7. Socioeconomic rights and majoritarian courts in Latin America

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During the past several decades, many courts in Latin America have been active in enforcing socioeconomic rights. While traditional theorists tended to argue that they raise intractable problems of democratic legitimacy and judicial capacity, and thus should either be left out of constitutions entirely or should be left judicially unenforced, recent trends in international human rights and comparative constitutional law have attacked these conclusions. In particular, recent trends in Latin American constitutionalism have put significant pressure on the traditional view that socioeconomic rights should be non-justiciable.

I argue here that their enforcement in the region raises an important paradox: courts have often found ways to make socioeconomic rights justiciable, but in some common patterns of enforcement they have had relatively little transformative impact. One important idea for understanding this paradox, tied to the theme of this chapter, stems from recent themes in U.S. constitutional theory: courts often behave as majoritarian rather than counter-majoritarian institutions. Thus, they sometimes favor patterns of jurisprudence that tend to bolster their own support among politically powerful actors. For example, courts have often favored individualized models of enforcement, where aggrieved (often relatively affluent) litigants can go to the court and seek an individual remedy giving them a treatment or other benefit, and "negative injunctions", where courts strike down efforts by the political branches to use austerity measures to reduce existing welfare packages, often enjoyed by civil servants and others who are relatively privileged. To be clear, the claim is not that social rights jurisprudence reaching the most marginalized members of society is impossible or does not occur. Recent scholarship suggests that certain modes of enforcement, especially structural remedies forcing the state to construct or improve social welfare programs, have success at

reaching the very poor.[1] The claim here is instead that under common conditions, courts both inside and outside of Latin America utilize, and have incentives to utilize, modes of enforcement with impacts that are skewed towards less marginalized groups.

These majoritarian patterns of jurisprudence, when they materialize, carry out functions that are different from those hypothesized in most of the existing literature. For example, in enforcing socioeconomic rights, courts often substitute for bureaucratic organs that fail broad swaths of the public (a service-provision function).[2] Further, courts enforcing socioeconomic rights sometimes block measures that are unpopular but nonetheless pass the political branches because of international or domestic pressure (a principal–agent function).[3] Finally, courts enforcing socioeconomic rights can help to build up constitutional culture by making the constitution directly relevant to people's lives (a constitutional culture-building function).[4] The majoritarian model of judicial review explored in this chapter has important implications for the enforcement of socioeconomic rights and beyond. Most obviously, it suggests that those relying on courts to carry out projects of social transformation may be overstating the case. On the other hand, it also suggests that judicial enforcement of social rights is potentially useful for a broader range of reasons than is often recognized.

I. SOCIOECONOMIC RIGHTS AND THE NEW CONSTITUTIONALISM: TOWARDS JUSTICIABILITY

Much classic theory on socioeconomic rights focused on problematizing their nature and especially their enforceability. According to these theorists, socioeconomic rights are different from traditional negative rights in several ways. First, they are thought to suffer from a "radical indeterminacy" because they can require fulfillment in any number of different ways.[5] The

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[1] *See*, *e.g.*, Cesar Rodriguez-Garavito and Diana Rodriguez-Franco (2015), *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in Latin America* (Cambridge: Cambridge University Press); Daniel M. Brinks and Varun Gauri (2014), "The law's majestic equality? The distributive impact of litigating social and economic rights", *Perspectives on Pol.*, **12**, 375; David Landau (2012), "The reality of social rights enforcement", *Harv. Int'l L. J.*, **53**, 189.

[2] *See* Section III.A (below).

[3] *See* Section III.B (below).

[4] *See* Section III.C (below).

[5] Frank Michelman (2003), "The constitution, social rights, and liberal political justification", *Int'l J. Const. L.*, **1**, 13, 31 (referring to the term without

right to housing, for example, is indeterminate in the sense that it is unclear what kind of house is required, what amenities the house must include, the time frame under which the house must be delivered, etc. Second, they were uniquely thought to involve courts in the setting of budgetary priorities, the spending of money, and the creation of social programs.[6] In short, socioeconomic rights were thought to involve challenges to judicial legitimacy and capacity that were fundamentally different in kind from those involved with negative rights.

This traditional view inculcated Latin American constitutionalism in important ways. In Mexico's 1917 Constitution, for example, which was one of the oldest constitutions in the world to contain social rights, the provisions have long been thought to be non-justiciable.[7] The rights were seen as central to the ideology of Mexican constitutionalism, but meant to bind the political branches and not the courts. Similar devices were employed in other Latin American countries, either textually or non-textually. In Chile, socioeconomic rights were included, but were excluded from the scope of the constitutional individual complaint mechanism.[8]

Shifts both inside and outside the region have put pressure on this conception. In international human rights law, the default position has shifted, with scholars and policymakers increasingly likely to see positive rights as justiciable.[9] They have pointed out, for example, that many negative rights (like the right to a fair trial) also involve the spending of money, and that negative rights as well as positive rights can involve

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endorsing the argument that it makes socioeconomic rights non-justiciable); *see also* Frank Cross (2001), "The error of positive rights", *UCLA L. Rev.*, **48**, 857 (noting that one reason for non-enforcement of socioeconomic rights is that "such rights, by their nature, are highly indeterminate").

[6] *See*, *e.g.*, Cross (n 5), at 889–90 (discussing the problem within the context of the United States).

[7] *See*, *e.g.*, Jorge R. Ordoñez, "La justiciabilidad de los derechos sociales en México: 90 años de carrera con obstáculos", *Suprema Corte de Justicia de la Nación, Publicaciones Becarios de la Corte*, **1**, 183, available at: http://207.249.17.176/Transparencia/Lists/Becarios/Attachments/299/Becarios_183.pdf (accessed 19 September 2017); Miguel Carbonell (2008), "Eficacia de la constitución y derechos sociales: esbozo de algunos problemas", *Estudios Constitucionales*, **6**, 43, 65 (noting that the *amparo* has proven insufficient to protect socioeconomic rights because of its narrow standing rules).

[8] *See* Chile Constitution (1980), Art. 20 (defining the rights that the *recurso de protección* can be used to protect).

[9] *See*, *e.g.*, Malcolm Langford (2009), "The justiciability of social rights: From practice to theory", in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press), pp. 3, 31.

problems of indeterminacy.[10] Within the region, "new constitutionalist" currents of thought have put pressure on the non-justiciability position.

The term new constitutionalism has been widely used in Latin America, but not always precisely defined. In general within the region, the concept connotes a series of shifts in the importance and meaning of constitutional laws, but these shifts are difficult to pin down because they vary significantly from place to place.[11] They are linked to broader shifts in international human rights law and comparative constitutional law but also rooted in Latin American legal history. One important shift is that the structural part of the constitution, historically dominant in Latin American constitutionalism, has become subordinate to the "dogmatic" or rights portion of the constitution.[12] A dominant story in Latin American history is one in which constitutions had long been ignored; and the new constitutional movement was an attempt to make them "real". The new constitutionalists sought to activate rights provisions, such as socioeconomic rights, that had been found in constitutions for a long time but had not been given much content by courts.[13] They further sought to prevent systemic violations of human rights that had been carried out in the region in the recent past.[14]

Further, the new constitutionalism has suggested new methods of constitutional interpretation. Constitutional rights are now interpreted in light of higher-order principles like human dignity, and thus constitutional interpretation becomes a more heavily value-laden enterprise.[15] Techniques like proportionality, and particularly the influential work of Robert Alexy and his Latin American disciples, allow courts to adjudicate carefully between conflicting rights or principles.[16] These techniques are

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[10] *See* id., at 30.

[11] For an overview of some of these shifts, *see* Javier Couso (2010), "The transformation of constitutional discourse and the judicialization of politics in Latin America, in Javier Couso, Alexandra Huneeus and Rachel Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press), p. 141.

[12] *See*, *e.g.*, Roberto Gargarella (2013), "Dramas, conflictos, y promesas del nuevo constitucionalismo latinoamericano", *Anacronismo y Irrupción*, **3**, 245, 253.

[13] *See* Rodrigo Uprimny (2011), "The recent transformation of constitutional law in Latin America: Trends and challenges", *Tex. L. Rev.*, **89**, 1587, 1600 (noting that the "transformative" constitutions of recent Latin American history have generally taken two tracks: extending rights and increasing popular political participation).

[14] *See* id., at 1599.

[15] *See*, *e.g.*, Miguel Carbonell (2010), "Desafíos de nuevo constitucionalismo en América Latina", *Precedente*, **2010**, 207, 214.

[16] *See generally* Carlos Bernal Pulido (2007), *El Principio de proporcionalidad y los derechos humanos: El principio de proporcionalidad como criterio para*

important because they provide courts with the ammunition needed to enforce constitutional rights, such as socioeconomic rights, that have long lain dormant.

Finally, the movement suggests a new role for the judge within the legal order. Judges become more central figures as they are tasked with interpreting and applying newly active constitutional rights within their jurisdictions. Charged with applying proportionality tests and applying rights in light of higher-order principles, constitutional judges are seen as more creative and proactive figures.[17] Socioeconomic rights are in many ways close to the core of this project, because they involve rights that have been historically under-enforced (indeed in many places ignored), and they may operate for the benefit of groups that have historically been marginalized.[18] Thus, currents of new constitutionalist thought have put pressure on the non-justiciability position. And indeed, socioeconomic rights are now enforced to a degree in most of the major Latin American countries, including Brazil, Argentina, Colombia, Costa Rica, and Venezuela.[19]

The Colombian example is perhaps a useful case study. Major political forces at the constituent assembly of 1991 were in agreement that socioeconomic rights should be included in the Colombian Constitution. However, they took differing positions about the justiciability of these rights. In particular, the national president Cesar Gaviria argued that the rights should be included but not rendered justiciable (at least by individual complaint).[20] He laid out the classic position in favor of directive principles: inclusion of the rights would help to validate the importance of socioeconomic issues and would allow political parties, civil society groups, and citizens to focus the state's attention on them, but should

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determinar el contenido de los derechos fundamentales vinculante para el legislador, 3rd edn (Madrid: Centro de Estudios Políticos y Constitucionales).

[17] *See* Uprimny (n 13), at 1607.

[18] *See* Gargarella (n 12), at 246 (noting that these rights were historically under-enforced).

[19] *See*, *e.g.*, Daniel Brinks and William Forbath (2011), "Commentary: Social and economic rights in Latin America: Constitutional courts and the prospects for pro-poor interventions", *Tex. L. Rev.*, **89**, 1943, 1944 ("[T]he courts of the region are well past discussing whether they should enforce [socioeconomic rights], and are now fully engaged in exploring how and to what effect they can and should enforce them.").

[20] *See*, *e.g.*, Intervention of Cesar Gaviria at the Opening of the Constituent Assembly, 5 February 1991, in Manuel Jose Cepeda (1992), *Introducción a la Constitución de 1991* (Bogatá: Presidencia de la República), at pp. 329, 340–41 ("As is obvious, these socioeconomic and collective rights cannot be directly enforced by an individual before a judge.").

not allow the courts to get involved.[21] The final constitutional product reflected a compromise position: the key provision listed certain rights as being "of immediate application" but excluded the socioeconomic rights from this list.[22] The Constitution also allowed constitutional complaints (*tutelas*) to be taken in order to protect "fundamental rights", but it did not define this term.[23]

The new Colombian Constitutional Court, in some of its first decisions, found ways to make socioeconomic rights justiciable. It rejected a rigid classification between first generation rights and socioeconomic rights, holding that the classification of a right as fundamental had to be made case by case and in the generally pro-guarantee spirit of the Constitution.[24] It also drew on German precedent to create a right to a vital minimum, which was synthesized from explicit constitutional rights and principles and the right of citizens to have at least a minimum level of economic subsistence.[25] This construct allowed the Court to link socioeconomic rights to the right to life and the principle of human dignity; the connectivity doctrine in turn allowed the Court to enforce socioeconomic rights via *tutela* whenever they were linked to these other rights.[26] In recent jurisprudence, the Court has held that socioeconomic rights, in and of themselves, can be fundamental rights in some aspects and some circumstances.[27] Thus the Court has moved towards a position that makes socioeconomic rights directly justiciable, even without regard to the connectivity doctrine.

A consideration of the outlier countries which have resisted making socioeconomic rights justiciable is again useful in mapping the outer reaches of the influence of the new constitutionalism. Mexico, as already noted, has a long history of both including socioeconomic rights and

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[21] *See* id.

[22] *See* Colombia Constitution (1991), Art. 85.

[23] *See* Colombia Constitution (1991), Art. 86. Note that the Constitution did contain a division of rights provisions into different categories, including "fundamental rights" and "economic, social, and cultural rights". The former contained mostly negative rights, while the socioeconomic rights were generally put in the latter category. This division was done by the Codification Committee before the second and final floor debate, not by the Assembly itself. The Court, in its early socioeconomic rights decisions, declined to give the labeling much weight. *See*, *e.g.*, Decision T-406 of 5 June1992, § 14.

[24] *See*, *e.g.*, id., § 15.

[25] *See* Decision T-426 of 24 June 1992, § 5 (synthesizing the right from explicit rights and guarantees in the constitutional text).

[26] *See*, *e.g.*, Decision T-491 of 13 August 1992, § 2.

[27] *See*, *e.g.*, Decision T-760 of 31 July 2008, § 3 (affirming that the right to health is a fundamental right in its basic aspects without regard to the connectivity doctrine).

refusing to render them justiciable;[28] the Chilean Constitution included socioeconomic rights but has the same tradition of non-justiciability and made most of them textually non-enforceable by at least the individual complaint.[29] Both countries are also on the margins of the new constitutionalism discourse, rather than close to the center as in Colombia. But in both countries, there are now at least debates about the justiciability question. In Mexico, for example, Supreme Court magistrate and well-known jurist Jose Ramon Cossio has argued that these rights, properly understood, should be rendered justiciable, although he has also lamented the fact that citizens and civil society are not bringing socioeconomic rights cases to the Court.[30] He argues that the objections to socioeconomic rights involve pragmatic objections to the ways in which these rights would be enforced, and not arguments against justiciability.[31] More broadly, some scholarship has considered the impact of recent reforms to the Mexican system of constitutional protection which strengthened the individual complaint and increased the relevance of international law for constitutional interpretation on the socioeconomic rights questions.[32] The main argument is that by incorporating elements of international human rights law, the reforms have rendered socioeconomic rights justiciable.[33]

In Chile, similarly, the domestic context around socioeconomic rights centers largely on a well-known failure: claimants in dire situations who sought coverage for HIV/AIDS medications lost their cases, even though they at a key point tried to frame their cases around the right to life rather than health.[34] Nonetheless, recent scholarly debate on this issue centers around a

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[28] *See* n 7.

[29] *See* n 8.

[30] *See* Jose Ramon Cossio, "Problemas para la exigibilidad de los derechos sociales y económicos en México", available at: biblio.juridicas.unam.mx/libros/6/2873/8.pdf (accessed 15 September 2017).

[31] *See* id.

[32] *See*, *e.g.*, Omar Gomez Trejo (2014), "Estánderes internacionales en material de derechos económicos, sociales, y culturales", in Magdalena Cervantes Alcayde et al. (eds), *Hay justicia para los derechos económicos, sociales, y culturales?* (Mexico City: Suprema Corte de Justicia de la Nación), pp. 159, 159–60; Rodrigo Guitérrez Rivas (2014), *La justiciabilidad de los derechos económicos, sociales, culturales, y ambientales en el marco de las recientes reformas constitucionales en material de derechos humanos*, in id., at 92, 97–98.

[33] Other scholarship has noted that at least some Mexican decisions seem to recognize socioeconomic rights – like the right to health – in at least some contexts. *See* Maria del Rosario Huerta Lara (2009), "Expansion y justiciabilidad de los derechos sociales en Mexico", *Letras Jurídicas*, **20**, 1.

[34] *See*, *e.g.*, Jorge Contesse and Domingo Lovera Parmo (2008), "Access to medical treatment for people living with HIV/AIDS: Success without victory in

2008 decision in which the Constitutional Court held that private health insurers (largely serving the middle and upper classes) which charged different prices to consumers based on gender and age violated the constitutional right to health.[35] While much of the debate has centered around whether the decision was in fact a real application of socioeconomic rights, the literature does show an emerging debate on socioeconomic rights enforcement even in a legal culture that has been hostile to that enforcement.[36]

The justiciability debate in Latin America is not over, but it does seem to be moving towards a consensus position that favors enforcement.[37] As the next section will show, the way that socioeconomic rights are enforced in Latin America demonstrates a tension between different aspects of the new constitutionalism. While courts increasingly embrace justiciability, in many cases they enforce socioeconomic rights in ways that are relatively unlikely to be transformative. This is not an aberration: it reflects the fact that courts are often majoritarian rather than counter-majoritarian actors.[38]

II. THE HOW AND WHY OF SOCIOECONOMIC RIGHTS ENFORCEMENT IN LATIN AMERICA

This section describes the key modes of enforcement in the region and seeks to give an explanation as to why those modes are important. A few

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Chile", *Sur: International Journal on Human Rights*, **8**, 142 (noting that the litigants achieved their political goals even though the courts declined to intervene, rejecting the argument that the case really involved the right to life and not the right to health).

[35] Rol 1710-10-INC, 6 August 2010.

[36] For a sampling of that debate, *see* Santiago Montt and Jose Luis Cardenas (2011), "La declaración de inconstitucionalidad del artículo 38 TER de la ley de ISAPRES: Mitos y realidades de un fallo histórico", in Javier Couso (ed.), *Anuario de Derecho Publico Universidad Diego Portales 2011* (Santiago: Universidad Diego Portales), p. 17 (arguing that the decision "enters a new stage of [Chilean] economic constitutional law" but that its ultimate effect is unclear); Luis Cordero Vega (2011), "Comentario a la sentencia de inconstitucionalidad de la tabla de factores de ISAPRES: un aparente triunfo de los derechos sociales", *Anuario de Derechos Humanos*, **7**, 151, 158 (arguing that the decision is an application of the right to health in a sense, although one that may have a "regressive effect" because it leaves out users of the public health system who cannot afford private health care).

[37] *See* Brinks and Forbath (n 19), at 1944 (summarizing a series of symposium contributions as showing that Latin American courts have moved beyond the question of whether socioeconomic rights are justiciable and on to the question of how to enforce them).

[38] *See* Section III (below).

courts in the region, especially the Colombian Constitutional Court, have experimented with structural remedies where the court seeks to pressure the state to create, build up, or improve the performance of social welfare bureaucracies.[39] These rights have received significant scholarly attention and debate regarding their effectiveness at changing state practices and at aiding marginalized groups.[40] However, Latin American courts often enforce socioeconomic rights through two other models: an individualized model of enforcement, where a single petitioner goes to a court to get a single remedy, and a negative injunction model, where a court strikes down legislative attempts to alter the status quo by reducing the existing social welfare net.[41] The advantage of both models is that they fit easily into traditional models of rights enforcement; the trouble with both is that they are often not particularly transformative. Neither requires the state to construct new programs, and the primary beneficiaries are likely to be more affluent groups like civil servants, rather than the very poor.

The reasons why these two models have been common are of course more speculative, but one can ascertain two broad groups of explanations. A first emphasizes ideological restrictions on judicial role – judges gravitate towards traditionalist methods of enforcement because they are more comfortable with those methods.[42] Without dismissing the obvious importance of that factor, I suggest that political restrictions and incentives have also played a role. Recent constitutional theory from the United States is helpful as a guidepost: much recent work on the U.S. Supreme Court finds that it often behaves as a majoritarian rather than countermajoritarian actor. The insights from that theory, I suggest, are helpful in understanding patterns of social rights enforcement in the region.[43]

A. Two Major Models of Enforcement

In a range of countries including Brazil, Colombia, and Costa Rica, a major model of enforcement is individualized: citizens come to the court for an individual remedy, whether a readjustment of a pension or access to a treatment.[44] This model bears some logic to the traditional theory of

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[39] *See* n 1, and sources cited therein.
[40] *See* id.
[41] For a fuller description of both models, *see* Landau (n 1).
[42] *See* Section III.B (below).
[43] *See* Section III.C (below).
[44] *See*, *e.g.*, Florian F. Hoffmann and Fernando R.N.M. Bentes (2008), "Accountability for social and economic rights in Brazil", in Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice: Judicial Enforcement of*

the *amparo*: those who sue get access to a right or privilege, but the right is not automatically generalized to the broader society. For example, several countries have a robust right to health jurisprudence where individual petitioners can file claims to get access to medicines or treatments that they need to survive or to live a dignified life.[45]

This model is perhaps the purest at fitting the judicial review of socioeconomic rights into traditional patterns of judicial review within Latin America. Benefits can be targeted or given out selectively only to those who actually bring the lawsuit. Further, because constitutional instruments are often (although not always) very complex, the need to bring an individual complaint before receiving the remedy will screen out litigants that lack the resources or knowledge needed to bring the suit.[46]

In a second model (which I have elsewhere called "negative injunction"), courts use socioeconomic rights as a way to block policy changes (such as austerity measures) that weaken the economic position of an individual or group.[47] Whereas in the first model, socioeconomic rights are turned into individual entitlements to social goods, in the second model they are modeled as negative rights to stop governmental invasion of pre-existing entitlements. Thus, courts in Brazil have prevented austerity measures imposing cuts in civil servant pensions;[48] courts in Colombia have stopped the state from using austerity to reduce the real value of civil

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Social and Economic Rights in the Developing World (Cambridge: Cambridge University Press) (finding that in Brazil, judges heard a large number of individual cases on the right to health and tended to grant relief, but that they shied away from granting relief in system-wide cases); Defensoría del Pueblo, La tutela y el derecho a la salud 2012, at 226 tbl. 8 (showing that the percentage of all individual complaint or *tutela* cases in Colombia involving the right to health has hovered between 23 and 40 percent of all individual complaints filed in the country in the last decade); Varun Gauri, Jeffrey K. Staton and Jorge Vargas Cullell (2015), "Transparency and compliance: The Costa Rican Supreme Court's monitoring system" (2015), *J. Pol.*, **77**, 774 (describing and critiquing the Costa Rican Court's individualistic model of enforcement), available at: http://www.law.uchicago.edu/files/files/staton_transparency_compliance.pdf (accessed 2 October 2017).

[45] *See* n 44.

[46] *See* Hoffmann and Bentes (n 44) (noting the complexity of the Brazilian individual complaint instruments needed to bring an individual suit).

[47] *See* Landau (n 1), at 444–47.

[48] *See*, *e.g.*, Daniel Brinks (2011), "'Faithful servants of the regime': The Brazilian Constitutional Court's role under the 1988 Constitution", in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (New York: Cambridge University Press), p. 128 (describing some of these cases and noting that the Brazilian STF is most likely to step in in cases that combine corporatist interests of fellow judges with the interests of the general public).

servant salaries.[49] An interesting combination of both the individualized and negative injunction models is the *corralito* litigation in Argentina, where the courts never flatly struck down an austerity policy freezing bank accounts but did issue a myriad of individualized injunctions granting relief to individual petitioners, generally well after the fact.[50] The negative injunction model offers a second interesting way of squaring the judicial review of socioeconomic rights with traditional theories of judicial role. Courts issuing such a remedy are not required to create social programs, but merely exercise a veto over government attempts to make cuts.

A full assessment of these models of litigation is beyond the scope of this chapter; their effects at any rate are highly complex and contingent on institutional conditions.[51] For our purposes it is sufficient to see some of their limits in terms of social transformation. The individualized model works by giving individual petitioners the resources and knowledge to sue for access to a social good that they are entitled to under existing systems; the negative injunction model stops the state from constricting existing programs. Neither model aims to build programs that do not yet exist, and therefore to expand the social safety net. The logic of both is to regulate existing social welfare programs (which are often quite under-inclusive in Latin America), rather than to draw the marginalized into those programs.[52] It thus may be the case in some countries that there is a robust

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[49] *See* Decision C-1433 of 23 October 2000 (holding that all public sector workers have a right not to have the real value of their salaries decrease from year to year); C-1064 of 10 October 2011 (modifying that holding so that only poorer workers making less than twice the minimum wage would receive absolute protection for the real value of their salaries, and allowing reductions in salaries for wealthier workers during some conditions).

[50] For a description of the cases, *see* Catalina Smulovitz (2006), "Judicialization of protest in Argentina: The case of corralito", in Enrique Peruzzotti and Catalina Smulovitz (eds), *Enforcing the Rule of Law: Social Accountability in the New Latin American Democracies* (Pittsburgh: University of Pittsburgh Press), p. 55.

[51] *See*, *e.g.*, Brinks and Forbath (n 19), at 1951 (noting that a comprehensive evaluation of the impact of socioeconomic rights litigation may be "beyond the reach of empirical research altogether" because of the complexity of the question, and pointing out that individualized litigation that directly reaches the affluent may nonetheless have indirect effects on the poor).

[52] For similar arguments on the impact of individual litigation on the poor because of selection in terms of which actors bring lawsuits, *see* Octavio Luis Motta Ferraz, "Harming the poor through social rights litigation: Lessons from Brazil", *Tex. L. Rev.*, **89**, 1643 (arguing that the Brazilian right to health litigation distributes resources towards the relatively affluent by providing those with the resources to sue with a virtually unqualified right to health); Landau (n 1) (arguing that the same effect obtained even with the relatively easy to use Colombian *tutela*).

socioeconomic rights jurisprudence, but that jurisprudence has relatively little transformative effect.

B. Limitations on Judicial Role and Judicial Capacity

One way to understand the pattern of enforcement in Latin America is to note that making socioeconomic rights justiciable does not cause the legitimacy and capacity worries that animated the enforcement dilemma to disappear. Instead, it forces courts to face those dilemmas, with the risk that courts will be insufficiently bold. In short, one perspective on the limitations on judicial review of socioeconomic rights is that they stem from courts that are unduly traditionalist and take a limited view of the separation of powers.

Mark Tushnet, for example, notes that while the proponents of socioeconomic rights review properly point out that socioeconomic rights cases do not raise difficulties that are different in kind from negative rights, they do often raise problems that are different in degree.[53] Both positive rights like healthcare and negative rights like due process may involve the spending of money and the setting of priorities, for example, but positive rights require a bigger set of alterations to the status quo and therefore involve courts in these issues to a greater extent.[54]

From this perspective, the individualized remedy and negative injunction strategies may be attractive to judges because they do not place courts in a difficult position from the standpoint of judicial role or capacity. Both remedies look like the kinds of orders that courts have long been accustomed to issuing, and which are relatively easy to enforce. Neither requires some act that would require the court to gain an unusual amount of information or which would be unusually difficult to carry out.

To a degree, these constraints on judicial role and capacity are malleable. The Colombian Constitutional Court, for example, has adopted a celebrated approach with its two major structural interventions in 2004 and 2008. In the first case, the Court used its doctrine of a "state of unconstitutional conditions" to undertake a structural intervention in the public policy on Colombia's roughly 3 million internally displaced persons.[55] The doctrine allows the Court to offer broader structural remedies, rather than those merely resolving the individual case at issue, when it identifies a large number of potential claimants and systematic failures at the policy

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[53] *See* Mark Tushnet (2006), *Weak Courts, Strong Rights* (Princeton: Princeton University Press), p. 234.

[54] *See* id.

[55] *See* Decision T-025 of 22 January 2004.

level.[56] The Court held that although a legal framework existed, national and local authorities in fact were not implementing a coherent set of policies, due to failures in both capacity and will.[57] In the second (healthcare) case, the Court avoided using the language of a state of unconstitutional conditions but nonetheless undertook a series of structural remedies in order to repair systematic problems within the healthcare system.[58] These included problems with the definition of the standard package of benefits, the benefits received by poorer households in the subsidized system versus those held by households in the contributory system, and problems with the flow of financial resources within the system.[59]

As several scholars have noted, these structural cases (both of which are still ongoing) are innovative. They have adopted a model that requires that state to report on its progress at certain intervals, both through written report and regular public hearings.[60] The Court then refines its orders in response to these reports. Further, the Court has drafted in civil society in interesting ways. In the displaced persons case, for example, the Court has relied heavily on a Monitoring Commission made up of elements of civil society to monitor the state and feed policy information to the Court.[61] These cases build off of the structural injunctions found in the United States and several other contexts, but tailor that model to the Colombian context.[62]

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[56] *See* id., § 7 (laying out a five-factor test for declaring a state of unconstitutional conditions, including the "(i) massive and generalized violation of various constitutional rights affecting a significant number of people, (ii) the prolonged omission of the authorities to comply with their obligations to guarantee rights, (iii) the failure to produce legislative, budgetary, or administrative measures necessary to avoid the violation of rights, (iv) the existence of a social problem whose solution requires the intervention of various entities, requires the adoption of a complex and coordinated grouping of actions and demands a level of resources that requires an important additional budgetary effort, (v) if all the people affected by the same problem were to accede to the tutela to protect their rights, greater judicial congestion would be produced").

[57] *See* id., § 6.3.

[58] *See* Decision T-760 of 31 July 2008, § III (listing the individual and structural orders of the Court).

[59] *See* id., § 6.

[60] *See* Cesar Rodriguez-Garavito (2011), "Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America", *Tex. L. Rev.*, **89**, 1669, 1693–94 (describing the Court's process of enforcement in T-025).

[61] *See* Cesar Rodriguez-Garavito and Diana Rodriguez-Franco (2010), *Cortes y cambio social: Como la corte constitucional transform el desplazamiento forzado en Colombia* (Bogotá: DeJusticia), p. 85 (giving an overview of the composition of the Commission and its work).

[62] On U.S. structural injunctions, *see*, for example, Malcolm Feeley and

The Colombian structural decisions are therefore justly celebrated within the region, and useful to spark a debate on judicial role. They help to focus attention on a set of questions that remain underexplored, and focus more attention than is typical in the new constitutionalism to questions of remedy. The healthcare case is a good example: the Court adopted a structural approach after years in which it had issued individual remedies, and in the face of concern about the equity effects of those remedies.[63] The case in turn has allowed the Court to achieve broader goals for more marginalized groups, such as the equalization of benefits for those citizens in the subsidized regime. The decisions also highlight ways in which courts may be able to overcome deficits in judicial capacity. The Court's skillful using of public hearings and the media may be helpful in achieving compliance in complex cases, and its reliance on civil society commissions and other devices might help to ameliorate some of the weaknesses in the Court's monitoring and information-gathering capabilities.[64]

At the same time, limitations on socioeconomic rights enforcement appear in part to be political, rather than just being based on judicial role conception or a lack of judicial capacity.[65] The Colombian Court's dramatic structural interventions have coexisted with a very large number of individualized judgments on health, pensions, and other social rights.[66] As I explain in the next section, part of the answer to this puzzle is that

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Edward Rubin (2000), *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press).

[63] *See* Alicia Ely Yamin and Oscar Parra Vera (2010), "Judicial protection of the right to health in Colombia: From social demands to individual claims to public debates", *Hastings Int'l & Comp. L. Rev*., **33**, 431, 444–45.

[64] For a more in-depth discussion of these points, *see* David Landau (2013), "Aggressive weak-form remedies", *Const. Ct. Rev*., **5**, 244 (South Africa) (examining ways in which aspects of the Colombian model of structural review could be useful in the South African context).

[65] *See*, *e.g.*, Paola Bergallo (2011), "Courts and social change: Lessons from the struggle to universalize access to HIV/AIDS treatment in Argentina", *Tex. L. Rev*., **89**, 1611 (finding that the Argentine courts began treating the HIV/AIDS issue with structural remedies, but later turned to more targeted litigation that affected only discrete individuals and groups).

[66] Furthermore, some of the Court's structural jurisprudence has been targeted at relatively affluent groups. An example is the UPAC litigation discussed below, where the Court attempted to use a large-scale remedy to bail out mostly middle-class homeowners in the formal housing system. *See* text below accompanying nn 76–81. And it is notable that the health case combined orders designed to aid the poor directly (e.g., requiring an equalization in benefit packages) with those designed to repair the system for the public more broadly (e.g., requiring that the package of benefits be clarified and updated to take account of the Court's *tutela* jurisprudence). *See* T-760, § III.

theorists still overlook the extent to which judicial review can be a majoritarian rather than counter-majoritarian exercise. Social rights enforcement is an area where an undue emphasis on counter-majoritarian courts may overemphasize the degree to which courts will carry out projects of social change for the most marginalized.

C. The Majoritarian Court

The postulate that courts are basically counter-majoritarian institutions has long infused U.S. constitutional theory, forming the core concern of theorists for several generations. The central challenge, from a counter-majoritarian perspective, is how to justify unelected judges seizing the power of constitutional interpretation away from political actors. The most famous set of responses revolve around the political process theory school of John Hart Ely: courts wield power legitimately when they work to correct defects in the political process, and in particular to unblock channels that have prevented discrete and insular minorities from exercising political power or from being represented.[67] Ely's core set of concerns were the civil rights movement in the United States, but his theory works well as an underpinning of the transformative project of new constitutionalism: courts have a mandate to transform the political system for the benefit of traditionally marginalized groups.[68] Scholars of comparative constitutional law have gravitated towards this conception, arguing, for example, that courts are perhaps more likely than other branches of government to be a voice for the poor.[69]

Both recent and older work has shown that the theory of the counter-majoritarian court (as a descriptive reality, rather than a normative goal) is unlikely to hold. Recent work suggests that the Supreme Court gained power by being useful to prevailing political coalitions, rather than being

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[67] *See* John Hart Ely (1981), *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press).

[68] For an example of the appropriation of the political process theory in comparative constitutional law, *see* Theunis Roux (2013), *The Politics of Principle: The First South African Constitutional Court* (Cambridge: Cambridge University Press), p. 334 (exploring the puzzle of the South African Constitutional Court's weakness in enforcing political rights, which would seem to be the most justified exercises of judicial review under Ely's theory).

[69] *See*, *e.g.*, Siri Gloppen (2006), "Courts and social transformation: An analytical framework", in Roberto Gargarella et al. (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (London: Routledge), p. 35 (mapping the conditions under which courts may be receptive to pro-poor claims).

independent of those coalitions.[70] In other words, the Supreme Court has rarely departed from the will of the prevailing coalition for very long, because of the selection of justices and because of pressure that can be put on the Court.[71] More strongly, some recent work finds that the Court's decisions have rarely gone against public opinion. Finally, an older line of work argues that the Court has generally been unable to spark significant social change unless it has substantial political support. The myth of the heroic court in cases like *Brown v. Board of Education*[72] has been undercut by research showing that real progress was limited until the Court gained the support of Congress.[73] Put together, these two lines of work have cast doubt on the idea that courts in the United States are likely to be the voice of the marginalized in the face of a hostile or indifferent political system.

Both dominant models of socioeconomic rights enforcement in Latin America can fruitfully be seen from the perspective of a majoritarian rather than counter-majoritarian judiciary. The individualized model of enforcement allows courts to issue relief to give benefits, like a treatment or a pension, directly to a claimant, and to do so at low risk.[74] It also allows courts to offer relief in individual cases without having to deal directly with the collective consequences or costs of a policy change. It essentially allows the court to give benefits to individual litigants without having to pick up the tab. Finally, it allows the court to look like the good face of government, in contrast to the service provider which failed to do its job properly and is characterized as the dysfunctional face. The negative injunction model allows courts to restore civil service or other benefits which are being threatened by the political branches.[75] These cases thus

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[70] *See* Keith Whittington (2008), *The Political Foundations of Judicial Supremacy* (Princeton: Princeton University Press) (arguing that political leaders gave power to the Court because it served their interests to do so); Mark Graber (1993), "The non-majoritarian difficulty: Legislative deference to the judiciary", *Studs. Am. Pol. Dev.*, **7**, 35 (arguing that many of the Court's major cases were the result of Congress inviting the judiciary to decide in order to take pressure off of intra-party splits).

[71] For the classic statement of this position, *see* Robert A. Dahl (1957), "Decision-making in a democracy: The Supreme Court as a national policy-maker", *J. Pub. L.*, **6**, 279 (arguing that the Court is unlikely to be a protector of minority interests against the majority for very long).

[72] 347 U.S. 483 (1954).

[73] *See*, *e.g.*, Gerald Rosenberg (2008), *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd edn (Chicago: University of Chicago Press).

[74] *See* text accompanying nn 44–46.

[75] *See* text accompanying nn 47–49.

again allow the court to play the benevolent face of government in contrast to the threats being made by other state institutions. These cases are much riskier for the court than individualized cases, since they involve a far more significant range of state interests (often, macroeconomic policy management or fiscal stability). But the potential rewards for a court, in term of popularity, are also significant because of the salience of these cases.

Majoritarianism raises a set of concerns that run beyond traditionalist conceptions of judicial role or limitations on capacity, because it suggests that in many contexts, courts have political incentives to favor the interests of groups that are relatively affluent, such as what one might call in certain contexts the "middle class". A striking example is the famous Colombian case involving UPAC, the national housing system. When a deep economic crisis threatened that system in the late 1990s, the Constitutional Court stepped in within a context where the other branches of government essentially took little action.[76] It struck down key elements of the existing system and forced the government to provide bailouts and more buyer-friendly loans to several hundred thousand debtors, who were generally not poor (because the formal housing sector was composed of relatively wealthy groups).[77] The Court's actions were highly creative and showed little restraint based on traditional conceptions of judicial role: it held a widely covered public hearing on the issue to which it invited a number of different social groups.[78] Further, after striking down the entire system but deferring the order so as to give the state only a few months to rewrite the entire law,[79] it essentially rewrote key parts of the new law by declaring them only conditionally constitutional. For example, it held that interest rates charged within the system must be below those charged in other parts of the economy because of the constitutionally protected nature of housing.[80] The justice who wrote several of the key opinions was dubbed the "housing justice". He soon

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[76] *See* Rodrigo Uprimny Yepes (2006), "The enforcement of social rights by the Colombian Constitutional Court: Cases and debates", in Gargarella (n 69), at 127, 136 (describing the context of the UPAC crisis).

[77] In the two key decisions, the Court first struck down the entire existing UPAC system on the grounds that it had been improperly promulgated, *see* Decision C-700 of 16 September 1999, and then upheld the new version of the law passed by the Congress but used the power of conditional constitutionality to effectively rewrite significant portions of the law, *see* Decision C-955 of 26 July 2000.

[78] *See* Decision C-700, id., § VI (describing the hearing).

[79] *See* id., § VII.5 (deferring the effect of the judgment of unconstitutionality until the end of the current legislative term in 2000).

[80] *See* Decision C-955 of 26 July 2000, § V.B.4.

ended his term in the Court and was named on the Liberal party ticket as the unsuccessful vice-presidential candidate.[81]

The political pressures placed on courts in this context vary from system to system in ways that are still not fully understood. In contexts where parties are very strong, like Chile and Mexico, justices' main incentives are likely to be to the parties themselves, and they have relatively little incentive to generate direct public support.[82] This may be one reason why socioeconomic rights jurisprudence continues to be extremely limited in both countries.[83] Where parties are weaker, however, as in Brazil and Colombia, or where the political system is widely held in disrepute (as in many Latin American countries), justices may indeed have a strong incentive to generate the support of the general public. Within Latin America, this incentive sometimes appears to manifest itself in a robust socioeconomic rights jurisprudence that nonetheless benefits relatively affluent groups rather than the most marginalized members of society.

III. THE MANY FUNCTIONS OF SOCIOECONOMIC RIGHTS ENFORCEMENT IN LATIN AMERICA: BEYOND TRANSFORMATION

This section follows on the last one by seeking to give an account of the functions that socioeconomic rights play in Latin American systems. It builds on the key insight developed in the previous sections: many of the patterns of socioeconomic rights enforcement found in the region are essentially majoritarian. Majoritarian exercises of judicial review, like counter-majoritarian exercises, raise a problem of justification, but the nature of the problem is at least partially distinct. While those defending counter-majoritarian exercises must explain why courts should be able to second-guess the decisions of the political branches, those defending

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[81] *See*, *e.g.*, "El Efecto 'Vice'", Semana, 8 April 2002, available at: http://www.semana.com/noticias-nacion/efecto-vice/20354.aspx (accessed 15 September 2017).

[82] South Africa offers an interesting example. Roux notes that the Constitutional Court works in the context of a very strong dominant party, the ANC, and is not well known or particularly popular with the general public. *See* Theunis Roux (2009), "Principle and pragmatism on the Constitutional Court of South Africa", *Int'l J. Const. L.*, **7**, 106, 111. Unlike the Mexican and Chilean courts, the South African court has attempted to enforce socioeconomic rights, but has done so in a highly cautious way, preferring to prod government institutions slowly rather than to appeal directly to the people. *See* id., at 133–36.

[83] *See* text accompanying nn 28–36.

majoritarian exercises must explain why courts are useful at all.[84] This section gives a partial account of that utility, at least within the Latin American context. In so doing, it points out that the functions of socio-economic rights enforcement are more diverse than often recognized in the literature: social transformation and poverty-alleviation are of course important aspirations, but social rights enforcement also carries out a range of other functions.

A. Service Provision and Dysfunctional States

Courts providing a high volume of individualized remedies may be working within bureaucratic systems that are dysfunctional. This appears to be the problem in the healthcare systems of both Brazil and Colombia. In both countries, the systems themselves have pervasive problems. The Colombian system uses private healthcare insurers to provide services, under the supervision of the state. But there are important failures at the regulatory, service-provision, and supervisory levels. The state regulators do a poor job defining the standard package of benefits to which patients are entitled; private service providers routinely deny care for items that should be included in that package; and state entities charged with supervision in fact have exercised very little.[85] In Brazil, the system is state run but also plagued with improper denials of care and could move extremely slowly.[86] In systems like these, courts can become almost a part of the bureaucracy, correcting faults within the system and allowing petitioners to get relief. Petitioners have applied to the courts in both countries in large numbers because they know that the courts will get them surer relief, and often quicker relief, than they can get in the ordinary bureaucracy.

The overall effect of this model of courts as service providers is extremely complex, and is an area where more work is needed. There are some cases where a large number of court decisions have induced the bureaucracy to alter their broader policies. This happened with HIV/AIDs medications in both Brazil and Colombia, where bureaucracies began covering the

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[84] *See*, *e.g.*, Michael C. Dorf (2010), "The majoritarian difficulty and theories of constitutional decision-making", *J. Const. L.*, **13**, 283, 284–85 (the majoritarian nature of judicial review "mostly dissolves [the counter-majoritarian] problem, but it raises a distinct one: Are courts that roughly follow public opinion capable of performing what is generally understood as their core counter-majoritarian function – protecting minority rights against majoritarian excesses? Do American courts, in other words, have a majoritarian difficulty?").

[85] *See* Yamin and Parra Vera (n 63), at 433–39.

[86] *See* Hoffmann and Bentes (n 44).

treatment in response to judicial pressure.[87] There is less evidence that courts using this model can construct improvement in the quality of the bureaucracy. The basic flaws in the Brazilian and Colombian healthcare systems have not been corrected. Indeed, by granting targeted relief to patients who choose to sue – and who are likely among the more vocal and politically powerful – courts may actually reduce the political pressure for reform, allowing a bad model to persist.

Further, judicial intervention in these cases can sometimes exacerbate problems or create new ones. In Brazil, commentators have noted that the jurisprudence creates a "queue-jumping" phenomenon: it allows those who sue to jump to the front of the line, ahead of those waiting for normal bureaucratic channels to operate, which in turn encourages more litigation even for those treatments that would have been covered as a matter of course.[88] In Colombia, the Court created a similar but more complex problem by holding that some treatments outside of the normal package of benefits could be covered if needed and ordered by a court, but would be paid for by the state rather than the private insurer because of their extraordinary nature.[89] This led the private insurers to actually encourage litigation in some cases as a way to get a holding that they could provide an extraordinary service (perhaps invented or unnecessary) and be reimbursed by the state.[90] In turn, the private insurers' behavior led to a flood of judicial orders for state-covered reimbursements, straining the flow of resources within the system.

At the same time, it would be a mistake to view judicial interventions in

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[87] *See* Ana Cristina Gonzalez and Juanita Duran (2011), "Impact of court rulings on health care coverage: The case of HIV/AIDs in Colombia", *Medicc Rev*., **13**, 54 (noting that regulators responded to court decisions by adding treatments to the standard package of benefits, but arguing that this was done without adequately considering the fiscal sustainability of the system); Octavio Luis Motta Ferraz (2009), "The right to health in the courts of Brazil: Worsening health inequities", *Health & Hum. Rts. J*., **11**, 33, 35 (finding that the Congress may have responded in part to an initial wave of litigation on HIV/AIDS by passing a law in 1996 requiring coverage of these medications).

[88] *See* Hoffman and Bentes (n 44), at 143 (arguing that queue-jumping harms the rest of the members of the system, many of whom are "likely indigent").

[89] *See* Katharine G. Young and Julieta Lemaitre (2013), "The comparative fortunes of the right to health: Two tales of justiciability in Colombia and South Africa", *Harv. Hum. Rts. J*., **26**, 179, 189.

[90] *See* id., at 190 (arguing that the Court's reimbursement rule for non-standard packages of benefit treatments encouraged substantial corruption). The same rule led them often to deny coverage for included treatments in an effort to get a judicial order holding the treatment to be outside the standard package and thus reimbursable. *See* id.

these cases as pathological. They have a powerful political logic because these interventions allow courts to position themselves as defenders of the public against an indifferent or incompetent bureaucracy. Citizens favor these interventions because they provide at least some avenue through which they can get redress for situations in which they are being treated shabbily by private or state actors providing essential services. And the state itself may not mind a model that provides relief to a group of petitioners while reducing the pressure to reform or improve the overall architecture of the system. Finally, the service-provision model at least gives a substantial group of petitioners access to services that would have been denied to them otherwise. In this sense, it serves as a kind of institutional second-best for a world in which bureaucracies function poorly and there is little prospect of improvement.

B. Democracy-Promotion and Principal–Agent Problems

The second broad pattern of enforcement – the negative injunction – is generated by a related political logic. Scheppele has noted that in some situations, courts may have a plausible claim to be a better representative of the public than the political branches themselves.[91] She uses the Hungarian austerity decision of 1995 to make this point. Under significant pressure from international financial institutions, the government agreed to huge cuts in social welfare programs. Particularly because Hungary was transitioning from a communist state, these cuts affected a broad swath of society and focused on the middle class rather than the poor.[92] For example, they cut social security benefits and programs of support for new parents. The Constitutional Court struck many of the cuts down because they did not adequately protect vested property interests and settled expectations. The Court's decision was immediately very popular with the public and led to further negotiations between the state and the international institutions, which softened the impact of the austerity measures in the final version.[93]

Scheppele's story fits nicely within a majoritarian, principal–agent model of review. Rather than defending the interests of marginalized

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[91] *See* Kim Lane Scheppele (2004), "A realpolitik defense of social rights", *Tex. L. Rev.*, **82**, 1821.

[92] *See*, *e.g.*, Andras Sajo (2006), "Social rights as middle class entitlements in Hungary", in Roberto Gargarella et al. (n 69), p. 83 (arguing that the Hungarian decision largely protected the economic interests of the middle class from cuts in the communist-era welfare state).

[93] *See* Scheppele (n 91), at 1947 (according to opinion polls, "overwhelming majorities" of between 80 and 90 percent of the Hungarian population approved of the Court's decision in its immediate aftermath).

groups against the majority, the court defends the public against its representatives in cases where these representatives are not adequately carrying out popular will. The court acts as a "fire alarm" mechanism to alert the people that something has gone wrong in the relationship between the governors and the governed.[94] In the case of Hungary, one might argue that the extreme pressure applied by international financial institutions coupled with problems in the developing party system created a representation problem.[95] The Court's decision flagged the problem and restarted the negotiation process.

Austerity measures may represent one example of the kind of situation in which the principal–agent model is likely to work well. Domestic institutions may be under significant pressure from international institutions, and may be more responsive to those institutions than to domestic political actors. Further, the crisis itself may lead political institutions to overestimate the need to undertake structural reforms and to underestimate the damage done to the affected population.

An example is the Colombian economic crisis of the late 1990s, already alluded to above, and during which the country was in active negotiation to receive funding from international financial institutions in return for sweeping structural reforms.[96] A crisis in the system of interest rates for the formal housing sector placed hundreds of thousands of middle-class debtors in danger of default, but the political branches did not design any effective response.[97] Civil society groups made up of diffuse debtors tried to form but claimed that they had trouble reaching the political branches, perhaps because they were not a pre-existing pressure group with access to the levers of power.[98] The Court stepped in and forced attention to the

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[94] *See* David Law (2009), "A theory of judicial review and judicial power", *Geo. L.J.*, **97**, 723, 731 (arguing for a principal–agent theory of judicial review in which the courts act as a fire alarm against government that exceeds its bounds and mobilizes the populace against those excesses).

[95] *See* Scheppele (n 91), at 1929 ("At that point, theories of democratic accountability go silent, and in fact, it is hard to see just how countries whose policies are being micromanaged by outsiders can meet the basic test of democratic politics – that public policy is accountable to the preferences of voters.").

[96] *See* Sebastian Edwards and Roberto Steiner (2000), "On the crisis hypothesis of economic reform: Colombia 1989–91", *Cuadernos de Economia*, **112**, 445–493, (describing the "extended facility agreement" Colombia entered into with the IMF, for the first time in its history, in June 1999, to carry out sharp spending cuts, labor reforms, and other measures).

[97] *See* Uprimny (n 76), at 136.

[98] *See*, *e.g.*, (1998), "Usuarios piden acabar con el UPAC", *El Tiempo*, 18 November, available at: http://www.eltiempo.com/archivo/documento/MAM-853292 (accessed 18 September 2017).

issue by holding an extraordinarily broad public hearing at which politicians, experts, and civil society groups testified; it then forced legislative action by entirely striking down the existing system but deferring that decision for a few months in order to give the president and the Congress time to remake the law.[99] The justice who wrote some of these major decisions (and who later ran for vice-president) defended them in the press by paraphrasing the great populist leader Jorge Eliécer Gaitán: "The people are more intelligent than their leaders."[100] The argument of the Court seemed to be that it was correcting a majoritarian democratic failure; a failure noted even by the dissenters.[101] The Court also struck down reductions to the budget that reduced real public sector salaries, although it later gave the state more flexibility in implementing these reforms and gave reinforced protection only to lower income workers.[102] A variant of the same basic story may explain anti-austerity decisions in Brazil and Argentina, and the post-economic crisis in Europe.[103]

A major problem with the principal–agent model is that the line between democracy-enhancing interventions and populism is quite thin, and perhaps impossible to draw. There may indeed be moments where courts represent democratic popular will better than the political branches. But courts may also claim this mantle in cases where political institutions make an informed, although painful, choice for austerity in response to a full

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[99] *See* Decision C-700 of 16 September 1999, § VI; (1999), "UPAC: se midieron las fuerzas", *El Tiempo*, 28 July, available at: http://www.eltiempo.com/archivo/documento/MAM-894490 (accessed 18 September 2017).

[100] *See* Interview with José Gregorio Hernández (200), *La República*, 12 November ("[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 says, than their leaders.").

[101] *See* Decision C-700 of of 16 September 1999 (Eduardo Cifuentes Munoz and Vladimiro Naranjo Mesa, dissenting) ("The absence of leadership in a country that does not confront its great conflicts and concerns, for the moment hides the impropriety of the actions of the Court and leads one to look with indulgence on its evident extra-limiting of powers. But the enormous cost of this kind of intervention, although momentarily popular, will gravitate negatively on the constitutional jurisdiction that, in the end, will not resist this great disfigurement.").

[102] *See* Decision C-1433 of 23 October 2000; Decision C-1064 of 10 October 2001.

[103] *See*, *e.g.*, Roberto Cisotta and Danielle Gallo (2014), "The Portuguese Constitutional Court case law on austerity measures: A reappraisal", LUISS Guido Carli Working Paper 4/2014 (describing key decisions of the Portuguese Constitutional Court), available at: http://eprints.luiss.it/1298/1/WPG_04-14_Cisotta_Gallo.pdf (accessed 18 September 2017).

range of political input, and courts overturn this choice because they can reap the benefits of a popular decision without having to pay any costs. They may falsely, in other words, tell the public that it can have its cake and eat it too. Much may depend on the exact model of review used by the court, and in particular whether the decision leaves room for negotiation or instead shuts down political options.[104]

The aim here, at any rate, is not to make a normative evaluation of a complex form of judicial review, but merely to point out that the phenomenon – like the service provision model explored above – has a political logic. While courts face significant risks in striking down major pieces of austerity legislation, they can also position themselves as the guardians of popular input against distorted or poorly functioning political institutions.

C. Constructing Constitutional Culture

Finally, it may be that a majoritarian enforcement of socioeconomic rights – particularly through the individualized model – is helpful in constructing a constitutional culture, or a culture where actors outside the judiciary have taken constitutional values seriously. This is an area in which far more research must be done, since we know almost nothing about how constitutional cultures are constructed in different contexts. Nonetheless, it may be plausible that a broadly majoritarian model of socioeconomic rights enforcement, which targets the middle class or general public rather than the marginalized, would be helpful to the construction of a constitutional culture. The service provision model explained above may demonstrate why: citizens who receive direct relief from the courts in the face of a recalcitrant bureaucracy will see a constitution that works materially in their favor. Under this theory, citizens may become attached to constitutions because of the material benefits they receive from them, rather than symbolic or abstract decisions.

The Colombian case provides some evidence that this pathway is a potential one. Since the economic crisis of the late 1990s, a very high percentage of individual complaints (or *tutelas*) filed in the country have been based on socioeconomic rights (chiefly rights related to healthcare or

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[104] An example is the comparison of the two salary decisions issued by the Colombian Constitutional Court. The first required salary increases for all public sector workers equal to the rate of inflation; the second created more flexibility by requiring such increases in all circumstances only for poorer workers making less than twice the minimum wage, and allowing real decreases for other workers if adequately justified by the state. *See* n 101.

pensions). The percentage of all individual *tutelas* on the right to health alone has hovered between 20 and 40 percent since 1999, reaching a high of 40 percent in 2008.[105] The Court has maintained this jurisprudence despite a series of critiques by important legal actors. In an important 1997 decision, Justice Eduardo Cifuentes Munoz (the creator of the Colombian "vital minimum" doctrine) argued that the flood of individual *tutelas* was distorting the healthcare system and having problematic equity effects, and tried to order changes in the judicial approach.[106] This decision did not stem the sharp increase in healthcare *tutelas*. Moreover, the 2008 structural healthcare decision (written by Manuel Jose Cepeda, a designer of the court and later one of its most influential justices) was driven partly by concerns about the equity and distortions caused by individual relief.[107] This decision may have reduced the volume of healthcare *tutelas* somewhat (down from 40 percent of dockets in 2008 to just over 20 percent two years later), but it has not caused the Court to eliminate this line of cases.[108]

We do not know why this is. It does seem likely, though, that the Court's individualized socioeconomic rights jurisprudence played some role in protecting the Court against backlash. Two presidents – Ernesto Samper and Alvaro Uribe – as well as the Supreme Court launched attacks against the Court between 1996 and 2002.[109] In each case, the Court and its allies took the same approach: they framed proposals that at times were rather narrow changes to the Court's powers, and at other times sweeping attacks on a number of aspects of judicial power, as grave threats to the *tutela* itself. During the discussion of the Supreme Court's relatively technical proposal to disallow *tutelas* from being taken against ordinary judicial decisions, the then president of the Constitutional Court stated that the measure would "deal a mortal blow to the *tutela*".[110] Similarly, during discussion of then-President Uribe's much more sweeping propos-

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105 *See* Defensoria del Pueblo (n 44), at 226 tbl. 8.

106 *See* Decision SU-111 of 9 August 1997.

107 *See* Yamin and Parra Vera (n 63), at 444–45.

108 *See* Defensoria del Pueblo (n 44), at 226 tbl. 8.

109 *See* Year V, 329 Gaceta del Congreso, 15 August 1996 (Samper proposal); Year VI, 59 Gaceta del Congreso, 19 March 1997 (Supreme Court and Council of State proposal); Year XI, Gaceta del Congreso 484, 12 November 2002 (Uribe proposal).

110 Year VI, 451 Gaceta del Congreso, 31 October 1997, at 20 (statement of Antonio Barrera). The president of the Supreme Court, after the effort had failed, would claim that the Constitutional Court and its supporters had "incited the population" by framing the reforms as a "conspiracy against the tutela". *See* John Gutierrez (1997), "Congreso no dio la Talla en Reforma de Tutela", *El Tiempo*,

als, which would have disallowed the *tutela* from being taken against socioeconomic rights or judicial decisions, required a super-majority to strike down constitutional amendments and laws, and closed off judicial review of declarations of emergency and states of internal commotion, the Court quickly met in special session and unanimously approved a statement that the reforms, while ostensibly technical, "would in reality eliminate the efficacy of the *tutela*".[111] During all of these periods, key allies of the Court in civil society and academia made similar statements. The approach seems to have worked: political actors feared to attack the *tutela* and none of these court-curbing measures were passed. Statements from key political actors make it clear that they were unwilling to go after such a popular instrument, even when prodded by a popular president like Uribe.[112]

What is clear, then, is that the Court managed to construct the *tutela* in a way that made it hard to attack, and the linchpin of *tutela* jurisprudence is individualized socioeconomic rights cases. What remains unclear is the extent to which the constitutional culture around the *tutela* is due to other factors and the extent to which the model can be generalized to other places.

IV. CONCLUSION: CONCEPTUALIZING A MAJORITARIAN COURT IN LATIN AMERICA

This chapter has argued that the purposes of socioeconomic rights jurisprudence in Latin America, have been, in part, misperceived: courts have often assimilated these rights not so they work for the benefit of the marginalized in order to transform society, but so that they bolster the fortunes of more affluent groups. The political incentives and constraints on courts, explained in recent strands of U.S. constitutional theory, make this outcome unsurprising. Courts are largely majoritarian rather than counter-majoritarian actors.

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28 November, available at: http://www.eltiempo.com/archivo/documento/MAM-680262 (accessed 18 September 2017).

111 *See* (2003), "La Corte se va Lanza en Ristre Contra la Reforma", *El Tiempo*, 31 July, available at: http://www.eltiempo.com/archivo/documento/MAM-991678 (accessed 18 September 2017).

112 *See* (2003), "Reforma Agita Congreso", *El Tiempo*, 1 August (discussing criticism of the proposal in Congress, including both those ostensibly allied with Uribe), available at: http://www.eltiempo.com/archivo/documento/MAM-1034549 (accessed 18 September 2017).

The normative implications of this argument – for socioeconomic rights and other fields of comparative constitutional law – are complex and require further exploration. On the one hand, it seems to dampen the promise of courts to carry out transformative projects, and reminds scholars and policymakers that vigorous or robust patterns of socioeconomic rights enforcement are not necessarily equated with social transformation. On the other hand, the findings here suggest that courts perform a wider range of functions than is often recognized in the literature. Instead of viewing courts as counter-majoritarian actors standing outside of politics, we may continue to gain a more fruitful understanding of judicial politics by viewing judiciaries as integral parts of their own political regimes.