The sexuality cases, on the other hand, have been generally solved through principles. This can be seen from the way that the court frames the matters and from the answers it provides (i.e., reasons to constantly go in one direction, instead of another). *See supra* subpart III(B).

Yet, there is a third modality of legal reasoning that needs to be considered in order to give a full account of the way the supreme court works through its normative inquiries. James Gordley has described and labeled the teleological–conceptual method: core concepts and institutions of private law were built using a method of reasoning originally deployed by Aquinas and then perfected by the late scholastics of the sixteenth and seventeenth centuries, who acheived a synthesis between Roman law and Thomistic or Aristotelian philosophy. *See* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 70–71 (1991) (noting that late scholastics in the sixteenth century attempted to apply Thomistic and Aristotelian principles to issues of property, contract, and tort law, and stating that "[i]n the seventeenth century, the doctrines of the late scholastics were taken over intact and popularized by the founder of the northern natural law school, Hugo Grotius"). The method proceeds by conceiving legal concepts and institutions as being substances—that is, as entities that can be natural (like an animal or man) or artificial (like a chair)—with a determined and fixed *essence*. *See id.* at 16–19 (describing the Thomistic method of understanding a thing or action by describing its "substantial form" or "essence," which allows one to formulate a definition that states both the general class to which it belongs and the specific differences that makes it a distinct kind within that class). In order to discover the essence of a legal institution, they built concepts following Aristotle's theory of the four causes, according to which the essence of a thing is known when its causes (final, formal, efficient, and material) are identified. *See id.* at 23 (describing the Thomistic position that "essences are linked to ends"—specifically to Aristotle's final cause—and outlining the late scholastic application of this doctrine to legal institutions such as contracts). The method, according to Gordley, has been grossly disarticulated as its explicit grounding in Aristotelian–Thomistic philosophy has come to be suppressed. *See* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 14 (2006) (noting that the philosophical foundations of the legal system developed by the late scholastics were forgotten during the seventeenth and eighteenth centuries, but that rather than developing new systems, jurists of this period continued to employ "concepts . . . which had a meaning in the older philosophical synthesis but were now becoming incoherent"). This model of normative inquiry, though markedly altered, is still visible in much of legal doctrine in the continental tradition today. *See generally* Madrazo, *From Revelation to Creation*, *supra* note 124 (referring to the distinction between two historical modes of normative inquiry: the "model of revelation," which was concerned with the interpretation of texts and which roughly corresponded to the model of rules, and the "model of creation," which drew from the teleological–conceptual model and the Aristotelian theory of causes in addition to texts).

Though we consider the teleological–conceptual model key to understanding legal thought in Mexico in general and at the supreme court in particular, we have not included this mode of normative inquiry as a tool for explaining the court's decisions in this Article. In the family of cases we are concerned with, the teleological–conceptual mode of normative inquiry did not prevail in the court's opinions, but it informs a substantial part of the minority opinions in both the *Decriminalization* and *Same-Sex Marriage* cases. In the *Decriminalization* case, the dissenting justices argued that the proper end of the "right to reproduction" (i.e., the Right to Choose Clause) was for reproduction to take place (final cause), and that reproduction required both men and women to participate (efficient cause). The dissent developed its interpretation accordingly, arguing that (a) abortion could not be protected under the clause, for it betrayed its end, and (b) if abortion

Now, the court deploys the right to the free development of one's personality in different directions, integrating it with other rights and deriving from it not only freedoms for the citizenry but also demands of state recognition. It hardly understands itself as a court of law, but rather as a constitutional tribunal. It sees not rules but values and principles to be creatively used in building, not just applying, the law.

The quote from Macy Gray's song, *Sexual Revolution*, at the start of this Article aims to evoke this tension. The court is caught between the taboos inherited from its court-of-law past—a court told by its tradition to be discreet and not to flesh out a right if it can apply a rule—and a court that shows intense impulses to share its creative freak with the rest of us, and construct rights from values in complex and intermingled ways; a court that yearns to come out of the closet of formalism[153] and engage in the revolution of rights that it itself has already begun. If the court decides to come out of the closet and unquestionably and openly continues to be anything like the court that in an almost unanimous voice decided the *Same-Sex Marriage* case, then it is likely to be a beautiful thang to listen to.

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were allowed, it would be a decision to be taken jointly by man and woman. Voto de minoría que formulan los ministros Sergio Salvador Aguirre Anguiano, Mariano Azuela Güitrón y Guillermo I. Ortiz Mayagoitia [Dissenting Opinion of Aguirre, Azuela, and Ortiz, JJ.], en la acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Pleno de la SCJN, Novena Época, 28 de Agosto de 2008, slip op. at 16, *available at* http://www.unifr.ch/ddp1/derechopenal/temas/t_20090316_03.pdf. For more on the teleological–conceptual method used by the dissent, see Madrazo, *supra* note 12, at 13–16, 20–25. In the *Same-Sex Marriage* case, justices in the minority argued that the proper end of marriage was reproduction (final cause); thus, allowing for marriage that could not lead to (natural) reproduction would destroy its essence. *Cf. id.* at 24 (describing natural reproduction as protected by fundamental rights). The minority in this last case was composed of Justice Sergio Aguirre Anguiano and then-Chief Justice Guillermo Ortiz Mayagoitia, whose interventions can be found online. *See* Sesión Pública Ordinaria del Pleno de la SCJN [Ordinary Public Session of the Supreme Court], sobre acción de inconstitucionalidad 2/2010, Novena Época, 3 de Agosto de 2010, slip op. at 20–32, 57–61, *available at* http://www.scjn.gob.mx/2010/pleno/Documents/2010/ago2.pdf (comments of Justice Aguirre Anguiano and Chief Justice Ortiz Mayagoitia). This line of reasoning was the core of the original *Conjugal Rape* case in 1994—not a part of this research—in which the court found that whether imposed sex was rape or undue exercise of a right depended on whether the act pursued the proper end of marriage—namely reproduction. *See supra* note 29 and accompanying text. For an example of teleological–conceptual reasoning in the context of marriage in the U.S., see Sherif Girgis et al., *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 246 (2010).

153. We understand formalism, in Mexico and the continental tradition at least, not so much as a coherent theory of law, but rather as a set of practices and attitudes toward the law that have been in motion for several centuries. For us, these practices and attitudes include at least three aspects: (1) a tendency to "decide without solving" matters, as coined by Magaloni & Negrete, *supra* note 13; (2) an understanding of legal decisions as the application of rules rather than the deployment of principles; and (3) the reification of institutions and concepts corresponding to a teleological–conceptual model of normative reasoning that has, as one of its effects, the trumping of people's desires and needs in favor of privileging the essence of "institutions" and "legal concepts." For more on understanding formalism in order to better overcome it, see generally Madrazo, *El formalismo*, *supra* note 124.

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The Unending Quest for Land: The Tale of Broken Constitutional Promises

Helena Alviar García*

The issue of land redistribution has been present in Colombian constitutional history since the mid-1930s. In 1936, the Colombian constitution included an article that established the social function of property.[1] This limitation over absolute property rights was reiterated in multiple laws in the half century that followed and was included in the 1991 constitution.[2] Notwithstanding the constitutional and legal reforms, the quest for land redistribution has had little success: land concentration remains prevalent,[3] and the issue of redistribution is at the heart of the contemporary Colombian political agenda.[4]

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1. After the 1936 constitutional reform, the constitution read as follows:

> Private property and other rights acquired justly in conformity with the civil laws by individuals or juridical persons are guaranteed and may not be disregarded or violated by later laws. When, through the application of a law enacted for reasons of public welfare or social interest, there results a conflict between private rights and a necessity recognized by the same law, private interests must yield to public or social interests.
>
> Property is a social obligation which implies obligations.
>
> For reasons of public utility or social interest defined by the Legislature, expropriation may take place by means of judicial sentence and with previous indemnification.
>
> Nevertheless the Legislature, for reasons of equity, may decide the cases in which no indemnity is payable, by a favorable vote of an absolute majority of the members of both Chambers.

CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA [C.R.C.] 1886, art. 26 (Colom.) (1936).

2. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (Colom.) (restating the provisions of 1936 constitutional reforms); L. 160/94, agosto 3, 1994, DIARIO OFICIAL [D.O.] (Colom.), *available at* http://www.paramo.org/files/recursos/L1601994.pdf (reforming the agrarian social structure to prevent inequitable land ownership); L. 6/75, enero 10, 1975, D.O. (Colom.), *available at* ftp://ftp.camara.gov.co/camara/basedoc/ley/1975/ley_0006_1975.html (setting standards for sharecropping contracts); L. 135/61, diciembre 13, 1961, D.O. (Colom.), *available at* http://www.notinet.com.co/serverfiles/servicios/archivos/n1961/ley135-61.htm (reforming the agrarian social structure to prevent inequitable concentration of land ownership); L. 200/36, diciembre 30, 1936, D.O. (Colom.), *available at* http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=16049 (setting basic rules for land tenure).

3. ABSALÓN MACHADO, LA CUESTIÓN AGRARIA EN COLOMBIA A FINES DEL MILENIO [THE AGRARIAN QUESTION IN COLOMBIA AT THE END OF THE MILLENNIUM] 63–91 (1998). According to Machado, 1.75% of landowners owned 46.35% of the total land area in 1984, whereas 1.33% of landowners owned 53.8% of the total land area in 1996. *Id.* at 63 tbl.8. This trend of increasing land concentration has continued since 1996. As Yamile Salinas Abdala observed:

There have been multiple academic interpretations that aim to explain the structural rigidity of land distribution in the Colombian context.[5] Nevertheless, the contribution of the law to this rigidity has been less explored.[6] In this Article, I will argue that shifts in legal theory as well as the interaction between different legal regimes and economic-development ideas

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> There are 2.6 million private land plots in the country that belong to 3.5 million landowners and represent almost 56% (68 million hectares) of the total surface area of the country (114 million hectares). 57.3% of landowners possess plots below 3 hectares in 1.7% of the total surface area, whereas less than 1% owns plots of over 500 hectares, spread over 61.2% of the land. Inequality in land ownership is reflected in the Gini index for 2004, which was 0.8517, and in the conflicts on the use of land. Land is used in 62.3% of the country's territory for activities for which it is unsuited.

Yamile Salinas Abdala, PODION, *Tenencia de tierra y conflicto interno* [*Possession of the Land and Internal Conflict*], DATOS Y COMENTARIOS DE COYUNTURA COLOMBIANA [FACTS AND COMMENTARIES OF THE COLOMBIAN *COYUNTURA*], 1–2 (Apr. 2007), http://www.podion.org/apc-aa-files/6c606489dc4c33a52d281c930806b63d/Coyuntura_Colombiana_14_Abr_2007.pdf.

4. During their first year in office, President Juan Manuel Santos and his Minister of Agriculture, Juan Camilo Restrepo, have placed a considerable emphasis on redistribution of land. *See, e.g.*, Press Release, Presidencia de República de Colombia [Presidency of the Republic of Colombia], ¡El proceso de restitución de tierras empieza ya! [The Land Restitution Process Begins Now!] (Oct. 20, 2010), *available at* http://wsp.presidencia.gov.co/Prensa/2010/Octubre/Paginas/20101020_01.aspx (describing the government's plan to return farmlands to farmers displaced by violence); Press Release, Presidencia de República de Colombia, MinAgricultura activó plan de choque para restituir y formalizar tierras a 130 mil familias [The Ministry of Agriculture Activated an Emergency Plan to Restore and Formalize Land to 130,000 Families] (Oct. 15, 2010), *available at* http://wsp.presidencia.gov.co/Prensa/2010/Octubre/Paginas/20101015_06.aspx (announcing the Ministry of Agriculture's plan to compensate victims of violent displacement and dispossession by restoring 312,000 hectares of farmland under the Victims Act); Press Release, Presidencia de República de Colombia, Gobierno radicó en el Congreso proyecto de ley de restitución de tierras [The Government Has Filed a Bill for Land Restitution] (Sept. 7, 2010), *available at* http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Paginas/20100907_11.aspx (discussing a bill before the Colombian legislature attempting to take and distribute 500,000 hectares of farmland a year to prevent concentration of land ownership); Press Release, Presidencia de República de Colombia, Palabras del Presidente Juan Manuel Santos Calderón en el lanzamiento de la Política Integral de Tierras [Remarks by President Juan Manuel Santos Calderón at the Launch of the Comprehensive Lands Policy] (Sept. 3, 2010), *available at* http://wsp.presidencia.gov.co/Prensa/2010/Septiembre/Paginas/20100903_15.aspx (noting the president's submission of the Comprehensive Land Policy to the Colombian congress).

5. *See, e.g.*, Thomas T. Ankersen & Thomas Ruppert, Tierra y Libertad: *The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 103–04 (2006) (contextualizing Colombian land distribution policy within the framework of that nation's positive-obligation approach to the "social function" doctrine); Helena Alviar García, Redistributing Land in Latin America: Caught Between Economic Development and Positivism (June 26–29, 2008) (conference paper), *available at* http://www.law.yale.edu/documents/pdf/sela/Alviar.pdf (classifying Colombia as a nation where neoclassical interventionism has been the driving force behind land reform).

6. I have noted the importance of such studies elsewhere:

> If we take a more dynamic understanding of law, the way Ministries and government agencies function in terms of a specific goal is important. In this sense, an analysis of the type of public officials that set in place a norm, the number of agencies involved, the unification in one or many agencies and the coherence or incoherence of regulatory texts are extremely important.

Alviar García, *supra* note 5, at 18.

have been key to perpetuating land concentration even in the face of constitutional and legal provisions that demand its social use.

I will do this in three steps. In Part I, I will present a short account of the evolution of the social function of property. In this account, I will focus on the roles that different branches of government played in allowing or preventing this property restriction, as well as the underlying ideas about development that supported these norms. In Part II, I will describe the post-1991 interpretation of the social functions of property. This Part will assess the interaction between different legal definitions of property, the institutional arrangement in place for land distribution, the clashes and gaps it presents, and the economic frame within which this regime developed. Finally, I will present some conclusions.

My underlying view of law is greatly influenced by the work of Duncan Kennedy and David Kennedy.[7] Both of them are interested in fleshing out the legal theory that is prevalent at different historical periods and its relationship to ideas about economic development.[8] Most economists and policy makers in the Colombian context have an instrumental idea of law.[9] Nevertheless, this idea has not been static over time. Therefore, one of the basic goals of this Article is to look at the shifts and rigidities of the modes of legal reasoning, the interaction between the different legal regimes at particular times, and the changes in the relevance of certain actors (the executive, lawmakers, judges, administrative agency directors, and public officials). In addition, the analysis of the changes in law will include observations on whether the legal institutions and tools have been significantly transformed in order to achieve land redistribution, and on the way in which law is influential in structuring the market.[10]

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7. Specifically, my view has been influenced by DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, *in* SEXY DRESSING ETC. 83 (1993) [hereinafter DUNCAN KENNEDY, *The Stakes of Law*] (blending the views of Robert Hale and Michael Foucault, and discussing distributional realities of law); David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (David M. Trubek & Alvaro Santos eds., 2006) (evaluating the impact of the emergence of the rule of law as a development strategy); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra*, at 19 [hereinafter Duncan Kennedy, *Three Globalizations*] (examining how the "three globalizations" of legal, institutional, and conceptual change affected development in the West, including Colombia); and David Kennedy, Law and Development Economics: Toward a New Alliance (Aug. 15, 2008) (unpublished manuscript) [hereinafter David Kennedy, Law and Development Economics], *available at* http://www.law.harvard.edu/faculty/dkennedy/publications/Law%20and%20Development%20EconomicsAug15Draft%20Stiglitz%20volume.pdf (discussing the relationship between legal choice and economic-development policy).

8. *See, e.g.*, Duncan Kennedy, *Three Globalizations*, *supra* note 7, at 20–22 (discussing the various legal theories related to historical time periods from the nineteenth through the twenty-first centuries).

9. *Cf.* David Kennedy, Law and Development Economics, *supra* note 7, at 29 (discussing instrumentalism inherent in neoliberal reforms in developing countries).

10. In the U.S. legal tradition, Robert Hale was one of the first legal theorists to explain to what extent the market is a legal arrangement. DUNCAN KENNEDY, *The Stakes of Law*, *supra* note 7,

As I will describe later in this Article, the executive branch has had an enormous amount of power in deciding the form and content of land distribution in the Colombian context. Nevertheless, other actors have restrained the executive branch's power at various times. At times, the judiciary has blocked redistributive impulses or the possibility of expropriating land for social purposes; at other times, the administrative agencies in charge of regulating land reform have been co-opted by reactionary forces; and at still other times, congress has curbed redistributive land policies.

I. Historical Account

A. Appeasing Landless Peasants

The quest for land started in the early 1920s, during which there was an extensive increase in the amount and forcefulness of the demands by landless peasants as well as the small, but growing, urban workforce. During this decade, union organization began and fierce demonstrations against state policy were staged.[11] Diverse associations of workers—tailors; shoemakers; railroad, port and public-works employees; as well as female workers—whose slogan was "equal pay for equal work" led illegal strikes or violent public demonstrations.[12] At the center of their demands were a minimum wage, social security, compensation for job-related health risks, legal protection for women's and children's labor, and minimum hygiene standards.[13]

Disputes over land were at the heart of these struggles. At the time, many peasants who had tenant-type arrangements—contracts by which they would be allowed to use a piece of land in exchange for money, work, or part of the harvest—were expelled from the land.[14] This expulsion occurred for two reasons: first, because landowners no longer viewed the tenant

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at 83. The relevance of this idea for the law-and-development tradition is clearly explained by David Kennedy in the following terms:

> The turn to law is important. Capital is, after all, a legal institution—a set of entitlements to use, risk and profit from resources of various kinds. Law defines what it means to "own" something and how one can successfully contract to buy or sell. Financial flows are also flows of legal rights. . . . Markets are built upon a foundation of legal arrangements and stabilized by a regulatory framework. Each of these many institutions and relationships can be defined in different ways—empowering different people and interests. Legal rules and institutions defining what it means to "contract" for the "sale" of "property" might be built to express quite different distributional choices and ideological commitments. One might, for example, give those in possession of land more rights—or one might treat those who would use land productively more favorably.

David Kennedy, Law and Development Economics, *supra* note 7, at 2.

11. *See* GERARDO MOLINA, LAS IDEAS LIBERALES EN COLOMBIA: 1915–1934 [LIBERAL IDEAS IN COLOMBIA: 1915–1934], at 112–17 (1974) (discussing the various workers' strikes that occurred in the early 1920s).

12. *Id.* at 112, 115, 121–23.

13. *Id.* at 117.

14. *Id.*

arrangements as economically attractive, given the rising value of land and tenant demands for better conditions,[15] and second, because landowners saw a risk that, as land was becoming more and more valuable, the tenants would claim ownership to it (after twenty years of possession).[16] The eviction of independent laborers in the regions of highest land quality increased property concentration and at the same time provoked social unrest.

The solution to this combination of demands was provided by the incorporation of Leon Duguit's ideas of property rights limited by a social purpose. Among members of the ruling liberal party, there was a group that understood that the party needed to transform its political content in order to both put an end to the escalating social conflicts and win the votes of the workers and landless peasants. Once the progressive wing of the liberal party was in power, they needed to institutionalize this ideological shift by providing the constitutional and legal instruments conducive to their efforts. As a consequence, on September 10, 1934, Dario Echandía, the Colombian Interior Minister, presented a constitutional reform project whose objective was to "de-individualize" the concept of rights[17] and transform the role of the state according to, in his words, a "modern" idea.[18] In the Minister's view, this reform was necessary because the increase in social conflicts, the escalation in the number and violence of illegal strikes, the constant and fair demands of workers, and the struggles over land demonstrated the need to put an end to the institutional failures produced by excessively individualistic conceptions of rights established in the constitution.[19]

In 1936, Law 200 established the presumption of ownership in favor of those who occupied the land and were exploiting it economically.[20] The law also gave ownership rights to squatters who in good faith thought that the land had no previous owner, and it extinguished the right of ownership for rural tracts larger than 300 hectares.[21] The legal provision, however, had very meager results in terms of redistribution for various reasons. As an

15. *See id.* (identifying rising land values—a result of the capitalist system and appreciation due to peasant labor—and peasant refusal to work under the condition of the tenant-type arrangements as factors contributing to the unraveling of the tenant system).

16. *See* CÓDIGO CIVIL [C. CIV.] [CIVIL CODE] art. 2531 (establishing twenty years as the period of time after which individuals in possession of land could claim ownership). The twenty-year period required to acquire property through possession was subsequently lowered to ten years. L. 791/02 art. 5, diciembre 27, 2002, D.O. (Colom.), *available at* http://portal.dafp.gov.co/portal/pls/portal/formularios.retrive_publicaciones?no=847.

17. *See* ALVARO TIRADO MEJÍA & MAGDALA VELÁSQUEZ, LA REFORMA CONSTITUCIONAL DE 1936 [THE CONSTITUTIONAL REFORM OF 1936], at 86 n.73 (1982) (explaining that the project called for individual rights to yield to the public interest when applying a law with a social purpose).

18. *Id.* at 86–87.

19. *Id.*

20. Economically exploiting the land meant, according to the law, "positive acts of ownership, such as planting, occupation with cattle, and other acts of economic meaning." L. 200/36 art. 1, diciembre 30, 1936, D.O. (Colom.), *available at* http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=16049.

21. *Id.* art. 6.

example, landowners became more diligent in evicting squatters before they could acquire rights through prescription. Additionally, the government made no effort to declare extinctions despite the fact that there were many large, unused tracts of fertile land at the time.[22]

B. Preventing the Cuban Revolution and Promoting Industrialization

Concerned with the Cuban Revolution[23] and given the very frustrating results of the law enacted in 1936, President Alberto Lleras proposed a law in 1961 to reform the land structure of the country, eliminate unequal land concentration, promote the productive and efficient use of land, distribute property to landless peasants, and give preference to those who work the land.[24] The enactment of this new law also created the Colombian Land Reform Institute (INCORA or the Institute) in order to manage and distribute land that had no owner. In addition, the Institute could acquire private lands in order to comply with the law's objectives.

The 1961 reform faced several obstacles.[25] First, instead of redistributing concentrated property, a large amount of the granted plots were in frontier lands lacking access to water or roads because of their remote locations, and were therefore unsuitable for agriculture.[26] In addition, INCORA acquired most plots during the two years before the redistribution process was halted.[27] The Institute did not distribute land at an efficient rate: of the 2,454,000 hectares acquired through property extinction, only 5,000 were granted to 281 beneficiaries.[28] The same happened with lands acquired

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22. *See* Roger W. Findley, *Ten Years of Land Reform in Colombia*, 1972 WIS. L. REV. 880, 883 ("[T]he Land Law of 1936 . . . did not result in significant redistribution of lands . . . . Landowners became more diligent in evicting squatters promptly before they made improvements or obtained prescriptive titles, and there were few, if any, governmental efforts to declare extinctions.").

23. *See* CHE GUEVARA, GUERRILLA WARFARE 242 (Brian Loveman & Thomas M. Davies, Jr. eds., Scholarly Res. Inc. 1997) (describing the state of Colombian politics in the 1960s, when the influence of Che Guevara and the Cuban Revolution was sweeping across Latin America).

24. L. 135/61 art. 1, diciembre 13, 1961, D.O. (Colom.), *available at* http://www.notinet.com.co/serverfiles/servicios/archivos/n1961/ley135-61.htm.

25. There are many articles that describe these frustrating results, including Ankersen & Ruppert, *supra* note 5; Peter Dorner & Herman Felstehausen, *Agrarian Reform and Employment: The Colombian Case*, 102 INT'L LABOUR REV. 221 (1970); Roger W. Findley, *Presidential Intervention in the Economy and the Rule of Law in Colombia*, 28 AM. J. COMP. L. 423 (1980); Findley, *supra* note 22; Kenneth L. Karst, *The Colombian Land Reform Law: "The Contribution of an Independent Judiciary,"* 14 AM. J. COMP. L. 118 (1965); and Joseph R. Thome, *Limitaciones de la legislación Colombiana para expropiar o comprar fincas con destino de parcelación* [*Limitations of the Colombian Legislation to Expropriate or Buy Farms with the Purpose of Parcelization*], 8 INTER-AM. L. REV. 281 (1966).

26. Findley, *supra* note 22, at 897.

27. *See id.* at 899 ("[O]ver half of the negotiated purchases and almost two-thirds of the expropriations were completed between August 1969 and July 1971. In July 1971 INCORA suspended all redistribution activities, and as of July 1972 the suspension remains in effect." (footnote omitted)).

28. *Id.* at 901.

by gratuitous transfers: of 310,000 hectares, only 44,000 were distributed.[29] Of the 1,647 farms acquired by INCORA, only 33 corresponded to expropriated land.[30]

Furthermore, after the late 1950s, the economic-development model set in place in Colombia was almost completely geared toward industrialization through the import-substitution model.[31] This fact had several consequences. First, public resources were redirected from land distribution toward production improvement.[32] Second, little attention was paid to agricultural development. Finally, the judicial branch contributed to the legal rigidities that prevented the constitutional promise from crystallizing. This happened in basically two ways. The first was the combination of administrative and judicial institutions, which prolonged adjudication processes and made distribution uncertain.[33] Second, the Council of State[34] ordered new inspections for contested expropriated land.[35] This procedure gave affected property owners an additional opportunity to make the necessary adjustments in order to prove their productive use of land.[36]

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29. *Id.*

30. *Id.* at 898 tbl.3. Other authors have shown how INCORA's task was mainly to distribute land from the public domain. *See* Dorner & Felstehausen, *supra* note 25, at 223 ("INCORA statistics show that 88,200 parcels of land were titled between 1961 and June 1969, adding 2.8 million hectares to the registered land area. But most of this land came from the public domain and does not represent expropriated or redistributed land." (footnote omitted)).

31. Albert Berry & Francisco Thoumi, *Import Substitution and Beyond: Colombia*, 5 WORLD DEV. 89, 89 (1977) (stating that industrialization policy was oriented toward the import-substitution pattern in post-World War II Colombia). Import substitution is an economic policy promoting industrialization by protecting domestic producers from the competition of imported goods through the imposition of high tariffs or quota restrictions. *Import Substitution*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/284081/import-substitution.

32. Findley, *supra* note 22, at 905.

33. *See id.* at 908–11 (explaining the complex and time-consuming administrative and judicial procedures required to expropriate land for distribution).

34. The Council of State is part of the judicial branch with jurisdiction over all disputes within the government—which often involve the actions, omissions, operations, and contracts carried out by the executive branch. *See* JORGE PABLO OSTERLING, DEMOCRACY IN COLOMBIA 150–51 (1989) (detailing the functions of the Council of State, and noting that it "also plays the role of senior legal adviser for the Executive Branch"). Therefore, the Council of State is the highest authority regarding any sort of dispute with the administration. Its other functions include the review of congressional acts and constitutional control over administrative decrees promulgated by the government; it also has jurisdiction over all administrative agencies. Luz Estella Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT'L & COMP. L. REV. 59, 79 (1995).

35. *See* Findley, *supra* note 22, at 911 ("Rather than relying on evidence introduced at the administrative proceedings with respect to whether the land was being 'economically used,' the [Council of State] ordered new visual inspections to determine the degree of use.").

36. *Id.*

II. Post-1991 Developments

A. Broadening the Social Function

The 1991 constitution went further than the 1936 constitutional reform in emphasizing a social function for property. Article 58 of the 1991 constitution adopted the wording of article 30 of the previous constitution but added the following provisions: (1) the social function of property not only "entailed obligations" but also an "ecological function"; (2) an obligation on the state to "protect and promote" associative and communal forms of property; (3) expropriation through an administrative procedure subject to judicial review; and (4) no judicial review of congressional invocations of social or public interest. Therefore, the text of article 58 as adopted in 1991 reads as follows:

> Private property and all other rights acquired according with civil laws are guaranteed, and cannot be disavowed or violated by future laws. If a conflict arises between the rights of individuals and a need recognized by a law enacted for reasons of public or social interest, the private interest must give way to the public or social interest.
>
> Property is a social function that entails obligations. *As such, it also entails an ecological function.*
>
> *The State shall protect and promote associative and communal forms of property.*
>
> Expropriation will be allowed, by judicial decision and prior compensation, for public or social interest reasons that shall be defined by law. *Compensation shall be set, taking into account the interests of the community and the affected individual. Expropriation may be carried out through an administrative procedure, subject to judicial review, even with respect to the amount of compensation, in the cases determined by law.*
>
> However, Congress may determine, for reasons of equity, those cases in which compensation is not due, with the favorable vote of an absolute majority of the members of each house. *Reasons of equity, as well as the public or social interest motives that may be invoked by Congress, shall not be subject to judicial review.*[37]

This distributive impulse was reiterated in several Constitutional Court rulings. One of the most relevant was a 1993 decision that linked the distribution of land to democracy:

> The numerous constitutional provisions on access to property . . . fall within a framework of distributive justice and seek to give a real basis to the principles of participative democracy and equality of opportunities. Democracy with hunger is a utopia and a farce. The unequal distribution of income and goods is only compatible with a

37. C.P. art. 58 (Colom.) (emphasis added).

> declaration of rights but not with their full and unrestricted exercise. Alongside the dimension of adequate economic exploitation of property traditionally associated with the social function of property, the idea of equality should now be placed on equal footing, as it is not limited to being a condition of legitimating private ownership but also the justification for emancipatory processes for the glaring number of those without property.[38]

Nevertheless, this provision was weakened by a 1999 constitutional reform that eliminated the last two paragraphs of article 58. This constitutional reform was proposed by the government as a way to promote foreign investment. According to the government, foreign investors had "well-known fears" because the possibility of decreeing expropriation without compensation ran counter to several bilateral investment treaties to which Colombia was a party, as well as the expropriation provisions of the American Convention on Human Rights.[39]

B. *The End of the Distributive Impulse: Inefficient Procedures, Legal Restrictions, and Institutional Problems*

1. Rigid Procedures and Regime Interaction.—The distributive thrust of the 1991 constitutional provision was further toned down through a combination of legal, administrative, and judicial acts. The first land reform law set in place after the constitutional reform, Law 160 of 1994, reduced the state's scope of action by setting the grant of credits as the main mechanism for peasants to acquire land.[40] Thus, distribution was left to market forces, as opposed to previously enacted systems where the state had some power in distributing land.[41] At the same time, the procedures set in place in order to expropriate and redistribute land were far from being expeditious or flexible. Finally, the institutional arrangement necessary to provide a significant impulse to land allocation was dismantled during President Uribe's government with the transformation of INCORA into a new institution called

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38. Corte Constitucional [C.C.] [Constitutional Court], enero 18, 1993, M.P: E. Cifuentes Muñoz, Sentencia C-006/93 (slip op. at 22), *available at* http://www.corteconstitucional.gov.co/relatoria/1993/C-006-93.htm.

39. No. 189, septiembre 21, 1998, GACETA DEL CONGRESO, pp. 1–2 (Colom.).

40. L. 160/94 art. 25, agosto 3, 1994, D.O. (Colom.), *available at* http://www.paramo.org/files/recursos/L1601994.pdf.

41. Law 160 of 1994 established a subsidy to be granted by INCORA for the beneficiary to acquire land in order to develop a "productive project." As opposed to the previous system, in Law 160 of 1994, INCORA was expected to be an actor in the market, not a distributor of land:

> A subsidy is hereby established for the acquisition of land in the modes and procedures established in this Law, as a non-reimbursable credit, originating from the budget of INCORA, which will be granted for one time only to each peasant subject to the agrarian reform, in accordance with the policies to be set by the Ministry of Agriculture and with the eligibility requirements that will be established.

Id. art. 20.

INCODER. In the following subsections, I will explain the role that each of these debilitating factors had.

Law 160 of 1994 entrusted INCORA with two main functions: acquire land and redistribute it.[42] These two functions entailed four different processes.

a. Direct Negotiation.—Direct negotiation consists of the negotiation that INCORA—and, since 2003, INCODER[43]—initiates, according to the law of convenience and the appropriateness of the identified terrain, in order to assign the land to its beneficiaries.[44]

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42. INCORA was created through Law 135 of 1961 as an autonomous administrative agency. L. 135/61 art. 2, diciembre 13, 1961, D.O. (Colom.), *available at* http://www.notinet.com.co/serverfiles/servicios/archivos/n1961/ley135-61.htm. Its basic functions were set out as follows:

> (a) to administer in the name of the State unoccupied lands of national property, adjudicate them or constitute reservations and carry out settlements on them, in accordance with . . . this Law. . . .
>
> (b) to administer the National Agrarian Fund;
>
> . . . .
>
> (d) to clarify the situation of land ownership . . . with the objective of identifying with precision which lands belong to the State . . . .

Id. art. 3, at 802.

43. In 2003, a number of institutions associated with agrarian reform were suppressed by the incoming Uribe administration. Through Decree 1300 of 2003, the government instead created one sole agency in charge of the functions of INCORA, the National Institute of Land Betterment, the Fund for Rural Investment, and the National Institute of Fishery and Agriculture; it also created the Colombian Institute for Rural Development, INCODER. Decreto No. 1300/03, mayo 21, 2003, D.O. (Colom.), *available at* http://www.secretariasenado.gov.co/senado/basedoc/decreto/2003/decreto_1300_2003.html.

44. The initiation of a direct negotiation and expropriation proceeding can be triggered by the identification of underworked land or for public interest reasons. According to Law 160 of 1994, public interest reasons included,

> 2. To benefit the persons or organizations for which the National Government has created specific programs.
>
> 3. Relocating owners or occupiers of zones that have been designated as having special interest or being environmentally important. . . .
>
> . . . .
>
> 5. To give land to peasant men and women of low income, small landowners, peasant women who head a household and those in a situation of economic and social vulnerability caused by violence, abandonment or widowing, in cases in which agreement cannot be reached between peasants and landowners, or in negotiation meetings in the cases so determined by the Board of Directors.

L. 160/94 art. 31. The new Rural Development Statute defines the following public interest motives to expropriate land:

> (a) For indigenous, Afro-Colombian and other minorities that do not possess land, or are established in an insufficient extension of land.
>
> (b) To give land to peasants who inhabit regions affected by supervening natural disasters.
>
> (c) To benefit peasants, persons or organizations for which the Government established special programs for distribution of land or special handling zones or zones of special environmental interest.

L. 1152/07 arts. 4, 36, 38, julio 25, 2007, D.O. (Colom.), *available at* http://www.secretariasenado.gov.co/senado/basedoc/ley/2007/ley_1152_2007.html.

b. Expropriation.—Expropriation is done through complex proceedings, which include both administrative and judicial components. Once an offer is rejected, INCODER adopts a resolution for extinction of property rights that bear on the land plot. The owner may challenge the resolution through an administrative proceeding. If the resolution is confirmed, INCODER must file suit before the competent court in order to declare the extinction of property.[45]

c. Recovery of land.—Next, INCODER must deal with the demarcation and clarification of property rights, as well as the recovery of unduly occupied land. In some cases, the boundaries of rural land plots are not entirely clear. In others, property rights over the land plots are not clear.

d. Extinction.—Finally, INCODER is empowered to extinguish property rights on unused plots.[46] These processes are justified by a notion of property rights according to which property entails not only a right to own the land but also a correlative duty to use it. Unused lands are therefore subject to extinction processes. INCODER has to verify whether the land has been abandoned and whether the law applies.[47] Then, it must adopt a resolution extinguishing property. This resolution can be challenged directly before the State Council, the highest administrative court.[48]

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45. L. 1152/07 art. 146. Land acquisition had the following procedure:

> 1. Based on an annually defined program, INCORA shall identify the corresponding rural land plots.
>
> 2. The maximum negotiating price shall be that of the commercial value of the land . . . .
>
> 3. INCORA shall make an offer of purchase to the owners . . . .
>
> 4. The owner has ten days to accept or reject the offer. During the same timeframe and for one time only, he may object to the value assigned to the land and seek a new valuing of it . . . .
>
> 5. If the parties agree about the offer, a contract shall be done. . . . It is understood that the owner declines direct negotiation and rejects the offer if he does not expressly accept the offer within the set timeframe. It is also understood that the offer is rejected if accepted with conditions . . . .
>
> 6. Once the direct negotiation stage is exhausted, the General Manager shall order the expropriation of the land plot and other real property rights constituted on it, in accordance with the procedure set out in Chapter VII.

L. 160/94 art. 32. Article 33 contains a detailed description of the expropriation procedure, which has an administrative phase and a judicial phase. *Id.* art. 33.

46. L. 160/94 art. 52.

47. The causes for extinction are set out in Law 160 of 1994 as follows: (i) ceasing to exercise possession during three continuous years; (ii) violating regulations on conservation, management, and rational use of natural renewable resources; (iii) violating regulations on the preservation and restoration of the environment; and (iv) violating rules on zones of agricultural reserve or forest reserve as established in development plans for districts or municipalities of more than 300,000 inhabitants. *Id.*

48. *See id.* art. 53 ("Against the resolution that declares [extinction], the interested party may only file for reconsideration, within the five days after its notification, and an action for review before the State Council, Chamber of Administrative Controversies [with no right to appeal] in accordance with the provisions of Article 128(8) of the Code of Administrative Controversies.").

In addition to acquiring land, INCODER must also distribute the acquired lands. This is done through the granting of subsidies, voluntary negotiation, and adjudication of unoccupied lands. Appendix A summarizes the different administrative and judicial procedures necessary for land distribution. It shows that most of the procedures combine administrative and judicial aspects—a circumstance that illustrates the complexity and length of the distributive process and partly explains why land distribution has historically been so inefficient.

There are several conclusions that can be drawn from the previous description and explanation. First, the combination of administrative and judicial procedures makes the distribution of land cumbersome, rigid, and long. Second, administrative decisions are made by government agencies and can be more easily modified than judicial decisions.[49] This brings flexibility to some procedures, but it has also translated into high levels of corruption.[50]

2. Coexistence of Diverse Definitions of Property.—Property is defined by the civil code as "the right over a corporal thing to dispose of it arbitrarily, in accordance with the law and the rights of others."[51] This involves, according to Colombian civil law, an absolute, exclusive, and perpetual right of property. Possession, in turn, is the holding of a physical thing with an intent of owning the thing in good faith.[52] Possession can turn into a right of property after a period of five or ten years,[53] depending on whether in the particular case it is "regular" (just title and good faith) or "irregular" (invalid title, bad faith, or disturbance by third parties).[54] Three distinct problems for land distribution have emerged from this view of property: (1) the way in which property is in fact transferred is not reflected by the categories

49. Whereas judicial decisions generally cannot be modified by a judge unless there is an appeal, administrative acts may be freely modified and even reversed. *See* CÓDIGO CONTENCIOSO ADMINISTRATIVO [C.C.A.] [ADMIN. LITIG. CODE] art. 69 ("Administrative acts shall be revoked by the same officials that issued them, or their hierarchical superiors, ex officio, or by an ex parte request . . . ."); *id.* art. 71 ("Administrative acts may be revoked at any time . . . ."); CÓDIGO DE PROCEDIMIENTO CIVIL [C.P.C.] [CIVIL PROCEDURE CODE] art. 309 ("A judgment may not be reversed or reformed by the Judge that has pronounced it."). Even with those limitations, an administrative official enjoys far greater discretion than a judge in the modification of decisions.

50. *See* Samir Elhawary, *Between War and Peace: Land and Humanitarian Action in Colombia* 9 (Humanitarian Policy Grp., Working Paper, 2007), *available at* http://www.odi.org.uk/resources/download/1912.pdf ("[F]ailure can also be attributed to the levels of corruption within the institute . . . . INCODER has often bought noncultivatable land at excessive prices or with inherited debts, often from front-men linked to paramilitaries and/or drug-traffickers.").

51. C. CIV. art. 669. The word *arbitrarily* was struck by the Constitutional Court. C.C., agosto 18, 1999, M.P: C. Gaviria Díaz, Sentencia C-595/99 (slip op. at 14), *available at* http://www.corteconstitucional.gov.co/relatoria/1999/C-595-99.htm.

52. C. CIV. arts. 2527–34.

53. *Id.* arts. 2529, 2533.

54. *See id.* art. 2528 (describing "regular" possession); *id.* arts. 2531–32 (describing "irregular" possession).

contained in the civil code, which leads to informality or lack of legal stability;[55] (2) access to credit turns on whether one is a property owner or not, which in turn depends on the formal categories of "property"—categories that do not reflect the de facto relationships of property in rural Colombia;[56] and (3) the state uses these civil law categories in the design of public policy, thereby creating severe hurdles for national land policy.[57]

Collective property rights are in tension with classical understandings of property.[58] Law 70 of 1993 was enacted in order to provide the possibility of collective entitlement over land to indigenous and Afro-Colombian communities in certain zones.[59] Its purpose, however, has been frustrated by the advance of large-scale, long-term agricultural projects such as the

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55. The characteristics of land tenure are described by a World Bank document in the following terms:

> In practice, however, land markets have found to be thin, highly segmented, characterized by high transaction costs, and often pushed into informality. Credit market imperfections, lack of market information by potential sellers, and the lack of farm models suited to the specific needs and factor endowments of small agricultural producers, have prevented such an outcome and contributed to the fact that beneficiaries under the old-style reform program often acquired marginal lands at highly exaggerated prices without making productive use of it.

Klaus Deininger, Making Negotiated Land Reform Work: Initial Experience from Colombia, Brazil, and South Africa 14 (World Bank Policy Research, Working Paper No. 2040, 1999) (citation omitted), *available at* http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-2040.

56. *Cf.* Daniel Bonilla Maldonado, Legal Pluralism and Extra-legal Property, Class, Culture and Law in Bogotá 23 (2008) (unpublished manuscript), *available at* http://www.utexas.edu/law/centers/humanrights/events/speaker-series-papers/Bonilla_Extralegal%20Property.pdf (indicating that legalized property, as opposed to extrajudicial property, is a prerequisite for obtaining credit).

57. *See, e.g.*, Juan Camilo Restrepo Salazar, *Una Política Integral de Tierras para Colombia* [*A Comprehensive Land Policy for Colombia*], MINISTERIO DE AGRICULTURA Y DESARROLLO RURAL, REPÚBLICA DE COLOMBIA [MIN. OF AGRIC. & RURAL DEV., REPUBLIC OF COLOM.], 20–22 (Aug. 2010), http://www.minagricultura.gov.co/archivos/ministro_jc_restrepo_tierras_2.pdf (detailing a plan to formalize ownership rights in rural lands); *Autorización a la nación, a través del Ministerio de Agricultura y Desarrollo Rural, para contratar un crédito externo con la Banca Multilateral para financiar el programa de la dinamización del mercado de tierras rurales y la formalización de la propiedad rural y urbana* [*Authorization to the Nation, Through the Ministry of Agriculture and Rural Development, to Engage an External Line of Credit with the Multilateral Bank to Finance the Program to Revitalize the Rural Land Market and Formalize Rural and Urban Property Rights*], DEPARTAMENTO NACIONAL DE PLANEACIÓN [NAT'L PLANNING DEP'T], 1–5 (Oct. 12, 1994), http://www.dnp.gov.co/PortalWeb/Portals/0/archivos/documentos/Subdireccion/Conpes/2736.pdf (describing the national plan to formalize land ownership rights and recommending the arrangement of financing for the project).

58. Article 329 of the Colombian constitution establishes this regime:

> The establishment of indigenous territorial entities shall be created according to the rules of the Organic Law of Territorial Organization, and its delimitations will be set by the national government, with the participation of representatives of indigenous communities along with the concept of the Territorial Organization Commission. The reservations are collective property and cannot be alienated. Laws will define the relations and coordination of these entities with those of which they are a part.

C.P. art. 329 (Colom.).

59. A very complete account of Law 70 of 1993 can be found in KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY 224–73 (2010).

cultivation of the African palm tree and the persistence of mining activity in those territories. For example, in 1996, the Afro-Colombian community along the Mira River filed for collective entitlement under Law 70 of 1993, but the process of adjudication was burdened with the competing claims of palm producers.[60] The lives of the inhabitants of the Mira River basin have also been fraught with mass violence by guerrilla and paramilitary groups such that many persons have been forcibly displaced from their home territory.[61] In turn, the Uribe administration in 2002 sought to intensify palm production[62] and turned it into a privileged economic development objective, which runs counter to the idea of land distribution since mass production of palm involves a high concentration of land in the hands of a few people for a very long time.[63] This is one example of how the good redistributive intentions of the law ran into the hard reality of strong economic interests backed by governmental policy and widespread violence in the territories of Afro-Colombian and indigenous communities.[64]

3. Institutional Problems.—One of the most striking ways in which law and legal institutions contribute to the rigidities in land distribution in Colombia is found in INCODER, the administrative agency in charge of developing this policy. Among the most salient characteristics of its inefficiency are inadequate staffing (in terms of numbers, knowledge, and geographical distribution), gaps in information, and backlogs in the adjudication process. INCODER began operations with 472 employees—a very low number taking into account that the four agencies it replaced had a total of 2,139 employees.[65] The effects of this can be seen in the high level of the agency's inefficiency. In a 2004 report conducted by the attorney general's office to evaluate land distribution policies, the lack of results was attributed

60. Tatiana Alfonso et al., *Caso 1: Alto Mira y Frontera* [*Case 1: Alto Mira and Frontera*], *in* DERECHOS ENTERRADOS: COMUNIDADES ÉTNICAS Y CAMPESINAS EN COLOMBIA, NUEVE CASOS DE ESTUDIO [BURIED RIGHTS: ETHNIC AND RURAL COMMUNITIES IN COLOMBIA, NINE CASE STUDIES] 29, 30 (Julieta Lemaitre Ripoll ed., 2011) [hereinafter DERECHOS ENTERRADOS].

61. *Id.* at 30–31.

62. *See* Garry Leech, *The Oil Palm Industry: A Blight on Afro-Colombia*, N. AM. CONGRESS ON LATIN AM. REP. ON AMERICAS, July–Aug. 2009, at 30, 30–31, *available at* http://www.globalexchange.org/countries/americas/colombia/nacla5.pdf (observing that "[w]ith the government's encouragement, the Colombian palm industry has exploded in recent years," and citing a 300% growth in the value of palm oil exports from 2002 to 2006).

63. *See id.* at 32 ("Despite the prevalence of small growers, large palm companies . . . dominate the industry.").

64. *See* Alfonso et al., *supra* note 60, at 30 (discussing legal debates in 1996 and 2002 about whether and how to protect and promote the Colombian palm oil industry while accounting for individuals displaced by violence).

65. PROCURADURÍA GENERAL DE LA NACIÓN [ATT'Y GEN. OF THE NATION], ANÁLISIS A LA EJECUCIÓN DE LA REFORMA SOCIAL AGRARIA Y LA GESTIÓN DEL INSTITUTO COLOMBIANO DE DESARROLLO RURAL—INCODER [ANALYSIS OF THE EXECUTION OF THE SOCIAL AGRARIAN REFORM AND THE MANAGEMENT OF THE COLOMBIAN INSTITUTE FOR RURAL DEVELOPMENT—INCODER] 16 & n.2 (2006) (on file with author).

to the fact that INCODER had just sixty-one employees and twenty-six lawyers assigned to carry out all the administrative procedures of all nine programs.[66] In addition, with the transformation into INCODER, INCORA's regional presence was considerably diminished: only nine offices were dedicated to regional programs, compared with more than fifty that were running before.[67] The attorney general's report suggests that this outcome has prevented efficient decision making.[68]

Furthermore, the delays in the process to assign land in any one of the different procedures explained above are absolutely scandalous. According to a 1996 press report summarizing the findings of the attorney general's office, agrarian reform in Colombia has not worked because of INCORA's inefficiency.[69] At the time, in the department surrounding Bogotá (Cundinamarca), there were more than 10,000 requests for land—and most of these requests had been made more than ten years before.[70] In the Caribbean department of Cesar, where no offers to buy land had been processed in the preceding thirteen years, 375 offers to buy land remained unanswered.[71] In the Pacific department of Valle del Cauca, 5,800 processes had not been resolved in the last twenty years.[72]

In 2006, according to another press report summarizing the findings of the attorney general's office, the problems described above remained the same. According to the report, INCODER was unable to carry out its own programs.[73] In the previous calendar year, INCODER had acquired only 9,751 hectares for agrarian reform, most of them for indigenous communities.[74] The National Planning Department reported a total of 2,171 hectares of property in Ayapel and Tierralta (Córdoba) that were given to INCODER, but INCODER reports to have assigned just 934 of those hectares.[75] Finally, the attorney general's office has removed many employees of INCODER for corruption. A former deputy was removed

66. *See id.* at 25 ("This situation is worsened considering that, for the procedure of all nine programs, INCODER has only sixty-one processing authorities and twenty-six lawyers, which suggests that every processing authority would have to assume an average of 870.63 files and each lawyer 2,043 files in order to reach a decision.").

67. *Id.* at 16 & n.3.

68. *See id.* at 16 (decrying the practice of making land decisions in offices far from the location of the land—for example, sending decisions about lands in Riohacha to the Santa Marta office for processing).

69. *El Incora frenó la reforma agraria* [*Incora Halted Agrarian Reform*], ELTIEMPO.COM (Sept. 28, 1996), http://www.eltiempo.com/archivo/documento/MAM-513505.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Reforma agraria: 42 años negociando una finca* [*Agrarian Reform: 42 Years Negotiating a Farm*], ELTIEMPO.COM (Apr. 22, 2006), http://www.eltiempo.com/archivo/documento/MAM-1996221.

74. *Id.*

75. *Id.*

because he assigned land without following adequate procedures.[76] Other officials were removed for keeping money that was paid to INCODER by debtors.[77]

C. *Interaction with Economic Development Ideas*

As I have described in the previous subparts, the distributive promise present in the Colombian constitutions since 1936 was weakened through the interaction between the social function of property and the classical description of it. The burdensome combination of administrative regulations, judicial intervention, and legal dispositions that privileged either the adjudication of unused land or the conferment of subsidies—as opposed to the expropriation of land that was not exploited according to its social function—caused constitutional promises to go unfulfilled.

In addition, for at least fifty years, there was a bias against agriculture in favor of industrialization, resulting in a lack of resources to provide for social and economic progress in rural areas. In the last ten years, agriculture has played only a minor role in development plans, and land distribution has hardly been mentioned.[78] This fact, combined with agro-industrial projects such as biofuel production and mining, has precluded a more egalitarian rural society in Colombia.[79] As a matter of fact, there is a contradiction between land distribution on the one hand and agro-industrial development and mining on the other.[80]

In Appendix B, I present the few references to agriculture that the national development plans have had in the last twenty years. At the same time, agro-industrial projects and mining have acquired enormous

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76. *See Confirman destitución a ex Subgerente de INCODER* [*Confirming Removal of Former INCODER Deputy*], PROCURADURÍA GENERAL DE LA NACIÓN [ATT'Y GEN. OF THE NATION] (Oct. 13, 2010), http://www.procuraduria.gov.co/html/noticias_2010/noticias_728.htm ("According to the evidence, despite fulfilling a public calling process that was democratic and participative, Mr. Quessep Feria included a group of 50 more individuals, from which, finally, 24 benefited. Of the 1,591 individuals who began the initial process, only 13 were favored.").

77. *Pliego de cargos contra ex funcionarios del Incoder* [*Statement of Charges against Former Incoder Officials*], PROCURADURÍA GENERAL DE LA NACIÓN [ATT'Y GEN. OF THE NATION] (Nov. 7, 2008), http://www.procuraduria.gov.co/html/noticias_2008/noticias_505.htm ("Apparently, the official back then had acquired more than 10 million pesos that various debtors of INCODER had given to it as part of the payment for the respective loans that the institute had given to finance the acquisition of plots located in different municipalities of Sucre.").

78. *See* Julieta Lemaitre Ripoll, *Introducción: Derecho, Desarollo y Conflicto de Tierras: ¿La Próxima Frontera?* [*Introduction: Law, Development, and Land Conflict: The Next Frontier?*], *in* DERECHOS ENTERRADOS, *supra* note 60, at 15 (describing the tendency of state policy since 2000 toward large-scale agro-industrial and natural resource extraction projects).

79. *See id.* at 22–23 (noting that local populations pay high costs related to the cultivation of the African palm tree (a crop used in the production of biofuels), including deterioration of food security and increased poverty as a result of the transition to manual labor, while companies reap tremendous financial harvests).

80. *See id.* at 20 (identifying the conflict between indigenous communities with collective title and agro-industrial development projects).

importance as development tools. There are two preliminary conclusions that can be drawn from these two facts. First, the promotion of large-scale projects—such as mining and palm production—concentrate government investment and resources in these areas, as opposed to other styles of production and property that would promote less land concentration. Second, the fact that land distribution is hardly mentioned shows that the social function of property has been a broken constitutional promise.

For example, in 2004, the Colombian Agricultural Institute (ICA) transferred a land plot of over 17,000 hectares (known as Carimagua) to INCODER with the purpose of distributing title to the plot to several displaced families.[81] Instead, in 2007, INCODER opened a public offer and handed the plot to palm producers under a concession contract.[82] The attorney general and several opposition legislators objected to the decision to transfer the land to large-scale palm producers.[83] The government, headed by President Uribe, reasoned that land could be given to displaced persons only after being turned into productive land by large-scale entrepreneurs.[84] Thus, instead of adjudicating individual plots to families, the government thought it more efficient to hand the whole area to a long-term palm tree plantation that would employ the displaced persons but would not give them ownership of the land. Here, the government privileged the same model of production that had been privileged by Law 70 of 1993, which resulted in a greater concentration of land and ran counter to the redistributive goals of article 58 of the constitution and the various laws enacted to fulfill its objectives.[85] The government's view of distributive efficiency proved to be a very strong obstacle for land redistribution and is yet another example of how administrative agencies play a central role in the way that distribution ultimately unfolds.

Another important case on agrarian reform and displaced population is that of Montes de María, where several massacres have taken place during the last fifteen years.[86] Recently, the government gave property titles to

81. Alfonso et al., *supra* note 60, at 82.

82. *See id.* at 86 (describing initial news reports of the assignment of the plot to producers of palm and rubber trees and the cessation of public bidding for plots in 2007).

83. *See id.* at 87 (identifying the opposition of, among others, the attorney general and Cecilia López Montaño, a legislator).

84. *Id.* at 88.

85. Law 70 was intended to provide collective title to Afro-Colombian communities, but due to procedural delays and increasing government support of agro-industrial projects, the result was actually greater concentration of land in industrial hands. *See supra* notes 59–64 and accompanying text. Compare this result with the social function of property and land redistribution authorized by the constitution. *See supra* notes 37–38 and accompanying text.

86. For example, in January 2001, a paramilitary group killed twenty-eight peasants and burned down their houses. *Nación deberá pagar a víctimas por masacre en Montes de María* [*Nation Must Pay Victims of Massacre in Montes de María*], ELESPECTADOR.COM (July 22, 2008), http://www.elespectador.com/noticias/judicial/articulo-nacion-debera-pagar-victimas-masacre-montes-de-maria.

almost 100 displaced families.[87] But now new owners will face pressure to sell the assigned plots to agro-industrial palm growers. After having been abandoned for ten years, the assigned lands need investment for water, irrigation, and electricity—tasks that hardly any farmer can afford to complete.[88]

III. Conclusion

As I stated in the Introduction, my objective in this Article was to flesh out how law and legal institutions have prevented the constitutional promise of the social function of property. New notions of property rights—such as environmentally-protected areas, collective property for indigenous and Afro-Colombian groups, and informal possession arrangements—have met resistance from formalistic, rigid definitions of property that have remained mostly unchanged since 1887. In both the historical evolution and recent history, the constitutional distributive impulse has been weakened by establishing rigid, time-consuming, and elaborate administrative and judicial procedures. In addition, the institutional arrangement set in place in order to develop land adjudication policies has struggled with financial constraints and personnel problems, and it has concentrated its efforts on assigning public domain plots and raising productivity. All of these facts—combined with clear biases toward urban industrial development, agro-industries, and mining—have created a system in which land distribution is marginal or nonexistent.

87. *Restituyen tierras a 95 familias despojadas de Montes de María* [*Restoration of Land to 95 Families Displaced from Montes de María*], ELESPECTADOR.COM (Feb. 5, 2011), http://www.elespectador.com/noticias/politica/articulo-249185-restituyen-tierras-95-familias-despojadas-de-montes-de-maria.

88. *Restitución en Montes de María, entre la ilusión y el miedo* [*Restitution in Montes de María, Between Illusion and Fear*], VERDADABIERTA.COM (Feb. 8, 2001), http://www.verdadabierta.com/index.php?option=com_content&id=3020.

Appendix A. Administrative and Judicial Procedures Necessary for Land Distribution

Process	Administrative	Judicial
Direct negotiation. Complements the process of expropriation: if the owner does not accept the offer, INCODER proceeds to expropriate.[a]	X	
Expropriation of property. Follows direct negotiation. Begins with the expedition of a resolution that can be litigated.[b]	X	X
Demarcation and clarification of property. An administrative process, but the resolution can be litigated using the revision action.[c]	X	X
Recovery of illegally occupied unused land. An administrative process, but the administrative resolution can be litigated using revision or nullity actions.[d]	X	X
Property extinction of unused land. This administrative process *must* be reviewed by a judge.[e]	X	X
Subsidy assignment.	X	
Voluntary negotiation between owner and buyer. The state's role is to serve as an advisor for the potential buyer.	X	
Unused land adjudication. The resolutions that adjudicate land can be annulled in a judicial process.[f]	X	X

[a] L. 160/94 art. 33.

[b] L. 160/94 art. 33.

[c] L. 160/94 art. 50.

[d] L. 160/94 art. 50.

[e] L. 160/94 art. 53. Note that the revision is itself a judicial process before the administrative jurisdiction. Although the disposition is not mandatory, it is very likely that the owner of the land will oppose the resolution through both administrative and judicial procedures.

[f] L. 160/94 art. 72.

Appendix B. References to Agriculture in the National Development Plan (NDP), 1990–2010

NDP Years	References to Agriculture
1990–1994	• The bank in charge of rural issues (the Agrarian Bank) was capitalized in order to provide loans in order to acquire and improve rural housing. • Specific programs for irrigation and land productivity.
1994–1998	• Agrarian modernization, sustainable production and the strengthening of Colombia's comparative advantage. • Access to credits and subsidies to improve land productivity.
1998–2002	[This NDP does not include clear land-redistribution, social, or modernization policies for rural areas.]
2002–2006	Although public policies for agriculture and land distribution are not the main governmental objectives of this NDP, they are included as instrumental policies for the government's primary goals.
2006–2010	• Provisions are set to improve rural housing programs, including special access for displaced population. • Establishment of unused land adjudication for displaced population. • Promotion of agro-industry, ecotourism and rural micro-finance. • Improvement of the institutional management of INCODER.

Source: Texto de Planes de Desarrollo de Años Anteriores [*Text of Development Plans from Prior Years*], DEPARTAMENTO NACIONAL DE PLANEACIÓN [NAT'L PLANNING DEP'T], http://www.dnp.gov.co/PortalWeb/PND/PlanesdeDesarrolloanteriores.aspx.

Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico

Antonio Azuela*

Introduction

This Article is about the challenges of thinking about property as a constitutional issue in contemporary Mexico. Apart from showing the changes that have rendered obsolete a property regime that lasted for more than seven decades, I argue that the need for a constitutional debate on property is particularly serious given the fact that Mexican constitutional scholars have not paid attention to the vast array of problems that have emerged around property rights in Mexico.

In Part I, I present a synthesis of the Mexican "postrevolutionary model" of property, that is, the regime that had at its core Article 27 of the constitution.[1] In Part II, I describe six developments that, during the last decades, have called into question such a model. In Part III, I briefly discuss the theoretical options that we have to understand these developments. Finally, in Part IV, I argue that insofar as the crisis in our constitutional model derives from different social processes, its understanding goes beyond the mobilization of legal theories, and that we need to use social sciences more intensively.

The Mexican constitutional property regime is a very complex one. For many authors, Article 27 is the nucleus of the "social pact" of the postrevolutionary era.[2] In more than four thousand words, even after the neoliberal amendments of the early nineties, it deals with a wide variety of issues. Just as political analysts were intrigued by the fact that a political regime based on an organization called the "Institutional Revolutionary Party" (*Partido Revolucionario Institucional*, PRI) could last for so long,[3] constitutional

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1. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.).

2. Probably the most representative author of this view is Arnaldo Córdova. *See* ARNALDO CÓRDOVA, LA IDEOLOGÍA DE LA REVOLUCIÓN MEXICANA: LA FORMACIÓN DEL NUEVO RÉGIMEN [THE IDEOLOGY OF THE MEXICAN REVOLUTION: THE FORMATION OF THE NEW REGIME] 221–31 (1973) (tracing the myriad interests represented in the formation and the text of Article 27).

3. Scholars have forwarded a number of reasons for the PRI's long-standing rule. *See, e.g.*, Joseph L. Klesner & Chappell Lawson, Adiós *to the PRI? Changing Voter Turnout in Mexico's Political Transition*, 17 MEXICAN STUD. 17, 24 (2001) ("As observers of Mexico know well, the

lawyers might wonder how it was possible that a constitutional order that maintained the commitment to protect private property and, at the same time, the promise of distributing land to communities that need land, might be seen as a constitutional property regime just like any other.

As a point of departure, it is important to clarify in what sense property should be seen as a constitutional issue. This would not be necessary in other contexts, but it is necessary in the Mexican case because our constitutional scholars seem to have, in these crucial years, turned their backs on the subject. In order to illustrate the absence of constitutional scholarship on property, I explored a sample of the writings available on the web.[4] None of the 342 texts written by five highly recognized Mexican constitutional scholars discussed property as a problem.[5] This demonstrates that the crisis in Mexico's property regime that I describe in this Article has been ignored by our constitutional scholars. As I will demonstrate, the only significant jurist that took the question seriously was the late Martín Díaz y Díaz.[6]

Property can now be seen as a constitutional issue in two senses. First, it is something that constitutional texts must address. Even if it is only to assert that property is *not* a fundamental right, as in the Colombian constitution,[7] it is necessary to at least refer to it precisely for that reason. Then, there is a second and more profound link between property and the constitution: from a sociohistorical point of view, state power (i.e., one of the building blocks of a constitution) is based, among other things, on a complex set of property relations. There is no constitution that does not presuppose (and is not built upon) some basic social arrangement as to who owns what—an arrangement that has to be understood not in the sense of social contract theory, but in a deeper sociohistorical sense, as in Carl Schmitt's *The* Nomos *of the Earth*.[8]

PRI long engaged in all manner of fraud to increase its vote shares at the expense of the opposition—from ballot stuffing to multiple voting by PRI partisans to outright fabrication of results."); Victoria E. Rodríguez & Peter M. Ward, *Disentangling the PRI from the Government in Mexico*, 10 MEXICAN STUD. 163, 169 (1994) (discussing the PRI's ability to mobilize voters through fraud, "press-ganging," and exertion of local political authority); *The Beginning of the End of the Longest-Ruling Party*, ECONOMIST, June 24, 2000, at 25, 26 (noting as an example that the PRI used land redistribution to gain voter loyalty).

4. The database was constructed by Lidia González-Malagón as part of a research project led by the author.

5. The scholars are Miguel Carbonell, Jorge Carpizo, Lorenzo Córdova, Pedro Salazar, and Diego Valadez. The collection includes 155 texts of an academic character, as well as 186 short texts in journals.

6. *See infra* notes 10, 38 and accompanying text.

7. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58 (Colom.) (stating that when private property interests are in conflict with the public interest, "the private interest must concede to the public or social interest").

8. *See* CARL SCHMITT, THE *NOMOS* OF THE EARTH: IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 208 (G.L. Ulmen trans., Telos Press 2003) (1950) ("The economy, in particular, belonged to the non-state private sphere. On both sides of hostilities, this constitutional

In fact, the most challenging aspect of thinking about property as a constitutional issue is that of reconstructing the dynamic relationship between changes in property relations (as social relations) and their meaning in the world of the constitution. This does not mean that we should disregard the importance of constitutional texts as such. They are relevant either because they describe arrangements that already exist or because they prescribe how to transform them. Mexico is a good example of the latter: the constitutional text contains what is commonly referred to as "a national project."[9] But the postrevolutionary state, as we knew it, did not appear the day after the enactment of the constitution in February 1917. It was the result of a great variety of interactions between state agents and social actors (peasants, corporations, local elites, etc.) through the granting of concessions, expropriation procedures, and settlements of all sorts—a process that took several decades. In short, the (trans)formation of property relations was at the same time the (trans)formation of the state. By looking at the constitution *as a process*, Martín Díaz y Díaz was probably the only jurist who recognized this intimate relationship between property and state formation.[10]

I. The Postrevolutionary Model

At the risk of oversimplification, we can divide the content of Article 27 into three main components: a general principle and two sets of rules.[11] The general principle refers to the nation's "primary ownership" (*propiedad originaria*) over all land and water. The first set of rules refers to state interventions on private property (i.e., expropriation and regulations), and the second set of rules refers to who is entitled to own what. The general principle appears in the first paragraph of Article 27, which states, "The ownership of all water and land within the national territory belongs primarily (*originariamente*) to the Nation, who has had and has the right to transfer

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standard was unspoken but presupposed, and also often spoken of as a general principle of international law.").

9. *See* C.P. art. 26 (Mex.) (establishing the authority of the federal government to plan the economy to promote energy, development, permanency, and fairness to economic growth to assure Mexico's independence as well as its political, social, and cultural democracy).

10. *See* Martín Díaz y Díaz, *Las Expropiaciones Urbanisticas en México: Aproximaciones a un Proceso sin Teoria* [*The Urban Expropriations in Mexico: Approaches to a Process Without Theory*], *in* DESARROLLO URBANO Y DERECHO [URBAN DEVELOPMENT AND LAW] 253, 261–62 (Fernando Serrano Migallón ed., 1988) (discussing the relationship between property issues and the constitution). This is consistent with the way many historians are approaching the formation of the state in Mexico and other Latin American countries. *See, e.g.*, Gilbert M. Joseph & Daniel Nugent, *Popular Culture and State Formation in Revolutionary Mexico*, *in* EVERYDAY FORMS OF STATE FORMATION: REVOLUTION AND THE NEGOTIATION OF RULE IN MODERN MEXICO 3, 15 (Gilbert M. Joseph & Daniel Nugent eds., 1994) ("[Mexican] state formation can only be understood in relational terms . . . .").

11. For the distinction between principles and rules, see MANUEL ATIENZA & JUAN RUIZ MANERO, A THEORY OF LEGAL SENTENCES 6–19 (Ruth Zimmerling trans., Kluwer Academic Publishers 1998) (1996).

their ownership to individuals, thus constituting private property."[12] Setting aside the translation problems of this text, it seems clear that the intention of its drafters was to locate private property as a lesser right compared to the right of the nation over the territory. It is no wonder that this principle has been subject to different interpretations. One can even be skeptical about its practical relevance,[13] but for many authors, it is the foundation of the program of the Revolution, as it gives the state (although the text refers to the Nation)[14] ample powers to distribute land and, in general, to direct economic activity.[15] This principle was used as the basis of a robust state power vis-à-vis private owners.

The rest of Article 27 is organized into two sets of rules with more precise consequences. The first set refers to state interventions that restrict property rights, and this set is itself broken into two forms of intervention. The first form of state intervention is expropriation. The way expropriation is phrased in Article 27 is quite similar to how it is phrased in other liberal constitutions. Government cannot take private property unless it is for a public need (*utilidad pública*) and "by means of" compensation.[16] Beyond this apparently harmless formulation in the constitutional text, the power to expropriate was one of the main components in the formation of the postrevolutionary regime. The 1938 nationalization of the oil industry, one of the landmarks of modern Mexico, took place through an exercise of the power to expropriate.[17] Similarly, most land distribution in the context of agrarian reform also took place through expropriation of land that exceeded

12. C.P. art. 27 (Mex.).

13. Mainstream constitutional scholars are skeptical about this principle. *See* JORGE CARPIZO, ESTUDIOS CONSTITUCIONALES [CONSTITUTIONAL STUDIES] 428 (1980) (explaining that the principle of *propiedad originaria* is unnecessary); FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO [MEXICAN CONSTITUTIONAL LAW] 188 (35th ed. 2003) (noting that the government-imposed modalities of private property cannot constitutionally negate the "individual guarantee of property" embodied in Article 27). For my own skeptical rendition of the concept of *propiedad originaria*, see Antonio Azuela, *El problema con las ideas que están detrás* [*The Problem with the Ideas Behind Legal Text*], *in* EN BUSCA DE MOLINA ENRÍQUEZ: CIEN AÑOS DE *LOS GRANDES PROBLEMAS NACIONALES* [IN SEARCH OF MOLINA ENRÍQUEZ: ONE HUNDRED YEARS OF *THE GREAT NATIONAL PROBLEMS*] 79, 92–97 (Emilio Kourí ed., 2009) [hereinafter EN BUSCA DE ENRÍQUEZ] (concluding that discussion of the idea of *propiedad originaria* is superfluous in the context of the modern property rights debate).

14. C.P. art. 27 (Mex.).

15. *See, e.g.*, ROLANDO CORDERA & CARLOS TELLO, MÉXICO: LA DISPUTA POR LA NACIÓN: PERSPECTIVAS Y OPCIONES DEL DESAROLLO [MEXICO: THE CONTEST FOR THE NATION: PROSPECTS AND OPTIONS FOR DEVELOPMENT] 95 (15th ed. 2002) (describing how government control of private property defined the neoliberal project in agricultural activities).

16. The only hint of an authoritarian regime is the fact that the text does not make explicit whether compensation must be paid *before* the expropriation. The text uses the ambiguous formula "by means of compensation" (*mediante indemnización*). C.P. art. 27 (Mex.).

17. Arthur W. Macmahon & W.R. Dittmar, *The Mexican Oil Industry Since Expropriation I*, 57 POL. SCI. Q. 28, 28–29 (1942).

the maximum allowed.[18] The idea that private property rights to land were legitimate as long as they did not exceed certain limits[19] legitimized agrarian reform under the rule of law. However, everyone knew that those limits were not always respected, as many large landholdings remained untouched for decades and many small properties were taken illegally.[20] That was one of the taboos in postrevolutionary Mexico, and only conservative commentators would criticize these practices.[21] Nevertheless, the political regime obtained a great deal of its legitimacy from the notion that it was honoring the commitments of the revolution. It suffices to say that when land distribution was declared finished, more than half of the national territory was already the property of agrarian communities (*ejidos* and *comunidades*);[22] nowadays they comprise around thirty thousand communities.[23]

The second form of state intervention on private property is established in the third paragraph of Article 27. There are some interesting technical

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18. *See* Ewell E. Murphy, Jr., *Expropriation and Aftermath: The Prospects for Foreign Enterprise in the Mexico of Miguel de la Madrid*, 18 TEX. INT'L L.J. 431, 432 (1983) (citing C.P. art. 27 (Mex.)) ("After the 1910 Revolution the major *hacendados* in turn were expropriated, and holdings in excess of statutory maxima now remain subject to forced redistribution.").

19. In the case of agricultural land, the acreage depended on productivity (the minimum acreage was 100 hectares for land with irrigation and 800 hectares for the driest land); for cattle-raising land, legal criteria were more generous. *Compare* C.P. art. 27, § XV (Mex.) ("Small agricultural property is that which does not exceed one hundred hectares of first-class moist irrigated land . . . . [O]ne hectare of irrigated land shall be computed as . . . eight of *monte* [scrub land] or arid pasturage."), *with id.* ("Small holdings for stockraising are lands not exceeding the area necessary to maintain up to five hundred heads of large livestock . . . .").

20. *See* Nora Louise Hamilton, *Mexico: The Limits of State Autonomy*, 11 LATIN AM. PERSP. 81, 90 (1975) ("While [agrarian reform] had been sufficient to cause uncertainty among landowners and to lead to production cutbacks, the bulk of the peasants remained landless and the latifundia structure remained basically intact."); *cf.* James W. Russell, *Land and Identity in Mexico: Peasants Stop an Airport*, MONTHLY REV., Feb. 1, 2003, *available at* 2003 WLNR 16945216 (describing how the postrevolutionary governments "redistributed just enough land to assure peasant political support without completely undermining rural class structure").

21. *See* Hamilton, *supra* note 20, at 102 n.3 (describing how, in spite of agrarian reform, large landowners "circumvent[ed] the law restricting the size of landholdings (e.g., by distributing portions among relatives and friends) [which] led to the emergence of dual systems of agriculture in both the ejidal and private sectors, characterized by large-scale commercial units producing for the internal market").

22. These are the names of the two types of collective legal subjects that agrarian legislation recognizes. *Comunidades* are those that existed before the Revolution and *ejidos* are those that were created after—the latter amount to more than 90% of all agrarian communities. Héctor Robles Berlanga, *Tendencias del campo mexicano a la luz del Programa de Certificación de los Derechos Ejidales (Procede)* [*Trends in the Mexican Countryside in Light of the Certification Program for the Rights of* Ejidos], *in* POLÍTICAS Y REGULACIONES AGRARÍAS: DINÁMICAS DE PODER Y JUEGOS DE ACTORES EN TORNO A LA TENENCIA DE LA TIERRA [AGRARIAN POLITICS AND REGULATIONS: POWER DYNAMICS AND SOCIAL INTERACTION IN LAND TENURE] 131, 131 (Éric Léonard et al. eds., 2003).

23. Monique Nuijten, *Family Property and the Limits of Intervention: The Article 27 Reforms and the PROCEDE Programme in Mexico*, 34 DEV. & CHANGE 475, 477 n.2 (2003) (Neth.) (noting that according to the Ministry of Agrarian Reform (SRA) there were 27,605 *ejidos* and 2,337 *comunidades* in Mexico in 2003).

problems in that paragraph, which are beyond the scope of this Article,[24] so I will refer only to the clause governing the power to "regulate the use of those natural elements that can be privately appropriated" (*regular el aprovechamiento de los elementos naturales susceptibles de apropiación*).[25] Interestingly, this rule explicitly states that regulations are meant to "make a fair distribution of public wealth and to look after its conservation."[26] In spite of the sixteen amendments that have been introduced to Article 27 since 1917, and especially in spite of the neoliberal reforms of the early nineties,[27] these words remarkably remain part of the constitution. For many legal scholars, these words are proof that the Mexican constitution is the first "social constitution" of the twentieth century.[28] More modestly, other scholars simply say that these words indicate that Mexican doctrine views private property not as an absolute right, but as a "social function."[29]

This clause was amended in 1976 to authorize the regulation of urban development, and again in 1987 to authorize environmental legislation.[30] A vast array of legal instruments has been developed through legislation in these areas, with a tendency to place land use regulatory authority in the hands of municipalities.[31] All of this seemed to be a natural development from the original ideas of the framers of the 1917 constitution, except that as I show in the following Part, the ability to implement land-use regulations—both in urban and rural settings—has proved highly problematic.

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24. C.P. art. 27 (Mex.). This paragraph establishes the polemical concept of *modalidades a la propriedad*, which refers to the creation of different forms of property as part of the nation's rights. *See* Emilio H. Kourí, *Interpreting the Expropriation of Indian Pueblo Lands in Porfirian Mexico: The Unexamined Legacies of Andrés Molina Enríquez*, 82 HISP. AM. HIST. REV. 69, 108 (2002); *see also* Antonio Azuela & Miguel Ángel Cancino, *Los asentamientos humanos y la mirada parcial del constitucionalismo mexicano* [*Human Settlements and the Partial View of Mexican Constitutionalism*], *in* LA CONSTITUCIÓN Y EL MEDIO AMBIENTE [THE CONSTITUTION AND THE ENVIRONMENT] 257, 261 (2007) (juxtaposing private and state control of property affecting natural resources and agriculture).

25. C.P. art. 27 (Mex.). Similar to contemporary mainstream economics, the drafters of Article 27 had the idea that some natural elements had certain intrinsic characteristics that made them more prone to private appropriation.

26. *Id.*

27. *See infra* subpart II(A).

28. TODD A. EISENSTADT, COURTING DEMOCRACY IN MEXICO: PARTY STRATEGIES AND ELECTORAL INSTITUTIONS 95 n.3 (2004); *see also* Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After* Presidencialismo, 4 INT'L J. CONST. L. 411, 412–13 (2006) (identifying the constitution of 1917 as the "social constitution" due to its establishment of standards for the right to work, equal protection, and other social welfare measures).

29. Russell H. Fitzgibbon, *Constitutional Development in Latin America: A Synthesis*, 39 AM. POL. SCI. REV. 511, 519 (1945).

30. CLAUDIA GAMBOA MONTEJANO & MARÍA DE LA LUZ GARCÍA SAN VICENTE, DIVISIÓN DE POLÍTICA INTERIOR [DIVISION OF INTERIOR POLICY], ARTÍCULO 27 CONSTITUCIONAL [ARTICLE 27 OF THE CONSTITUTION] 18–24 (2005) (discussing amendments to Article 27 of the Mexican constitution).

31. *See, e.g.*, Decreto por el que se reforma y adiciona el artículo 115 de la Constitución Política de los Estados Unidos Mexicanos [Decree Reforming and Adding to Article 115 of the Political Constitution of the United States of Mexico], DO, 3 de Febrero de 1983 (Mex.).

The second set of rules in Article 27 determines who can own what. It prohibits certain individuals and organizations from acquiring certain resources. Until 1994, churches did not even exist as legal entities, and therefore they were denied the right to own any kind of property.[32] Citizens of other countries, even today, cannot own property in border and coastal regions. Then there is a list of the resources that are defined as national property—a list that expanded continuously from 1917 to 1982: mining and oil resources, almost all watercourses, islands, the sea bed, and electric power.[33]

In some cases, like those of oil and electric power, "exploitation" is reserved to the state. For the rest, private corporations (and since 1992, even foreign firms) may have access to these resources, but only through administrative concessions, which do not confer property rights to those resources.[34]

It would be impossible to address here all of the issues related to resources that are considered national property. What I want to stress here is the intention of the drafters of the constitution and subsequent amendments to create and consolidate a *national patrimony*. Apart from those resources that are explicitly mentioned in Article 27, secondary legislation has expanded the project: archaeological remains (all objects and buildings erected before the Spanish conquest in the sixteenth century), as well as national parks (that had to be created through expropriations) were also part of that ambitious project.[35] Both material progress and national identity were designed to flourish from a patrimony that would grow indefinitely. If every political regime has its own myths, or "civil religions,"[36] in postrevolutionary

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32. Timothy D. Richards, *Trusts in Latin America: Mexico and Colombia*, 15 TR. & TRUSTEES 472, 475 (2009). Of course, churches used straw men for the administration of their properties. *Id.*

33. Even if electric power is not a thing that can be subject to ownership, like land, minerals, etc., its generation is part of the list of things that are the exclusive property of the nation, which prevents the participation of private (not to mention foreign) investors in the area. C.P. art. 27 (Mex.) ("Only the Nation shall be in charge of generating, conducting, transforming, distributing and providing electricity as a public service. No permit shall be issued to private individuals or corporations in order to provide such a public service . . . .").

34. *See* Ewell E. Murphy, Jr., *Back to the Future? The Prospects for State Monopoly in Hydrocarbons and Electric Power Under Article 27 of the Mexican Constitution*, 3 U.S.-MEX. L.J. 49, 54–55 (1995) (explaining that Mexico's national oil company (PEMEX)—the only company that can conduct petroleum operations—may employ private contractors, including those from other countries, provided that the private contractors are paid in cash rather than through a production or profit-participation interest).

35. *See* Norma Rojas Delgadillo, *Cultural Property Legislation in Mexico: Past, Present, and Future*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 114, 115–16 (Barbara T. Hoffman ed., 2006) (describing the 1970 Federal Law on the Cultural Heritage of the Nation, which protects archaeological monuments and "areas of natural beauty").

36. *See* Phillip E. Hammond, *Pluralism and Law in the Formation of American Civil Religion*, *in* VARIETIES OF CIVIL RELIGION 138, 138–39 (Robert N. Bellah & Phillip E. Hammond eds., 1980) ("[T]o the degree a collection of people *is* a society, it will exhibit a common ('civil') religion."); *see also* John A. Coleman, *Civil Religion*, 31 SOC. ANALYSIS 67, 76 (1970) (defining "civil religion" as a collection of beliefs, rituals, and symbols that connect a society's place in space and time to existential concepts).

Mexico it would be the national patrimony. That is why property issues have a powerful emotional impact on Mexican political discourse.

There is still one more aspect of Article 27, probably the most important of them all, to discuss—agrarian reform. Rural communities that did not have enough land and water were given the constitutional right to obtain these resources.[37] The drafters of both the constitutional text and the secondary legislation struggled to define which private property was subject to seizure for that purpose, so that land distribution was legal only if certain conditions were met. But in reality, agrarian reform did not always occur in strict compliance with the law. The political and ideological thrust behind land distribution was so strong that in many instances the government had to legitimize de facto land invasions, and in other cases, prevent the distribution of large landholdings that might be distributed. Thus, the rules of Article 27 became a source of legal ambivalence in the postrevolutionary regime. On the one hand, they expressed the commitment of the state to protect property; on the other, they gave rise to high expectations for land distribution—regardless of who was to bear the burden. Again, Martín Díaz y Díaz was the only legal scholar to make this ambivalence the subject of serious consideration.[38] In what follows, I will try to show that, for a number of reasons, the principles and rules in Article 27 are in crisis and that a new conception of property is necessary.

II. Making the Constitution Obsolete

In this Part, I will describe five different social processes that, taken together, have brought with them a profound crisis in the property regime that was originally established in the constitution of 1917.

A. National Patrimony

Every society has what anthropologists call "inalienable possessions."[39] That is, a selection of resources that, for different reasons, cannot be private property and therefore belong to society as a whole—in fact, they help to

37. C.P. art. 27, § 10 (repealed 1991) (Mex.); *see also* James J. Kelly, Jr., *Article 27 and Mexican Land Reform: The Legacy of Zapata's Dream*, 25 COLUM. HUM. RTS. L. REV. 541, 544 (1994) (chronicling the repeal of Article 27, section 10).

38. *See* Martín Díaz y Díaz, *La Constitución ambivalente. Notas para un análisis de sus polos de tensión* [*The Ambivalent Constitution. Notes for a Discussion of the Poles of Tension*], *in* 80 ANIVERSARIO HOMENAJE: CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [80TH ANNIVERSARY HOMAGE: THE POLITICAL CONSTITUTION OF THE MEXICAN STATES] 59, 72 (1997) (identifying contradictions in Article 27).

39. *See* ANNETTE B. WEINER, INALIENABLE POSSESSIONS: THE PARADOX OF KEEPING-WHILE-GIVING 150 (1992) (defining inalienable possessions as "possessions [that] are embedded with culturally authenticating ideologies . . . that give shape and drive to political processes. They are imbued with history . . . and the beliefs and stories that surround their existence.").

create the very wholeness of that society.[40] As we have seen, the idea of recognizing and preserving a rich national patrimony was an essential theme of the Mexican Revolution.[41] However, at least three developments have put that project in crisis in the last decades. First, two of the components of Mexico's national cornucopia—national parks and archaeological sites—were supposed to be acquired (at some cost) from private landowners, and expropriation was seen as the usual procedure.[42] For different reasons, those procedures were rarely completed.[43] Between 1917 and 1987, forty-seven areas were declared national parks[44] but they were not expropriated or purchased in any way.[45] Consequently, since the mid-eighties, the government has followed a different strategy for the conservation of biodiversity: the creation of biosphere reserves that do not require land to be taken from its owners.[46] As for national parks, most of them never became public property, and the uncertainty of their legal status is a constant source of conflict today between the owners of the land and the bureaucracies that try to manage those parks in the name of the nation.[47]

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40. For an in-depth discussion of inherently public property as a social good, see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). Rose describes the concept of inherently public property and argues that public property is a "comedy of the commons" because it helps to enhance sociability and thereby enriches and coalesces society. *Id. But cf.* Gareth A. Jones & Peter M. Ward, *Privatizing the Commons: Reforming the* Ejido *and Urban Development in Mexico*, 22 INT'L J. URB. & REGIONAL RES. 76 (1998) (describing how traditionally public land in Mexico was privatized through deregulation).

41. *See supra* notes 35–36 and accompanying text.

42. *See* C.P. art. 27 (Mex.) ("Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity"); Delgadillo, *supra* note 35, at 115–17 (describing how the Federal Law on the Cultural Heritage of the Nation provided for national ownership of areas of national heritage and beauty).

43. *See, e.g.*, Ludger Brenner & Hubert Job, *Actor-Oriented Management of Protected Areas and Ecotourism in Mexico*, 5 J. LATIN AM. GEOGRAPHY 7, 16 (2006) (discussing a monarch butterfly preserve and noting that "no expropriation was ever carried out there").

44. LANE SIMONIAN, DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO 96–97 (1995).

45. *See, e.g.*, *id.* at 155 (describing how Enrique Beltrán's efforts to expropriate private land within areas designated as national parks failed).

46. *See* David Dumoulin & Aurélia Michel, *La* communauté indienne participative*: de quelques usages dans la politique mexicaine* [*The Participative Indian Community: Some Uses in Mexican Politics*], *in* CULTURES ET PRATIQUES PARTICIPATIVES: PERSPECTIVES COMPARATIVES [PARTICIPATIVE CULTURES AND PRACTICES: COMPARATIVE PERSPECTIVES] 233, 240–41 (Catherine Neveu ed., 2007) (describing the development of biosphere reserves, which allow indigenous communities to remain on their tribal land).

47. *See* MARÍA FERNANDA PAZ SALINAS, LA PARTICIPACIÓN EN EL MANEJO DE ÁREAS NATURALES PROTEGIDAS: ACTORES E INTERESES EN CONFLICTO EN EL CORREDOR BIOLÓGICO CHICHINAUTZIN, MORELOS [PARTICIPATION IN THE MANAGEMENT OF PROTECTED NATURAL AREAS: ACTORS AND INTERESTS IN CONFLICT IN THE BIOLOGICAL CORRIDOR OF CHICHINAUTZIN, MORELOS] 85–96 (2005) (detailing ownership and boundary disputes that arose between the government and local communties in postrevolutionary Mexico); *see also id.* at 158 & 159 nn.71–72 (outlining myriad problems, legal and otherwise, with the administration of communal resources).

Archaeological sites have met a similar fate. Pre-Columbian buildings are national property but, alas, the land between them is not; which is why it is necessary to buy or expropriate archaeological sites so they become public property. While national parks number less than one hundred, archaeological sites number more than thirty thousand.[48] In a few of them—specifically, in those that are widely visited—the federal government has managed to establish some sort of de facto control. Both national and international tourists can visit them and feel that they are in a public area, but for the most part, legally, they are not.[49] Only recently, conflict over land ownership has emerged. One example is the famous Mayan city of Chichén Itzá, whose lands were bought at an allegedly high price by the government of the State of Yucatán in 2010 because of holdouts by private landowners.[50] Today, Chichén Itzá is not the property of the nation, but of one of the nation's states; the link between the nation and its most "original" patrimony is broken.

Beyond that particular case, there is a more generalized trend. Most archaeological sites are within lands that belong to agrarian communities (*ejidos* and *comunidades*), which until 1992 held inalienable property rights over such lands.[51] But when a constitutional reform in that year opened the way for the alienation of such lands, a huge number of sites were in danger of becoming the property of individuals. Nevertheless, government officials have found ways to prevent that from happening.[52] Only recently, however, has it become evident that land in archaeological sites is not public property. Here, as with national parks, legal scholars have been reluctant to recognize publicly that, as in Hans Christian Andersen's story,[53] the emperor is naked.

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48. *See* COMISIÓN NACIONAL DE ÁREAS NATURALES PROTEGIDAS [NATIONAL COMMISSION OF PROTECTED NATURAL AREAS], http://www.conanp.gob.mx/english.php (last updated Nov. 5, 2010) (indicating that sixty-seven Mexican national parks exist today); Monica Drake, *Tourism to Mexico Is Up*, N.Y. TIMES: IN TRANSIT: EXPERT TRAVEL ADVICE (Oct. 28, 2010, 6:40 PM), http://intransit.blogs.nytimes.com/2010/10/28/tourism-to-mexico-is-up/ (quoting Alfonso Sumano, the regional director for the Mexico Tourism Board for the Americas, as saying that "Mexico has 30,000 ecological sites").

49. For example, the ethnography of Lisa Breglia shows us the sort of local arrangements that create such an illusion. LISA BREGLIA, MONUMENTAL AMBIVALENCE: THE POLITICS OF HERITAGE 65 (2006) (depicting the fact that, when Chichén Itzá was privately owned, this fact was "of little significance" to its thousands of daily visitors).

50. *See Mexican State of Yucatán Buys Archaeological Site of Chichen Itza from Private Landowner*, ARTDAILY.ORG (Apr. 1, 2010), http://www.artdaily.com/index.asp?int_sec=2&int_new=37171 (reporting that the land sold for USD17.8 million).

51. *See* Kelly, *supra* note 37, at 544 (including alienability of agrarian communities' land among the changes produced by the constitutional amendments approved in November 1991).

52. *See* DANIELA RODRÍGUEZ HERRERA, LEY AGRARIA Y PROTECCIÓN DEL PATRIMONIO ARQUEOLÓGICO [AGRARIAN LAW AND THE PROTECTION OF ARCHAEOLOGICAL HERITAGE] 55–165 (2000) (describing the "*Procede*" by which land certificates were given out and the later intervention into the process by the National Institute of Anthropology and History to protect archeological sites).

53. Hans Christian Andersen, *The Emperor's New Clothes*, *in* THE ANNOTATED CLASSIC FAIRY TALES 269, 276–77 (Maria Tatar ed., 2002).

In short, there are national patrimonies that existed as promises that never materialized.

There is a second process that calls into question the postrevolutionary national patrimony: the constant challenge by private individuals to the principle of national ownership of certain natural resources. The most salient instance of this dispute is over water rights; cities need water, but agrarian communities and individual landowners who have water rights are challenging attempts by federal authorities to take it to urban areas. This is happening throughout the country, but the most significant case is Mexico City. More than one million people (mostly poor) who live east of the metropolitan area do not get enough water, and the project of bringing it from outside the basin has been challenged by rural communities that see the water as theirs.[54] This is not the place to say which side is right in these conflicts, but only to assert that the postrevolutionary paradigm of water as national property is not working anymore. No one dares to support strict enforcement of the law, and government agencies are weak in front of both agrarian communities and rich individual landowners.[55]

A third and more promising development is the change of the definition of wildlife. Up until 2000, legislation on hunting declared that wild animals were national property[56]—just another component of Mexico's national patrimony. But then, in one stroke, new legislation declared that animal wildlife can become the property of the owner of the land.[57] Since then, landowners (including thousands in agrarian communities) have been able to manage animal wildlife as their own, with full legal support.[58] In an

54. *See* MANUEL PERLÓ COHEN & ARSENIO ERNESTO GONZÁLEZ REYNOSO, ¿GUERRA POR EL AGUA EN EL VALLE DE MÉXICO? ESTUDIO SOBRE LAS RELACIONES HIDRÁULICAS ENTRE EL DISTRITO FEDERAL Y EL ESTADO DE MÉXICO [WATER WARS IN MEXICO? A STUDY ON THE HYDROLOGIC RELATIONS BETWEEN MEXICO CITY AND THE STATE OF MEXICO] 109–10 (2005) (summarizing the position of authorities outside of Mexico City against permitting a federal entity to operate and administer their water supply); Cecilia Tortajada, *Water Management in Mexico City Metropolitan Area*, 22 WATER RESOURCES DEV. 353, 370 (2006) (identifying water shortages affecting over one million people near Mexico City).

55. *See, e.g.*, Odile Hoffmann, *Políticas Agrarias, Reformas del Estado y Adscripciones Identitarias: Colombia y México [Agrarian Policies, State Reform, and Ascription of Identities: Colombia and Mexico]*, 60 REVISTA MEXICANA DE SOCIOLOGÍA [MEXICAN J. SOC.] 99, 106 (1998) (describing, as an example, the inability of the government to respond to the resistance of the *campesinos ejidatarios* in Chiapas in 1994); Sergio Peña, *Land Use Planning on the U.S.–Mexico Border: A Comparison of the Legal Framework*, 17 J. BORDERLANDS STUD. 1, 13–14 (2002) (observing that municipal governments in Mexico have had a weaker role managing urban growth of the power of locals).

56. Ley Federal de Caza [LFC] [Federal Hunting Law], art. 3, DO, 5 de Enero de 1952 (Mex.).

57. Ley General de Vida Silvestre [LGVS] [General Law on Wildlife], art. 4, DO, 3 de Julio de 2000 (Mex.).

58. This has led, for example, to the recovery of the populations of certain species, such as the bighorn sheep (*Ovis canadensis*). *See* David S. Maehr, *Large Mammal Restoration: Too Real to Be Possible?*, *in* LARGE MAMMAL RESTORATION: ECOLOGICAL AND SOCIOLOGICAL CHALLENGES IN THE 21ST CENTURY 345, 352 (David S. Maehr et al. eds., 2001) ("[Some private landowners] have forged ahead with their own private initiatives to restore large-mammal communities. The bighorn

optimistic vein, perhaps this represents a good opportunity for a new way to define patrimony. The traditional definition, which sees patrimony as a collection of resources that are owned by the state on behalf of society, would give way to a definition that stresses the obligation of society to preserve those resources for future generations. In other words, the emphasis on rights would be replaced by an emphasis on obligations: whoever owns resources that are considered crucial for the future of society is subject to the obligation of using them wisely. This is nothing less than the idea of sustainable use translated into a legal concept.[59]

Another change in the definition of patrimony is the idea that some of its components (like water) do not necessarily have to be maintained as state property. Although this incites well known criticisms about privatization,[60] sooner or later this will have to become part of the constitutional agenda.

Probably the most interesting aspect of the crisis of the patrimonial regime in the Mexican constitution is that constitutional lawyers do not seem to recognize it. In a recent debate about a presidential initiative to modify slightly the oil industry rules, some jurists made their voices heard, but only to offer what they saw as the right interpretation of the constitutional text, not to advance proposals about the content of the text.[61]

B. Expropriation

As we saw in the previous subpart, the power of eminent domain was the main instrument for the construction of the postrevolutionary state. It is important to recognize that the power of eminent domain was used in an arbitrary way, both in relation to the obligation to pay a fair compensation and in terms of due process. It suffices to mention that landowners affected by

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(*Ovis canadensis*) is now reclaiming portions of its historic range through the privately funded efforts of the Turner Endangered Species Fund.").

59. Martín Díaz y Díaz, *El aprovechamiento de los recursos naturales: Hacia un nuevo discurso patrimonial* [*The Exploitation of Natural Resources: Toward a New Patrimonial Discourse*], 24 REVISTA DE INVESTIGACIONES JURÍDICAS [LEGAL RES. J.] 91, 172 (2000) (Mex.).

60. *See, e.g.*, Alberto Chong & Florencio López-de-Silanes, *The Truth About Privatization in Latin America*, *in* PRIVATIZATION IN LATIN AMERICA: MYTHS AND REALITY 1, 1 (Alberto Chong & Florencio López-de-Silanes eds., 2005) (noting that academia, politicians, and the media have voiced concerns about privatization's record, the sources of the gains, and its impact on social welfare and the poor).

61. For an example of the recent debate between Arnaldo Córdova and Miguel Carbonell about constitutional interpretation surrounding an initiative to reform the oil industry, compare Miguel Carbonell, Op-Ed., *La Constitución no es un Fetiche* [*The Constitution Is Not a Fetish*], EL UNIVERSAL, May 30, 2008, http://www.eluniversal.com.mx/editoriales/40618.html (Mex.) (referring to his debate with Córdova on the senate floor and continuing the debate) with Arnaldo Córdova, Op-Ed., *La letra y el espíritu de la Constitución* [*The Letter and Spirit of the Constitution*], LA JORNADA, June 8, 2008, http://www.jornada.unam.mx/2008/06/08/index.php?section=politica&article=014a1pol (Mex.) ("[T]he only thing clear [in this debate over constitutional reform] is that nothing is clear in Article 27."). *See also* Arnaldo Córdova, Op-Ed., *El debate constitucional* [*The Constitutional Debate*], LA JORNADA, May 25, 2008, http://www.jornada.unam.mx/2008/05/25/ index.php?section=opinion&article=008a1pol (Mex.).

eminent domain procedures did not have a right to be heard before their property was taken; a simple decree by the executive had the effect of transferring property rights to the state.[62] However, a number of social changes (associated with the transition from a rural to an urban society) provoked changes in the use of expropriation. As land distribution moved forward, it affected not only individual landowners, but also agrarian communities whose lands were taken for the expansion of urban centres, infrastructure, or other purposes. Groups of peasants, who in the 1930s and 1940s were gaining access to land through expropriation procedures, were now the victims of the same procedures in order to give way to the needs of an urban society.[63]

In the last two decades, expropriation entered a profound crisis. This has taken place in two different contexts. First, growing expectations for the consolidation of the rule of law, political pluralism, and a more independent judiciary have imposed new demands on the way eminent domain power is exercised. While governments in the postrevolutionary era were able to impose takings as an expression of the public will, and in some cases even ignore judicial decisions altogether,[64] this practice proved increasingly difficult under the new conditions. Today, federal judges take every opportunity to rule in favor of affected owners and against what they construe as arbitrary expropriations. Judicial activism has become so intense that even those who just one decade ago insisted on the arbitrary use of eminent domain are now worried about the possibility of a paralysis in public works that such activism is creating.[65]

An emblematic case in this respect is that of *El Encino*, a piece of land that was expropriated for the completion of a road system in Mexico City.[66]

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62. The landowner does have the ability to publically protest and to present a reasonable appraisal of his land during a fifteen-day notice period, but he does not have the ability to stop or stay expropriation via judicial process. Ley de Expropiación [LE] [Expropriation Law], arts. 2, 4, DO, 25 de Noviembre de 1936 (Mex.).

63. *See* Russell, *supra* note 20 (explaining how the Mexican federal government tried to expropriate peasant land in order to build an international airport, and how Emiliano Zapata in the past had expropriated lands from landlords to give to the peasants).

64. This created the problem of *inejecución de sentencias* (judicial rulings that could not be executed), which is one of the most problematic issues that the supreme court faces nowadays. *See, e.g.*, *Cancela SCJN fallo sobre "El Encino"* [*Supreme Court's Ruling Cancels "El Encino"*], SIPSE.COM (Aug. 25, 2010), http://www.sipse.com/noticias/62576-cancela-scjn-fallo-sobre-encino.html (reporting that the supreme court is to review the decision of a lower court due to the government's failure to comply with the lower court's judicial ruling).

65. *See* Carlos Elizondo Mayer-Serra & Luis Manuel Pérez de Acha, *¿Un nuevo derecho o el debilitamiento del estado? Garantía de audiencia previa en la expropiación* [*A New Right or the Weakening of the State? The Right to a Judicial Hearing Before Expropriation*], CUESTIONES CONSTITUCUONALES [CONSTITUTIONAL QUESTIONS], July–Dec. 2009, at 100, 101, 144 (lamenting that corruption in the judiciary turned expropriation from a tool of post-revolution reform to modern day abuse).

66. Carlos Aviles, *Corte reabre juicio por predio El Encino* [*Court Reopens Trial Regarding* El Encino *Property*], EL UNIVERSAL, Aug. 23, 2010, http://www.eluniversal.com.mx/notas/703518.html (Mex.) ("Mexico City authorities expropriated two plots of *El Encino* in 2000

A series of administrative and judicial pitfalls led to the allegation that judicial orders were being ignored by the authority responsible for the taking, the head of the Mexico City government, then the most relevant political leader of the left in the country.[67] As a result, he was accused of contempt of court and then impeached in 2005[68] this was the main precursor to the electoral conflict that divided public opinion over the result of the presidential elections of 2006 and called into question nothing less than the legitimacy of the electoral system. It all began with a seemingly simple takings case.

There is a second dimension in the crisis of expropriation that seems much more profound: the growing ability of one specific kind of landowner—agrarian communities—to prevent the expropriation of their lands for public works. The most illustrative case is that of San Salvador Atenco, a village on the periphery of Mexico City that managed to stop the building of a new airport for the main city in the country.[69] The airport was to be the main infrastructure project of Vicente Fox, the first president of what is commonly referred to as the Mexican transition to democracy.[70] Peasants not only displayed an ability to occupy the public space and to garner great public sympathy, but they also obtained an injunction in an *amparo* suit against the expropriation that would have taken more than 10,000 acres of their land.[71] Here, the political legitimacy of the democratic

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. . . in order to construct the avenues of Vasco de Quiroga and Carlos Graef Fernández in the Santa Fe zone.").

67. *La Corte deja en el limbo jurídico caso de El Encino* [*Court Leaves the Case of* El Encino *in Legal Limbo*], CIUDADANOS EN RED, Nov. 26, 2010, http://www.ciudadanosenred.org.mx/metroaldia/corte-deja-en-el-limbo-jur-dico-caso-el-encino (Mex.) ("It is fitting to recall that this process has been litigated for over ten years and provoked the impeachment of then-Head of Government Andrés Manuel López Obrador for his contempt of the court by failing to pay a proportional indemnity.").

68. *See* Aviles, *supra* note 66 ("The [Mexican supreme court] reopened, once again, the discussion concerning the expropriation of the property known as *El Encino*, which the Federal District had litigated for ten years and which even led to the impeachment of the former head of city government, Andrés Manuel López Obrador."); John Authers, *Confusion Widens over López Obrador Impeachment*, FIN. TIMES, (Apr. 14, 2005), http://www.ft.com/intl/cms/s/0/579182e6-ad2f-11d9-ad92-00000e2511c8.html#axzz1NJ34qOcK (describing the vote to impeach Obrador over contempt of court allegations).

69. *See* Enrique Moreno Sánchez, *El aeropuerto y el movimiento social de Atenco* [*The Airport and the Social Movement of Atenco*], CONVERGENCIA, REVISTA DE CIENCIAS SOCIALES [CONVERGENCE, MAG. OF SOC. SCI.] (Mex.), Jan.–Apr. 2010, at 79, 84–87 (recounting the social movement against the airport proposal and describing its significance in social movements); María de la Luz González, *Cronología del conflicto de San Salvador Atenco* [*Chronology of the Conflict of San Salvador Atenco*], EL UNIVERSAL, Jan. 21, 2008, http://www.eluniversal.com.mx/notas/475742.html (Mex.) (recounting the resistance of citizen groups, confrontations with police, and cancellation of the project).

70. *See* John Stolle-McAllister, *What* Does *Democracy Look Like? Local Movements Challenge the Mexican Transition*, LATIN AM. PERSP., July 2005, at 15, 24–25 (characterizing President Fox's prioritization of the airport's construction as "high").

71. *See* Russell, *supra* note 20 (describing opposition of peasant groups in court actions and their occasional success in obtaining temporary injunctions).

election of the new government was not enough to justify the exercise of eminent domain over an agrarian community. The conflict over Atenco is, in fact, only the tip of a huge iceberg: in many parts of the country *ejidos* and *comunidades* are able to prevent expropriations through a combination of legal and political mechanisms, a process that is driving land prices upward and making the development of public works increasingly difficult.[72]

In sum, postrevolutionary governments were able to subordinate private landowners to the needs of agrarian reform, but this very process paved the way for forms of community landownership that have managed to resist the public interest in post-postrevolutionary times. Even though the distribution of agrarian land came to an end almost two decades ago, peasant communities that obtained land through it now have more power and prestige than the government initiatives to expropriate their land for the public interest. Moreover, there is no legal doctrine to deal directly with this situation. More than twenty years ago, Martín Díaz y Díaz wrote that expropriation in Mexico was "a process without a theory."[73] Today, the Mexican legal system is paying the price for not having given enough thought to the theoretical relationship between peasants' property rights and the power of eminent domain.

C. Land Use Regulations

The power to regulate land use is one of the main instruments of urban and environmental policies in the world. For the legal profession, one of the problems with this power is determining how far regulations may go before generating the obligation to compensate landowners. As we saw in Part I, since 1917 the Mexican constitution has contained a provision that authorizes the regulation of the use of land and other natural resources in the urban and the rural contexts.[74] Here too, the promise that property could perform a social function has remained unfulfilled. But the main obstacle for translating all of those instruments into effective policies has *not* been of a legal nature.[75] Municipal governments have simply been too politically weak to impose urban and environmental regulations upon private landowners. Most cities have enacted their urban plans but, for a number of reasons, these plans

72. For a description of the manner in which *ejidos* and *comunidades* have been able to resist expropriation, see Gareth A. Jones, *Resistance and the Rule of Law in Mexico*, 29 DEV. & CHANGE 499 (1998) (Neth.).

73. Martín Díaz y Díaz, *Las expropiaciones urbanisticas en Mexico: Aproximaciones a un proceso sin teoria* [*Urbanistic Expropriations in Mexico: Approximations of a Process Without Theory*], *in* DESARROLLO URBANO Y DERECHO: DIRECCIÓN E INTRODUCCIÓN GENERAL [URBAN DEVELOPMENT AND LAW: ADDRESS AND GENERAL INTRODUCTION] 253, 261 (Fernando Serrano Migallón ed., 1988).

74. C.P. art. 27 (Mex.).

75. *See* Jones, *supra* note 72, at 501–03 (describing the *ejidos*' parallel or extralegal resistance to regulation).

have not met their goals.[76] In particular, plans are modified whenever developers decide to use this or that piece of land.[77] The result has been a pattern of urban development that consists of monotonous housing compounds isolated from each other and from urban areas.[78] The planning profession has been unanimous in denouncing this new urban model, but there are no signs that these tendencies may change in the short term.[79]

It is worth mentioning that alongside this weakening of state regulatory power, some interesting land use initiatives have appeared. One of them is the proliferation of "compensation for environmental services" schemes. Both federal funds and contributions from cities are being allocated to rural communities in exchange for their commitment to preserve their forested areas to ensure the recovery of the aquifers from which urban areas obtain water.[80] This is a new sort of "social pact" through a legal form that departs from all previous forms of land use regulation: it is of a contractual character. For lawyers who belong to the postrevolutionary legal culture, these schemes amount to turning Article 27 on its head; the obligation to preserve natural resources, which was originally vested in those who owned them, is being replaced by compensation that society must provide. The pragmatic argument—that water tariffs from cities (the source of the compensation) can be used as incentive and compensation for the conservation of forests—clashes with the traditional idea that conservation is an inherent obligation for those who own natural resources, i.e., with the very idea of the social function of property.[81]

However, no matter how far one can go in the use of these new instruments, it is hard to envision a situation in which they replace traditional command and control instruments altogether. Particularly when, as we have said, state ownership of natural resources has ceased to be the only way of preserving national "patrimony."[82] Therefore, it is important to understand

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76. *See, e.g.*, *id.* at 518 (describing how the political backlash of *ejidos* cautioned government officials against using a public-utility argument for enacting urban development and slowed land use regulation).

77. *See* Pedro Moctezuma-Barragan, *Participatory Planning Under the Mexican Volcanoes*, *in* CITIES IN TRANSITION 71, 74 (Tasleem Shakur ed., 2005) (recognizing the ability of urban developers to influence the planning process through corruption of local government officials).

78. *See, e.g.*, Irma Escamilla et al., *Cities of Middle America and the Caribbean*, *in* CITIES OF THE WORLD: WORLD REGIONAL URBAN DEVELOPMENT 103, 120 (Stanley D. Brunn et al. eds., 4th ed. 2008) (recounting the development of shantytowns outside of Mexico City and recent construction of higher income homes on the periphery).

79. *See* Emilio Duhau, *Los nuevos productores del espacio habitable* [*The New Producers of Living Space*], CIUDADES [CITIES], July–Sept. 2008, at 21, 24–25 (criticizing the new model as not adapted to the socioeconomic status of urban residents).

80. *See* Francisco Chapela, *Communal Conservation in Mexico's Protected Areas*, LEAD INTERNATIONAL, http://www.lead.org/page/536 (summarizing the history of government-funded initiatives to promote forest preservation).

81. *See infra* text accompanying notes 118–25.

82. As soon as a private owner, and not a government agency, is responsible for the preservation of an element of a collective patrimony, the rules that ensure such preservation become

how it is that the *real* power of property owners, including both individuals and communities, is stronger than the power of the state to regulate the use of the land and its resources. This is not just another legal problem in a very strict sense, it is a *socio-legal* one. In Mexico, there is no equivalent to the *Lucas v. South Carolina Coastal Council*[83] case that expresses a constitutional doctrine about property.[84] What we have is a problem that is beyond the law, but nevertheless affects the balance between landowners and the public interest—a complex social problem about which we know very little.

D. Tenure Regularization in Low-Income Settlements

So far I have dealt only with the kinds of issues that would constitute a central chapter in a legal manual on property and the constitution. However, there is a legal practice through which millions of people have access to property, both in Mexico and in other countries—a practice that would never attract the attention of constitutional scholars. This refers to land-regularization programs, through which government agencies develop complicated legal procedures in order to provide property titles to families (or their dominant members) who have built their houses on what are commonly labeled "irregular human settlements."

Since the early seventies, a federal agency called CORETT (Commission for the Regularization of Land Tenure) has conducted eminent domain procedures on lands located on the urban peripheries that members of agrarian communities had been selling to poor families.[85] It is important to recall that one of the most profound social changes in Mexico since the 1940s has been its transition from a rural to an urban society.[86] In that context, at least half of Mexico City's expansion from 1970 to 2000 took place on land that had previously been distributed to peasants as part of the agrarian reform.[87]

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more relevant than ever. Leaving such rules to the possibility that private agents might arrive at virtuous agreements will seem too risky for state functionaries, especially if they have been elected through democratic processes.

83. 505 U.S. 1003 (1992).

84. *See id.* at 1019 ("[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."); *id.* at 1030 ("When . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles [of state nuisance and property law] would dictate, compensation must be paid to sustain it.").

85. EGYPT BROWN ET AL., SECURE TENURE IN LATIN AMERICA AND THE CARIBBEAN: REGULARIZATION OF INFORMAL URBAN SETTLEMENTS IN PERU, MEXICO AND BRAZIL 50 (2006), *available at* http://wws.princeton.edu/ research/final_reports/f05wws591g.pdf.

86. *See supra* notes 62–63 and accompanying text.

87. *See generally* MARTHA SCHTEINGART, LOS PRODUCTORES DEL ESPACIO HABITABLE: ESTADO, EMPRESA Y SOCIEDAD EN LA CIUDAD DE MÉXICO [PRODUCERS OF LIVING SPACE: STATE, ENTERPRISE AND SOCIETY IN MEXICO CITY] (1989) (describing the social, political, and economic challenges of the expansion of housing in Mexico City in the twentieth century).

Lack of secure tenure is a problem that affects millions of families.[88] But does this mean it is a constitutional problem? It is, as far as it concerns housing as a fundamental right: all legal practices that lead to (or stand in the way of) people's access to security of tenure over the house they inhabit should be considered part of the constitutional agenda of housing rights. However, constitutional lawyers do not seem to be aware of this. For example, a book by one of the most celebrated neoconstitutionalists in Mexico extensively discusses housing rights from a philosophical perspective, but fails to even mention CORETT or address the problem of tenure security at all.[89]

In the field of housing and urban studies, there have been intense debates about the legal form that security of tenure should take. Thus, Hernando de Soto's proposal to deliver property titles to families in irregular settlements was seen by many (including the World Bank and President Ronald Reagan) as a panacea, not only for dealing with the problem of tenure insecurity, but as a recipe for economic progress in underdeveloped societies in general.[90] Similarly, the impact of property titles on family and gender relations has inspired socio-legal analysis that brings to light aspects of "the social life of property" that had previously been ignored.[91]

Even if constitutional lawyers cannot see this, regularization programs bring about a number of serious and substantive dilemmas about property rights. To illustrate, consider one of the most relevant conflicts of the first decade of this century in Mexican political life. *Paraje San Juan* was the name of a piece of land in Mexico City's periphery that was illegally subdivided and has been progressively urbanized since the end of the 1940s.[92] In the late 1980s, when more than fifty thousand people inhabited the area without property titles, the city government initiated eminent domain procedures as part of a property-ownership-regularization program.[93] After almost fifteen years of litigation, a federal court awarded the (alleged) original

88. Ann Varley, *The Political Uses of Illegality: Evidence from Urban Mexico*, *in* ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES 172, 172 (Edésio Fernandes & Ann Varley eds., 1998) ("[M]illions of families liv[e] in illegal housing areas around many of [Mexico's] cities.").

89. *See* MIGUEL CARBONELL, LOS DERECHOS FUNDAMENTALES EN MÉXICO [FUNDAMENTAL RIGHTS IN MEXICO] (2004).

90. *See* HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 251 (June Abbott trans., 1989) (arguing for the proliferation of legal instruments that enable the widespread ownership of property); President Ronald Reagan, Project Economic Justice, Speech Presented at the White House (Aug. 3, 1987), *available at* http://www.cesj.org/homestead/strategies/regional-global/pej-reagan.html (praising de Soto's research).

91. *See generally, e.g.*, Ann Varley, *Gender and Property Formalization: Conventional and Alternative Approaches*, 35 WORLD DEV. 1739 (2007) (detailing the gender implications of the effects of both conventional and alternative methods for securing tenure).

92. *Regularizará la SRA el 'Paraje San Juan'* [*SRA to Regularize the 'Paraje San Juan'*], ES MAS [MORE] (Mex.) (June 16, 2004), http://www.esmas.com/noticierostelevisa/mexico/371534.html.

93. *Id.*

owner compensation for the equivalent of some USD170 million.[94] That was an exorbitant figure, and the local government (again, the one led by Andrés Manuel López Obrador)[95] refused to pay.[96] Public opinion was polarized: sympathizers of the head of the local government urged him not to pay; others demanded that in the name of the rule of law, the government comply with the judicial decision and just pay.[97] The justices of the supreme court must have perceived that the whole issue was giving a bad image to the judiciary—indeed, the compensation looked too high. So, the supreme court "attracted" the case and reduced the compensation to less than one-tenth of the original figure.[98]

This was one of the most embarrassing moments for the court in the post-post-authoritarian era. But no one seemed to realize that—behind the issue of the "rule of law"—what was at stake was nothing less than the idea of property rights. No one, both within and outside of the legal profession, posed the obvious question about the role that the landowner had played in the whole story: was he a victim of the invasion of his land? In such a case, did he at least try to prove that he resisted, by whatever means, that invasion? Or, conversely, was he the one who (contrary to the law) subdivided the land, made a profit at that time, and forty years later was ready to cash in an enormous amount of money just because our (constitutional) judges were unable to pose that question? The whole judicial procedure construed the landowner as a victim that should be compensated; as a result, the question about the social function of property was conveniently left out of the legal process.

There are many other interesting aspects in the case of *Paraje San Juan*, but there is one legal dilemma that we can recognize as relevant for the definition of property in urbanization processes: do landowners who were not diligent enough in relation to the urbanization of their lands deserve to be compensated when the time for regularization arrives? This should be a central issue in the debate over eminent domain in countries like Mexico—if

94. *See* Carlos Avíles Allende, *Desecha la Corte queja de PGR por Paraje San Juan* [*Court Dismisses Complaint of PGR by Paraje San Juan*], EL UNIVERSAL (Apr. 7, 2005), http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=123680&tabla=nacion (Mex.) (identifying judgment against the city, forcing payment of 1.81 billion pesos for expropriation of Paraje San Juan).

95. *See supra* notes 67–68.

96. *See* Allende, *supra* note 94 (noting the local government's challenge to the court's ruling).

97. *See* José Espina Von Roerich, *Paraje San Juan: el martirio de un indestructible* [*Paraje San Juan: The Martyrdom of an Indestructible*], LA CRÓNICA DE HOY [CHRON. TODAY] (Oct. 20, 2003), http://www.cronica.com.mx/nota.php?id_nota=90123 (Mex.) (describing the "fierce controversy among various political actors" over Obrador's refusal to pay).

98. Fabiola Cancino, *Paragá GDF 60 mdp por Paraje San Juan* [*GDF Will Pay 60 Million Pesos for Paraje San Juan*], EL UNIVERSAL (Feb. 4, 2006), http://www.eluniversal.com.mx/ciudad/73979.html (Mex.) (reporting that the government of Mexico City will pay 60.5 million pesos for expropriation of Paraje San Juan, and not the 1.81 billion originally ordered, after the Mexican supreme court ordered a reappraisal of the property). "Attraction" is the mechanism through which the supreme court rules on cases that in principle are within the jurisdiction of lower federal courts. C.P. art. 107, § V (Mex.).

only because irregular urbanization is a chronic feature of urban processes,[99] and at some point, we have to come to terms with the situation of the original owner of the land.

E. The Ambivalence of Communitarian Claims

There is one issue that has appeared too frequently in the previous account: the growing power of agrarian communities (*ejidos* and *comunidades*), which, during the first decades of the postrevolutionary regime, were just a piece in the complex web of the Mexican political system. For a long time, they represented an emerging form of property that was marked by subordination to the federal government; this was a central feature in the postrevolutionary regime.[100]

As agrarian reform was gradually consolidated, communities learned how to defend themselves from government manipulation, political pluralism established itself throughout the country, and new issues, such as public services in townships where the peasant population was gathered, became important in rural life. These developments produced an unintended consequence: agrarian communities ended up performing functions that local governments were unable to fulfill. Although this has been documented by a considerable number of field studies,[101] constitutionalists have not seen a problem there that might interest them—at most, they see it as an enforcement problem. We are talking here about more than half of the national territory, where the power of municipalities is easily challenged by agrarian communities.

This is, without a doubt, the most serious problem of those I have discussed, because *ejidos* and *comunidades* ended up in an extremely ambivalent position: they have taken into their own hands the satisfaction of those collective needs that municipalities were not prepared to take care of. At the same time, they are seen by agrarian law as mere landowners. This is not the place to go deeper into this question, but it should be clear that these corporations are both a hope for communitarianism and a threat to statism. It

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99. *See* Martim O. Smolka & Adriana de A. Larangeira, *Informality and Poverty in Latin American Urban Policies*, *in* THE NEW GLOBAL FRONTIER: URBANIZATION, POVERTY AND ENVIRONMENT IN THE 21ST CENTURY 99, 99–113 (George Martine et al. eds., 2008) (describing the "more than a century of short-sighted urban policies" in Latin America).

100. ARTURO WARMAN, EL CAMPO MEXICANO EN EL SIGLO XX [THE MEXICAN COUNTRYSIDE IN THE TWENTIETH CENTURY] 154 (2001).

101. *See, e.g.*, PEDRO F. HERNÁNDEZ ORNELAS, AUTORIDAD Y PODER SOCIAL EN EL EJIDO [AUTHORITY AND SOCIAL POWER IN THE *EJIDO*] 155–57 (1973) (analyzing how different *ejidos* prioritize the community projects they undertake themselves, such as provision of electricity, irrigation, and construction of schools); Antonio Azuela, *Ciudadanía y Gestión Urbana en los Poblados Rurales de Los Tuxtlas* [*Citizenship and Urban Management in the Rural Village of Los Tuxtlas*], 28 ESTUDIOS SOCIOLÓGICOS [SOC. STUD.] 485, 485–86 (1995) (Mex.) (noting the weak presence of local authorities in *ejidos* and arguing that the process of urbanization that these villages have undergone has led to the creation of public goods managed by *ejido* communities).

should be obvious that this tension has a structural character and that it should be at the center of our constitutional agenda.

III. A Brief Visit to Theories

If the problems I discussed thus far constitute a crisis in the constitutional rules on property in Mexico, one of the ways to address that crisis is to consider the theories we have at hand. Anyone who seeks orientation as to how to conceptualize property will come across three groups of theories. First, we can use utilitarian theories, that is, theories that follow the "greatest happiness principle."[102] These assume that under certain circumstances, different property regimes will produce different results in terms of that principle.[103] They vary according to what sort of circumstance will be predominant, but they all aspire to an explanation of individual behavior as the basic focus of analysis.[104] What they have to offer is the possibility of getting the institutions right, that is, of identifying the sort of property rules that will incentivize the desired behavior.

There are at least two reasons why these theories cannot be ignored. First, they constitute the most straightforward way to analyze fundamental issues such as resource degradation. One cannot overstate how important it is for scholars to reflect about the impact of property arrangements on the use (or misuse) of valuable natural resources and ecosystems.

Second, the application of a utilitarian approach to common property arrangements over natural resources—which led to the awarding of the Nobel Prize in economics to Elinor Ostrom in 2009—has been a breakthrough in the study of property.[105] The possibility that common property regimes may not necessarily lead to the famous "tragedy of the commons"[106] has prompted the formation of a growing academic community devoted to the study of the social dynamics of resource use from a utilitarian

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102. *See generally* Amnon Goldworth, *The Meaning of Bentham's Greatest Happiness Principle*, 17 J. HIST. PHIL. 315, 315–16 (1969) (discussing the "interesting history" of the "Greatest Happiness Principle").

103. *See* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 5–7 (1990) (setting out the operative factors and consequences of several utilitarian individual and collective welfare maximization theories).

104. *See id.* at 6 (noting that a common feature of such models is that they define "the accepted way of viewing many problems that individuals face when attempting to achieve collective benefits").

105. *See id.* at xi (describing the content and perspective of Ostrom's work).

106. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (arguing that common property causes a tragedy, as "[e]ach man is locked into a system that compels him to increase his [marginal utility] without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest . . . . Freedom in a commons brings ruin to all."). *But see* Rose, *supra* note 40, at 766–71 (arguing that certain public resources and activities benefit from participation and are therefore "the reverse of the 'tragedy of the commons': it is a 'comedy of the commons,' as is so felicitously expressed in the phrase, 'the more the merrier.'").

perspective.[107] Constitutionalists cannot afford to ignore what this movement has to say about property. This cannot be exaggerated in the case of Mexico, where almost two-thirds of the forested land is owned collectively by agrarian communities.

In fact, utilitarian ideas have already been used, during the early 1990s, to modify Article 27, in order to give agrarian communities the right to transfer their lands and to allow foreign investment in mining.[108] Almost two decades later, constitutional scholars have not even tried to explain what sort of property regime we have after such a neoliberal surgery.

A second group of theories is built around the idea of fundamental rights. They constitute a strong link between legal scholarship and political philosophy. Despite their diversity, they all have in common the concern about the set of values that justify and give meaning to the constitutional order. Their importance cannot be overstated, as they provide substantive arguments about the legitimacy of legal institutions. The most influential school of constitutional thinking in Latin America, known as neoconstitutionalism, distinguishes itself precisely by recognizing fundamental rights as the organizing principles of contemporary constitutions.[109]

It is interesting to note that the question of property stands at a very uncertain place in the arena of fundamental rights. To be sure, classical liberal thought is still present in most constitutional theories as the main source for a defense of private property, not only as a fundamental right, but even as the "guardian of every other right," to use Ely's expression.[110] Against this version of the liberal tradition, there is a growing body of literature in which social, cultural, and economic rights seem to be in

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107. *See* Brendan Fisher et al., *Common Pool Resource Management and PES: Lessons and Constraints for Water PES in Tanzania*, 69 ECOLOGICAL ECON. 1253, 1254 (2010) (describing Ostrom's 1990 work as one of three "seminal works" that have spawned modern common pool resource analysis); *see also, e.g.*, *infra* note 108.

108. *See* Jessa Lewis, *Agrarian Change and Privatization of* Ejido *Land in Northern Mexico*, 2 J. AGRARIAN CHANGE 401, 405 (2002) (stating that the purpose of the changes to Article 27 was to "moderniz[e] the *ejido*" which was seen as a "barrier[] to economic efficiency and progress"); *The Austin Memorandum on the Reform of Art. 27 and its Impact Upon Urbanization of the* Ejido *in Mexico*, 13 BULL. LATIN AM. RES. 327, 327 (1994) (describing the changes made to Article 27, including the right to "sell, rent, sharecrop or mortgage their land parcels" and the "opportunit[y] for private capital (including foreign) to purchase former *ejido* holdings").

109. *See* Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, *in* CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141, 152, 156 (Javier Couso et al. eds., 2010) (describing the "rising influence of neoconstitutionalism in Latin America" and its emphasis on natural law and the analysis of fundamental rights). Legal positivism, that dominated a good part of the twentieth century, is the "mainstream" against which neoconstitutionalism builds its own prestige. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 33–35 (1986) (defining and discussing legal positivism and noting that it "has attracted wide support").

110. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26 (1992) (quoting Arthur Lee, an American diplomat during the American Revolution).

contradiction with private property. Debates about the privatization of water services (which for some represents a threat to the human right to water) are only one illustration of this tension.[111]

Moreover, one of the leading figures of neoconstitutionalism, Luigi Ferrajoli, has advanced the argument that property should *not* be seen as a fundamental right.[112] It is beyond the scope of this Article to present and discuss that argument; it suffices to say that this represents the most recent attempt to call into question the status of property as a right.

When Mexican jurists finally decide to study property as a constitutional issue, it will be interesting to see what they have to say about its status as a fundamental right. But regardless of whether they embrace Ferrajoli's thesis or not, that would not be enough to resolve the problems I referred to in the previous Part.[113] Unless conflicts reach courts under the form of conflicts between rights (and most conflicts do not), it does not matter whether property is a "second-class" right. As long as the law provides protection to property owners, and legal operators are ready to act accordingly, the fundamental dilemmas around property issues will be there as a challenge for the legal profession.

The third group of theories can be described as social function theories. As I mentioned earlier, this catch phrase was adopted in Mexico by many jurists, and even by the supreme court, as a way of making sense of our constitutional regime of property.[114] Historically, these theories are linked to the welfare state and, in particular, to the idea that property rights are to be protected only as far as they contribute to the creation and circulation of wealth without becoming an obstacle to the satisfaction of collective needs.[115] In the context of urban and environmental policy, these theories provide the rationale for the establishment of planning as a form of regulation that restricts the rights of land and property owners for the sake of the general welfare. Even if, to some observers, these theories might look profoundly anti-liberal, the truth is that they provided the theoretical justification for the maintenance of private property as the basic institution of capitalism.[116]

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111. For a summary of the debate over the privatization of water, see generally KAREN BAKKER, PRIVATIZING WATER: GOVERNANCE FAILURE AND THE WORLD'S URBAN WATER CRISIS 78–108 (2010).

112. LUIGI FERRAJOLI, DERECHOS Y GARANTÍAS. LA LEY DEL MÁS DÉBIL [RIGHTS AND GUARANTEES. THE LAW OF THE WEAKEST] 45–46 (1999) (discussing the differences between fundamental liberty rights and property rights).

113. *See supra* Part II.

114. *See supra* note 29 and accompanying text.

115. *See, e.g.*, THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY 149 (2001) (discussing how the "concept of social function" is used in the German welfare state to balance the "protection of property rights between the individual and the communal interests").

116. A wide variety of new doctrines called for a redefinition of property rights in the context of the industrial society. *See, e.g.*, HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY 295 (D. Appleton & Co. 1886) (1879) (advocating that common ownership

There are at least two main variants of social function theories. The first one can be found in the German constitution, which uses slightly different language. Instead of using the word *function*, it simply proclaims that property rights come with a set of inherent social obligations.[117] Restrictions that are imposed upon property owners are not seen as external phenomena in relation to property rights, but as part and parcel of property as an institution.[118]

The second variant carries with it a bolder proposal. Legal scholars in Latin America who follow it make a distinction between saying that property is a right that *has* a social function and saying that property *is* a social function. The origin of this formulation is the work of Leon Duguit, a French jurist who tried to apply Comtian positivism and Durkheimian functionalism to legal phenomena.[119] The idea was not to affirm a moral obligation on the part of property owners, but to assert that sociological concepts were enough to describe what already was happening in the field of property in industrial societies—solidarity as a social fact.[120] Therefore, such concepts substitute for old legal concepts. The very notion of "right" should then be replaced by the concept of "function."[121] Clearly, in this respect this theory failed: far from disappearing from legal thought, the idea of fundamental rights became central in postwar legal scholarship in the Western world, in a movement that has been described as "the rise and rise of human

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of land "is the remedy for the unjust and unequal distribution of wealth apparent in modern civilization, and for all the evils which flow from it"); RICHARD TAWNEY, THE ACQUISITIVE SOCIETY 36–37 (1921) (decrying a system of inherited property and wealth that produced "irrational inequalities" and subverted principles of equal opportunity). Even the Catholic Church developed its new doctrine on property through the *Rerum Novarum* encyclical issued by Pope Leo XIII on May 15, 1891. *See generally* Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor* (1891), *reprinted in* 2 THE PAPAL ENCYCLICALS 1878–1903, at 241 (Claudia Carlen ed., 1981) (endorsing the unique human capability to possess private property).

117. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 14(2) (Ger.) ("Property entails obligations. Its use shall also serve the public good.").

118. *See* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY 100 (2006) (stating that Article 14(2) "explicitly indicates that in the German constitutional scheme, a social obligation is inherent in ownership").

119. *See* M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191, 201–02 (2010) (noting that Duguit adopted Durkheim's idea of "social solidarity" and that Duguit's method of observation originated in Comte's positivism).

120. *See id.* (discussing Duguit's approach to social solidarity); *see also* WOLFGANG GASTON FRIEDMANN, LEGAL THEORY 229–30 (1967) (summarizing Duguit's "discovery of social solidarity as a fact and necessity of social life" and exploring its implications in his writings).

121. The idea of doing without the concept of "subjective rights" was part of the wider scientific project of legal positivism. *See, e.g.*, Alf Ross, Comment, *Tû-Tû*, 70 HARV. L. REV. 812, 818, 825 (1957) (stating that "the concept of rights is a tool for the technique of presentation serving exclusively systematic ends" and that what is really important is "the exercise of force (judgment and execution) by which the factual and apparent use and enjoyment of the right is effectuated"); *see also* HANS KELSEN, PURE THEORY OF LAW 129 (Max Knight trans., Univ. of Cal. Press 1978) (1934) (arguing that in a pure theory of law, the distinction between objective law and subjective rights is dissolved).

rights."[122] As for the idea of social function, it is simply impossible to find it in any relevant contemporary legal theory.

Nevertheless, in Latin America the idea of property as a social function is widely and highly regarded.[123] In fact, it has presided over the promotion and defense of some of the most innovative and progressive pieces of legislation in the region for the previous two or three decades.[124] Authors on the more conservative side of the ideological spectrum tend to disagree with this theory, favoring an approach that emphasizes the virtues of a market economy.[125] Obviously this is a question of political preference. For this author, even if talking about social function is theoretically weak (because the word "function" is meaningless in contemporary legal theory), its political implications are positive to the extent they express and reinforce the commitment of state institutions to counteract the negative aspects of a market economy. Further, the term *social function* highlights the importance of collective interests that, within certain limits, should prevail over those of property owners.

In Mexico, the idea of a social function of property can be used to bring the relationship between property and social justice back into the constitutional debate. In fact, if the core of social function theories is the idea that property implies the existence of an inherent social obligation, this idea can be used to respond to many of the challenges of our time. There is no obstacle between thinking about an intergenerational obligation inherent in property rights and imposing limitations that lead to the sustainable use of resources (particularly natural resources) that can be privately owned. This future depends on the social acceptance of this idea in the democratic process.

Even if one embraces the idea of a social function in the political arena, it has two additional limitations. First, it is not sensitive to the impact that different property regimes may have, under certain circumstances, upon the use of natural resources. In other words, it does not respond to the problems

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122. *See* ANTHONY WOODIWISS, HUMAN RIGHTS 79–80 (2005) (introducing a discussion of what Kirsten Sellars has ironically termed the "'rise and rise' of human rights" in the United States and Japan, and conceding that the "Western-European aspect of the story of the revival of rights disclosure has been told sociologically and very well many times already").

123. In Latin America, to a much larger extent than in Europe, Duguit's ideas were used in the redefinition of property in the context of progressive–populist political regimes. *See* Mirow, *supra* note 119, at 195 ("Based on Duguit's work, drafters of Latin American constitutions changed the way property was defined in the first decades of the twentieth century.").

124. *See* EDESIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 98 (1995) (noting that since 1988 in Brazil, there has been a slow process towards affirming the social function of property through the enactment of urban legislation).

125. *See, e.g.*, Paul L. Poirot, *The War on Property*, *in* FREE MARKET ECONOMICS: A BASIC READER 29, 30 (Bettina Bien Greaves ed., 1975) ("Private ownership and control, of itself, does not assure the most efficient use of scarce resources in service to others. That assurance comes as a result of competition."); Leonard E. Read, *Free Market Disciplines*, *in* FREE MARKET ECONOMICS: A BASIC READER, *supra*, at 265, 265 ("Contrary to socialistic tenets, the free market is the only mechanism that can sensibly, logically, intelligently discipline production and consumption.").

that utilitarian theories pose, and those are real problems. Second, it does not address the status of property as a fundamental right, that is, it is not sensitive to the debates in the field of political philosophy and jurisprudence, which may potentially have an impact when courts construe the cases before them as conflicts between rights. In order to be convincing and to make sense of the institution of property, any theory of property must face the intellectual challenges that these two intellectual traditions pose.

In order to illustrate the limitations of all of the theories on property I have just mentioned, I will mention an issue for which none of the three groups of theories can give an answer—the social ambivalence of peasants' rights over land and natural resources. As we have seen, Mexican *ejidos* and *comunidades* are more than mere forms of private property. Even if they can be depicted as such by some rigorous theoretical standard, they functionally operate as forms of local government.[126] From the traditional point of view of public law, this situation is untenable, as they enjoy the privileges of both worlds and none of the responsibilities: they exert power over their "territory," but they are not subject to political accountability. At the same time, they have the legal protection of private owners, but they manage to escape the force of state institutions.

From a communitarian point of view (the opposite of a public law point of view), the emerging power of rural communities can be seen as promising. This is obviously not the place to discuss that issue, but it should be clear that it will be one of the main challenges for those who want to take property seriously as a constitutional problem.

IV. Final Remarks

I have referred to a variety of issues that, taken together, amount to a crisis in the constitutional regime of property in Mexico. I have emphasized variety to remind the reader that property is a complex and highly problematic field. It includes situations as diverse as corporations subject to government regulations, agrarian communities confronted with the depredatory practices of their own members (the tragedy of the commons), families (and individuals within them) seeking legal recognition for their homes, and government agencies that have to use eminent domain to complete public works. In other words, I have tried to show that even if one can speak of a crisis of the postrevolutionary property regime of Mexico, such a crisis is made up of several social issues, some of which are relatively independent from each other.

In the last Part, I suggested that the different theoretical approaches to property issues cannot be ignored, as they illuminate different aspects of the complex world of property as an institution. However, I have also argued that they do not provide enough elements to deal with the complex agenda

126. *See supra* subpart II(E).

we have in front of us. How, then, should we proceed? For the moment, I can only point in two directions. First, we must recognize that property is a constitutional issue—in the case of Mexico, it seems that this requires an explanation. Second, we have to listen to what social sciences have to tell us about property relations and their transformations.

Property is a constitutional problem to the extent that the social changes I have described are, at the same time, changes in the scope and intensity of state power: a weakened power of eminent domain; a failure of the government power to regulate land uses; the growing power of agrarian communities that act as local governments; and the growing challenge, both in public opinion and in actual practice, of the state ownership of certain natural resources (particularly water) and places with symbolic value (archaeological sites). All of these are not only "social" processes taking place outside state institutions, they are part and parcel of the transformation of the Mexican state in recent decades. These changes may not affect the words in the constitution, but they change their social and political meaning, as well as the expectations of relevant social actors before them.

On the other hand, the contribution of social sciences lies in the fact that they help us to understand the sorts of substantive dilemmas that administrative agencies and judges face in property cases—even if in many instances they do not recognize them. Let us recall some of the most relevant of those dilemmas in three different areas: the environmental agenda, the urban agenda, and the patrimonial agenda.

The environmental agenda calls for the sustainable use of resources. In rural areas, this issue has replaced that of land distribution. Today, the dominant legal question is the following: what should be the extent of property rights of agrarian communities and individuals who own land with special ecological value? In practical terms, what sort of land-use restrictions should give rise to a right to compensation? This is even more relevant given the fact that state organs with the legal power to regulate land uses (for the most part local governments) are extremely weak in the face of private landowners and agrarian communities. If we understand the social power of these stakeholders, and the way they exercise this power, we will surely be in a better position to determine how land-use regulations might be reinforced.

On the other hand, the urban agenda raises a number of dilemmas related to social justice. To name a few, in land regularization programs, what should be the rights of the original landowners given (or regardless of) the way they conducted themselves during the formation of irregular settlements? What is the correct policy to determine which members of the family should get the property title? How does the government ensure that increases in land prices that are the product of the collective effort of urbanization do not end up in the pockets of a handful of landowners and developers? By knowing how that power is exercised, we should be in a better position to know how to strengthen state institutions.

The patrimonial agenda is particularly important for a country like Mexico that has put so much effort into the formation of a national patrimony as a foundation of its identity. One main question to be addressed is this: is it possible to change the emphasis of our concept of national patrimony from a defensive institution to an active assumption of responsibilities toward future generations?

Finally, there are questions that affect both urban and rural life, local government, and a huge part of the national patrimony. Considering that agrarian communities have become, in many regions of the country, de facto local authorities, what should be their proper place within the constitutional order? Is it possible to think of them as a fourth level of government? If so, is it possible to transform them so that they recognize that all residents have the same rights as the peasants who originally received the land?

These dilemmas are of great importance, even as they remain invisible to constitutional lawyers and scholars. Of course, sociological approaches are a necessary, but not a sufficient, condition to achieve a new, proper framing of property as a constitutional issue. Framing property as a constitutional issue cannot be the direct outcome of sociological analysis alone—though this was the positivistic dream of Duguit and nineteenth century sociology. But ignoring what social sciences can tell us about property would amount to isolating legal scholarship from real life. It remains to be seen whether constitutional scholars are ready to take that risk.

Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions

Daniel M. Brinks* & William Forbath**

I. Introduction

Barely more than a decade old, the jurisprudence of social rights across Latin America has inspired a rich debate among judges, scholars, and advocates about the impact of judicial enforcement of social and economic rights (SER) upon the distribution of social goods like health care and education, about what effects the involvement of courts has upon the politics and practices of social provision, and about how to assess them. These articles are important contributions to those debates.

Martin Luther King described the rights-bearing provisions of the Civil War Amendments of the U.S. Constitution as "promissory notes";[1] that is not a bad way to consider the SER provisions of the many new (as well as the several older but profoundly modified) constitutions of Latin America that were crafted from the late 1980s through the 1990s. Forged after long struggles against violent and authoritarian regimes, these constitutions aimed to consolidate democracy. But the constitutions arose in the context of economic as well as political transformations. Alongside democratization, Latin America in the late twentieth century was also witness to the demise of mid-century models of economic development and social provision. The "developmental state," the "planning state" as well as the traditional "welfare state" were assailed in the name of free markets and neoliberal reform. Privatization of industry, cut backs in social services, an easing of import restrictions, and scores of other political–economic changes threatened the already precarious lot of the poor and working classes, even as they were being newly outfitted as democratic citizens.

The impulse behind the SER provisions of the new constitutions was somehow to match the democratic promise of participation in public life with a promise of participation in the material opportunities, public goods and social wealth that neoliberal reforms were thought to promote. Against the neoliberal grain of the times, the SER provisions echoed older socialist,

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1. *See* Martin Luther King, Jr., I Have a Dream, Keynote Address of the March on Washington, D.C., for Civil Rights (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 217 (James M. Washington ed., 1986).

social democratic, or social Catholic ideals. Their drafters and proponents may have seen them as promissory notes to be redeemed in the form of protection against the harshness and widening inequalities of new market-based political economies. The new constitutions reflect the old social democratic insight that civil and political rights, separation of powers, and other political and institutional arrangements cannot do all the work of vouchsafing stable liberal democratic regimes. But what kinds of legal initiatives might begin to redeem the promises of SER was up for grabs.

Two decades later, we can begin to take stock of what has emerged. If we are right about the kinds of hopes and burdens borne by the new SER provisions, it should be no surprise that disagreements abound. The empirical complexities are compounded by normative ones. Just what kind of social provision do constitutional SER promise? What should count as progress toward redeeming them? And what are the appropriate baselines for measuring that progress? It is a mark of their richness that these articles help us think about all these questions.

II. State of the Art

There is a notable silence in these three articles,[2] one which highlights the state of both theory and practice relating to the judicial enforcement of SER in Latin America. All three focus on the impact and effects of this practice—they argue about how to measure the impact and about how to depict and characterize the different kinds of effects litigation might have, and they question the wisdom of various approaches to litigation and judicial intervention. None of the articles spends much time at all on what might be considered threshold questions—of separation of powers, for example, and whether SER are or should be justiciable. Even the most critical article, Ferraz's article on health rights litigation in Brazil, argues that judicial interventions should be evaluated not a priori, but rather based on the strength of their effects[3]: Do judicial attempts to enforce SER improve conditions for the marginalized or do they actually make things worse? This set of concerns reflects the fact that the courts of the region are well past discussing whether they should enforce SER, and are now fully engaged in exploring how and to what effect they can and should enforce them.

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2. Paola Bergallo, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 TEXAS L. REV. 1611 (2011); Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS L. REV. 1643 (2011); César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEXAS L. REV. 1669 (2011).

3. Ferraz, *supra* note 2, at 1645 ("In my view, there is no a priori legitimate role for courts in a democracy with respect to the adjudication of social and economic rights .... Courts' legitimate role hinges strongly, in my view, on whether they can do a good job ....").

Like the court he examines, Rodríguez-Garavito is interested chiefly in broad, structural reform litigation.[4] He begins by discussing the multiple effects of rulings by the Colombian Constitutional Court that have addressed conditions in domains as disparate as prisons, internally displaced persons (IDPs, in the parlance of international humanitarian law) and the public health care system. In these cases and others, the court found that existing conditions violated fundamental constitutional commitments, issued a finding of an "unconstitutional state of affairs,"[5] and began efforts to change this state of affairs. The court orders typically involve a large number of governmental and nongovernmental actors, complex public policy issues, high ranking government officials and vastly expensive undertakings. The IDPs in question, for instance, amount to five million people living in precarious conditions, with limited or no access to adequate housing, education, health care, and other basic services. The health care decision aims to unify the public noncontributory health care system with the contributory system in order to offer the same care to those who pay for health care and those who do not. It aims to transform the entire public health care system in Colombia.[6]

Bergallo also describes litigation over health care, but this time in Argentina, focusing on how litigation has affected access to HIV/AIDS treatment.[7] According to her chronicle, courts and legal activists began collaborating in about 1990,when HIV-positive people were routinely denied access to basic services. At the time, the Catholic Church hierarchy opposed public health service efforts against the spread of HIV/AIDS, and politicians and political appointees were more concerned with winning Church support than with effectively addressing HIV/AIDS. As in South Africa during that nation's era of official AIDS "denialism," it was during this period of greatest political resistance that litigation based on the social right to health had its most important, transformative effects.[8] Bergallo shows how court orders "destabilized" the status quo,[9] opening the way for the creation and growth of comprehensive programs to address the HIV/AIDS epidemic in Argentina. Later litigation, in a more favorable policy environment, was limited to extending individualized remedies to individual litigants.

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4. Rodríguez-Garavito, *supra* note 2, at 1669.

5. *Id.* at 1670.

6. *Id.* at 1669–71.

7. Bergallo, *supra* note 2, at 1611.

8. *Cf.* William Forbath with assistance from Zackie Achmat, Geoff Budlender & Mark Heywood, *Cultural Transformation, Deep Institutional Reform and SER Practice: South Africa's Treatment Action Campaign*, *in* STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 51 (Lucie E. White & Jeremy Perlman eds., 2010).

9. Bergallo, *supra* note 2, at 1611; *cf.*, Charles Sabel & William A. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

Ferraz sharply questions these more optimistic accounts of SER litigation, on the basis of the Brazilian experience with right to health litigation. He focuses on the vast number of individual claims to medications not being provided by the public health system—at least 40,000 such cases per year, Ferraz estimates—and he argues that the cumulative effect of this litigation is likely to be a deeply regressive one.[10] Relatively well-off claimants, with access to lawyers and courts, are bound to secure an ever greater proportion of the public health budget, leaving less and less for the have-nots, who have more limited access to the courts. Moreover, Ferraz argues, now that Brazilian courts have embarked down this path, this regressive effect can only grow. Confronted with gripping, often life-or-death, individual claims, courts are unlikely to resist granting relief regardless of the broader distributional consequences. Therefore, Ferraz concludes that, at least in the case of individual claims to medication, SER litigation cannot be fixed, and judges should be barred from adjudicating these claims.[11]

All together, then, these three articles offer a quick and ranging overview of the experience and the literature on SER in Latin America. Bergallo provides the most richly contextualized account of the political and institutional circumstances within which SER litigation unfolds, assessing how, in light of the constraints and opportunities such contexts create, advocates' litigation strategies can shape judicial outputs and affect the social and political impact of SER litigation. Rodríguez-Garavito offers a more systematic typology of effects arising from litigation—direct and indirect, material and symbolic. And he examines the ways that different kinds of judicial remedies—"strong" versus "weak" judicially-pronounced rights, detailed, managerial or juristocratic decrees versus open-ended and "dialogical" or collaborative ones, and extended versus modest or non-existent periods of judicial monitoring of the implementation of decrees—may account for the magnitude of such effects. Finally, Ferraz raises in a very pointed way what is in some ways the ultimate question for advocates and academics alike: what is the overall effect of this activity on the distribution of the social goods that SER are supposed to guarantee?

III. Broader Contexts and Challenges

The articles pose theoretical and methodological challenges to one another. Ferraz's article challenges the others to be critical and rigorous in their evaluation of the regressive potential of SER litigation. Bergallo's article invites reflection on what the other two articles, particularly Ferraz's, miss by dint of abstracting away from political and institutional contexts.

10. Ferraz, *supra* note 2, at 1652.

11. *Id.* at 1658–62.

Finally, Rodríguez-Garavito may be read to prod his colleagues to be comprehensive and precise about the sorts of effects one might attribute to judicial interventions, and to be clear about what is being left out of the analysis. In what follows, we will first place the articles in a more global context, then draw out some of the challenges the articles offer each other, and finally offer some challenges of our own to the common enterprise on which they are embarked.

The subject matter of the three articles—SER litigation and the judicial enforcement of SER—is a relatively new activity, the consequences of which we are only beginning to understand. One thing is already quite clear, however. This is a massive and widespread phenomenon, which has already grown beyond the expectations of the theorists who first engaged the question of the enforceability of SER in national constitutions.[12] A global survey of SER decisions includes judicial opinions resting on the right to housing, work, health, a clean environment, a minimum level of subsistence, a dignified existence and much more.[13] A study of the scope, causes, and effects of SER litigation in Brazil, India, Indonesia, Nigeria and South Africa reveals that courts are making decisions that purport to allocate vast amounts of resources, and change or create policy in all kinds of areas—from clean air to hot school lunches to national education budgets. These decisions affect the lives of hundreds of thousands, probably millions of people.[14] The phenomenon has swept the more progressive courts in Latin America, filling the dockets of courts in Costa Rica,[15] Colombia,[16] Brazil,[17] Argentina,[18] Venezuela,[19] and others. Indeed, whereas fifteen years ago scholars and commentators decried the weakness of the Latin American judiciary,[20]

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12. *See, e.g.*, Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996).

13. MALCOLM LANGFORD, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (2008).

14. VARUN GAURI & DANIEL M. BRINKS, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 324–33 (2008).

15. Bruce M. Wilson, *Rights Revolutions in Unlikely Places: Colombia and Costa Rica*, 1 J. POL. LATIN AM. 59 (2009).

16. *Id.*; Rodrigo Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52 LATIN AMERICAN POL. & SOC'Y 67 (2010); 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 (2010).

17. Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100 (Varun Gauri & Daniel M. Brinks eds., 2008).

18. PAOLA BERGALLO, JUSTICE AND EXPERIMENTALISM: JUDICIAL REMEDIES IN PUBLIC LAW LITIGATION IN ARGENTINA (2005).

19. ANGEL R. OQUENDO, LATIN AMERICAN LAW (2006).

20. LINN A. HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (2007); Linn Hammergren, UNITED NATIONS DEVELOPMENT PROGRAMME,

current work and commentary tend to emphasize courts' outsize influence on politics and policies. In particular, they underscore that influence in respect of SER.[21]

Perhaps this is not so surprising. As we noted at the outset, since the 1970s, Latin America has undergone three separate but related transformations. First came the wave of democratization. During the late 1970s, all but three of the countries of the region were authoritarian, and many suffered under the most brutal and violent regimes of their history; thirty years later, nearly all the countries are democratic, and the region is experiencing the most stable and sustained period of democracy in its history.[22] Occasionally before, but usually shortly after this political transformation came an economic transition—not as harsh, perhaps, as that experienced in Eastern Europe but roughly similar. Most of the countries of the region embraced the so-called Washington consensus, enacting, to a greater or lesser degree, neoliberal market reforms that cut back on social services, eased import restrictions, and moved the region away from the traditional welfare state model.[23] Finally, almost as a bridge between the greater participation in public life implied by democratization, and the diminished participation in public goods implied by neoliberal reform, the countries of the region adopted new constitutions or modified existing ones to incorporate a lengthy list of social and economic rights into their fundamental laws.[24]

Many of the drafters of these new constitutions and amendments undoubtedly thought that a robust SER regime was a way to mitigate the harshness of a market-based economy. Often enough, drafters and negotiators were concerned to bring left-wing movements on board the new democratic constitutional settlements; an unqualified embrace of the neoliberal political-economic settlement was probably too much for the left to stomach. The poor masses, who were the left's real or imagined constituents, could not remain dispossessed of everything but the ballot. Often enough, too, drafters included social democrats or social Catholics or simply moderates who understood that a stable constitutional democracy demanded

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Fifteen Years of Justice and Justice Reform in Latin America: Where We Are and Why We Haven't Made More Progress (March 2002), http://www.undp-pogar.org/publications/judiciary/linn2/.

21. JAVIER COUSO ET AL., CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (2010); RACHEL SIEDER ET AL., THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (2005); ALICIA ELY YAMIN & SIRI GLOPPEN, LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? (2011).

22. Scott Mainwaring et al., *Classifying Political Regimes in Latin America, 1945–1999*, 36 STUD. COMP. INT'L DEV. 37 (2001).

23. *See* SEBASTIAN EDWARDS, CRISIS AND REFORM IN LATIN AMERICA: FROM DESPAIR TO HOPE (1995); PUBLIC SUPPORT FOR MARKET REFORMS IN NEW DEMOCRACIES (Susan C. Stokes ed., 2001).

24. DANIEL M. BRINKS & ABBY BLASS, THE INSTITUTIONAL ROOTS OF JUDICIAL POWER: LATIN AMERICA FROM 1975 TO 2009 (2011).

improving the material fortunes of those masses. They hitched their hopes to the idea that neoliberal, market-based reforms would bring growth; and growth would underwrite redistribution—and enable government to redeem the promises of SER.

Indeed, many of the people most actively promoting the judicial enforcement of SER will explain that this is exactly their agenda: to shield the most vulnerable from the uncertainties and harshness of a pure market model, and to extend the benefits of public services and public goods to the most vulnerable.[25] If SER advocacy and adjudication are going to do this work, however, the articles in this section suggest, a number of things have to be true.

First, as Bergallo emphasizes, it is important to consider the context within which rights claims are made.[26] Key questions here relate to several aspects of the socio-political environment. One is the broad institutional context—How much state capacity is there? How do coordination problems across levels and units of government impede the ability of courts to address problems? And are courts potential sources of coordination? Do public or private actors provide the services? And what are the material, institutional, and ideological interests of these actors? Are key policy makers and bureaucrats actively opposed to the claims in question, or is the litigation a potential source of leverage or "cover" for some state actors who may benefit from judicial intervention? Other issues relate to the organizational capacity and goals of the litigants: Who is bringing these claims? What is their experience with rights-based litigation? How well linked are they to potential allies and collaborators in social movement, policy making, and professional networks? How sophisticated are they in crafting litigation strategies that exploit or forge such links? What vision of lawyering animates their work? What kind of impact are they after? Is it merely delivering the goods to individual clients? Is it drawing attention to neglected failures of social provision? Or is it empowering and gaining bargaining leverage or a "seat at the table" for movements and representatives of marginalized constituencies? As Bergallo points out, all these factors strongly mark the character and effect of SER claims.

Even taking account of all these matters, so Rodríguez-Garavito's article implies, there remains some question about whether judicial interventions in these broad problems of social provision can have any effect at all. Taking as the null hypothesis the argument that courts are largely

25. In addition to our many conversations with activists, judges, and lawyers from the region, one can find such references in various publications. *See, e.g.*, VÍCTOR E. ABRAMOVICH & CHRISTIAN COURTIS, LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES [SOCIAL RIGHTS AS ENFORCEABLE RIGHTS] (2002); Víctor E. Abramovich, *Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies*, 2 SUR INT'L J. HUM. RTS. 181 (2005).

26. Bergallo, *supra* note 2, at 1625.

ineffective in producing large-scale social change, he argues we must not fall into a facile reductionism in evaluating the impact of the cases. His article thus presents a framework for classifying effects as direct or indirect, symbolic or material. Using this framework, and resting on extensive fieldwork, he maps the impact of the structural cases decided by the Columbian Constitutional Court described earlier. Whether and to what extent courts have this impact, he argues, depends in large part on the courts' approach—do they announce strong rights, do they employ strong remedies, do they adopt monitoring mechanisms, do they adopt a dialogic approach that enlists all sides to the litigation and beyond—civil society organizations, state bureaucrats and social movement actors—in fashioning and refashioning potential solutions? Can they prod and cajole all these parties into negotiating and collaborating with one another? Thus it appears that, if judicial interventions on behalf of SER are to have any impact at all, courts and advocates alike will have to be sophisticated in ways that go far beyond traditional roles.

But Ferraz, as we saw, mounts an even stronger critique. If SER are to cushion the harshness of the market on behalf of the underprivileged, they cannot be a mechanism to extend and reinforce privilege.[27] Intuitively, his argument has considerable appeal: if he is right that courts are, in these cases, allocating scarce resources in a more or less zero sum environment, and that the litigants are predominantly from the middle class or higher, then in every individual case involving medications there are a million unrepresented—and underprivileged—interested parties. In a system that relies heavily on litigation to determine the allocation of resources, the interests of these less privileged nonlitigants are bound to be undervalued. Over time, we would expect the provision of public health goods to shift in favor of the litigant classes and against the poor. If Ferraz's critiques are on target, this could undermine the entire SER project—SER litigation has effectively become a Trojan horse for bringing the inequalities of the market back into the allocation of the very goods SER were to place beyond the logic of the market.

Ferraz makes a strong case for this position. But the other two articles caution against too swift an embrace of his view that SER and their judicial enforcement are yet another mechanism to preserve and enhance existing inequalities.[28] Ferraz focuses strictly on individual rather than collective cases, and, in Rodríguez-Garavito's language, on the direct, material effects of these cases. But, as he acknowledges, these are the most likely cases, and the most likely effects, to show a regressive impact. Direct effects of suits on

27. Ferraz, *supra* note 2, at 1663.

28. *See* Bergallo, *supra* note 2, at 1612 (describing the results of studies on the effectiveness of judicial decisions to effect social change and determining that a concise conclusion is difficult); Rodríguez-Garavito, *supra* note 2, at 1689 (arguing that judicial decisions can impact SER and describing how that impact can be increased).

behalf of individuals are, of course, closely tied to litigant resources—by definition, those individuals who cannot litigate cannot enjoy the direct, material effects of individual litigation. But the more we consider indirect (and symbolic) effects, and the more we consider group litigation and suits seeking programmatic change and structural reforms, the more these cases can benefit those who have never set foot in a courtroom. And if we expand our view further to what Bergallo calls political effects—the kinds of leverage litigation produces for state actors promoting programmatic change, or what Rodríguez-Garavito describes as the reframing of public discourse and policy initiatives by dint of rights advocacy—we again find that the benefits of litigation—even of individual cases—flow to people far removed from the centers of litigation, as Bergallo illustrates in the case of HIV/AIDS programs in Argentina, and their spread from the capital to outlying areas.

Perhaps more importantly, before we can reach a conclusive evaluation of the net effect of SER litigation—whether positive or negative—we must reach for a much more comprehensive evaluation than is present in any of the three articles that follow, or any of the research to date. Before we go further, we hasten to say that this does not diminish the value of any of the three contributions. A comprehensive evaluation of the kind we are suggesting here may well be beyond the reach of empirical scholarship altogether, and in any event need not be the goal of every contribution in this area. What we are proposing is, then, more of a cautionary note about how to read the conclusions than a critique of the contributions.

All of the articles focus fairly narrowly on what the courts have or have not accomplished in particular cases, in response to particular claims, for the people who made the claims in question, in order to evaluate the positive, negative or null effects of that intervention. A more comprehensive understanding of the reach and limitations of SER might lead to a more cautious assessment of the (positive *and* negative) impact of particular cases. As Ferraz would argue, we should take into account not only what the court gives to the claimants before it, but how that affects the millions of others who are dependent on the public health system, or the social budget more generally. On the other hand, as Rodríguez-Garavito and Bergallo might argue, we must also consider the transformative effect of even individual cases on everything from the discourse around a public policy issue, to the relative balance of power between health providers and patients, citizens and bureaucrats, the internally displaced and the public. And it may be that the judicial recognition of rights in one area transforms the law and politics of rights in an entirely different area—as the South African housing rights case, *Grootboom*, did for a wide range of entirely unrelated SER.

The articles already suggest an ambitious research agenda for those interested in the real world effect of SER. But we would go further, at least in reflecting on the likely impact of SER litigation. Fully exploring the cumulative, net effect of SER on the living conditions of poor citizens living

under these new, rights-rich constitutions requires a powerful counterfactual imagination. Stated in the broadest possible terms, we must imagine what the world would look like without judicial oversight of these fundamental commitments, and compare that to what the world looks like with these judicial interventions. Ferraz points out that the middle class appears to benefit disproportionately from medications litigation in Brazil.[29] But if there is one thing we know about Brazil it is that public goods have always been disproportionately directed toward the middle and upper classes. Brazil's taxing system, education system, urban spending policies, policing approach—and health care system—are virtually all regressive, and were all designed by legislators, and operated by the executive, with little or no judicial intervention. In that context, it is neither surprising nor definitive to show that litigation also fails to disproportionately benefit the very poor. Recent public policy efforts—most notably the *Bolsa Família* program, which has benefited millions of poor families—run somewhat counter to this trend, but have not managed to reverse all the structural inequalities present in Brazilian public policy.

The question then really is will the poor, over the long run, derive more benefits from a public health system in which the possibility of litigation exists than from one in which it does not? Indeed, the question may be broader still: Will the poor live better in a society in which SER are officially acknowledged and judicially enforceable, than in one where they either do not exist as constitutional commitments, or exist only as programmatic directives addressed to the legislature and executive? The answer to that question is not obvious from evidence that the direct effect of individualized litigation is regressive. Surely, Ferraz is right that poor Brazilians might benefit were the nation's SER jurisprudence more akin to South Africa's—with its emphasis on assessing social policies and programs to ensure that they take adequate account of the needs and circumstances of the most disadvantaged, its readiness to prod government to implement such changes, and its chariness toward individual claims for direct relief.[30] But it may be that such a jurisprudence would prove still-born in the Brazilian context; or it may be that claims for such relief can only be brought by state actors in Brazil, who, in turn, may find leverage in virtue of the individual litigation Ferraz decries.

It may be that, for all its faults and inequalities, SER litigation still provides a measurable benefit for the poor of Latin America. Maybe the rich (or at least the middle class) get more out of litigation; but we do know that the poor and marginalized are also litigating social and economic rights, as

29. Ferraz, *supra* note 2, at 1661–62.

30. *See* Forbath, *supra* note 8.

Bergallo, Rodríguez-Garavito, and others[31] show, and sometimes this means that some marginalized individuals can litigate to get what they were promised in their constitutions, when they would otherwise be sent away empty handed by legislators and bureaucrats. The traditional method, in Brazil, for dealing with bureaucratic indifference was the use of influence and personal connections—the traditional *jeitinho* or personal favor. A shift to the courts implies a recognition that these state services are a matter of right, not largesse, and are bestowed on the basis of universalistic criteria, not personalism. It is a step toward recognizing the value of universal citizenship over the traditional personalized view of state-citizen relations.[32] This seems a step forward for both the middle class and for the poor who manage to litigate—even if the forum is weighted toward the former.

Rodríguez-Garavito and Bergallo might go further, though. Both articles argue that there are ways to use SER litigation to craft structural responses to structural problems—that there are ways, in other words, to include Ferraz's unrepresented millions in the litigation.[33] And, when this happens, the courts can stir the emergence of new social movements and the creation of new civil society organizations; transform decision-making processes to make them more inclusive and transparent; empower government, by resolving coordination problems; empower state bureaucrats who actually want to help bring SER to earth. From these articles, we know that SER cases can generate information about the scope and nature of a problem; give a voice to otherwise silenced interested actors; provide a forum for devising solutions to complex problems—on a deadline; transform social understandings of a problem; prompt the transformation of public policy; trigger media coverage, in explicitly rights-based terms, of a massive social problem; reallocate resources to care for politically disadvantaged groups, like HIV/AIDS patients; and more. It may be that the net effect of all these transformations is to create a politics and a state that is more attuned to the basic needs of the poor.

On the other hand, deriving the net effect of all this on the welfare of the weakest in society is still not an easy task, which is exactly why it is so important to take seriously Ferraz's challenge. The three articles usefully tell us who some of the winners are, in the game of SER litigation, and Ferraz

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31. GAURI & BRINKS *supra* note 14; Bruce M. Wilson, *Litigating Health Rights in Costa Rica*, *in* HEALTH RIGHTS IN COMPARATIVE PERSPECTIVE (Alicia Ely Yamin & Siri Gloppen eds., forthcoming); Bruce M. Wilson, *Claiming Individual Rights Through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT'L J. CONST. L. 242 (2007).

32. Roberto da Matta, *The Quest for Citizenship in a Relational Universe*, *in* STATE AND SOCIETY IN BRAZIL: CONTINUITY AND CHANGE 307 (John Wirth et al. eds., 1987).

33. *See* Bergallo, *supra* note 2, at 1639–40 (arguing that there is sufficient evidence demonstrating the impact of structural cases in right-to-health litigation); Rodríguez-Garavito, *supra* note 2, at 1671 (describing structural cases and their impact on SER litigation).

suggests that the middle class wins more often than the poor.[34] But even if we grant that this is a zero-sum game, the articles still do not provide evidence on who the losers are, and they cannot answer whether the poor would be better off still trusting to more conventional politics. It is obvious that conventional politics have failed the poor in Latin America for some two hundred years now. But there is some indication that the politics of the region have—finally—begun to respond to the numerical advantage the poor inevitably have in such an unequal context. We have witnessed a "turn to the left" in many of the countries of the region, the resurrection of "twenty-first century socialism," the appearance of constitutions, as in Ecuador and Bolivia, dedicated to recognizing and addressing the needs of marginalized indigenous communities, and so on.

Perhaps it is no coincidence that rights litigation makes such a forceful appearance exactly when electoral swings appear to threaten, or at least call into question the dominant, market-based economic model. Perhaps the poor should trust their fortunes to demonstrations and elections, and view with suspicion a device that, prima facie at least, appears to overturn the resource allocation decisions of elected officials.[35] Our own sense, as is probably clear, is that courts can work hand in hand, or in antagonistic cooperation, with elected officials, and legal strategies based on SER can complement more traditional political ones for extending benefits to the poor. But for that to happen—and here we fully concur with Ferraz—courts will have to be exceptionally sensitive to the distributive, structural impact of their decisions, and advocates will have to be canny and resourceful in the ways they craft claims.

Paradoxically, the old model of the "restrained" judge, who applies the law syllogistically and narrowly to the facts of the case, without raising his or her gaze to the broader policy implications of the decision, appears most likely to do harm over the long run. In a recent decision, Gilmar Mendes of the Brazilian Constitutional Court quoted Sunstein and Holmes: "Taking rights seriously means taking scarcity seriously."[36] We take this to be true, and like Ferraz, we have some doubts whether Brazilian judges have yet taken this insight to heart. But we see, in the behavior of the Colombian Constitutional Court, in the more enlightened decisions of courts in Argentina and elsewhere, reason to hope that judges ultimately will grasp this lesson. If so, they may well turn out to be, in some cases, under some

34. Ferraz, *supra* note 2, at 1661–62.

35. Others have made similar claims with respect to constitutionalism and judicial review more broadly. *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

36. *See* S.T.F., STA 175 AgR/CE-CEARÁ, Relator: Min. Gilmar Mendes, 17.3.2010, Diário da Justiça [D.J.], 30.4.2010, 4 (quoting STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 94 (1999)).

circumstances, a part of a process that leads to the greater realization of social and economic rights for the poor.

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Commentary: Comparative Constitutional Law and Property: Responses to Alviar and Azuela

Karen Engle

I am pleased to have the opportunity to comment on two very rich and provocative articles: *Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico* by Antonio Azuela and *The Unending Quest for Land: The Tale of Broken Constitutional Promises* by Helena Alviar García.[1] Both articles offer historical and contemporary accounts of the role of the social function of property in the constitutional framework of the countries they study (Mexico for Azuela and Colombia for Alviar).

I begin this Commentary with a few general thoughts on comparative method, and then engage in a comparison of the articles by discussing three issues they raise. In particular, I consider the tension between individual property rights and social function examined in each article, the possibilities the authors imagine for collective rights and conservation within the property rights regimes they examine, and the views about the role of law the articles express.

I. Some Thoughts on Comparison

These articles were presented as part of an explicitly comparative Texas Law Review Symposium. Each panel at the Symposium included presentations from authors from various countries, generally about their own constitutional systems, with the purpose of enabling an analysis of the similarities and differences in the systems. Some of the speakers included brief or sustained reference to the constitutional law of other countries as well, while some even attempted to identify or describe a Latin American regional approach.[2]

We had surprisingly little discussion in the Symposium, however, about why and how we engage in comparison, and about what we hope to achieve by doing so. There are of course no single answers to these questions, as those engaged in comparative legal analysis deploy various methods and do

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1. Antonio Azuela, *Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico*, 89 TEXAS L. REV. 1915 (2011); Helena Alviar García, *The Unending Quest for Land: The Tale of Broken Constitutional Promises*, 89 TEXAS L. REV. 1895 (2011).

2. *See, e.g.*, Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEXAS L. REV. 1835 (2011); Roberto Gargarella, *Grafting Social Rights onto Hostile Constitutions*, 89 TEXAS L. REV. 1537 (2011); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEXAS L. REV. 1587 (2011).

so with different aims. Indeed, comparative lawyers, at least in the global north, have long been engaged in debates over how and what to compare, the biases reflected in the representations of both self and other in the discipline,[3] and the extent to which those from the site of study can aspire to play the role of comparativist rather than simply of native informant.[4]

Sometimes comparativists focus on similarities in otherwise seemingly disparate systems to show patterns or biases across systems. Other times they concentrate on differences between the systems. While some of those who focus on differences aim to recognize and preserve such differences, others seek a way to harmonize them.[5] Comparative *constitutional* law, which is a relatively new field, tends toward projects of harmonization.[6]

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3. For an early and significant text outlining a critical approach to comparative law, see Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985). For an attempt to identify and pursue a variety of critical methodological approaches to the field, see the contributions to the 1997 Utah Law Review Symposium, *New Approaches to Comparative Law*, 1997 UTAH L. REV. 255. For examples of works that include critiques of the ways that those engaged in comparative analysis often represent their own legal system in the process of comparison, see Mitchel de S.-O.-l'E. Lasser, *Comparative Law and Comparative Literature: A Project in Process*, 1997 UTAH L. REV. 471; Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West"*, 1997 UTAH L. REV. 287.

4. As David Kennedy put it some years ago,

> Generations of foreign lawyers trained by comparativists in the United States...have been valued here for their information, their perspective, rather than their ideas, and have been encouraged to spend their time studying their own legal systems, working out similarities and differences with ours, rather than taking on topics at the core of our own methodological or political concerns. In such a scheme, only the very exceptional native informant can aspire to become a comparativist, and then, for all the lip service paid to learning from one another, the job is clear—go home an agent of cosmopolitan sensibilities in the periphery, an expert in listening to your own legal culture and translating its peculiarities to a universal audience while importing to your own society the sophisticated results of cosmopolitan harmonization.

David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 591.

5. Annelise Riles identifies the following aims of the "masters" of mid-twentieth century comparative law, which are arguably not so different from the goals of many comparative lawyers today: "the colonial project," "modernization and reconstruction," "internationalism," and "institution building." Annelise Riles, *Introduction: The Projects of Comparison*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW 1, 11–12 (2001).

6. For an attempt to name and situate the field, see DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW (Vicki Jackson & Mark Tushnet eds., 2002). *But see* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 125 (2005) (referring to *Defining the Field of Comparative Constitutional Law* and stating that, "none of the essays in this collection, its bold title notwithstanding, address the issue of methodology in the study of comparative constituional law"). The field has its own journal, the International Journal of Constitutional Law, which began in 2003. Sujit Choudry contends that the central preoccupation of the field of comparative constitutional law has been "The Rights Revolution," a preoccupation he defines as relating to "[a] bill of rights that is entrenched and supreme over legislative and executive action, backed up by judicial review by independent courts." Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Postconflict State*, 6 ANN. REV. L. & SOC. SCI. 301, 303 (2010). He connects that focus to transitional democracies and the drafting of new constitutions in Central and Eastern Europe and Latin America.

Even when the goal is harmonization, a question remains about which, if any, of the existing models one hopes to serve as the basis of that harmonization. Much of the discussion that took place at the Symposium revolved, if implicitly, around that question.

The Symposium raised additional issues with regard to comparison because it often relied on one presentation to understand the constitution, jurisprudence, or legal philosophy of a given country. When we read one article on the social function of property in Mexico and another on the same in Colombia (as with the two articles I discuss here), should we attribute differences in the pieces to local or national specificities or should we see them as stemming from differences in method, discipline, focus, or even affect? Similar questions emerged in discussion on other panels. On the panel on Social and Economic Rights, for example, one of the commentators noted that we saw a relatively pessimistic article from Octavio Luiz Motta Ferraz on Brazil[7] and a more optimistic one from Paola Bergallo on Argentina.[8] Are these differences due to judicial review in fact being more promising in Argentina than in Brazil, or are the differences in the articles more accurately attributed to different political or methodological approaches of the two authors? If so, to what extent are the latter related to the actual constitutions and constitutional jurisprudence of the countries from which the authors hail?

While many Latin American countries were unrepresented or underrepresented in the Symposium, others were arguably overrepresented. Colombia would fall into the latter category, not only because the Symposium included many articles from Colombian academics and jurists, but because the jurisprudence of the Colombian Constitutional Court has served as an object of admiration and aspiration for many from outside Colombia. An advantage to having so many articles by Colombians in the Symposium is that we could see disagreements among them, even if the authors come from relatively similar backgrounds and training.

I would like to keep in mind the role of (the idea of) the Colombian constitution and constitutional jurisprudence as I compare the articles by Azuela and Alviar. Azuela, though almost exclusively writing about Mexico, finds it useful to look to Colombia and Brazil, which he says have "some of the most innovative and progressive" law in the region with regard to recognizing the social function theory of property.[9]

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7. Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS L. REV. 1643 (2011).

8. Paola Bergallo, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 TEXAS L. REV. 1611 (2011).

9. Azuela, *supra* note 1, at 1939. He notes, for example, that the 1991 Colombian constitution makes it clear that property is not a fundamental right, *id.* at 1916, meaning that they cannot form the basis of a *tutela*, or direct claim, before the Constitutional Court.

While Alviar agrees with Azuela that much of the Colombian constitution is progressive in terms of its view of the social—as well as the ecological—function of property, she shows a myriad of ways in which its progressiveness is undermined, particularly in the context of expropriation. By calling attention to private law rules about property (including the definition of property itself), the failure of all three branches of the government (including the judiciary) to take seriously its redistributive impulses, and the development priorities of the state, her article calls into question some of the optimism others have expressed in the Colombian constitutional design, and which is repeated at some level in Azuela's article.

The two articles I address here are, I think, differently situated from much of the rest of the Symposium in that they are not only about comparing constitutions or constitutional jurisprudence. Rather, as I discuss more fully below, they both attend to structures and processes outside the formal constitutional frame.

II. Indeterminacy of Both Social Function and Right to Property

The articles focus on the state's failure to engage in large-scale redistribution of property, despite recognition of the social function of property. They both at some level attribute this failure to competing impulses, as Alviar puts it, within constitutions over the past century. On one hand, they prioritize the state's right to distribute and redistribute property on an understanding of social function. On the other hand, they emphasize the sanctity of the right to private property. Azuela shows how even Mexico's 1917 constitution manifests this ambivalence. Although it recognizes that "ownership of all water and land within the national territory belongs primarily (*originariamente*) to the Nation,"[10] it also permits the state to "transfer . . . ownership to individuals, thus constituting private property,"[11] which then cannot be taken by the government "unless it is for a public need (*utilidad pública*) and 'by means of' compensation."[12]

All of the versions of the constitutions of Mexico and Colombia considered by Azuela and Alviar engage in a balancing of these two impulses. Of course, such weighing of interests can also be found in some form in most constitutions, and generally arises with regard to two issues—when a state can expropriate private property and how much it is required to pay in compensation. Additionally, international human rights documents

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10. I am using Azuela's translation of Article 27 of the Mexican constitution, though many translations use the word "originally" rather than "primarily." *See* Azuela, *supra* note 1, at 1917–18 (citing Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.)).

11. *Id.*

12. *Id.*

that recognize a right to property also engage in this balancing, whether or not they explicitly mention social function.[13]

Although both articles suggest the indeterminacy of the social function of property, they also both identify a bias. That is, the indeterminacy tends to work against redistribution, or at least has done so since the onset of neoliberalism. They both demonstrate that judges and administrative agencies (to whom some constitutions have delegated the authority to expropriate) have been more responsive to claims of property rights violations by property owners than to the state's interest in expropriation. For Azuela, federal judges are often (and problematically) engaged in "judicial activism," "tak[ing] every opportunity to rule in favor of affected owners and against what they construe as arbitrary expropriations."[14] For Alviar, even the fact that expropriations often need to be brought before a judge makes them more cumbersome and less likely to occur.

III. Collective Property Rights and Conservation

Both articles, if implicitly, raise an issue about the extent to which communal or collective rights, if recognized, might disrupt the individual rights paradigm. In other words, could the right to property be deployed in a communal fashion that would undermine the dominant individual, private property paradigm? Or, as Audre Lorde put it in another context, can the master's tools ever dismantle the master's house?[15]

The question particularly resonates for me because I have been involved in some efforts to use the right to property in the American Declaration and

13. *See, e.g.*, Council of Europe, European Convention on Human Rights, Protocol 1, art. 1, March 20, 1952, E.T.S. No. 009 (recognizing the right to property subject to "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"); Organization of American States, American Convention on Human Rights, art. 21(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention] ("Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."); *see also* Catarina Krause & Gudmunder Alfredsson, *Article 17: The Right to Property in Other Human Rights Instruments*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 359, 363–74 (Gudmunder Alfredsson & Asbjørn Eide eds., 1999) (discussing the debates over the right to property and whether it should be included in the International Convention on Civil and Political Rights and the International Convention on Economic, Social, and Cultural Rights); THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY 7 (2002) (arguing that while the end of the cold war in 1989 made the right to property an increasingly likely instrument for the protection of vulnerable groups, "[p]roperty rights have . . . often been perceived as an instrument to protect the rich and the powerful").

14. Azuela, *supra* note 1, at 1927.

15. *See generally* Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110 (2007).

Convention[16] to argue for the recognition of collective rights for indigenous peoples and Afro-descendants in the Americas and even for the recognition of individual rights for small property owners along the U.S.–Mexico border who have had part of their property taken to build the border wall. Those involved in the projects have in mind progressive aims, but a number of us have also expressed discomfort about reinforcing this monolithic idea of property rights with these kinds of claims.[17] The question, for me in any event, is whether there might exist a particularly robust and transformative idea of collective property rights.

Alviar seems somewhat hopeful about the prospects for collective rights, focusing in particular on the recognition achieved by Afro-descendants in the 1991 constitution and subsequent legislation, specifically Law 70 of 1993.[18] At the same time, she shows how Afro-descendant communities have been thwarted in their exercise of these collective rights by "strong economic interests backed by governmental policy," such as the advancement of oil palm.[19] I think Alviar might enrich her story by considering the role that yet another competing impulse—the ecological function of property—might have played in the recognition of collective rights for ethnic communities in the first place. For example, though the state of Colombia was certainly conflicted about its development priorities in the early 1990s, it was encouraged by Afro-descendant groups, conservation groups, and some parts of the World Bank to essentially exchange the recognition of quasi-territorial rights for a guarantee that the land would be used in sustainable ways.[20] Thus, Law 70 of 1993, which recognizes collective title for certain Afro-descendant communities, stipulates that those who receive title "will develop practices of conservation and management that are compatible with ecological conditions."[21] Additionally, it specifies that the land is inalienable, inseverable, and cannot be used for collateral.[22]

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16. *See* Organization of American States, American Declaration of the Rights and Duties of Man, art. XXIII, O.A.S. Official Rec., OEA/Ser.L./V./11.23, doc. 21, rev. 6 (1998) ("Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."); American Convention, *supra* note 13, at Art. 21(1).

17. For a more general critique of reliance on a "monolithic slate" of property rights, see Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J.L. & POL'Y 243, 267 (2008).

18. L. 70, 27 de Agosoto de 1993, Diario Oficial [D.O.] (Colom.).

19. Alviar García, *supra* note 1, at 1908.

20. *See* KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT 248–53 (2010) (describing the history of Law 70 of 1993); Karl H. Offen, *The Territorial Turn: Making Black Territories in Pacific Colombia*, 2 J. LATIN AM. GEO. 43, 43–44 (2003) (noting that this reform resulted from "a wide constellation of internal and external forces, including bottom-up localized pressures for social change and top-down global pressures for .political-economic reform").

21. L. 70 of 1993, art. 6(b).

22. *Id.* art. 7.

If the land cannot be used as collateral, of course, Afro-descendants have little access to credit. Although Law 70 addresses that concern directly, by providing alternative bases for credit,[23] the state has failed for close to two decades to promulgate regulations to implement those provisions.[24] Without such regulations, barriers to credit are essentially built into this legal form of communal property. This limitation within formalized, collective property might be usefully juxtaposed to Alviar's discussion in another part of the article, about how access to credit has posed significant problems for many rural communities because of the lack of formalization of their (presumably individual) property,[25].

Azuela, I think, is somewhat more ambivalent about the promise of collective property, even as an ideal. Or—more accurately perhaps—he is less pessimistic about the government's decision in 1992, as a part of its neoliberal market reforms, to make *ejido* lands individual and alienable.[26] This reform was highly criticized by indigenous groups and by the left more generally at the time for its break-up of communal lands and power. Azuela contends, however, that the reform has not had the consequences many of its critics expected, in large part because individuals in many agrarian communities have often chosen not to sell their land. The land intact, the communities have gained or retained political power as a result of the government's reluctance to expropriate land.

Azuela gives the well-known example of San Salvador Atenco, where a community managed to keep the government of Mexico from building a new airport in 2002. The community engaged in public protest, but filed an *amparo* suit against the expropriation of property it would have entailed.[27] Based on this and other examples, Azuela concludes that "postrevolutionary governments were able to subordinate private landowners to the needs of agrarian reform, but this very process paved the way for forms of community landownership that have managed to resist the public interest in post-postrevolutionary times."[28]

It is not altogether clear to me whether this conclusion is promising or not for Azuela. The answer might well depend upon the asserted public interest and also on the type and politics of the community. I wonder how far Azuela would be willing to go in terms of permitting expropriation and

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23. *See, e.g., id.* art. 52.

24. For discussion of debates over these regulations, see ENGLE, *supra* note 20, at 243–46.

25. *See* Alviar García, *supra* note 1, at 1907 ("[A]ccess to credit turns on whether one is a property owner or not, which in turn depends on the formal categories of 'property,' —categories that do not reflect the de facto relationships of property in rural Colombia . . . .").

26. *Ejidos*, generally, are collective legal subjects recognized by agrarian legislation. Azuela, *supra* note 1, at 1919 n.22.

27. *Id.* at 1928.

28. *Id.* at 1929.

displacement of communities to exercise the ecological function of property. Would he draw a distinction between indigenous and non-indigenous communities? Should he?[29]

IV. Role of Law

I think there is some productive tension between the two articles with regard to their understanding of the extent to which law (including private law), as opposed to other social relations, is responsible for the failures of constitutional law. Azuela contends that he is discussing "a problem that is beyond the law, but nevertheless affects the balance between landowners and the public interest."[30] He calls on constitutional lawyers to consider issues he identifies as "'social' processes taking place outside state institutions," such as

> weakened power of eminent domain; a failure of the government power to regulate land uses; the growing power of agrarian communities that act as local governments; and the growing challenge, both in public opinion and in actual practice, of the state ownership of certain natural resources (particularly water) and places with symbolic value (archaeological sites).[31]

While Azuela identifies such concerns as "beyond the law" (though he believes constitutional lawyers should attend to them),[32] Alviar generally locates similar problems within law itself. Like Azuela, she looks beyond the words of the constitution, but to courts and administrative agencies. She also looks to other types of law, specifically private law, and the impact they have on constitutional ordering. Thus, when she looks at the interaction between the state and the market, she does so with an eye toward how the "law is influential in structuring the market." She aims to "look at the shifts and rigidities of the modes of legal reasoning, the interaction between the different legal regimes at particular times, and the changes in the relevance of certain actors."[33]

In short, what Azuela might call extra-legal, Alviar might see as *enshrined* in and facilitated by law, particularly by a formalistic understanding of property that hasn't really changed since 1887. While this difference in approach might be semantic or disciplinary, I think it is worth

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29. Azuela raises questions as well about the extent to which those whose land is not expropriated should be responsible for the preservation of natural resources on that land. He seems skeptical of the environmental compensation schemes and expresses some sympathy with those who claim that "these schemes amount to turning Article 27 on its head; the obligation to preserve natural resources, which was originally vested in those who owned them, is being replaced by compensation that society must provide." *Id.* at 1930.

30. *Id.* at 1931.

31. *Id.* at 1941.

32. *Id.* at 1931.

33. Alviar García, *supra* note 1, at 1897.

exploring in consideration of the promises and pitfalls of various constitutional and private law arrangements with regard to the (re)distribution of property, as well as of the hopes for and limitations to different political interventions.

One point on which the articles agree is that constitutions cannot or should not be the sole site of struggle over property. I think their view on the limitation of the constitution and constitutional law might usefully be applied by others to the distribution of resources more generally.

V. Concluding Thoughts

Over the past two decades, international human rights has become the *lingua franca* of states and social movements, from the left to the right. Even claims for economic redistribution are largely made today in the name of human rights, economic and social as well as civil and political. The left has long been skeptical of human rights for multiple reasons, including its inability to challenge the primacy of property rights. Yet, much of the left is now largely mobilized around human rights, including property rights. Azuela and Alviar offer useful insight into the extent to which different articulations of property rights both open up and limit the possibilities for attending to ongoing distributional inequality as well as to ecological degradation.

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Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition

Victor Ferreres Comella*

It is impossible to do justice to the richness of the ideas presented in the Constitutional Review panel of this Symposium with the brief comments I am going to make. These ideas deal with diverse issues, and they raise questions of different sorts. I would like to emphasize, however, one underlying theme that partially unites them. The label we could use to capture the theme would be something like this: "Courts in Latin America and the constraints of the civil law tradition." In what follows, I will elaborate on this theme, and I will pose some questions for the panelists, to further our conversation.

Let us begin with Angel Oquendo's account of the rights revolution that several organizations in Latin America have set in motion in the last fifteen years.[1] Such organizations have resorted to the judiciary to vindicate both negative and positive rights. Their victories are to be celebrated, but they are only "a first step."[2] When it comes to positive rights, in particular, it is necessary to get the support of social and political actors. Otherwise, litigation strategies will have an insignificant impact in practice, and may actually be counterproductive.

Oquendo suggested two main reasons why the impact of courts is likely to be marginal. The first is of a general kind: given the structure of adjudication, judges can only settle the controversies that are brought to them by external actors. Therefore, they can only attend to a fraction of the infringements of rights that take place. The second reason is specific to the civil law tradition that Latin American countries belong to: the absence of a doctrine of stare decisis. Judicial determinations in civil law countries bind exclusively the parties to the controversy at hand. Courts are not empowered to set out binding rules that can affect other, similarly situated individuals. As a result of these constraints, the transformative capacity of Latin American judges is rather limited. This suggests that, perhaps, conservative forces in the region are not very worried about the progress that social rights advocates seem to be making through the courts. After all, those are merely isolated victories, which do not produce broader effects in the law.[3]

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1. Angel Oquendo's panel presentation on positive rights in Latin America was based mostly on work published earlier. For his rights revolution account, see Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185 (2008).

2. *Id.* at 233.

3. *Id.* at 210–11.

The panel is right, it seems to me, about the structural limitations of courts in general, and about the more specific restrictions, in particular, that courts in the civil law tradition face. There has been, of course, lots of controversy about this latter point. How much different is the civil law from the common law when it comes to the role of precedents? The "official theory" in many civil law countries is that the highest courts do not create precedents that are binding on lower courts. Judicial independence and separation of powers are usually invoked to justify the proposition that a judge is free to interpret the law as she thinks right, without being subject to any instructions by higher courts as to how to interpret the law. This "official theory," however, can be easily attacked from a normative point of view. If we value legal certainty and equality before the law, as we should, it seems necessary to require lower courts to follow the doctrines generated by the highest courts, and to expect the highest courts to be consistent from one case to the next. If judges reach inconsistent decisions, individuals cannot easily predict how the law will be applied to their cases, and great inequalities in legal treatment are caused. Modern constitutions, moreover, enshrine legal certainty and equality as important values to preserve. This should help undermine the "official theory" about precedents in civil law countries.

Indeed, it would be strange if judges and lawyers working in a civil law system were not sensitive to the need to guarantee some measure of coherence in the application of the law. Even if the holdings laid down by the highest courts are not technically binding, one would expect such holdings to be respected as a matter of fact. The question, then, is how much convergence obtains in practice. There is no systematic study that provides an answer to this question.[4] Although there is room for variation, the general picture seems to be that the force of precedents in civil law jurisdictions is weaker than that of precedents in the common law. They have some authority, but of a weaker sort.

Precisely as a result of this, a number of countries in Europe and Latin America have introduced an important mechanism in the field of constitutional law: abstract review of legislation. Through this procedure, a law can be tested for its constitutionality on its face, without having to wait for a specific controversy to arise. And the challenge can be brought directly to the highest court, without having to run up the judicial pyramid. The power of the court at the apex is thus greatly increased. Its determination that a law is unconstitutional produces "general effects" (*erga omnes* effects). The statute that is declared to be invalid gets eliminated from the legal system and can no longer be applied to any case by any judge. As we will see later in this Commentary, the court in charge of abstract review can sometimes choose to

4. For some comparative analyses on this matter, see INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (Neil MacCormick & Robert Summers eds., 1997).

reconstruct the statute to make it consistent with the constitution, instead of eliminating it altogether.[5] But even in that case, the court's decision produces *erga omnes* effects, as if the legislature had introduced an amendment to the statute. Abstract review is thus a powerful weapon that compensates for the relative weakness of the doctrine of stare decisis in the civil law tradition.

Note that for abstract review to do its work, it is not necessary to establish a separate constitutional tribunal (although this has been the practice in almost all European countries). Instead of creating such a tribunal, it is possible to place abstract review in the hands of the existing supreme court. In Latin America we find examples of each of these institutional possibilities.[6] In Colombia, for instance, abstract review was originally assigned to the supreme court—in 1910, the court was given jurisdiction to decide *acciones públicas de inconstitucionalidad* (abstract review challenges brought by ordinary citizens). Decades later, this responsibility was transferred to the new constitutional court that was set up in 1991[7]. In Mexico, in contrast, no separate tribunal has been created. Abstract review of legislation is entrusted to the ordinary supreme court. The same is true in Brazil. It should be noted, however, that the Brazilian supreme court acts in practice as a constitutional tribunal, since its main focus is constitutional adjudication, while most ordinary legal issues are settled by another court (the superior court of justice).

The impact of abstract review depends, in part, on how easy it is to trigger the pertinent procedures. Interestingly, the rules on standing in this connection are very broad in some Latin American countries. In Colombia, for example, any citizen can bring an abstract challenge, even if he or she has no interest at stake in any particular case.[8] In Brazil, any political party, however small, is authorized to attack laws in the abstract, provided it has at least one representative in congress. The boards of the National Bar Association, national unions, and class associations also have standing.[9] This is quite remarkable. The doors of European constitutional courts, in contrast,

5. *See infra* notes 25–26 and surrounding text.

6. For a general overview of the different systems of judicial review that have emerged in Latin America, see Justin O. Frosini & Lucio Pegoraro, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?*, 3 J. COMP. L. 39 (2008).

7. For an overview of the Colombian Constitutional Court's role and its historical background, see Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOB. STUD. L. REV. 529, 532–57 (2004).

8. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 241–42 (Colom.).

9. *See* CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 103 (Braz.).

are less open in abstract review proceedings—the list of actors empowered to attack statutes tends to be more restrictive.[10]

It would be very fruitful to come up with a detailed study of what the actual practice has been in the Latin American countries that have incorporated abstract review mechanisms. We have some evidence, however, that the consequences have been significant. In his article, for example, Alejandro Madrazo tells us the story of the Mexican supreme court.[11] As he explains, there was a big change in 1994, when the constitution was amended to grant the court the power to decide "acciones de inconstitucionalidad."[12] These abstract review actions can be brought by several institutions. Depending on the types of laws under attack, the actions can be initiated by 33% of the members of each house of congress, the Attorney General, 33% of members of state legislatures, 33% of the members of the Federal District legislature, political parties, and the National Commission of Human Rights.[13] In the past, Madrazo asserts, the court was an obscure institution, in large measure because its decisions had no general effects. As a result of the 1994 amendment, the court has gained visibility.[14]

A similar story can be told about the Brazilian supreme court. Abstract review was introduced in the 1960s, with notable consequences. As Justice Joaquim Barbosa explains, "abstract review presents none of the disadvantages that contribute to the inefficiency of the diffuse model."[15] "A decision made by the Court under abstract review", he explains, "is binding for the whole judicial system and other branches of the government."[16] Since the actors with standing to institute a challenge against a law are many and varied, the court has had the opportunity to rule on many controversial issues. As a result, the Brazilian court has become a formidable check on

10. *See* Victor Ferreres Comella, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 60–65 (2009).

11. Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEXAS L. REV. 1863 (2011).

12. *Id.* at 1865.

13. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 105, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Última reforma publicada 29 de Julio de 2010) (Mex.).

14. Other commentators have also stressed the relevance of the 1994 reforms in Mexico. Karina Ansolabehere, for example, has compared the performance of the Supreme Court of Argentina with that of the Supreme Court of Mexico. *See* Karina Ansolabehere, LA POLITICA DESDE LA JUSTICIA: CORTES SUPREMAS, GOBIERNO Y DEMOCRACIA EN ARGENTINA Y MEXICO [FROM POLITICS TO JUSTICE: SUPREME COURTS, GOVERNMENT AND DEMOCRACY IN ARGENTINA AND MEXICO] (2007). She claims that the more intense activism of the latter court is connected, in part, to its capacity to declare laws unconstitutional with general effects, in the context of abstract review proceedings. This mechanism is absent in Argentina. *Id.* at 132.

15. Joaquim Barbosa, *Reflections on Brazilian Constitutionalism*, 12 UCLA J. INT'L L. & FOREIGN AFF. 181, 189 (2007).

16. *Id.*

political majorities in power. "The diffuse model of review is on the decline, as Brazil turns more frequently to abstract review."[17]

All this, of course, simply reinforces the earlier point about the minor role that precedents play in civil law countries when judges decide specific cases in ordinary procedures. It is precisely in order to overcome that limitation that special procedures of abstract review have been deemed necessary.

This being so, there is a question to address: Are judges likely to behave differently depending on the nature of the effects of their decisions? More precisely, are judges likely to be more careful (prudent, deferential) when they know that their determinations as to the constitutionality of a law—concerning social rights, for example—will have *erga omnes* effects, than when they know that only the particular parties to the case will be affected? Do abstract review mechanisms encourage courts to be more cautious, given the systematic effects they entail?

Let me now turn to Alejandro Madrazo's article, which provides us with a fascinating picture of the philosophical tensions that underlie the Mexican supreme court's jurisprudence.[18] As he explains, the 1994 constitutional reform changed the nature of the court, transforming it into an institution that is very similar to a constitutional tribunal.[19] Its jurisprudence, however, is not always congruent with the new role it is expected to perform. In too many cases, the court resorts to traditional methods of legal reasoning, which are no longer in keeping with the constitutional function the court must carry out. The court should be sensitive to general principles, and should be eager to elaborate them from case to case. The court should overcome its traditional "formalism," Madrazo says.[20]

In this connection, it would be interesting to ask ourselves whether the civil law culture is "formalist." The answer depends, of course, on what we mean by legal formalism. If we refer, for example, to a jurisprudential approach that emphasizes the importance of having a consistent network of legal concepts in order to categorize cases and problems, it is true that many civil law countries have traditionally been quite formalist, when compared to common law jurisdictions.[21] The prominent role of professors in the civil law tradition is in part responsible for this feature. The centrality of judges in the common law, in contrast, pushes in a more pragmatist direction.[22]

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17. *Id.*

18. Madrazo & Vela, *supra* note 11, at 1863.

19. *Id.* at 1893.

20. *Id.* at 1893 n.53.

21. I will mention an example of this later. *See infra* note 27 and accompanying text.

22. On the connection between conceptualism and the prominence of scholars in the civil law tradition, see JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA (2007).

Another kind of formalism relates to the role of legal texts and linguistic conventions in adjudication. A formalist legal theory places great emphasis on written legal provisions, and on the relevance of linguistic conventions to assign meaning to them. A judge is not entitled to deviate from the norm that results from a conventionalist interpretation of a given law, even if she can point to principles and goals that suggest that the norm is unjust or imperfect. A judge should not extend or restrict the norm to make it better. In addition, a formalist legal theory may be critical of legislatures and constitution makers enacting very abstract provisions. More specific clauses are to be preferred. A "substantive" theory, instead, allows judges to adjust the semantic content of the law in order to serve various underlying principles or goals. Such a theory, moreover, finds no reason to be worried about the fact that statutes and written constitutions sometimes include relatively abstract clauses. The contrast between these two approaches is a matter of degree, of course. It is an open question whether the civil law is more formalist (in this sense) than the common law. There is a considerable degree of variation within each legal culture. There are important disagreements, moreover, among legal actors in each country, as to the best approach to the law.[23]

As an example of formalism, Alejandro Madrazo mentions the Mexican supreme court's reluctance to engage with the right to reproductive freedom. In some important cases, the court has made no reference to this right, in order to avoid delicate matters. Madrazo indicates, however, that such a right is explicitly mentioned in the constitution.[24] If that is so, one wonders whether this is really an example of "formalism"—in the sense I have just described. The supreme court would be "formalist," we might say, if the reason why it declined to recognize the right to reproductive freedom was that such a right was not specifically mentioned in the constitution. But if such a right is specifically mentioned, the court's decision not to deal with it is actually "anti-formalist." Avoiding a delicate matter for prudential reasons is not an exercise in formalism. Rather, it is a pragmatic move.

My comment is just an invitation for Madrazo to distinguish and further elaborate the various ways in which we can understand formalism, in order to better assess his interesting claim that the supreme court in Mexico is too formalist in its constitutional jurisprudence.

The panel offered another angle from which to explore certain features of the civil law culture.[25] This refers, in particular, to the controversies that

23. Some useful studies on the different styles of statutory interpretation in various countries can be found in INTERPRETING STATUTES: A COMPARATIVE STUDY (Neil MacCormick & Robert Summers eds., 1991). Within the common law world, it is possible to identify relevant differences from one jurisdiction to another. For the contrast between the English and the American legal systems, for instance, see P.S. Atiyah & R.S. Summers, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987).

24. Madrazo & Vela, *supra* note 11, at 1881–82.

25. This discussion is credited particularly to Cesar Landa.

have arisen in various Latin American countries concerning the legitimacy of so-called atypical decisions. These are special decisions that courts (usually constitutional courts) render in the context of procedures of legislative review. Instead of nullifying a statute that is found to be at odds with the constitution, they prefer to partially reconstruct it to ensure compliance with constitutional principles. As previously mentioned, the impact of a court's decision striking down a statute can be very significant.[26] The legal gap that such an invalidation produces can be very detrimental, not only to governmental interests, but to the very constitutional rights to be protected by courts. That is why courts often choose to find ways to partially save the statute under review, through an "atypical decision".

This is particularly so when the right to equality is at stake. If a law is unconstitutional in that it unjustly denies a certain benefit to a particular group of people, there are two possible ways to do away with the discrimination: the benefit can be eliminated for all groups, or it can be extended to the excluded group. Both leveling down and leveling up can restore equal treatment. In many instances, however, courts have good reasons to conclude that leveling up is the better solution: it is the decision that the legislature most likely prefers, and the one that does less harm to the individuals whose rights and interests are at stake.

The panel explained, however, that such decisions have been attacked in many quarters. For a number of observers, they are a "nightmare." There are good reasons to be concerned. Courts should not be free to repair statutes in whatever direction they like. It is important, therefore, to provide courts with guidelines that can help them craft such decisions in the right way. This invites us to build a theory of constitutional procedural law that can be useful to judges. Such a theory should be rooted in Latin American experiences, while being open to European influences.

This is all very sensible. The only reservation I have has to do with the formalist approach that many scholars in Europe and Latin America have followed when addressing this problem. They have been "formalist" in the first sense I distinguished earlier—when I discussed Alejandro Madrazo's article[27]—that is, they have been conceptualistic, not pragmatist. Indeed, many scholars who have written on atypical decisions have used as their starting point a particular conception of the nature of a constitutional court. In their view, a constitutional court with the power to review the validity of laws is to be conceived as a "negative legislature." It is like a legislative body, in that it can repeal a law with general effects. If that is the essence of a constitutional court, then atypical decisions are problematic. (For quite a number of scholars, they are ultimately illegitimate.) When a court chooses

26. *See supra* note 5 and accompanying text.

27. *See supra* note 21 and accompanying text.

to partially reconstruct a statute to make it consistent with the constitution, it no longer acts as a "negative legislature," but as a "positive legislature." The court in such a case amends the statute, and that is said to be inconsistent with the very nature of a constitutional tribunal.

My impression is that the debate concerning atypical decisions is not going to be fruitful if we frame it in this conceptualistic manner. That constitutional courts should simply be "negative legislatures" is written nowhere. It is not part of any conceptual reality we are supposed to track. (Hans Kelsen's position, by the way, was much more pragmatic, in spite of the fact that he coined the expression "negative legislature.")[28] We should get rid of a priori definitions and start with the observation that, in many instances, it is not reasonable for a court to simply strike down the statute under review, given the harmful effects that legal gaps can produce. It makes sense, therefore, for courts to find other ways to react to constitutionally defective statutes. The question, then, is what factors should judges take into account in order to decide whether they should render an atypical decision, and in what manner they should partially reconstruct the law under review. In this regard, the pragmatic approach followed by the South African Constitutional Court, for example, has much to recommend.[29]

Let me finally turn to Diego García-Sayán's contribution, which invites us to consider a different set of problems. His article offers us an interesting account of the role of the Inter-American Court of Human Rights.[30] García-Sayán emphasizes the court's strength. The binding nature of its judgments, he asserts, is not up for discussion, and national courts are actually taking the court's case law into account, as a source of binding precedents.[31] Importantly, it is not only the courts of the state that has been condemned by the court in a particular case that feel bound. The courts in other states consider themselves bound too. This is a very interesting phenomenon, which we can also observe in Europe: national courts in many jurisdictions have held that they are under a duty to follow the case law produced by the European supranational courts (the European Court of Human Rights and the Court of Justice of the European Union).

If we go back for a moment to what I said at the beginning,[32] there is reason to be surprised here. As we saw, it is commonly believed that, at the domestic level, the highest courts in civil law jurisdictions are not

28. I have argued this point about Kelsen's pragmatism in Victor Ferreres Comella, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 10–28 (2009).

29. See, for instance, the constitutional court's decision in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC).

30. Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin America*, 89 TEXAS L. REV. 1835 (2011).

31. *Id.* at 1836.

32. See *supra* notes 3–4 for a discussion of the structural limitations of the courts.

empowered to issue legally binding rulings. Lower courts tend to follow the interpretations announced by the highest courts, but they are not technically bound by them. Yet, when it comes to supranational courts, there is less reluctance to accept the latter's case law as legally binding. It would be interesting to have some theory to explain this remarkable contrast. One possibility, of course, is to be skeptical about the contrast: it cannot really be the case, one may suspect, that the role of precedents in a civil law system is going to be different depending on the domestic/supranational nature of the court laying down the precedents. Actually, one could even suggest that supranational tribunals are weaker than the highest domestic courts, and that it is precisely such weakness that needs to be compensated for through a discourse that emphasizes the need for judges and lawyers to follow supranational rulings. It would be interesting to hear what Diego García-Sayán thinks about this. What accounts for this tendency to "officially" accept the binding force of the precedents set out by supranational courts? Is this another paradox of the civil law tradition?

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Commentary: Constitutional Structure in Latin America

Jonathan Hartlyn*

Constitutional structure is important to study because we believe it is often linked with things we care about such as good governance, democracy, economic and social well-being, or justice, though we continue to debate when as cause, when as consequence, and when in a linked interactive fashion. And, it is also important to study changes in constitutional structure which are sometimes invoked by politicians, or social actors, or academics as key ways to solve fundamental challenges of their societies.

Because this is potentially such a large topic authors typically narrow their focus. Authors can choose to focus on different types of changes in constitutional structures, such as by replacement, or by reform or amendment, our due to evolving judicial interpretation, or by evolution in informal rules or norms. Or, they may choose to focus also on incorporating related elements, such as electoral systems, viewed as central to the regulation of political life in the country, and then, within them, on different subsets of provisions within these changes.

The article by José Antonio Cheibub, Zachary Elkins, and Tom Ginsburg focuses on changes in a set of provisions relating to executive–legislative balance of power in the context of constitutional replacements.[1] These replacements are defined generally as a constitutional revision carried out without following the amending procedure of the existing constitution, or based on the classification in historical texts.[2] In turn, Claudio Fuentes focuses specifically on constitutional change in Chile over a two decade period—a case specifically of reform, not replacement, of the 1980 authoritarian constitution of General Augusto Pinochet.[3] Gabriel Negretto examines political and electoral reforms broadly, not distinguishing between replacements or reforms and incorporating electoral measures as well.[4] And Andrea Pozas-Loyo and Julio Ríos-Figueroa, in turn, focus specifically on amendment and reform as opposed to replacement or broad

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1. José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 TEXAS L. REV. 1707 (2011).

2. *See* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 55 & n.22 (2009).

3. Claudio A. Fuentes, *A Matter of the Few: Dynamics of Constitutional Change in Chile, 1990–2010*, 89 TEXAS L. REV. 1741 (2011).

4. Gabriel L. Negretto, *Shifting Constitutional Designs in Latin America: A Two-Level Explanation*, 89 TEXAS L. REV. 1777 (2011).

scope constitutional change to demonstrate how the judiciary comprise a political actor which can protect their autonomy and influence.[5]

All four of these are excellent articles. Though the authors are looking at somewhat different things, as noted, they do talk to each other, as I will try to draw out below. Each of these articles also represents the tip of an iceberg for the author or authors: an introduction to a much broader agenda for further research on an important topic in which they are involved, and laying out that agenda could usefully be drawn out more explicitly in their conclusions.

The division of labor agreed upon between me and John Ferejohn, the other panel commentator, is that I would focus primarily on the articles by Chelkinsburg (José Cheibub, Zach Elkins and Tom Ginsburg) and by Claudio Fuentes. Let me then turn to the article by Cheibub et al. on *Latin American Presidentialism in Comparative and Historical Perspective.*

Scholars have been chipping away at the analytical wall put up between parliamentary and presidential systems for some time. With regard to the notion that parliamentary systems provide powerful incentives for coalitional behavior absent in presidential systems, José Cheibub, Cecilia Martínez Gallardo, my colleague in Political Science at the University of North Carolina at Chapel Hill, and others[6] have been examining how coalition behavior and dynamics actually work in presidential systems and finding quite a bit of it. And now, José, Zach, and Tom are seeking to push the envelope further, saying that the presidential–parliamentary distinction really may not matter at all on certain critical dimensions, such as executive lawmaking authority—where region trumps democratic regime type.

I do agree with them that Latin American presidents have had extraordinary legislative powers. Indeed, it has been a long-standing view that presidents in Latin American have had extensive powerful formal constitutional powers compared to other national executives, including particularly the U.S. President.[7] It is valuable to see this now placed in a broader, updated comparative frame of reference, with a set of extensive, carefully chosen measures, and with an ability to track changes over time more systematically than before thanks to the impressive dataset of the Comparative Constitutions Project.[8] The notion that in the end the differences they highlight may be as important or more important than the

5. Andrea Pozas-Loyo & Julio Ríos-Figueroa, *The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils*, 89 TEXAS L. REV. 1807 (2011).

6. *See* JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM AND DEMOCRACY (2007); Octavio Amorim Neto, *The Presidential Calculus: Executive Policy Making and Cabinet Formation in the Americas*, 39 COMP. POL. STUD. 415 (2006); Cecilia Martínez Gallardo, Coalition Duration in Presidential Systems (Aug. 2008) (conference paper).

7. *See* Jonathan Hartlyn & Arturo Valenzuela, *Democracy in Latin America since 1930*, *in* VI CAMBRIDGE HISTORY OF LATIN AMERICA, PT. 2: LATIN AMERICA SINCE 1930: ECONOMY, SOCIETY AND POLITICS 99 (Leslie Bethell ed., 1994).

8. COMPARATIVE CONSTITUTIONS PROJECT, http://www.comparativeconstitutionsproject.org.

presidential–parliamentary distinction certainly will attract attention. However, I have several questions and qualifications.

First, there is the question of which features of presidentialism should one focus on. In their article, Cheibub et al. make the argument, with which I agree, that the U.S. and Latin American presidential systems are similar because the executive is popularly elected and does not need the confidence of the legislature to remain in office. However, there are other important similar features which are significant and could be addressed. One is the issue of the dual legitimacy of the executive and the legislature, since both are popularly elected. Another similarity—in contrast to parliamentary systems—is that as a result of this, in a presidential system the head of state and the head of government are the same individual.

The article is also correct in noting that presidentialism has been very "sticky" in Latin America, in spite of frequent constitutional replacements in the region. One remarkable example is Colombia: when the Conservative and Liberal parties agreed to divide power equally between them in the consociational National Front arrangement, with perfect parity in congress, in the judiciary, in the cabinet, and in appointed governors and mayors, instead of a plural executive of some type, they opted instead for alternation in the presidency between the two parties. Yet, the article could cite and explore further Uruguay's two unhappy experiences with a plural executive.

One of the most dramatic findings in the article is with regard to the growth in formal executive powers in Latin America, particularly in terms of the ability to propose constitutional amendments and budget legislation, initiate ordinary legislation, and possess decree powers. A central issue which should be addressed is whether the formal legal changes represent for each country in which it took place an actual change in de facto presidential power, or whether—as greater respect for congruence between de facto and de jure powers grew—there was pressure to "constitutionalize" what was already in fact informal practice. Some past analyses of presidential power have sometimes mischaracterized actual presidential budgetary and decree powers through a strict reliance on formal texts.[9] Over the extensive time period in which the article makes comparisons, from the nineteenth century into the twenty-first century, there may well also be a secular change toward greater respect for formal institutions and constitutional texts. Since the number of countries is relatively small, it might be worthwhile to do some comparative case study analysis.

Another powerful point made in the article is that the story is more one of change and of greater convergence over time than of stability. However, if in fact the change is more to bring de jure norms in line with actual practice, then there is even more reason to believe that executive dominance

9. *Cf.* JONATHAN HARTLYN, THE STRUGGLE FOR DEMOCRATIC POLITICS IN THE DOMINICAN REPUBLIC 218 (1999).

started out strong in the region. At the same time, the story of convergence appears to emerge only after World War II, when the first quantifiable increase in similarity across constitutions in Latin America is found (see their Appendix D).[10] Interpreting constitutional similarities in the period before 1870 is also difficult given the region's dramatic history of instability and civil wars and the absence or just the beginnings of state formation. In addition, there was initial experimentation with various constitutional forms: Roberto Gargarella has discussed three constitutional models which were present in the nineteenth century, with the liberal and conservative models winning out over a more radical model by the end of that century.[11]

Finally, in terms of convergence over time, the article may be too unidimensional in what it focuses on, as it contrasts the U.S. President and Latin American presidents exclusively along the dimension of the balance of power between executives and legislatures. The article sometimes slips into arguing more broadly that what we are observing is an expansion of executive powers in the region, whereas the article is focused on only one (admittedly important) dimension, executive lawmaking powers. I was thinking this already, and then I read the article by Gabriel Negretto for this panel. In this article, he explicitly draws out the contrasting pattern between the president's legislative powers in Latin America, in which he concurs with Cheibub et al. that these have grown over time in the region, and the president's government powers, which he finds have not because of growing congressional power over cabinets, growth in political decentralization, and greater judicial independence from the executive, among other measures. Similarly, Negretto's article emphasizes that contemporary trends in electoral rule changes have also not all favored executive power concentration. In addition to these features, in recent years many constitutions in the region have also introduced elements of direct democracy, including in some countries the popular recall of presidents. Thus, the article by Negretto and these other issues raise the question whether the convergence pattern identified by these authors holds across different dimensions of executive power, which could potentially impact their cross-regional comparisons as well. As these comments suggest, this is an important project, which raises significant issues, and I look forward to seeing more work from it.

Claudio Fuentes is also embarking on an ambitious and important project on constitutional change in Chile, one that places the constitutional reform process in Chile in a broad theoretical and comparative context, while carrying out important empirical research including interviews with many of the central actors and the systematization of key data.

Overall, I find the analysis in this article convincing, in terms of the central role of the executive in implementing constitutional reform in the

10. Cheibub, Elkins & Ginsburg, *supra* note 1, at 1736.

11. ROBERTO GARGARELLA, THE LEGAL FOUNDATIONS OF INEQUALITY (2010).

post-Pinochet period and regarding why the minority political force on the right, which had effective veto power regarding constitutional reform, shifted over time to accept significant constitutional change, leading to the significant reform of 2005. However, in asking why Chile contrasts with other countries in terms of retaining such a strongly presidentialist constitution and enacting reform only (not replacement) in such a controlled fashion, I think he underplays one feature which sets Chile apart in the Latin American context: on measures of stateness and of rule of law (not necessarily democratic rule of law), Chile comes out higher than other countries in the region and has for some time. It is in this context that democratic actors carried out the transition from authoritarian rule fundamentally respecting the rules of the game and won, by defeating Pinochet in the 1988 plebiscite. Although it is true that Chile and Peru are the only South American contemporary cases which did not replace their Constitution inherited from an authoritarian regime via a constituent assembly, as noted in the article's Table 1,[12] there are several country cases elsewhere in the region that fall in the same category, such as the Dominican Republic and several Central American countries. However, it remains the case that Peru and these other countries are similar in having much less historical experience than Chile with regard to constitutionalism, stateness, and democracy.

Thus, Chile does seem distinct in terms of the cautious, subdued nature of the process driven by a respect for the rules of the game and a mindset of reform and gradualism. Given these features of the Chilean experience, it does not seem that surprising to me that an initial constituent assembly was not considered possible and that Chilean democratic leaders did not opt to seek a more radical route of constitutional replacement. As is evident in Venezuela, Ecuador, and Bolivia, this process typically follows a period of sustained economic crisis, and serial party and even party system delegitimation, and typically involves a highly popular president with a broad ambitious agenda for social as well as political change, initially blocked by an opposition Congress, pursuing a complex process of constituent assembly election, enactment of a new constitution, and eventually congressional closure.

In contrast, there is a very telling quote in Claudio's article from then-opposition politician Patricio Aylwin, explaining his thinking in the 1980s about the peaceful struggle for democracy: there was a need "to deliberately avoid the theme of [the constitution's] legitimacy."[13] Given that type of mindset, the 1989 reform, as Claudio analyzes so well, which otherwise appears hopefully minimalist and unsatisfactory, in fact did set the stage for making subsequent constitutional reform easier by changing some of the rules of the game. Especially from a contemporary perspective, the Chilean Coalition of Parties for Democracy (CPD—*Concertación de Partidos por la*

12. Fuentes, *supra* note 3, at 1750 tbl.1.

13. *Id.* at 1762.

Democracia) center-left coalition, which on the one hand was the most successful coalition government in the entire region during this time period, governing Chile from 1990 to 2005 and successfully winning 3 re-elections, also strikes us as excessively cautious. What may be useful to pursue more in the article or in subsequent research is the counterfactual of a more confrontational and thus inevitably also a more mobilizational strategy earlier on, as apparently Ricardo Lagos sought to do.

The article does an excellent job explaining how the CPD governing coalition sought constitutional reform—in its gradual, elitist way—from early on and how its efforts picked up dramatically once Lagos was elected President. Here, the article by Andrea and Julio raises an important issue which is somewhat underanalyzed in Claudio's article: how did the views of key state actors, such as the military and of the judiciary, evolve over time, as Pinochet was arrested abroad, came back to Chile, and was eventually delegitimized even regarding personal corruption. How did their links, and those of the business sector, with the parties of the right evolve over this time period? Also relevant for future reseach would be the question of what elements of the constitution inherited from the Pinochet military regime the CPD, and particularly the executive branch (granted so many effective powers), found attractive, and whether that potentially slowed change at all. Did the CPD coalition not push harder for reform exclusively because of the perceived inability to convince rightist elements in Congress? And, a more systematic analysis of the changing political context for the right leading up to the significant reforms enacted in 2005 could usefully include public opinion data as another indicator of the electoral pressures felt by these political actors.

Chile is a relative outlier in the Latin American context, which makes issues of diffusion especially interesting. As the article notes, diffusion of political ideas is seen as important in generating constitutional change, especially constitutional replacements. Clearly the Chilean model itself is not diffusing to the rest of the region. Rather, the question is whether in this case there was "negative diffusion"—I wonder if in his interviews with party leaders they talked about experiences elsewhere on the continent as lessons to be learned about what not to do?

Whether countries have had recent constitutional replacements or more limited reforms like in Chile, one thing that is clear is that both of these appear to be catalysts for further reforms, rather than representing a clear resolution among key actors about the rules of the game under which ordinary politics should be pursued going forward. Claudio Fuentes notes this for the case of Chile. And, regarding more ambitious constitutional replacements, given their highly specific nature or the ambiguities and tensions found in their texts, which political actors subsequently seek to modify or adapt for their advantage, the pattern in the region has been one of on-going constitutional debate and modification. In contemporary Latin America, both political and social actors understand democratic politics to be

as much about the rules of the game as about political conflict within certain rules. This bodes well for the research agendas of all the authors on this panel.

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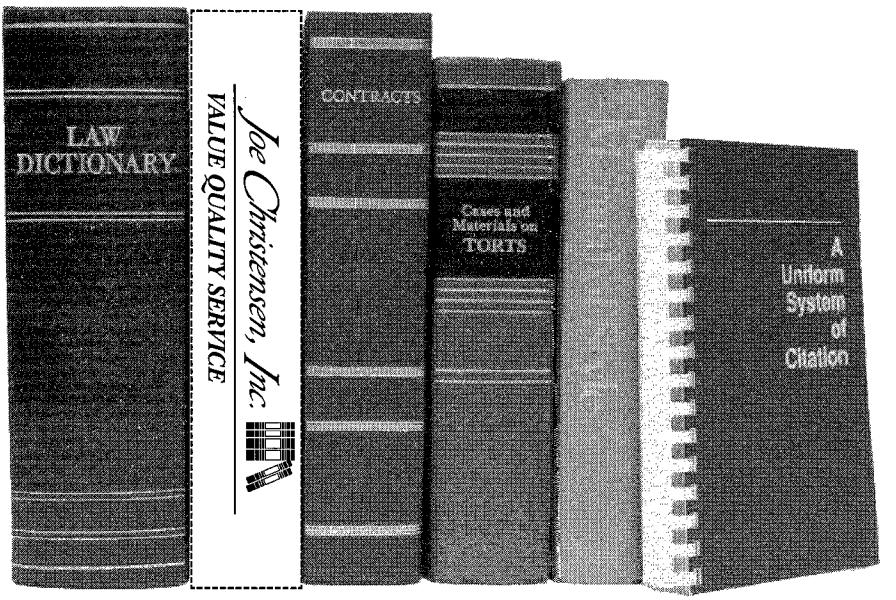

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