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The Reality of Social Rights Enforcement

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

INTRODUCTION

For all practical purposes, the debate about whether to include social rights in constitutions is over. Social rights are rights of citizens to receive services such as food, health care, housing, and social security. The U.S. Constitution does not include any of these rights, and most American scholars have long taken a position against their inclusion. But the American position against social rights is an outlier; there is now a "near consensus" (outside of the United States) that countries should include such rights in their constitutions.[1] Moreover, there is an increasingly vibrant and varied jurisprudence on what these rights mean and how they should be enforced. Social rights are not mere paper rights; courts around the world are actively enforcing them.[2]

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1. CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221 (2001) ("A remarkable feature of international opinion—indeed a near consensus—is that socioeconomic rights deserve constitutional protection. The principal exception to the consensus is the United States . . . .").

2. Several important edited volumes have attempted to come to terms with this enforcement by surveying practices around the world. *See, e.g.*, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR

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

One aim of this Article is simply to marshal empirical evidence and explanations showing that most of the literature mischaracterizes what social rights enforcement is—courts can aggressively enforce these rights and yet do little to affect social transformation.[3] I focus on a case study of the Colombian Constitutional Court, which has extraordinarily vibrant social rights jurisprudence but has struggled to target its jurisprudence towards marginalized social groups despite a doctrinal and ideological commitment to those groups. The case study is based upon my own extensive fieldwork in the country. I supplement that evidence with evidence from Hungary, South Africa, Brazil, and other countries, showing that the hypotheses derived from the Colombian case appear to hold more broadly.

The evidence I present also sheds light on why this occurs. It suggests at least two major reasons for these trends. One important factor is the nature of the judiciary. Despite the extensive literature in constitutional theory on counter-majoritarianism, courts are actually pro-majoritarian actors in many circumstances. Indeed, they are often populist actors—they sometimes favor middle class groups with social rights like food and housing precisely in order to gain political support. Another reason for this trend is that courts are likely to choose certain remedies because of ideology and resource constraints, and these remedies are particularly ineffective at targeting lower class groups.

THE POOR? (Roberto Gargarella et al. eds., 2006); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008).

3. My argument is that most social rights jurisprudence has benefitted the middle class; this does not necessarily mean that this jurisprudence has not had some positive impact on the poor. As Daniel Brinks and William Forbath note, it is very difficult to argue empirically about whether judicial enforcement of social rights, on aggregate, has a positive impact on the poor. *See* Daniel Brinks & William Forbath, *Commentary: Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-Poor Interventions*, 89 TEX. L. REV. 1943, 1952–53 (2011). It might be that even the relatively small number of the impoverished who benefit directly from judicial intervention do better than they would if the political process were left alone, or it might be that judicialization of these rights has indirect effects on the political process that are beneficial. It is sufficient for my purposes to say that claims that social rights are socially transformative are overstated.

Thus, the second major aim of this Article is to reorient the very rich, but in my view misguided, debate about how social rights should be enforced. Scholars led by Mark Tushnet and Cass Sunstein have argued that "weak form" or dialogical enforcement of social rights, whereby courts point out political failures to fulfill these rights but generally leave the remedy to the discretion of the political branches, is the best way to balance a desire to enforce social rights and the legitimacy and capacity strains that such enforcement places on courts.[4] The dialogue-based approach has not really been used outside of South Africa, and in that country it has not accomplished much. Systematic failures in both legislative and bureaucratic politics in developing countries make dialogic approaches unlikely to work in those countries—the intended recipient of the dialogue is unlikely to respond effectively.

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

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

The rest of this Article is organized as follows: Part I surveys the existing literature on both the inclusion of social rights in constitutions and the question of how social rights should be enforced. My aim is to show that existing work has mischaracterized both what social rights enforcement is about and how most courts are actually enforcing social rights. Part II

4. *See, e.g.*, SUNSTEIN, *supra* note 1, at 221–37; MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 227, 264 (2008). R

presents a case study of the social rights jurisprudence of the Colombian Constitutional Court, which has produced one of the most varied and vibrant bodies of jurisprudence on these issues. I show that the Court has consistently proclaimed a serious interest in improving the situation of marginalized groups, but because of both remedial issues and populist tendencies on the Court, it has had trouble targeting its interventions towards these groups. Part III presents complementary evidence from other systems. This Part shows that the link between the form of the remedy and the beneficiaries of a given intervention is strong, and that courts have tended to use types of remedies that have been ineffective at reaching the poorest members of society. Part IV presents some important policy implications of my analysis: in particular, I suggest changes in the doctrines used by the Committee on Economic, Social, and Cultural Rights (which is charged with interpreting the International Convention on Economic, Social, and Cultural Rights), which would more clearly target the poor, and I argue that the transnational dialogue or migration of constitutional ideas needs to focus on remedies and not just on the definition of rights. Further, I suggest that for various reasons, institutions other than constitutional courts might be more effective enforcers of social rights. Part V concludes.

I. The Existing Debate

A. The Debate on Inclusion of Social Rights in Constitutions

The debate on whether to include social rights in constitutions is an old one. The U.S. Constitution does not include these rights, and it served as a very influential model for other constitutions in the nineteenth century.[5] But the force of the U.S. model began to cede ground to competing ideologies and newer models in the twentieth century. For example, both the Mexican constitution (written in the midst of the Mexican revolution) and the German constitution (written after the country's catastrophic defeat in World War I) during the Weimar Republic included lists of social rights.[6]

The ideological importance of these rights gained force in the post-World-War II period, with a parade of post-colonial constitutions in the developing world. Internationally, countries agreed to the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights, although the language of the two covenants reflects a continuing difference in how the international commu-

5. *See, e.g.*, Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 Am. U. L. Rev. 1490–93 (1996–1997) (explaining how Argentina borrowed from the American constitution in the nineteenth century).

6. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 867–72 (1986).

nity saw them.[7] Domestically, countries in the developing world, which have written new constitutions since the post-war period, have generally included lists of social rights like rights to food, housing, health care, and social security.[8] Some of these countries have conferred less than full constitutional status on these rights, for example by labeling them as non-directive fundamental principles, but this position has also become an outlier in recent constitutional design. Thus, in this area as in others, the United States is increasingly "exceptional"[9] and, despite the American rejection of social rights, they are firmly part of the post-war synthesis on the contents of constitutional law.

Still, the debate about the appropriateness of these rights has continued to be important to scholars and constitutional designers. An important group of scholars, particularly in the United States, continues to defend the position that social rights have no place in a constitution. The major arguments here revolve around the undesirability of judicial enforceability of these rights, and focus on two prongs: first, that judges lack the democratic legitimacy to enforce these rights, and second, that they lack the institutional capacity.[10] The argument begins by positing that social rights are a subspecies of positive rights, which entail the right to receive something from the state rather than merely requiring the state to leave one alone.[11] Enforcement of these rights might require, then, that the judge order the state to provide people with goods or services, which would raise the specter of "the courts running everything—raising taxes and deciding how the money should be spent."[12] Judges lack the democratic legitimacy to carry out this kind of policymaking, and they lack the capacity to do so. Courts are unsuited to decide where to spend the state's limited resources, and they will have trouble giving precise content to vague rights of the sort of the right to food or housing.[13] Michelman's observation that courts perform poorly when adjudicating "polycentric" issues is particularly applicable to socio-eco-

7. Most importantly, Article 2 of the International Covenant on Economic, Social, and Cultural Rights states that the States Parties agree to "take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights in the present [ ] Covenant . . . ." International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), art. II, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976). Thus, most of the Covenant is seen as being "progressively" rather than immediately realized; this sharply limits the obligations placed on states. No similar provision exists in the International Covenant on Civil and Political Rights.

8. *See* TUSHNET, *supra* note 4, at 220. R

9. Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 664 (2008).

10. *See, e.g.*, Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003) (summarizing the conventional arguments and arguing that they are inadequate in coming to grips with the full scope of the issue).

11. *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864–68 (2000–2001) (posing "the following simple test for distinguishing between positive and negative rights—if there was no government in existence, would the right be automatically fulfilled?").

12. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 169 (1999).

13. *See, e.g.*, Michelman, *supra* note 10, at 15 (summarizing this position). R

nomic rights; they have an inherent "[r]aging indeterminacy."[14] The result of all this is that courts are unlikely, in practice, actually to enforce socio-economic rights: they will be unwilling to incur the wrath of the political branches or to fulfill undertakings located so far beyond their own capacity.[15] Courts will auto-limit in order to avoid sanctions from other branches of government or from the public: "It is futile to rely on the judiciary to provide basic welfare for the disadvantaged, if the political branches are unwilling to do so."[16]

These arguments have been attacked by a different group of scholars, who argue that social rights are actually not different from traditional, first-generation rights, and can and should be enforced by courts. The distinction, these scholars argue, may even be "meaningless."[17] These scholars argue that social rights have a negative dimension as well as a positive dimension: enforcement may often require that courts enjoin states from taking some action that threatens social rights (for example, industrial development that threatens the right to health, or forced evictions from slums that threaten the right to housing).[18] They also argue that enforcement of civil and political rights may often require the spending of significant amounts of state resources—for example, the right to a fair trial requires the state to spend significant amounts of money.[19]

On the legitimacy and capacity points, these commentators note that the enforcement of traditional civil and political rights can also involve the court in complex remedies (the U.S. school desegregation and prison reform cases are examples), and that courts can (albeit perhaps awkwardly) develop the capacity to deal with these sorts of cases.[20] Finally, these scholars note that courts can undertake many types of social rights enforcement without provoking unduly complex issues of enforcement or policy line-drawing—in many cases, the court can provide an individualized remedy to a single plaintiff, which obviates the need to make a large-scale intervention in public policy.[21]

The truth in this debate is almost certainly somewhere in between. That is, the critics of the conventional view are right that social rights enforce-

14. *Id.* at 30–31 (analyzing a hypothetical "social citizenship right" and its "raging indeterminacy").

15. *See* Cross, *supra* note 11, at 887–93. R

16. *Id.* at 888.

17. Malcolm Langford, *The Justiciability of Social Rights: From Theory to Practice*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3, 30–31 (Malcolm Langford ed., 2008).

18. *See, e.g.*, Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-economic Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 46, 46 (Malcolm Langford ed., 2008) (arguing that "[t]he distributional implications of traditional remedies are also underlined by the fact that some socio-economic rights can be enforced by traditional remedies . . . ."); *see also* Michelman, *supra* note 10, at 17 (noting that "social rights can sometimes be 'negatively protected' by comfortably kosher forms of judicial intervention"). R

19. *See* Langford, *supra* note 17, at 30.

20. *See id.* at 35–37.

21. *See* Roach, *supra* note 18. R

ment is not always and inevitably different from negative rights enforcement. By restricting themselves to certain kinds of cases and certain remedial techniques, courts can assimilate enforcement of social rights to enforcement of more traditional kinds of rights. But there is often a difference of degree. As Tushnet notes, "it is not that recognizing social and economic rights would have budgetary consequences, while recognizing other constitutional rights does not . . . . Protecting background private law rights and first- and second-generation constitutional rights is cheap, though not free. Protecting social and economic rights is expensive."[22] Moreover, while negative injunctions and individualized remedies could likely enforce some kinds of social rights, the enforcement of many kinds of rights are likely to require the creation of new programs.[23] These tasks are difficult for courts to perform, and they may refuse to perform them because of a perceived lack of capacity or legitimacy. As I explain in more detail below, the fact that social rights have some aspects that are more easily assimilated to traditional rights enforcement, and other facets that would require courts to undertake radical tasks, is important. It means that in practice, courts are likely to enforce social rights either by issuing negative injunctions or by giving individualized remedies to individual plaintiffs. Such methods of enforcement will be least likely to get courts into serious trouble.

B. The Debate on Enforcement and the South African Obsession

Most of the more recent work in the field has focused on the specific question of *how* social rights should be enforced rather than the older question of *whether* they should be included in constitutional texts in the first place. Some critics of social rights argued that if social rights were actually put into constitutional texts, courts would be unlikely to actually do anything with them.[24] Understanding their lack of democratic legitimacy and institutional capacity, courts would merely ignore these rights. Empirical experience has shown this observation to be false—courts have found a variety of approaches to enforce these rights. However, scholars have emphasized a clear tension between the desire to enforce socio-economic rights once they find their way into the text and the strains on both capacity and democratic legitimacy that courts may feel if they aggressively enforce them.

The theoretical debate, however, has focused almost entirely on a single country (and largely on a single case). In the famous *Grootboom* decision, the South African Constitutional Court held that the political branches in South Africa had violated the constitution by failing to develop a housing plan that would meet the immediate needs of the poorest people most in need of

22. TUSHNET, *supra* note 4, at 234. R

23. *See id.*

24. *See* Cross, *supra* note 11, at 888–89. R

assistance, like the plaintiff.[25] But the Court refused to order an individualized remedy for the plaintiff, such as an order that the state provide her with housing—the constitution did not create a right to housing "immediately upon demand."[26] Nor did the Court give the details of such a plan and require the political branches to adopt it or try to implement the plan itself. Instead, the Court merely stated that the political branches had the obligation to "devise and implement a coherent, coordinated programme" and that a "reasonable" part of the total housing budget had to be reserved for those in desperate, immediate need of housing.[27] The underlying concerns of the Court appeared to be the ones of the critics of social rights—the Court was concerned that it would lack the legitimacy and capacity to issue a stronger order.[28]

A prominent group of American constitutionalists lauded the decision as a reconciliation of two imperatives previously thought mutually exclusive by most—the enforcement of the detailed social rights now found in most constitutions and the assurance that courts do not overstep their bounds of democratic legitimacy and capacity. Thus, Mark Tushnet wrote that the Court's work constituted a new kind of judicial review, "weak form review," that allowed courts to judicially enforce these rights without involving them in complex public policy decisions or letting them run roughshod over the legislature.[29] In other words, the Court gave the right to housing some judicially enforceable content, but at the same time, gave "legislatures an extremely broad range of discretion about providing" the right.[30] In a similar vein, Cass Sunstein wrote that the Court had effectively "steer[ed] a middle course" between holding socio-economic rights non-justiciable and holding them to "create an absolute duty" to provide housing or food or health care for everyone who needs it.[31] Instead, the Court had enforced the right to "promot[e] a certain kind of deliberation . . . as a result of directing political attention to interests that would otherwise be disregarded in ordinary political life."[32]

More recent work has critiqued the positions of Sunstein and Tushnet. A large group of both South African and American scholars has argued that weak-form enforcement, as exemplified by *Grootboom*, did not work—the legislature did not produce the plan that the Court requested, and the case

25. Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 1169 ¶ 93-96 (CC).

26. *Id.* ¶ 95.

27. *Id.* ¶¶ 66, 92, 95.

28. *See* TUSHNET, *supra* note 4, at 243 (noting that the Court used "the language of nonjusticiability" but "went on . . . to enforce the relevant social welfare right"). R

29. *See id.* at 242–44.

30. *Id.*

31. SUNSTEIN, *supra* note 1, at 233. R

32. *Id.* at 235. Other U.S. scholars have written similar assessments. *See, e.g.*, Michelman, *supra* note 10, at 27 (noting that *Grootboom* "does not . . . seem shockingly pre-emptive of legislative and executive policy choice"); MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 261, 265 (2009) (defending *Grootboom* against various critics). R

did virtually nothing to actually advance the right to housing.[33] Many of these academics have argued that *Grootboom* had more or less the right idea but needed to be ratcheted up: the remedy needed to be made a little less "weak" in order to be effective.[34]

In a series of recent articles, Brian Ray notes that the South African Constitutional Court has abandoned the *Grootboom* approach for another tactic that Ray calls engagement.[35] The core of the engagement remedy is that the Court orders the state to negotiate with the plaintiffs so that a satisfactory agreement can hopefully be reached. For example, in the *City of Johannesburg* case, over 400 residents of two unsafe buildings in a slum sued to stop the state from forcibly evicting them in pursuit of a large-scale urban regeneration.[36] The Constitutional Court issued an interim order requiring the city and the residents to "engage with each other meaningfully . . . in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned."[37] The parties reached an agreement; the City agreed to stop evictions in the short-term and to refurbish rather than destroy many of the buildings in the area.[38] Ray argues that engagement, which the Court has also used in subsequent cases, is an alternative to *Grootboom* that also manages the tension between the need to enforce these rights and the capacity and legitimacy problems that courts feel when they enforce them. Engagement "falls somewhat short of the call by the Constitutional Courts' critics for full-fledged judicial interpretation and enforcement, but the same features that make engagement something less than strong court enforcement also enhance its legitimacy."[39] As with *Grootboom*, however, there are real questions about the general effectiveness of the engagement remedy, at least as it is currently used by the South African Constitutional Court—engagement has failed in several subsequent cases.[40]

33. *See, e.g.*, Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 136 (2009); David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance*, 119 SALJ 484 (2002); D.M. Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite,'* 22 SAJHR 301 (2006).

34. *See* Davis, *supra* note 33; Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007) (arguing that the court may want to consider ratcheting up the remedy even as it maintains a minimalist vision of the right). R

35. *See* Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy*, 9 WASH. U. GLOB. STUD. L. REV. 399 (2010); Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797 (2009) [hereinafter Ray, *Extending the Shadow*]; Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151 (2009).

36. Occupiers of 51 Olivia Rd. v. City of Johannesburg 2008 (5) BCLR 475 ¶1 (CC).

37. Occupiers of 51 Olivia Rd. v. City of Johannesburg, Interim Order Dated 30 August 2007, *available at* http://www.constitutionalcourt.org.za/Archimages/10731.pdf.

38. Occupiers of 51 Olivia Rd. v. City of Johannesburg 2008 (5) BCLR 475 ¶ 24 (CC).

39. Ray, *Extending the Shadow*, *supra* note 35, at 842. R

40. For example, as Ray notes that in *Mamba v. Minister of Social Protection*, the South African Constitutional Court ruled that the government should engage with refugees in order to determine what to do with certain refugee camps that were scheduled to be closed. However, the government declined to

C. The Reality of Social Rights Enforcement

Critics of social rights argued that courts would probably respond to the constitutionalization of social rights by declining to enforce those rights. Tushnet, Sunstein, and Ray argued that courts should relieve the tension between enforcement of social rights and democracy/capacity issues by adopting the "weak form" or dialogical review used in *Grootboom* or an engagement remedy like the one used in *City of Johannesburg*.[41] But neither approach seems to function well or to describe accurately the majority of social rights enforcement occurring around the world.[42] The critics were wrong to suggest that social rights enforcement would not occur; in reality, courts have found a variety of ways to give content to these rights. But the South African solutions seem deeply bound up with the political situation and legal culture of that country and have not been used anywhere else.[43]

In reality, courts have found other ways to manage the tension between the enforcement of social rights and the capacity and legitimacy costs perceived to go along with that enforcement. Many courts appear to rely upon an *individualized enforcement* model—when an individual plaintiff comes to the court asking for provision of some particular medicine or treatment, they grant relief to that individual plaintiff.[44] This model relieves the tension noted above by providing relief to only a single plaintiff, thus avoiding complex management issues and making it appear that the court is not intervening massively in public policy. Even though the aggregate affect of these decisions on the public budget can be very large, the individual decisions appear to be familiar court-like work; the court is simply deciding whether one plaintiff is entitled to a remedy against one defendant. A second way in which courts manage the tension is by issuing *negative injunctions* striking down a law and maintaining the status quo, rather than issuing positive orders forcing the state to provide a service.[45] Again, by doing this, the courts are assimilating social rights enforcement into the enforcement of traditional first-generation rights—it is issuing a merely negative remedy for the right.

Both of these remedies allow courts to carry out social rights enforcement relatively securely and without worrying that they will be seen as overreaching beyond the traditional tasks of courts. But there is a significant cost—both tools are heavily tilted toward middle class and upper income groups rather than poor plaintiffs. In other words, in much of the world social rights enforcement is vibrant, but accrues to the benefit of higher class

undertake more than a formal interaction with refugee groups and simply began closing the camps. *See id.* at 837–42.

41. *See id.*

42. *See infra* Parts II, III (summarizing evidence that most courts focus on other approaches).

43. *Cf.* Roux, *supra* note 33, at 110–11 (arguing that South African jurisprudence has to be understood within the context of the country's dominant party system). R

44. *See infra* Parts II.C, III.A.

45. *See infra* Parts II.D, III.B.

groups rather than those social groups most in need.[46] With individualized enforcement, this occurs because individual middle class rather than poor plaintiffs are more likely to know their rights and to be able to navigate the expense and intricacies of the legal system.[47] In the negative injunction cases, it occurs because the state usually tries to cut middle class pension and health care benefits for civil servants and other middle class groups rather than those few services going to the very poor.[48] Put another way, the status quo gives the poor relatively little to protect through negative enforcement. To make matters worse, courts often manage the tension between social rights enforcement and democracy by engaging in judicial populism—issuing decisions that are calculated to raise the ire of the political branches but to gain strong support from the middle class groups. For example, courts often strike down austerity measures that limit middle class social benefits precisely because they will have the support of the median voter when they do so, which may insulate them from retaliation.[49]

All of this suggests that the conventional literature misunderstands both the general nature of social rights enforcement and the tradeoff faced by courts. Most of the literature on social rights, whether in favor of or against enforcement, assumes that it is a counter-majoritarian exercise, and that the beneficiaries of its enforcement will be marginalized groups.[50] This does not appear to be true—social rights enforcement is essentially majoritarian in many cases, and the beneficiaries are middle and upper class groups rather than the marginalized. Moreover, the real tradeoff faced by courts when choosing remedies is more complex than simply a tradeoff between effective enforcement and legitimacy or capacity issues. Instead, there are three issues—the legitimacy/capacity cost to the court, the effectiveness of the intervention, and the question of which group benefits from the intervention.

46. *See infra* Parts II, III (presenting evidence for this argument).

47. *See infra* text accompanying notes 119–125. R

48. *See infra* text accompanying notes 232–233. R

49. *See infra* text accompanying notes 139–150. R

50. *See, e.g.*, Cross, *supra* note 11, at 886 (noting that positive rights claims would "pit poor individuals against the government"); Roberto Gargarella, *Theories of Democracy, the Judiciary, and Social Rights, in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 13, 28 (Roberto Gargarella et al. eds., 2006) (noting the social rights "are normally claimed by groups that consider themselves marginalized by the dominant political forces"); RAN HIRSCHL, TOWARDS JURISTOCRACY 125–39 (2004) (suggesting that courts in South Africa, New Zealand, Israel, and Canada have not aggressively enforced social rights because these courts were set up to protect the interests of entrenched elites and have no interest in protecting marginalized groups); SUNSTEIN, *supra* note 1, at 223 (noting that protection of social rights is about the provision of "minimal protections against starvation, homelessness, and other extreme deprivation"); Michelman, *supra* note 10, at 32 (arguing that social rights are about providing "a social citizenship guarantee" or "a credible guarantee of constant, good faith pursuit by the powers that be of assurance of the prerequisites to social citizenship to all who seek them on fair terms"). Only a few authors have noted the point that social rights claims might be aggressively enforced, but in favor of the rich or middle class instead of the poor. *See* Langford, *supra* note 17, at 38 (noting that "[a] particular concern is that middle classes may better capture the Courts in comparison to the poor"); Andras Sajo, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 83 (Roberto Gargarella et al. eds., 2006) (arguing that social rights enforcement in Hungary has accrued largely to the benefit of the middle class). R R R R

TABLE 1: THE EFFECTS OF SOCIO-ECONOMIC RIGHTS REMEDIES

Approach	*Legitimacy/ Capacity Costs on Court*	*Effectiveness at Changing Practice*	*Likely Beneficiaries*
Individualized enforcement	Low	Will not alter bureaucratic behavior	Middle & upper-class groups
Negative injunctions	Moderate, although may be high if have huge macroeconomic effect	Will strike down laws and maintain status quo	Middle & upper-class groups
Weak-form enforcement	Low to moderate	Will not cause any change	Nobody, although may aim at poor
Structural enforcement	High	May alter bureaucratic practice	May target lower income groups

Table 1 summarizes these tradeoffs. Individualized enforcement may have a low legitimacy cost and does not strain the capacity of the court, but it primarily benefits upper income groups. Further, the evidence indicates that it does little to improve the performance of the bureaucracy in providing social services, and thus it may be relatively ineffective as well. Negative injunctions are effective (at least at maintaining the status quo) and may have only moderate capacity and legitimacy costs to the court (depending on their macroeconomic effect), but they again benefit primarily upper income groups. Weak-form enforcement or engagement appears to be targeted at lower income groups and to have low legitimacy and capacity costs for the court, but it also appears to be ineffective.[51] A fourth approach, *structural enforcement*, is familiar from U.S. public law[52] and occurs when a court issues broad orders aimed at reforming institutional practice over a long period of time.[53] This appears to hold some promise at targeting relief towards lower income groups, and may be able to do so effectively in some circumstances, but it obviously involves the court deeply in polycentric decisions and thus may put a significant strain on the legitimacy and capacity of the court.

51. *See supra* text accompanying notes 33–40 (describing the results of the relevant South African jurisprudence).

52. *See generally* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (surveying structural injunctions across a range of areas in U.S. law).

53. *See infra* Part II.E.

II. A Case Study on the Difficulties of Social Rights Enforcement

In this section I use a case study to test my two major hypotheses: (a) that much of social rights enforcement is majoritarian and benefits middle and upper class groups, and (b) that there is a strong relationship between the type of remedy used by courts and the identity of the beneficiaries from the intervention. I focus on the Colombian Constitutional Court from 1991 to the present. The Court makes a good case study for two reasons. First, it has been extraordinarily active in enforcing social rights and has used three types of remedies noted above—individualized enforcement, negative injunctions, and complex structural remedies—in its jurisprudence. Thus, it can demonstrate the effects of different types of remedial approaches, while holding constant certain cultural, political, and contingent factors that vary across countries.

Second, it constitutes, in many respects, a "least likely case" for my theory that social rights enforcement is largely majoritarian.[54] The Court has shown a jurisprudential commitment, demonstrated from its creation, to aiding economically marginalized groups, and its jurists have generally been creative and sophisticated; they have, for example, been willing to use innovative remedies.[55] Further, as discussed in detail below, the Court possesses some of the strongest powers of any constitutional court in the world. Finally, as I note elsewhere, the magistrates have generally stated that they may legitimately substitute for the roles of other branches of government if necessary in order to further constitutional values.[56] Thus, one would expect that were *any* court going to be successful in targeting lower income groups with its social rights jurisprudence, it would be the Colombian Constitutional Court. The Colombian Court is least likely to fall into the theoretical difficulties I have identified. Least likely cases are analytically useful in demonstrating claims. If the claim holds true even in the "least likely" case, then it seems likely to hold true across a wide range of political and legal environments.

The findings of the case study demonstrate that the Court has often been unwilling or unable to target its jurisprudence towards the lower classes. The magistrates have often relied on the individualized enforcement and

54. The concept of a least likely case was invented by political scientists as a way to make causal inferences from the case-study method, which often involves, by necessity, a small number of observations. *See generally* Harry Eckstein, Regarding Politics (1992).

55. For background on the justices who have made up the court, see David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 3 Geo. Wash. Int'l L. Rev. 687, 724–36, 743 Table 2, 744 Table 3 (2005).

56. My argument is that the Court is a "least likely" case in many respects, but not in all. For example, the political context in which the Court works has made it likely that magistrates will seek political careers after their terms have ended, and many have in fact done so. *See infra* note 150. This may make the Colombian Court more prone to populism than other courts. R

negative injunction models. The main direct beneficiaries of these remedies have been middle and upper class groups, and neither approach has had much success in altering public policy or bureaucratic behavior in ways that have been beneficial to the poor. Additionally, the magistrates have often displayed populist tendencies, deliberately targeting some of their interventions towards middle class groups. More recently, however, the Court has made efforts to correct both of these tendencies—for example, because of its awareness of equity problems with existing approaches, the Court has relied more on innovative remedies like structural injunctions. Some of these have had beneficial effects on the poverty rate.

Thus, the case study demonstrates that even a powerful, innovative Court particularly attuned to marginalized social groups will struggle to target its jurisprudence towards the poor. A transformative jurisprudence is not impossible, but it does require considerable remedial creativity and commitment on the part of justices—that is, a willingness to depart sharply from traditional notions of judicial role. The case study also demonstrates this Article's claim that different models of social rights enforcement produce markedly different results—the structural injunction model has seemingly done much more for the poor than the individualized enforcement or negative injunction remedies. Part III will show that most other courts around the world are considerably less likely to produce a transformative, pro-poor social rights jurisprudence. Absent the Colombian Constitutional Court's extraordinary institutional context, design features, and quality of personnel, courts are unlikely to produce much of any social rights jurisprudence with real pro-poor benefits. In particular, more innovative remedies like structural injunctions are very rare in the comparative context.

A. Background on the Creation of the 1991 Constitution and Constitutional Court

Colombia's 1886 Constitution, which was in effect until 1991, contained no references to socio-economic rights, nor did the courts make any effort to enforce any. Indeed, the Supreme Court, the highest court on constitutional matters during the pendency of the 1886 Constitution, focused primarily on structural matters, especially the balance of power between Congress and the Executive and the constitutional amendment process.[57] By the 1980s, there was a rising sense that Colombia was in crisis because of violence.[58] At the same time, there was a sense that Colombian politics had ossified—to end a

57. *See generally* ALFONSO CHARRIA ANGULO, LEGALIDAD PARA TIEMPOS DE CRISIS [TIMES OF LEGAL CRISIS] (1984) (examining the role of the Supreme Court between 1886 and 1933); HUGO PALACIOS MEJIA, LA ECONOMIA EN EL DERECHO CONSTITUCIONAL COLOMBIANO [THE ECONOMY IN COLOMBIAN CONSTITUTIONAL LAW] (1975) (looking at Supreme Court decisions from the National Front era); ESTADO DE SITIO Y EMERGENCIA ECONOMIA [STATE OF SIEGE AND EMERGENCY ECONOMICS] (Manuel José Cepeda ed., 1985) (detailing the Supreme Court's attempts to limit executive power in the 1980s).

58. DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 252, 268 (1993).

previous civil war in the 1950s, the two traditional parties, the Liberals and Conservatives, had agreed to divvy up key political, administrative, and judicial posts in an arrangement known as the National Front, and this made the political system resistant to change for decades.[59]

Finally, after a series of political assassinations culminated in the killing of the liberal candidate for president, Luis Carlos Galán, in 1989, a short-lived student movement erupted and the major presidential candidates agreed to support the calling of a Constituent Assembly in order to write a new constitution.[60] Because of the electoral rules under which the Assembly was elected and the nature of the political moment, the composition of the Assembly was considerably more plural than ordinary politics and included several political groupings beyond the traditional two party system. While the largest block was the Liberal party, the second largest party was a demobilized guerrilla group called the M-19, and the third largest group was a breakaway segment of the Conservative party called the Movement for National Salvation ("MSN").[61]

As I have noted elsewhere, the Constituent Assembly distrusted existing institutions, particularly the Congress. It therefore sought to reform existing institutions in order to make them stronger and more pluralistic, but it also tried to create new institutions to place checks on existing institutions and to create avenues for citizens to make end runs around them.[62] Chief among this latter effort was the creation of a new, specialized Constitutional Court, whose nine justices served nonrenewable eight-year terms.[63] The system does not necessarily distance judges from politics in general, but it does make it difficult for any single political force to capture the Court. The President, Supreme Court, and Council of State (the nation's high administrative court) each had the power to send lists of three candidates for one-

59. *Id.* at 223–48. Under the arrangement, the two parties agreed to rotate the presidency, offer significant cabinet positions to the opposing party, and split the Supreme Court between their supporters. Although the National Front formally ended in 1978, when the parties began competing for the presidency again, the two traditional parties continued to monopolize nearly all posts, and the political system continued to resist change. *Id.* at 249–282; *see also* RAFAEL BALLEN M., CONSTITUYENTE Y CONSTITUCION DE 1991 [THE CONSTITUENT ASSEMBLY AND THE 1991 CONSTITUTION] 16–81 (1991) (laying out various unsuccessful efforts at constitutional reform).

60. BALLEN, *supra* note 59, at 101–57. A Constituent Assembly was not explicitly contemplated in the 1886 Constitution, which only allowed amendment via congressional action. Nonetheless, the Supreme Court, in a narrowly divided vote, allowed the Assembly to proceed on the theory that ultimate power to rewrite the Constitution rested with the people. *See id.* at 157–232 (reprinting both the majority opinion and the dissents). R

61. Of the seventy seats elected to the Assembly, the Liberals won twenty-three seats, the M-19 nineteen, the MSN eleven, and the Conservatives only nine. JAIME BUENHORA FEBRES-CORDERO, EL PROCESO CONSTITUYENTE: DE LA PROPUESTA ESTUDIANTIL A LA QUIEBRA DEL BIPARTIDISMO [THE CONSTITUTIONAL PROCESS: FROM STUDENT PROPOSAL TO THE FAILURE OF BIPARTISANSHIP] 354–55 tbl. 4 (1991).

62. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 338–40 (2010).

63. CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] art. 239.

third of the vacancies on the Court.[64] The final selection was made by the Senate from each list of three candidates.[65] The Court had the power to hear the traditional Colombian instrument of review, the unconstitutionality action, which was an abstract review petition that could be initiated by any citizen against any law.[66]

In addition, the 1991 Constitution created a new device, the *tutela*.[67] *Tutelas* were constitutional complaints allowing citizens harmed by government (and in some cases private) actions in violation of their constitutional rights to bring suit.[68] The device was designed to be fast (it had to be heard and decided within ten days by the first instance court and twenty by the appellate court) and informal (it merely had to contain a short statement of the facts, and could be filed by telegram or even orally in certain cases).[69] It would be heard by two courts within the ordinary judiciary and then sent to the Constitutional Court, which could use a certiorari-like mechanism to select some for review.[70]

The then-president, Cesar Gaviria, saw the *tutela*, along with the Constitutional Court itself, as one of the key achievements of the new Constitution. In his only speech before the Assembly during its work, he noted the pervasive problem of "arbitrariness" in Colombian society, both because of the low quality of government and because of pervasive violence.[71] He argued that the *tutela* was necessary in order to make "the Constitution cease

64. *Id.*

65. *Id.*

66. CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] art. 241, para. 4; Statutory Law of the Administration of Justice, No. 270 of 1996, art. 44, *available at* http://www.corteconstitucional.gov.co/la corte/ley270%20-%2043a49.php.

67. CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] art. 86. In part, the article states: "Every person has the right to file a *tutela* before a judge, at any time or place, through a preferential and summary proceeding . . . for the immediate protection of his fundamental rights when that person fears they may be violated by the action or omission of any public authority. . . . In no case can more than 10 days elapse between filing the *tutela* and its resolution." *Id.*

68. The *tutela* was allowed against any "public authority"; it could also be brought against private actors if they were charged with "delivering a public function," if their conduct had a serious affect on "collective interest," or if the petitioner was left in a "defenseless or subordinate" state before the private actor. *Id.*

69. *See* Decree 2591, noviembre 19, 1991, [165] DIARIO OFICIAL [D.O.] (Colom.), art. 1 (noting that a *tutela* can be filed at any "day or hour"); art. 14 (noting that the procedure is "informal," for example, that it need not cite the precise constitutional norm at issue and that it can be filed by telegram, or in case of urgency, orally); art. 29 (noting that the first instance judge must render a decision within ten days); arts. 31–32 (requiring appeals to be filed within three days and requiring the appellate court to render decision within twenty days).

70. *See* Decree 2591, noviembre 19, 1991, [165] DIARIO OFICIAL [D.O.] (Colom.), art. 32 (setting up the ordinary appeals procedure); art. 33 (setting up a procedure whereby, following any appeal, panels of two justices on the Constitutional Court select *tutela* decisions for revision by the full Court "without express motivation and according to their own criteria.").

71. Cesar Gaviria Trujillo, *Intervencion del Señor Presidente de la Republica, Doctor Cesar Gaviria Trujillo, Ante la Asamble Nacional Constituyente (Abril 17 de 1991)* [*Speech of the President of the Republic, Dr. Cesar Gaviria Trujillo, Before the National Constituent Assembly (April 17, 1991)*], *in* INTRODUCCIÓN A LA CONSTITUCION DE 1991 [INTRODUCTION TO THE 1991 CONSTITUTION] 329, 338 (Manuel José Cepeda ed., 1993).

being something theoretical, a collection of illusions and good intentions, and convert it into an instrument to resolve conflicts peacefully, combat injustices and fight against arbitrariness."[72] He also emphasized the ease of the new device, which would allow citizens to "easily" bring their cases, and would force judges to decide them "quickly and without formalism."[73]

The Constituent Assembly also included a long list of rights in the new Constitution. Particularly important here was a comprehensive list of social rights, including rights to education, housing, health, and social security.[74] Moreover, Article 1 of the Constitution, which enshrined the basic definition of the new state, defined it as an "estado social del derecho" or "social state of right."[75] This was a significant change from the 1886 Constitution, which was broadly seen as enshrining an "estado del derecho" or "state of law."[76] The change in terminology reflected the Assembly's desire to move Colombia toward a social welfare state.[77]

The inclusion of these social rights and social principles was not controversial at the Assembly; what was controversial was the enforceability of these rights. President Gaviria argued that social rights should be included as societal goals but that it would be a mistake to render them directly enforceable via the *tutela* or other device.[78] Article 85 of the 1991 Constitution defined a list of rights as "immediately applicable"—this list included most of the traditional rights but pointedly excluded the social rights.[79] Moreover, the *tutela* only runs to protect "fundamental rights," and the Constitution contains separate chapters for "fundamental rights," "economic, social, and cultural rights," and "collective and environmental rights." Thus there is some evidence that the Assembly intended to make socio-economic rights judicially unenforceable, or at least to make them un-

72. *Id.* ("When dealing with obvious cases of arbitrariness, it is clear that the public unconstitutionality action, with all its virtues, by itself, is insufficient to protect rights . . . .").

73. *Id.*

74. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] arts. 48 (social security), 49 (health), 51 (housing), 67 (education).

75. Article 1 states: "Colombia is a social State of law organized in the form of a unitary Republic, decentralized, with autonomy of its territorial entities, democratic, participatory and pluralistic, founded in respect for human dignity, in work and solidarity of the persons that integrate it and in the prevalence of the general interest." CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] art. 1.

76. *See* Cesar Gaviria Trujillo, *Las Bases Políticas del Nuevo Constitucionalismo* [*The Political Bases of the New Constitutionalism*], *in* INTRODUCCIÓN A LA CONSTITUCIÓN DE 1991 16, 21 (Manuel José Cepeda ed., 1993) (explaining the differences in the philosophy of rights between the two constitutions).

77. *See id.* at 17–18.

78. *See* Cesar Gaviria, *Palabras del Señor Presidente de la República, Doctor Cesar Gaviria Trujillo, en la Instalación de la Asemblea Nacional Constituyente. Febrero 5 de 1991* [*Words of the President of the Republic, Dr. César Gaviria, at the Opening of the National Constituent Assembly (Bogotá, Colombia, Feb. 5, 1991)*], *in* INTRODUCCIÓN A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO, 313, 317 (Manuel José Cepeda ed., 1993) ("As is obvious, these socioeconomic and collective rights cannot be directly enforced by an individual before a judge. The reform proposal adopts that understanding. But it also adopts the understanding that, in this respect, as in general with respect to the entire Bill of Rights, all Colombians must live and develop a sense of commitment with the fundamental democratic principles that drive us all to be ever-alert guardians of liberty, justice, and equality.").

79. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1991 [C.P.] art. 85.

enforceable absent prior legislative action to define their content.[80] As we see below, the new Constitutional Court would quickly reject these positions in favor of one allowing justiciability.

B. The Construction of the Vital Minimum Principle

The first Constitutional Court was controlled by progressive justices who moved quickly to emphasize the place of social rights in the constitution.[81] In one of the Court's first decisions, the Court established that the definition of fundamental rights used for determining whether a *tutela* could be taken was not a closed set of provisions either listed in Article 85 or designated as such in the chapter titled "Fundamental Rights," but instead was an open set of provisions that had to be established by the Court on a case-by-case basis.[82] Although this decision did not immediately designate most of the social rights as "fundamental," it did make it easier for the Court to move towards enforcing social rights via *tutela*. Further, the Court developed its "connectivity" doctrine, whereby rights that the Court was unwilling to otherwise deem fundamental in this period (like the rights to health and social security) could be treated as fundamental if connected to rights that were fundamental, mainly the rights to life and human dignity.[83]

But the most important conceptual innovation in this area was the idea of the "vital minimum," which the Court created in a 1992 decision authored by Eduardo Cifuentes. There is no explicit right to a minimum level of subsistence in the Constitution. However, the Court deduced such a right from the social rights found in the text and from the social state of law and human dignity principles stated in Article 1.[84] The Court was also careful, however, to view the right in systematic terms, and not to turn it into an unlimited right to take resources from the state: "The right to a vital minimum is not a subjective right by anyone to demand, in a direct way and without attending to the special circumstances of the case, economic assistance from the State."[85] In this decision, the Court protected the right of an

80. For a discussion of the legislative history in the Constituent Assembly and its meaning, see MANUEL JOSÉ CEPEDA, LA TUTELA: MATERIALES Y REFLEXIONES SOBRE SU SIGNIFICADO [*La Tutela*: Materials and Reflections on its meaning] 33–34 (1992).

81. The progressives were actually outnumbered on the new court, four to three, by career judges with strong links to the old Supreme Court. As explained to me by both Cifuentes and his then-law clerk Rodolfo Arango, the three managed to exercise disproportionate influence on the Court largely because they maintained an essentially united jurisprudential position, whereas the other justices did not act cohesively. Moreover, precisely because the Constitution was a new document, very different from the old 1886 text, the justices with ties to the old Supreme Court felt uncomfortable interpreting the document and tended to defer to the academic justices: "We were owners of the garden, and they felt like guests there." Interview with Eduardo Cifuentes (May 11, 2010); interview with Rodolfo Arango (April 11, 2010).

82. Corte Constitucional [Constitutional Court] [C.C.], mayo 8, 1998, Sentencia T-002/92, Gaceta de la Corte Constitucional [G.C.C.] (vol. 1, p. 183) (Colom.).

83. *See* C.C., septiembre 24, 1998, Sentencia T-534/92, G.C.C. (vol. 5, p. 464) (Colom.).

84. C.C., junio 24, 1992, Sentencia T-426/92, G.C.C. (vol. 2, p. 452) (Colom.).

85. *Id.* § 6.

elderly man to receive a pension that had been improperly denied him, where in fact the agency had declined even to respond to his petitions.[86] The Court emphasized the age of the man and the fact that he lacked any economic resources.

Thus the "vital minimum" doctrine, which has become one of the most important concepts in Colombian constitutional law, served two key purposes when created. First, doctrinally it offered a means for determining when the socio-economic rights were sufficiently connected to other rights, like the right to life, to be enforced via *tutela*—when the failure to fulfill these rights threatened the petitioner's right to be provided with some minimum level of subsistence, then they were clearly connected to these fundamental rights. Second, it established a vision of social rights that emphasized those social groups with the greatest need. Related to the doctrinal concept of the "minimum core" in international law, it established what was in essence a rule of prioritization—the state should spend money ensuring that all citizens receive at least a minimal level of food, clothing, and housing.[87] The "minimum core" concept was developed by the Committee on Economic, Social and Cultural Rights (charged with enforcing the International Covenant on Economic, Social, and Cultural Rights) in an effort to give some immediately enforceable content to the positive obligations in the Covenant. States that fail to provide at least "minimum essential levels" of the social rights would, prima facie, be in violation of the Covenant.[88] Thus social spending should generally go towards the poorest members of society. The magistrate who coined the concept, Eduardo Cifuentes, was adamant on this point when speaking to me: "I had thought that our law needed a strong component of social justice. It needed something to redress poverty."[89]

So viewed, the "vital minimum" principle was both a way to give social rights teeth and a limitation on the teeth of those rights. Social rights could only be invoked via *tutela* by those marginalized groups who most needed them. This reasoning was built into the doctrine in both pension cases and health cases, which would become the two workhorses of the Court's social rights *tutela* jurisprudence. In pension cases, the petitioner needed to show that he lacked other resources, so that the failure to pay his pension would threaten his right to a dignified life.[90] In health cases, the doctrine de-

86. *See id.*

87. Cifuentes did not cite the concept of the minimum core, although he did emphasize the related concept of the "essential nucleus" of a right under international law. *See id.* §§ 21–26.

88. Comm. on Econ., Soc., & Cultural Rights, Rep. on 5th Sess., Nov. 26-Dec. 14, 1990, Annex III at ¶ 85–86; ECSOCOR, 13th Sess, Supp. No. 3 (1991); *see also* Malcolm Langford & Jeff A. King, *Committee on Economic, Social, and Cultural Rights: Past, Present and Future*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 477, 492–95 (Malcolm Langford ed., 2008) (explaining the concept of the minimum core).

89. *See* Cifuentes, *supra* note 81. R

90. *See, e.g.*, C.C., noviembre 10, 1993, Sentencia T-516/93, G.C.C. (vol. 11, p. 547) (Colom.); C.C., abril 15, 1997, Sentencia T-193/97 (Colom.) ("The jurisprudence of the Court has been emphatic in

manded that the petitioner show both that the failure to receive the treatment was severe enough to threaten his rights to life, dignity, or personal integrity, and that the petitioner lacked the resources to pay for the treatment or to attain it under some other plan.[91] And in general, in these early cases the Court was cautious about expanding the vital minimum concept. As Rueda shows in his careful analysis of the spread of the doctrine, the Court heard few vital minimum cases before about 1995 and in those cases, "when the claimants could not prove that their situation was absolutely desperate and that they were incapable of self-help, the court did not grant protection of their right to a *minimo vital*."[92] For example, a woman's petition asking that her child, who was in a coma, not be discharged from the hospital because of her non-payment of the bill was denied because the Court found that the mother could provide the necessary care for the child on her own.[93]

C. The Vital Minimum Evolves: Individualized Enforcement

Individualized social rights cases, especially those to enforce rights to health and to pensions, exploded sometime in the late 1990s. This section shows that these claims, especially *tutelas* dealing with health care and pensions, eventually came to dominate the docket of the Court. The effects of this massive jurisprudence strongly support the argument that the main claimants in these cases have been relatively wealthy groups. Further, it ap-

sustaining that the liquidation and payment of workers' obligations escapes the proper ambit of the tutela action, and although it has been allowed in certain cases, these have been exceptional . . . . Thus, the Court has found that the right of a worker to receive the payment of a salary can be vindicated via tutela when his right to a vital minimum has been affected; that it is possible to use the tutela to force monthly pension payments for an elderly person in pressing circumstances when this is his only income . . . ."); *see also* Augusto Conti, *Procebilidad de la acción de tutela en materia pensional. Sistematización y alásis de la jurisdprudencia de la Corte Constitucional* [*Procedurability of the* Tutela *Action in Pension Matters. Systemization and Analysis of the Jurisprudence of the Constitutional Court*], *in* TEORÍA CONSTITUCIONAL Y POLÍTICAS PUBLICAS BASES: CRITICAS PARA UNA DISCUSIÓN [CONSTITUTIONAL THEORY AND PUBLIC POLICY: CRITICAL BASES FOR A DISCUSSION] 295, 309–10 (Manuel José Cepeda et al. eds., 2007).

91. *See* DIEGO LÓPEZ MEDINA, *"Sistema de Salud" y "derecho a la salud": Historia de su interrelación en la jurisprudencia constitucional* ["The Health System" and "the Right to Health," The History of their Interrelation in Constitutional Jurisprudence] 39–40 (April 24, 2008).

92. Pablo Rueda, *Legal Language & Social Change During Colombia's Economic Crisis*, *in* CULTURES OF LEGALITY: JUDICIALIZATION & POLITICAL ACTIVISM IN LATIN AMERICA 25, 37 (Javier Couso et al. eds., 2010). Mauricio García Villegas has some data on the incidence of *tutelas* on social issues in these early years. He finds that between 1992 and 1996, looking at all *tutelas* filed nationwide, thirty-one percent of *tutelas* dealing with first-generation rights were granted, but only nineteen percent of *tutelas* dealing with social issues were granted. *See* MAURICIO GARCIA VILLEGAS, *Derechos Sociales y Necesidades Politicas. La Eficacia Judicial de los Derechos Sociales en el Constitucionalismo Colombiano* [Social Rights and Political Necessities. The Judicial Effectiveness of Social Rights in Colombian Constitutionalism, *in* EL CALEIDOSCOPIO DE LA JUSTICIAS EN COLOMBIA [THE CALEIDOSCOPE OF THE JUSTICES] 455, 464 (2004). At the Constitutional Court level, he finds a total of only 164 social rights cases levied against the state between 1992 and 1997, although he also finds that sixty-six percent were granted. *See id.* at 470 tbl. 7. Thus, nationally, lots of social rights *tutelas* were being filed but were generally denied, while at the Constitutional Court level claims were generally granted but the Court was unwilling to spend much of its docket on these issues.

93. *See* C.C., noviembre 10, 1993, Sentencia T-527/93, G.C.C. (vol. 11, p.652) (Colom.).

pears that this jurisprudence has had very few systematic effects on the conduct or effectiveness of the bureaucracy charged with providing services and with monitoring and regulating provision. This is a particularly important conclusion because the Colombian *tutela* appears to be among the cheapest and easiest devices of its kind in the world—it lacks any formalities, can potentially be brought without a lawyer, and must be decided by the courts very quickly.[94] Thus, these results are likely to hold even more strongly in other systems, and even clever design seems unlikely to ameliorate them.

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

These suits were fairly important from the outset of the 1991 Constitution: a study of *tutelas* filed nationwide between January of 1991 and December of 1996 found that 11.6% of all *tutelas* demanded that an entity offering "social security" (health care or pension) services respond to a request, 9.2% allege that an employer or other entity had failed to pay either social benefits or salary for their employees, and an additional three percent allege that a request for social security benefits has been denied.[95] Thus social themes constituted at least a quarter of all *tutelas* filed even in the early years of the Court's work.

But the number of these suits climbed sharply and steadily during the 1990s, particularly with respect to the right to health. For example, only 10,732 *tutelas* on the right to health were sent to the Constitutional Court for possible revision in 1992; however, this number reached 133,373 cases by 2001.[96] And according to the Defensoría del Pueblo, *tutelas* invoking the

94. *See generally* Manuel José Cepeda Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 552–53 (2004); *see also infra* text accompanying notes 67–73 (discussing the design of the *tutela*). An analogous result occurred in India, where the Supreme Court's attempts to broaden standing requirements and allow even hand-written notes to serve as the basis for lawsuits did not produce a flood of litigation by lower-class groups. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION 85–86, 91–93 (1998). Arguing lack of a legal support structure such as civil society organizations oriented towards the courts stunted this development. *See id.* at 95–110. R

95. *See* Villegas, *supra* note 92, at 423, 425 tbl. 1 (2004). R

96. Rodolfo Arango, *El Derecho a la Salud en la Jurisprudencia Constitucional*, [*The Right to Health in Constitutional Jurisprudence*] *in* TEORÍA CONSTITUCIONAL Y POLÍTICAS PUBLICAS BASES: CRITICAS PARA UNA DISCUSIÓN [CONSTITUTIONAL THEORY AND PUBLIC POLICY: CRITICAL BASES FOR A DISCUSSION] 295, 309–10 (Manuel José Cepeda et al. eds., 2007) 89, 138 tbl. 1 (2007).

right to health increased from 24.7% of all *tutelas* filed in 1999 to 41.5% in 2008.[97] Similarly, the number of *tutelas* related to the right to health that were actually heard by the Court climbed from twenty one in 1994 to 290 in 2003, an increase from 3.9% to 33.4% of the court's total *tutela* docket.[98] A similar thing, on a lesser scale, happened with respect to pension claims, which in by 2001 consumed 9.9% of the Court's *tutela* docket.[99] The result, as noted by Augusto Conti, is that by 2003, half of the Court's *tutela* docket dealt directly with these two rights, and of the other half, Conti asserts that a large portion dealt "indirectly" with related themes.[100]

The sharp rise in the quantity of these *tutelas*, especially those invoking the right to health, can best be explained by a combination of supply and demand factors. On the demand side, people were driven to file *tutelas* because of serious failures in both the regulatory systems and the ordinary judiciary. Both the pension and health systems had fundamental problems in their design and oversight. The pension system, as Conti notes, was subdivided into a confusing welter of types of pensions, each with its own subrules—this confusion was a major cause of regulatory errors and thus of litigation.[101] The health care system allowed private, HMO-like organizations to offer service to the public, but these private organizations had to offer a standard package of treatments (called an Obligatory Health Plan or POS) to their patients.[102] The POS was designed to exclude certain treatments in order to ensure the profitability of the health care organizations and the financial viability of the system; for example, the standard POS initially excluded a lot of expensive but life-saving treatments, such as AIDS medication and cancer treatments.[103] Moreover, the Law created two different health care systems, a contributory regime for those who held formal employment or who could otherwise pay into the system and a subsidized regime for the poor who could not buy into the contributory regime. The Law established a goal of equalizing the two regimes, but the subsidized

97. Defensoría del Pueblo, La Tutela y el Derecho a la Salud, Periodo 2006–2008, [*Defender of the People, The Tutela and the Right to Health for the Period 2006-2008*], at 30 tbl. 4 (2009), *available at* http://www.semana.com/documents/Doc-1959_2009924.pdf (noting that *tutelas* invoking the right to health constituted 21,301 of 86,313 in 1999, but 142,957 of 344,468 in 2008).

98. Arango, *supra* note 96, at 138 tbl. 2 & 141 tbl. 4.

99. Conti, *supra* note 90, at 295, 363 tbl. 3 (2007).

100. *Id.* at 295.

101. *See id.*, at 296–97 (emphasizing the "complexity" of the pension legislation and the "legislative diaspora that governs it").

102. The POS was not left up to each company to design, but instead a standard POS was imposed by regulators. The health providers were compensated by receiving a fixed payment for each member who was affiliated with their service. *See, e.g.*, Juan-Manuel Diaz-Granados Ortiz & Nelcy Paredes Cubillos, *Sistema de salud en Colombia: Cobertura, acceso y esquemas de financiación. Visión de futuro desde el aseguramiento* [*Health Care System in Colombia: Coverage, Access and Financing Schemes. A Future Vision of Insurance*], *in* Revisión a la Jurisprudencia Constitucional en Materia de Salud: Estado de las Cosas Frente a la Sentencia T-760 de 2008 [Review of Constitutional Jurisprudence in Health Care: The State of Things Set Against the T-760 ruling of 2008] 29, 33–36 (Maria Lucía Torres Villareal ed., 2009).

103. *See* López Medina, *supra* note 91, at 30. R

POS was initially set to be much smaller than the contributory POS.[104] Further, there were a very large number of citizens who were not attached to either system.[105] These elements are obvious contributors to litigation, as people would sue when they could not receive treatment necessary to their health or survival because their POS excluded it or they were not affiliated with any system.

But beyond basic design problems, both systems were plagued by rampant noncompliance and by a lack of effective oversight of the non-complying actors. Conti argues that in many pension cases, there is no real dispute about the rule; instead the agency simply uses trivial arguments as cover to avoid paying the claim.[106] Further, there is no effective administrative oversight of these entities.[107] On the health side as well, statistical evidence shows that the majority of *tutela* claims have been for things included in the POS, rather than for treatments found outside it.[108] And all actors agree that the entity charged with policing the health providers, the National Superintendent of Health, has done very little to regulate the conduct of the health providers towards their consumers.[109] Further, the ordinary judiciary is an unappealing option for citizens who have failed to receive their pension or who require health care; it is expensive to access, slow, and unpredictable.[110] In contrast, the *tutela* mechanism is quick, inexpensive, and has tended to favor petitioners. For example, the petitioner prevailed eighty six of the time in right-to-health cases between 2006 and 2008.[111]

104. Manuel José Cepeda, *Conferencia de Manuel José Cepeda Espinosa en el Foro "Revisión a la Jurisprudencia de la Corte Constitucional en Materia de Seguridad Social en Salud: Sentencia T-760 de 2008"* [*Manuel José Cepeda Espinosa's Lecture at the Forum, "Review of Constitutional Jurisprudence of the Constitutional Court in Social Security Matters in Health Care: The T-760 Ruling of 2008"*], *in* Revisión a la Jurisprudencia Constitucional en Materia de Salud: Estado de las Cosas Frente a la Sentencia T-760 de 2008 [Review of Constitutional Jurisprudence in Health Care: The State of Things Set Against the T-760 ruling of 2008] 13, 19–20 (Maria Lucia Torres Villareal ed., 2009).

105. *See* Procuraduría General de la Nación [National Attorney General's Office], El Derecho a la Salud en Perspectiva de Derechos Humanos y el Sistema de Inspección, Vigilancia, y Control del Estado Colombiano en Materia de Quejas en Salud [The Right to Health Care from a Human Rights Perspective and the Colombian State's System of Inspection, Oversight, and Control of Health Care Claims] 74 (2008), *available at* http://www.dejusticia.org/admin/file.php?table=documentos_publicacion&field=archivo&id=178 (presenting data showing that overall coverage in the system was only 29.1% in 1995, including only 2.9% of the poorest quintile, although by 2005, total coverage had climbed to 68.1%).

106. Conti, *supra* note 90, at 297–98. R

107. *Id.*

108. *See, e.g.*, Defensoria del Pueblo, *supra* note 97, at 56 (showing that 53.4% of all demands were for treatments included in the POS in the 2006–08 period); *see also* Alicia E.Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 Hastings Int'l & Comp. L. Rev. 431, 443 (2010) (analyzing these statistics). R

109. *See, e.g.*, Procuraduria General de la Nacion, *supra* note 105, at 134–36 (criticizing the performance of the Superintendent of Health in policing health care providers and handling complaints). R

110. *See* Conti, *supra* note 90, at 361–62 (giving examples of the problems of both the administration and ordinary judiciary in handling pension cases). R

111. Defensoria del Pueblo, *supra* note 97, at 91. Changes in the economic environment were also relevant contributors. For example, an economic downturn in the late 1990s fueled a sharp rise in this kind of litigation: the Constitutional Court received only 33,633 right-to-health *tutelas* in 1997 and R

While the demand-side story is important in explaining why an increasingly huge number of actors would file *tutelas*, there is an equally important supply-side story which explains why the Court became increasingly receptive to these claims. As noted above, in the early to mid-1990s the Court developed an important but cautious social rights jurisprudence and spent relatively little time on these issues—it protected the rights of the most marginalized members of society on an individualized basis.[112] Since the Court has total control over its *tutela* docket (it chooses the cases it wants to hear via a certiorari-like mechanism), it is very significant that the Court used only 5.8% of its docket on health cases in 1994, but by 1998, that number had risen to fourteen percent, and by 2003, thirty-three percent.[113]

The Court shifted its doctrines to encourage claims from a broader range of groups.[114] An important point here is how the Court shifted its doctrines dealing with the economic resources of the petitioner. In the doctrines dealing with pensions and health care as originally conceived, there was a strong emphasis on allowing the *tutela* to proceed only when the petitioner could show a lack of other resources.[115] This emphasis faded with time. In the pension area, it did this largely by classifying many kinds of claims as per se actionable via *tutela*, regardless of the wealth of the petitioner.[116] At any rate, powerful members of society, including ex-congressmen, magistrates of the high courts, and state functionaries, have been able to use the *tutela* to gain access to their pensions.[117] An illustrative case is that of an ex-Supreme Court Justice who argued that his pension was wrongly calculated. The Court took the case via *tutela* and adjusted the pension. It is notable that the pension that the state had already agreed was due to Justice Valencia was about twelve million pesos per month, or about $6,000 monthly, a fairly large sum in Colombia. His new pension would be around twenty million pesos monthly, or about $10,000.[118]

In the health area, the Court technically maintained the doctrinal requirement that the petitioner be unable to afford the treatment, but in practice paid little attention to it.[119] This appears to have been an artifact of two

38,248 in 1998, but in 1999, the number rose to 90,248, and in 2000 it reached 131,765. *See* ARANGO, *supra* note 96, at 138 tbl. 1. R

112. *See supra* text accompanying notes 90–92. R

113. Arango, *supra* note 96, at 138 tbl. 2, 139 tbl. 3, 141 tbl. 4. R

114. Pablo Rueda discusses some related shifts that are not emphasized here. *See* Rueda, *supra* note 92, at 39–40. R

115. *See, e.g.*, Rueda, *supra* note 92, at 37 ("[W]hen the claimants could not prove that their situation was absolutely desperate and that they were incapable of self-help, the court did not grant protection of their right."); LOPEZ MEDINA, *supra* note 91, at 39–40 (explaining a doctrinal requirement in the health area that the petitioner be unable to pay for the treatment). R R

116. For a general overview, see Conti, *supra* note 90. R

117. *See id.* at 362 (collecting cases).

118. C.C., julio 21, 2009, Sentencia T-483/09, *available at* http://www.corteconstitucional.gov.co/relatoria/2009/t%2D483%2D09.htm (Colom.).

119. *See, e.g.*, LÓPEZ MEDINA, *supra* note 91, at 40 n.58 (noting that this doctrinal principle has been maintained but also stating that "[d]espite this doctrinal effort, it is clear that today the judges cannot R

separate problems in the health area—the first is that a lot of important health care purchases are expensive enough to overwhelm the resources of virtually any household in the country, and the second is that the design of the *tutela*, which requires that the judge render a decision within ten days, leaves little time for fact-finding. Because of the latter problem, in practice courts "cannot discriminate" between households who could pay for treatments and those who could not.[120] This too has become a largely middle class right. A study by the Procuraduría (a kind of Attorney General who monitors the state) found that the number of *tutelas* was strongly concentrated among middle and upper class groups rather than the poor.[121] Their study, conducted in 2003, approximated that seventy three percent of all *tutelas* on the right to health were filed by members of the contributory regime, or those who generally have formal employment and a reasonable income. This group represents only thirty five percent of the population. Members of the subsidized regime, who receive free health care through the state and represent twenty three percent of the population, filed only three percent of *tutelas*, while those who are linked ("vinculados") to the health care system but not formally a member of either group (generally also very poor) represent thirty eight percent of the population and yet filed only thirteen percent of all *tutelas*.[122]

The key point, then, is that individualized *tutela* jurisprudence focused on pensions and especially health care became a massive part of what the Constitutional Court (and the judiciary in general) was doing. Further, this jurisprudence moved far away from its underpinnings in the "vital minimum" doctrine aimed at the very poor and became an essentially middle class right open to everyone. Because middle and upper class groups were much more likely to know their rights and to be able to afford to go to court, they naturally filed the bulk of the claims.

The effects of this kind of massive individualized jurisprudence on the executive bureaucracies was largely negative.[123] We can focus on evidence from the health field, which has been more extensively studied. Petitioners inevitably bypassed the regulatory structure and went straight to a *tutela* for two reasons: first because it was ineffective at policing the health care providers, and second because the courts, and not the regulators, would order the provision of treatments found outside the POS (and in fact would order the state to reimburse the health care provider for the expense). The aggregative effect of all these decisions did alter regulators' decisions about the nature of

discriminate adequately between the users of the system. The redistributive effect of the decisions needs to be studied more carefully but it seems clear, in any case, that the doctrine of the Court is not sufficient to overcome the clear differentiation between the population with capacity and without capacity to pay for treatments outside of the POS").

120. *Id.*

121. *See* PROCURADURIA GENERAL DE LA NACION, *supra* note 105, at 170. R

122. *Id.*

123. *See* LÓPEZ MEDINA, *supra* note 91. R

the POS. In particular, a 1997 regulation created the concept of an "open POS" and thus recognized that treatments not included in the list could be prescribed if necessary to preserve the life or health of the patient, and stated that the state would pay for these treatments (rather than the health care provider) under many conditions.[124] In 2005 through 2007, the regulators changed the contents of the POS somewhat, adding for example treatments for chronic diseases like HIV and kidney disease.[125] But the regulators made little effort to improve oversight of the health care providers, and thus about half of the cases continued to be for treatments that were actually located in the POS, but that the health care providers erroneously refused to provide.[126] Moreover, judicial institutions sometimes competed with administrative structures—while regulators in 1997 set up Technical-Scientific Committees (staffed by doctors and other medical professionals) to evaluate individual claims to treatments not included in the POS, these Committees were used much less frequently than the courts, likely because the courts moved quickly and virtually always sided with petitioners (who of course were able to choose the forum). In the health care area, then, the courts were primarily a substitute for effective regulation rather than a force helping to construct better regulation.[127]

The Court's aggressive jurisprudence, increasingly unmoored from its foundations in the "vital minimum" doctrine, produced some pushback from within the Court itself. The most notable of these efforts was a 1997 case decided by Justice Cifuentes, the original author of the vital minimum doctrine. Cifuentes noted that the courts had issued orders that aided petitioners in particular cases, but had no way to "hold for all those who find themselves in the same situation as the petitioner."[128] Nor did the judge normally understand the "final cost or possibilities of" expanding an individualized order across all similarly situated cases.[129] As noted by the South African Constitutional Court in *Soobramoney*, granting individualized claims to relief had ramifications both for equality, since many others in the same

124. *Id.* at 41.

125. *Id.* at 47.

126. *See* DEFENSORÍA DEL PUEBLO, *supra* note 97, at 56 tbl. 23 (finding that in the 2006 through 2008 period, 53.4% of all *tutelas* in this area were for treatments included in the POS, and only 46.6% were for non-POS treatments). R

127. One other reaction to the Court's jurisprudence is worth mentioning: in 2007 the Congress passed a new law that, *inter alia*, attempted to give the Superintendent of Health new powers. For example, the Superintendent was given power to exercise certain quasi-judicial powers and to resolve certain categories of disputes, most importantly disputes dealing with whether a given treatment is inside the POS, in an attempt to remove cases from the judiciary. *See* PROCURADURÍA, *supra* note 105, at 183–87 (discussing Law 1122 of 2007). The same law creates a Committee to revise the contents of the POS at least once per year. *See id.* R

128. C.C., agosto 9, 1996, Sentencia SU-111/97, ¶ 15, *available at* http://www.corteconstitucional.gov.co/relatoria/2000/c%2D1433%2D00.htm (Colom.). The case itself involved a sixty-four year old woman who suffered from arthritis and whose treatments had been suspended by the state insurance company. The Court held both that she had not shown any injury to her right to a "vital minimum," and that she had failed to exhaust the legal avenues open to her in the ordinary judiciary. *Id.* ¶ 19.

129. *Id.*

position would never benefit from the order, and democracy, since on aggregate the Court's jurisprudence could be directing huge amounts of spending by the state.[130]

Cifuentes reemphasized that social rights were justiciable primarily under the "vital minimum" idea, whereby there is a "grave attack against the human dignity of persons pertaining to vulnerable sectors of the population and the State . . . has failed to provide the minimum material assistance without which the defenseless person will succumb before his own impotence."[131] In other cases, Cifuentes suggests, the *tutela* should only proceed when the person has no other legal mechanism (like the ordinary judiciary) to defend his rights, and only in order to gain access to services or treatments already created by law (in other words, those treatments found inside and not outside the POS). This proposed solution, however, gained no traction, as the caseload statistics noted above show. The Court continued with an essentially middle class jurisprudence and continued to grant a large volume of claims for treatments not included in the POS.

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

A severe economic crisis in the late 1990s led to a significant flood of additional *tutelas* on economic matters; it also pushed the Court towards finding larger-scale solutions to economic problems.[132] The Court's larger-scale jurisprudence had a populist bent. Magistrates on the Court aimed their jurisprudence at protecting the economic interests of middle class groups, and in response gained substantial political support among those groups. This section focuses on two such examples—the Court's efforts to protect middle-class homes from foreclosure, and its efforts to ensure salary increases for middle-class civil servants despite a severe budget crisis.

One of the largest-scale interventions in the Court's history was its decisions dealing with a housing crisis in 1999 that threatened more than 200,000 mortgagees with foreclosure (a significant number in a country of, at that time, about 35 million people). The housing financing system, called UPAC, adjusted the mortgage payments that homeowners owed according to interest rates in the economy. In the late 1990s, due to Central Bank action and other factors, the nominal interest rate reached thirty-three percent (far higher than the rate of inflation), which caused mortgage payments to skyrocket and thus caused trouble in the mortgage market. Homeowners

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

131. C.C., Sentencia SU-111/97, *supra* note 128, ¶ 16. R

132. *See supra* note 97 (explaining how the economy affected the *tutela* docket). R

and associations of homeowners began bringing claims (both via abstract review and *tutela*) to the Court, which proved receptive.[133]

In July 1999, the Court held a broad public, legislative-style hearing on the housing matter, to which it invited twenty-five individuals to speak, including members of civil society groups dealing with housing, bankers, labor union leaders, economists, congressmen, and government officials.[134] And in September 1999, the Court struck down the entire UPAC system on structural grounds, holding that the law, which had been issued by the President during a state of emergency, instead had to be issued by Congress.[135] The dissenters pointed out that the reasoning seemed flimsy, and the Court's real motive appeared to be the substantive one of aiding debtors.[136]

At any rate, the President did construct a new system, and submitted a bill to Congress by the deadline. The new bill incorporated the Court's prior jurisprudence; for example, it banned prepayment and capitalization, and tied mortgage payments only to the rate of inflation.[137] It also went beyond the Court's jurisprudence by providing funds to bail out struggling homeowners and refinance their debts.[138] Nonetheless, after the new bill was passed, it too was challenged on abstract review, and the Court used its

133. *See* Efrain Forero, *Evolution of the Mortgage System in Colombia: From the UPAC to the UVR1* (Mar. 1, 2004), *available at* http://www.allbusiness.com/personal-finance/real-estate-mortgage-loans/1112078-1.html.

134. For a list of participants and a description of their contribution, see C.C., septiembre 16, 1999, Sentencia C-700/99, § VI, G.C.C. (vol. 8, p.231) (Colom.). The Court also received an extremely high number of written comments from various economists, public officials, and leaders of civil society groups. *See* C.C., julio 26, 2000, C-955/00 § III, (Colom.); *see also* C.C., octubre 6, 1999, Sentencia C-747/99, § V, G.C.C. (vol. 9, p.149) (Colom.) [hereinafter C-747/99]. Even before this hearing, the Court had struck down a law requiring the Central Bank to set the UPAC rate according to the interest rates in the broader economy. *See* C.C., mayo 27, 1999, Sentencia C-383/99, G.C.C. (vol. 4, p.399) (Colom.). The Court held that tying UPAC to interest rates "completely distorts the just maintenance of the value of the obligation." *Id.* § 4.11. Other decisions in this period also aided debtors and the Court held capitalization—whereby payments do not even cover the accrued interest and it is therefore added onto the principle—unconstitutional, and further banned prepayment penalties from mortgages. *See* C-747/99, § 4.3; C.C., mayo 26, 1998, Sentencia C-252/98, G.C.C. (vol. 4, p.448) (Colom.).

135. C.C., septiembre 16, 1999, Sentencia C-700/99, G.C.C. (vol. 8, p.209) (Colom.).

136. The argument of the majority was that the law dealing with UPAC constituted a *ley marco*, a kind of basic law that had to be issued by the legislature. Thus the 1993 executive decree issuing these regulations was void. *Id.* § VII.3. But as the dissenters pointed out, the 1993 decree merely reorganized existing regulations from a number of different statutory sources and placed them in one law; it did not actually add anything new to the system. *Id.* (Cifuentes Munoz & Naranjo Mesa, dissenting). And the Court had also previously held that the decree at issue was valid. *See id.*

137. *See* C.C., julio 26, 2000, C-955/00, (Colom.), (reprinting the text of Law 546 of 1999); *see also* Salomon Kalmonovitz, *La Corte Constitucional y la Capitalización de Intereses* (2000), 3, *available at* http://www.banrep.gov.co/documentos/presentaciones-discursos/pdf/K-Corteycapitalizacion.pdf (arguing that the prior judicial decisions "predetermine in some measure the deliberations of Congress").

138. The law also took other important measures. For example it required a down payment of at least thirty percent of the value of the house so as to help ensure that the mortgage payments did not become unsustainable down the road. Sergio Clavijo, *Fallos y Fallas Economicas de la Corte Constitucional: El Caso de Colombia, 1991–2000* [*The Constitutional Court's Rulings and Economic Mistakes: The Colombian Case, 1991–2000*], (2001), 23, *available at* http://www.hacer.org/pdf/clavijo.pdf. This was perhaps inspired by the Court's jurisprudence forbidding capitalization (which got at the same goal), but went beyond any prior express command of the Court.

power of conditional constitutionality—holding a norm constitutional only under the condition that it be interpreted a certain way—to make substantial changes to the law. For example, it capped interest rates at the "lowest interest rate" being charged in the Colombian economy.[139]

As I pointed out in prior work, the background to these decisions was the obvious policy problems with the existing system, and the failure of the political branches to take effective action to alter the system.[140] The dissenters and economists also suggested that the Court was acting in a populist manner. The economist Salomon Kalmonovitz argued that the Court was attempting to "replace the Congress" by holding a public hearing, but that those at the hearing were not selected by "proportional representation elected by popular suffrage," but instead by "the positions with which the Constitutional Court sympathizes."[141] Kalmonovitz argued that the Court's intervention primarily benefited the upper and upper middle class, and not the lower middle class or poor, because those groups were generally left outside of the formal housing system and either obtained financing on the black market or rented homes.[142] Similarly, the economist Sergio Clavijo argued that the Court's measures, which capped interest rates for all homeowners and provided the same subsidized terms for everyone to refinance, were significantly less targeted towards the lower classes than earlier executive action which would have focused bailout funds on the owners of the least expensive homes.[143]

Indeed, few actors missed the fairly obvious point that the Court was acting as a populist body in making these decisions. An editorial in *Semana* (the country's most important weekly newsmagazine) stated that these decisions "appeared to give preference to populism, camouflaged beneath a doubtful veneer of equity, over economic considerations."[144] There was considerable speculation that the decisions might be a starting point for a political campaign by key actors involved.[145] Further, the author of the two key decisions striking down the entire system and reviewing the new law passed

139. *Id.* at 4, 21.

140. *See* David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 Harv. L. Rev. 319, 354–58 (2010).

141. Kalmonovitz, *supra* note 137, at 2. R

142. Kalmonovitz, *supra* note 137, at 8. Kalmonovitz argued that because all mortgage-holders received the same capped interest rate, and all received the same terms of refinancing, most went to wealthy mortgage-holders or speculative investors. *See id.* (noting that the smallest mortgages of between $0 and $48 million pesos constituted seventy-eight percent of all mortgages, but received only fifty-one percent of the new subsidies). R

143. *See* Clavijo, *supra* note 138, at 24–26 (explaining that a 1998 Economic and Social Emergency decree would have focused bailout funds, at least initially, on the smallest mortgages, and then used leftover funds on wealthier homeowners). R

144. *La Dictadura de la Corte* [*The Court's Dictatorship*], SEMANA (July 5, 1999), *available at* http://www.semana.com/noticias-economia/dictadura-corte/39466.aspx.

145. *See Pelea de Gallos* [*Cockfights*], SEMANA (Oct. 30, 2000), *available at* http://www.semana.com/noticias-nacion/pelea-gallos/15227.aspx ("[F]or many it is fairly probable that this [has to do with] the desire of some magistrates on the Constitutional Court to aspire to occupy other positions in the State.").

by Congress, José Gregorio Hernández, gave several interviews in the press in which he defended his work largely in populist terms. When asked about the effect of his jurisprudence on the banking sector, he stated that "housing is not a business."[146] In another interview, he made a striking statement when asked about criticisms of the Court:

> [I]f you are talking about the criticisms, there is no need for the Court to discuss them because they have already been defeated, and in what a fashion, by public opinion . . . . [T]he work of the Constitutional Court has been well received by the people. Because the people are much more intelligent, as Gaitán[147] says, than their leaders. . . .[148]

After leaving the Court in 2001, Magistrate Hernández was the Liberal candidate for vice-president; Magistrate Cifuentes (who had dissented from the major UPAC decisions) was named on a list submitted by the President and then appointed by the Senate to serve as the national Ombudsman (*Defensor del Pueblo*).[149] Indeed, a significant number of the justices on the Court have gone into politics after their terms have ended.[150]

The second major "populist" moment of the Court during the economic crisis was the Court's intervention in public sector salaries in 2000. Because of the economic crisis and its resulting effect on tax revenue, the budget for 2000 proposed a nine percent increase for government employees making less than twice the minimum wage, and no increase for government employees making more than that amount.[151] The nine percent increase was running just about at the rate of inflation.

The Court held that the government had to provide every government worker with an increase in salary at least equal to the rate of inflation, a

146. *La Vivienda no es un Negocio* [*Housing is Not a Business*], SEMANA (February 18, 2000), *available at* http://www.semana.com/noticias-economia/vivienda-no-negocio/14910.aspx.

147. Jorge Eliecer Gaitán was a populist leader in the 1940s who was assassinated on April 9, 1948, and whose death precipitated a long period of violence in the country. DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 196–203 (1993).

148. Interview with José Gregorio Hernández, La República (November 12, 2000).

149. *See El Efecto "Vice"* [*The Vice Effect*], SEMANA (Apr. 8, 2002), *available at* http://www.semana.com/noticias-nacion/efecto-vice/20354.aspx (noting that the Liberal presidential candidate Horacio Serpa had climbed five points in the polls since choosing Hernández as his vice-presidential candidate, due to the latter's popularity from the UPAC decision); *No Me Voy Por Un Buen Puesto* [*I'm Not Leaving for a Good Post*], SEMANA (July 27, 2003), *available at* http://www.semana.com/noticias-enfoque/no-voy-buen-puesto/71894.aspx (noting that Cifuentes had served as Defensor del Pueblo).

150. For example, from the first Court, other than the two names already mentioned, Magistrate Carlos Gaviria subsequently served as Senator, and Magistrate Alejandro Martinez Caballero served on the municipal council. From the second Court, Jaime Araújo Rentería served as candidate for the presidency. *See Ex-Magistrados Piden a Nilson Pinilla Retractarse De Afirmaciones* [*Ex-Judges Ask Nilson Pinilla to Retract His Statements*], EL TIEMPO (Mar. 30, 1999), *available at* http://www.eltiempo.com/archivo/documento/CMS-4919789 (listing names of magistrates who subsequently served in political posts).

151. *See* C.C., octubre 23, 2000, Sentencia C-1433/00, § 2.2 (Colom.).

decision that affected about 600,000 government workers.[152] The Court held that there was a basic right for salaries to retain their real value, basing this holding on a constitutional right for the government not to "diminish the social rights of workers, among which is naturally found the salary" either during normal periods of time or an economic state of emergency.[153] As Uprimny and Guarnizo have pointed out, this strain of the Court's jurisprudence is based on another principle found in international law, and in particular noted by the U.N. Committee on Economic, Social, and Cultural Rights—the principle of progressivity or non-retrogression.[154] The Committee has stated that most of the rights found in the UN Convention on Economic, Social, and Cultural Rights need to be fulfilled progressively over time. One consequence of this framework, according to the Commission, is that "any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of rights provided for the Covenant and in the context of the full use of maximum available resources."[155] As Langford and King explain, the non-retrogression principle is not an absolute bar to measures which might worsen the situation of some groups; instead, such measures receive "a particularly strict form of scrutiny" and require "a high level of justification."[156]

The Court also attempted to link its decision to the "vital minimum" principle, stating that workers must receive a wage that

> not only must represent the value of the work, but that also must be proportional to the material necessity of the worker and her family, in dignified and just conditions, and which will permit her to subsist adequately and decently. For this reason, the wage should assure a vital minimum, as the jurisprudence of this Court has understood, and also be mobile, and thus always maintain equivalence with the price of work.[157]

152. *See ¿Aquí quién manda? {Who Is Giving Orders Here?}*, SEMANA Nov. 27, 2000, *available at* http://www.semana.com/noticias-nacion/aqui-quien-manda/15528.aspx.

153. C.C., octubre 23, 2000, Sentencia C-1433/00, § 2.2 (Colom.).

154. Rodrigo Uprimny & Diana Guarnizo, "¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana" (Is an Adequate Doctrine Possible on the Principle of Non-Retrogression? An Investigation Into Colombian Constitutional Jurisprudence) (July 30, 2006), *available at* http://www.dejusticia.org/interna.php?id_tipo_publicacion=2&id_publicacion=180.

155. U.N. Commission on Economic, Social, and Cultural Rights, *General Comment No. 3, The Nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86, ¶ 9.

156. Langford & King, *supra* note 88, at 502. The Committee, in particular, believes that retrogressive measures can be justified based on the level of economic crisis currently being faced by the country and whether the country had considered other options like international assistance, the level of participation of affected groups, and whether the measure impinges on the "minimum core" rights of poorer groups. *See id.* R

157. C.C., octubre 23, 2000, M.P: A. Carbonell, Sentencia C-1433/00, *available at* http://www.corteconstitucional.gov.co/relatoria/2000/c%2D1433%2D00.htm (Colom.).

The reference to the vital minimum principle is puzzling, because the Court struck down a government scheme that focused on protecting government workers at the bottom of income distribution while sacrificing those at the top. The Court instead required that all wages for government workers retain their purchasing power. Yet wealthier workers are not in danger of falling below the vital minimum.

The press and economics strongly attacked this decision. As a dissenting justice and economists pointed out, the Court's decision could have a significant effect on the macroeconomy by extending the budget deficit and raising inflation, issues that were normally left up to the political branches.[158] The press also emphasized the equitable impact of the Court's decision, noting that most government workers were from relatively high income strata, and that the decision would hurt poorer workers by reducing social investment.[159] Newspaper articles warned that with the UPAC, salary, and other decisions the Court had intervened in large chunks of macroeconomic policy.[160] Current and former government officials and presidential candidates criticized the Court harshly. The presidential candidate (and later President) Álvaro Uribe hinted that the Constitutional Court should be abolished.[161] An editorial in the most prominent Bogotá newspaper wondered "[h]ow an institution like the Court could cause so much damage without anyone being able to control it?"[162] Finally, there was fear that the known "populists" on the Court would seek to extend the effect of the decision to the private sector.[163]

E. Attempted Refocus on the Vital Minimum Principle

There was, then, a backlash against the Constitutional Court in the political air. Given the fragmented nature of Colombian politics, it is unclear whether political forces could have rounded up enough votes to punish the Court by amending the Constitution to reduce its powers, but most of the Court was due to turn over in 2001 after completing their eight-year terms.

158. *Id.* § 3 (Pardo Schlesinger, J., dissenting) ("Macroeconomically, an increase in salary for a significant group of workers, like those of the central administration, could have a harmful impact on inflation."); *see also* Clavijo, *supra* note 138, at 30–39 (making similar points with empirical data). R

159. *See, e.g.*, *¿Aquí quién manda?*, *supra* note 152. R

160. *See, e.g.*, *id.* The Court also issued a number of other decisions, most on structural grounds like separation of powers, that struck down governmental initiatives aimed at overcoming the economic crisis. For a list, see Clavijo, *supra* note 138, at 17 (noting that the Court struck down key elements of an economic emergency plan in 1998 including taxes on financial institutions, the government investment plan for the 1999–2002 period, a grant of extraordinary powers to the executive to restructure the public sector, and executive decrees aimed at restructuring the public sector). As I argue elsewhere, these structural decisions may have had a substantial negative impact on the Colombian economy. *See* Landau, *supra* note 140, at 352–54. R

161. Landau, *supra* note 140, at 352–54. R

162. *La Corte Constitucional y los Salarios {The Constitutional Court and Wages}*, EL TIEMPO (Oct. 27, 2000), *available at* http://www.eltiempo.com/archivo/documento/MAM-1272200, at 13–15.

163. *See Confusión por Salarios {Wage Confusion}*, EL TIEMPO (Oct. 25, 2000) (noting past decisions of José Gregorio Hernández).

The appointment procedure gave political forces an opportunity to influence judicial behavior. The behavior of the prior court was a major issue in the hearings for the new justices.[164] Some of the aspirants for a new post stated publically that they favored a different approach from the current court on some issues. For example, Manuel José Cepeda, who was on one of the president's lists and who won election to the Court in a close vote,[165] stated in relation to the Court's macroeconomic jurisprudence that "a new law is required that has the tools to be able to incorporate the effects of decisions without sacrificing principles."[166]

The new Court immediately undertook a new approach to the salaries question. In a 2001 decision reviewing the budget for the year, the Court (in a decision written by Cepeda and Justice Jaime Cordoba Trivino) changed its doctrine.[167] It held that the right of workers who made less than twice the minimum salary to an increase in accord with inflation was untouchable, but that the real incomes of wealthier workers could be limited in some circumstances when required by macroeconomic conditions. The Court stated: "The limitation of the right to maintain the acquisitive power of a salary, for workers situated in the superior rungs of the salary structure, implies no limitation on their right to a vital minimum."[168]

In other words, the Court reestablished the vital minimum doctrine as a doctrine aimed mainly at the poor. By paring back the macroeconomic effects of its jurisprudence, the Court also headed off the backlash. When Álvaro Uribe won election in 2002 and his new Interior and Justice Minister, Fernando Londoño Hoyos, sought to attack the powers of the Court via constitutional amendment, the proposals went nowhere.[169]

The new Court has still faced the problem, however, of a massive individualized rights jurisprudence, particularly on health issues, which appeared to benefit middle and upper class groups much more than the poor.[170] It would eventually tackle this problem via a new device, the "state of unconstitutional affairs" doctrine. As I explain elsewhere, the "state of unconstitutional affairs" doctrine works much like a structural injunction in the United States.[171] Rather than issue an individualized *tutela* remedy to an

164. *See*, *e.g.*, Interview with Manuel José Cepeda in Bogotá, Colom. (Mar. 24, 2009); Rudolf Hommes, *La Nueva Corte Constitucional*, EL TIEMPO Nov. 28, 2000, *available at* http://www.eltiempo.com/archivo/documento/MAM-1285740.

165. *Corte Constitucional de Avanzada {The Future Constitutional Court}*, EL TIEMPO (Dec. 15, 2000), *available at* http://www.eltiempo.com/archivo/documento/MAM-1217594 (noting that the closest election was on Cepeda's list, and that he won in the Senate by only nine votes, fifty-one to forty-two).

166. *Aquí quién manda?*, *supra* note 152. R

167. *See* C.C., octubre 10, 2001, M.P: M. Espinosa, Sentencia C-1064/01, *available at* http://www.corteconstitucional.gov.co/relatoria/2001/c%2D1064%2D01.htm (Colom.).

168. *Id.* § 5.2.4.

169. *See* Gaceta del Congreso, No. 323, Aug. 9, 2002, *available at* http://winaricaurte.imprenta.gov.co:7778/gaceta/gaceta.nivel_3. The proposal was introduced in Congress but gained no additional traction.

170. *See supra* Part II.C.

171. Landau, *supra* note 140, at 358–62. R

individual plaintiff, the Court issues structural orders to the bureaucracy in order to make it change policy in an area. The Court also maintains supervisory jurisdiction over the case for a very long period of time.

The Court has only used this device, in a full-fledged way,[172] twice, but both attempts have been massive interventions in public policy and are still ongoing. The first, in 2004, was the Court's intervention into displaced persons, or refugees who have been displaced from their homes but are still residing somewhere in Colombia (usually in the big cities).[173] Because of Colombia's ongoing civil violence, displaced persons are about ten percent of the total population, or somewhere between three to five million people. The second attempt occurred in 2008, when the Court took structural jurisdiction over the entire health care system.[174] Both decisions were written by the same justice, Manuel José Cepeda.

My interviews with the justices, particularly Cepeda, revealed several motives for their decisions to issue a "state of unconstitutional affairs" order. First, they were concerned about docket congestion on the Court itself, as well as on the lower courts—issues involving displaced persons were taking up an increasing amount of space on the Court's docket, and the health issue, by around 2008, had reached about half of the Court's entire *tutela* docket.[175] Second, they were concerned about equity issues, especially in the health area, where as we have already seen, middle and upper class groups filed the bulk of claims.[176] Third, they believed that both areas had pervasive regulatory failures, although in somewhat different ways. In the displaced persons area, before the Court's decision a public policy simply did not exist; hardly any actors in the state took notice of the problem.[177] This was a breathtaking failure for an issue that affected such a large percentage of the population. In the health care area, a public policy did exist, but the judiciary believed that the bureaucracy was essentially abdicating its regulatory

172. The Court has labeled other areas "states of unconstitutional conditions," but has not accompanied these declarations with broad structural orders and ongoing supervisory power. *See id.* at 358–59.

173. *See* C.C., enero 22, 2004, M.P: M. Espinosa, Sentencia T-025/04, *available at* http://www.corteconstitucional.gov.co/relatoria/2004/t%2D025%2D04.htm (Colom.).

174. *See* C.C., julio 31, 2008, M.P: M. Espinosa, Sentencia T-760/08, *available at* http://www.corteconstitucional.gov.co/relatoria/2008/t%2D760%2D08.htm (Colom.). The Court did not actually use the label "state of unconstitutional conditions" in this decision, but it effectively set up the same kind of supervisory authority over the system.

175. Interview with Manuel José Cepeda, in Bogotá, Colom. (Aug. 28, 2008); interview with Jaime Córdoba Triviño, in Bogotá, Colom. (Aug. 25, 2008); *see also* Landau, *supra* note 140, at 360 (noting the "flood of *tutelas*" on the displaced persons issue). R

176. Interview with Manuel José Cepeda, in Bogotá, Colom. (Aug. 26, 2008); *see also* Yamin & Parra-Vera, *supra* note 108, at 444–45 (noting that equity concerns drove T-760/08). R

177. Cesar Rodriguez Garavito & Diana Rodriguez Franco, Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazamiento Forzado en Colombia [Courts and Social Change: How the Constitucional Court Transformed Forced Displacement in Colombia] 40–44 (2010) (providing evidence that no public policy existed on the displaced persons issue before the T-025/04).

and supervisory role to the courts, which already were managing the system through individualized jurisprudence: "We were the bureaucracy."[178]

The Court's approach has been broadly similar across the two cases: it proceeds first by gathering information from the government, civil society, and governmental monitoring groups like the Ombudsman and Attorney General. Based on this information, it issues fairly detailed orders to the government. Finally, it periodically holds public hearings in which it solicits the views of civil society groups, governmental monitoring organizations, and cajoles the government.[179] In the displaced persons case, it began by trying simply to develop an adequate set of statistical indicators for the state to use in assessing the scope of the problem.[180] It also worked on building up a state bureaucracy and a set of basic programs that would respond to the immediate needs for subsidies on a range of social rights (housing, health care, etc.).[181] Finally, it has focused on a range of more particularized problems. For example, it has held public hearings on particularly affected groups with distinctive problems (children, women, Afro-Colombians, indigenous groups, the handicapped)[182] and has recently been focused on expanding administrative capacity at the regional and local level.[183] In the case of health care, the Court has focused on four areas: (1) expanding the POS of the subsidized regime so that it is equal to the POS of the contributory regime, which was a goal originally set out in law but not realized, (2) fixing the system of state reimbursement to the health care providers for treatments located outside of the POS, (3) ensuring that the POS be updated annually by the regulators, and (4) expanding access to the system and ensuring universal coverage.[184]

Although full assessment of the results of these two massive cases is another project, we can still learn from this information. First, these structural remedies have allowed the Court to target its interventions at lower class

178. Interview with Manuel José Cepeda, in Bogotá, Colom. (Mar. 25, 2009).

179. Landau, *supra* note 140, at 358–62. The contempt sanction is rarely used, although some public officials stated that they were concerned about its application. Interview with Angela Portela, Acción Social, in Bogotá, Colom. (July 22, 2009). R

180. *See* C.C., La Sala Segunda de Revisión, mayo 4, 2007, Auto 109 de 2007 (Colom.); C.C., La Sala Segunda de Revisión, septiembre 7, 2007, Auto 233 de 2007 (Colom.); C.C., La Sala Segunda de Revisión, mayo 13, 2009, Auto 116 de 2008 (Colom.) (all debating and adopting certain statistical measures for state use).

181. *See, e.g.*, C.C., La Sala Segunda de Revisión, agosto 23, 2005, Auto 175 de 2005 (Colom.) (considering the sufficiency of the government's efforts to increase the budget).

182. *See* C.C., La Sala Segunda de Revisión, agosto 23, 2008, Auto 092 de 2008 (Colom.) (considering the plight of displaced women and ordering the creation of specific programs aimed at them); C.C., La Sala Segunda de Revisión, octubre 6, 2008, Auto 251 de 2008 (Colom.) (displaced children); C.C., La Sala Segunda de Revisión, enero 26, 2009, Auto 004 de 2009 (Colom.) (indigenous groups); C.C., La Sala Segunda de Revisión, enero 26, 2009, Auto 005 de 2009 (Colom.) (Afro-Colombians); C.C., La Sala Segunda de Revisión, enero 26, 2009, Auto 006 de 2009 (Colom.) (handicapped).

183. *See, e.g.*, C.C., La Sala Segunda de Revisión, enero 26, 2009, Auto 008 de 2009 (Colom.) (focusing on coordination between the central government and regional entities).

184. *See* C.C., julio 31, 2008, Sentencia T-760/08, § 6.2, *available at* http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm (Colom.); *see also* Cepeda, *supra* note 104, at 13.

groups, rather than issuing a largely middle class jurisprudence. The displaced persons case has allowed the Court to cajole the state into funneling resources towards income support and subsidies for the displaced, which are almost always very poor.[185] Similarly, one of the major goals of the health care case has been to equalize the quality of care in the subsidized regime, which is utilized by poor Colombians who are unemployed or who work in the informal sector.[186] This may help poorer Colombians receive health care without needing to file a *tutela*.

Second, my field research indicates that these two cases are taking up a large amount of the Court's resources. The Court is a fairly small institution, and each case has required a large amount of time of some of the judges and law clerks, and has the hiring of additional staff.[187] It would be difficult for the Court to perform more than a few of these structural interventions at any one time.

Third, the debate about structural injunctions in the United States has focused on two main issues: whether judicial involvement of this type is undemocratic and whether judges possess the capacity and skills to make successful interventions of this type.[188] The Court's intervention in the displaced persons area has been largely successful on both scores; its intervention in the health care area has been markedly less successful. This suggests that structural injunction cases can work, albeit only in certain political contexts.

185. *See, e.g.*, COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DEZPLAZAMIENTO FORZADO, EL RETO ANTE LA TRAGEDIA HUMANITARIA DEL DESPLAZAMIENTO FORZADO: GARANTIZAR LA OBSERVANCIA DE LOS DERECHOS DE LA POBLACIÓN DESPLAZADA [THE CHALLENGE BEFORE THE HUMAN TRAGEDY OF FORCED DISPLACEMENT: ENSURING THE RIGHTS OF THE DISPLACED POPULATION] (2009), 199 tbl. 59, *available at* http://www.internal-displacement.org/8025708F004CE90B/(http Documents)/73C67C3F2B667C88C12575E00041A054/$file/VOL_2_DH.pdf (finding that only fourteen percent of displaced persons age twelve or over earn the minimum wage or more).

186. *See infra* text accompanying notes 102–105. R

187. Each of the two cases is managed by a panel of three judges, with one member of each panel serving as the presiding judge and spending a substantial amount of time on the case. One of the three law clerks (magistrados auxiliares) of these presiding judges works full time on the case, assisted by an additional technical staff of four or five people. Interview with Ivan Escrucería, Magistrado Auxiliar (Justice Jorge Ivan Palacio Palacio), Corte Constitucional, in Bogotá, Colom. (Aug. 26, 2009) (charged with coordinating the health case).

188. For views generally critical of structural injunctions, see generally ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 223 (2003); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing through case studies of abortion and desegregation cases that courts cannot bring about large-scale social change); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 273 (1977) (noting that structural judicial orders often lead to unexpected results because "the situation they propose to control [may be] too fluid . . . ," or because the "interaction of several targets [may] combine 'chemically' to transform the decree on the ground."); JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF MISSOURI V. JENKINS (2008) (showing that the desegregation of Kansas City school systems went awry when the court and the city sought to build magnet schools to attract white upper-income students, but those students still preferred suburban schools, leaving the district with many expensive and empty schools). For a more favorable view, see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE (1998) (arguing that the structural reform cases aimed at overhauling Southern prisons were largely successful).

As Cesar Rodriguez Garavito and Diana Rodriguez Franco demonstrate in their landmark study of the displaced persons case, since the Court's intervention, the government had drastically increased the budget for the problem and has created a massive bureaucracy spread across numerous agencies.[189] Furthermore, there is now a well-functioning set of statistical indicators to measure the depth of the problem.[190] Finally, the government appears to have improved displaced persons' enjoyment of rights in certain areas by creating functioning subsidy programs for basic needs like food, housing, and health care.[191] In the health care area, progress has been very slow. An agency is ostensibly carrying out the redesign of the POS and equalization of the subsidized and contributory regimes, but it is working very slowly and probably lacks a sufficiently high profile within the government.[192] The government also declared a state of social and economic emergency in December 2009,[193] and pursuant to that emergency issued new taxes to fund the system. However, at the same time the government arguably made it very difficult to gain access to treatments outside the POS, which limited access to the *tutela*.[194] Many of these decrees cut against the body of the Court's *tutela* jurisprudence and were clearly a form of resistance to the Court. The decrees provoked large protests by doctors and consumer groups, and the Court struck down the declaration of social emergency in March 2010, but left the new taxes in place.[195] The judges charged with implementing the structural decision on health care told me in April 2010 that they were uncertain whether the government is genuinely interested in complying with the decision.[196]

189. *See* RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 177, at 212 tbl. 1 (showing that the budget for the problem rose from 120,700 million pesos in 2003 to 542,185 million pesos in 2005 and 1,021,936 million pesos in 2008). R

190. *See id.* at 216–45 (explaining the construction and evolution of the statistical indicators ordered by the Court).

191. *See*, *e.g.*, *id*. at 254–72 (finding some progress along these dimensions); Comisión de Seguimiento, *supra* note 185 (finding the same in a national survey of displaced households). R

192. Interview with Heriberto Pimiento, Member of the Comisión de Regulación de Salud (CRES), in Bogotá, Colom. (Apr. 29, 2010).

193. Pursuant to article 215 of the Constitution, the President may declare a state of social and economic emergency whenever events occur that "disrupt or threaten to disrupt in serious or imminent manner the economic, social, or ecological order of the country or which constitute a grave public calamity," and after making such a declaration he may issue decrees relating to that issue which have the force of law. The Constitutional Court must review both the declaration of a state of emergency and the individual decrees issued during the emergency. Constitución Política de Colombia [C.P.] art. 215.

194. *See*, *e.g.*, *Medicos Dicen que son 'Aberrantes' los Decretos de la Emergencia Social {Doctors Say Social Emergency Decrees are 'Aberrant'}*, SEMANA (Feb. 1, 2010), *available at* http://www.semana.com/noticias-problemas-sociales/medicos-dicen-aberrantes-decretos-emergencia-social/134430.aspx.

195. *See* C.C., Sala Segunda de Revisión, abril 16, 2010, Sentencia C-252/10, §6.2, *available at* http://www.corteconstitucional.gov.co/relatoria/2010/c%2D252%2D10.htm (Colom.); *see also Medicos Dicen que son 'Aberrantes' los Decretos de la Emergencia Social {Doctors Say Social Emergency Decrees are 'Aberrant'}*, SEMANA (Feb. 1, 2010), *available at* http://www.semana.com/noticias-problemas-sociales/medicos-dicen-aberrantes-decretos-emergencia-social/134430.aspx (outlining the resistance of doctors to the measures).

196. Interview with Mag. Jorge Ivan Palacio Palacio, Mag. Gabriel Eduardo Mendoza Martelo, & others, in Bogotá, Colom. (Apr. 29, 2010).

I would emphasize differences in the political context as the key variables for understanding this difference. In the displaced persons case, the Court was writing on a virtually clean slate—little public policy or bureaucracy existed prior to the Court's decision.[197] In response to the Court's decision, the administration quickly created a budget on the issue and began hiring bureaucrats who would work solely on this issue. There is now both a central office in Acción Social, the executive's own social program that coordinates the effort, and a series of bureaucrats spread across many agencies within the state.[198] The Court has also received support from a strong and fairly cohesive civil society group, which it organized into a Compliance Commission.[199] The Commission is made up of domestic NGOs, international organizations like the U.N. High Commission on Refugees, and organized groups of displaced persons themselves.[200] Many of the Court's policy ideas and much of the monitoring of the executive was done by this Commission.[201] The Court's work has plausibly been democracy-enhancing: it has created a public debate on the issue of displacement (the number of news articles dedicated to the topic has increased sharply),[202] and it has empowered civil society groups and given them access to the bureaucracy.[203]

The Court's choices appear to have been successful because the Court, the civil society groups, and the bureaucracy all share an essentially similar vision of how to create and improve public policy in this area.[204] On most

197. RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 177, at 94–96 (noting that the "problem was relatively absent from the public discussion" before the Court's decision); 130–33 (noting that little public policy existed on the topic prior to the judicial intervention). **R**

198. Interview with Angela Portela, Acción Social, in Bogotá, Colom. (July 22, 2009); Interview with Viviana Ferro, Territorial Coordination of Displaced Persons Grp., Ministerio del Interior y Justicia, in Bogotá, Colom. (May 5, 2010).

199. Interview with Marco Romero, Dir., Codhes, in Bogotá, Colom. (Aug. 4, 2009).

200. *See* COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DEZPLAZAMIENTO FORZADO, *supra* note 185, at 17–18 (listing individual and corporate members of the Commission). **R**

201. For example, the Director of Codhes, a key NGO on the Commission, told me that most of the statistical indicators adopted by the Court came from proposals by the Commission. When the state disagreed with the Commission, the Court almost always sided with the Commission. Interview with Marco Romero, Dir., Codhes, in Bogotá, Colom. (Aug. 4, 2009).

202. RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 177, at 98 tbl. 1 (presenting data from EL TIEMPO to support this claim). **R**

203. Directors of domestic NGOs (Codhes and the Colombian Commission of Jurists) and international organizations (the U.N. High Commission on Refugees) all told me that the bureaucracy had become much more receptive to them since the decision. Interview with Marco Romero, Dir., Codhes, in Bogotá, Colom. (Aug. 4, 2009); Interview with Juan Manuel Bustillo, Comisión Colombiana de Juristas, in Bogotá, Colom. (July 22, 2009); Interview with Andres Celis, U.N. High Commission on Refugees, in Bogotá, Colom. (Aug. 11, 2009). I do not want to overstate the degree to which the decision benefitted all civil society groups. Because the court tends to talk in a technical language, and has emphasized statistical measures and complex public policy goals, many of the organizations of displaced persons have had little voice when compared to the technically-savvy NGOs. Interview with Juan Manuel Bustillo, Comisión Colombiana de Juristas, in Bogotá, Colom. (July 22, 2009); *see also* RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 177, at 180–88 (presenting evidence for this point). **R**

204. One factor here is that some of the personnel hired in the government formerly worked for the NGOs working on the topic. Interview with Claudia Juliana Melo, Displaced Persons Grp., Departamento de Planeación, in Bogotá, Colom. (May 6, 2009).

issues, there has been no plausible vision other than that of the Court and the Commission. Furthermore, President Uribe managed to find a way to fit support for displaced persons into his broader political program.[205] He placed the bulk of the policymaking role in Acción Social and focused the program on dispensing individualized benefits to actors who registered as displaced. As with other social benefit programs in Latin America that depend on direct monetary receipt from the President, it is plausible that this has helped to build presidential support. Meanwhile, progress on bigger structural issues, like reduction of targeted violence by paramilitaries and return of land to displaced groups, has been much slower than the granting of targeted subsidies and aid packages.[206] Furthermore, huge problems remain at the local level; in many municipalities and departments, compliance has lagged badly because of local officials or a lack of capacity.[207] But despite the serious problems with compliance in some areas, it is impressive what has been achieved.

The political context of the health care case is completely different. The Court stepped into the middle of an already well-developed, although flawed, public policy. There was already a well-developed bureaucracy, for example, invarious government ministries.[208] Policymakers have felt that the Court was modifying the framework in ways that were too costly. For example, given the relative numbers of people in the contributory and subsidized systems, several officials told me that full equalization of the two systems was economically impossible.[209] Other officials dislike that the *tutela* is the main tool for accessing health care, and feel that the judges lack an understanding of the relevant technical principles.[210] Many doctors and consumer groups feel that the Court's intervention is insufficient, and that what is needed is a move towards a completely different system, such as a public single-payer system.[211] The health insurance companies are worried that the Court's actions will eventually subject them to additional regulatory scru-

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

206. *See generally* Comisión de Seguimiento a la Política Pública Sobre Dezplazamiento Forzado, *supra* note 185. R

207. Interview with Viviana Ferro, Territorial Coordination of Displaced Persons Grp., Ministerio del Interior y Justicia, in Bogotá, Colom. (Aug. 8, 2011).

208. *See* Juan Carlos Cortes Gonzalez, *Derecho a la proteccion social* [*The Right to Social Protection*] 280–96 (2009) (outlining the basic structure of the Colombian health care system and the bureaucracies established to carry it out).

209. Interview with José Fernando Arias Duarte, Departamento de Planeación, in Bogotá, Colom. (Apr. 28, 2010).

210. *See, e.g.*, Lopez Medina, *supra* note 91, at 65 (noting the lack of technical capacity even at the Constitutional Court level); Interview with Heriberto Pimiento, Member, Comisión de Regulación de Salud (CRES), in Bogotá, Colom. (Apr. 29, 2010). R

211. Interview with Dr. Gabriel Carrasquilla, Director, Centro de Estudios y Investigación en Salud, in Bogotá, Colom. (Apr. 13, 2010).

tiny and will raise their costs.[212] In short, there is little organized support or shared vision for the Court's work in this area. The Court, for example, has only recently been able to build a Compliance Commission in the health area.[213] Both the president of the Commission and one of its members have emphasized to me that the members of the Court have widely varying visions and that few members regularly attend.[214] Furthermore, the Commission is dividing its energy between supervising compliance with the Court's orders and drafting a new legal proposal to fundamentally change the system.[215] Many members of the Commission are thus convinced that the Court's orders will not be sufficient to fix the problems in the area.

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

F. Conclusions from the Case Study

The case study of Colombia strongly supports the two major claims of this Article: social rights enforcement largely benefits middle class rather than poor groups, and the choice of remedy makes a significant difference on the questions of who benefits from the enforcement and what effect it has on the bureaucracy. Indeed, despite the fact that the Court at its outset announced a doctrinal position—the vital minimum—that seemed to target its social rights jurisprudence towards the marginalized, it subsequently had great difficulty actually targeting those groups. There are two main reasons for these problems. First, the Colombian Court demonstrated populist tendencies at certain points, particularly during the economic crisis of the late 1980s. Second, the remedial design issues raised in Part I loomed large; the Court often relied on two models, individualized enforcement and negative injunction, that largely benefitted higher income groups. The Court only moved to far more costly and difficult remedies, such as structural injunctions, relatively recently when it believed the other approaches to have failed.

212. Interview with Ana Cecilia Santos, Vice-President, ACEMI, in Bogotá, Colom. (Apr. 28, 2010).

213. In April 2010, the justices and their clerks told me that they had had little luck getting civil society groups to cooperate with the Court and to monitor the government. Interview with Mag. Jorge Ivan Palacio Palacio, Mag. Gabriel Eduardo Mendoza Martelo, & others, in Bogotá, Colom. (Apr. 15, 2010). As of July 2011, however, a Commission did exist. Interview with Pedro Santana, President, Compliance Commission, in Bogotá, Colom. (Aug. 4, 2011).

214. Interview with Pedro Santana, President, Compliance Commission, in Bogotá, Colom. (Aug. 4, 2011); Interview with Mario Hernández, in Bogotá, Colom. (Aug. 13, 2011).

215. Interview with Mario Hernández, in Bogotá, Colom. (Aug. 13, 2011).

III. Evidence from Other Countries

In this section I present evidence from other countries to support both hypotheses. In particular, I emphasize that remedies, both individualized enforcement and the negative injunction approach, appear to have a pronounced tilt towards upper-income groups. The individualized enforcement approach seems to do little to improve bureaucratic performance, while the negative injunction approach tends to involve the court in serious macroeconomic messes. Finally, a structural injunction approach, although relatively rare in comparative law, appears to have some promise both in targeting lower-income groups and in effecting positive changes in the bureaucracy, at least in certain political contexts.

A. Individualized Enforcement

The comparative evidence described below strongly supports the inferences, drawn from the Colombian data, that individualized enforcement of social rights tends to disproportionately benefit middle and upper class groups, and that its effect on bureaucratic effectiveness is ambiguous at best. Furthermore, individualized enforcement, especially of the rights to health and social security, appears to be very common in comparative constitutional law.[216] This is likely because individualized enforcement appears to be "court-like": it involves courts in one-on-one disputes without seeming to involve them in complex policy disputes that are beyond their competence. The analysis here will focus on Brazil, which is a case that has been studied relatively extensively.

In Brazil, courts have aggressively protected the right to health, but almost always through individualized rather than structural enforcement.[217] As in Colombia, the success rate of these individualized claims is very high. A careful empirical study by Florian Hoffmann and Fernando R.N.M. Bentes looked at health litigation between 1994 and 2004 in five Brazilian states and in the two highest federal courts of the system: the Federal Supreme Court and the Superior Court of Justice.[218] The paradigmatic case is a claim by an individual against the state or a private health insurer for the provision of some treatment or particularly a medicine, driven as in Colom-

216. For example, individualized enforcement of the rights to health and social security is fairly common in Argentina and Venezuela. *See, e.g.*, Christian Courtis, *Argentina: Some Promising Signs*, *in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 163, 169–76 (Malcolm Langford ed., 2008); Enrique Gonzalez, *Venezuela: A Distinct Path Towards Social Justice*, *in* Social Rights Jurisprudence: Emerging Trends in International and Comparative Law 192, 202–04.

217. *See* Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* Courting Social Justice 100 (Varun Gauri & Daniel M. Brinks eds., 2008).

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

bia by the complexity of the health care provision system.[219] Hoffmann and Bentes found that plaintiffs begin with about a seventy percent success rate at the trial court level, that this success rate reduces to about sixty percent after accounting for the decisions of the intermediate appellate courts, but goes back up to eighty-two percent after accounting for review by the apex courts.[220]

Case law appears to pay little attention either to resource limitations or to the economic position of the petitioner in these individual cases. For example, in a seminal 1997 case, a petitioner suffering from a rare degenerative disease requested stem-cell treatment in an American clinic; the treatment would cost $63,806.[221] The state raised the argument of resource limitations, but the Brazilian Federal Supreme Tribunal upheld the claim, stating, "[b]etween the protection of the inviolable rights to life and health . . . and the upholding . . . of a financial and secondary interest of the State, . . . ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health."[222] As Octavio Luiz Motta Ferraz notes, the basic rule of the Brazilian judiciary in these individualized cases is that "the right of the individual must always prevail, irrespective of its costs."[223] As in Colombia, the individual cases are detached from their systematic context.

In contrast, few collective claims have been filed, and these have usually been denied. Hoffmann and Bentes posit that the Brazilian judiciary is still steeped in a civil law tradition and thus unwilling to take on the obvious policymaking role implied by aggregate litigation.[224] That is, they decide individualized claims from a "purely individual civil rights perspective" without giving much thought to economic or social impact; thus they tend to grant these claims.[225] The arguments flip for collective cases, where arguments about social and economic impact are used to justify non-concession because judges are unwilling to appear to be making large-scale policy judgments.

There is no direct quantitative data on exactly who is filing these cases, but the accumulation of other relevant evidence means that "[i]t is not diffi-

219. *See id.* at 122–23 ("[T]he great majority of health cases in Brazil concern individual provision or financing claims, notably access to medicines and, less frequently, access to treatment."). Ferraz cites research studying 23,003 lawsuits in San Paolo, and finding that 66.1 percent of the lawsuits sought access to a medication. *See* Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1661 (2011).

220. Hoffmann & Bentes, *supra* note 217, at 119.

221. *See* Ferraz, *supra* note 219, at 1656–58 (discussing S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, Diário da Justiça D.J., 17.04.1998, 64, 65 (Braz.)).

222. *Id.* at 1658 (quoting Brazilian STF case prioritizing the right to health over state's resource limitations, S.T.F., Recurso Extraordinario [Extraordinary Remedy] No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1418 (Braz.)).

223. *Id.*

224. *See* Hoffmann & Bentes, *supra* note 217, at 116–17.

225. *Id.* at 126.

cult to guess."[226] Work by Ferraz has found that the richest states file the bulk of the claims. His study found that of 4,343 suits filed between 2005 and 2009, the ten Brazilian states with the highest scores on the United Nations' Human Development Index generated ninety-three percent of the claims, while the ten states with the lowest scores generated only seven percent.[227] Other research has shown that most claimants rely on private lawyers, and that most claims are for high cost medications and similar goods rather than basic health needs. Thus, the conclusion of observers has been that most of this litigation is being filed by middle-class petitioners rather than the poor.[228] This is not surprising, given that Brazilian legal devices, unlike the Colombian *tutela*, are relatively complex and expensive, and, as Hoffmann and Bentes find, that the poor have a "general lack of rights consciousness and trust in the judiciary."[229]

Finally, Hoffmann and Bentes find little evidence that this individualized jurisprudence has provoked positive effects on the executive bureaucracy. They find that the major policy decision to include HIV drugs on the lists of allowable medicines was unrelated to litigation, although they do find that some other medicines have been included on the list because of a critical mass of litigation.[230] Still, they find that, as in Colombia, most of the real problems in the Brazilian health bureaucracy are problems of "implementation" rather than design; even when a drug or treatment is included on the list, patients often do not receive it without legal action.[231] In this sense, as in Colombia, the Brazilian courts have become a partial replacement for the bureaucracy rather than helping to improve bureaucratic action.

B. Negative Injunctions

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

226. Ferraz, *supra* note 219, at 1661. R

227. 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? 76, 87–88 (Alicia Ely Yamin & Siri Gloppen eds., 2011).

228. *See, e.g.,* Ferraz, *supra* note 219, at 1662 ("Given this profile in which most litigation focuses on health attention that cannot be regarded as a priority for a research-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."); Hoffmann & Bentes, *supra* note 217, at 143 ("[T]he queue jumping of litigant patients, many of whom are middle class, at public pharmacies does have a direct impact on nonlitigant patients, the majority of whom are, quite likely, indigent."). R

229. Hoffmann & Bentes, *supra* note 217, at 113.

230. *Id.* at 136–37.

231. *Id.* at 137–38.

appropriateness.[232] The Colombian Court used this principle in its 2000 public sector salary case, in which it ordered all public sector employees to receive increases in salary at least equal to the rate of inflation. The negative injunction is very popular in comparative law as a means to enforce social rights, most likely because it also appears relatively court-like: the judiciary is not involved in making complex budgetary allocations or otherwise constructing policy, but instead merely prevents the state from putting some new policy into effect. In other words, enforcement of social rights by negative injunction makes these rights look more or less like other kinds of rights.

This kind of social rights enforcement is likely to have a strong tilt in favor of more affluent groups. Middle and upper class groups tend to have pensions, decent health care, and other subsidies. These benefits can be attractive targets for governments that urgently need to cut budget deficits and which may be under international (IMF, World Bank, etc.) pressure to do so. In contrast, the very poor do not have many benefits for the government to take away; therefore, states are less likely to cut these benefits during recessions and periods of structural adjustment. One of the most common types of social rights enforcement "for the benefit" of the poor illustrates this point; the poor may file injunctions against evictions from slums built on lands that they do not own, or from living on the street, in both India and South Africa.[233] The jurisprudential logic in both countries is that there is a constitutional right to housing, and while the positive aspect of this right (the building of decent housing for all) cannot be realized immediately, the courts will at least enforce the negative aspect of the right by making it more difficult to evict poor tenants from their existing homes in ramshackle slums or on the streets. These cases may do something for the poor, but not much.

The more typical negative injunction case in comparative constitutional law benefits the middle class. A good example is the Hungarian Constitutional Court's activism on social benefits in the mid-1990s, when the Court struck down a series of important government measures. The Hungarian

232. *See supra* text accompanying notes 154–156 (describing the non-retrogression principle as a creation of the Committee on Economic, Social, and Cultural rights, and which is charged with interpreting the International Covenant on Economic, Social, and Cultural rights). R

233. *See, e.g.,* S. Muralidhar, *India: The Expectations and Challenges of Judicial Enforcement of Social Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 102, 112–14 (Malcolm Langford ed., 2008) (discussing cases from India although finding enforcement of even this minimal protection spotty); Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797, 820–25 (2009) (explaining how South African Courts have made forced evictions of slum dwellers more difficult for the state to carry out). The South African Court has gone beyond just issuing negative injunctions; in some cases it has imposed novel remedies. For example, in one famous case it ordered the government to compensate a landowner because slum-dwellers were on his land, and because of constitutional principles he could not evict the slum-dwellers. *See* Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151, 188–89 (2009) (discussing the 2005 case of *President of the Republic and others v. Modderklip Boerdery*).

government, in the midst of a severe economic crisis and under pressure from international organizations like the IMF, attempted to cut many benefits from the social benefits system (pension, child supports, sick leave, etc.) and to move from a universal system toward a need-based system.[234] The jurisprudential basis for these judgments was that people with existing benefits had property-like rights to those entitlements that the government could not take away lightly.[235] While there is a debate about the appropriateness of these decisions,[236] there is no doubt that these judgments benefited mainly upper-income groups, and that Sajó is correct in calling the Hungarian social rights "middle class entitlements."[237] Like the Colombian UPAC and salary cases, these decisions were also very popular with the public. A poll taken just after the decisions found that eighty-nine percent of the population had heard of them, and that eighty-four percent of those who voted for the ruling parties and ninety percent of those who did not favored the decisions.[238]

Experience from Brazil and Argentina has at times shown similar patterns. In Brazil, for example, the Supreme Federal Tribunal (STF) in 1999 enjoined a large portion of President Cardoso's public sector pension reform, holding that the reform should have been done via constitutional amendment and not via ordinary law.[239] In Argentina, there were a flood of complaints seeking injunctions after restrictions on cash withdrawals (the famous "corralito") were imposed during a deep economic crisis in 2001. Claimants won many individual injunctions against these measures, primarily at the lower court level (although the Supreme Court issued contradic-

234. *See* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1943–47 (2004) (explaining how the Court, in a series of fifteen decisions, blocked much of an Economic Stabilization Package that imposed sharp cuts on maternity benefits, social security, health care, child support, and sick pay).

235. *See* Malcolm Langford, *Hungary: Social Rights or Market Redivivus?*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 250, 256–60 (Malcolm Langford ed., 2008). The Court divided benefits into two types: (1) insurance-like benefits where the individual pays in to the state program in order to receive benefits later, and (2) solidarity benefits where the individual did not pay into the system before receiving benefits. There were constitutional protections for both types of benefits, but they were higher for the former type because of the prior payments made by the individual. *See* Scheppele, *supra* note 234, at 1946. R

236. *Compare* Scheppele, *supra* note 234 (defending these decisions as democracy-enhancing because they empowered domestic groups over international austerity organizations like the IMF) and Langford, *supra* note 235, at 259 (arguing that the Court merely imposed reasonable due process protections and ensured that safety nets were not drastically changed too quickly), *with* András Sajó, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, *in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 83, 97 (Roberta Gargarella et al. eds., 2006) (arguing that "[i]n Hungary, social rights were understood as an entitlement of the overwhelming majority," and thus "judicial enforcement . . . cannot be seen as counter-majoritarian, even if . . . the prevailing majoritarian solutions were both inefficient and socially unjust"). R R

237. *See* Sajó, *supra* note 236.

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

239. *See* Julio Rios-Figuerosa & Matthew M. Taylor, *Institutional Determinants of the Judicialization of Policy in Brazil and Mexico*, 38 J. LAT. AM. STUD. 739, 758–59 (2006).

tory rulings, with some supporting the claimants as well).[240] As Linn Hammergren noted, this was a species of "judicial populism"—the court was "playing to the masses."[241] In both cases, again, the beneficiaries were middle- and upper-class groups—those who had civil service pensions and who had significant bank accounts.

A final point is that this kind of jurisprudence, although seemingly court-like, tends to get judiciaries in big trouble. This happens because these cases tend to impinge on core macroeconomic policy decisions at precisely the moment in which governments are experiencing budgetary stress and need to undertake structural adjustments. These are often "populist" decisions and may be popular with the public, as the Hungarian and Colombian decisions show.[242] But they also anger presidents and legislatures, who may seek to attack or overhaul judiciaries as a result. The popularity of courts like the Hungarian and Colombian ones might have protected them from obvious attempts to attack it, like jurisdiction-stripping efforts or attempts to pack the court or remove the existing justices,[243] but the appointment process offers a much lower-salience way to alter judicial behavior: in Hungary in 1999, the entire court turned over and a much less activist group of justices were appointed to replacing the outgoing court.[244] To a much lesser degree, the same happened in Colombia, where the justices appointed in 2001 continued to make activist decisions but also promised self-restraint, and particularly that they would pay attention to the economic consequences of their decisions.[245]

C. *Structural Injunctions*

Structural injunction-like devices have been rare in comparative constitutional law. Although various scholars have pointed out their theoretical utility in resolving difficult social rights problems, they remain for the most part the pipe dream of academics in other countries, a remedy that exists in journal articles but is almost never seen in reality.[246] This has been especially

240. *See generally* Catalina Smulovitz, *'Judicialization of Protest in Argentina: The Case of* CORRALITO*, in* ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN NEW LATIN AMERICAN DEMOCRACIES 55 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006). Smulovitz finds that in 2002 the courts granted 143,836 injunctions; each injunction led to the return of about $20,000.

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

242. *See supra* text accompanying notes 148–149, 235.

243. *See* GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 19–57 (2005) (arguing and providing evidence that public support can insulate a court from attempts to retaliate against it by the political branches).

244. *See* Scheppele, *supra* note 238, at 53–54 (stating that "[t]he old Constitutional Court was dead" after 1998). R

245. *See supra* text accompanying notes 164–166. R

246. Paola Bergallo provides interesting evidence from Argentina, which is one of the few countries that has actually attempted structural remedies. She notes that in the early stages of HIV/AIDS litigation, courts relied on a structural remedy forcing the state to provide treatment for victims, and this litigation is credited with vastly expanding treatment in the country. However, subsequent decisions

true in South Africa, where the Court has aggressively taken on the challenge of defining constitutional rights but has been willing to give only very limited remedies for their violation.[247] And, as the Colombian example shows, structural remedies are expensive, time-consuming, demand a tremendous amount of legal and political skill from the judiciary, and only appear to work well in certain political contexts.[248] On the other hand, they have the potential to correct some of the biases seen in the other devices, and they may be especially promising for targeting lower income groups. The limited comparative experience that exists for these devices supports these hypotheses.

In particular, the Indian Supreme Court has at times experimented with structural remedies for constitutional violations. The most famous example is the Court's 2001 order in *People's Union for Civil Liberties* v. *Union of India & Others*.[249] In this case an Indian NGO challenged the federal government's grain distribution policy, which it argued violated the constitutional right to be free from hunger. In order to protect export agriculture, the government was storing rather than distributing huge amounts of grain even as the country was in the midst of a severe famine.[250] The Indian Supreme Court agreed with the challenge; although its initial order was mainly declaratory, it maintained jurisdiction over the case and began issuing increasingly expansive and specific orders, quickly branching out from an exclusive focus on grain policy. For example, the Court has ordered the creation of specific programs for giving grain to poor families, implementing complex food-to-work programs, and creating a school lunch program for children.[251] The Right to Food Campaign, a collection of NGOs that first brought the claim

focused on the needs of individuals or small groups, and thus avoided the structural dimensions of litigation. *See* Paola Bergallo, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 TEX. L. REV. 1611, 1638–41 (2011). This suggests that because of ideological or political factors, even a court that has experimented with structural remedies may have trouble sustaining such a course.

247. *See*, *e.g.*, Danielle Elyce Hirsch, *A Defense of Structural Injunctive Remedies in South African Law*, 9 OR. REV. INT'L L. 1, 1–3 (2007); Jonathan Klaaren, Note, *A Remedial Interpretation of the* Treatment Action Campaign *Decision*, 19 S. AFR. J. HUM. RTS. 455, 456 (2003); Mia Swart, *Left Out in the Cold?: Crafting Constitutional Remedies for the Poorest of the Poor*, 21 S. AFR. J. HUM. RTS. 215, 226–228 (2005); Murray Wesson, Grootboom *and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. AFR. J. HUM. RTS. 284, 305–307 (2004); *see also* Emma C. Neff, *From Equal Protection to the Right to Health: Social and Economic Rights, Public Law Litigation, and How an Old Framework Informs a New Generation of Advocacy*, 43 COLUM. J.L. & SOC. PROBS. 151 (2009) (arguing that socio-economic rights litigation should be approached with the same tools used to analyze structural reform litigation); Paola Bergallo, *Justice and Experimentalism: Judicial Remedies in Public Law Litigation in Argentina* (2005) (Unpublished paper from the Yale University Seminar in Latin America on Constitutional and Political Theory), *available at* http://www.law.yale.edu/documents/pdf/Justice_and_Experimentalism.pdf.

248. *See supra* text accompanying notes 206–215. R

249. Writ Petition (Civil) No. 196 of 2001, (May 8, 2002) (India), *available at* http://www.righttofoodindia.org/orders/may8.html.

250. Neff, *supra* note 247, at 164–65.

251. Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 700 (2010).

to the Court, has been instrumental in monitoring compliance, bringing new information to the court, filing new claims, and acting as a bridge between the Court and the public.[252] The Court also established a Commission in 2002 to monitor implementation; the two central commissioners in turn appointed advisors from each state. The Commission collects information from the governments, influences the design of interim orders, and mediates policy changes with the governments.[253]

Overall, the intervention appears to have been successful both in improving food policy in India and, more broadly, in starting a broad public debate on the topic. The government recently announced a new law (the National Food Security Act) aimed at regulating the entire problem.[254] The similarities between the Indian food case and the Colombian displaced persons case are striking and may help us construct usable theory for when structural interventions are likely to be successful. In both cases the court took on massive issues that the political branches had basically ignored and constructed public policy from the ground up. In both cases the court had strong and unified support from civil society, and the court rebuked the government by taking a moral stance that the government could not easily oppose. This suggests again that courts might be better at building new public policies than at attempting to work within already established and entrenched policies and bureaucracies. In other words, these are less institutional reform cases and more institutional construction cases. Moreover, the nature of civil society in a given area seems to be critical to judicial success—courts may not be good at resolving complex pluralistic disputes in areas where different kinds of civil society groups present different kinds of claims (as in the Colombian health case).[255] Courts may be more effective when a relatively monolithic set of civil society organizations offer a clear vision, as in the Colombian displaced persons and Indian food cases.[256]

252. *See id.* at 723–26.

253. *See id.* at 726–29 (noting that the Commission has had a significant impact on the interlocutory orders of the Indian Supreme Court, and that it has both referred compliance issues back to the Court and at times attempted to resolve them autonomously through mediation).

254. *See id.* at 752–60 (noting that the proposed law evolved out of the work of the Court, the Commission, and the Right to Food Campaign).

255. *See supra* text accompanying notes 202–213. R

256. Along related lines, the seminal study of Feeley and Rubin on structural reform of U.S. prisons concluded that courts were successful at reforming certain Southern prisons because a large battery of experts on prison policy all concluded these prisons were run off of an antiquated "plantation" model, and the experts proposed a clear vision for reform in order to modernize. However, courts have been less interested or effective in altering prison practice in modern but very harsh establishments like the "SuperMax" prisons, because these have been defended by large segments of the prison experts while being attacked by other experts. FEELEY & RUBIN, *supra* note 188, at 366–88. R

IV. IMPLICATIONS

The analysis presented above has significant policy implications for how domestic courts should enforce social rights and for how international bodies and organizations should think about enforcement of these rights and principles. The normative assumption on which I base this section is that it is desirable to improve targeting of enforcement towards lower-income social groups. (In my conclusion, I return to the idea that a relatively middle-class-based jurisprudence on social rights is probably inevitable, and I discuss the implications of that fact). I emphasize three points in this section. First, international policymakers, particularly those on the Committee on Economic, Social, and Cultural Rights, should emphasize and better define the minimum core and should deemphasize potentially dangerous concepts like non-retrogression. Second, the international dialogue between constitutionalists in different countries should emphasize remedies rather than rights alone, and a consideration of the U.S. experience (which amply demonstrates both the possibilities and limits of structural reform litigation) may be useful for these ends. Third, policymakers designing or reforming a judiciary should consider ways not only to preserve judicial independence while maintaining a link to the people, but also to rein in populist behavior by the judiciary.

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

As already indicated, the principle instrument governing socio-economic rights under international law is the International Covenant on Economic, Social, and Cultural Rights. The Committee on Economic, Social, and Cultural Rights, a standing committee of experts, acts as the interpreter of the treaty. It reviews state reports, but its major policy instrument has been the emission of "general comments" on various topics.[257] The general comments lay out the Committee's conceptual vision of how the rights in the Convention must be enforced. The Committee's influence on state judicial practice will vary tremendously and unavoidably from country to country. However, many countries now explicitly give international law very high status in domestic law; for example, some require that Constitutions be interpreted in light of international human rights principles. Furthermore, many constitutional courts appear to be increasingly knowledgeable about and comfortable with international law.[258] Colombia and South Africa certainly offer two

257. LANGFORD & KING, *supra* note 88, at 478–81. Note that unlike the other U.N. human rights conventions, the Committee is not set up by the treaty itself as the textual interpreter of the treaty. That role was given to the Economic and Social Council, a body of state parties and not independent experts. But the Standing Committee was created in 1985, and technically reports to the Economic and Social Council. *See id.* at 478. R

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

cases where the constitution gives international law high status, and in practice it has been important to judiciaries when undertaking constitutional interpretation. For example, the constitutional courts of both countries have paid considerable attention to the Committee's work.[259] We should thus expect the Committee's work to be influential in an increasing number of cases.

The Committee has recognized that most of the rights under the Convention are meant to be progressively rather than immediately realized. Article 2(1) imposes on the state parties an obligation to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[260] The Committee noted in its seminal General Comment 3: "[W]hile the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[261]

The question then becomes one of measuring whether state measures are adequate to comply with the Convention. Here General Comment 3 introduces two concepts of great importance. First, it introduces the concept of non-retrogression: "any deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[262] Subsequent General Comments have fleshed out this concept. For example, General Comment 19, on the right to social security, states:

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

259. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93 ("The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia."); S. AFR. CONST., 1996 art. 39 (stating that when interpreting the Bill of Rights, a court "must consider international law" and "may consider foreign law").

260. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Jan. 3, 1976).

261. *General Comment No. 3, supra* note 155, at 86, ¶ 2. The Comment also notes that there is a separate obligation to make access to these rights non-discriminatory; the separate non-discrimination norm is not dealt with here. *See id.* ¶ 1. **R**

262. *Id.* ¶ 9.

> rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.[263]

In other words, the provision against retrogressive measures is not an absolute bar; rather, such measures face a "particularly strict form of scrutiny."[264]

The Colombian, Hungarian, Argentine, and Brazilian examples all suggest that the rule may have dangerous and counterproductive effects when domestic courts give it teeth. It is quite rare for retrogressive measures to target the poorest sectors of society; the normal cases of this sort deal with pension or salary cuts that impact groups such as civil servants, thereby affecting the middle and upper classes. Judicial activism on these sorts of issues is dangerous for courts because such activism involves courts in core macroeconomic issues. It may prevent or slow necessary structural reforms, and it is dubious on equity grounds. The Committee should deemphasize or abolish the non-retrogression principle.

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

> On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être . . . . In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[265]

This, as Bilchitz has written, is basically a rule of prioritization: it states that, because states have a finite amount of resources, they must spend money first on ensuring that all citizens enjoy at least a minimum level of

263. General Comment No. 19, The Right to Social Security, Report on the 39th Sess., 2007, U.N. Doc. E/C.12/GC/19, ¶ 42.

264. LANGFORD & KING, *supra* note 88, at 502. R

265. General Comment No. *3*, *supra* note 155, ¶ 10. R

enjoyment of their basic social rights.[266] The rule had a considerable influence on the vital minimum doctrine created by the Colombian Constitutional Court.

Some commentators have objected to the minimum core concept on the ground that it is too vague; for example, it is unclear how the content of the minimum core is to be determined, and whether it should focus on the fulfillment of basic needs or the attainment of core values like human dignity.[267] However, this objection has relatively little relevance to the actual practice of domestic courts. The evidence presented here shows that domestic constitutional courts face a more basic question of whether to protect social spending on upper-income groups or instead to target poorer segments of the population. It is necessary that a framework clearly instruct courts that states must spend on the poorest members of society. The precise content of the obligation can be worked out by each country through time. International law is useful here as general guidance to constitutional courts for use in constitutional interpretation; it need not and should not resolve all of the details. My analysis suggests that the committee should give a greater emphasis to the minimum core.

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

There is a dialogue across countries between judges on constitutional courts.[268] Not all countries participate in this dialogue. Some countries, like the United States, have relatively "closed" systems of constitutional law and tend to resist engagement with comparative law.[269] Nevertheless, this rich conversation includes many of the constitutional courts in Europe, along with other courts (South Africa, Canada, and Israel, for example) elsewhere in the world.[270] Courts within this circle learn and use each other's jurisprudential ideas. An even wider circle of courts (often in the developing world)

266. DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 183–96 (2007) (making the case for a minimum core approach to socio-economic rights enforcement).

267. *See* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L LAW 113 (2008); *see also Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), ¶¶ 32–33 (arguing that a minimum core approach is inappropriate in South Africa because the Court cannot discern what the content of that minimum core might be).

268. *See*, *e.g.*, Anne-Marie Slaughter, *A Typology of Trans-judicial Communication*, 29 U. RICH. L. REV. 99 (1994).

269. *See*, *e.g.*, JACKSON, *supra* note 258, at 8 (noting that Justice Antonin Scalia's position advocating resistance to transnational engagement has recently been influential in the United States); Lorraine E. Weinreb, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTONAL IDEAS 84 (Sujit Choudhry ed., 2006) (arguing that the United States has erroneously become an outlier in this transnational discourse). R

270. *See generally* Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law, in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1 (Sujit Choudhry ed., 2006) (characterizing this exchange as a "migration" and giving some sense of the major participants).

is receptive to this discourse and receiving ideas from it, but has been less successful at gaining influence with the major players.[271]

Scholars have rarely examined the actual content of this discourse, since most of the work has focused on either its existence or its desirability. Nonetheless, the content seems closely linked to the identity of the core players, especially the prominent European constitutional courts like the German Constitutional Court.[272] The discourse focuses heavily on the content of various kinds of rights and on techniques for balancing these rights against one another and against state interests. For example, the technique of proportionality, which specifies the conditions under which rights may be limited, has proven to be highly portable across systems.[273]

The discourse has also emphasized the interaction between courts and legislatures. The trademark type of review in these systems is abstract review that occurs at the behest of a political minority in the legislature immediately after a bill has been enacted.[274] Courts in these European systems have thus adapted techniques to condition the type of dialogue that occurs between court and parliament. For example, the "conditional decision" allows the court to hold a law constitutional only if interpreted in a certain way—the conditions are then supposed to be binding on all subsequent authorities.[275] The "integrated decision" allows the Court to actually add textual content to an existing law in order to make it constitutional.[276] Finally, the "modulated decision" allows courts to hold a law unconstitutional, but to defer its unconstitutionality for a set period of time in order to allow legislative correction of the law.[277] These techniques appear to flow very freely across civil law countries with constitutional courts.[278]

271. A good example here is arguably Hungary in the 1990s, where the Constitutional Court relied heavily on the concept of human dignity borrowed from Germany. *See* CATHERINE DUPRE, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS 65–86 (2003).

272. *See* Mayo Moran, *Inimical to Constitutional Values: Complex Migration of Constitutional Rights*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 233, 237 (Sujit Choudhry ed., 2006) (noting the importance of the German idea of radiating constitutional values on other models of postwar constitutionalism).

273. *See* Weinreb, *supra* note 269, at 97 (arguing that proportionality is a part of "the postwar judicial paradigm"). Proportionality analysis generally proceeds in three steps. First, the objective pursued by the state for limiting the right must be of sufficiently high importance. Second, the measure taken must be rationally related to the stated goal and must infringe on the right no more than necessary to do so. Third, the actual benefit of the measure must exceed the cost to the rights-holder. *See id.* at 96–97. **R**

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

275. *See* STONE SWEET, *supra* note 274, at 50–55. **R**

276. *See id.*

277. *See id.*

278. As an example of its influence in Colombia via one of the first Constitutional Court's most influential magistrates, see Alejandro Martinez Caballero, *Tipos de Sentencias en el Control Constitucional de*

The dialogue has not significantly addressed the concept of remedies for actual violations of people's constitutional rights. The paradigm in Europe is of abstract review between court and parliament on the contents of the written law, not of judicial protection of the rights of injured defendants, and certainly not of protection *en masse* of a social group or structural reform litigation aimed at altering the behavior of an institution. Likewise, international law is little help; the orders of international tribunals tend either to be highly individualized or to lack any real supervisory teeth. The most useful source of information for complex cases aimed at protecting individual rights may be the United States, and especially its experiences with institutional reform litigation. The vast literature and case law on this litigation could be of great help in discerning what kinds of remedies are likely to be helpful in different political contexts.[279] The recent South African experiences with weak-form review and engagement should also be part of this conversation. Scholars should look carefully at why these remedies have largely failed to achieve their purpose.[280] However, the broader point is that this discourse needs to encourage judicial creativity not just in abstract review cases, but also (and especially) in concrete but complex cases involving institutions that violate rights of a large number of citizens. At least within the developing world, the dialogue between countries needs to put complex judicial remedies at its core.

C. *Avoidance of Judicial Populism*

The comparative politics literature has shown a near-obsessive interest in the concept of judicial independence; the underlying assumption is that judicial independence from political actors is a key aspect of democracy.[281] There is, however, another question lurking here, which has gotten much less play in comparative terms: how exactly will an independent court behave? While there is a significant literature on political populism, few actors

las Leyes: La Experiencia Colombiana {Types of Judgments in the Constitutional Control of Laws: The Colombian Experience}, REVISTA ESTUDIOS SOCIO-JURIDICOS [MAGAZINE OF SOCIAL-JUDICIAL STUDIES], Mar. 2000.

279. For classic examples of this literature, see GERALD N. ROSENBERG, THE HOLLOW HOPE (1991); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE (1999); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); REMEDIAL LAW: WHEN COURTS BECOME ADMINISTRATORS (Robert Wood ed., 1990); Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

280. *See supra* text accompanying notes 25–40. R

281. For prominent examples of the vast literature on judicial independence, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); Matthew Stephenson, *"When the Devil Turns": The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59 (2003); Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Julio Ríos Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LAT. AM. POL. & SOC'Y 31 (2007).

have noted the important point that courts also often act in populist ways.[282] If populist behavior is undesirable, then constitutional designers should focus on creating more responsible courts as well as independent courts.

This is not easy to do, but judicial design is never easy. Sometimes the cause of populism appears, paradoxically, to be an overdependence on the political branches and a corresponding lack of institutional strength in the judiciary—Argentina is such a case. As Helmke and Kapiszewski have argued, the Argentine Supreme Court is highly dependent on the President because Presidents have a history of removing justices at will. As a result, the judiciary has never developed a strong internal organization.[283] This has led to bizarrely obstructionist behavior at times; justices turn against unpopular outgoing presidents because they want to be maintained by the incoming opposition administration.[284] In cases like these, the remedies for a lack of independence may be the same as those for populist behavior.

In other cases, however, the two diverge. Independent courts like the Colombian and Brazilian judiciaries have both had problems with populism. In the case of Brazil, part of the problem seems to be the judicial hierarchy. Judicial placements and promotions are based almost entirely upon seniority, and neither the Supreme Court nor any other body (like a judicial council) has much control over individual judges.[285] As a result, a common problem in Brazil is that lower courts obstruct important government measures by issuing injunctions, and it takes time for the Supreme Federal Tribunal to resolve the resulting messes.[286] This could be solved by giving a Council, staffed preferably by mix of personnel from inside and outside the judiciary, control over judicial career paths.

In the case of Colombia, the problem of populism has arisen at the Constitutional Court level itself. Post-Court career paths contribute significantly to this problem. Magistrates are often appointed at a fairly young age, serve one eight-year term, and then are looking around for more opportunities.[287] In a weak, fragmented party system like Colombia's, political entrepreneurship has been an appealing option—magistrates make a name for themselves

282. An exception is LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007) (arguing that courts in Latin America need to be attentive to public demands, but that they sometimes engage in populist behavior for which they are poorly suited).

283. GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005); Diana Kapiszewski, Challenging Decisions: High Courts and Economic Governance in Argentina and Brazil (2007) (unpublished Ph.D. dissertation, U.C. Berkeley) (on file with author).

284. *See* HELMKE, *supra* note 283. R

285. *See* Julio Rios-Figueroa & Matthew Taylor, *Institutional Determinants of the Judicialisation of Policy in Brazil & Mexico*, 38 J. LATIN AM. STUD. 739, 746–47 (2006) (noting that individual judges have a "remarkable degree" of independence from their superiors in Brazil).

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

287. *See supra* text accompanying note 150. R

with several "big name" decisions and then run for political office.[288] José Gregorio Hernandez, who made a name for himself as the UPAC justice and then became the vice-presidential candidate for a major party, is a paradigmatic example.[289] Fairly simple design fixes could resolve the problem. For example, justices could be barred from running for elected office or from holding appointed office for some set period of time.[290]

D. Substitutes for Constitutional Courts

The analysis also raises the important question of whether bodies other than constitutional courts would target socio-economic rights enforcement more effectively at marginalized social groups. This question is not wholly new. Bruce Ackerman has argued for example that courts would be unlikely to take social rights seriously or to have the capacity to enforce them, so it would be better to leave social rights enforcement up to a special "Distributive Justice Branch."[291] Of course, the construction of such an explicitly-dedicated branch is unlikely, but most developing democracies now include a set of powerful "control institutions" other than constitutional courts. These include institutions like national ombudsmen and human rights commissions, as well as other bodies like electoral commissions and anti-corruption commissions. Christopher Elmendorf has argued that these institutions could serve as partial substitutes for constitutional courts and might help to consolidate democracy.[292]

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

However, these other institutions generally lack any sort of binding power for their policy proposals. They usually function through discussions

288. *See supra* note 150. R

289. *See supra* text accompanying note 149. R

290. Colombia has such a ban in its constitution, but it extends for only one year from the end of a justice's term. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 245. A second solution, establishing a high minimum age for justices so that the Constitutional Court tends to be their last post, is probably less appealing. Much of the appeal of the court has come from the dynamic nature of its justices; these advantages would likely be lessened by an older court.

291. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 663, 724–25 (2000).

292. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953 (2007).

with the elected branches and by publicizing problems in reports, or by reporting abuses to other authorities like prosecutors.[293] This would be problematic for the same reason that weak-form enforcement is problematic: dialogic methods of judicial review that lack a high degree of coercion are unlikely to work in developing countries with weak bureaucracies and severe representation problems in the legislature.[294] The political branches are unlikely to respond to a court absent high levels of pressure. This suggests that states should give institutions like ombudsmen and human rights commissions power to issue binding orders on other institutions of state in at least some circumstances (perhaps subject to ultimate review by the judiciary).[295]

V. Conclusion: Coming to Grips With a Middle-Class Social Rights Jurisprudence

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

The broader point is that we need to reevaluate what social rights do; we must re-envision them as a largely middle-class phenomenon. As such, their enforcement is mostly majoritarian. While U.S. constitutional theory coined the phrase "countermajoritarian difficulty," American scholars have long noted that this is an oversimplified view of what the Supreme Court does

293. The general model is that they have coercive powers of investigations but cannot issue binding policy orders. *See id.* at 978–82.

294. *See* Landau, *supra* note 62, at 320–22 (arguing that developing countries have problems in both their legislatures and bureaucracies that make more coercive remedies appropriate).

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

and that it essentially follows majority will in many circumstances.[296] But the same vision has not penetrated much of comparative scholarship. Making a full evaluation of the fact that courts are majoritarian in many (perhaps most) circumstances is a task for another article. Middle-class centric judicial enforcement may not be an entirely bad thing, given the dearth of legitimacy that most state institutions have in developing countries and the low quality of their bureaucracies. This suggests that the core question attending this sort of enforcement is the rebound effect that judicial action has on bureaucrats, politicians, and civil society groups—does it strengthen civil society and improve bureaucratic performance? A big part of the answer, again, is likely to rely on remedial innovation: courts may need to intrude more on democratic institutions in order to improve them.

296. *See*, *e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279 (1957).