



# Beyond Judicial Independence: The Construction of Judicial Power in Colombia

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Citation	Landau, David Evan. 2015. Beyond Judicial Independence: The Construction of Judicial Power in Colombia. Doctoral dissertation, Harvard University, Graduate School of Arts & Sciences.
Citable link	<a href="http://nrs.harvard.edu/urn-3:HUL.InstRepos:14226088">http://nrs.harvard.edu/urn-3:HUL.InstRepos:14226088</a>
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Beyond Judicial Independence: The Construction of Judicial Power in Colombia

A dissertation presented

by

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to

The Department of Government

in partial fulfillment of the requirements

for the degree of

Doctor of Philosophy

in the subject of

Political Science

Harvard University

Cambridge, Massachusetts

October 2014

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Abstract

This dissertation seeks to explain the behavior of one of the most activist high courts in the world, the Colombian Constitutional Court, since its creation in 1991. The standard approach within the field emphasizes political competition or fragmentation as an explanation for judicial independence. This literature tells a standard story about (1) the origins of independent constitutional courts, (2) the durability of those courts, and (3) their behavior. None of those stories accurately explain the Colombian case. Study of the antecedents of the Constitutional Court shows that the Court was not a case of “independence by design.” Instead, designers hoped to create a body that would be closer to the prevailing political regime than the existing Supreme Court. Judicial power in Colombia was built up over very long periods of time, and was based on judicial usefulness to prevailing political regimes, rather than its distance from those regimes. Further, the Court has constructed doctrinal tools to allow it to intervene across a wide range of areas and has used judicial decisions to cultivate the support of academics, civil society, and the middle class. It is the support of these groups, rather than political fragmentation, which has been decisive in shaping the Court and in protecting it from court-curbing and court-packing efforts. The ultimate test of the Court’s power was the aggressive attacks of the Uribe administration: the Court used its alliances to survive the threat posed by a popular and powerful president, and eventually managed to confront this administration by blocking a constitutional amendment that would likely have given President Uribe an unprecedented third term in office. In Colombia and beyond, focusing on the ways in which judiciaries are embedded into historical regime

dynamics, and on the choices made by justices to carve out their own political space, can help to provide richer explanations for judicial behavior and more nuanced assessments of the effects of judicial activism.

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## Acknowledgements

I have accumulated innumerable debts in the course of completing this dissertation; I have space to acknowledge just a few of those here. I thank the Universidad Javeriana for helping to provide me with resources, space, and a scholarly community in some of my trips to Bogota, as well as the many scholars from there and from the Universidad de los Andes and the Universidad Externado who aided me in my research. I also thank so many former and current staffers of the Colombian Constitutional Court, for their warm assistance in helping me learn so much about the institution. The Weatherhead Center at Harvard University and the Humane Studies Institute partially funded my travels and research. I gratefully acknowledge extraordinary conversations, friendship, and assistance, to name just a few, from Aquiles Arrieta, Mario Cajas, Manuel Jose Cepeda, Jorge Gonzalez Jacome, Julian Lopez, Gonzalo Ramirez, Angela Paez, and Roberto Vidal. Further, I thank my dissertation committee – Jorge Dominguez, Steve Levitsky, Cindy Skach, and Mark Tushnet – for their guidance in shaping this project. Finally, I thank Melissa for her love and support.

Some ideas and text in Chapter 7 previously appeared in David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189 (2012); some of the other ideas discussed in this dissertation (in particular in Chapter 4) can also be found in David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319 (2010). The author retains the copyright in both works.

## Chapter 1: Introduction

This dissertation seeks to explain a puzzling phenomenon: the emergence of the Colombian Constitutional Court as one of the most powerful, activist courts in the world. The scope of the Court's work since its creation in the Constitution of 1991 is stunning, regardless of whether the point of comparison is other courts in the region or around the world. Moreover, the durability and consistency of the Court's activism is surprising: despite turnovers in personnel and a series of attempts to attack the Court politically, it has survived, its major doctrinal lines have continued to develop, and it has continued to carry out important interventions across a broad series of issue areas.

For example, the Court has carried out surprising steps of social transformation within a traditionally conservative Latin American society: it has legalized drug possession of a so-called "personal dose" and assisted suicide, required access to abortion in some circumstances, and forced recognition of gay marriage.<sup>1</sup> On socio-economic rights issues, the Court has been a world leader on both substantive rights and remedial issues. In 2004, for example, it declared a "state of unconstitutional conditions" involving all of Colombia's three to four million displaced persons: the Court held that the state was taking no effective measures to tend to people who had been forced from their homes because of the country's ongoing civil violence, and it has since issued an large number of structural orders.<sup>2</sup> Remarkably, the Court has achieved slow progress on these issues, helping to build up a more responsive bureaucracy and prodding improvement on a

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<sup>1</sup> See Decisions C-221 of 1994 (Carlos Gaviria Diaz) (personal dose); C-239 of 1997 (Carlos Gaviria Diaz) (assisted suicide); C-355 of 2006 (Jaime Araujo Renteria & Clara Ines Vargas Hernandez) (abortion); C-075 of 2007 (Rodrigo Escobar Gil) (recognizing a *union marital de hecho*, or common law marriage, for same sex couples); C-577 of 2011 (Gabriel Eduardo Mendoza Martelo) (calling the failure to allow gay marriage a "deficit of protection," and giving the legislature two years to fix the problem).

<sup>2</sup> See Decision T-025 of 2004 (Manuel Jose Cepeda).



series of indicators.<sup>3</sup> In 2008, the Court undertook similar measures for the entire national health care system.<sup>4</sup>

The Court has played an important role on recognizing rights for traditionally marginalized groups. It has greatly strengthened the autonomy of indigenous communities, for example, by requiring that major economic projects (mining, petroleum extraction, etc) undertaken in their territories be preceded by a robust “prior consultation” that has at times almost approached a veto.<sup>5</sup> This doctrine that has had substantial economic impacts by affecting the ways major the multinationals currently pouring into the primary sectors of Colombia do business. The Court has also reshaped the separation of powers, most prominently by making it very difficult for presidents to govern autonomously by invoking a security or economic state of exception. As a result, Colombia went from almost always being governed under a state of exception in the decades preceding the creation of the Constitution and Court to almost never being governed under a state of exception in the decades since.<sup>6</sup> Finally, and perhaps most surprisingly, in a landmark case in 2009, the Court held that two-term President Alvaro Uribe could not amend the constitution to run for a third term, among other reasons because such an amendment would constitute an “unconstitutional constitutional amendment.”<sup>7</sup> The court held, in other words, that the proposed constitutional referendum would essentially “replace” the existing constitutional

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<sup>3</sup> For an overview of the effects of this decision on the bureaucracy, budget, etc, see CESAR RODRIGUEZ GARAVITO & DIANA RODRIGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: COMO LA CORTE CONSTITUCIONAL TRANSFORM EL DESPLAZAMIENTO FORZADO EN COLOMBIA* (2010).

<sup>4</sup> See Decision T-760 of 2008 (Manuel Jose Cepeda). Both of these structural decisions are analyzed in more detail in Chapter 6.

<sup>5</sup> See, e.g., Decision C-175 of 2009 (Luis Ernesto Vargas Silva) (striking down the Statute of Rural Development for failing to properly include and regulate the right of prior consultation).

<sup>6</sup> For an overview, see Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, in *DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES* 46 (2004).

<sup>7</sup> The Court also held that there were various procedural problems in the financing of the proposed referendum and in the ways in which signatures had been gathered. See Decision C-141 of 2010 (Humberto Antonio Sierra Porto).

order rather than “amending” it. Colombian political elites complied with the decision and President Uribe left power in 2010.

Both the amount and shape of judicial power in Colombia are phenomena in need of explanation. A standard set of theories in comparative judicial politics holds that the phenomenon of “judicial independence” is best explained through the presence of political competition or fragmentation. This set of theoretical tools tells a standard story about the origin, durability, and behavior of constitutional courts: courts gain power as a form of insurance between rival political groups, maintain power because political fragmentation impedes court-curbing efforts, and are willing and able to act against dominant political coalitions because of their distance from prevailing political coalitions.

This dissertation uses the Colombian case to suggest ways in which the standard story is problematic or, at the least, incomplete. First, the historical evidence presented here suggests that the origins of judicial power in Colombia do not fit the standard story. Drawing off of evidence from the case of the United States Supreme Court, I argue that courts build up capacity through time by being involved in important parts of state-building (centralizing power, arbitrating disputes) over long historical periods. In Colombia, for example, the Supreme Court was involved in a variety of important public law matters at least from the creation of the 1886 Constitution.<sup>8</sup> In other words, the Colombian judiciary built up power not by acting as a neutral arbiter between competing political factions, but by acting as a key part of the regime. Second, the Colombian case suggests problems with the story of durability, or of how courts maintain their power through time. The driving factor in protecting the Court since its creation in 1991 has not been political fragmentation, but rather the Court’s own efforts to build a base of support, especially from middle class groups. In large measure, the Court constructed its own shield

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<sup>8</sup> See *infra* Chapter 2.

against court-curbing and court-packing measures. These alliances in turn strengthened the Court's ability to maintain coherent doctrinal lines, to enforce complex decisions, and to make dramatic interventions, such as the Uribe reelection decision, without facing a political backlash. Finally, the standard story about behavior fails to explain key aspects of the Colombian Court's behavior: what needs to be explained is not merely an "independent court," but a court that undertook a particularly sweeping pattern of activism. As explained in the following chapters, the key to understanding that pattern of behavior is not the distance of the Court from the political regime, but rather the particular pattern of alliances with different groups – academic elites, civil society, and the middle class –formed by the Court.

The end result of an analysis like the one carried out here is that we may be able to gain a more nuanced understanding of the power of constitutional courts than is possible by merely categorizing them as independent or non-independent. The decisions justices made as to which groups to align with have had important consequences for the shape of the Constitutional Court's power. For example, the Court's reliance on middle-class support has colored its socioeconomic rights jurisprudence: much of the Court's jurisprudence in areas like health care and pensions has benefited the middle class more than the poor.<sup>9</sup> Thus, close attention to the ways in which courts construct their own power should make possible a more realistic and individualized assessment of their effects of judicial power on society and on the political system. I turn towards these broader and normative issues in the conclusion to the dissertation.

The rest of this chapter first explains and critiques the dominant existing theories of comparative judicial politics: the political competition model. Part II then lays out the historical institutionalist arguments that underlie this dissertation and the plan of the rest of the chapters.

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<sup>9</sup> See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012) (arguing that judicial incentives are one reason why much of the socioeconomic rights jurisprudence in Colombia has benefitted relatively wealthy groups).

## I. The Standard Story

The still dominant approach in the field of comparative judicial politics focuses on explaining when a court is “independent.” The linchpin concept in the field of comparative courts divides the world into non-independent courts, which are creatures of dominant political actors, and independent courts, which are not. There are a number of normative reasons – ranging from protection of investors and economic growth to protection of human rights, the quality of democracy and increased political stability – why independent courts are said to be normatively superior.<sup>10</sup> The stock answer given is that as to why some courts are independent and others are not focuses on the shape of the political environment in which courts operate. Courts in competitive political systems, or in systems where power is truly separated between branches of government or levels of government, are more likely to be independent.<sup>11</sup> The existing literature in political science thus treats courts primarily as a product of their political environments

When the term independence is defined in the literature, it is often seen as the willingness of the judiciary to rule against the incumbent government.<sup>12</sup> Independent courts are said to be well-functioning and to provide a variety of benefits for the country; non-independent courts hinder the attainment of these benefits. For example, independent courts may increase investment and economic growth by increasing confidence that disputes will be handled impartially and that the

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<sup>10</sup> See, e.g., Douglas North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (arguing that the institutional shifts of the Glorious Revolution allowed for the protection of property rights and thus spurred economic growth); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LAT. AM. STUDS. 705, 705 (arguing that judicial independence is “at least a desirable, if not an essential, aspect of constitutional rule in the pursuit of rule of law and democratic accountability.”).

<sup>11</sup> See *infra* Part I for examples of this literature.

<sup>12</sup> See, e.g., Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 W. & M. BILL OF RIGHTS J. 1, 2 (1996) (defining judicial independence as “the freedom of judges to decide cases according to their view of the law”).

government cannot take actions against investors without consequences.<sup>13</sup> They may also increase political stability and peace by convincing groups out of power that there are limits on the power of majority groups, and may at any rate limit abuses of power by powerful actors.<sup>14</sup> Aside from the substantial academic literature on the topic, a large policy literature emphasizes the benefits of having independent courts; this work has served as the basis for large-scale reform programs, funded by international institutions, in many countries.<sup>15</sup> The literature has also emphasized that independence is only partly a product of design. In certain countries, independent courts may exist on paper but not in practice. In Argentina, for example, Supreme Court judges theoretically served for life. But as Helmke observed, the actual tenure of justices was very short, because incumbent presidents used a combination of threats and inducements to get hostile judges off of the bench and to stack the court with their own followers.<sup>16</sup>

Some work has attempted to provide a more fine-grained analysis of the concept of judicial independence. For example, Rios has argued that judicial independence can be subdivided into three distinct components, internal independence, external independence, and autonomy.<sup>17</sup> External independence focuses on the ability of the political branches to interfere in the court's work; for example, the ease of formal or informal removal of justices before their terms have expired. Internal independence, in contrast, focuses on the independence of judges from other

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<sup>13</sup> See North & Weingast, *supra* note 10.

<sup>14</sup> See Siri Gloppen et al., *Introduction: The Accountability Function of the Courts in New Democracies*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 1, 1 (2004) (adopting the premise that “in a democratic system, well-functioning and independent courts are central to making political power-holders accountable”).

<sup>15</sup> See, e.g., Roberto Lavar, *The World Bank and Judicial Reform: Overcoming “Blind Spots” in the Approach to Judicial Independence*, 22 DUKE J. COMP. & INT’L L. 183 (2012); RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (Pilar Domingo & Rachel Sieder, eds., 2001); JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA (Edmundo Jarquin & Fernando Carrillo, eds., 1998).

<sup>16</sup> See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. P. SCI. REV. 291 (2002) (noting that judicial tenures on the Supreme Court were often very short, and that judges were commonly removed through irregular means).

<sup>17</sup> See Julio Rios Figueroa, *Judicial Independence: Definition, Measurement, and Its Effects on Corruption. A Study of Latin America* (unpublished Ph.D. dissertation, on file with author).

judges, particularly the independence of lower-ranked judges from their superiors. Autonomy, finally, looks at the ability of the judicial branch as a whole to control its budget and organization. While it may make sense to separate these concepts for purpose of easier measurement, it is unclear whether they are meaningfully distinct concepts analytically. External independence and autonomy would appear to be closely related to a single core concept – the ease with which other political actors can dictate judicial decision-making. Removal and budgetary or resource reductions are merely two tools to obtain the same end. Internal independence clearly does reflect a distinct concern; what we might call (using the language employed in this dissertation) the possibility that judges might primarily be interested in an audience of other judges superior to them, which could have important consequences.<sup>18</sup> But this is not normally the risk that is captured by the concept of judicial independence in the literature. The core concern remains the risk that judges will rule in accordance with the wishes of the dominant political regime, rather than according to some other set of criteria.

Judicial independence is a distinct concept from the rule of law, although the two terms are related. Independence appears to be related to the propensity of the courts to rule against the incumbent government, while the rule of law is a broader term that encompasses the predictability and rationality of the legal system.<sup>19</sup> Among other things, independence focuses on politically-important cases, while the rule of law concept focuses more on routine cases. A country possesses the rule of law if individuals or businesses wronged by other individuals or businesses can go to the courts and get a predictable resolution of their dispute based on legal

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<sup>18</sup> See Julio Rios-Figueroa & Matthew Taylor, *Institutional Determinants of the Judicialisation of Politics in Mexico and Brazil*, 38 J. LAT. AM. STUDS. 739 (2006) (comparing the effects on policy of Brazilian judicial politics, where internal independence is high, and Mexican judicial politics, where it is low).

<sup>19</sup> See, e.g., Miguel Schor, *The Rule of Law*, in *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 1329, 1329 (David S. Clark., ed., 2007) (“The rule of law means that government can act only through legal rules and that law checks the power of government.”).

principles rather than extrinsic factors such as bribery. Singapore, for example, has a functioning judiciary and scores well on most analyses of the rule of law, even though the courts are not independent in politically-charged cases.<sup>20</sup>

### **A. The Standard Causal Story: The Origins and Durability of Independent Constitutional Courts**

The literature has focused on a theory of how courts attain independence with three related arguments. First, a pervasive strain of the literature argues that independence emerges as a product of cooperation between rival political forces in environments where politics is highly competitive.<sup>21</sup> Under this theory, judicial independence failed to emerge in Japan because one party dominated the regime; in contrast, independence emerged in places like the United States because rival parties saw a benefit in placing limits on the other party when they were out of power.<sup>22</sup> In other words, all major players in the system get together and choose a world where both they themselves, and their opponents, are limited in imposing certain extreme policies whenever they happen to be in power.<sup>23</sup> A second theory emphasizes the importance of horizontal competition between institutions in increasing judicial independence. Under this theory, national or state governments where all institutions are governed by the same actors are much less likely to have independent courts than governments where divided government obtains, and different institutions (legislatures, presidents, etc) are controlled by different

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<sup>20</sup> See Gordon Silverstein, *Singapore: The Exception the Proves Rules Matter*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 73 (Tom Ginsburg & Tamir Moustafa, eds., 2008).

<sup>21</sup> See, e.g., Matthew C. Stephenson, “*When the Devil Turns ...*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUDS. 59 (2003).

<sup>22</sup> See Mark J. Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEG. STUDS. 721 (1994) (comparing the Japanese and American cases).

<sup>23</sup> For a seminal application of this theory to the Constitutional Courts of Asia, see TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003) (comparing courts in Taiwan, Korea, and Mongolia).

actors.<sup>24</sup> Under conditions of divided government, the judiciary will tend to be selected in a heterogeneous manner that does not disproportionately benefit any one party, and political institutions will find it harder to discipline judiciaries that rule against their interests, since a ruling that hurts one institution will likely benefit another.<sup>25</sup> Finally, a third theory hypothesizes that independent courts will often emerge when historically hegemonic political parties or forces are threatened by emerging new parties.<sup>26</sup> For example, Hirschl argues that in Israel, the effort to create a more powerful Supreme Court with judicial review powers to interpret basic laws was pushed by secular parties who increasingly felt challenged by more religiously-based political groups.<sup>27</sup> Similarly, he has recently argued that judicial empowerment in various countries in the Middle East, such as Egypt, can be understood as a means for relatively secular groups to control and limit assertions of Islamic law by other groups.<sup>28</sup>

Put together, this work contains a theory of both the origins of independent courts and their ability to maintain power over time. The origins story suggests that independent courts emerge as a form of insurance in situations where political competition is high or is increasing; the durability story theorizes that political fragmentation is the key variable in ensuring the survival of independent constitutional courts. However, growing literature has cast some doubt on the completeness of these causal stories. First, various authors have pointed out that political competition and checks and balances appear to be neither necessary nor sufficient for judicial

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<sup>24</sup> See, e.g., Rebecca Bill Chavez, John A. Ferejohn, & Barry R. Weingast, *A Theory of the Politically Independent Judiciary*, in *COURTS IN LATIN AMERICA* 219 (Gretchen Helmke & Julio Rios-Figueroa, eds., 2011); REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* (2004) (demonstrating how differences in subnational politics impacted judicial independence in different states).

<sup>25</sup> See, e.g., Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC'Y 117 (2001) (noting that courts have “zones of tolerance” that shift based on the nature of the political context in which they are acting).

<sup>26</sup> See, e.g., JODI S. FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S* (2008).

<sup>27</sup> See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (promulgating a “hegemonic preservation” thesis and applying it to Israel, Canada, New Zealand, and South Africa).

<sup>28</sup> See RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).



independence to emerge.<sup>29</sup> Strong courts with some willingness to rule against the government have emerged in authoritarian states, for example in Egypt. Moustafa has hypothesized that the government was willing to set up a relatively strong Constitutional Court in the country because it was necessary to attract investment.<sup>30</sup> Further, strong courts have existed in dominant-party regimes, such as South Africa and India.<sup>31</sup> While the regime may have exercised an important influence on judicial behavior in both of these countries, both possessed considerable capacity and some distance from their respective political regimes. Nor does political competition guarantee that judicial independence will emerge. In a number of countries in Latin America such as Argentina and Ecuador, courts have remained very weak despite a highly competitive political system. These examples do not necessarily destroy the theories outlined above, but they do show that they have considerable trouble accounting for a range of key cases.

Second, a set of authors working on the history of judicial development in the United States has offered a highly nuanced critique of this literature by finding that the standard origins story is inconsistent with the predictions of the theory. Mark Graber, Howard Gillman, and Keith Whittington have all argued in essence that the U.S. courts gained power not because they impartially mediated disputes between political parties or institutions, but rather because they

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<sup>29</sup> See, e.g., Maria Popova, *Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine*, 43 COMP. POL. STUDS. 1202 (2010) (arguing that intense political competition can actually act as an obstacle to judicial independence in new democracies because vulnerable incumbents have incentives to use the judiciary to perpetuate themselves in power); Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345 (2009) (arguing that judicial independence and the rule of law seem generally associated with competitive democracy, but explaining reasons why the relationship often does not hold).

<sup>30</sup> See Moustafa, *supra* note **Error! Bookmark not defined.** More broadly, the relationship between dictatorship and judicial independence is much more complex than is often assumed. As Ginsburg and Moustafa point out, authoritarian regimes need courts to carry out a number of functions (legitimation, social control, controlling administrative agents, and making credible economic commitments) and thus might provide them with some independence to carry out those goals. See Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 4-11 (Tom Ginsburg & Tamir Moustafa, eds., 2008).

<sup>31</sup> See, e.g., Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106 (2009) (showing how the Court is able to operate despite the presence of a dominant party).

were useful to particular factions, parties or movements at various points in time. Graber shows how courts were useful to political parties who faced issues that divided them internally. When such issues arose, for example in the case of slavery in the case of the Democratic party before the Civil War, political actors may invite and welcome judicial intervention as a way to defuse these tensions.<sup>32</sup> Thus, Graber points out that *Dred Scott* was actually welcomed by a broad swath of political actors before the civil war.<sup>33</sup> Both Gillman and Whittington have showed how courts have been useful throughout U.S. history to parties in power who have faced constraints from other national or subnational actors.<sup>34</sup> For example, Gillman argues that nationalizing Republicans in the late 19<sup>th</sup> and early 20<sup>th</sup> century relied on the courts, stacked with lawyers tied to railroads and other national industries, as a way to cheaply reduce barriers to industry and nationalization in the various states.<sup>35</sup> This work shows that the causal stories posited above cannot easily explain the American case, which was one of the core cases for the development of the theory, and also suggest deep theoretical problems. Rather than viewing courts as being neutral arbiters in political games, they might generally be viewed more realistically as part of the prevailing political regime.<sup>36</sup> As in American history, courts might tend to gain power precisely when they are viewed as useful to prevailing political elites in attaining their goals.<sup>37</sup> At the broadest level, this work suggests that viewing “judicial independence” as a likely or

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<sup>32</sup> See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDS. AM. POL. DEV. 35 (1993).

<sup>33</sup> See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 33-35 (2006).

<sup>34</sup> See, e.g., Keith E. Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

<sup>35</sup> See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511 (2002).

<sup>36</sup> This point was initially made by Dahl, who argued that it was unlikely the Supreme Court would stay out of touch with prevailing political alignments for long. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 179 (1957).

<sup>37</sup> See, e.g., KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

desirable outcome is unlikely – what we see as strong courts are more likely to be courts that effectively serve the interests of dominant political elites.

Similarly, a group of comparative scholars centered on Latin America has suggested that the behavior of judiciaries is best explained as a consequence of the historical development of these institutions through long periods of time. Hilbink argues that the Chilean judiciary has been a consistently conservative institution, and has maintained this orientation through transitions from democracy to dictatorship and back again.<sup>38</sup> The judiciary avoided changing, Hilbink argues, because processes of training, recruitment, and promotion tended to replicate these values through time. In other words, judiciaries, when set up as relatively insulated bodies, tend to be highly resistant to change imposed from the outside political system. Similarly, Kapiszewski has argued that courts develop distinctive “court cultures” through time, and has stated that these cultures tend to be passed on through time because of continuity in things like training and promotion, as well as in the professional staff that assists the justices.<sup>39</sup> Through a careful study of interventions in economic policy in Brazil and Argentina, she shows that the distinctive court cultures of the two judiciaries impacted the ways in which the courts worked – the Argentinian court cycled through waves where it fully acquiesced in economic policies alternating with other waves where it confronted the regime, while the Brazilian court engaged in more productive interactions where it challenged certain aspects of governmental policy while attempting to accommodate the basic thrust of the action. These works and other similar works pose a different theoretical challenge to the dominant theory. They show first that elements internal to the judiciary such as recruitment, promotion, and staffing patterns, rather than just external factors in the political system, have important influences on judicial behavior. Also, they demonstrate that

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<sup>38</sup> See LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007).

<sup>39</sup> See Diana Kapiszewski, *How Courts Work: Institutions, Culture, and the Brazilian SupremoTribunal Federal*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 51 (2010).

judiciaries are institutions which build up capacity through time; strong courts are thus not mere products of current political configurations but a result of interactions and decisions made over a long period of time.

The thrust of this critique is that the origins story is likely to be more complex than the standard story, which suggests that we must incorporate some historical dimension into our comparative stories about the emergence of judicial power. The literature is still groping towards a conception of why history matters. The studies by Kapiszewski and Hilbink fill in an important part of the story: both judicial institutions and the broader legal culture within which they are embedded may in some circumstances be very sticky. This is partly because judiciaries, especially civil-law judiciaries, are bureaucracies, and bureaucracies can be resistant to external change under at least some conditions. Moreover, legal training is particularly thick; the thickness of local legal discourses may mean that the behavior of court officials is difficult to change. Less work has focused on the historical development of judiciaries within their broader political systems. My argument here is that this development may also prove “sticky” – the kinds of tasks judiciaries have historically performed and the ways courts are drafted (or not) into state-building processes may condition the willingness of political actors to accept patterns of judicial activism.

Further, this recent work suggests ways in which the story of how courts are able to survive court-curbing efforts may be incomplete. The existing literature tends to treat courts as mere objects of their political environments. In the political competition model of Tom Ginsburg and others, courts are designed by political actors to be weak if they are in the presence of overpowering political forces, but to be much stronger if they are needed as a form of insurance

between competing political factions.<sup>40</sup> In the hegemonic preservation model of Ran Hirschl, judicial empowerment serves as a way for political elites who are facing threats from the political realm to protect their power by giving power to non-elected judges who are ideologically aligned with those elites.<sup>41</sup> Models of the judicialization of politics often point to the incentives, such as blame avoidance and the avoidance of intra-party tension, which political actors have in sending issues to the judiciary.<sup>42</sup> Judiciaries are constrained actors, and the political context shapes their behavior in important ways. At the same time, it is a mistake to dismiss the willingness and ability of judicial actors to shape their own political environments. Judges in many systems, and in many contexts, may not possess an institutional perspective: the Argentine Supreme Court justice who referred to Peron and then-Argentine President Menem as his “only” political bosses was a creature of the Peronist party and the incumbent president, and not of the Court as an institution.<sup>43</sup> But in other contexts, we know that judges do develop an institutional perspective – they consider the impact of decisions not only on their personal political views, but also on the Court as an institution.

And judges can influence the political environment, potentially fending off court-curbing measures, in at least four important ways. First, judges like other actors can take steps to strengthen their own institutions internally, for example by hiring and maintaining staff with a particular sense of mission and by socializing new staff members into that mission. This kind of dynamic, which Kapiszewski calls “court culture,” might help to maintain continuity on the court

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<sup>40</sup> See *supra* notes 21-25.

<sup>41</sup> See *supra* notes 27-29.

<sup>42</sup> See, e.g., ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 50-52 (2000) (explaining the mechanisms through which legislative minorities use abstract review to advance judicialization); Graber, *supra* note 32 (noting that political actors often send issues to judiciaries where those issues split their own parties); Hirschl, *supra* note 27 (explaining the factors that lead political actors to allow judicialization of highly political cases).

<sup>43</sup> See REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 34 (2004) (identifying a statement made by Rodolfo Barra).

through time.<sup>44</sup> New judges will be inculcated into the existing worldview, and will at any rate have trouble making radical changes to the status quo because they will tend to face opposition from incumbent judges and from their own professional staffs. They may also lack access to the concepts and legal language necessary to make major changes from the status quo. Many courts lack a strong “court culture,” but courts that possess this dynamic may be resistant to change.

Second, a court’s jurisprudence may have an important and sticky impact on politics by helping to define constitutional meaning. Decisions can settle ambiguous constitutional issues or gaps in the constitutional text. For example, in Whittington’s model of constitutional construction, both courts and other actors outside of the courts can take steps to create constitutional meaning on issues where the constitutional text is silent.<sup>45</sup> Constitutional interpretation can play a similar function, by settling the meaning of ambiguous provisions. Of course, there is no reason that judicial decisions constructing or interpreting constitutional meaning need prove sticky. But they often do, even in systems that lack a formal doctrine of *stare decisis*.<sup>46</sup> They may act as focal points for future political or judicial activity, or build up coalitions of actors supporting the intervention of the court. Further, to the extent that existing doctrines appear to form a coherent fabric with a broader set of principles and rules defining constitutional meaning, judges may be reluctant to change an isolated doctrine that would decrease that coherence. Judicial actors in both civil and common law systems may value

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<sup>44</sup> See Kapiszewski, *supra* note 39; see also Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65 (Cornell W. Clayton & Howard Gillman, eds., 1999) (finding similar acculturation dynamics at work in the United States Supreme Court).

<sup>45</sup> Unlike constitutional interpretation, constitutional construction occurs when actors define constitutional meaning in a way that cannot plausibly be traced to the existing text. See KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

<sup>46</sup> The Latin American tradition with respect to precedent is, at any rate, much more complex than the simple divide between common law and civil law systems would suggest. Systems including the Colombian and Mexican have at least some experience with precedent predating the modern era. See, e.g., DIEGO EDUARDO LOPEZ MEDINA, EL DERECHO DE LOS JUECES 7-28 (2009) (tracing the history of precedent in Colombia).

coherence in the jurisprudential structure. Again, these dynamics will not emerge in all legal systems, but they can and do emerge in many.

Third, judicial decisions can reach outside of the political sphere to influence political coalitions. Judicial decisions can place new items on the public agenda by getting attention from the media and civil society groups. Creative judicial decisions can also reshape the menu of options available to politicians. For example, a well-timed decision to strike down a law might force the hand of politicians who would have preferred inaction by making the status quo much less appealing. By the same token, judicial decisions can rally coalitions both in favor of and against a court. For example, judicial decisions blocking austerity policies that are pushed on countries by international financial institutions may prove very popular with the public, giving courts a significant boost in popular support and helping to shield them against political retaliation.<sup>47</sup> At the same time, some decisions might provoke a “backlash” against courts by provoking the ire of interest groups – this is often the story told of *Roe v. Wade* and its effect on the pro-life community.<sup>48</sup> The broad point is that courts can affect political coalitions and political options in various ways. Some of these actions may strengthen a court as an institution, while other may weaken it.

Finally, while courts may depend on civil society groups and other elements of their “support structure” in important ways, they are not powerless in shaping these groups and institutions. As McCann has shown with respect to equal pay litigation in the United States, litigation can act as a tool for organizing groups around a particular issue by acting as a symbolic rallying point.<sup>49</sup> Beyond symbolism, courts can take steps to give civil society groups increased power over

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<sup>47</sup> See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921 (2004) (telling such a story with respect to judicial interventions on socioeconomic rights issues in Hungary).

<sup>48</sup> See Gerald N. Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 182-89 (1991).

<sup>49</sup> See Michael W. McCann, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

bureaucratic actors. For example, courts can and do empower civil society groups by appointing them as negotiators with government actors, or by using them as monitors of governmental activity or as sources of information and policy ideas. Courts acting in a relatively weak civil society environment might also rely on other “checking” institutions like ombudsmen, attorney’s general, and human rights commission to act as a part of their support structure.<sup>50</sup> Here too, judges can shape the power and mission of these institutions, by giving them particular tasks and by empowering them vis-à-vis the bureaucracy.

In short, we have good reason to believe that courts can shape their political environments in a number of different ways. In at least some cases, judges can use this power to strengthen the court as an institution, or to push a political agenda that is distinct from the desires of dominant actors in the broader political system. This does not mean that courts are unconstrained actors – their ability to shape the political playing field is limited, and overly aggressive actions may result in successful retaliation against the court. The amount and nature of political space that a court will enjoy has much to do with the shape of the political and party system in a given country. Nor does it mean that all courts will *in fact* behave with this kind of institutional perspective or autonomy. There are many examples of courts where there is no separation between the regime and the judiciary. The reasons why would seem to have much to do with the historical development of judicial power in a given country.

## **B. The Choice of Dependent Variable**

Almost no existing work has challenged the hegemonic place that the concept of independence enjoys in the literature. The intuitive appeal of the concept likely explains its power in both the academic and policy literatures. However, the theories outlined above suggest

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<sup>50</sup> For a comparative study of these kinds of national, non-judicial human rights institutions in Latin America, see Thomas Pegram, *National Human Rights Institutions in Latin America: Politics and Institutionalization*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE 210 (Ryan Goodman & Thomas Pegram, eds., 2012).



various ways in which independence may be a poor measure of those things which we may find important in a judiciary.

First, the literature has had some trouble defining the concept of judicial independence. Rios-Figueroa, as noted above, breaks the broad variable of judicial independence down into three component subparts – external independence, internal independence, and autonomy.<sup>51</sup> Similarly, judicial independence often proves difficult to measure – a court that strikes down few laws might be dependent on government support, or might just be staffed with judges who have a limited conception of judicial role. Furthermore, a dependent court might strike down a high volume of laws if it is striking down legislation passed by other administrations or if it anticipates a shift in its political masters.<sup>52</sup> Both the concept and measurement of judicial independence are more complex than they might at first appear.

A bigger problem is that judicial independence tells us very little about how a court actually behaves. To use a simple example, the Chilean, Mexican, and Colombian high courts are all considered highly independent in the literature, yet the three courts do very different things. The Chilean Constitutional and Supreme Courts continue to leave the Chilean Constitution almost entirely undeveloped.<sup>53</sup> The Supreme Court appears to see itself almost entirely as a private law court, enforcing and interpreting contract, tort, property, and criminal law, rather than as a court that should focus on developing and interpreting constitutional provisions. The Mexican Supreme Court has focused primarily on mediating disputes between different parties and different levels of government.<sup>54</sup> In contrast to its robust jurisprudence on this issue, the Court

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<sup>51</sup> See Rios-Figueroa, *supra* note 17.

<sup>52</sup> See GRETCHEN HELMKE, JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005).

<sup>53</sup> There are some recent exceptions. See Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideational Roots of Rights Adjudication in Chile*, in COURTS IN LATIN AMERICA 99 (Gretchen Helmke & Julio Rios-Figueroa, 2011).

<sup>54</sup> See Karina Ansolabehere, *More Power, More Rights? The Supreme Court and Society in Mexico*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 78 (Javier Couso et al., eds., 2010).

has left the various rights provisions of the Constitution almost untouched. Finally, the Colombian Supreme Court has taken on an activist role along both dimensions, both ensuring that the historically strong Colombian president has been weakened in his ability to act unilaterally and in part substituting for the political branches when it has found that they have taken inadequate steps to enforce social rights and other constitutional provisions.<sup>55</sup> Labeling each of these courts as “independent” gives us too little information about their actual behavior.

Rather, to answer questions about judicial behavior, we need more information about the set of actors with whom these different courts have ideological or incentive-based links. These actors might be parties within the political system, subsets of the public, civil society groups, or elements within the judiciary itself. Both the United States and Mexico have Supreme Courts with justices strongly linked to political parties. In the United States, for example, a long line of research has shown that the best predictor of judicial behavior at the Supreme Court level is the political preferences of the individual justices. This has pulled constitutional jurisprudence in particular directions; both decisions and interpretive methodologies (for example, originalism) are seen as having very close links to the Republican and Democratic parties. A somewhat similar pattern obtains in Mexico, where justices have been very close to the PAN and the PRI, the two parties with sufficient representation in Congress to elect justices.<sup>56</sup> These justices have focused on creating a level electoral playing field for the parties, two issues that have been central to the Court in the post-democratic transition period. Further, because the PRI as well as the PAN is now largely neoliberal on economic policy, the justices have generally been unwilling to activate the rich social rights provisions that subsist in the Mexican Constitution.

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<sup>55</sup> See generally David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. L. REV. 319 (2010).

<sup>56</sup> See, e.g., Arianna Sanchez, Beatriz Magaloni, & Eric Magar, *Legalist v. Interpretivist: The Supreme Court and the Democratic Transition in Mexico*, in COURTS IN LATIN AMERICA 187 (Gretchen Helmke & Julio Rios-Figueroa, eds., 2011) (finding evidence that justices on certain questions hew close to the parties that appointed them).

Different patterns have obtained in other countries, where parties are weaker. In Brazil, for example, where parties are highly fragmented and the judiciary is quite insulated from the political system (justices are often subject to automatic promotions based on seniority), the judiciary is relatively corporatist, and often appears to make decisions based on the institutional interests of the judicial branch.<sup>57</sup> Such judiciaries have sometimes been described as “too independent,” but commentators are really just observing the effects of a particular configuration of audiences and interests on the Court. Finally, at various points both the Brazilian and Argentinian judiciaries have been described as “populist” – judges have made decisions sought by the masses or the middle class, perhaps in the hope that these decisions would help their political careers.<sup>58</sup> Particularly in weak party environments, such behavior may make sense: judges may be able to serve as political entrepreneurs who can parlay judicial decisions into either electoral success or at least greater renown.

A further problem is normative: as suggested particularly by the work of historical scholars on the U.S. outlined above, independence in judiciaries may not correlate with the development of judicial power or with other desirable qualities in courts. As explained above, the U.S. Supreme Court gained strength through time not because it was independent of prevailing political coalitions, but rather because it had a close relationship with them, and did work that they found useful.<sup>59</sup> Similarly, some courts in the world appear to be engaged in valuable work despite having close relationships with their prevailing political regimes. For example, Roux has noted that the South African Constitutional Court has a very close relationship with the ANC.<sup>60</sup> It

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<sup>57</sup> See MATTHEW TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL (2008)

<sup>58</sup> See LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007).

<sup>59</sup> See *supra* text accompanying notes 32-37.

<sup>60</sup> See Roux, *supra* note 31; see also Jackie Dugard & Theunis Roux, *The Record of the South African Constitutional Court in Providing and Institutional Voice for the Poor: 1995-2004*, in COURTS AND SOCIAL TRANSFORMATION IN

could hardly be otherwise, given the fact that the ANC is a dominant (although factionalized) party and is heavily involved in selecting the justices. This context has a significant effect on the behavior of the Court – Roux argues that the Court has avoided challenging the ANC on major policy decisions and has instead focused on gently prodding the regime to advance on policies where the ANC is generally in agreement but is lagging due to resource constraints or other reasons. The famous *Grootboom* decision is a good example – the Court stated that the government’s housing policy, which made no provision for the poorest people with urgent needs for housing – was unconstitutional, but declined to order a specific remedy, instead leaving the shape of the new policy up to the legislature.<sup>61</sup> The Court acted in an area – advancement of social rights – where there was broad agreement within the ANC on substantive policy, but pace was slowed by resource constraints. Further, the Court’s approach, which has been dubbed “weak-form” review in the literature, is consonant with a political context where the Court is worried about angering the dominant-party regime by being too demanding.<sup>62</sup> Similarly, many of the Constitutional Court’s decisions have focused on legitimating transformative policies of the regime, explaining why these decisions do not violate equality, property, or other rights of the white minority or of other groups. Yet at the same time, the South African Court is a very high capacity court, and many of its decisions have become famous around the world. Calling the Court “non-independent” or only “weakly independent” does not seem to do much to explain its behavior.

By the same token, judicial independence is not an unalloyed good. The counter-majoritarian difficulty, a construction of the United States legal literature, argues that exercises of judicial

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NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR 107 (Roberto Gargarella et al., eds., 2006) (arguing that the Constitutional Court has had only a very limited effect on the poor).

<sup>61</sup> See *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC).

<sup>62</sup> For an explanation of weak-form review, see MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 247-50 (2008) (explaining the use of weak-form review for socioeconomic rights in the *Grootboom* decision and elsewhere).

review over democratic policymaking need justification.<sup>63</sup> The comparative literature on the “judicialization” of politics shows that courts around the world have increasing influence over questions once categorized as “political” rather than “legal.”<sup>64</sup> Exercises of judicial power over the political branches face a potential legitimacy problem, and they may have an adverse dynamic effect on the quality of political institutions. Independent courts may also bring a variety of other ills, such as corruption and disruptive impacts on policy. The Brazilian judiciary, which has high external independence, internal independence, and autonomy, is a case in point. As Taylor argues, the Brazilian courts are “high impact, low functionality” – they have the independence necessary to intervene on important policy matters, but they often do so in unpredictable and unproductive ways – lower courts, largely free from the threat of reprisals by their superiors, often grant injunctions against important pieces of legislation.<sup>65</sup> Courts that are unmoored from their own political regimes may also be more tempted to take “populist” decisions that may garner the courts popular support among the middle class, but may have disruptive or adverse effects for the political system as a whole.<sup>66</sup> The broad point is that just as judicial independence may tell us too little about what a court is actually doing, it may also tell us too little about the normative effects of what it is doing.

None of the problems explored here – fuzziness in the concept, difficulties of measurement, and lack of correlation with important descriptive and normative dimensions – wholly vitiate the value of judicial independence as a dependent variable. Most commentators seem to agree on a

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<sup>63</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

<sup>64</sup> See, e.g., ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

<sup>65</sup> See Matthew M. Taylor, *The Riddle of High Impact, Low Functionality Courts in Brazil*, 25 REV. ECON. POLIT. 418 (2005).

<sup>66</sup> See Hammergren, *supra* note 58, at 280; Landau, *supra* note 9, at 243-45 (considering ways for systems to avoid the problem of judicial populism).

common-sense definition of judicial independence as the ability to take decisions against political incumbents. Such a concept can usually be given at least rough measurement across countries and across time. Judicial independence is still a useful concept in cross-national comparison. But it is not even close to the whole story.

## **II. The Argument**

The puzzle I seek to explain in this dissertation is the emergence of a particularly powerful Constitutional Court in Colombia after 1991. The phenomenon to be explained is not simply the emergence of an “independent” court: the courts in places like Mexico, Brazil, and Chile are equally independent. It is a court that is highly active across a certain range of issues, for example the separation of powers, socio-economic rights, and a transformative conception of equality for historically marginalized groups like women, gays, and the disabled. Simply explaining the Court’s “independence” is not enough.

The stock tool of explanation also falls short of explaining either the origins or the durability of the Colombian Constitutional Court. A key insight is that the historical processes through which judiciaries were inserted into the state building process are sticky, and continue to have an important impact on the current role of a judiciary. A judiciary involved in important tasks – say arbitrating between competing political factions or centralizing power in the provinces – builds up capacity through time. Capacity includes what Kapiszewski calls “court culture” – a set of norms and expertise within the court on how to handle particular types of claims through time.<sup>67</sup> It also includes the attitudes of external actors, particularly political elites, about what kinds of disputes are properly judicialized. Internally, a conception of judicial role may prove resistant to change through time, while externally, actors accustomed to judicial interventions in complex

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<sup>67</sup> See Kapiszewski, *supra* note 39.

political questions may continue to seek legal responses to political crises. Judicial capacity is thus an important but complex concept. At root, it deals with the ability of courts across countries to deal with different types of legal problems in a competent way. But we might also define it as a sociological concept – capacity depends in part on the perception of other political actors in the system about the competence of the courts.

Judges in high-capacity systems will be comfortable resolving complex or important cases; judges in low capacity systems will not be willing to take on these tasks. Indeed, while the literature has focused on independence, the biggest divide between judiciaries is not between independent judiciaries and dependent ones. It is instead between high capacity judiciaries and low capacity judiciaries. For example, the difference between the Colombian judiciary and the Singaporean judiciary, two high capacity judiciaries with differences in independence, is far less gaping than the difference between either of these systems and the judiciaries of Ecuador or Honduras. The Honduran judiciary might be coded as independent based on its raw ability to rule against the executive, but this independence is swamped by its low capacity. The judges are not well-trained to resolve complex legal disputes with political salience, nor do other political actors have confidence in the judicial branch as a solution to the country's problems. In Ecuador, the high courts have been considered sufficiently unimportant that they were left vacant for periods of time.<sup>68</sup>

The historical construction of judicial power in the United States has largely been told through this lens. Stephen Skowronek, Keith Whittington, Howard Gillman, and Mark Graber all show how courts played an important role in the construction of the American state. As Skowronek points out, in the early period American federal government was a government of

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<sup>68</sup> See Agustin Grijavla, *Courts and Political Parties: The Politics of Constitutional Review in Ecuador* (unpublished doctoral dissertation, on file with author) (2010).

“courts and parties” – the judiciary was one of the main emanations of federal power in the states and territories.<sup>69</sup> Even before the Civil War, politicians saw the judiciary as an important resolver of political disputes: as Mark Graber shows, the major political parties wanted the Court to decide *Dred Scott*, because they saw it as an issue that was too internally divisive to their parties to be decided in Congress.<sup>70</sup> In the late 19<sup>th</sup> and early 20<sup>th</sup> century, the Court played a major role in advancing the political agenda of dominant national actors, especially Republicans, who wanted to industrialize the country. They stacked the Court with former railroad lawyers and others with a pro-national business outlook, and undertook a number of measures particularly to weaken state power over commerce and regulations.<sup>71</sup> In return, political actors gave the Court increased jurisdiction and discretion in a series of laws.<sup>72</sup> The construction of judicial power in the United States was really a historical story of how the Court gained capacity through time by being at the center of the state-building project. There was no critical juncture: rather the story is one where judicial actors slowly accrete power through carrying out particular projects and an increased understanding that major disputes should in fact be resolved judicially.

This lesson has not really been absorbed in the comparative literature, which is largely focused on the contemporary spread of “new constitutionalist” theory rather than the past, and where histories of individual judiciaries are rare projects. But we can see at least three major patterns in the ways courts have been integrated into the state-building project in different countries. Some courts (low-capacity courts) never appear to develop competence in any area: we might use the Ecuadorean and Argentinian judiciaries as paradigmatic examples (although to different degrees). The high courts are staffed by political “hacks” that are perceived as lacking

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<sup>69</sup> STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920*, at 24 (1982)

<sup>70</sup> See GRABER, *supra* note 33.

<sup>71</sup> See Gillman, *supra* note 35.

<sup>72</sup> See WHITTINGTON, *supra* note 37, at 95-100 (laying out incentives that political actors have to support the courts).



the technical training necessary to decide disputes in rational and impartial ways. The cycle is self-perpetuating: because the courts are perceived as relatively useless by political actors, they are packed with more hacks, and talented jurists are unwilling to sit on the courts. These courts are viewed by political actors largely as sources of patronage and as surefire votes in favor of the interests of the regime. They are basically marginal to the state-building process.

Other courts develop high capacity in private law areas but not in public law issues: the paradigmatic example might be the Chilean judiciary. The Chilean courts were given sufficient space in the late 19<sup>th</sup> and 20<sup>th</sup> centuries to develop considerable professionalism and expertise on civil law and other private law matters. The high courts attracted talented lawyers with considerable sophistication in these areas. However, the court was never given the space to expand into public law matters; state-building appears to have occurred largely without the aid of the judiciary, and the party system resolved disputes between branches of government by itself, without the intervention of the courts. The Chilean Court did not play a significant role either in centralizing the country or in adjudicating disputes between major political parties or actors.<sup>73</sup>

Finally, a third set of courts developed considerable capacity in public law as well as private law. In Latin America, Colombia, Brazil, and (perhaps) Mexico all appear to be examples of this. In all three countries, the courts were important from the 19<sup>th</sup> century onwards in performing various tasks involved in state-building. In all three countries, there is some evidence that the judiciary played a role in centralizing large, decentralized countries with legacies of federalism. But the judiciaries were also involved in other tasks: in both Colombia and Mexico in the 1930s and 1940s, for example, the judiciaries were important in reinterpreting public law to legitimate

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<sup>73</sup> As Couso notes, judicial review in democratic Chile during the early and mid-20<sup>th</sup> century was carried out internally to the legislative branch, rather than by the judiciary. Moreover, the instrument of judicial review that did exist, the *recurso de inaplicabilidad por inconstitucionalidad*, was little used and legislation was given extreme deference by the judicial branch. See Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010*, 89 TEX. L. REV. 1517, 1524-27 (2011).

new, more interventionist states and to prevent conservative elements from blocking reform. In these countries, the courts attracted talented jurists who are comfortable resolving politically-salient questions. Moreover, political actors have often turned to the judiciary to resolve pressing problems facing their countries, since they view the courts as a competent institution for resolving disputes and fixing problems. In Colombia, this was manifested in 1991, when the Constituent Assembly imbued the newly-created Constitutional Court with an extraordinary set of legal instruments; in Mexico, it was manifested post-1994, when political actors turned to the judiciary as a key instrument in maintaining a level electoral playing field in a Mexico that was democratizing after years of one-party rule and largely rigged elections. In Brazil, finally, the judiciary was trusted both by the military regime – which gave it a large role in reviewing the convictions and sentences of military prisoners – and by constitutional designers during the transition to democracy, who gave the courts broad powers to monitor the distribution of powers between the states and the federal government and between the different branches of the federal government.<sup>74</sup>

The Colombian judiciary built up considerable capacity at least as early as the late-19<sup>th</sup> century, by performing a variety of tasks that were useful to political regimes in different periods. These tasks are examined in detail in Chapter 2, but they included centralizing power after the writing of the Constitution of 1991, helping to transform and modernize the public and private legal framework during the Liberal hegemony of the 1930s, and legitimating and helping to hold together the National Front regime after the 1950s. As in the United States, the Colombian Supreme Court built up power by playing a major role in state-building, and the Court was rewarded by receiving increasing power through time. This capacity in core political

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<sup>74</sup> On the role of the Brazilian courts during the military dictatorship, see ANTHONY PEREIRA, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA* (2005).

matters had an important influence on the 1991 Convention creating the Constitutional Court, where delegates – despite their displeasure with recent decisions of the Supreme Court – were willing to imbue the Constitutional Court with sweeping (and in comparative terms, almost unprecedented) powers, because they viewed the judiciary and law as ways to solve the most pressing problems that Colombian society faced. The Convention viewed the solution to the country’s problems in legal terms, and created a court which had possessed both the public action (abstract review over legislation at the initiative of any citizen, at any time) and the *tutela* (an extremely quick, flexible, and easy to use individual complaint mechanism).<sup>75</sup> The break, then, between the pre-1991 and post-1991 system of judicial review in Colombia is much smaller than is often supposed. The Supreme Court before 1991, like the Constitutional Court after 1991, has played a role at the center of the political system.

A focus on the historical development of judicial power helps shed light on a fact that has received little explanation or attention in the existing literature: Those courts identified as the strongest constitutional tribunals in the developing world – in places like India, South Africa, Hungary (in the 1990s), and Colombia – all had histories of judicial power. Strong courts did not spring up whole-cloth, but rather appear to be products of a longer historical development.<sup>76</sup> Many—although not all—of these courts gained strength while their countries were British colonies, and there appears to be at least some relationship between a British colonial tradition, as in India and South Africa, and strong courts. Second, the focus on the construction of judicial capacity may help identify strong courts existing in surprising political environments. For example, the Pakistan Supreme Court exists in an unfavorable political environment, with unstable democratic governments interspersed with interludes of dictatorship. Yet observers have

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<sup>75</sup> For details on these mechanisms, *see infra* Chapter 3.

<sup>76</sup> On the rule of law tradition in South Africa, *see* JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000* (2008).

noted that the Pakistan Supreme Court has shown surprising power, at times issuing decisions that have created important limits on the powers of dictators.<sup>77</sup> The behavior of the Court is difficult to understand if one focuses only on the political environment, but becomes more comprehensible if one considers the history of the institution. The judiciary, during and after the colonial period, has played a consistently important role in state-building, and this has created a court with considerable capacity and willingness to intervene on important political questions. This point – which suggests the generalizability of the argument – is treated in more detail in the conclusion.

Further, the standard story fails to explain the Court’s ability to survive repeated attempts at court-curbing and court-packing, virtually from its inception in 1991 up to the present. It is true that the Court in Colombia has acted in a generally (although not uniformly) fragmented political space since 1991. The party system was not only competitive, but over most of this period deinstitutionalized: the traditional two-party system (dominated by the historical Liberal and Conservative parties) broke down in the 1990s, leading to a Congress that was dominated by a combination of factions of the former parties and “electoral microenterprises,” or short-lived movements formed around particular personalities.<sup>78</sup> The deinstitutionalization of the party system is relevant to understanding the way the Court has gone about carving out political space. But as I show in detail in Chapter 8, neither fragmentation nor deinstitutionalization was the main variable that protected the Court from court-curbing or court-packing: instead, the Court’s own efforts to build a supportive shield of civil society groups, academics, and the middle-class are what protected the court, time and again, from political attacks.

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<sup>77</sup> See PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* (1995).

<sup>78</sup> See, e.g., Eduardo Pizarro Leongomez, *Giants with Feet of Clay: Political Parties in Colombia*, in *THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES* 78 (Scott Mainwaring et al., eds., 2006).

In the Colombian case, judicial power was constructed by the justices of the Constitutional Court after 1991. This construction was not, of course, undertaken on a blank slate: the history of judicial politics in Colombia and the long-term development of judicial capacity are important for understanding how the Court was able to accrue significant power. In particular, the historical dimension is helpful for understanding (i) why political elites were willing to allow the Constitutional Court to play such a significant role, (ii) why the Constitutional Court was imbued with such significant powers by the Constituent Assembly of 1991, and (iii) how high-ranking judiciaries in Colombia – including the Constitutional Court – were able to act as relatively autonomous institutions. Similarly, the political context in Colombia is relevant for understanding the possibilities for the judicial construction of power. The relatively deinstitutionalized, fragmented political system after 1991 made it relatively unattractive for members of the Court to seek strong alliances within the political party system.

With this framework, the choices made by the justices, particularly in the interim court of 1992 and the first full court of the 1990s, had important consequences for both the extent and shape of the power exercised by the Constitutional Court. Simply put, the existence of a durable activism by the Colombian Constitutional Court was largely a product of efforts of doctrinal construction and political alliance building carried out by justices on the Court. Moreover, as I show in detail in chapters 4 and 5, most of this construction was done by a particular set of progressive justices.

Doctrinally, justices on the interim court and the first full court built up a theory of constitutional meaning and filled gaps in the constitution in a coherent and powerful way that has proven very sticky through time. A set of progressive justices on the Court established a set of principles that aimed to make the long Colombian constitution coherent and to give the Court a

sense of “mission.” These justices also filled gaps in ways that gave the Court power over other political institutions: the president, the Congress, the ordinary courts, etc. The doctrines established by members of the first Courts thus formed the scaffolding for a durable form of activism. Internally to the Court, they have acted as a focal point helping to maintain attention on a particular set of issues. Externally to the Court, they provided a basis for allowing the Court to assert itself over institutions and practices that had long escaped judicial scrutiny.

At the same time, these progressive members of the Court worked towards establishing a set of political alliances to protect and promote the Court. As noted above, in the fluid and weak party environment of Colombia, cultivating ties with the party system was not a particularly appealing option. Justices on the Court instead cultivated close ties with a subset of the academic community, helping to provide a set of clerks to provide continuity on the Court and a supportive community to write in favor of it. Justices also developed ties with civil society groups, helping to build up a community and give it leverage over bureaucratic actors. Finally, the Court has taken decisions that have given it a high level of popularity with the middle class (particularly on economic issues), helping to cultivate popular support for the Court. In particular, the *tutela* has gained an almost mythic status within Colombian popular culture as an instrument by which ordinary citizens achieve results – access to healthcare and petitions, responses to petitioners, etc – within an otherwise dysfunctional bureaucracy. These groups have helped to shield the Court from political backlash: most prominently because the great popularity of the Court has made politicians fearful of attacks against it.

Finally, a focus on judicial efforts to construct power within the constraints of a political system is helpful in developing a more nuanced dependent variable, beyond just looking at judicial independence. The different kinds of political alliances that courts build across countries

might be an important variable in explaining the differing shape of judicial power across countries.<sup>79</sup> For our purposes here, we might focus on a single important variable: the shape and strength of the party system in a given country. Where parties are strong and institutionalized, in most cases judges will have strong ties to these parties. This will be particularly true in cases where the selection process gives a large role to the political branches, as with most constitutional courts around the world. Judges will tend to have backgrounds that are closely tied to these parties; moreover, where judges do not serve for life, their success in subsequent, post-court careers may tend to depend heavily on how well they carried out the platforms of these groups.<sup>80</sup>

A different pattern obtains where parties are relatively weak. Here, judges are unlikely to be closely tethered to particular political actors. This will be especially true if the design of the system, as in Colombia, privileges non-political actors (like ordinary judges) over politicians in the selection of the court. In some cases, constitutional court judges might be heavily influenced by other parts of the judicial hierarchy, and thus might seek to make decisions that do not upset these groups. In other cases, judges might be drawn to the academic communities from which judges and particularly their professional staffs are drawn. In yet others, judges might see advantages in playing directly to the public, hoping to launch or sustain political careers as political entrepreneurs. In the Colombian political context, direct and occasionally “populist” appeals to the public are a viable political strategy, because the party system is deinstitutionalized and thus the barriers to entry into the political system are low. The same is

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<sup>79</sup> For a consideration of the importance of judicial audience in shaping judicial behavior, see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2008).

<sup>80</sup> There is a small literature on judicial career paths, but this literature focuses on lower court judges. See Anibal Perez-Linan, Barry Ames, and Mitchell A. Seligson, *Strategy, Careers, and Judicial Decisions: Lessons from the Bolivian Courts*, 68 J. POL. 284 (2006).

not true in countries like Mexico and South Africa, where decisions against the interests of the major political parties are probable political death sentences.

The point here, at any rate, is not to build a theory of how strategies of judicial coalition-building allow for more nuanced analyses of judicial behavior, but just to point out that such a theory seems plausible. I return to the cross-country comparisons between Colombia and other key cases both inside and outside of Latin America in the conclusion to this dissertation.

### **III. The Plan of the Dissertation**

The rest of the dissertation focuses on explaining the emergence of a particular form of activism within the Colombian case. Chapters 2 and 3 focus on the “origins” of the Constitutional Court. Chapter 2 argues that the emergence of a strong court in Colombia after 1991 is inexplicable without considering the historical development of judicial review in Colombia since 1886. Judicial power in Colombia was not built up overnight; rather it was the product of a Supreme Court that had long been inserted into the state-building process to carry out important tasks. Chapter 2 thus shows that the Colombian judiciary gained power because of its usefulness to dominant political actors, and not because of its distance from prevailing political coalitions. Chapter 3 documents more particularly the creation of the Constitutional Court in 1991, and shows that its designers at the Constituent Assembly were not attempting to create a more independent judiciary. In many ways, they were instead trying to create a Court that was closer to the prevailing political regime, and they were motivated by a backlash against aggressive exercises of judicial review by the old Supreme Court in the 1980s.

Chapters 4 through 8 focus on explaining how the Court has built up its capacity and defended its power since 1991. Chapter 4 focuses on the act of doctrinal construction, considering how the Court synthesized a set of principles out of a long constitutional text in



order to build a sense of role and mission. Further, it shows how the early courts resolved a number of ambiguous points in ways that gave it supremacy as an institution over other political actors, even in domains (like emergency powers) where they had long acted with impunity. The creation of doctrine, of course, does not itself guarantee the effective assertion of judicial power, but it played a key role in several different ways. It provided a coherent focal point for actors inside the court, while giving the court the scaffolding it needed to assert itself over other political institutions.

Chapters 5, 6, and 7 show how the Court forged alliances with three distinct groups – an academic legal community, civil society groups, and the middle class – that served as an important source of protection and support for the Court. These three groups played somewhat different roles. A set of legal academics around the Court provided clerkship personnel, helping to ensure continuity (and at times a kind of rigidity) in the court’s decision-making. This influence has become particularly important as the composition of the justices themselves has shifted from primarily academic constitutional-law specialists at the inception of the Court to primarily career judges specializing in private law today. The Court has enjoyed a symbiotic relationship with the civil society groups surrounding it: it has provided these actors with more influence over the bureaucracy, and at the same time had depended on these groups for help enforcing complex decisions and for support when under attack from political actors. The important work of Charles Epp on “support structures” is thus incomplete in a key way: while courts may indeed need the help of “support structures” to carry out “rights revolutions,” they can to some extent influence the power, scope, and mission of these groups. Finally, the Court has long cultivated an important audience from the general public and especially the middle class. It has done this by constructing the *tutela* as an instrument open to middle-class interests

on social and related issues, and by granting most of the claims brought before it. It has also at times demonstrated a pull towards large-scale populism, most importantly during the deep economic crisis of the late 1990s, when it took massive steps to bail out homeowners and to maintain salaries for middle-class civil servants.

Chapter 8 considers the effect of these political alliances on an important realm: retaliation against the Court, either through court-packing or court-curbing. The evidence demonstrates that political fragmentation and de-institutionalization, while not irrelevant, were not the main factors protecting the Court. For example, court-curbing efforts were stopped because the groups support groups – academics, civil society groups, and the public – rallied around the Court in order to protect it. The Court thus in an important sense constructed its own shield against political retaliation. In particular, academics and civil society groups tended to reframe narrower attacks against the Court or its jurisprudence as being attacks against the Constitution of 1991 and the very popular *tutela* instrument. The Court's fear of taking on such popular institutions would then cause the attempts at court-curbing to fail.

Finally, Chapter 9 concludes by carrying out two tasks: placing the argument in a comparative perspective and developing its implications for theory in judicial politics and for policy practices. The argument suggests that the near-exclusive focus of the existing comparative literature on judicial independence is a mistake: it is time for scholars to focus on a more nuanced dependent variable for many purposes. The precise shape of judicial power – the *what* and *how* of the policy areas in which constitutional courts intervene – is at least as important a variable as whether or not the court is in general terms independent of the political branches. The same point has implications for the policy community: not all forms of judicial independence are created equal, and the question of whether judicial independence or activism is good or bad is

probably unanswerable in the abstract. Institutions promoting stronger courts or the rule of law need to be aware of the difficult tradeoffs and choices involved in different patterns of judicial empowerment.

## **Chapter 2: The Long-Run Construction of Judicial Capacity: The Colombian Supreme Court, 1886-1991**

In this chapter I argue that judicial capacity to intervene in political issues in Colombia was built up over a very long period of time. Moreover, I argue that the Court gained power because of its intertwinement with prevailing political regimes, rather than – as in the standard story – because of its distance from those regimes. The argument here tracks, in comparative terms, the argument made by Keith Whittington with respect to the United States.<sup>81</sup> Whittington argues that the United States Supreme Court was not set up to be independent of political forces. Instead, it gained power through time precisely because it was useful to one or another political faction. For example, in the late 19<sup>th</sup> century the Court was empowered by Republicans linked to business leaders in order to help root out protectionist legislation and other roadblocks put up by state and local governments.<sup>82</sup> American federalism created a significant need for this kind of judicial intervention – federal courts could often overcome state-level measures that could not be overcome by Congress or the President. Whittington thus tracks how the federal judiciary was given additional power – for example, more control over the Supreme Court’s own docket, or fewer judges – because these institutions were performing politically salient functions that were favorable to those in power. Put another way, courts were not above or independent from politics; they were an important part of various political regimes. And the accretion of power through time has made the Supreme Court a very powerful institution.

I make a similar argument with respect to the Colombian judiciary. The Colombian judiciary built up experience dealing with political matters from an early period. Virtually all

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<sup>81</sup> KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

<sup>82</sup> See *id.*; see also Howard Gillman, *How Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, *AMERICAN POLITICAL SCIENCE REVIEW* 96 (2002).

major political controversies were judicialized. However, it is wrong to see the judiciary as having been independent from political actors; instead, the Colombian judiciary was part of the prevailing political regime, and played an important role in carrying out functions for that regime. The judiciary gained additional power through time because it played these functions, and Colombian political and social actors began to see the Court as a solution to important problems. As I show in the next Chapter, even when the 1991 Constituent Assembly set out to discipline and punish the Supreme Court for excessive activism, it viewed the solution not as less judicial power, but as more judicial power of a different type.

Section I of this Chapter very briefly surveys the period from 1886 to the creation of the National Front in the 1950s – this period has not been the object of much extensive research, but I suggest from available evidence that the Court gained power through time because it was useful to prevailing political regimes at various moments. Section II looks in much more depth at the National Front period – I show in Section II.A that the Court was important not because it acted above politics or as an impartial arbiter between political forces, but rather because it helped to legitimate the National Front and to carry out core tasks that underlied the logic of the regime. In Section II.B, I demonstrate that as the consensus surrounding the National Front disintegrated, the Court grew at odds with prevailing political forces and began making important decisions that were at odds with prevailing political interests. This laid the groundwork for an attack against the Supreme Court during the Constituent Assembly of 1991 (discussed in the next Chapter) – in many ways the creation of the Constitutional Court in 1991 was a response to the decisions of the Supreme Court in the late 1970s and 1980s. But because the political landscape had been so heavily judicialized for so long, political actors saw the response to the Supreme Court not as being less judicialization, but rather as being more judicialization, of a different sort.

By this time, the Court had built of significant capacity for dealing with important political questions, and political forces accepted that role.

## **I. The Supreme Court Before the National Front: Vignettes from 1886-1957**

Little research has been done on the history of the Colombian Supreme Court; domestic authors working on legal history have, in a civil law tradition, preferred to trace the influence of treatise writers rather than writing about jurisprudence.<sup>83</sup> However, the evidence that exists suggests that the Court was carrying out politically important tasks from an early date. I do not in this Chapter explore why this occurred – that is a question that seems rooted in either political sociology or culture, and which I cannot effectively deal with here. What I do suggest is that these patterns tended to be self-perpetuating: once actors began to view the Court as a useful and politically important institution, they would continue to heap powers on it, increasing its ability to intervene in core political questions.

Two other introductory points are relevant here. The first point is that the Court was never really set up to be highly independent of political forces in this period. While the initial 1886 Constitution allowed judges to serve for life, a 1905 reform cut their term to five years. Thus, between 1905 and 1945, judges were selected by the President with the approval of the

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<sup>83</sup> There are some notable exceptions. For example, Jorge Gonzalez Jacome has written a detailed study of the political role of the Court during two periods, the creation of cassation in 1886 and the creation of the public action of unconstitutionality in 1910. *See* JORGE GONZALEZ JACOME, ENTRE LA LEY Y LA CONSTITUCION: UNA INTRODUCCION HISTORICA A LA FUNCION INSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA, 1886-1915 (2007). Mario Cajas has recently completed a comprehensive study of the history of the Supreme Court between 1886 and 1991, focusing particularly on the stage of siege jurisprudence, and emphasizing an institutionalist explanation for much of the Court's behavior. For example, Cajas argues that the Court often used doctrines strategically to dodge politically-difficult cases, so as to preserve the power of the Court. *See* Mario Alberto Cajas Sarria, *La Corte Suprema de Justicia en Colombia, 1886-1991: El Control Constitucional en una Perspectiva Historica y Politica* (2012) (unpublished Ph.D. dissertation, Los Andes University, Faculty of Law, on file with author).

Senate for short, five-year terms, which generally (if not inevitably) allowed a President to select his own Court, at least if he was willing to wait a year or two. After 1945, the five-year term was retained and the President sent three-member lists to the Congress, which elected the justices from those lists – this method gave somewhat more power to Congress while maintaining the same closeness between Court and political regime. The second, related point is that perceived attacks against the powers or composition of the Court were fairly rare, and associated with the dictatorships of General Rafael Reyes and General Gustavo Rojas rather than with civilian regimes. Where the Court was out of step with a political regime, the leaders of that regime could simply wait for a brief period of time, and then reconstitute a Court that was friendlier to their interests.<sup>84</sup>

#### **A. The Creation of Cassation: 1886**

The 1886 Constitution followed a period of civil conflict based largely on the question of how centralized the Colombian state should be. One group of mostly Liberals sought to perpetuate a decentralized or federal state in which local interests would predominate; they wanted to continue the federal and highly decentralized form of government that had been written into the 1863 Constitution. A second group of mostly Conservatives sought to centralize state power, believing that the existing state of decentralization was inhibiting economic growth

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<sup>84</sup> It was General Reyes who initially cut the life terms of the justices down to five years, a reform that was notably not reversed after the return to civilian rule. In the 1950s, General Rojas launched a sustained attack against the judiciary as being too closely affiliated with the two parties, forcing the members of that Court to resign in 1953 and to be replaced with justices who were handpicked by Rojas. He interfered with the judiciary again in 1956, creating a new Constitutional Business Chamber staffed with eight justices selected by Rojas. Another group of justices resigned over this incident and were replaced by the General. Attacks by ordinary civilian governments were unusual but not unheard of. For example, the conservative regime of Mariano Ospina Perez in 1949, which held power at the beginning of La Violencia in which inter-party violence raged throughout the country, passed a decree purporting to require a three-fourths majority in order to strike down the government's state of siege decrees. Ospina Perez faced a Court that was still affiliated with the Liberal hegemony of the 1930s and 1940s (see Section A.3 below), and feared opposition to some of his measures, which included the suspension of Congress. However, an institutional crisis was averted when enough liberal justices left to allow Ospina to have a sympathetic court. *See, e.g.,* Cajas, *supra* note 83, at 368-76.

and creating civil disorder. The Conservatives won the war and essentially imposed a centralized constitution on the country; the subsequent period was known as the “Regeneration.” The new constitution abolished the states that had existed under the old text and replaced them with departments which enjoyed substantially less autonomy. Along with this project, they gave the Supreme Court the power of cassation, allowing it to unify the jurisprudence of regionally-based courts on matters such as civil, commercial, and criminal law. The Court had not been given this power under the 1863 Constitution, since the different states were considered to have the power to create and interpret their own systems of law.<sup>85</sup> It is clear that the power of cassation, even though not a form of constitutional judicial review, was considered politically important.

Jorge Gonzalez Jacome has argued persuasively that the cassation function was a key part of the Conservative project of centralizing and unifying the country.<sup>86</sup> For example, the Court began publishing its decisions in the *Gaceta Judicial*, and in its first issue in 1887, made the following statement:

The absolute federal regime that has reigned in the Republic since 1863, created bigger and smaller substantial differences in the legislation of the nine states that are at present national departments, producing discord in social life, in families, in the security or property and in the judicial proceedings of Colombians [; these differences] have no reason to exist in the heart of a natural and historical united community that is linked by common sentiments, characters and necessities. To the ills caused by the diversity of nine bodies of legislation was added all of the national legislation, and nothing was more difficult in Colombia than achieving the unity of law and the uniformity of Justice. As a consequence, the Assembly gave new powers to the Judicial Power, and created the power of cassation as a new judicial procedure, with the laudable purpose of ensuring justice everywhere and opening the way for the highest court to establish principles and rules that will create a national jurisprudence and serve as a solid guarantee to all the interests in the rule of law.<sup>87</sup>

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<sup>85</sup> JAIME AZULA CAMACHO, 2 *MANUAL DE DERECHO PROCESAL CIVIL* 328 (1997).

<sup>86</sup> See GONZALEZ JACOME, *supra* note 83, at 45-79.

<sup>87</sup> Supreme Court of Justice, *Gaceta Judicial* No. 1, Bogota, Feb. 12, 1887, at 1.



Gonzalez shows how the Court's early decisions also focused on constructing a vision of the cassation mechanism that promoted it as a way to achieve systematic doctrinal uniformity on important matters, rather than as a mechanism to achieve procedural justice. In other words, the Court emphasized the importance of the Court for creating the new political order.

## **B. The Creation of the Public Action: 1910**

A second important moment occurred in 1910, when the Court was given a potent mechanism of judicial review, the public action, which allowed any citizen to launch a constitutional challenge of any law at any time. This mechanism, which continues to exist in Colombia, is one of the most potent forms of judicial review in the world. The absence of standing or similar justiciability requirements has allowed most important political controversies to reach the Court. The legislative history of the action is terse and obscure, making it difficult for scholars to figure out exactly why the action was introduced.

The historical context and the Court's early decisions, however, help to fill in some of the gaps in the record. The Regeneration period that followed the creation of the 1886 Constitution, and which was marked by thoroughgoing Conservative dominance, ended in the War of a Thousand Days between 1899 and 1902, which was a bloody conflict between the country's political forces. In the aftermath of that War, General Rafael Reyes served as a strong president who presided over a technocratic, coalition-based cabinet. Reyes's project depended heavily on the use of governmental money and power to modernize and industrialize the country. Moreover, Reyes took steps to modernize the country and weaken the regions by splitting the large and historically important regions into subparts and amending the Constitution to give Congress the power to make new regions or break up old ones rather easily. His presidency was successful in

achieving many of its goals but eventually fomented a backlash in some of the regions, where leaders in particular favored a more laissez-faire economic approach and resented Reyes's taxation and economic policies.<sup>88</sup> Thus, Reyes was forced to resign in 1909 by another coalition government, called the Union Republicana, which embodied this laissez faire orthodoxy. This new government held a Constituent Assembly in 1910, and passed a package of reforms including the creation of the public action.

There are at least two hypotheses to explain the creation of the public action. The first holds that the instrument was created by the new coalition government to strengthen the ability of the political minority within the coalition (generally the Liberals in this period) to protect itself.<sup>89</sup> In this view, the Court was expected precisely to play a kind of arbitration or insurance function, ensuring that no political movement would have its rights unduly trampled by the other party. A second theory instead emphasizes that the creation of the instrument had a more substantive political valence: it was part of the imposition of a more laissez-faire economic orthodoxy, and particularly aimed at weakening the ability of the president to take unilateral action against the wishes of the elite in Congress.<sup>90</sup> These explanations are not necessarily inconsistent; accompanying constitutional reforms like the one that shortened the presidential term to four years could support both views. And there is some evidence to support the first

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<sup>88</sup> The immediate trigger was controversy over Reyes' attempt to settle the Panama Canal issue with the United States, but it is clear that bigger ideological issues surrounding economic policy and centralization lay in the background. *Humberto Velez Ramirez, Rafael Reyes: Quinquenio, regimen politico y capitalismo (1904-1909)*, in 1 NUEVA HISTORIA DE COLOMBIA 207-12 (1984).

<sup>89</sup> See Gonzalez Jacome, *supra* note 83, at 101-05 (2007); Maria Jose Maya, *Discordia, reforma constitucional, y Excepcion de Inconstitucionalidad*, 42 REVISTA DE ESTUDIOS SOCIALES 118 (2012).

<sup>90</sup> See ALFONSO CHARRIA ANGULO, *LEGALIDAD PARA TIEMPOS DE CRISIS* 130-44 (1984)

hypothesis: other reforms from 1910 aimed at strengthening electoral guarantees for the opposition, for example.<sup>91</sup>

But the neutral, independent judiciary hypothesis fails to explain several facts. First, as Mario Cajas has pointed out, the Court in this period dodged the key cases that split the new coalition rather than deciding them. For example, the Court in 1912 refused to rule on a case that pitted a fiscally conservative president, Carlos Restrepo, against a Congress that wanted to spend on public works programs. The Congress overrode the president's veto of a significant spending measure, and the president challenged the bill on the grounds that there were procedural errors in its approval. However, the Court refused to hear the case, holding that it lacked the power to judge constitutional errors in the passage of legislation.<sup>92</sup> Similarly, the Court in July 1914 declined to hear a challenge to the Urrutia-Thompson treaty that finally settled the secession of Panama, a tortuous issue in Colombian politics for several decades and one that again split the ruling coalition. The Court held that it lacked the power to hear a challenge to a treaty.<sup>93</sup> It is difficult to view the case as an arbiter between political forces if it showed little interest in deciding the disputes that split the major political forces which were then-governing the country.

Further, this hypothesis downplays the substantive valence of the Court's early decisions. The Court focused largely on protecting laissez-faire economic interests, and most importantly in striking down actions of Reyes that were seen as hostile to the interests of the laissez-faire coalition responsible for removing him. In other words, the Court served as part of the political

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<sup>91</sup> For an overview of the 1910 reforms, see, for example, *Juan Carlos Esguerra Portocarrero, La reforma constitucional de 1910*, 2 HISTORIA CONSTITUCIONAL DE COLOMBIA 83 (Jaime Vidal Perdomo & Augusto Trujillo Munoz, eds., 2d ed. 2012).

<sup>92</sup> See Decision of April 20, 1912, 20 Gaceta Judicial, No. 1019, p. 990-1039.

<sup>93</sup> See Decision of July 6, 1914, 23 Gaceta Judicial, Nos. 1147-1148, p. 11.

regime that toppled Reyes, rather than as a neutral arbiter. And the Court was empowered in order to serve those interests.

The Court faced several key problems in the post-Reyes era. First, and most obviously, the actors who had removed Reyes had to contend with a series of laws, particularly on taxation and regulatory policy, which were seen as excessively interventionist and dictatorial in nature; the Court helped to remove these laws. The new regime did not want to destroy the entire edifice built by Reyes; indeed it saw value in maintaining some of his work while removing other key pieces.<sup>94</sup> Most of these decisions were founded on the rights to acquired rights (article 31) and to property (article 32). For example, the Court struck down a tax on the ownership of emerald mines, holding that the tax violated the right to property because the property had already been taxed at the time of acquisition.<sup>95</sup>

Similarly, the Court struck down parts of a 1907 transportation law that forced train and other public transportation companies to (a) give certain classes of people free transport, and (b) required their tariffs to be approved by the Ministry of Public Works.<sup>96</sup> The Court held that the first provision was contrary to the right to property, while the second violated the right of these businesses to freely exercise their profession because the government was overstepping its rights to inspect and regulate businesses for security, morality, and public health. As the Court stated:

Article 44 of the Constitution establishes that any person can carry out any honest trade or occupation, without needing to belong to a guild or trade association, and that the authorities will inspect industries and professions for their morality, security, and to protect the public health. The precious right that this

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<sup>94</sup> See Jorge Orlando Melo, *De Carlos E. Restrepo a Marco Fidel Suarez. Republicanos y gobiernos conservadores*, in 1 NUEVA HISTORIA DE COLOMBIA 215, 220-25 (1984).

<sup>95</sup> See Corte Suprema de Justicia, Gaceta Judicial Nos. 1091-1092, at 4-5 (1912); *see also* Decision of Nov. 21, 1912, 22 Gaceta Judicial, No. 1091, at 1146 (striking down a Reyes-era state of siege decree taking property to certain springs, lagoons, and swamps on the ground that it violated the right to property).

<sup>96</sup> See Corte Suprema de Justicia, 23 Gaceta Judicial, at 2-9 (1913).

constitutional norm guarantees, and the liberty of industry within the limits signalled by it, involves not only the faculty to carry out any trade or honest occupation, but also to enjoy the benefits and products that are obtained in the exercise of the industry or profession, since if the law gives a right to an end, it clearly also gives a right to the adequate means to obtain it. If the industry established, for example, is that of transportation, the businessman can freely set the price of the service offered, which cannot be regulated.... In other words, it is the economic law of supply and demand which in the end sets the price of the services offered in all classes of industries and professions.<sup>97</sup>

Alfonso Charria Angulo has listed the major decisions of the Court in the post-Reyes era, finding that it struck down important pieces of legislation passed during the Reyes era and thus was “especially jealous in its control of the laws and the decrees” passed during the Reyes government.<sup>98</sup> In contrast, when reviewing new pieces of legislation passed after Reyes’s term, the Court generally showed “self-restraint,” as in the budgetary and treaty cases noted above.<sup>99</sup> Thus, the Court was invested with the ideology of the winning, laissez-faire coalition, and was charged with carrying out a task – partially dismantling the state constructed by Reyes – that was useful to the new regime.<sup>100</sup>

A second major task of the post-Reyes Court was to legitimate the new political order. This was a complex task: many of those who had ousted Reyes, including the new president Carlos Restrepo, believed that he had fundamentally violated the constitutional order. In particular, Reyes had used state of siege powers to close down the Congress and to appoint a National Constituent and Legislative Assembly to carry out both constitutional reforms and ordinary actions of governance. These actions were obviously of dubious legality, and therefore

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<sup>97</sup> *Id.* at 5.

<sup>98</sup> CHARRIA ANGULO, *supra* note 90, at 142.

<sup>99</sup> *See* GONZALEZ JACOME, *supra* note 83, at 105-12.

<sup>100</sup> The usefulness of the Court to the post-Reyes regime on this point should not be overstated. The Congress itself could and did strike down many of the acts of the Reyes government, which raises the question of why the Court was seen as important. *See id.* It may be that the Court provided the new regime with legitimacy by holding that Reyes’s actions were unconstitutional, or it may be that the Court was effective at discriminating between measures passed by Reyes that should be disgarded and those that should be maintained.

so were the many constitutional reforms and laws passed by this Assembly. Yet the new, post-Reyes institutional order faced an odd conundrum: if the old regime was illegal, then all of its acts would be void, including laws and decrees seen as useful by the new regime. More importantly, if the old regime was illegal, so was the new regime and its actions. The new regime did not claim to be either a clean break from Reyes or a legal restoration of the old status quo. Instead, those who replaced Reyes in power had simply forced him to resign and had then governed under the legal framework he had created.<sup>101</sup> To be sure, many of the laws and constitutional reforms he had enacted were repealed or amended by either Congress or a new Constituent Assembly, or struck down by the Supreme Court. But the new Congress decided to maintain existing laws and decrees passed during the Reyes government in force until legally derogated by the new institutions. Indeed, the Congress itself had been elected using the procedure laid out in one of Reyes's constitutional reforms.

It fell to the Supreme Court to straighten out this problem, which it did in a 1912 case involving the legality of a contract signed during Reyes first state of siege.<sup>102</sup> The facts of the case were quite prosaic – the national Attorney General (*Procurador General*) sued an individual who had bought land from the government under Reyes, arguing that the 1907 contract authorizing the purchase was void and that the land should be restored to the state. The Attorney General argued that laws pre-existing the Reyes government had set out certain formalities for the sale of land, that the contract selling the land in this case had ignored those formalities, and that Legislative Decree 34 of 1905, which had attempted to nullify those formalities and give the president more power to sell public land, was itself illegal as of the date of the sale. Legislative

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<sup>101</sup> See CHARRIA ANGULO, *supra* note 90, at 100-03.

<sup>102</sup> Corte Suprema de Justicia, 21 Gaceta Judicial, 231-44 (1912). For a fuller commentary on the decision than is possible here, see CHARRIA ANGULO, *supra* note 90, at 130-44.

Decree 34 had been issued by the president during a State of Siege in February 1905; in March 1905 the President declared the State of Siege to be at an end but also stated that the decrees issued “will remain in effect and with the force of law until the Legislative Power states otherwise.” The Attorney General argued that the sale was void because it had gone through long after order had been reestablished, and under the constitution no State of Siege decree could remain in force following the reestablishment of order.

The Supreme Court however rejected this argument in a brief opinion, noting that an April 1905 law of the Assembly had ratified the decree as “permanent law,” and stating that such a ratification could act retroactively to approve the decree as of the date of its issuance. The Court noted:

It should be added that the Legislative Branch has understood things this way in a general sense: the National Assembly of 1905 met in virtue of Legislative Decree Number 29 of that year, which is identical to the [Decree] 34. That Constituent and Legislative Assembly passed all of the laws from 1905 to 1908, as well as various acts reforming the constitution, among others Number 9 of 1905, which served as the basis for the convocation of the Assembly of 1910. This corporation dictated laws and constitutional reforms, including number 80 of the expressed year, on which the election of the subsequent congresses has depended.<sup>103</sup>

What is important here is not the specific legal analysis, which eludes many of the key questions surrounding the scope and limits of the State of Siege power found in the 1886 Constitution.

What is important, instead, is that the Court made a self-conscious effort to legitimize the current regime by denying the illegitimacy of the Reyes administration. Again, the Court is better seen as a part of the regime embodied by the coalition that overthrew Reyes, rather than as a merely neutral arbiter between competing factions.

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<sup>103</sup> *Id.* at 133.

### C. The “Gold Court” of the 1930s

The politics of the 1930s resembled those of 1886, rather than those of the Reyes and post-Reyes period: a hegemonic political party (this time the Liberals) held power continuously between 1930 and 1946, and imposed its vision on the country. The important 1936 constitutional reform was an ideological reform that reflected the programmatic vision of the Liberals and the problems that they saw in the Conservative-imposed, centralized and religious 1886 Constitution. Indeed, President Alfonso Lopez Pumajero noted that the reforms had “broken a vertabrae” of the 1886 Constitution by changing many of the provisions giving Catholicism a privileged place in Colombian life.<sup>104</sup> The reform aimed at a set of goals important to Liberals in this area.<sup>105</sup> Economically, it redefined the right to property as implying “social obligations” and noted that expropriation could occur without compensation for reasons of “equity” if an absolute majority of both houses of Congress voted in favor. It also made explicit the President’s power to “intervene” in the economy after receiving Congressional authorization. Finally (and most controversially), the reform significantly changed the place of the Catholic Church in the Colombian civil order, for example by derogating provisions providing that public education will be run in accordance with the Church and making the Church the official religion of the nation.

For about a year in the early part of President Lopez’s term, the Court was still controlled by Conservatives, who blocked some of the President’s measures. For example, the Court struck down his attempt to enact sweeping tax reforms by executive decree, forcing him to get

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<sup>104</sup> Alvaro Tirado Mejia, *Lopez Pumajero: La Revolucion en Marcha*, in *I NUEVA HISTORIA DE COLOMBIA* 305, 345 (2001).

<sup>105</sup> For an overview of these reforms, see Cesareo Rocha Ochoa, *La Reforma a la Carta Politica de 1936*, in *2 HISTORIA CONSTITUCIONAL DE COLOMBIA* 115 (Jaime Vidal Perdomo & Augusto Trujillo Munoz, eds., 2d ed. 2012).



congressional approval for these measures.<sup>106</sup> Similarly, even after Lopez was able to select the Court (in 1935), the Court still blocked some of his measures – for example, the Court blocked substantial parts of a 1937 bill authorizing the government to intervene in the multinational-dominated banana industry (which had gotten a black eye following a massacre of United Fruit workers on the coast in 1928).<sup>107</sup> The Court held that some of the provisions allowing the president to intervene in the industry were too vague, and that other provisions allowing him to expropriate the property of the banana companies in certain circumstances were inadmissible because the provisions did not give reasons for the expropriation. Thus, the Court initially displayed some reluctance to interpret the new constitutional provisions broadly.

However, as the Court turned over in 1935, and was replaced by a more Liberal set of judges, the Court undertook a comprehensive reworking of private and public law doctrines, earning the moniker the “gold court.” As noted by other scholars, the Court’s emphasis in this period was really on private law.<sup>108</sup> The focus in this section, on public law, is of necessity highly partial – during this period the Court was issuing only a few public law decisions a year, and many were on unimportant measures. Still, the Court did issue key decisions in the late-1930s and early-1940s that reinterpreted the concept of property, state intervention, and Church-state relations in ways that were critically important to the legitimacy and effectiveness of the Liberal political regime.

For example, in 1938 the Court issued a famous decision on the right to property after the 1936 reforms. A citizen challenged a law allowing compensation for expropriations to be set at artificially low levels (by tying compensation to values fixed for administrative purposes by land

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<sup>106</sup> See Tirado Mejia, *supra* note 104, at 336.

<sup>107</sup> See Decision of Sept. 4, 1939, 48 Gaceta Judicial 610-649 (1939).

<sup>108</sup> See, e.g., DIEGO EDUARDO LOPEZ MEDINA, *TEORIA IMPURA DEL DERECHO* 303-333 (2004) (mapping out many of these shifts and arguing that these changes were important but short-lived in Colombia).

registries), and allowing authorities to take possession of an expropriated property before the judicial process had been completed and thus compensation had been paid.<sup>109</sup> The Court upheld the measure with little difficulty, noting in the process the ways in which property had been redefined. The Court quoted the French scholar (and statist) Luis Duguit for the propositions that “[i]f in any given moment individual property ceases to correspond to a social necessity, the legislator should intervene to organize another form of appropriation of riches,” and that “[i]t can be said that the fact of the conception of property as a subjective right disappears to give place to the conception of property as a social function.”<sup>110</sup> The Court also noted that the 1936 reforms had “relativized the fundamental right to property, accentuating the submission of it to the interests of the collectivity and with that limiting the arbitrary disposition of property.”<sup>111</sup>

Similarly, in a second case, the Court upheld a tax that was designed to force property owners to pay for the value of adjoining public works that conferred benefits on them.<sup>112</sup> The demandant argued that the tax was arbitrary and singled out individual homeowners, and was thus unconstitutional. The Court found, on the contrary, that the provision harmonized very well with the 1936 reforms:

This reform was without doubt inspired by the modern concept that teaches that property, from an economic point of view, is a means of production that interests not only its owner and beneficiary, but all of society, whose life it feeds. With this criteria founded in the double interest, individual and social, the laws impose every day new rational limits on the arbitrary exercise of the absolute right of dominion as established in the old definition of the Civil Code[. I]n this way it is possible to oblige the owner of land to put it in cultivation, because the title of owner carries with it the implicit obligation to put their land into active cultivation

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<sup>109</sup> See Decision of Mar. 10, 1938, 48 Gaceta Judicial 193-203 (1938).

<sup>110</sup> *Id.* at 194. As noted by Lopez Medina, Duguit was a particularly important figure in Colombia during this period, especially for the idea of that law implied “social functions.” See LOPEZ MEDINA, *supra* note 108, at 326 n.184.

<sup>111</sup> *Id.* at 193.

<sup>112</sup> See Decision of Dec. 3, 1937, 45 Gaceta Judicial 794-801 (1937).

within a sense of solidarity, leading to an increase in general riches and in the common good.<sup>113</sup>

Using this theory, the Court had little trouble upholding a tax that made landowners pay for the additional value granted to their properties through public spending projects.

The Court used similar concepts in another famous decision, upholding various provisions aimed at aiding debtors.<sup>114</sup> The provisions at issue, for example, placed a tax on excessive interest charged by creditors and gave that money back to debtors, in order to favor debtors. While the Court expressed some discomfort with the idea that taxation could be used for regulatory (as opposed to revenue-based) reasons, it borrowed concepts from its reworking of contract law (particularly ideas of “good faith” and “abuse of right”) to uphold the provision at issue.<sup>115</sup> Another part of the challenged laws changed the ratio at which Colombian money was tied to gold and allowed debts contracted in foreign currency to be reset in Colombian currency in certain circumstances. The Court extensively reviewed what it saw as the modern theory of money, noting that “the ideal unit of the monetary regime does not constitute a subjective right,” but instead was a “prerogative” of the state to set as it wished.<sup>116</sup>

The Court also extensively reviewed the nature of the provisions found in the Constitution, dividing them into four groups – absolute fundamental rights, relative fundamental rights, institutional guarantees, and principles of democracy.<sup>117</sup> The first set, which involved rights like the right to personal liberty and the inviolability of the home, were guaranteed in order to give individuals a “sphere of liberty” that was always protected; the second, involving rights like liberty of the press, profession, association, and religion, were rights that were social and

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<sup>113</sup> *Id.* at 798.

<sup>114</sup> *See* Decision of Feb. 25, 1937, 44 *Gaceta Judicial* 613-622 (1937).

<sup>115</sup> *See id.* at 614-17.

<sup>116</sup> *Id.* at 621.

<sup>117</sup> *See id.* at 620-22.

political in nature and that were not granted absolutely but only within the existing limits of law. Yet other provisions found in the Constitution, like the principle of acquired rights or non-retroactive application of the law, were not fundamental rights at all, but mere “institutional guarantees” – they might be designed to strengthen and mediate between fundamental rights, but were not themselves such rights. Finally, the Court noted that many of the provisions in the Constitution formed part of the principle of democracy, and that duly-passed laws were entitled to respect because they were emanations of democratic will. Thus, the petitioner’s argument that the laws at issue were unconstitutional because they retroactively changed the terms of contracts would not prevail, because of “the primacy of the formal-political element of democracy over the institutional guarantee of the non-retroactivity of law,” or in other words, “the unconditional primacy of the public over the private.”<sup>118</sup>

The reinterpretation of public law that the Court is undertaking in these decisions was important even though it was not “rights protecting” in the traditional sense.<sup>119</sup> The point of these decisions, as in the United States and elsewhere in the same period, was not to protect individuals from the state but to give the state the power and space to use law as an instrument to achieve new goals. These decisions should be seen as helping to create that space by denying that law is full of natural conceptions of property and contract rights that are unalterable by state action. For example, the reinterpretation of constitutional theory in the prior decision was important because it limited the extent to which constitutional rights stood as a barrier against interventionist laws – only “absolute” fundamental rights were now untouchable by the state, and with all other classes of activities the democratic principle stood as a crucial counterweight to

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<sup>118</sup> *Id.* at 621.

<sup>119</sup> See, e.g., Manuel Jose Cepeda, *La Reforma de 1936 y Las libertades Publicas: Que ha hecho la Corte Suprema?*, in *ESTADO Y ECONOMIA: 50 ANOS DE LA REFORMA DEL 36*, at 63 (Alvaro Tirado Mejia, ed., 1986) (arguing that even the Gold Court did little to enforce the new rights found in the 1936 reform).

any claim by the individual. In short, the Court helped to reconstruct the legal order in ways that made the dramatic interventions of the Liberal regime in areas like tax reform, agrarian reform, and labor reform possible.

As the Court acted in ways that aided the political regime, the regime responded by rewarding and strengthening the Courts. For example, in 1936, the Liberal-dominated Congress passed Law 96 of 1936, which gave the Court more sweeping powers when hearing a public action. The statute, *inter alia*, allowed the Court to compare the text of the law at issue to any constitutional provision, rather than simply those provisions stated in the demand, and gave public actions to the entire Supreme Court, rather than simply to its Chamber of General Business.<sup>120</sup> Further, in Lopez Pumajero's second term, between 1942 and 1945, he again turned towards constitutional reform, this time in order to create a series of structural reforms that would complement his earlier programmatic reforms. The President saw these reforms as closely linked to his early reforms, noting in introducing them that the 1936 reform "remained truncated" because the organic part of the Constitution had not been touched.<sup>121</sup> The reforms particularly focused on increasing the powers of the President, but also strengthened the power of the Supreme Court over the lower courts. For example, the reform took away the power of the departmental assemblies to send lists to the Supreme Court for the selection of judges on Superior Tribunals of Judicial Districts, instead leaving the entire selection of those judges in the hands of the Supreme Court.<sup>122</sup> Once again, the Court used its additional faculties to aid the political regime in which it was embedded, and as it did so, it was rewarded with additional capabilities.

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<sup>120</sup> See Law 96 of 1936, April 24, 1936, in *Diario Oficial* No. 23216, June 25, 1936.

<sup>121</sup> See Gustavo Humberto Rodriguez, *Segunda Administracion de Lopez Pomajero*, in 1 *NUEVA HISTORIA DE COLOMBIA* 373, 387-88 (2001).

<sup>122</sup> See Augusto Trujillo Munoz, *La Reforma Constitucional de 1945*, in 2 *HISTORIA CONSTITUCIONAL DE COLOMBIA* 161, 167-68 (Jaime Vidal Perdomo & Augusto Trujillo Munoz, eds., 2d ed., 2012).

## II. The Supreme Court During the National Front

In this section I focus on the role of the court during the National Front period. At first glance, this period (like the post-Reyes period) would appear to fit the “political competition” story very well. Following a prolonged period of severe partisan violence called “La Violencia,” one of Colombia’s few genuine dictators, General Gustavo Rojas Pinilla, took over and ruled the country. The exiled party leaders, realizing that they needed a solution both to end the partisan violence and to expel the (somewhat populist) dictator, agreed on a pacted democracy in cooperation with certain elements of the military.<sup>123</sup> In the new regime, which included pervasive constitutional reforms approved in a plebiscite, Liberals and Conservatives agreed to evenly split posts in the Congress and in the public administration, and to rotate the presidency for four consecutive four-year terms. The new constitution also included a highly independent judiciary – posts on the Supreme Court would be evenly split between Liberals and Conservatives (parity), justices would serve for life, and vacancies on the Court would be filled not by any outside political actors, but instead by the remaining members of the existing court itself (cooptation). It would seem, then, that the Court was set up to be highly independent as an important way to maintain the interparty coalition and to arbitrate interparty disputes.

But considered in more depth, this simple story becomes less plausible. First, the new design of the judiciary was included at the insistence of the military – it was not part of the initial inter-party pact. The judicial reforms, along with a provision requiring that a certain percentage of the budget be spent on education, were the only major contributions of the military to the

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<sup>123</sup> For overviews of this period, see, for example, Gabriel Silva Lujan, *El origen del Frente Nacional y el gobierno de la Junta Militar*, in II NUEVA HISTORIA DE COLOMBIA 179 (2001); DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 223-48 (1993); ROBERT H. DIX, *COLOMBIA: THE POLITICAL DIMENSIONS OF CHANGE* 129-68 (1967).

National Front.<sup>124</sup> While the motives of the military are opaque, the fact that the military rather than the parties reformed the judiciary muddies any simple account that the judiciary was designed to mediate interparty disputes.<sup>125</sup> More importantly, as an instrument of inter-party cooperation, the judiciary seemed pretty redundant. Other instruments in the pact, such as the alternation in the presidency, parity in both the Congress and public administration, and a requirement that major pieces of legislation be approved by a two-thirds majority, seem more than adequate to protect the interests of both the parties or their major factions.

There were perhaps three types of tensions in the National Front. The first were tensions between the two major parties. These sorts of problems were largely taken care of by the overall design of the system – the judiciary was not really necessary to defuse these problems because the parity and alternation principles already tended to defuse them. Moreover, these tensions had already been greatly reduced by the traumatizing experience of *La Violencia* and the resulting dictatorship. There is thus no real evidence that the Court was heavily involved in these issues.

A second tension was between insiders (the mainstream Liberals and Conservatives), and outsiders such as leftist groups and populists left over from the Rojas dictatorship. The leftists increasingly turned to violence outside the system (feeding the FARC and other guerrilla

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<sup>124</sup> The parties wanted magistrates to be divided equally between them (parity), but they rejected both the idea of life terms and the cooptation system for replacement, preferring a system like the traditional one that gave them more of a say in selecting new justices. See Mauricio A. Plazas Vega, *El Frente Nacional*, in 2 HISTORIA CONSTITUCIONAL DE COLOMBIA 193, 262 (Jaime Vidal Perdomo & Augusto Trujillo Munoz, eds., 2d ed. 2012) (quoting Circular No. 59, Oct. 1957, of the Direccion Nacional Liberal).

<sup>125</sup> The military's motives may have been connected to the attacks against the judiciary carried out by General Rojas. Rojas argued that the Colombian judiciary was too closely tied to the parties and thus insufficiently technocratic or professional. It appears that members of the junta ruling Colombia after Rojas's fall were attentive to the critique. For example, the Junta stated in 1957 that "if the life term of magistrates of the High Court is combined with an adequate career system, such that justices would only arrive at the highest court after having served, through a rigorous system of promotions, in the lower reaches of the judicial branch, ... very firm bases would have been established, within the limits of human imperfection, to achieve the ideal of an autonomous, wise, and oportune judicial branch." SECRETARIA GENERAL DE LA JUNTA, JUNTA MILITAR DE GOBIERNO: ITINERARIO HISTORICO 100 (1957).

groups), but the populists, led by ANAPO, which was controlled by Rojas himself, constituted the greatest electoral threat to the National Front. Here again, the overall design of the political and electoral system was very effective in excluding outsiders, and at least intermittently effective in coopting support by coming up with policy responses that appealed to the urban and rural masses. The Court's major role here was in creating additional legitimacy for the system. It sometimes legitimated the overall system by allowing certain forms of political competition that the dominant political actors would have suppressed. Further, it almost inevitably upheld major pieces of reform legislation against challenges that they violated rights to property, acquired rights, etc. Finally, it legitimated exercises of presidential power via the state of siege mechanism against charges that they violated constitutional rights or that they constituted an extralimitation of presidential power.

A major example of the first action occurred early in the National Front, when the Court closely monitored the congressional trial of former dictator Rojas Pinilla, first throwing out some charges and requiring certain norms of due process, and after Rojas's conviction and relatively mild sentence of loss of political rights, eventually dismissing all charges against him and reinstating his full political status.<sup>126</sup> The Court thus allowed Rojas to lead ANAPO and to compete against the National Front, where he would come quite close to defeating the official candidate, Misael Pastrana, in 1970. These decisions might best be interpreted as reactions to the

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<sup>126</sup> The Court acted here in a series of decisions spread out over several years. First, in two key decisions in 1959 and 1960, the Court established the rules of process for trying an ex-president, which are not well-signaled in the Constitution. The Court held that the Senate had the power to determine the political responsibility of the ex-president, but the Court maintained power to determine criminal responsibility. *See* Gaceta Judicial, Tome 90, Nos. 2211-2212, pgs. 493-497 (1959); Auto of Aug. 2, 1960, Gaceta Judicial, Tome XCIII, Nos. 2228-2229, pgs. 20-42. The Court also threw out certain charges against Rojas, holding that the statute of limitations had run. *See id.* at 41. After finding other charges – such as bribery – to be founded in the record, see Auto of Aug. 14, 1961, Gaceta Judicial, Tome XCVI, Nos. 2242-2244, pgs. 42-80; the court eventually absolved Rojas of these charges. Decision of July 31, 1963, Gaceta Judicial, Tome 103, Nos. 2268-2269, pg. 21-33.



excessive zeal in the Front for excluding all other political movements, which tended to drive dissidents outside of the system and into violence.

The second sort of legitimizing function was more prominent. Some of the National Front presidents, particularly Carlos Lleras Restrepo (1966-1970) and his successor Misael Pastrana (1970-1974) launched significant reform programs as a reaction to the threats from both leftist groups and ANAPO. The Court rejected challenges to these major reform initiatives, in the process refusing to give the constitutional rights guarantees expansive interpretations.<sup>127</sup> Indeed, it is striking that the Court did not interfere with the major policy initiatives of Colombian administrations until the 1980s, and that it was never really willing to use constitutional rights, such as the right to property, to block these efforts. Likewise, the Court generally upheld the major uses of state of siege powers by Colombian presidents until the 1980s, and these decisions at times played an important legitimating function. For example, President Turbay in the late-1970s issued a state of siege decree called the Statute of Security in 1978, which increased the penalty for various crimes, created new crimes with vague definitions like “subversion,” and gave the military and the police sweeping new powers to punish crimes without judicial involvement. The Court upheld almost all of these measures, and Turbay trumpeted the decision as a way to placate both domestic and international critics.<sup>128</sup>

But perhaps the Court’s most important task was in monitoring a third type of tension created by the system: the tension between Congress and the President that was created by the structure of the system itself. Elements of the Colombian political system, such as the patronage-

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<sup>127</sup> See, e.g., Decision of Dec. 11, 1964, Tome CIX, No. 2274, pgs. 38-78 (upholding an effort of Agrarian reform against charges that it violated the separation of powers by creating an special state entity, the Colombian Institute of Agrarian Reform); Decision of Aug. 25, 1977, 71 Jurisprudencia y Doctrina 799-808 (upholding a legal framework and presidential decree establishing rent control).

<sup>128</sup> See, e.g., Decision of Oct. 30, 1978, 85 Jurisprudencia y Doctrina 11-47.

based, rural-dominated Congress, combined with elements of the design of the National Front (particularly the parity requirement and the need for two-thirds approval for many major pieces of legislation) to create a Congress that was increasingly reactionary and detached from national political issues. Congressmen tended to focus on passing individual, localized spending bills that benefitted their constituents, while the two major parties lost force and became increasingly factionalized due to the ban on inter-party competition. Presidents, meanwhile, tended to represent more progressive, change-oriented elements: they tended to lead the charge to make the National Front system more effective and more able to respond to the threats posed by outsider movements.<sup>129</sup> This progressive/conservative or national/local split divided the two major parties along factional and other lines; as noted by Graber in the context of the United States, these divides made it more difficult for the political system itself to handle these issues. The Courts thus played a major role in rationalizing the system and in particular in ensuring that the reform-minded presidents possessed the resources needed to govern effectively.

This was a major concern of the Court even before the 1968 Constitutional reforms, which emphasized these problems and attempted to resolve them. Much of the Court's jurisprudence in the early period of the National Front aimed at striking down public work or pork barrel projects objected to by the president, and which were not contemplated by a previously defined legal plan. A set of constitutional amendments in the 1940s had attempted to rationalize public spending and congressional behavior by giving Congress the power to adopt "the plans and programs" for economic development and public works, and then limiting its

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<sup>129</sup> For an analysis of this dynamic, see for example, Ronald A. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 110 (Scott Mainwaring & Matthew Soberg Shugart, eds., 1997).

power to “decree public works” on the existence of previous “plans or programs.”<sup>130</sup> Further, the Congress had power to foment “useful enterprises or activities worthy of support,” but again only in “strict subjugation to the corresponding plans and programs.”<sup>131</sup> The Court very actively enforced these provisions in the early period of the National Front; indeed, this provision appears to have been by far the most commonly invoked in the 1958-1968 era to strike down laws.<sup>132</sup> Congress had passed a 1946 law laying out some general requirements for public works projects, for example that they include budgets and plans, and comply with other formal requirements. The Court actively struck pork barrel projects down when they did not comply with these requirements.

#### **A. The 1968 Constitutional Reforms**

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<sup>130</sup> See CONST. COL. (1886), art. 76, secs. 4 & 19.

<sup>131</sup> See CONST. COL. (1886), art. 76, sec. 20.

<sup>132</sup> For examples, see Decision of Jan. 31, 1961, *Gaceta Judicial*, Tome XCIV, No. 2235-2236, pg. 469-71 (striking down a public works project in Ituango); Decision of Jan. 31, 1961, *Gaceta Judicial*, Tom XCIV, No. 2235-2236, pg. 472-476 (same with respect to a project in San Rafael de Negua); Decision of Feb. 11, 1963, *Gaceta Judicial*, Tome 91, No. 2266, pgs. 8-12 (same with respect to a facility in Barranquilla); Decision of Oct. 2, 1963, *Gaceta Judicial*, Tomes 103-104, Nos. 2268-2269, pgs. 36-37 (same with respect to a public works project in Valdivia); Decision of Oct. 30, 1963, *Gaceta Judicial*, Tomes 103-104, nos. 2268-2269, pgs. 40-43 (same with respect to parts of a highway funding bill); Decision of Nov. 12, 1963, *Gaceta Judicial*, Tomes 103-104, nos. 2268-2269, pgs. 50-57 (same with respect to a project of public buildings and prisons nationwide); Decision of Nov. 18, 1963, *Gaceta Judicial*, Tomes 103-104, nos. 2268-2269, pgs. 58-63 (same with respect to a school in Santa Marta); Decision of Dec. 15, 1964, *Gaceta Judicial*, Tome CIX, No. 2274, pgs. 79-81 (same with respect to various public works projects around the country). Decision of Dec. 16, 1974, Tome CIX, No. 2274, pgs. 82-87 (same with respect to funding for roads and aqueducts); Decision of Aug. 2, 1965, Tome CXIII-CXIV, Nos. 2278-2279, pgs. 18-22 (nationalization of a school); Decision of Aug. 3, 1965, Tome CXIII-CXIV, Nos. 2278-2279, pgs. 23-24 (funding for the University of the Atlantic); Decision of Nov. 30, 1965, Tome CXIII-CXIV, Nos. 2278-2279, pgs. 36-38 (funding for a university in Bogota); Decision of Dec. 16, 1965, Tome CXIII-CXIV, Nos. 2278-2279, pgs. 61-64 (public works in the north of Antioquia); Decision of Feb. 10, 1966, Tome CXV, No. 2280, pgs. 14-17 (nationalization of a school); Decision of Dec. 6, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pgs. 42-44 (funding for a high school); Decision of July 28, 1966, Tome CXVII, No. 2282, pgs. 36-38 (funding for the town of Arauquita); Decision of Aug. 31, 1966, Tome CXVII, No. 2282, pgs. 77-79 (funding for a public work in Narino); Decision of Aug. 31, 1966, Tome CXVII, No. 2282, pgs. 80-83 (funding for a university in Pereira); Decision of Sept. 3, 1966, Tome CXVII, No. 2282, pgs. 84-86 (works in Augustin Codazzi); Decision of Sept. 3, 1966, *Gaceta Judicial*, Tome CXVII, No. 2282, pgs. 87-89 (funding for an institute in Bogota); Decision of Sept. 23, 1969, *Gaceta Judicial*, Tome CXXXVII, No. 2338, pg. 328-32 (nationalizing a high school and ordering the construction of a building).

In many ways, the key moment of the National Front was the 1968 constitutional reform of Carlos Lleras Restrepo, which had two major components.<sup>133</sup> First, Lleras Restrepo phased out some parts of the National Front while preserving and modifying other elements.<sup>134</sup> For example, a requirement that cabinet posts be equally-divided between the two major parties was maintained until 1978, and then replaced by a requirement that an “equitable” share of posts be given to the losing party.<sup>135</sup> Further, Congress was opened to free electoral competition gradually beginning in 1970.<sup>136</sup> Other institutions, such as the courts, were maintained as is. These reforms aimed overall at strengthening and maintaining the National Front rather than in dismantling it. If the weakened some elements of the Front, it was only so the regime could become a permanent rather than a temporary arrangement.<sup>137</sup>

Second, Lleras Restrepo significantly altered the balance of power between Congress and the executive branch.<sup>138</sup> For example, the new constitution gave the President exclusive powers to introduce certain kinds of legislation, for example on fiscal matters, on public works, and on the economic plans that the government submitted. This was “one of the most salient features” of the reform; it aimed at allowing the president to rationalize public expenditures and thus gain further control over macroeconomic policy.<sup>139</sup> Other reforms were along much the same lines.

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<sup>133</sup> There was also a third piece of the reform which I do not touch upon here, and which sought to undertake some relatively minor reforms to the municipalities and departments at the subnational level. These reforms are generally irrelevant to the argument advanced here.

<sup>134</sup> For an overview of this piece of the reforms, see PRESIDENCIA DE LA REPUBLICA, *HISTORIA DE LA REFORMA CONSTITUCIONAL DE 1968*, at 171-316.

<sup>135</sup> *Id.* at 596 (art. 120, sec. 1).

<sup>136</sup> *Id.* at 590-91 (arts. 90 & 99).

<sup>137</sup> See Gabriel Silva Lujan, *Carlos Lleras y Misael Pastrana: reforma del Estado y crisis del Frente Nacional*, in 2 *NUEVA HISTORIA DE COLOMBIA* 237, 246 (Alvaro Tirado Mejia et al., eds, 1989) (“Even though in some aspects the measures represented movement towards a more open political game, at bottom what was achieved with these changes was the prolonging of the bipartisan coalition.... In practice, the reform of 1968 gave a permanent existence to restricted democracy, which had been supposedly transitory and was conceived as a therapy to resolve some specific problems of bipartisan violence.”).

<sup>138</sup> For an overview, see PRESIDENCIA, *supra* note 134, at 27-167.

<sup>139</sup> CARLOS RESTREPO PIEDRAHITA, *25 ANOS DE EVOLUCION POLITICO-CONSTITUCIONAL, 1950-1975*, at 91 (1976).

The President was given exclusive power to introduce the budget, and the Congress was forbidden from increasing spending or from including new articles of spending without the prior assent of the government. The President could put a message of urgency on any bill it submitted, thus requiring a congressional vote within 30 days and without considering any other measures first. In certain key areas, such as the public debt, the system of exchange rates, and the organization of the public administration, Congress's power was restricted to the passage of so-called "leyes cuadros" that would delimit the broad or "general" outlines of public policy. The President was given exclusive power to fill in the details in these areas, and autonomous powers to regulate – even without the prior passage of congressional laws – in other areas. Finally, the President was given the power to declare a state of economic and social emergency; once that had been declared, the President could issue decrees which had force of law, and which would be in effect permanently.<sup>140</sup> As President Lleras Restrepo noted in his letter introducing the reforms, the country was suffering from an "institutional disorder"; he blamed the current institutional regime for creating a fiscal imbalance, a "dispersion of resources," and for "the lack of productivity in investment."<sup>141</sup> The reforms, he argued, aimed at making the public sector more modern and efficient.

The two major pieces of reform suffered from different fates in the Congress – the reform of the major National Front institutions became highly politicized and was seen as threatening core Congressional interests; at one point Lleras Restrepo was forced to offer his resignation to

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<sup>140</sup> This idea did not come from the president, but instead from a group of Senators. *See* PRESIDENCIA, *supra* note 134, at 113-14. Still, ideologically it was in accord with the President's proposal. Both the President and the Senate were concerned that the paralysis in the Congress was driving the President towards overusing the "State of Siege" mechanism found in the 1886 constitution. *See id.* at 22. This mechanism was ill-suited for making economic policy, among other things because decrees issued during a State of Siege only lasted until the State of Siege was lifted. The President, commenting on the reforms approved in the first round, noted that this new emergency mechanism was a "great advance in harmonizing the powers of the Executive with the nature of economic and social phenomena of contemporary life;" it thus appears to have been a friendly amendment. *Id.* at 426.

<sup>141</sup> *See id.* at 22-23.

the Senate in order to force the major provisions through.<sup>142</sup> In contrast, the second group of reforms were seen as technical and non-controversial; although the Senate did make some important changes to the legislation (such as adding the regime for economic and social emergency), these were largely made in a cooperative spirit.<sup>143</sup> As noted by Archer and Shugart, the Congress basically agreed to surrender large chunks of its power to the President during this period.<sup>144</sup> Ideologically, however, the two programs had a close link – both were designed at perfecting the National Front, making it a permanent arrangement. The first group of reforms sought to continue the major political elements of the regime permanently. The second sought to correct distortions caused by the regime, particularly in the Congress, and at a deeper level to further “depoliticize” public policy by allowing presidential technocrats to make major decisions.

The key point, at any rate, is how the Court interpreted the Constitution in the aftermath of this major reform. During the heyday of the National Front, the Court closely monitored the Congress in order to preserve ample space for presidential action, following the major lines of the 1968 reform. In this sense, the Court is again best viewed as an important part of the regime, rather than as an independent actor that stood apart from or above it. First, as in the prior period,

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<sup>142</sup> See *id.* at 281-89 (containing the text of the letter, which was rejected as the President had hoped and expected). The controversies did not generally go to key matters; the Congress for example fought largely over whether it would be able to extend the term of current members for an additional two years. See *id.* at 427. For a detailed accounting of this episode and its success, see Silva Lujan, *supra* note 137, at 244.

<sup>143</sup> The Senate also added a proposal to create a specialized Constitutional Court; this proposal had never previously been made in the country. See *id.* at 114-15. The magistrates would have been elected by the Congress, adhering to the principle of parity, and would have been elected for renewable six-year terms. See *id.* at 166. The President was not hostile to the concept, see *id.* at 426-27, but it was removed in the final round of Senate debates. Senators were concerned that the new institution would “politicize” the judiciary, and instead created a “Constitutional Chamber” within the existing Supreme Court, which would offer initial opinions in constitutional cases before these cases were ruled upon by the full Court. See *id.* at 480-83 (containing the criticisms of the Constitutional Court proposal); 608-10 (containing the final text of the reforms on this issue). I do not focus on the creation of a Constitutional Chamber here, but it clearly influenced the behavior of the Court in important ways, and served in some regards as a precedent for the creation of the Constitutional Court much later. For example, the creation of the Chamber made the Court’s constitutional jurisprudence more sophisticated – it began using techniques such as conditional decisions, where a provision was upheld, but only if interpreted in a certain way. Decision of May 14, 1970, Tome CXXXVII bis, No. 2338 bis, pg. 161-67 (issuing conditional decision limiting power of regional officials to enforce a curfew etc, to enforcing measures already established by the president or by law).

<sup>144</sup> See Archer and Shugart, *supra* note 129, at 136-41.

the Court continued to strike down congressional laws decreeing public works as being unauthorized by the economic plans issued by the president.<sup>145</sup> But this task, which had been very important to the Court in the early period of the National Front, declined in importance as the Court began interpreting the new provisions in the 1968 reforms aggressively. For example, the Court jealously guarded the President's new power to declare legislation that he sent to the Congress "urgent." Once such a declaration had been made, the Congress had to consider the measure within 30 days and without taking up other business. The Court enforced these provisions aggressively. For example, in a 1974 decision, the Court struck down a bill to regulate congressional pensions, which had been objected to by the president, because it was approved after the president had sent a declaration of urgency accompanying his agrarian reforms.<sup>146</sup>

Similarly, the Court kept control over categories of laws in order to ensure that the president's new exclusive powers of initiative were protected. A 1971 decision is illustrative – here the Court explained that the 1968 reforms had been carefully crafted to "maintain the unity and order of public spending."<sup>147</sup> The Court noted that "plans" themselves now could be exclusively introduced by the government, and that spending measures introduced under an economic plan had to be subject to one of two routes. Either they constituted public spending or investment measures, which themselves were subject to the exclusive initiative of the government (article 79, section 3), or they constituted measures to foment "useful enterprises or activities worthy of support," which remained with free congressional initiative, but which could only be passed in "strict subjugation to the corresponding plans and programs" (article 76,

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<sup>145</sup> See Decision of Oct. 30, 1970, *Gaceta Judicial*, Tome CXXXVII bis, No. 2338 bis, pg. 454-59 (construction of a public building in Cali); Decision of Nov. 19, 1969, *Gaceta Judicial*, Tome CXXXVII bis, No. 2338 bis, pg. 460-66 (funding for journalist unions); Decision of Jan. 20, 1971, *Gaceta Judicial*, Tome CXXXVIII, No. 2340-2342, pg. 13-17 (funding for a facility in Huila); Decision of Sept. 3, 1971, *Gaceta Judicial*, Tome CXXXVIII, No. 2340-2342, pgs. 369-371 (conceding public buildings and funds in Zipaquirá).

<sup>146</sup> See Decision of Feb. 14, 1974, 27 *Jurisprudencia y Doctrina* 166-168 (Mar. 1974).

<sup>147</sup> See Decision of Jan. 20, 1971, *Gaceta Judicial*, Tome CXXXVIII, Nos. 2340-2342, pgs. 13-17, at 16.

section 20).<sup>148</sup> Thus the Court interpreted the various provisions so as to create “harmony” between them, and in a way that gave the president a dominant role in decreeing public spending.<sup>149</sup> In subsequent decisions, the Court was equally broad in defining the scope of the areas where the President had exclusive powers of initiative.<sup>150</sup>

Further, the Court acted aggressively to define and protect those areas where the President had potentially been given powers to regulate directly. The post-1968 Constitution contained two types of provisions on this question. First, the post-1968 Constitutional text gave the president various quasi-legislative powers (in article 120) over certain important areas, such as banking and private saving, organization of public administration, foreign exchange, public utilities, and education. Some of these provisions – for example dealing with education – had existed prior to the 1968 reforms – but the reforms greatly expanded the list. Further, the pre-

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<sup>148</sup> See *id.* at 15-16. In the case, the Court held that the measure at issue – decreeing public spending for a specific public work over three years – was not itself a plan, but was a public spending measure under such a plan, and was thus subject to exclusive presidential initiative. Moreover, even had the measure not constituted a plan, it would be a measure to “foment useful enterprises or activities worthy of support,” but one not passed in accord with the relevant plans. It is important to note, however, that the Court did not in this period or later push the notion that there was one, centralized plan at the national level. It instead rather loosely referred to all sorts of framework statutes as plans, and upheld public works measures if they were based on them. Palacios has argued that the Court thus failed to realize some of the rationalizing potential of the 1968 reforms. See HUGO PALACIOS MEJIA, 2 LA ECONOMIA EN EL DERECHO CONSTITUCIONAL COLOMBIANO 393-98 (1975).

<sup>149</sup> See Decision of Jan. 20, 1971, at 15. It is important to note, however, that the Court did not in this period or later push the notion that there was one, centralized plan at the national level. It instead rather loosely referred to all sorts of framework statutes as plans, and upheld public works measures if they were based on them. The presidents in this period pushed the Court to do more to limit and rationalize congressional initiative on these questions. For example, President Misael Pastrana argued, in his veto of a public works bill, that the term “plan” had a highly specific, technical meaning, and that the various laws that Congress had passed to impose some structure on public works spending did not constitute “plans” at all, and thus could not serve as the basis for public works spending. See Palacios Mejia, *supra* note 148, at 398-99 (quoting veto message, Misael Pastrano Borrero). The Court did not adopt this suggestion, instead striking down the bills at issue on the ground that they were not issued in accordance with even the minimal requirements imposed by existing congressional legislation. See *id.* Palacios has argued that the Court thus failed to realize a significant part of the rationalizing potential of the 1968 reforms. See *id.* at 393-98.

<sup>150</sup> Consider, for example, the Decision of Feb. 1, 1972, 2 Jurisprudencia y Doctrina 88-92 (Feb. 1972). The decision noted that the president has exclusive powers to introduce bills on most fiscal matters including tax “exemptions”, with the exception of “personal exemptions from the income tax,” where Congress maintained free initiative. The Court went on to define “personal exemptions” from the income tax narrowly to include only the “minimum amount” excluded from the tax for “sustaining the taxpayer and those whom the civil law requires him to sustain and educate.” This allowed the Court to strike down a bill regulating other kinds of exemptions from the income tax code. See Decision of Oct. 10, 1973, 24 Jurisprudencia y Doctrina 769-770 (striking down a bill delegating to the president power to adjust pensions for veterans because the bill had not been initiated by the president).



1968 Court had followed a wandering line on the breadth of the presidential powers implied by these provisions and on whether they displaced Congress from acting in the area; the post-1968 Court had no such doubts.<sup>151</sup> Second, as noted above, the 1968 Constitution created the so-called *ley cuadro*, which meant that in certain areas such as the system of foreign exchange and public debt, the Congress was explicitly restricted to issuing only a law setting out general policy, and was textually required to leave regulation of the details to the president.

An early example occurred in 1969, when the Court considered the president's powers to "inspect" educational institutions (which was one of the powers that predated 1968), and struck down a Congressional bill purporting to regulate the nature of instruction in law faculties. The Court carefully distinguished the President's general power to issue regulations interpreting and applying existing congressional laws ("subordinate regulation") from his specially enumerated powers in article 120 to issue some regulations even in the absence of prior congressional action ("autonomous regulations"). The Court also issued a clear statement about the doctrine in light of the 1968 reform: "In effect, the reform of 1968, within its purposes and characteristics, more

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<sup>151</sup> A series of pre-1968 cases lay out the doctrinal dispute. In two 1966 decisions, the Court held that congressional bills regulating policy details on education did not violate the presidential power to "inspect" education institutions, because the president's autonomous power to act did not disable Congress from acting in the area. *See* Decision of Oct. 10, 1966, *Gaceta Judicial*, Tome CVXIII, pgs. 3-10 (holding, over presidential objection to a law dealing with educational institutions, that presidential powers to inspect educational institutions allowed for autonomous regulatory and administrative action, but suggesting that these actions must generally be subject to congressional laws except in extreme cases); Decision of Dec. 16, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pgs. 49-53 (holding that a congressionally-passed law regulating educational institutions did not violate the separation of powers, because the area did not form "a private competence of the president, to the exclusion of the Congress"). However, the Court did prevent Congress from giving this presidential power to other actors. *See* Decision of Nov. 16, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pgs. 23-28 (striking down a law that sought to give the powers to inspect universities to the National Council of Rectors, rather than to the executive branch). In a 1967 decision, those previously dissenting won the day, holding that this presidential power did indeed disable Congress from acting at least on the details of educational policy. The Court stated: "The legislator... must not enter in the field of regulation, as he must not do so in a concrete manner in direction and inspection, which are administrative activities. He must comply with his legislative task only in the pronouncement of the general and abstract rule or in the creation of the fundamental structures for the offering of service by the State, without invading the administrative terrain of the specific regulatory power which section 13 of article 120 of the Constitution assigns to the President of the Republic." *See* Decision of Mar. 30, 1967, *Gaceta Judicial*, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 43-45, 45.

than a displacement of the powers of Congress to the Executive, procured the delimitation of its powers, the simplification of the work belonging to the legislative branch, so that it would now be both unnecessary and inadmissible in light of the constitution for the legislator to be occupied with formulating policy in detail in certain areas, such as those relative to public administration, personal, salaries and benefits, credit, commerce, and foreign exchange, customs duties, for example.... [I]ssues that deal with highly technical questions... should be subjected only to the legislative power...of formulating a politics, a tendency... leaving the concrete solutions, which can be changed or varied, to the flexible appreciation and decision of the administrative authorities.”<sup>152</sup> In other words, the point of the provisions was not only to give the president ample room to act without the necessity of Congressional intervention, but also to ensure that Congress – which was considered less competent and technical than the president – did not interfere in various important areas.

Another key case occurred in 1972, when the Court considered the President’s constitutional power to “exercise, as his own constitutional attribution, the necessary intervention in the Bank of Emission and in the activities of natural or legal persons that have as their object the management or enjoyment and the investment of funds based on private investment.”<sup>153</sup> The Court noted that prior to the 1968 reforms, the President merely had power to “inspect” banks, which was a “subordinate administrative function that had to be exercised within the existing substantive legal order.”<sup>154</sup> The Court held that the 1968 reforms had changed presidential powers in this area, giving the president a power that “would normally have belonged to

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<sup>152</sup> Decision of Nov. 29, 1969, *Gaceta Judicial*, Tome CXXXVII, No. 2338, pgs. 569-85; *see also* Decision of Dec. 10, 1969, *Gaceta Judicial*, Tome CXXXVII, No. 2338, pg. 594-609 (same).

<sup>153</sup> Decision of Aug. 18, 1972, 8 *Jurisprudencia y Doctrina* 473 (Aug. 1972) (interpreting article 120, section 14 of the Constitution).

<sup>154</sup> *See id.* at 479.

Congress, such as the power to legislate on banking issues....”<sup>155</sup> More fundamentally, the Court held that the presidential power to act in this area was *exclusive*; the presidential power to regulate private investment deprived the Congress of the power to act. Thus, the Court struck key pieces of a bill that governed the management of banking deposits by the Agrarian, Industrial, and Mining Credit Fund. The following year, the Court applied the same set of doctrines to strike down much of a law setting up the organization and functions of the Central Bank – the Court read the President’s autonomous powers in this area quite broadly, depriving Congress of much of its power over monetary policy.<sup>156</sup> The Court acted similarly in other areas, holding that presidential powers, for example to “exercise inspection and vigilance” over public utilities for various purposes, not only carved out a substantial swath of terrain as subject to autonomous presidential regulation, but also deprived Congress of any power to act in these areas.<sup>157</sup> All of these decisions, at the time they were issued, were considered important, and created a debate in legal circles.<sup>158</sup>

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<sup>155</sup> *Id.* at 480.

<sup>156</sup> See Decision of Dec. 14, 1973, Gaceta Judicial, Nos. 2390-2391, pgs. 276-287. The dissenters argued that the Court had reached too far, and that the president’s autonomous power to “intervene” in the Central Bank could not encompass the power to establish its organization. See *id.* at 286-87 (Jose Enrique Arboleda Valencia et al., dissenting).

<sup>157</sup> See, e.g., Decision of Dec. 6, 1973, 25 Jurisprudencia y Doctrina 56-63 (Jan. 1974) (striking down a Congressional bill regulating investment and management of public utilities as infringing on exclusive presidential power to “exercise inspection and vigilance over public utilities so that their income will be conserved and properly applied, and so that in all essential points comply with the will of the founders” (citing article 120, section 19 of the Constitution of 1886).

<sup>158</sup> For some discussion, see HUGO PALACIOS MEJIA, 1 LA ECONOMIA EN EL DERECHO CONSTITUCIONAL COLOMBIANO 243-272 (1975) (considering the presidential attribution to intervene in the banking sector). The most sophisticated evocation of this debate occurred not in the Supreme Court, but in the Council of State. The Council, in a long and widely publicized 1974 decision (which took up an entire volume of the Jurisprudence and Doctrine magazine), suggested disagreement with the doctrine and approach of the Supreme Court and stated that a presidential regulation could in fact be struck down for attempting to modify or derogate existing congressional laws. The Council of State seemed to be trying to reestablish the traditional hierarchy between law and regulation; the president had autonomous power to act in these areas in the absence of congressional legislation, but could not disable congress from acting or disagree with existing laws. Thus, in a long and scholarly decision (including references, for example, to French doctrine), the Court struck down parts of a presidential decree creating regional funds of social capitalization. See Decision of June 4, 1974, 32 Jurisprudencia y Doctrina 431-477 (Aug. 1974); see also Decision Oct. 6, 1976, 59 Jurisprudencia y Doctrina 744-776 (Nov. 1976) (reiterating this doctrine after containing an extensive discussion of both the cases and academic commentary on the issue). Note also that this line

Finally, the Court exercised only very weak controls over presidential action. It upheld virtually all delegations of legislative power to the executive branch, even those involving the power to write or revise codes.<sup>159</sup> And while it did sometimes strike down presidential exercises of that delegated power, it did so only where the presidential decree clearly fell outside of the scope of the delegation.<sup>160</sup> A good example of the general looseness of control on these issues, especially on major policy questions and even late in the National Front, was the Court's upholding of a presidential decree retaining part of all coffee exports without any compensation, mainly in an attempt to stabilize prices.<sup>161</sup> The decree was based on a law delegating power to the president to create a statute on foreign exchange and foreign commerce. The attackers of the decree argued that the delegation contained no provision allowing for this retention, and that the retention was in effect a tax, but the Court rejected the argument soundly, holding that the decree was broadly related to the ends of the delegation and that the president, at any rates, had special powers to intervene in the economy.<sup>162</sup>

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of decisions lost some importance in the later National Front (in the late 1970s and 1980s), but remained important. For example, in 1982 the Court struck down various provisions of a law establishing duty-free zones for foreign and domestic businesses, holding that the provisions in question regulated the details of the question, and thus invaded the regulatory sphere of the president rather than being limited to a "ley cuadro" that created general policy. *See* Decision of July 15, 1982, 129 *Jurisprudencia y Doctrina* 732-753 (Sept. 1982).

<sup>159</sup> *See, e.g.*, Decision of Feb. 10, 1967, *Gaceta Judicial*, Tome 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 32-36; Decision of Apr. 9, 1980, 102 *Jurisprudencia y Doctrina* 398-401 (June 1980) (upholding delegation to create a new Criminal Code). Further, the Court held that the president could even use his delegated powers to strike down existing law. *See* Decision of Aug. 22, 1974, 34 *Jurisprudencia y Doctrina* 575-578 (October 1974).

<sup>160</sup> *See, e.g.*, Decision of Dec. 14, 1961, *Gaceta Judicial*, Tome XCVII, Nos. 2246-2249, pgs. 25-29 (holding that a decree purporting to create a Division of National Taxes as falling outside a congressional delegation). Further, the Court was generally fairly loose on the requirement that delegations be "precise," holding that it was sufficient for Congress to indicate the "special ends" of the delegation. *See* Decision of Feb. 10, 1967, *Gaceta Judicial*, Tome 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 32-36.

<sup>161</sup> *See* Decision of Apr. 8, 1981, 114 *Jurisprudencia y Doctrina* 437-466 (June 1981).

<sup>162</sup> Note that these doctrines of the Court involving delegated powers did not change substantially, even in the late National Front period. The Court continued to uphold delegations so long as they had some time limitation and gave basic guidance to the executive, even if the time period was very long and the delegation was to construct a new code. *See, e.g.*, Decision of Sept. 19, 1985, 169 *Jurisprudencia y Doctrina* 39-47 (Jan. 1986) (upholding a delegation to the president for two years to write a new Code of Criminal Procedure).

Further, the Court was very liberal with uses of both state of siege and state of economic and social emergency powers. On the former, the Court continued the tradition, existing for most of Colombian history, of upholding virtually all exercises. Rights-based challenges were given short shrift – even draconian measures like censorship, restrictions on movement and the right to strike, trial by military tribunal, and the creation of vague new crimes were upheld with little comment.<sup>163</sup> For example, a 1970 decision disposed of a challenge to a state of siege decree allowing censorship of the press in only a few pages, and concluded that “the legality of censorship under the state of siege regime is not seriously debatable.”<sup>164</sup>

Thus, the only real recourse was to argue that the measure was “unconnected” to the declaration of the state of siege or the need to restore order. The Court did strike down some totally unrelated measures – in perhaps the most blatant example, it stopped the president from using a State of Siege decree to reorganize the postal service.<sup>165</sup> However, it generally deferred

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<sup>163</sup> See Decision of July 13, 1966, Tome CXVII, No. 2282, pgs. 12-28 (holding that a decree allowing certain classes of crimes to be judged by Verbal War Councils was constitutional, because it was connected to the State of Siege declaration); Decision of Apr. 11, 1967, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 53-65 (upholding sweeping measures allowing authorities to confine individuals to certain areas of the country, although striking down a provision allowing for the cancellation of naturalized citizenship, on the grounds that this violated a specific constitutional provision); Decision of Aug. 13, 1970, Gaceta Judicial, Tome CXXXVII bis, No. 2338 bis, pg. 312-15 (upholding a decree allowing military judges to try civilians in certain situations, with little reasoning); Decision of March 31, 1971, Gaceta Judicial, Tome CXXXVIII, No. 2340-2342, pgs. 121-23 (again upholding with little reasoning a state of siege decree allowing civilians to be tried by military tribunal for certain crimes); Decision of Mar. 31, 1971, Gaceta Judicial, Tome CXXXVIII, No. 2340-2342, pgs. 124-127 (upholding measures allowing for a system of prior censorship of the press); see Decision of May 27, 1971, Gaceta Judicial, Tome CXXXVIII, Nos. 2340-2342, pgs. 219-221 (upholding a measure allowing for suspension of academic activity in public and private universities); Decision of Dec. 11, 1975, 50 Jurisprudencia y Doctrina 73-77 (Feb. 1976) (upholding a decree criminalizing “instruction on fighting tactics” in any form, “without permission from the competent authority”); Decision of Oct. 13, 1977, 73 Jurisprudencia y Doctrina 30-41 (upholding a decree criminalizing strikes during the state of siege, although with ten dissents).

<sup>164</sup> Decision of Aug. 13, 1970, Gaceta Judicial, Tome CXXXVII bis, No. 2338 bis, pg. 316-19.

<sup>165</sup> See, e.g., Decision of May 18, 1966, Gaceta Judicial, Tome CXVI, No. 2281, pg. 4-12, at 9 (striking down a state of siege decree reforming the healthcare system on grounds of lack of connectivity); Decision of July 25, 1966, Tome CVVII, No. 2282, pgs. 39-46 (striking down a state of siege decree that reorganized the postal service, on the grounds that it clearly had no relationship with the declaration of state of siege); Decision of July 17, 1967, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 125-128 (striking down a state of siege decree transferring ownership of a public entity to the National Learning Service (SENA), because there was clearly no relationship with the reestablishment of public order); Decision of Jan. 20, 1977, 63 Jurisprudencia y Doctrina 158-160 (Mar. 1977)

to the executive, holding that it was unable to strike down a measure in cases where connectivity seemed doubtful but not impossible to find. Thus, state of siege decrees would only be struck down where “manifestly and evidently [the decree] had no relationship” with the maintenance of order.<sup>166</sup> For example, the Court upheld a decree establishing a subsidy for public transport, because it found that the corresponding reduction in cost would reduce unrest by low income users.<sup>167</sup> And as a final piece of the doctrine, the Court stated that measures that had been derogated by the time they were passed upon by the Court could not be reviewed at all – given the transient nature of state of siege measures, this often made draconian but short-lived instruments totally unreviewable.<sup>168</sup>

After the State of Economic and Social Emergency was created in 1968, the Court’s initial decisions merely transplanted much of the doctrine from the State of Siege context. The Court’s first test in this area was in 1974, when an emergency was declared by President Alfonso Lopez Michelsen to push through various economic measures in the face of a deteriorating

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(striking down a state of siege decree providing for new spending on roads, etc, as having no relationship to state of siege).

<sup>166</sup> See, e.g., Decision of Apr. 28, 1967, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 71-74 (upholding a decree fixing salaries for military judges and prosecutors and stating that it would strike down a decree for lack of connectedness only when that lack was “notorious, and not when it is merely doubtful.”); Decision of May 24, 1967, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 75-81 (upholding a decree that amended the labor code, and noting that “the Plenary Chamber can neither affirm nor deny whether ... connectivity exists or not.... We must defer to the criteria of the Executive.” The Court held that it was possible that the code was related to the social unrest, although it expressed some doubt about that proposition); Decision of Sept. 6, 1967, Tomes 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 146-151 (upholding various reforms to the sales tax regime, on the grounds that these reforms did seem related to the social unrest and would “strengthen the possibilities of action of the state with its fiscal resources, on the disturbing economic phenomena);

<sup>167</sup> Decision of Feb. 29, 1968, Tomes CXXV-CXXVI, Nos. 2290-2295, pgs. 232-235 (upholding a state of siege decree granting an subsidy to importers of vehicles for public service, finding that there was a connection because “the reduction in the cost of a transport vehicle... favors mainly those who most utilize it, who are people with low incomes, and contributes to the removal of some perturbing factors, accelerating the return of the previously broken tranquility”).

<sup>168</sup> See Decision of Apr. 20, 1966, Gaceta Judicial, Tome CXVI, No. 2281, pg. 13-14 (refusing to hear a challenge to an expired state of siege decree that had been enacted into law by the Congress); Decision of Aug. 22, 1966, Gaceta Judicial, No. 2282, pgs. 57-59 (same with respect to a State of Siege decree ceding an Island to Cartagena). Some on the court begin questioning this doctrine after 1968, but it was not changed until 1977. See, e.g., Decision of June 17, 1970, Gaceta Judicial, Tome CXXXVII Bis., No. 2338 Bis., pgs. 196-203 (with dissents from several members of the Constitutional Chamber).

economic situation and fiscal deficit. First, the Court held that it would conduct only a formal review of whether the emergency had been correctly declared (ie. whether the signatures of the appropriate people had been gathered). It refused to undertake a substantive review of whether the declaration was necessitated by an emergency that met the constitutional definition, holding that this was a task for the president.<sup>169</sup> The Court also applied its familiar connectivity test to individual measures promulgated under the emergency, although as in the State of Siege context quite deferentially. Finally, the Court held that the government could create or raise taxes during a state of economic and social emergency so long as they potentially helped to overcome the emergency, even though the Constitution otherwise provided that “in times of peace” only Congress could create new taxes.<sup>170</sup> All the key pieces of the 1974 emergency were thus upheld; control on the President’s power during the emergency was “minimal.”<sup>171</sup>

Overall, then, merely describing the mid-National Front Court as “independent” seems to do relatively little analytic work. The Court is far more meaningfully seen within the context of the regime, and in helping achieve the major goals of the architects of the National Front and the 1968 reforms. The Court generally allowed presidential action, thus letting the president and his (generally technocratic) administration become the major policymaker, especially on economic matters. The president had exclusive powers to introduce legislation in many economic areas, was delegated huge swaths of authority in others, could enact autonomous regulations without congressional interference in others, and could (and often did) resort to States of Siege or States of Economic and Social Emergency to make law in other cases. Congress was relegated to a

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<sup>169</sup> See Decision of Oct. 15, 1974, 36 *Jurisprudencia y Doctrina* 717-732 (Dec. 1974).

<sup>170</sup> See, e.g., Decision of Oct. 23, 1974, 36 *Jurisprudencia y Doctrina* 732-739 (Dec. 1974) (upholding most of a decree, over ten dissents); Decision of Oct. 31, 1974, 36 *Jurisprudencia y Doctrina* 739-769 (same issue, again upholding the decree with ten dissents).

<sup>171</sup> See Manuel Jose Cepeda Espinosa, *Las Relaciones entre el Presidente y la Corte Durante la Emergencia Economica: Un Semidios Enfrentado a un Monstruo*, in *ESTADO DE SITIO Y EMERGENCIA ECONOMICA* 43, 43 (Manuel Jose Cepeda Espinosa, ed., 1985)

relatively minor role, and the Court zealously ensured that the Congress did not make policy “irrationally” or intrude on exclusive presidential domains. In other words, the Court was an important influence on the shape of the state during this period, much as the U.S. Supreme Court helped strengthen the federal government versus the states in the late-19<sup>th</sup> and early-20<sup>th</sup> centuries. The Court helped to create a state that was “technocratic,” “rational” and in some sense “above partisan disputes,” much as the designers of the National Front (and Restrepo, who later fine-tuned it) had intended. More than saying the Court was independent, we might say that the Court was highly capable, and closely tied to the elites within the regime.

### **B. The Court Drifts Away from the Political Regime**

As time went on, the Court lost its close relationship with the political regime. Moreover, this regime itself began to fracture, as the two-party cooperation slowly broke down and as the public lost confidence in the traditional political parties. The National Front completely ended after 1986, when President Barco announced that he would choose a cabinet of his choosing, and conservatives in response refused to accept any posts in the regime.<sup>172</sup> In great part, the distance between the Court and the political system was a product of design. Initially, the Court had been chosen by the Congress based on equal representation of both parties; such a selection mechanism was bound to guarantee that the Court did a good job representing the major political actors. But the National Front also included a so-called cooptation system, whereby the existing Court picked its own replacement.

Thus, as the National Front wore on, the Court increasingly turned away from the dominant political actors. In some measure, it was perceived as becoming a more corporatist

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<sup>172</sup> See Ricardo Santa Maria Salamanca, *Aspectos Politicos del gobierno de Barco (1986-1990)*, in 7 NUEVA HISTORIA DE COLOMBIA 61, 62-64 (1998).



body, protecting its own interests and values. Such a tendency was marked from the beginning of the National Front – the Court was always fairly jealous of attempts to strip its jurisdiction, to change the method of composition of the Court, or to replace ordinary courts with special ones.<sup>173</sup> But it became more marked as time went on, and the Court became a key component of what critics of the National Front called the “blocked society,” whereby it began stopping popular and large-scale attempts to move away from the institutional framework of the National Front.

This is part but not all of the explanation for the changes in judicial behavior: it is clear that the Court also began paying attention to a human rights discourse that first sprung up during the Turbay administration in the late 1970s. The Turbay measures were particularly repressive, especially the Statute of Security decree, which added vague new crimes like “subversion” and allowed police and military officials to independently punish some crimes. The measures also interacted with a new context in which security personnel were increasingly trained to root out internal subversion. The Court upheld most of the Statute of Security but was criticized for doing so, and critics provided evidence that the state security apparatus was using these powers to

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<sup>173</sup> See, e.g., Decision of June 28, 1965, *Gaceta Judicial*, Tomes CXI-CXII, Nos. 2276-2277, pgs. 12-37 (striking down a law that would have gotten rid of Circuit Judges and given all of their functions to a set of municipal judges, on the grounds that these judges were created by the Constitution); Decision of Aug. 28, 1965, *Gaceta Judicial*, Tomes CXIII-CXIV, Nos. 2278-2279, pgs. 25-32 (unanimously striking down a provision that filled expanded slots on the Council of State through congressional vote, on the ground that this violated the cooptation scheme contemplated in the National Front); Decision of Apr. 1, 1966, Tome CXVI, No. 2281, pgs. 34-40 (striking down a law that allowed for the suspension of the pay of judges by the Minister of Justice in certain circumstances, on the ground that the bill violated the separation of powers); Decision of Oct. 26, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pg. 16-22 (striking down a decree that would have treated municipal judges like circuit judges for purposes of promotion, when the Constitution specified them as being of different ranks in the judicial hierarchy); Decision of Dec. 14, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pgs. 35-41 (striking down a law that would have given power to replace certain Councillors of State in the hands of only some, rather than all, members of the institution); Decision of Dec. 16, 1966, *Gaceta Judicial*, Tome CXVIII, No. 2283, pgs. 45-48 (again holding that the Congress lacked power to get rid of the category of Circuit Judge); Decision of Feb. 9, 1967, *Gaceta Judicial*, Tome 120-123, Nos. 2284, 2290, 2291, 2296, pgs. 22-31 (striking down a law that created a Superior Disciplinary Tribunal with the power to hear disciplinary complaints against Supreme Court and Council of State magistrates, and to hear appeals in disciplinary matters involving lower courts from these bodies) (citing the Decision of June 28, 1965).

harass sectors of the citizenry. Following this decision, groups of professors, civil society leaders, and some judges began developing a human rights oriented discourse and created a Permanent Committee for the Defense of Human Rights in Colombia. The early events of this group, such as the 1<sup>st</sup> National Forum on Human Rights held in 1979, included participation by a couple of magistrates of the Court, who criticized the excessive duration and human rights abuses that were associated with a state of siege. The jurisprudence developed by the Colombian Supreme Court in the late 1970s and 1980s was not primarily a human rights discourse, but it is clear that these concerns lurked in the background of the relevant decisions.

A first major decision occurred in 1978, when the Court struck down a constitutional amendment that would have called a Constituent Assembly to reform certain parts of the Constitution.<sup>174</sup> The Court held that the Constitution could only be reformed by Congress, and that Congress could not delegate this competence to a special Assembly. Moreover, the Constitution could not be reformed to allow for such a power, because such a reform would fundamentally change the political identity of the document. Notably, the Constituent Assembly would have been convoked only to work on two issues: (1) the extent of decentralization in the country and the powers of departments and municipalities, and (2) the judicial system in the country, including the constitutional jurisdiction. Politicians were discussing changing the composition of the Supreme Court or replacing its judicial review powers by creating a new Constitutional Court. Thus, it is reasonable to suspect that the Court felt that its powers were likely threatened.

A second major attack occurred when the Court struck down the entire (and major) constitutional reform of 1979, which was a second attempt to achieve some of the same goals

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<sup>174</sup> See Decision of May 5, 1978, 79 *Jurisprudencia y Doctrina* 494-535 (July 1978).

that would have been achieved by the Assembly. The Court found that that there had been procedural errors in its passage through the Congress.<sup>175</sup> In order to reach this result, the Court had to overrule its own long-standing doctrine that it would not review constitutional amendments, even for procedural errors in passage.<sup>176</sup> The reforms, *inter alia*, gave much of the constitutional review powers previously vested in the entire court in the separate constitutional chamber, thus depriving most of the Court of a vote on constitutional matters. Moreover, the reforms fundamentally changed the way the Court was composed, making judges serve for eight year terms, rather than for life, and allowing the Supreme Court to select replacement only from a list elaborated by a new body, the Superior Judicial Council. The 1979 reforms were in part an attempt to reduce the growing gap between the Court and the political system, but the Court reacted by striking down the attempt, and in so doing, prevented a huge package of reforms to the presidency, congress, and other institutions from moving forward. The decision stunned the Turbay administration, whose Minister of Justice reacted by calling it a “coup d’etat without arms”; the President of the Court responded by stating that the country was “on the edge of a cataclysm.”<sup>177</sup> Further, President Turbay, one day before the decision was announced, went so far as to try and neutralize it by passing Decree 3050, stating that a three-fourths majority would be necessary to strike down a law or congressional act. The Court however refused to apply the decree, holding that it was unconstitutional.<sup>178</sup>

The Court also underwent a crucial change in its state of economic and social emergency jurisprudence. In 1982, President Betancur declared a state of economic and social emergency in

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<sup>175</sup> See Decision of Nov. 3, 1981, 120 *Jurisprudencia y Doctrina* 937-1039 (Dec. 1981) (entire issue). For an in-depth discussion of both this decision and the prior one, see, for example, Luis Javier Moreno Ortiz, *Las Ultimas Reformas a la Constitucion de 1886*, in II HISTORIA CONSTITUCIONAL DE COLOMBIA 369, 418-37 (Jaime Vidal Perdomo & Augusto Trujillo Munoz, eds., 2d ed. 2012)

<sup>176</sup> See, e.g., Decision of Apr. 16, 1971, *Gaceta Judicial*, Tome CXXXVIII, Nos. 2340-2342, pgs. 148-165.

<sup>177</sup> See *Julio Cesar Turbay Ayala*, in PRESIDENTES DE COLOMBIA, 1810-1990, at 289, 293 (1989).

<sup>178</sup> See Decision of Nov. 3, 1981, at 982-83.

order to deal with a widening fiscal crisis, a balance of payments problem, and trouble in the banking sector, all of which had cropped up at the end of the previous regime.<sup>179</sup> While the Court upheld some of the measures undertaken during a 1982 emergency, including the nationalization of banking institutions,<sup>180</sup> it began to take a harder line, especially concerning taxation. For example, it struck down a presidential attempt to modify the income tax system by decree, holding that although the president could sometimes create new taxes by decree when necessary to overcome the emergency, the state of economic and social emergency was incompatible with permanent structural changes to the system.<sup>181</sup>

The Court noted that the general rule for the creation of taxes was that they should be approved by Congress in a deliberative and representative process, and expressed doubts about widespread policymaking by presidential decree: “The Court understands the democratic and representative origin of the President of the Republic..., [but] the Congress is not only democratic and representative ... but also and above all, the deliberative and pluralist organism which represents the entire nation and not merely an electoral majority. Additionally, the presidential post is monolithic and not plural and deliberative like the Congress.”<sup>182</sup> This attack on rational economic management in the name of representative democracy was not in the spirit of the National Front and its 1968 reforms. In subsequent decisions, the Court reiterated a similar worry that the country would live “in a state of permanent economic emergency or of constant or total disorder.”<sup>183</sup> Since the emergency mainly sought a series of tax reforms, most of it was

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<sup>179</sup> See Juan Camilo Restrepo, *El Gobierno de Belisario Betancur (1982-1986)*, in VII NUEVA HISTORIA DE COLOMBIA 43, 49-52 (1998).

<sup>180</sup> See Decision of Dec. 2, 1982, 134 Jurisprudencia y Doctrina 106-160 (Feb. 1983) (upholding almost all of the nationalization decree).

<sup>181</sup> See Decision of Feb. 23, 1983, 136 Jurisprudencia y Doctrina 343-370 (Apr. 1983).

<sup>182</sup> *Id.* at 354.

<sup>183</sup> See Decision of Apr. 11, 1983, 138 Jurisprudencia y Doctrina 501-509, 503 (June 1983) (striking down another structural tax reform).

struck down as unconstitutional.<sup>184</sup> Further, even outside of the tax area, the Court began to strike down economic measures if it found that they were based in “structural and chronic conditions,” rather than a demonstrable economic emergency.<sup>185</sup>

The Court’s actions had important effects, delaying Betancur’s ability to pass most of his tax reform for more than a year and forcing him to offer concessions to interest groups in the Congress.<sup>186</sup> They also caused a backlash against the Court. While the President himself accepted the decisions, a member of his cabinet stated that they had been “devastating for the economy,” and a bipartisan group of members of Congress proposed raising the number of votes needed to strike down a law and the creation of a new Constitutional Court to replace the Supreme Court.<sup>187</sup>

Finally, and most importantly, the Court slowly changed its jurisprudence on the state of siege, and began to question presidential exercises of this power somewhat more rigorously. In 1977 the Court changed its jurisprudence on derogated decrees, holding that it did indeed have the power to review them even though they were no longer in force.<sup>188</sup> The majority’s argument emphasized the need for the Court to conserve its jurisdiction: “in an extraordinary situation, with extraordinary powers whose exercise make constitutional guarantees more vulnerable, corresponds an extraordinary control, which is not left to the good judgment or to the political and legal sensibility of the people.”<sup>189</sup>

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<sup>184</sup> See 136 Jurisprudencia y Doctrina 371-373 (containing the dispositions of various decrees).

<sup>185</sup> See Decision of Mar. 7, 1983, 139 Jurisprudencia y Doctrina 412-416, 412 (striking down a decree reforming the regime governing management and compensation in catastrophes).

<sup>186</sup> See Cepeda, *supra* note 171, at 46.

<sup>187</sup> See *id.* at 62-63.

<sup>188</sup> See Decision of Oct. 20, 1977, 74 Jurisprudencia y Doctrina 75-83 (Feb. 1978).

<sup>189</sup> *Id.* at 77.

Along similar lines, larger minorities begin to have doubts about whether the ordinary courts could be replaced by military tribunals and courts martial even during a state of siege.<sup>190</sup> This was a long running debate in the Court's jurisprudence. The Court had previously held that military tribunals, which generally included summary procedures and fewer rights than ordinary courts, could not be used to try civilians outside of a state of siege, and in so doing had defended the principle that citizens are entitled to be tried by ordinary judges. As the Court noted in one of its key decisions on this issue:

A fundamental principle presides over and orients the administration of justice in Colombia: that of ordinary jurisdiction. In other words, that all the inhabitants of the national territory are submitted to the same judges, to a single procedure and to the inexorable application of the same civil, criminal, and administrative precepts. This is the general rule that configures the ordering of the state as an entity with democratic coloring and civil composition.<sup>191</sup>

Still, in these decisions the Court carefully distinguished wartime or state of siege situations, holding that a much broader use of military justice was appropriate in such situations.<sup>192</sup>

As the National Front wore on, with states of siege becoming an endemic part of the regime, the Court's willingness to distinguish peacetime and wartime eroded. In a 1979 decision, the Court reiterated its jurisprudence and upheld a state of siege decree allowing courts martial to try some crimes by civilians. However, a growing group of dissenters would have struck the decree down.<sup>193</sup>

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<sup>190</sup> See, e.g., Decision of Oct. 30, 1978, 85 Jurisprudencia y Doctrina 11-47 (Jan. 1979).

<sup>191</sup> Decision of Oct. 4, 1971, Gaceta Judicial, CXXXVIII, Nos. 2340-2342, pgs. 408-417, 412; see also Decision of May 31, 1984, 151 Jurisprudencia y Doctrina 610-640 (striking down a part of the Code of Criminal Procedure allowing police officials to try defendants for minor crimes, on the grounds that these attributions belonged to the judicial branch)

<sup>192</sup> See Decision of Nov. 9, 1971, Gaceta Judicial, Tome CXXXVIII, Nos. 2340-2342, pgs. 469-470 (allowing such an expansion during a State of Siege with little debate)

<sup>193</sup> *Id.* at 35 (Jose Maria Velasco & Gustavo Gomez Velasquez, dissenting); see also Decision of July 3, 1984, 153 Jurisprudencia y Doctrina 751-768 (again upholding the use of verbal councils of war to try civilian crimes during a state of siege, although with a litany of dissents).

Further, majorities of the Court began to question the substantive provisions enacted by presidents during states of siege. For example, in a second 1979 decision, the Court struck down a state of siege decree that would have allowed the Director of Prisons to send those convicted by first instance courts (and who were still on appeal) to the distant and difficult prison on the Island of Gorgona.<sup>194</sup> The Court was concerned about judicial jurisdiction and process, holding that the prisoner had a basic right to be held in a prison situated where the judicial process against him was occurring so that he could communicate with his lawyer and undertake other measures.

In a third key 1979 decision, the Court struck down a decree that abbreviated procedures for verbal councils of war against civilians during states of siege even further, by replacing a provision in the Military Code with another provision that would have given defendants only one day to prepare their case per 1000 pages in the dossier against them.<sup>195</sup> In the course of striking down this decree, the Court noted:

It would be legally impossible and contrary to common sense to accept that the functioning of civil, criminal, or labor processes ... would constitute an obstacle for the maintenance of public order.... The traditional indulgence of this class of deviations has helped erode the true nature of the exceptional institution of the state of siege which, being exceptional, has very strict limits. When those indispensable limits are overcome, one falls into another species of disorder, graver than the one caused by popular insurgency, since it stems from the actions of those charged with protecting liberty and the rights from which it derives.<sup>196</sup>

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<sup>194</sup> See Decision of Nov. 5, 1979, 97 *Jurisprudencia y Doctrina* 31-39 (Jan. 1980).

<sup>195</sup> See Decision of Dec. 3, 1979, 99 *Jurisprudencia y Doctrina* 204-226 (Mar. 1980); see also Decision of Apr. 9, 1980, 103 *Jurisprudencia y Doctrina* 478-480 (July 1980) (reiterating a prohibition against trying civilians by court martial during times of peace, in order to avoid destroying "the democratic principle that everyone should be judged by their natural judge v... which for civilians are the common judges").

<sup>196</sup> Decision of Dec. 3, 1979, at 210. Note that the decision also contains hints of an autonomous rights discourse, in including a reference to the constitutional right to defense and to international treaties ratified by Colombia (Law 74 of 1968). See *id.* The Court was not following a consistent line in this period. In 1980, for example, a majority upheld another state of siege decree that suspended certain other procedures for verbal councils of war. The dissent was left pointing to the doctrine of the 1979 decision, without success. See Decision of May 23, 1980, 104 *Jurisprudencia y Doctrina* 595-620 (Aug. 1980).

The Court's discourse on state of siege decrees thus began to strengthen as its distance from the political regime grew.

However, it took bolder action in the late 1980s, after the new liberal President Virgilio Barco had ended the National Front era practice of sharing cabinet posts with the opposition party and after the Supreme Court itself had been stormed by the M-19 guerillas. The resulting military operation to storm the Palace of Justice had resulted in the deaths of a litany of Supreme Court justices, arguably reducing the Court's confidence level in the legitimacy and efficacy of the repressive apparatus of state.<sup>197</sup>

Further, the new President decided to use the state of siege mechanism in innovative ways, for example in order to remedy structural crises in infrastructure and poverty that he argued underlay the crisis of order. The Barco administration served during one of the most difficult moments in modern Colombian history – both guerrilla groups and narcotraffickers formed existential threats to the state, and key politicians like Luis Carlos Galan and Carlos Pizarro Leongomez were assassinated. Yet, while the Court continued to uphold most state of siege decrees,<sup>198</sup> it struck down a number of key decrees, and became a significant antagonist of the Barco administration.

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<sup>197</sup> For example, the Court partially reversed its longstanding doctrine refusing to hear challenges to treaties in 1986, when it struck down the extradition treaty with the United States on the grounds that it had not properly been signed by the president and thus held that treaties could be reviewed for procedural irregularities in their construction. *See* Decision of Dec. 12, 1986, 182 *Jurisprudencia y Doctrina* 139-153 (Feb. 1987).

<sup>198</sup> For example, even in the late 1980s, the Court was still upholding measures that created new, vague crimes, heightened punishments, and limited freedom of the press. *See, e.g.,* Decision of Mar. 3, 1988, 197 *Jurisprudencia y Doctrina* 311-321 (May 1988) (upholding the so-called 'statute for the defense of democracy,' enacted during a state of siege). However, the Court did show some evidence of developing an independent rights-consciousness towards the very end of the National Front. For example, in 1988 the Court struck down a decree that established broad censorship, holding that this was inappropriate even during a state of siege without some evidence that the material in question "worked against public order." *See* Decision of Jan. 19, 1989, 208 *Jurisprudencia y Doctrina* 239-241 (Apr. 1989) ("And do not let it be said that article 42 of the Constitution consecrates freedom of the press in times of peace and that, therefore, in times of no peace that privilege disappears, without more."). Additionally, the Court struck down a decree establishing life in prison without any possibility of parole for certain classes of criminals, on



In 1987 a majority of the Court finally changed its jurisprudence on allowing military tribunals or courts martial to try civilians during a state of siege.<sup>199</sup> In this decision the Court reiterated and extended its jurisprudence and the reasoning of its dissenters on the importance of maintaining control by ordinary judges.<sup>200</sup> The Court reasoned as follows:

[I]t cannot cease to be worrying that it has been said too frequently that judges are incapable of complying with their duties with respect to certain criminal phenomena that are already endemic to our society and that, in consequence, the Armed Forces must enter to resolve their deficiencies. With the same logic it would have to be said that the labor of the legislature and even the government would have to be assumed by [the military], thereby upsetting the entire constitutional order. ....

One of the most precious conquests of political civilization is that of justice administered by organs that are independent, impartial, and versed in legal science.... Now, military criminal justice, for its organization and for the form in which it is composed and functions, is not part of the Judicial Branch, as required by the Constitution for the judgment of the civil population.<sup>201</sup>

Similarly, the Court struck down a state of siege decree creating a special investigative commission outside of the normal judicial hierarchy to investigate the most serious crimes by narcotraffickers and guerrilla groups.<sup>202</sup>

President Barco also found many of his innovative attempts to use state of siege jurisprudence to tackle economic or structural problems frustrated, as the Court found that these

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the grounds that the president was attempting to use the exceptional measure of state of siege to enact permanent measures. *See* Decision of Mar. 27, 1989, 210 *Jurisprudencia y Doctrina* 369-395 (June 1989). The Court also noted in passing that the measure worked against the “humanistic tradition of the Rule of Law” and “the eminent dignity of the human person,” but stated that “it did not find it pertinent to extend the discussion of those themes” because the first criteria of decision was sufficient. *Id.* at 380.

<sup>199</sup> Notably, this decision was issued the same week as a second important decision, which struck down a large piece of a delegated decree allowing the president to issue a law regulating judicial career paths. *See* Decision of Mar. 3, 1987, 185 *Jurisprudencia y Doctrina* 431-444; *see also* Decision of June 25, 1987, 189 *Jurisprudencia y Doctrina* 925-932 (Sept. 1987) (striking down more provisions of the same decree). The Decree would have given a Judicial School much of the power to select judges for appointment and promotion; the Court found that this violated the separation of powers by taking away the Supreme Court’s own powers to appoint lower court judges, and thus struck most of the decree down.

<sup>200</sup> Decision of Mar. 5, 1987, 185 *Jurisprudencia y Doctrina* 492-509 (May 1987).

<sup>201</sup> *Id.* at 498.

<sup>202</sup> *See* Decision No. 58, Apr. 25, 1987, in 1 *EL RESTABLECIMIENTO DEL ORDEN PUBLICO: UNA UTILIZACION INNOVADORA DEL ESTADO DE SITIO* 231 (1990)

were improper attempts to invoke emergency powers.<sup>203</sup> For example, the Court struck down decrees establishing special terms for telecommunications contracts in affected regions, and setting up special regimes for the economic reconstruction of certain parts of the country.<sup>204</sup> The Court found that these “chronic” or “structural” problems were not “directly” related to the crisis of order and thus ought to be handled through the normal legislative process, rather than through invocation of state of siege powers.

The cumulative impact of these decisions deeply angered the Barco administration; the President in response gave an extraordinary 1988 television address in which he explained in great detail the Court’s recent jurisprudence and expressed his disagreement with it. He complained that “in the last year a series of decisions of the Supreme Court of Justice have practically taken away all efficacy and utility from the institution of the State of Siege” and argued that “the capacity of the executive to manage public order has been significantly reduced.”<sup>205</sup> Finally, Barco concluded by “exhorting, very respectfully, to the Honorable Supreme Court of Justice that it appreciate in a different way the urgencies of the present

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<sup>203</sup> The discourse here focused more heavily on structure and particularly on the powers of the president than on rights. As an example, the Court struck down a decree establishing life in prison without any possibility of parole for certain classes of criminals, on the grounds that the president was attempting to use the exceptional measure of state of siege to enact permanent measures. *See* Decision of Mar. 27, 1989, 210 *Jurisprudencia y Doctrina* 369-395 (June 1989). The Court also noted in passing that the measure worked against the “humanistic tradition of the Rule of Law” and “the eminent dignity of the human person,” but stated that “it did not find it pertinent to extend the discussion of those themes” because the first criteria of decision was sufficient. *Id.* at 380. However, the Court did show some evidence of developing an independent rights-consciousness towards the very end of the National Front. For example, in 1988 the Court struck down a decree that established broad censorship, holding that this was inappropriate even during a state of siege without some evidence that the material in question “worked against public order.” *See* Decision of Jan. 19, 1989, 208 *Jurisprudencia y Doctrina* 239-241 (Apr. 1989) (“And do not let it be said that article 42 of the Constitution consecrates freedom of the press in times of peace and that, therefore, in times of no peace that privilege disappears, without more.”).

<sup>204</sup> *See* Decision No. 42, May 19, 1987, *in* 1 *EL RESTABLECIMIENTO DEL ORDEN PUBLICO: UNA UTILIZACION INNOVADORA DEL ESTADO DE SITIO* 171 (1990) (telecommunications contracts); Decision No. 53, June 4, 1987, *in* 1 *EL RESTABLECIMIENTO DEL ORDEN PUBLICO: UNA UTILIZACION INNOVADORA DEL ESTADO DE SITIO* 197 (1990) (economic reconstruction of Uraba).

<sup>205</sup> Virgilio Barco, Intervencion por television del Presidente de la Republica, Virgilio Barco, exhortando a la Corte Suprema de Justicia para que fortalezca el Estado de Sitio, enero 13, 1988, *in* 2 *EL RESTABLECIMIENTO DEL ORDEN PUBLICO: UNA UTILIZACION INNOVADORA DEL ESTADO DE SITIO* 1352, 1353, 1357 (1990).

moment and return to the President the necessary capacity of action....”<sup>206</sup> The President subsequently warmed, after early 1988, to the idea of wholesale constitutional reform by Constituent Assembly, paving the way for the Constituent Assembly of 1991.<sup>207</sup> Thus, Barco’s support for the Assembly was related to his frustrating experiences with the Supreme Court.

### **III. Conclusion**

This Chapter demonstrated that for almost all of the Court’s history, including the bulk of the National Front period, the Court worked in conjunction with the dominant political regime, rather than in opposition to it. The Court grew in power primarily because it was useful to these political elites in carrying out a range of tasks including, for example, (a) legitimating the basis by which the regime held power, (b) regulating the relationship between the branches of government, (c) striking down laws associated with the prior regime, and (d) reworking legal doctrine to give the new regime more space in which to work. As in American legal history, the key to the judiciary’s development was not its independence but rather the fact that it played a fairly central role within the development of the Colombian state.

This Chapter has also shown that the historic closeness between the Colombian state and the Supreme Court broke down after the late 1970s, when the regime began questioning and striking down major presidential initiatives, including significant constitutional reforms and important uses of emergency powers. As we have seen and will see in more detail in the next chapter, the Supreme Court’s distance from the political regime created a substantial backlash against the Court; the creation of a new institution to manage judicial review, the Constitutional

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<sup>206</sup> *Id.* at 1358.

<sup>207</sup> *See, e.g.*, Carta del Señor Presidente de la Republica, Virgilio Barco, a los Directores del Diario “El Espectador,” Juan Guillermo Cano y Fernando Cano, Enero 30 de 1988, in 1 DEL PLEBISCITO A LA ASAMBLEA CONSTITUCIONAL 42 (1990).

Court, was an attempt to create a body that would be closer to the political system than the existing court, rather than an attempt to create a more “independent” court. Yet at the same time, because of the country’s long tradition of using the judiciary for important matters, members of the Constituent Assembly viewed solutions to the problems facing the country as “more courts” and “more law”: they therefore imbued the new Court with a wealth of powers. In other words, the distaste of many political elites for the behavior of the Supreme Court led them to create the Constitutional Court; but the long tradition of courts playing a key role in Colombian political development led them to make that new court strong rather than weak.

### **Chapter 3: The Creation of the Constitutional Court**

This chapter examines the creation of the Constitutional Court in 1991, focusing on an important puzzle: given the widespread dissatisfaction with the Supreme Court at the end of the National Front period, why did constitutional designers opt to create an even more powerful Constitutional Court, with some of the most extensive powers of any tribunal in the world, in 1991?

Chapter 2 demonstrated that the Colombian Court had historically been closely tied to the prevailing political regime; further, it normally gained additional power because it was seen as useful to dominant political elites. Thus, Colombian elites built up a sense of judicial capacity over a long period of time. The previous chapter also demonstrated that beginning in the late 1970s, the Colombian Supreme Court was in an anomalous position – it drifted away from the regime on key points and began striking down a significant amount of important legislative and constitutional change. The Court, as a result, earned the ire of elites in the political regime, who argued that the Court was helping to construct a “blocked society.” As Fernando Cepeda argued in the late 1980s, it was as if the keys of change had been thrown into the sea.

Both facets of this context – the extended past working back at least to 1886 and the Supreme Court’s behavior since 1979 – had an impact on deliberations at the 1991 Assembly, in a way that initially appears paradoxical. At one level, deliberations around the Constitutional Court were focused on a negative evaluation of recent actions of the Supreme Court, which was seen by many actors as making unproductive and costly interventions in the political system. The criticisms of the Court’s recent actions – blocking constitutional reform and partially defanging the states of siege and emergency – came to a head at the Convention, where many members viewed the Court as extremely out of touch with modern politics. Members of the Constituent

Assembly did not set out to create a more independent court than the Supreme Court, or a Court that would adjudicate disputes above politics. There is far more evidence for the contrary hypothesis – that they were frustrated with the distance between the Supreme Court and the political regime, and sought to create a new Court that would be closer to prevailing political elite. In other words, the creation of the Constitutional Court (along with related constitutional changes) was a strong reaction against the Supreme Court. The Constitutional Court is therefore not a case of “judicial independence by design” – it does not fit the standard story of political elites getting together and agreeing to create a court that will apolitically adjudicate between their interests. We must seek, as I show in the following chapters, some other explanation for the Constitutional Court’s extraordinary power.

But at the same time, the Assembly created a Constitutional Court with sweeping powers, possessing some of the strongest instruments of any such court in the world. The Assembly maintained the Court’s ability to undertake abstract review of statutes at the petition of any citizen, at any time. In comparative law, the lack of any specialized standing or duration requirements for abstract review is quite rare.<sup>208</sup>

The Assembly also gave the Court a new power, the *tutela*, which allows any citizen to bring a constitutional complaint enjoining the actions of a governmental (and in some cases private) actor infringing on their fundamental rights. This instrument is in the class of powers called an “individual complaint,” which is common both in Europe and, under the name *amparo*,

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<sup>208</sup> Where such instruments exist in the other major systems of Latin America – as in Mexico, Brazil, and Chile – their use is limited to some powerful subset of the political system (such as the president or a large fraction of either a national or subnational government) and often limited to before or shortly after the statute has been passed. *See generally* Patricio Navia & Julio Rios Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUDS. 189 (2005). Major European systems – such as Germany, France, Spain, and Italy – impose similar requirements on the exercise of abstract review. *See* ALEC STONE SWEET, GOVERNING WITH JUDGES 47 tbl. 2.2 (2000). For example, Spain limits this power to the prime minister, the president of parliament, fifty members of either chamber, the executives of the autonomous regions, or the ombudsman, and requires that laws be referred within 90 days of passage. *See id.*

in Latin America. But the Colombian version is an unusually powerful version of the mechanism, for three main reasons.<sup>209</sup> First, it is extraordinarily fast – the Constitution specifies that *tutelas* must be decided within ten days. The Constitution is also explicit that the tutela is informal – the petitioner does not need a lawyer and courts cannot impose formal procedural barriers to its use. This is different from the way the mechanism works in much of Latin America, where it is highly specialized and encrusted with procedural formalities.<sup>210</sup> Finally, the vast bulk of *tutelas* are heard by the lower (ordinary) courts, and the Constitutional Court is given discretionary power to pick and choose those cases that it wants to review. The Court's docket control has prevented it from having the severe workload problems faced by similar courts in places like Spain and Brazil, where this control is absent, and has allowed it to focus more on developing major principles of constitutional law.<sup>211</sup>

The puzzle, then, is that delegates would choose to create an extremely powerful court in a context where public and political debate was dominated by criticism of the recent actions of the Supreme Court. The answer to this puzzle lies in the long history of the Supreme Court's

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<sup>209</sup> The text of the article creating the *tutela* reads as follows:

**Article 86.** Every person has the right to file a *tutela* before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority.

The protection will consist of all order issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be challenged before a superior court judge, and in any case the latter must send it to the Constitutional Court for possible revision.

This action will be available only when the affected party does not possess another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the *tutela* and its resolution.

The law will establish the cases in which the *tutela* may be filed against private individuals entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability.

<sup>210</sup> For an overview, see ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (2009)

<sup>211</sup> Members of the government and Assembly were highly aware of the Spanish experience and designed the discretionary-review mechanism precisely to avoid the congestion that had occurred with the Spanish Constitutional Court's workload. See, e.g., MANUEL JOSE CEPEDA, LA TUTELA: MATERIALES Y REFLEXIONES SOBRE SU SIGNIFICADO 107 (1992) (recounting testimony that was given to the Fourth Commission of the Assembly by experts on Spanish constitutional law on this point).

involvement in politics, usually in ways that were beneficial to prevailing political regimes. The Court had built up, through its work, a sense that it was capable of intervening in a broad range of political disputes. This led members of the Constituent Assembly to view solutions to the grave problems that the country was facing in 1991 in terms of judges and law. Constituents and those in the government (including then-president Cesar Gaviria) almost unanimously viewed additional judicial involvement in politics as the keystone to resolve these problems. Thus the Assembly imbued the newly-created Constitutional Court with an extraordinary range of powers. It is impossible to understand the design of the new Constitutional Court without understanding the deep sense that elite political actors possessed of judges as core political actors.

In Part I of this chapter, I briefly provide some background to the 1991 Constituent Assembly; rather than developing a complete sense of the proceedings, the purpose here is to provide sufficient context to understand the context in which the Constitutional Court was created. In Part II, I argue that the creation of the Constitutional Court cannot be explained as an attempt to implant a more independent judiciary in Colombia; instead, constituents were motivated by fear of the old Supreme Court and a desire to create a court that would hew closer to the prevailing dynamics of the dominant political regimes (as had been the case for virtually all of Colombian history). Finally, in Part III, I show how delegates and other key players were nonetheless strongly influenced by the long history of meaningful judicial intervention in politics; they thus tended to emphasize “judicial” solutions to the country’s problems.

## **I. The 1991 Assembly & The Prevalance of Insider/Outsider Coalitions**

The 1991 Constitutional Assembly took place in an atmosphere of extreme crisis. The tide of political violence appeared to reach its worst point in the late 1980s – a large number of



prominent political figures were assassinated, often by drug traffickers working with Pablo Escobar. Guerilla groups, narco-traffickers, and paramilitary organizations all constituted severe threats to order in the country; one or another of these groups was often in control of land in the provinces, and they were capable of staging spectacular acts in the capital itself, as occurred when the M-19 invaded the Palace of Justice (seat of the Supreme Court and Council of State) in 1985. The military's attempted assault on the Palace of Justice had disastrous results, leading to the death of the guerillas but also of a large fraction of the Court itself.<sup>212</sup>

Moreover, by the late-1980s there was an emerging consensus around the idea that political institutions were largely to blame for the crisis. The National Front had preserved the peace between the two traditional parties, but at the cost of excluding any other movements from power – these exclusionary tendencies helped to feed the left-wing guerilla movements (such as the FARC and M-19), who turned to arms in place of contending in the electoral arena that was closed to them. The traditional parties themselves weakened since they were no longer really competing against each for power. Both parties became highly factionalized and the ideological differences between Liberals and Conservatives, which had once been sharp along several dimensions, eroded, reducing the identification of citizens (especially in the cities) with these movements.<sup>213</sup>

Further, as suggested in the previous chapter, the National Front permitted, indeed encouraged, a particular configuration of executive-legislative relations that became problematic through time.<sup>214</sup> Essentially, the president made most major pieces of legislation unilaterally,

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<sup>212</sup> For some background on the era in which the 1991 Constitution was written, see, for example, DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 249-82 (1993); Miguel Silva, *La Asamblea Constituyente de 1991*, in *NUEVA HISTORIA DE COLOMBIA* 107 (Alvaro Tirado Mejia, ed., 1998).

<sup>213</sup> See GARY HOSKIN, *LEGISLATIVE BEHAVIOR IN COLOMBIA* (1976).

<sup>214</sup> For an overview of the patterns sketched here, see, for example, Ronald A. Archer & Matthew Soberg Shugart, *The Unrealized Potential of Presidential Dominance in Colombia*, in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 110 (Scott Mainwaring & Matthew Soberg Shugart, eds., 1997).

using powers granted through a State of Siege, State of Economic and Social Emergency, congressional delegation of emergency power, or autonomous regulation. Members of Congress meanwhile spent most of their time on non-national functions, particularly on accumulating funds for use on local patronage (called *auxilios*) in order to win reelection and to strengthen their local political connections.

On national matters, the president became the most progressive, change-oriented force in the system – presidents from the 1960s onwards constantly called for major constitutional changes to the system, and sought to push reform initiatives (such as agrarian reform) that would head off challenges to the legitimacy of the National Front. Beginning in 1968, when the Congress made it very difficult for the President to gradually undo pieces of the National Front, both Congress and the Supreme Court became noted for protecting the status quo. Congress, which was deferential to ordinary presidential policymaking, was actually selectively deferential and generally pushed back against attempts to dismantle the basic institutional structure of the National Front. Yet the only textual mode of constitutional amendment ran through the Congress, which could approve amendments by an absolute majority in two consecutive sessions.<sup>215</sup>

The Supreme Court, as explained in the last chapter, was divided equally between Liberals and Conservatives who served for life; the Court itself was placed in charge of picking its replacements. Perhaps as a result, the Court tended to act against certain attempts to reform the system, particularly when they touched the judiciary. The Court thus struck down the attempted Constituent Assembly of Lopez Michelsen in 1978, which sought deep reforms to the judiciary, along with the package of reforms approved by President Turbay in 1981, which would have largely placed the judicial review functions of the Court in the Constitutional

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<sup>215</sup> See *id.* at 147-52.

Chamber. In the late 1980s, during the Barco administration, the Council of State (the highest administrative court in the system) voided the Accord of the Casa de Narino, which aimed at paving the way for a plebiscite on constitutional reform. In short, when the President attempted constitutional change through Congress, he would often fail or have his efforts watered down; when he tried to bypass Congress by calling a Constituent Assembly, the courts would hold that he had unconstitutionally short-circuited the only valid procedure for constitutional change. Critics referred to this configuration as the “blocked society.”

The final trigger for overcoming these blockages was the assassination of the Liberal candidate for President in 1990, Luis Carlos Galán. The assassination sparked a short-lived but important student movement, the Septima Papeleta, which aimed at pushing comprehensive institutional and constitutional reform as a solution to the crises facing the state.<sup>216</sup> The initiative met consensus approval from major political leaders from various parties, and informally the students held a vote in injunction with elections in March 1990, where the initiative garnered over two million votes in favor. President Barco issued a decree allowing an official vote on whether to call a Constituent Assembly, which coincided with the 1990 presidential elections – the “yes” vote passed overwhelmingly. The new President, the Liberal Cesar Gaviria, then held a vote electing the members of the Assembly themselves. The Supreme Court, in a reversal of past practice, uphold both the Barco and Gaviria decrees, although the final vote on the Gaviria decree was by a very narrow margin.<sup>217</sup> The Court held that the people (the original constituent power) always had the inherent power to change their existing political institutions, and that this power could not be limited by the existing institutional order. The majority of the Court stated

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<sup>216</sup> For a history of the movement and its effects, see JAIME BUENAHORA FEBRES-CORDERO, *EL PROCESO CONSTITUYENTE: DE LA PROPUESTA ESTUDIANTIL A LA QUIEBRA DE BIPARTIDISMO* 89-135 (1991).

<sup>217</sup> See RAFAEL BALLEEN M., *CONSTITUYENTE Y CONSTITUCION DEL 91*, at 157-232 (1991) (reprinting the entire decision and its dissents).

that the people constituted the “primary constituency, and therefore can at any time give themselves a constitution distinct from the one actually in force without subjecting themselves to the requirements that it consecrates.”<sup>218</sup>

In composition, the Constituent Assembly included both representatives of the traditional parties and newcomers. In accord with the major political forces, President Gaviria agreed to use a new method of election which would create more space for non-traditional political forces. Rather than electing members in small districts, as had traditionally been done with Congress, the system elected all members of the Assembly from a single nationwide constituency, using proportional representation. The Liberals won a plurality of the seats, about one-third, although they won these seats using a huge number of different lists and were seen as facing serious problems of party discipline.<sup>219</sup> Indeed, on highly contested issues at the Convention the Liberals tended to splinter. The Conservatives, on the other hand, fared very poorly, winning only five seats (although they were joined by four other independent conservatives), including the ex-President Misael Pastrana. Many of their votes were soaked up by the National Salvation Movement (MSN) of Alvaro Gomez, a traditional Conservative boss who had taken on a heavily anti-system, anti-traditional party rhetoric. The MSN won about fifteen percent of seats, and Gomez now sought power as something of an outsider, rather than within the two-party framework. The major outsider force was the M-19, the demobilized guerrilla group that had stormed the Palace of Justice in 1985 and which now surprisingly won about one-quarter of all seats in the Assembly. The M-19, however, was also a heavily diverse group, including ex-representatives of the Liberal and Conservative parties as well as true leftists. Finally, the

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<sup>218</sup> *Id.* at 169-70.

<sup>219</sup> For the percentages of seats won by each party, see John Dugas, *El Desarrollo de la Asamblea Nacional Constituyente*, in *LA CONSTITUCION DE 1991: UN PACTO POLITICO VIABLE?* 45, 47 tbl.1 (John Dugas, ed., 1993).

remaining seats were taken up by a varied group of newcomers – several indigenous representatives, representatives of Protestant groups, other demobilized guerrillas, etc.

Decisions in the Assembly were largely made by three kinds of coalitions. First, there was broad agreement on most substantive measures, for example the composition of the charter of rights, the broad outlines of decentralization, etc. Most issues were decided by unanimity or near unanimity, and in general a spirit of consensus pervaded most phases of the discussion. The severe crisis had not only created space for the Assembly, but also seemed to create some consensus around the basic diagnosis, at least at the constitutional level. Most of the proposals approved by the Convention were approved by either unanimity or near unanimity: in the first plenary debate (articles had to be approved in two rounds to pass, but most debate was completed in the first round), 43 percent of articles passed unanimously, 82 percent with upwards of 90 percent of the votes in favor, and 95 percent with greater than 80 percent of the votes in favor.<sup>220</sup> The Assembly thus had little trouble agreeing on measures to attempt to strengthen and rationalize the Congress, as well as to create or strengthen a set of institutions – such as the Defensoria del Pueblo and Fiscal – that would act to work around those existing institutions in case they failed.

Second, a few substantive issues opened fissures along the traditional Liberal-Conservative lines – for example the references to religion and God in the preamble, and the debates about divorce (which was allowed) and abortion (about which the Constitution was silent). On these issues, the M-19 and the Liberals tended to stand on one side, while the Conservatives and the MSN stood on the other. These were not, by and large, crucially important debates.

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<sup>220</sup> See *id.* at 69 tbl.7.

Finally, a range of the most salient issues at the Convention were decided by insider-outsider or winner-loser coalitions. The outsider insurgent movements, the M-19 and MSN, had a clear interest in opening up the remnants of the National Front, allowing them to compete on equal terms with the traditional parties. They wanted to dismantle the systems that prevented them from accessing seats in the Congress, the Supreme Court, and other key bodies. The Conservatives, who traditionally had enjoyed half of all support in the electoral system but who in 1991 seemed very weak, had the opposite interest. They had lost two straight presidential elections (the last one in which their official candidate won only 700,000 votes and was trounced by both Gaviria, who won 2.8 million votes, Gomez, who won 1.4 million, and the head of the M-19, Antonio Navarro Wolff, who won 730,000<sup>221</sup>) and only won a few seats at the Convention. They wanted to preserve the institutions that had allowed the two-party system to monopolize power – non-proportional electoral rules, overrepresentation of patronage-based rural districts, parity and cooptation in the Supreme Court, etc. The Liberals were in the most ambiguous position; as a traditional party that was faring relatively well, they had both an interest in keeping out newcomers but could also afford to let some new political forces in, and they might hope to gain from opportunities to pack institutions that had traditionally been divided equally between the two parties. Further, they were led by a strong, young, and reform-minded new President, who seemed to have believed that his party would fare quite well under a more open system.

Thus, on a range of issues that had clear, short-term political salience, the MSN tended to join with the M-19 to push for more openness, while the Conservatives lead staunch opposition. The Liberals tended to split on these issues, with President Gaviria and his team often brokering the final deal and bringing some portion of the Liberals along with him. This was roughly the

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<sup>221</sup> For the totals, see BUSHNELL, *supra* note 212, at 292 appx b.

shape of the debate on judicial reform and on the existence and composition of the new Constitutional Court, as I explain in more detail below in Section B. These issues became highly politicized, and were not governed by consensus, largely because they were about the extent to which a National-Front era institution would be gutted and opened to new political forces.

This was also the shape of the debate about who would act as chair or president of the Assembly and about the electoral rules which would be used to elect the new Congress. On the former issue, many Liberals believed that a member of their delegation should act as sole chair, since they had won the plurality of seats. But the MSN and M-19 formed an alliance on this issue, agreeing to split the presidency of the Assembly between Gomez and Antonio Navarro Wolff, the leader of the M-19. Gaviria had to convince reluctant Liberals to accept a deal in which a Liberal, Horacio Serpa, would act as a third co-president.<sup>222</sup> On the electoral rules and related issues, leaders of the M-19 and MSN for example pushed for the allowance of factional lists, which they believed would accelerate the disintegration of the traditional parties, a two-round presidential election, a Senate elected from a single nationwide constituency using proportional representation, and elected rather than appointed governors.<sup>223</sup>

Further, these sorts of dynamics dominated the discussion about whether to revoke the mandate of the existing Congress so as to call new elections, which was the most incendiary moment of the Assembly. The Congress elected in 1990 continued to be dominated by the two traditional forces, which together held about 90 percent of the seats in both chambers. M-19 and the MSN strongly supported this idea, arguing that the Assembly held “original constituent

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<sup>222</sup> This incident is recounted in HUMBERTO DE LA CALLE, *CONTRA TODAS LAS APUESTAS: HISTORIA INTIMA DE LA CONSTITUYENTE DE 1991*, at 97-100 (2004).

<sup>223</sup> See ANTONIO NAVARRO WOLFF & JUAN CARLOS IRAGORRI, *MI GUERRA ES LA PAZ* 145-46 (2004); see also DE LA CALLE, *supra* note 222, at 147-48 (describing the strategic elements of Navarro’s plan as being aimed at opening the political system for his new party).

power” and therefore could take whatever actions it wanted vis-à-vis other institutions of state.<sup>224</sup>

The motive, of course, was to give each of these outsider movements space inside the Congress.<sup>225</sup>

Leaders of the MSN and M-19 approached Gaviria’s representatives and the Liberals in the Assembly, who with some reluctance agreed to go along. This proposal however split the Liberals, as almost all congressional liberals and some in the Assembly saw the action as hurting the fortunes of the party.<sup>226</sup> Eventually, the Liberals, MSN, and M-19 agreed on the revocation of Congress, but only after members of the MSN and M-19 agreed to vote for a proposal that would make current members of the Assembly (but not current members of Congress) ineligible for positions in the first new Congress, while current members of Congress would be eligible.<sup>227</sup> The primary opposition within the Convention was the Conservative party, which obviously stood to lose a large number of seats in new elections and which was not included in the discussions with Gaviria that created the accord.<sup>228</sup> Ex-president Pastrana, the leader of the

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<sup>224</sup> See, e.g., DE LA CALLE, *supra* note 222, at 199-200 (recounting speeches of members of the Assembly who claimed power to limit the duration of the president, remove members of the Cabinet, dictate legislative and constitutional matters of immediate application).

<sup>225</sup> See *id.* at 194-95.

<sup>226</sup> See, e.g., Carlos Obregon y Edulfo Pena, *Revocatoria Hoy a Discusion*, EL TIEMPO, May. 30, 1991 (stating that there was a “range of positions” within the liberal ranks on the proposal). The Liberal ex-president Lopez Michelsen also reacted against the agreement, appearing with Liberal congressmen to oppose the proposal and stating that it smacked of “bonapartism.” See de la Calle, *supra* note 222, at 24-27; 205-08.

<sup>227</sup> See DE LA CALLE, *supra* note 222, at 210-12. De la Calle, Gaviria’s minister of government, dramatically recreates the incident where the accord was reached: he states that Navarro approached Gaviria, agreeing to a proposal whereby the Congress would be revoked, but current members of the Assembly would be ineligible to run for reelection. The two then sprung this proposal on Gomez, who accepted it very reluctantly, understanding that it would hurt his movement. See *id.* at 210-12. Indeed, subsequent analysts have found that this was a factor in the next round of congressional elections, where the traditional parties fared well and the outsiders, many of whose best politicians served in the Assembly, performed poorly. The M-19, for example, basically imploded in the next several years, even though in 1991, Navarro was seen as a likely future president. See Lawrence Boudon, *Colombia’s M-19 Democratic Alliance: A Case-Study in New Party Self-Destruction*, 28 LAT. AM. PERSPECTIVES 73 (2001)

<sup>228</sup> Pastrana insisted that the issue, along with the rest of the Constitution, be put to the people in a referendum after being approved by the Assembly; Gaviria was unwilling to follow that course since he worried about both the participation levels and political winds that might undo the work of the Assembly. He thus insisted that Pastrana and the Conservatives be left out of discussions on the agreement. See DE LA CALLE, *supra* note 222, at 173-74.



Conservatives in the Assembly, resigned over the incident after making a dramatic speech,<sup>229</sup> and other members of the party complained that the Assembly was helping to consolidate a “dictatorship.”<sup>230</sup> The political coalitions around these debates are relevant here, because they are in certain respects similar to the political debates surrounding the creation of the Constitutional Court and other issues touching upon the reform of justice. Many of these issues as well became debates about undoing the institutions of the National Front and replacing “insiders” on the Supreme Court and elsewhere with “outsiders.”

## **II. The Creation of the Constitutional Court: Not a Case of “Independence by Design”**

### **A. The History of the Idea in Colombia**

The concept of a specialized Constitutional Court stems from Hans Kelsen, who envisioned it as a civil law answer to the judicial review powers of the U.S. Supreme Court. Judicial review in continental Europe reached its heyday after World War II (although the first instance of a centralized constitutional court was Austria in 1920), far later than the initiation of judicial review in the United States – specialized constitutional courts now exist in most of the major countries in Europe, such as France, Germany, Spain, and Italy.<sup>231</sup> Civil law ideas in Europe coupled themselves with a certain vision of separation of powers that made it ideologically very difficult to give ordinary courts powers of constitutional review. At risk of considerably oversimplifying, civil law countries historically have tended to adhere rigidly to a

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<sup>229</sup> See *Renuncio Pastrana Ayer Ante Plenaria*, EL TIEMPO, June 13, 1991, at 6A.

<sup>230</sup> See *Minorias Arremetan Contra el Acuerdo*, EL TIEMPO, June 13, 1991.

<sup>231</sup> See MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46-47 (1971).

conception that privileges the legislature as the sole creator of law and the judge as being rigidly confined to interpretation and application of the laws passed by the legislature.<sup>232</sup>

Against this backdrop, judicial review of the constitutionality of legislation was not an exercise in judging in the ordinary sense: according to Hans Kelsen (ideological founder of the Austrian model) a body exercising judicial review was instead acting as a “negative legislator,” in order to distinguish it from the parliament, which was a “positive legislator.”<sup>233</sup> Special constitutional courts therefore had to be set up to review constitutional matters and constitutional matters alone, separate from the highest ordinary court, the court of cassation, whose role was to unify the ordinary civil law. Constitutional review in such systems is ideally centralized, although many systems in practice have slipped fairly considerably towards decentralization through time. Theoretically, the constitutional court is the only body that can hear constitutional cases, as all ordinary judges in the system are barred from hearing them.<sup>234</sup> Further, constitutional courts are often more “political” in composition than Supreme Courts – they often include members picked by legislatures or other political bodies, whereas the integrants of the ordinary courts are normally career judges who are more insulated from politics.<sup>235</sup>

This debate has migrated to Latin America, which had historically been influenced by the model of the American judiciary. While some major countries such as Argentina have maintained the American model of a non-specialized Supreme Court, a large number of countries

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<sup>232</sup> See *id.*; JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 34-47, 136-41 (2d ed. 1985).

<sup>233</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 34-37 (2000); MERRYMAN, *supra* note 231, at 38 (“Indeed, a few purists within the civil law tradition suggest that it is wrong to call such constitutional courts ‘courts’ and their members ‘judges’. Because judges cannot make law, and because the power to hold statutes illegal is a form of lawmaking, these officials obviously cannot be judges and these institutions cannot be courts.”)

<sup>234</sup> See CAPPELLETTI, *supra* note 231, at 55-60.

<sup>235</sup> For example, in France, one-third of the members of the court are named by each of the president, the president of the National Assembly, and the president of the Senate; in Germany, one-half are elected by each of the upper and lower houses of Parliament; in Italy, one-third are named by each of the Parliament, executive, and judiciary; and in Spain, two-thirds are elected by congress and one-sixth each named by the executive and judiciary. See STONE SWEET, *supra* note 233, at 49 tbl. 2.3.

– for example, Brazil, Chile, Peru, and Ecuador – have adopted specialized constitutional courts in constitutional reforms undertaken since the early 1980s. Moreover, other countries like Mexico have maintained the label “Supreme Court” while transforming most of that Court’s docket into constitutional law, *de facto* creating a kind of constitutional tribunal.

The Colombian debate about whether to create a Constitutional Court was made in a peculiar climate that was quite different from the set of ideas floating around Western Europe after World War II. As explained in detail in Chapter 2, Colombia had a long-standing system of judicial review, and the public action in particular was considered a distinctively Colombian invention and a point of pride for members of the Colombian elite. Thus, the Constitutional Court was not in Colombia seen as a way to establish judicial review; it was instead viewed as a way to improve upon the system of review currently being carried out by the Supreme Court. And more particularly, the Constitutional Court idea sprung up in opposition to the design of the Court during the National Front, which insulated the Court from the political parties. As noted in the prior Chapter, the political parties favored splitting the justices evenly between Liberals and Conservatives; however, the idea of giving justices life terms and of allowing them to choose their own replacements (cooptation) was imposed by the military junta.

Almost immediately, significant factions in Congress attempted to reform the Constitution to alter either the term or selection mechanism of the Court. Members of Congress in the late 1950s and early 1960s consistently proposed sharp cuts in the terms of members of the Supreme Court (back to their historical levels of five years), and a selection mechanism that gave the political branches more power over appointments. In 1959, the Senate approved a proposal to cut the terms of members of the Supreme Court down to five years, and in 1963 the full Congress actually passed a reform that would both have both cut terms to five years and allowed

Congress to select magistrates from lists formulated by the president.<sup>236</sup> The president vetoed the latter proposal, preventing it from coming into effect.

In the late 1960s, opponents of the Supreme Court's design and performance often shifted from reforming the Court to creating a wholly new body, the Constitutional Court. Thus the Constitutional Court in Colombia was consistently pushed by political actors who were dissatisfied with the existing Supreme Court, and at least some of whom believed that the Court was too distant from the dominant political coalition. In contrast, opposition to these proposals was consistently led by supporters of the current Supreme Court, who felt that it was properly "independent" of political actors and feared the "politicization" of constitutional jurisprudence.

The idea of a constitutional court was first proposed during the pendency of the sweeping 1968 reforms discussed in detail in the prior Chapter. The proposal to create a constitutional court was the brainchild of the important liberal Senator Carlos Restrepo Piedrahita and not of the President at the time, Carlos Lleras Restrepo. It was supported by three arguments: first, an argument that specialization would lead to better constitutional jurisprudence, second, an argument that a "concentrated and uniform" system of review was preferable to the current "diffuse and multiple" system, whereby review functions were split between the Supreme Court, various administrative courts, and in fact any court in the country under certain conditions, and third, an argument that constitutional review was improperly politicizing the Supreme Court, thus damaging its "prestige."<sup>237</sup> Supporters lamented the fact that judicial review made the Supreme Court "take sides between the vast interests of legislators, interest groups, the government, etc," and referred to the "recent history of the country" as demonstrating the

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<sup>236</sup> See Mario Alberto Cajas, *La Corte Suprema de Justicia de Colombia, 1886-1991: El Control Constitucional en una Perspectiva Histórica y Política* 495, 546-48 (Facultad del derecho, Universidad de los Andes) (unpublished Ph.D. dissertation, on file with author).

<sup>237</sup> Domingo Sarasty M., *Ponencia Para Primer Debate (Cámara)*, in *HISTORIA DE LA REFORMA CONSTITUCIONAL DE 1968* 138-39 (1974); Carlos Restrepo Piedrahita, *Ponencia Para Segundo Debate (Senado)*, *in id.* at 114-15.

damage that had been done to the institution of the Supreme Court.<sup>238</sup> The new six-member court was to have been elected by the congress from lists presented by the President, Council of State (the highest administrative court), and the Supreme Court, for six-year terms.<sup>239</sup>

At the time, amendments to the Colombian constitution needed to be passed by congressional majorities in two consecutive years; this reform passed the first Congress in 1967, but was eliminated by the second in 1968. The Senate report that eliminated the provision cited both “technical” reasons for the change, and, more importantly, a fear that the Constitutional Court would move the country away from a “legal” form of constitutional review towards a system that “could be described as political,” given the shift from the cooptation system to a system in which constitutional judges would be elected by Congress.<sup>240</sup> Congress instead opted only to create a constitutional chamber inside the Supreme Court, like the civil, labor, and criminal chambers that already existed, and selected via the usual method of cooptation.<sup>241</sup> But while civil, criminal, and labor cases were decided by their respective chambers alone, constitutional questions were decided by the entire court, as they had been in the past, after study by the constitutional chamber. This system ensured the predominance of the ordinary judiciary in constitutional questions above the public law specialists, who were vastly outnumbered.

All four presidents from the late 1970s onward, after a wide gap had opened between the political regime and the judiciary, made a significant effort to create a constitutional court. Significantly, many of these proposals were blocked by the high courts themselves; others died

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<sup>238</sup> See Sarasty, *supra* note 237, at 139.

<sup>239</sup> *Id.* at 165-66.

<sup>240</sup> Ponencia Para Primer Debate, *in id.* at 481 (stating as a reason for archiving the proposal “[t]he passage from an eminently legal control, such as the one that appears in the Colombian Constitution, to a control that could be described as political, given the form of integration of the Constitutional Court, which according to article 57 of the first project is elected by the Congress, and even more so when after the “Plebiscite” of 1957 there was a desire to make the political activity of the conformation of the Supreme Court of Justice and of the Council of State independent by appealing to the known mechanism of cooptation.”).

<sup>241</sup> See JAIME ENRIQUE RODRIGUEZ NAVAS, *DINAMICA DEL CONTROL DE CONSTITUCIONALIDAD EN COLOMBIA*, 1811-1994, at 26-27 (1994).

or were diluted in Congress. The first occurred in 1977-78, when President Lopez Michelsen attempted to call a constitutional convention; as explained in the previous chapter, this reform was blocked by the Supreme Court, who declared it unconstitutional based on the idea that passage by congress in two sessions was the only legitimate way to reform the constitution. President Turbay Ayala, upon taking office in 1978, revived the constitutional court proposal briefly, but it was rejected in congressional debates and did not form part of a package of reforms passed by Congress. Congress did, however, pass significant reforms which would have allowed the Constitutional Chamber to carry out most judicial review functions on its own, and which would have created a Superior Council of the Judiciary to control judicial career paths. Further, Supreme Court justices would have served eight-year rather than life terms, and the Council would have been given power to draft lists off of which these justices would have been chosen, thus effectively ending the cooptation system.<sup>242</sup> At any rate, the entire reform package was again declared unconstitutional by the Supreme Court, this time on the grounds that the procedure followed by Congress had been improper. The third attempt to create a constitutional court occurred in 1984 during the Betancur administration; a proposal made it through one round of congressional approval but failed in the subsequent session. Finally, in 1988 the Liberal President Barco made the creation of a constitutional court part of his reform plan, which he intended – via a pact with the Conservatives -- to offer as a plebiscite. Barco's constitutional reform plan was shut down when the preparatory commission charged with formulating articles

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<sup>242</sup> See ARTURO SARABIA BETTER, REFORMAS POLITICAS EN COLOMBIA 45-53 (2003); DIEGO URIBE VARGAS, ESTRUCTURA CONSTITUCIONAL PARA EL CAMBIO 128-29 (1986); Fernando Cepeda Ulloa, *Colombia: The Governability Crisis*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 193, 196 (Jorge I. Dominguez & Michael Shifter, eds., 2d ed. 2003). A complete list of these provisions is available in the Supreme Court decision striking down the reforms. See Decision of Nov. 3, 1981, 120 Jurisprudencia y Doctrina 937, 943-45 (1981).

for the plebiscite was suspended by the Council of State on grounds that it sought to advance an end (reform of the constitution via referendum) not contemplated by that document.<sup>243</sup>

Some sense of the motivation behind these historical efforts to establish a Constitutional Court can be gleaned from the arguments of the Liberal politician Jaime Castro Castro, who was one of its major supporters. Castro served as Minister of Justice in the Misael Pastrana administration in the early 1970s, in the Senate during the late 1970s and early 1980s, and as Minister of Government under President Betancur. He later helped to design the Constitutional Court as a delegate to the Constituent Assembly. Castro issued stinging public critiques of the Court after it blocked the Assembly of Lopez and the reform of Turbay, and continued along this path in the 1980s from the Betancur administration, when in 1984 as Minister of Government he was the architect of a reform proposal that would have created a Constitutional Court elected by the Congress through lists sent by the president, Supreme Court, and Council of State. This was basically the same proposal eventually adopted in 1991. In an academic forum held at the Externado University in Bogota in 1984, Castro referred to the current Supreme Court repeatedly as the “government of judges” and blamed the Court for blocking the modernization of the country: “The possibilities of improving the political system, of modernizing it and updating it, of accommodating it to national necessities, are reduced to the point of disappearing and the political system puts the brakes on itself, ... generating its own destruction.”<sup>244</sup> Further, Castro criticized the cooptation system and the life tenure of magistrates and argued that the political branches must have a hand in integrating the new Constitutional Court: it was necessary to “simply synchronize the political will of the Nation with the exercise of constitutional

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<sup>243</sup> See VIRGILIO BARCO, PROYECTO DE REFORMA CONSTITUCIONAL: DEMOCRACIA PARTICIPATIVA Y JUSTICIA SOCIAL 80-83 (1988); BETTER, *supra* note 242, at 59-60; Cepeda Ulloa, *supra* note 242, at 196-97.

<sup>244</sup> See CARLOS RESTREPO PIEDRAHITA, ASPECTOS DEL CONTROL CONSTITUCIONAL EN COLOMBIA 111 (1984).

jurisdiction, via a formula that has been adopted in all parts of the world.”<sup>245</sup> His critique thus combined the two basic elements behind the history of the Constitutional Court in Colombia: a critique of the performance of the Supreme Court, which was seen as out of touch with modern Colombian society and its political class, and an argument that the solution to the problem was the creation of a specialized body that would be staffed in a way ensuring more affinity with changes in the political regime.

### **B. The Debates at the 1991 Constitutional Assembly**

A close read of documents surrounding the 1991 Constitutional Convention in Colombia suggests in fact that there was no concerted attempt to design a highly independent court. Instead, as in the historical debates surrounding the creation of a Constitutional Court, two factors dominated the context of the debates and relevant discussions: (1) anger and frustration with the old Supreme Court, which recent Colombian administrations blamed in part for governance problems, and (2) a debate about selection mechanisms for the Court, with the M-19 and MSN particularly stressing mechanisms that would give Congress a greater role in constituting the judiciary. On this second point, the debate about the Constitutional Court and on related issues resembled the insider/outsider or winner/loser fights outlined above – upstart parties pushed for dismantling rules that allowed the two traditional parties to dominate the judiciary, while the Conservatives, who seemed particularly weak in 1991, were staunchly opposed to these changes. The Gaviria administration, which had ties to the previous Barco administration and thus understood the governability problems caused by the Supreme Court in the 1980s, sided with the outsiders on many of these issues. In short, the creation of the Court is best understood as an attempt to bring the judiciary closer to the political regime than it had been

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<sup>245</sup> *Id.* at 122.



in the recent past, and as a fight over which political entities would have the closest links to the Court. Its creation cannot reasonably be understood as an attempt to create a more “independent” court or a court that would adjudicate above politics.

### **1. Backlash Against the Supreme Court**

On this issue as on others, President Gaviria’s proposals were key – his team, which was led by the Minister of Government Humberto de la Calle and which also included, particularly on judicial reform, his young adviser Manuel Jose Cepeda – played a consistently important role in shaping the deliberations of the Assembly.<sup>246</sup> Most of the final text (or at least sense) of the 1991 constitution matched the government’s initial proposal.<sup>247</sup> The president initially proposed a Constitutional Court with justices elected by the Senate from lists presented by the President, Supreme Court, and Council of State.<sup>248</sup> Various other delegates and organizations also proposed a constitutional court; some delegates and organizations (notably the Supreme Court and the Conservative party) opposed the proposal.

The question of why the President supported the proposal had much to do with the recent jurisprudence of the Supreme Court, and particularly the major presidential initiatives blocked during the last four presidential administrations of Lopez Michelsen, Turbay, Betancur, and Barco. Language throughout the Assembly was delicate when referring to the judiciary – this was necessitated in part by the 1985 M-19 takeover of the Court and massacre of many high court justices, which was still fresh in many people’s minds in 1991. The President thus studiously avoided framing the debate as an attack on the Supreme Court, instead noting the country’s

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<sup>246</sup> De la Calle was seen by much of the press as the most important participant in the constitutional process in 1991; ahead even of major players like Navarro. *See, e.g., De La Calle al Palacio?* CROMOS, July 8, 1991, at 18.

<sup>247</sup> An article-by-article analysis that compares the government’s proposal to the final text is given in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991 appx II (1993).

<sup>248</sup> *See* PRESIDENCIA DE LA REPUBLICA, PROYECTO DE ACTO REFORMATARIO DE LA CONSTITUCION POLITICA DE COLOMBIA 81-82, 211-19.

proud history of review with the public action. He pointed the debate instead towards the future, stating that a Constitutional Court would best help realize the rights and other provisions of the new Constitution.

But beneath the surface, there was continuing frustration with the role played by the Supreme Court, and above all fear of what it might do to the new constitution. De la Calle noted, for example, an incident during the debate over the revocation of the current Congress where opponents threatened to bring a complaint to the Supreme Court. He argued that the complaint backfired and contributed to the creation of the Constitutional Court, because “the majority of constituents felt the need to defenestrate the Supreme Court before it could throw the new constitution to the ground.”<sup>249</sup> Further, during the debate over the formulation of a charter of rights (in the first committee of the Assembly), De la Calle and Cepeda sent an interesting memo to the committee, recommending that they reformulate some rights using more precise or specific language. The two presidential advisers noted that the Supreme Court had often given very narrow interpretations two rights in the past:

[W]ith respect to some rights, the government considers it necessary to advance a little further in the delimitation of their content and purpose. One hundred years of jurisprudence of the Supreme Court of Justice and the Council of State show that merely reading a norm of the Constitution is insufficient to appreciate the meaning of some rights or the corresponding limitations or restrictions that the Constitution authorizes. Upon interpreting those norms, the two high courts have modified – if that expression is permitted – their significance.<sup>250</sup>

The memo went on to explain that the Court had interpreted rights like freedom of the press, right to privacy, freedom of assembly, and freedom of movement very narrowly in past

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<sup>249</sup> See DE LA CALLE, *supra* note 222, at 208.

<sup>250</sup> See La Necesidad de Ampliar los Derechos Civiles y Politicos, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO, at 287, 287 (1992).

decisions, and suggested specific language with respect to each of these rights in order to remedy these deficiencies.

Further, both supporters and opponents of the proposal to create a new Constitutional Court referred extensively to decisions of the Supreme Court during Assembly debates. As a reporter in *El Tiempo* stated after the Plenary debate, “The debate at root was dominated by a harsh judgment of the Supreme Court.”<sup>251</sup> There were two major classes of Supreme Court rulings discussed at the Convention. The first was the decisions of the Court to block attempts to reform the Constitution. Castro, now a delegate representing the Liberal party, discussed the “decisions that put an end to the last two attempts at constitutional reforms” as examples of an “evident divorce between the Court and society.”<sup>252</sup> In other words, delegates in favor of the creation of the Constitutional Court argued that the Court had drifted too far away from prevailing social current and from the current political regime.

Debate also focused heavily on the emergency powers jurisprudence of the Court. As noted in Chapter 2, starting in the late 1970s, the Court began striking down many important decrees issued under both mechanisms. Some delegates complained that the old Supreme Court had been too weak in standing up to the government during states of emergency. For example, a Liberal delegate, Julio Salgado, stated in committee that the Supreme Court “has been incapable of protecting the judicial order in Colombia or of preventing the supplanting of Congress by the Executive; on the contrary, it has given free rein to all of the State of Siege decrees that the government wished to promulgate.”<sup>253</sup> However, the debate did not focus on getting rid of these

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<sup>251</sup> Edgar Torres, *Duelo Político por la guarda constitucional*, EL TIEMPO, June 5, 1991, at 3A.

<sup>252</sup> See Jaime Castro, Por el Cual Se Crea la Corte Constitucional, Gaceta Constitucional, June 6, 1991, at 4; Edgar Torres, *Duelo Político por la guarda constitucional*, EL TIEMPO, June 5, 1991, at A3.

<sup>253</sup> Edgar Torres, *Dan ‘Luz Verde’ a la Corte Constitucional*, EL TIEMPO, May 4, 1991, at 6A; see also Gaceta Constitucional, May 10, 1991, at 6 (referring specifically to a recent decision in which the Supreme Court had allowed the president to wipe out political crimes; Salgado argued that this was an improper because only Congress had this power under the old Constitution).

powers. While the Constitutional Court has subsequently utilized a very tight control over these exercises, virtually eliminating emergency decrees from the Colombian legal order, at the time of the Convention in 1991 there was broad agreement that these mechanisms were necessary. The debate focused on how to make them more effective, or as President Gaviria noted at the installation of the Assembly, avoiding a “worst of both worlds” where states of siege were constantly invoked, giving the regime a bad name internationally, but “had lost their coercive force, their intimidative capacity, their effectiveness for reestablishing public order.”<sup>254</sup>

President Gaviria’s discourse thus tended to emphasize the problems that recent Supreme Court decisions on emergency powers (during the Betancur and Barco administrations) had caused for governance. For example, in a key agenda-setting speech in December 1990, before the opening of the Assembly, Gaviria stated the following:

[T]he diversity of the forms of disturbances of public order have required us to use the state of siege for diverse objectives, and the Supreme Court has retained the power to decide when exceptional powers have been constitutionally applied. This only creates uncertainty in an area where clarity is fundamental, and also puts the Supreme Court in difficult positions.<sup>255</sup>

The President’s point here was not that there had been too little judicial control of emergency powers, but rather that there was too much uncertainty about when powers could be used, and thus the new constitutional text and institutional order had to create more certainty. And he saw the Supreme Court’s recent decisions as a major part of this problem. He made the same point in stronger terms more than ten years later in the introduction to Humberto de la Calle’s memoir on the Assembly, where he referred to the “old, short, and vague norm [on State of Siege powers in

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<sup>254</sup> See CEPEDA ESPINOSA, *supra* note 250, at 324 (quoting the speech by the President in the Installation of the Assembly, on Feb. 5, 1991).

<sup>255</sup> See CEPEDA ESPINOSA, *supra* note 250, at 268. In a second speech in May 1991, for example, Gaviria stated that the new constitutional text on emergency powers would promote “clarity about the rules of the game.” See *id.* at 296.

the old Constitution] on which the Supreme Court had placed so many restrictions that it was not easy to figure out how to make the norm suitable when we were confronted with grave interruptions in public order.”<sup>256</sup> In turn, opponents of the creation of the Constitutional Court argued, such as the Conservative delegate Hernando Londoño, suggested that the President was trying to weaken a Supreme Court that had carried out its review functions well in this area and had protected fundamental rights that the President found inconvenient.<sup>257</sup>

Finally, it is notable that delegates demonstrated a fear that the Supreme Court would somehow undo all of their work. As noted above, de la Calle cited this fear as a major motive behind the creation of the new Constitutional Court. The Constitutional Court was created largely to insulate the Constitutional Convention’s work from what was considered to be potentially hostile judicial review. Although it is true that the Supreme Court had approved the initial decree calling the Convention, and had further stated since the start of the Convention that it would not intervene in the Convention’s work, the threat of hostile action before the old Supreme Court was hardly idle. As de la Calle notes, there was real fear that the Convention would run over its allotted time limit in the presidential decree (July 5, 1991); if it did so, it was certain the Congressional opponents would file suit and argue that the new Constitution should be declared void for failure to abide by the deadlines. If suit were filed, there was at least a

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<sup>256</sup> DE LA CALLE, *supra* note 222, at 11, 44 (Prologue of Cesar Gaviria). Another clue to Gaviria’s intentions can be gleaned in a later speech he gave after the first year of operation of the new Constitutional Court. In the state of siege area, he praised the Court for upholding all of his decrees and thus for reflecting “a healthy and modern conception of [emergency] powers based on reality and on the needs of our distressed country. This new conception has replaced another reflected in decisions prior to the [new] Constitution and based on abstract categories that distinguished, for example, the social from the political, or the abnormal from the normal and the common from the unusual . . . . This change of focus has permitted the Court to leave aside byzantine debates and pay must-needed attention to reality . . . .” Cepeda Espinosa, *supra* note 250, at 388. In particular, he praised the Court’s upholding of his decree removing governors and mayors who refused to comply with his directives on public order; he noted that under the old Constitution and the old court, a decree to this effect was struck down. *Id.* at 387.

<sup>257</sup> *Gaceta Constitucional*, Sept. 13, 1991, at 7.

reasonable fear that the Court would strike down at least some of the Convention's actions.<sup>258</sup>

Further, some of the Convention's most important decisions, in particular the decision to revoke Congress and call new elections and the decision to create a mini-Congress elected by the Convention to govern in the interim, arguably fell well outside of the Convention's mandate, which was to draft a new Constitution and not to govern the country.

It is evident from certain initiatives that the threat of Supreme Court action was a significant concern. Various delegates introduced proposals to create the Constitutional Court immediately after the promulgation of the Constitution and to cut off the Supreme Court's ability to hear constitutional cases filed after that promulgation.<sup>259</sup> One delegate, Maria Teresa Garces Lloreda of the M-19, explained her motives as follows: "The institutional stability that the country requires from this new political charter implies that it not be left at the mercy of possible lawsuits that could be presented by the enemies of this reform."<sup>260</sup> The final constitution contained a transitional provision forbidding the Supreme Court from hearing any constitutional challenge filed after June 1, 1991 (more than a month before the Convention completed its work and promulgated the document), and which required all challenges filed after that date to be sent to the Constitutional Court.<sup>261</sup>

## **2. Ending Cooptation: Bringing the Court Closer to the Political Regime**

If the debate about the creation of the Constitutional Court cannot be understood without emphasizing the backlash against the recent jurisprudence of the Supreme Court, it is equally important to consider the role of the insider/outsider coalitions discussed in Section A. As in 1968, this issue particularly came to the fore when discussion turned to the manner in which the

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<sup>258</sup> *See id.*

<sup>259</sup> *See* Gaceta Constitucional, May 10, 1991, at 8-9 (Gomez); June 6, 1991, at 4 (Castro); June 19, 1991, at 2 (Garces).

<sup>260</sup> Gaceta Constitucional, June 19, 1991, at 2.

<sup>261</sup> *See* BALLEEN, *supra* note 217, at 466.

Constitutional Court would be composed. As noted above, the President proposed a substantial departure from the existing framework for the Supreme Court: he favored a Constitutional Court selected by the Senate for eight-year terms from lists sent by three different bodies: the President, the Supreme Court, and the Council of State.

The task of drafting text on the administration of justice first went to the Convention's fourth committee, which was charged with issues relating to the organization of justice. Since the committee system at the Convention was basically self-selecting (size was flexible), this committee ended up with a great deal of former judges: at least four of the nine members of the commission had acted as judges in the past, including two members who had served on the Supreme Court.<sup>262</sup> The full committee, in turn, broke the issues up into tiny one- or two-person subcommittees: the issue of whether a Constitutional Court should be created and what competences it should be given was delegated to two M-19 representatives, Maria Teresa Garces and Jose Maria Velasco, both of whom had served as judges in the past. The fact that two judges were charged with formulating the first draft of the text was significant – former judges were likely to be less willing to dismantle the existing system of justice than some other delegates.

Thus both members of the subcommittee opposed the proposal of the President, although to greater and lesser degrees. Velasco, a former Supreme Court Justice, opposed creating a constitutional court altogether, emphasizing the need for “independence and autonomy of the judges from any interference by the Executive and Legislative branches in the composition and origin of judicial bodies” and the fact that the current court had in his view performed its role well.<sup>263</sup> Velasco's report echoed the position of the Supreme Court and Council of State at the

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<sup>262</sup> I glean the biographical data from BALLEEN, *supra* note 217, at 242-59. From a partisan standpoint, the committee was composed of three liberals (one of whom was its president), two members of the M-19, two members of the MSN, one independent conservative, and one member of the small ex-guerrilla group the EPL.

<sup>263</sup> See *Gaceta Constitucional*, April 4, 1991, at 2, 21.

Assembly; both bodies – and particularly the Supreme Court – strongly opposed any effort to create a Constitutional Court.<sup>264</sup> Garces’s report favored creating a Constitutional Court on grounds that greater specialization would be beneficial and would lead to greater uniformity and coherence in constitutional law, but she strongly opposed the president’s proposed method of integrating that court. As she stated, “Although in many countries the origin of the naming of magistrates to the Constitutional Courts is in the executive and legislative powers, the Colombian experience shows us that that form of election is conducive to partisan interference and inevitably leads to important limitations in the autonomy of the judges.”<sup>265</sup> In order to protect judicial autonomy, she recommended that the court be picked by the “Superior Council of Judicial Administration,” a new body that the Constitution would create to regulate judicial appointments (this Council, in turn, would be picked by the Supreme Court and the Council of State).

After this report was complete, the full committee proceeded to take up the issue, which far and away proved to be the most controversial that they faced.<sup>266</sup> The committee debate on whether the court should be created focused on the record of the old court and the potential for “politicization” of constitutional law. The final committee vote was 6 to 3 in favor, with the lone conservative, Hernando Londono, joined by Velasco and (oddly) the EPL’s representative in opposition.<sup>267</sup> After approving the creation of the body, the committee took up its method of integration.<sup>268</sup> The president’s greatest ally on this front proved to be Alvaro Gomez, the chief of the MSN block who had been so instrumental in dissolving the old Congress and who served on

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<sup>264</sup> See Corte Suprema de Justicia, Proyecto de Acto Reformatorio de la Constitucion Politica de Colombia No. 56, *Gaceta Constitucional*, Mar. 18, 1991, at 25; Consejo de Estado, Proyecto de Acto Reformatorio de la Constitucion Politica de Colombia No. 58, *Gaceta Constitucional*, Mar. 18, 1991, at 48-49.

<sup>265</sup> See *id.* at 16.

<sup>266</sup> The relevant committee hearings are found as follows: *Gaceta Constitucional*, May 1, 1991, at 8, 9, 11; May 8, 1991, at 10, 13; May 10, 1991, at 2, 3, 5, 7; May 15, 1991, at 2.

<sup>267</sup> *Gaceta Constitucional*, May 10, 1991, at 6.

<sup>268</sup> See *id.* at 7-9; May 11, 1991, at 2-3.



the Fourth Committee in addition to acting as one of the three presidents of the Convention. Gomez's motives for preferring the president's method of integration were unabashedly political. This is evident from the fact that his support for the president's integration method was packaged with an attempt to create the first Constitutional Court immediately, with the first set of magistrates elected by the Convention itself.<sup>269</sup> In his proposal, the Convention would also have been empowered to select new justices for the entire Supreme Court. The final vote on integration of the Constitutional Court proved to be even more contentious than the vote on whether the body should be created: the committee in fact could not agree on a method and left consideration of the two alternatives to the Plenary.<sup>270</sup>

In turn, debate in the first round of the Plenary was fierce, with El Tiempo calling it the most controversial issue considered to date. Leading the opposition was the Conservatives, and for basically the same reasons as they opposed the dissolution of the old Congress – given their weak position, they stood to be the big losers if an institution whose composition still reflected

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<sup>269</sup> See *Gaceta Constitucional*, May 10, 1991, at 8; see also *Gomez Propone Integrar Ya la Corte Constitucional*, *EL TIEMPO*, May 8, 1991, at 6A. Gomez's proposal for the initial integration of the Court did not carry; in the actual constitution, two members of the initial court were named by the President, one each by the chief prosecutor, Supreme Court, and Council of State, with the two remaining members being selected by the initial five. Congress had no input into the composition of this initial court, which sat for only one year. See *BALLEN*, *supra* note 217, at 465. The record suggests that as with the revocation of Congress, the ideological need of the Convention to appear as a benign designer of institutions and not as a participant in politics as usual was critical to this decision.

Gomez was strongly critical of certain proposals to make the judiciary more independent. For example, de la Calle relates that Gomez wanted the members of the Superior Council of Judicial Administration, see *infra* note 270, to be chosen from anyone but lawyers. See *DE LA CALLE*, *supra* note 222. He also favored having few constitutional qualifications for the judiciary, which would of course make it easier to pack the branch with political hacks. See *Gaceta Constitucional*, May 15, 1991, at 3.

<sup>270</sup> It is very telling, for example, that the president's proposal for integrating the Superior Council of Judicial Administration was *unanimously* rejected by the Fourth Committee. The president preferred staffing the Council with the heads of the three high courts (Supreme Court, Constitutional Court, and Council of State), the Minister of Justice, an appointee of the President, and two experts named by the others, so that the executive would be guaranteed a say in the body. The committee instead preferred what *El Tiempo* called a "radically" different structure, with the Council naming its own replacements from lists sent by the Supreme Court, the Council of State, the Constitutional Court, the Chief Prosecutor, and the President. See *Severa Derrota Sufrio Proyecto del Gobierno*, *EL TIEMPO*, April 24, 1991, at 7A; see also *Gaceta Constitucional*, May 2, 1991, at 19 (containing the minutes of the relevant committee meeting). The final text after voting by the Plenary reflected something of a compromise between these two positions, with the Council divided into two chambers, an administrative one with members named by the three high courts, and a disciplinary one with members elected by Congress from lists sent by the President.

the parity principle of the National Front was replaced by an institution selected by the political forces of the present. As in committee, then, the opposition in Plenary took the occasion to slam the proposal as a political power grab by the president and an attempt to politicize a previously independent institution, although it would seem that the motives of the Conservatives (partisan seat loss) were different from those of the opponents in Committee (loss of judicial autonomy). The Conservatives also tended to link the Constitutional Court decision to the Congressional proposal. As one prominent conservative lawyer, Hernando Yepes Arcila, argued on the floor:

What is being proposed . . . is no less than a coup d'état against the judicial branch in this country. There is no valid reason to dismantle an institution like this Supreme Court, which even more than being an example before the world, has complied with its responsibilities and has been of great support to the reform of the country. The only possible reason is an eminently political interest, the consummation of executive dictatorship that began to congeal in the political accord [dissolving the Congress]. Now, they are eliminating the last obstacle, as they are eliminating constitutional review . . . .<sup>271</sup>

Ex-President Pastrana also took to the floor in an extensive speech: he lauded the Court for its past performance, argued that the Court was not out of touch but was instead “in constant renovation” to keep up with changing circumstances, and referred to the “holocaust” of the taking of the Palace of Justice in 1985. Further, he colorfully analogized the substitution of the Supreme Court for a Constitutional Court to the French Revolution, stating that the Assembly was in a rush to “guillotine institutions that have been sacred for the country.”<sup>272</sup>

In turn, Liberals and the MSN were the most vocal in favoring the President's proposal. The President himself, in his only speech to the Assembly between its opening and closing, in April 1991, focused a large part of his time on making a stirring defense of the new Constitutional Court. He focused constituents on the future and on the question of what kind of

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<sup>271</sup> Hernando Yepes Arcila, quoted in *Discuten Corte Constitucional*, EL TIEMPO, June 13, 1991, at 9A

<sup>272</sup> See also MISAEL PASTRANA, DESDE LA ULTIMA FILA 91. Pastran, in his speech defending the Supreme Court colorfully referred to the Convention's assault on various of the old institutions as being like the guillotine during the French Revolution, where the innocent were condemned indiscriminately along with the guilty.

body they would like interpreting their work, an implicit nod to the fear that delegates had of the old Supreme Court somehow obstructing their achievements. Debate also focused on the integration of the new body, which proponents argued would be superior to the cooptation system. As Jaime Castro put it, should not the justices of a new court reflect the current social makeup better than the old Supreme Court, thus helping to heal the “evident divorce between the Court and society?”<sup>273</sup> Another Liberal argued similarly that bringing the Court closer to the current political configuration would create a better jurisprudence: “We cannot be scared of decisions being political when they must have that character. We cannot think about putting a judicial face on political decisions. The constitutional judge has to act with great discretion, which is at its maximum when he is modernizing an order . . . .”<sup>274</sup> Those in favor of the new institution thus focused on the need to reduce the gap that had opened up between the Court and the rest of the political system.

In the end, the president got exactly what he had initially proposed in terms of the integration of the Court. The final vote to create a Constitutional Court was 44 to 25 with one abstention: although the vote was supposedly secret, El Tiempo reported that all of the Liberals and members of the MSN favored the court; all nine Conservatives (including the four independent Conservatives) voted against it.<sup>275</sup> The only oddity is that the M-19 split its vote. It is unclear why this is so, but the split mirrored the disagreement between Garces and Velasco in the initial subcommittee, and may also have reflected symbolism over the M-19’s role in the 1985 massacre of about a third of the Supreme Court.<sup>276</sup>

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<sup>273</sup> See Jaime Castro, Por el Cual Se Crea la Corte Constitucional, *Gaceta Constitucional*, June 6, 1991, at 4; Edgar Torres, *Duelo Político por la Guarda Constitucional*, *EL TIEMPO*, June 5, 1991, at A3.

<sup>274</sup> *Gaceta Constitucional*, May 10, 1991, at 6.

<sup>275</sup> See *Corte Constitucional, en Firme*, *EL TIEMPO*, June 8, 1991, at 10A.

<sup>276</sup> See *Hoy Se Conocera la Nueva Corte*, *EL TIEMPO*, Nov. 26, 1985, at 7A. Navarro later expressed profound regret over the attack on the Palace of Justice, which he considered a “monumental error.” See NAVARRO & IRAGORRI, *supra* note 223, at 83-84. Opponents of the constitutional court tried to make symbolism over the 1985 attack part

The vote on the Court was part of a larger package of reforms to the judiciary, many of which sought to undo the cooptation regime that governed during the National Front period. For example, the Assembly created a National Council of the Judiciary to govern judicial careers, and divided it into an administrative chamber staffed by members appointed by the three high courts and a disciplinary chamber with members elected by Congress from lists sent by the President.<sup>277</sup> Moreover, Supreme Court and Council of State justices now served for eight-year terms, rather than for life, and the National Council of the Judiciary was charged with formulating lists of candidates to fill vacancies as they arose. The Supreme Court and Council of State were reduced to selecting candidates from these pre-formulated lists. These debates and votes also tended to track the insider/outsider logic, with newcomer parties like the MSN viewing them as opportunities to bust up the two-party monopoly, while the Conservatives were strongly in opposition, arguing that these proposals would gut a well-functioning system.<sup>278</sup>

In sum, it is clear that many delegates on both sides of the debate saw the key issue in the creation of the Constitutional Court as being about the change towards a more political method of integration – as in past attempts to create the Court, opponents argued that the proposal was a Trojan Horse designed to pack the judiciary, while supporters argued that the proposal would create a Court that was closer to the political regime and to society. Further, the voting on the

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of the debate. See, e.g., PASTRANA, *supra* note 272, at 95 (“The Supreme Court is an entity that is honored in Colombia, it is sufficient to cite the heroic act without precedent in national history: the martyrdom, the holocaust that they were victims of for the crime of never failing to be loyal to the cause of exercising justice.”).

<sup>277</sup> The president’s proposal for integrating the Superior Council of Judicial Administration called arguably for a higher dose of political intervention on the Council, but tellingly it was *unanimously* rejected by the Fourth Committee, which as noted before contained a high number of members with judicial experience. The president preferred staffing the Council with the heads of the three high courts (Supreme Court, Constitutional Court, and Council of State), the Minister of Justice, an appointee of the President, and two experts named by the others, so that the executive would be guaranteed a say in the body. The committee instead preferred what *El Tiempo* called a “radically” different structure, with the Council naming its own replacements from lists sent by the Supreme Court, the Council of State, the Constitutional Court, the Chief Prosecutor, and the President. See *Severa Derrota Sufrió Proyecto del Gobierno*, EL TIEMPO, April 24, 1991, at 7A; see also *Gaceta Constitucional*, May 2, 1991, at 19 (containing the minutes of the relevant committee meeting).

<sup>278</sup> See BALLEEN, *supra* note 217, at 393.

proposal bore some resemblance to the insider/outsider coalitions identified at the beginning of this Chapter: Conservatives who stood to lose the most strongly opposed the proposal, and some outsiders – particularly Alvaro Gomez of the MSN – saw the reconstitution of the Court as a political opportunity. Delegates were focused largely on trying to create a court that was closer to current political elites. Meanwhile, as noted above, the government and President Gaviria were focused on creating a Court that would not interfere in core regime interests in the same way as the Supreme Court since the late-1970s. Neither interest fits the standard account of the creation of independent courts.

### **III. The Belief in Law and the Creation of the Tutela**

Nonetheless, it is striking that members of the Assembly and the government demonstrated a broad consensus on another point: that many of the key solutions to the country's serious problems lay with law and with the judiciary. In other words, they may have wanted a judiciary that was less distant from the political regime than in recent Colombian history, but they also wanted a very powerful judiciary. As I explain here, this appears to have been largely a product of the capacity that the judiciary had built up throughout Colombian history to intervene in major political disputes and to shape the organization of the state. Put another way, when both the government and delegates across the political spectrum thought about solutions to major problems, they tended to think in terms of the judiciary.

This instinct demonstrated itself on a myriad of issues at the Assembly, but I focus here on the debates over the powers of the new Constitutional Court. Neither the government nor any faction at the Assembly seriously questioned the public action, the power that the Court had possessed since 1910 to hear abstract challenges to any statute (and certain decrees) made by any

citizen, at any time. Instead, representatives from across the political spectrum praised this tradition as being a distinctively Colombian innovation that had functioned very well. Delegates and the government disagreed about the identity of the entity in charge of conducting the review, but none seriously doubted that this power should exist. As examples, figures as far apart as Gaviria and Pastrana fundamentally agreed on this point. Gaviria referred to the public action as “without a doubt one of the principal contributions of Colombian law to modern constitutionalism,”<sup>279</sup> while Pastrana argued that it was “one of the great innovations that [Colombia] has given to the science of the universal legal order.”<sup>280</sup>

This despite the fact that such an instrument, in comparative terms, is quite unusually powerful (if not precisely unique). Ordinarily some kind of standing requirement was imposed for exercises of abstract review (for example, standing might be limited to the president and one-third of the legislature), and generally challenges are limited to only a brief period of time before or after passage of the law.

But there was also a broad consensus, initially motivated by the government project, around giving the courts sweeping additional powers. These powers dealt not with abstract review, but rather with various forms of concrete review. These proposals would eventually coalesce into the *tutela*, which would become the most important instrument in the new Constitution, and a legal instrument that has entered the Colombian vernacular. In other words, despite all of the problems that the judiciary caused for Colombian governance in the late 1970s and 1980s, Gaviria responded with proposals that gave judges considerably more power, and the Assembly easily accepted these powers.

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<sup>279</sup> Intervencion del Senor Presidente de la Republica, Doctor Cesar Gaviria Trujillo, Ante la Asamblea Nacional Constituyente, Abril 17 de 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 329, 341 (1992).

<sup>280</sup> PASTRANA, *supra* note 272, at 92.

A starting point for understanding what was going on is provided by Gaviria's several speeches to the Assembly. In his initial proposal to the Assembly, his speech opening the Assembly in February 1991, and the April 1991 address where he focused on reform of the judiciary, Gaviria began with a diagnosis of the crisis facing the country. In February, he began explaining the project by referring to the theme of "arbitrariness":

Every Colombian has suffered himself, or seen his compatriot suffer, because nobody listens to his claim or small complaint. We have all witnessed the indignation of a friend because justice was not done for him when his controversy was heard. And what is even graver: we all know that this aggressiveness that is characteristic of Colombians feeds a lack of respect for life, intolerance, daily fights, and frequent arrogant attitudes. Colombians have peacefully rebelled against this situation. Tired of the privileges, they want to receive just treatment. Before so much abuse and utilitarianism they ask to be respected in their dignity. Faced with discrimination, they demand equal attention from the authorities. Upon feeling unprotected, they demand effective guarantees for their rights. Alienation, violence, apathy, and disenchantment. These are all symptoms of a common problem: the lack of respect for rights, the fruit of diverse kinds of arbitrariness.<sup>281</sup>

Thus, the President identified the root cause of the crisis as being about "arbitrariness," by which he meant not only meant discriminatory or unfair actions of state officials, but also (and equally importantly) of private actors, which received no official response. He meant, in short, a situation where the rule of law did not prevail. Similarly, in a document outlining the general philosophical approach of the government to reform, the President asserted that "[t]he gravest problem facing Colombia in its civilized life is the constant violation of human rights and the determinative role that that violation has in the proliferation of violence."<sup>282</sup> Thus, the president

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<sup>281</sup> Palabras del Senor Presidente de la Republica, Doctor Cesar Gaviria Trujillo, en la Installacion de la Aseamblea Nacional Constituyente, Febrero 5 de 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 313, 315 (1992).

<sup>282</sup> Reflexiones para una nueva Constitucion, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 255, 260 (1992).

linked the micro-level them of violations of human rights by both state and non-state actors to the macro-level problem of pervasive societal violence.

The President identified the solutions to this core problem in law and in the courts, although he wanted both a new set of courts (headed by the Constitutional Court) and a new conception of law. His best articulation of this position is provided by his April speech to the Assembly, which is the only speech he made while the Assembly was in session. He focused on three themes connected to the reform of justice: the creation of a Prosecutor's office, the creation of the Constitutional Court, and the *tutela*, emphasizing the importance that he placed on these issues. He again reiterated the theme of "arbitrariness" and located it as the source of the pervasive violence facing the country: "There are those who affirm that historically violence has lived in the soil of this country in large part as a result of the arbitrary impositions with which some Colombians, either by being victorious in armed struggles between brothers or through exclusionary political processes, have wanted to make others submit."<sup>283</sup> He then explained how arbitrariness linked to the strengthening of the constitutional judiciary. Gaviria noted that the new constitution needed a much thicker and more "precise" set of rights, but he argued that this was insufficient without stronger mechanisms of judicial protection.

In order to make this point, Gaviria stressed two themes: rights needed to be made both more real and more concrete. On the first point, he argued that "rights must be taken seriously," that they could not merely be "a conjunction of good wishes and noble aspirations but as an instrument for the protection of rights."<sup>284</sup> Or, as he would put it in a subsequent speech celebrating the one-year anniversary of the creation of the Constitutional Court and reiterating the same basic point, it was necessary for the rights provisions of the Constitution to be more

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<sup>283</sup> Gaviria, *supra* note 281, at 330.

<sup>284</sup> *See id.* at 340.



than “dead letters, illusions, or good intentions.”<sup>285</sup> The discourse here was heavily influenced by the jurisprudence of the Supreme Court, which as explained in Chapter 2, was almost wholly devoid of a rights component. The Court rigorously enforced its vision of the constitutional structure, but generally read rights extremely narrowly. Thus, following the promulgation of the Assembly, the president and his advisers spoke broadly of the need for a “new constitutional law” or a “new conception of law.” As explained in more detail in Chapter 5, they attacked legal formalism, arguing that it had been used to mask visions of law that ignored individual rights.<sup>286</sup> Moreover, as noted in the document outlining the philosophical basis of the government’s proposal, the old Constitution contained relatively few rights, and was basically considered deficient and archaic in this regard.<sup>287</sup>

A second point was closely related to the first: the protection of rights needed to occur in concrete instances and not merely in the abstract. In the April speech, the President explained the point as follows:

We all know concrete cases of arbitrariness. Situations in which some ask what they can do. There is no law to impugn. No lawyer would counsel those who have been arbitrarily displaced to Bogota, in exercise of the public action, to accuse

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<sup>285</sup> See Cepeda Espinosa, *supra* note 247, at 390-91.

<sup>286</sup> See Extractos de las Palabras del Senor Presidente de la Republica, Doctor Cesar Gaviria Trujillo, en el Informe al Congreso. Diciembre 1 de 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 355 (1992) (“Embracing the peaceful revolution with all its consequences implies, without a doubt, reevaluating the role of law. The new Constitution demands it. It has been conceived as an instrument to promote change and not as a remote and pure text. The so-often criticized formalism has run its course now that rigorous technicalities must cede before the interest in assuring that we achieve our political and social objectives. The functions of law are also changing. More than constructing authority, what is pursued is strengthening institutional legitimacy; more than consolidating order, what we want to do is broaden democracy; more than imposing a vision of things, what we want to do is open space for pluralism; more than protecting liberty, what is desired is promoting equality; more than establishing rigid schemes, what we are trying to do is to avoid closing the doors to experimentation, imagination, and creativity.”); see also Palabras del Senor Presidente de la Republica, Doctor Cesar Gaviria Trujillo, en la Instalacion del Seminario ‘Dictactica de la Constitucion,’ Octubre 10 de 1991, in *id.* at 357 (“[W]ith the Constitution of 1991 a new conception of law was born.”).

<sup>287</sup> See Cepeda Espinosa, *supra* note 282, at 260 (“The Constitution of 1886 was timid in the consecration of rights. The reform of 1936 advanced in this camp and made formulations that were bold for their time, but with the passage of the years and the appearance of new realities their content has been rendered insufficient, and therefore we can affirm that the Constitution in force is precarious in its definition of civil and political rights, in the protection of social and economic rights and in the recognition of collective rights.”)

some legal norm as unconstitutional because there is no law authorizing discrimination or privileges. Thus, there is no law to impugn.<sup>288</sup>

In other words, the president viewed the public action as an abstract action, and as a kind of formal action, which was often useless in daily life. In his speeches, he consistently listed real-world situations where the action would not serve. What was necessary, instead, was a mechanism that was attentive to the fact that “what really matters is reality, the facts, the circumstances in which an individual finds himself.”<sup>289</sup>

The resulting package proposed by the President focused on several different mechanisms. First, a right of “amparo,” somewhat similar to the Spanish *amparo* or the German individual complaint, which would allow an individual whose concrete rights were violated to take a case to any lower court, and eventually a discretionary appeal to the Constitutional Court. The president outlined the essentials of the action as follows: “The judge must decide quickly, without formalities ... and appreciating whether on the facts of the case constitutional rights are being violated or put in danger.”<sup>290</sup> The President also favored the creation of a system of specialized constitutional tribunals beneath the Constitutional Court, who might hear these cases and exercise other functions of constitutional review. Finally, the President favored two other mechanisms, the “constitutional complaint,” which would allow citizens to take concrete cases directly to the Constitutional Court in some situations, and the “constitutional question,” which exists for example in Italy and would allow or require ordinary judges to refer constitutional issues to the Constitutional Court for resolution.<sup>291</sup>

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<sup>288</sup> Gaviria, *supra* note 281, at 338.

<sup>289</sup> *Id.* at 340.

<sup>290</sup> *Id.* at 338.

<sup>291</sup> See PRESIDENCIA DE LA REPUBLICA, PROYECTO DE ACTO REFORMATARIO DE LA CONSTITUCION POLITICA DE COLOMBIA 80-82 (1991).

The resulting debate in the Assembly was controversial in some senses and not in others, in ways that are complex but illuminating. Some of the work of drafting proposals in this area fell on the Fourth Committee, which was charged with the administration of justice and as already noted was dominated by ex-judges; some of the work also fell on the First Commission, which was charged with the protection of rights. There was broad consensus that an individual-complaint like mechanism needed to be created, and a number of distinct proposals included a mechanism that looked something like the government's amparo mechanism. A major proposal in this area came from a Conservative delegate of the First Committee, Juan Carlos Esguerra, who renamed the mechanism the "tutela" but maintained many of its basic elements as envisioned in the presidential proposal. Esguerra would have placed this mechanism in the administrative courts rather than allowing appeal to the Constitutional Court, but he agreed that decisions should be made within ten days via a summary process.<sup>292</sup> Esguerra described the "most important virtues [of the process] as being the ease with which it can be used by any person [and] the speed with which the mechanism must operate," and defined it as involving the right of "[a]ny person, in any moment, to ask any judge for the protection of any fundamental right."<sup>293</sup> Further, at the first debate in front of the Plenary, he defined the mechanism as "one of the most important innovations that could be incorporated in our constitution."<sup>294</sup> The basic definition and shape of the mechanism thus enjoyed broad support across the political spectrum.<sup>295</sup>

Other parts of the proposal had a much more difficult time: coalitions of delegates close to the ordinary judiciary (mainly in the fourth commission) and conservatives disliked elements

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<sup>292</sup> MANUEL JOSE CEPEDA, LA TUTELA: MATERIALES Y REFLEXIONES SOBRE SU SIGNIFICADO 36 (1992).

<sup>293</sup> *Id.* at 69.

<sup>294</sup> *Id.* at 87.

<sup>295</sup> For examples of the debate in which a broad variety of actors supported the basic conception of the tutela in the First Commission, see *id.* at 69-80.

of the proposal that seemed to increase the power of a new, specialized constitutional judiciary and to place it above the ordinary judiciary. Actors in both the fourth and first commissions thus took no action on the “constitutional complaint” and “constitutional question” proposals, and the fourth commission declined to allow the creation of a specialized constitutional judiciary beneath the Constitutional Court. The Fourth Commission tried to go further and to kill the idea that tutelas could be appealed to the Constitutional Court, but the Plenary disagreed with the Commission.<sup>296</sup> Further, a last-ditch effort by a member of the fourth commission and several conservatives to definitively foreclose the possibility of allowing tutelas to be taken against judicial decisions did not succeed.<sup>297</sup> Thus the final product allowed the Constitutional Court to hear appeals from tutelas first heard by ordinary judges via a discretionary procedure like the American writ of certiorari and utilized vague compromise language that left the question of tutelas against judicial decisions open.<sup>298</sup> In short, the basic philosophy of the tutela, and the vision of judicial role that underlies it, was broadly shared within the Assembly, whereas those aspects of the proposal that seemed to threaten the existing institutions of the ordinary judiciary proved controversial in the same way that the creation of the Constitutional Court was itself controversial.

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<sup>296</sup> See Ponencia para el Primer Debate en Plenaria, 85 Gaceta Constitucional (May 29, 1991), at 12 (Maria Teresa Garces, ponente) (“In relation to the revision by the Constitutional Court of the decisions taken in development of the amparo writ or the tutela of rights, the Commission answered in the negative....”); see also Cepeda, *supra* note 292, at 84 (containing statements by Garces that rejecting Constitutional Court jurisdiction over constitutional complaints, constitutional questions, or tutelas, because this review “does not correspond to our legal tradition.”)

<sup>297</sup> See CEPEDA, *supra* note 292, at 47 (containing a proposal by Garces, Hernando Yepes, and other conservatives to change the term “public authorities” to “administrative authorities” to make clear that the tutela could not be taken against courts).

<sup>298</sup> It is unclear whether the phrase “public authorities” was meant to include courts. As noted in the prior note, the Plenary rejected an attempt to clarify the language by changing it to “administrative” authorities. See *supra* note 297. However, it is also relevant that Esguerra, the core drafter of the tutela in the First Commission, believed that it was inherent in the instrument of the tutela that it could not be taken against judicial decisions, and thus did not need to be specified in the constitutional text. See Ponencia para el Primer Debate en Plenaria, 77 Gaceta Constitucional, May 20, 1991, at 9 (Jaime Arias & Juan Carlos Esguerra, ponentes).

The underlying philosophy of the proposal, on which there existed an apparent consensus, placed an extraordinary faith in the judiciary. As the President stated in his April remarks when defending his proposals on new constitutional instruments:

Without a doubt some of you will think, rightly, that there is going to be a lot of litigation on constitutional issues and, in particular, on issues of rights. Probably that will be the case. And that is as it should be. So that the Constitution will cease to be something theoretical, a conjunction of illusions and good intentions, in order to be converted into an instrument to peacefully resolve conflicts, combat injustice, and fight against arbitrariness. This is preferable to the use of illegal means, incendiary protests, or disobedience to the laws when someone considers them to be a violation of rights. It is better to accede to the judiciary in order to do justice. Nothing will return more dignity to the judges, nothing will allow judges to recover trust, respect and – why not – the affection of the citizenry, than to convert them into defenders of rights. That in the fight against arbitrariness the judges accompany citizens, carrying the standard of justice. This is the natural state in a state of law and in a participatory democracy.<sup>299</sup>

This is an extraordinary statement, combining an implicit rebuke of the old Supreme Court – which according to Gaviria had lost the respect and trust of the citizenry – with a sweeping sense of promise and faith in a reformed judiciary.

#### **IV. Conclusion**

The puzzle explored in this chapter is why a political class that was in large part tired of recent, spectacular judicial interventions in politics would be willing to give the Constitutional Court a set of powers that would make it among the most powerful such courts in the world, with considerably stronger instruments than those possessed by courts in the major European models such as France, Spain, and Germany. The answer relies in part on the history reviewed in Part II of this chapter: the coalition behind the Constitutional Court believed that the vices of the Supreme Court were largely a product of the cooptation system and in the way the Court had been embedded in the National Front, and thought they could avoid those vices with the new

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<sup>299</sup> See Gaviria, *supra* note 281, at 339.

design of the Constitutional Court, which would be closer and not further from the prevailing political winds. But it also seems to have been a product of the long-running intervention of the Supreme Court in highly political matters: as Gaviria and the delegates tried to resolve the most important problems facing the country, they naturally turned to the Courts as a significant part of the solution.

## **Chapter 4: Constructing Judicial Doctrine & Carving out Political Space**

This Chapter focuses on the ways that the Court – and above all a group of progressive academic justices – shaped the doctrines of the Court in a way that would maximize its influence over the rest of the political and judicial system. The Constituent Assembly left a series of key questions – dealing with the Court’s power over the ordinary and lower courts and its influence on the separation of powers – unanswered. Moreover, the new constitutional text created a Court with sweeping powers but otherwise left questions of judicial role and constitutional meaning unclear. In the face of these ambiguities, the justices on the Court had to construct a sense of institutional role.

Part I of this Chapter demonstrates that a small group of justices on the first court, aided by their clerks and closely affiliated with a set of elite universities, aimed at and succeeded in constructing a sense of mission for the Court. The sense of mission rested on a set of bedrock doctrinal choices made by that Court. None of these choices were compelled by the text of the 1991 constitution, but overall the read of the text that they created was convincing. Part II focuses on the doctrinal construction itself, by looking closely at the interim Court that served for that institution’s first year, the 1992-1993 term. I break down the Court’s doctrinal construction into three distinct objectives: creating a sense of institutional role and mission, establishing power over other political institutions by making their actions reviewable, and establishing the Court’s power to shape its own decisions. For example, these justices created the notion of the “vital minimum,” which synthesized a constitutional right to minimum subsistence and has stood as the bedrock of the Court’s social rights jurisprudence, and they created a jurisprudence that viewed the Court as the final interpreter of all constitutional issues, and which denied that other actors might have domains where they could act outside of the Court’s supervision. Part III

carries through these themes beyond the first year, showing how the first full Court – which contained many of the same justices as the interim Court – continued to develop the themes of the Court’s first year. For example, the Court deepened and expanded upon the vital minimum doctrine that underlay the first Court and greatly expanded its control over coordinate political institutions.

The argument is not that this doctrinal construction, standing alone, gave the Court the power to reshape the political system. The following chapters will show how the Court cultivated a number of different bases of support, and these bases of support – elements of the academic community, civil society, and the general public – have protected the Court at key moments. The Court’s aggressive exercises of judicial review, in other words, were supported by communities of actors with the ability to maintain continuity within the Court and to protect the Court against political backlash. In addition, there is no doubt that the fragmented political context within which the Court has often worked has increased the amount of political space that the Court has been able to seize.

At the same time, it would be a mistake to ignore the doctrinal foundations built in the Court’s first year and since expanded. First, this construction served as a focal point for actors inside and supportive of the Court. The Court in its first year resolved a number of different issues in ways that were contestable, and left ambiguous within the Assembly. Each of these issues could have been resolved differently: the Court could have held for example that socioeconomic rights, declarations of states of emergency, or ordinary court judicial decisions were non-justiciable. But the sum total of the Court’s work was to construct an ideological framework that was coherent in light of Colombian constitutional history. The linchpin concept was that the new constitutional order privileged “material” realization of rights, rather than the



formalism that allegedly dominated during the reign of the 1886 Constitution. This was symbolized by the privileging of a shift from a “estado de derecho” [rule of law] conception of the legal order under the 1886 Constitution, to an “estado social de derecho [social state of right] conception under the new text. The former supposedly meant a formal conception of law coupled with a formal conception of equality; the latter required a material transformation of society vis-à-vis a state that was committed to overcoming historical inequalities. It was also symbolized by the tutela itself, which was supposed to allow ordinary citizens to realize their rights quickly and easily. The ideological construction of the new Court suppressed continuities between the roles of the new Constitutional Court and the old Supreme Court, and asserted instead a sharp break.

Several important consequences followed from this reorientation. The material conception of law put the effective realization of rights – and of social transformation – at the center of Colombian constitutionalism. It was unacceptable under this framework, for example, to have a number of social rights provisions that were left non-justiciable. This conception also meant that the Court had to have supervisory authority over all other institutions of state – the presidency, the Congress, and the ordinary courts – in order to ensure that they carried out the constitutional vision. This was particularly true because of the consensus view in and around the Court that other institutions had not transformed with the new constitutional order. Finally, this conception meant that the Court needed full authority over the content and meaning of its own decisions, allowing it to construct a system that fused domestic and international law, that gave precedential effects to the Court’s decisions, and that allowed the Court to modulate its decisions in ways that gave them maximal effect within the political order. The coherence and persuasive power of this system acted as a stable basis for the Court’s subsequent work. Some within the Court have contested these principles on the margins, but not their essential correctness as a

statement about the meaning of the Colombian constitution. Both the magistrates and the clerks internalize this framework and work within it.

Second, the doctrinal construction of the Court created possibilities for action that would not have existed absent that work. The Court constructed, off of a fairly inhospitable constitutional base, a system of precedent asserting the power to shape the jurisprudence of all of the ordinary courts in the country, including the Supreme Court and the Council of State. It could not, of course, make those courts listen, but its doctrine at least created the possibility for influence. Similarly, the Court's doctrines asserting a right to a vital minimum helped link social rights that seemed, textually, difficult to enforce by tutela, with clearly justiciable rights and principles like life and human dignity. Finally, the Court used its assertion of complete control over the content of its own decisions to craft a series of modulated remedies that allowed it to maximize its political influence. Beyond mere assertions of unconstitutionality, the Court has utilized its power to add new text into existing laws, to uphold laws only on condition that they be interpreted in a particular way, to defer declarations of unconstitutionality for a period of time, and to retain jurisdiction over entire areas of policy for a long period of time by declaring an "unconstitutional state of conditions."

## **I. Ideological and Doctrinal Construction in the Court's First Year**

Since the constituent assembly dissolved congress in 1991, and new elections were not scheduled until the end of the year, the assembly had to find a formula for creating an interim court. The bargain agreed upon created a temporary seven-member Constitutional Court that would serve for one year, with the Supreme Court, Council of State, and Attorney General each appointing one member, while the president would directly appoint two members and would send two lists of three members to the new Constitutional Court, which would then choose the

remaining two members.<sup>300</sup> There is plentiful evidence that many Colombian institutions and individuals had no idea about the potential power of the Court. For example, many of the people initially picked to be on the Court – especially those with ties to the Supreme Court and Council of State – declined the post.<sup>301</sup>

It is clear, however, that the president and his advisors did understand the power of the Court. In making his interim appointments, the president was heavily influenced by a clique of legal academics centered around the University of the Andes, which both he and his chief legal adviser Manuel Jose Cepeda had attended, and where his Minister of Government, Humberto de la Calle, had taught. Cepeda had pushed the idea for a new Constitutional Court, and he and the rest of the Los Andes group had influenced the president's beliefs that new methods of legal interpretation were necessary.

Gaviria gave several speeches in the interim between the end of the assembly and the start on the Court on the need for a “new law” – the blocking function of the old Supreme Court had soured him on existing methods, and he was convinced of the need for more active methods of judicial interpretation to protect his new constitution.<sup>302</sup> The crux of this critique was that existing law was too “formalistic,” although defining what formalism meant is not easy.<sup>303</sup> Formalist judges paid more attention to process than to substance (for example, the old Supreme Court reviewed declarations of states of emergency only for whether proper procedures had been followed) and paid more attention to the precise text of a statute than to its underlying values. The synthesis created by the new judges on the Court would define itself in opposition to this

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<sup>300</sup> See CONST. COL., art. trans. 22.

<sup>301</sup> See, e.g., *No Acepto Mora Osejo*, EL TIEMPO, July 30, 1991, available at <http://www.eltiempo.com/archivo/documento/MAM-128496> (recounting three nominees who declined the position).

<sup>302</sup> See Speech of Cesar Gaviria in the Seminar “Didactica de la Constitucion,” Oct. 10, 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO (Manuel Jose Cepeda, ed., 1992) (“[W]ith the Constitution of 1991 a new conception of law was born.”)

<sup>303</sup> See generally MANUEL JOSE CEPEDA, LOS DERECHOS FUNDAMENTALES EN LA CONSTITUCION DE 1991 (1992) (recounting and criticizing the jurisprudence of the old Supreme Court).

kind of formalism – it would place the substantive realization of constitutional values above anything else.

The clique around Los Andes also played a big role in the president’s initial appointments – two of his appointees, Ciro Angarita Baron and Alejandro Martinez Caballero, had ties to the institution. A third magistrate tied to Los Andes, Eduardo Cifuentes, was appointed by the Attorney General. According to Eduardo Cifuentes, the three magistrates talked extensively before coming onto the court and decided to try and push law in a progressive direction:

We knew we had one year, because we did not know whether we would be reappointed. We wanted to change as much as we could in one year.... We were not a majority on the Court, but we had influence because we acted together.<sup>304</sup>

As Cifuentes suggests, the los Andes block dominated the Court’s first year – the other justices on the Court were generally more conservative, but they also lacked unity. All four had ties to the ordinary courts and two, Fabio Moron Diaz and Simon Rodriguez Rodriguez, had been presidents of the Supreme Court, but they otherwise had varied profiles. Moreover, the clique of justices was often able to establish pathbreaking decisions via tutela – the tutela mechanism, unlike the abstract review cases, were heard in panels of three justices, and the key socio-economic decisions below were all constructed by panels composed of two of the three members of the clique.<sup>305</sup>

As shown in Figure 4.1, which lists key holdings from the transitional court, the Court in its crucial first year would establish many of the principles that would later become the foundation of the synthesis, and the clique centered around Los Andes had a dominant impact on these

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<sup>304</sup> Personal interview, Eduardo Cifuentes, May 2010, Bogota, Colombia.

<sup>305</sup> Nunes for example finds that the success rate of tutelas in the interim year varied widely depending on who composed them. Success was very low in cases where none of this core group of three Los Andes justices served on the panel. *See* Rodrigo Nunes, Ideational Justice in Latin America 149 tbl. 5.1 (unpublished Ph.D. dissertation, University of Texas, 2010).

decisions. They did not win every battle – on the use of the tutela against judicial decisions they lost to a majority dominated by former Supreme Court judges, and on emergency powers they split somewhat, with Angarita in particular wanting to go further in reining in executive power. Nor did they complete the construction of doctrine – later courts would often make far more spectacular interventions in public policy. But they did establish most of the basic principles on which future jurisprudence would be built.

**Figure 4.1: Key Cases from the Court's First Year**

Case	Ponente	Holding	Vote
<b>The Creation of a Sense of Mission</b>			
T-002/92	Caballero	The meaning of a fundamental right for tutela purposes is not determined by those rights classified as “fundamental” or of “immediate application” in the text, but rather based on the ethos of the document.	3-0 (Caballero, Moron Diaz, & Rodriguez Rodriguez, majority).
T-406/92	Angarita	Social rights can be enforced via the tutela in certain circumstances	2-0-1 (Angarita & Cifuentes, majority; Hernandez, concurring)
T-426/92	Cifuentes	Where the right to a pension is connected with other rights like the right to life, it can be enforced using the tutela. There is a constitutional right to a “vital minimum” which can be invoked even if it requires government spending.	3-0 (Cifuentes, Hernandez, Martinez, majority)
T-534/92	Angarita	Similar reasoning with respect to right to health	3-0 (Angarita, Cifuentes, Hernandez, majority)
<b>Establishing Judicial Reviewability over Coordinate Institutions</b>			
C-004/92	Cifuentes	Court can control review declarations of emergency on substantive grounds; declared constitutional. Socio-economic emergency b/c of threat of strike	6-1 (Angarita, dissenting)
C-447/92	Cifuentes	Same. Socio-economic emergency b/c of electricity crisis	6-1 (Angarita, dissenting)
C-556/92	Per curiam	Same. State of interior commotion b/c of imminent release of dangerous prisoners	4-2-1 (Angarita & Caballero, dissenting; Cifuentes, concurring)
C-031/93	Cifuentes	Same. State of interior commotion b/c of increase in guerrilla activity	5-1-1 (Caballero, concurring; Angarita, dissenting)
C-543/92	Jose Gregorio Hernandez	Tutelas do not run against judicial decisions	4-3 (Angarita, Cifuentes, Caballero, dissenting)
C-027/93	Simon Rodriguez Rodriguez	The court can review treaties predating the 1991 constitution for conformity with it; many articles of the Concordat violate constitutional principles of religious equality.	6-1 (Hernandez, dissenting)
<b>Defining the Shape of Constitutional Court Decisions</b>			
C-574/92	Angarita	Treaties and other international legal principles “inherent to humanity” have constitutional status	7-0

Overall, the ethos of this faction was strongly anti-formalist in the sense that it aimed at emphasizing the values and spirit that lay behind the constitutional text rather than either the precise text or even the original meaning of the Constitution. For example, in one of the Court's first decisions, Justice Caballero held that whether a right was listed in the section of the constitution called "fundamental rights" or mentioned in a constitutional article as being of "immediate application," were only "secondary" criteria in determining whether a right was "fundamental" for purposes of determining whether the tutela could be used to enforce it, because making these textual signals exclusive criteria would "distort the pro-guarantor sense that the Constituent Assembly of 1991 gave to the mechanisms of protection and application of human rights."<sup>306</sup> In other words, the actual text of the document was less important than the overall spirit orienting the document.

More particularly, the new Court established key doctrines in three areas, which this section will treat in turn. First, the Court established a sense of role and mission out of the constitutional text. The Court laid out a coherent vision of constitutionalism that placed it at the center of the constitutional order, and that privileged the activation of a set of socioeconomic rights that were entirely absent from the prior constitution. This coherent constitutional vision has helped the Court maintain a consistent activism. Second, the Court established that other political institutions were subject to the review of the Court. It established a set of rules denying that there were gaps in the constitutional order – all institutional acts were subject to constitutional standards. In the Court's vision, this meant that it possessed powers of reviewability over a set of actions, like executive emergency powers and the decisions of the ordinary judiciary, that were previously exempt from constitutional scrutiny. These doctrines have served as the basis for the Court's ability to shape institutional behavior. Finally, the Court established a set of doctrines

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<sup>306</sup> T-002/92.

giving it broad powers to shape the content and meaning of its own decisions. The Court has operated an increasingly broad understanding of the so-called “constitutional block,” which has allowed it to draw upon international law as a source of legitimacy. Further, it established a system that gave the Court full powers over its own decisions and allowed it to construct a system of precedent that would, at least in theory, bind all other courts in the system.

## **A. The Construction of a Sense of Role**

### **1. The Court’s “Mission” Within the Political Order**

The basic doctrinal principles established in the first few years of the Court’s existence were rooted in a broader ideology about judicial role. On the one hand, the Court adopted a discourse of institutional failure in order to justify judicial activism – the idea was that the political branches, and particularly the congress, did not work properly. On the other hand, the Court has also worked towards a view of constitutional law that views it as essentially “technical” rather than “political” – as a discipline whose problems can be resolved through the application of sophisticated techniques and through close attention to the Court’s own prior precedents. These discourses are complementary to each other: the discourse on role provides a justification for activism, and the discourse on the nature of constitutional law provides a important distinction between the Court’s technical work and ordinary political processes.

The discourse on political role dates from the first year of the Court. For example, in T-406/92, the first of the key early social rights decisions, Justice Angarita defended his holding that courts could use the tutela to enforce social rights by stating:

The difficulties deriving from the overflowing power of the executive in our modern state and the loss of political leadership of the legislature should be compensated, in a constitutional democracy, with the strengthening of the judicial power, which is perfectly placed to control and defend the constitutional order.



This is the only way to construct a true equilibrium and collaboration between the powers; otherwise, the executive will dominate.<sup>307</sup>

In other words, in an institutional order where the legislature was structurally incapable of checking the executive, a strengthened judiciary was the best hope to do so. Further, in the absence of “legislative action,” the Court must “give force” to constitutional principles, developing and directly enforcing even socio-economic rights: “It’s clear that in principle in all of these cases the judge decides something that corresponds to the legislature. However . . . the lack of a solution from the organ that has the faculty to decide, makes it possible for another body, in this case the judiciary, to decide.”<sup>308</sup>

This kind of rhetoric matched the Constituent Assembly’s focus on congressional failure and executive overreach as being significant problems in Colombia. But whereas Angarita suggested that the Court compensate for the institutional failures of other branches, the Assembly focused largely on institutional renewal – a key goal was to redesign Congress and to make it work better. The consensus, however is that this institutional renewal of Congress has failed – as noted in the prior Chapter, the party system did not strengthen after 1991, and Congress continues to be plagued by weak parties and corruption. In short, as Fernando Cepeda notes, the “the unfortunate fact was that the spirit of the 1991 Constituent Assembly was not maintained” at the institutional level.<sup>309</sup> The Court’s ideological frame was thus grounded in an assessment of the political situation in Colombia.

Beyond these expansions and continuities in doctrinal lines, subsequent Courts have held a remarkably consistent sense of the same institutional role that animated the interim Court. The degree of consensus on the current Court about this conception of role is high, as indicated in a

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<sup>307</sup> T-406/92, June 5, 1992, § I.C., ¶ 9 (Ciro Angarita Baron).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 199.

series of interviews that I conducted with five current justices in 2009 and 2010, and with numerous clerks. My questions were designed to elicit the justices' reaction to two mega-cases of the Court examined in more detail in Chapter 7, a 2004 case (still ongoing) where the Court took over social policy involving Colombia's displaced persons (or refugees still living within the country), and a 2008 case (also ongoing) where the Court has attempted to structurally rework the health care system in Colombia. Only one justice – the current justice Mauricio Gonzalez, who was the legal secretary for President Uribe – expressed any pushback at this idea. He noted general support for the Court's existing socio-economic interventions on health and internal refugees, but noted that “in the future” the Court may want to be more cautious.<sup>310</sup> Justice Pretelt, however, who was another Uribe appointee, stated that he would like to see more interventions of the Court in areas like pensions and education.<sup>311</sup> Similarly, the current Justice Humberto Sierra Porto, who was appointed by the Council of State, noted that the Court had a high relevance for the lives of people, and as a result was often targeted for protest and petition as much as, if not more than, the Congress.<sup>312</sup>

Likewise, an institutional discourse on the failure of Congress has become a staple at the Court; it in fact underpins almost all of the Court's work. Two important examples will suffice here. First, in 2004 the Court (with Justice Cepeda writing the opinion) struck down an amendment to the Constitution that would have given executives sweeping new national security powers in areas of the country where violence remained endemic. The Court struck down the amendment on procedural grounds, holding that the congressional deliberations had been tainted. The problems were standard fare for Colombian politics – a key vote in the House had come several votes short of passage, so the chairman of the chamber tried to hold open the vote while

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<sup>310</sup> Personal interview, Mauricio Gonzalez, August 2009, Bogota, Colombia.

<sup>311</sup> Personal interview, Jorge Ignacio Pretelt, August 2009, Bogota, Colombia.

<sup>312</sup> Personal interview, Humberto Sierra Porto, August 2009, Bogota, Colombia.

his deputies cajoled members into voting or into changing their votes. When that failed, the chairman closed on the session on the grounds that legislators on the floor were making too much noise; by closing the session before the vote was complete, he rendered the existing vote a nullity and was able to hold a new vote later. Several days later, a new vote was held, and 14 legislators changed their vote – the clear inference, in line with Colombian politics, was that the executive or party leaders had given benefits to these legislators in return for their votes.

The Court held that the chairman’s attempt to nullify the initial vote had been illegal. It held the actual Congress up to the ideal one envisioned in 1991, and found the former wanting: “Congress is a space of public reason. Or at least, the Constitution postulates that that is what it should be.”<sup>313</sup> Further, it was deeply bothered by the switch of the 14 legislators, noting that these shifts were “questionable” and had “distorted the popular will” because the “change in vote occurred without any new public debate on the floor.”<sup>314</sup> The Court in fact has been very aggressive in controlling legislative procedure across a range of cases<sup>315</sup> – the reason, as Justice Cepeda noted, is that “we felt that the Congress was a bad Congress, want not even minimally rational, and we felt like we had to do something about that.”<sup>316</sup>

A second example occurred in 2003, when the executive sent a major tax reform initiative to congress. President Uribe sought to broaden the base of the country’s value-added-tax, its biggest source of revenue, by getting rid of a bunch of traditionally exempted products.

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<sup>313</sup> C-816 of 2004, Aug. 30, 2004 (Jaime Cordoba Trivino & Rodrigo Uprimny Yepes), § VII.138

<sup>314</sup> *Id.* at § VII.127.

<sup>315</sup> For example, the court will strike down legislative enactments because chamber leadership did not offer time for debate; for example, where the chair formally opens debate but then immediately closes it and proceeds to a vote before any statements have been made. *See* C-754 of 2004, Aug. 10, 2004 (Alvaro Tafur Galvis). Also, the Court will strike down bills where the chamber leadership has failed to read into the record, print in the legislative journal, or otherwise publicize the content of bills to be voted on, on the grounds that this precludes informed debate and voting. *See, e.g.*, C-760 of 2001, July 18, 2001 (Marco Gerardo Monroy Cabra & Manuel Jose Cepeda). Finally, the Court will strike down amendments to a bill made on the floor if it appears that a committee declined to debate the provisions at issue, but instead was trying to pass the buck to a later stage of the legislative process. *See* C-801 of 2003, Sept. 16, 2003 (Jaime Cordoba Trivino).

<sup>316</sup> Personal interview, Manuel Jose Cepeda, August 2009, Bogota, Colombia

The fiscal crisis grew as the bill sat before Congress, and thus the president greatly expanded the bill by proposing to tax a group of products that had historically not been taxed because they were “necessities.” The main challenge to the law rested on the argument that it unconstitutionally infringed the rights to life and to adequate sustenance, because it raised the price on necessary goods for people who could not afford the increase.<sup>317</sup>

The Court began by noting that, in principle, Congress was entitled to a “broad margin of configuration” in making tax decisions.<sup>318</sup> The trouble here was the quality of debate on the provisions at issue, which would have expanded the tax base to include many necessities traditionally exempted from the VAT. The Court stressed that the provisions were not the object of even a “minimal public deliberation in the Congress in which [their] implication[s] for equity and progressiveness were explored.”<sup>319</sup> Moreover, the bill itself showed an “indiscriminate” widening of the base to include many disparate items, thus offering evidence of a lack of deliberation.<sup>320</sup> Given these facts, the Court found that the legislature had not played its role properly and would not be given any “margin of configuration.”<sup>321</sup> Instead the Court independently reviewed, and struck down, the law.<sup>322</sup>

Coupled with this institutional justification of activism, the Court has also developed an ideology that marks off constitutional jurisprudence as an essentially technical rather than political activity. In building this conception, the Court has relied heavily on European theorists and on domestic academics and clerks who have studied in Germany or Spain. The German theorist Robert Alexy has an almost mythic status among the academic community surrounding

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<sup>317</sup> See C-776 of 2003, Sept. 9, 2003 (Manuel Jose Cepeda).

<sup>318</sup> See *id.* § VIII.4.5.0.

<sup>319</sup> *Id.* § VIII.4.5.0.

<sup>320</sup> See *id.* § VIII.4.5.1.

<sup>321</sup> See *id.* § VIII.4.5.6.1.

<sup>322</sup> *Id.* § VIII.4.5

the Court and the Court itself. Alexy has focused on showing how the enforcement of constitutional rights can be disciplined by using certain techniques. For example, Alexy has created a well-developed and highly-structured theory of proportionality, which assesses whether a governmental restriction on a given right is acceptable in light of the extent of the restriction and the values that the government is trying to protect.<sup>323</sup> The ultimate goal is to allow constitutional jurisprudence to give determinate answers to questions where multiple values conflict in a claim. The test becomes, in the words of one commentator, essentially an “arithmetic” equation, and public law becomes essentially a scientific enterprise.<sup>324</sup>

Many of Alexy’s writings have been translated in Colombia and published by the university presses, and his theories of proportionality have played a key role in constitutional jurisprudence. His theories have also been an important starting point for the academic community surrounding the Court. For example, Rodolfo Arango, a former clerk on the Court for Eduardo Cifuentes and Manuel Jose Cepeda and professor at Los Andes, studied under Alexy in Germany and developed a technical theory of the enforcement of social rights, building on his ideas.<sup>325</sup> Other scholars have also built on and extended Alexy’s ideas about proportionality.<sup>326</sup>

The conception of constitutional law as an essentially technical, scientific discipline complements the theory of judicial role explained above. The problem of political dysfunction justifies the Court’s role in the institutional order, while the theory of constitutional law as technical and non-political allows the Court to distinguish itself from the political branches.

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<sup>323</sup> See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers, trans., 2010). Alexy establishes, in essence, a three-stage process by which the constitutional judge first determines the interference of the law at issue with a protected constitutional value, then determines the corresponding principle being satisfied by the law, and finally a precise comparison between the two.

<sup>324</sup> See Jose Juan Moreso, *Alexy y la aritmetica de la ponderacion*, in EL PRINCIPIO DE LA PROPORCIONALIDAD EN EL ESTADO CONSTITUCIONAL (Miguel Carbonell, ed., 2007).

<sup>325</sup> See RODOLFO ARANGO, EL CONCEPTO DE DERECHOS SOCIALES FUNDAMENTALES (2005).

<sup>326</sup> See, e.g., CARLOS BERNAL PULIDO, EL NEOCONSTITUCIONALISMO Y LA NORMATIVIDAD DEL DERECHO (2009).

## **2. A Sense of Constitutional Purpose: The Vital Minimum and the Social State of Law**

The new constitution of 1991 was a hodgepodge of principles and an exceptionally long document. It was generally progressive, but otherwise reflected a series of compromises that made it potentially incoherent. One of the first Court's key tasks, then, was to give the text clearer meaning and a clearer sense of priorities.

The first Court answered this challenge by placing socioeconomic rights at the center of the new constitutional order. This was significant precisely because the text and the debates surrounding it left the status of socioeconomic rights deeply unclear. The Assembly did not, for example, establish clearly whether or not socioeconomic rights could be enforced via tutela. The text of the tutela provision, article 85, merely stated that tutelas could be taken to protect “fundamental rights,” without defining which rights were fundamental.<sup>327</sup> The headings of the constitution included a section on “fundamental rights,” which included first generation rights like speech and due process but excluded the socioeconomic rights.<sup>328</sup> These headings were done by the Codification Commission, however, and were not debated in the Assembly. Moreover, Article 86 contained a list of rights of “immediate application” – in general, the socioeconomic rights were excluded from this list.<sup>329</sup> But it is unclear from the debates what the significance of this list was and how it interacted with the requirement that a right be “fundamental.” Finally, President Gaviria made several speeches in which he laid out his position that socioeconomic

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<sup>327</sup> See CONST. COL., art. 86. For a close examination of the relevant debates, see MANUEL JOSE CEPEDA, LA TUTELA: MATERIALES Y REFLEXIONES SOBRE SU SIGNIFICADO (1992).

<sup>328</sup> The Codification Committee of the assembly, which was tasked with making the document coherent before its second and final floor debate, labeled those rights found in articles 11 through 41 – generally negative rights to things like speech, religion, and due process – “fundamental rights,” while labeling those found in articles 42 through 77 “economic, social, and cultural rights.” But it was unclear what weight should be assigned to this labeling.

<sup>329</sup> See CONST. COL., art. 85.

rights be included in the constitution as aspirations that would normally be judicially unenforceable.<sup>330</sup> But while Gaviria played a critical role in the Assembly, the positions of members of the Assembly were more nuanced. No clear position emerges on this issue.

The Court nonetheless moved quickly towards establishing the judicial enforceability of socioeconomic rights and in establishing them as central to the constitutional order. A key case here from the Court's first year was T-426 of 1992. T-426 did for socioeconomic rights what T-406 did for the Court's general conception of role: it influenced future decisions by laying out an aggressive vision of the Court's task. Like T-406, T-426 was written by a member of the court's core of progressive academics: Eduardo Cifuentes. He was joined on the tutela panel by another member of the group, Alejandro Martinez, as well as a member from outside that group who would grow into one of the Court's leading voices on socioeconomic rights, Jose Gregorio Hernandez. Cifuentes wrote an academic article while on the Court arguing that socioeconomic rights had to be at the center of Latin American constitutionalism because of the distinctive problems of poverty and inequality faced in the region.<sup>331</sup> Cifuentes explained in interviews that this was a priority for him and for the other justices in the Los Andes group – he believed it was “unthinkable” to have a constitutional jurisprudence without putting social issues at its center.

T-426 itself had simple facts.<sup>332</sup> An elderly man's wife died, and after her death he asked the authorities to switch her pension to him, as was his right under Colombian law. However, the agency did not attend to the request, putting the man in a difficult financial state and forcing him to be under the care of his daughter. The combined household lacked the money to pay for basic

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<sup>330</sup> See, e.g., Intervention of Cesar Gaviria at the Opening of the Constituent Assembly, Feb. 5, 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991, at 329, 340-41 (1992) (“As is obvious, these socioeconomic and collective rights cannot be directly enforced by an individual before a judge.”)

<sup>331</sup> See Eduardo Cifuentes Munoz, *El Constitucionalismo de la pobreza*, 4 DEREITO: REVISTA XURIDICA DH UNIVERSIDAD DE SANTIAGO DE COMPOSTELA 179 (1995) (giving statistics on poverty in Colombia and stating that the Court's jurisprudence has been caused not only by “the social state of law” principle, but also by “a social reality marked by inequality and social injustice”).

<sup>332</sup> See Decision T-426 of 1992, June 24, 1992 (Eduardo Cifuentes Munoz).

necessities, including a surgical procedure that he required because of his “precarious state of health.” The man brought a tutela, asking that the Court force Colombian authorities to grant his request to receive his wife’s pension. The trouble with the man’s argument was of course the issue of justiciability: it was unclear whether a tutela could ever be taken to protect a constitutional right to a pension.

In answering this question in the affirmative, the Court emphasized two key concepts. The first is the principle of “social state of law,” which is enshrined in article 1 of the Constitution as one of the basic principles of the Colombian state.<sup>333</sup> The switch from an *estado de derecho* [roughly rule of law], which was commonly used in constitutional jurisprudence under the 1886 Constitution, to an *estado social de derecho* [roughly social state of right] was particularly consequential, because the new term arguably implied a social welfare dimension to Colombian constitutionalism. For example, in the landmark tutela decision T-406 of 1992, Justice Angarita stated that “[t]he formulation in article 1 of the constitution, broadened and respected across the entire constitutional text, according to which Colombia is defined as a social state of law, is of an importance without precedent in the history of Colombian constitutionalism.”<sup>334</sup> In T-426, Justice Cifuentes defined the social state of right as “the form of political organization that has as one of its objectives combatting economic or social deprivation and the disadvantages of diverse sectors, groups, or persons of the population by offering them protection.”<sup>335</sup> The principle implied various duties on the part of state actors: that Congress has an obligation to enact measures that will help construct a more “just” social order, and that the state will guarantee to

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<sup>333</sup> See CONST. COL., art. 1 (“Colombia is a social state of right, organized in the form of a unitary Republic, decentralized, with autonomy in its territorial entities, democratic, participatory and pluralist, founded on respect for human dignity, in work and in the solidarity of the people that integrate it and in the prevalence of the general interest.”).

<sup>334</sup> Decision T-406 of 1992, June 5, 1992 (Ciro Angarita Baron).

<sup>335</sup> T-426, sec. 5.



all citizens the minimum necessary for a dignified existence.<sup>336</sup> In other words, the social state of right principle required an orientation of the entire Colombian state towards problems of poverty and inequality.

The Court added to this the principle of the “vital minimum,” which is a German constitutional concept. One of Cifuentes’ clerks, Rodolfo Arango, has just returned from completing a dissertation in Germany as a student of Robert Alexy, and Arango and Cifuentes developed the doctrine as a way to enhance the justiciability and importance of socioeconomic rights.<sup>337</sup> The basic notion is that Colombian constitutionalism, based on its various explicit rights and principles, creates an implicit but overarching right to a minimal level of well-being. As Cifuentes noted in T-426: “The social state of law demands that the state expend effort in constructing the indispensable conditions that would assure all of the inhabitants of the country a dignified life.... The goal of strengthening human capacity requires that the authorities act effectively to maintain and improve quality of life, including food, housing, social security and the monetary means to survive in society.”<sup>338</sup> Cifuentes found that although “not explicitly stated in the Constitution,” the right “could be deduced from the rights to life, health, work, and social security.”<sup>339</sup> The Court chiefly linked the vital minimum to the principle of the social state of right and to the constitutional rights to life and human dignity.

The vital minimum concept has become, along with the social state of right principle, one of the core concepts in Colombian constitutional law.<sup>340</sup> These principles put socioeconomic rights at the top of the constitutional order by making the political mission to fight poverty perhaps the

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<sup>336</sup> *Id.*

<sup>337</sup> Personal Interview, Eduardo Cifuentes, May 2010, Bogota Colombia; Rodolfo Arango, June 2011, Bogota, Colombia.

<sup>338</sup> T-426/92, § 5, June 24, 1992 (Eduardo Cifuentes Munoz).

<sup>339</sup> *Id.*

<sup>340</sup> For a perspective on the creation of the concept and its evolution through time, see Pablo Rueda, *Legal Language and Social Change during Colombia’s Economic Crisis*, in *CULTURES OF LEGALITY* 25 (Javier Couso et al., eds., 2010).

key constitutional goal. The social state of right principle implies that the entire state must be oriented towards dealing with socioeconomic deprivation. Further, they give a theory as to *why* socioeconomic rights are so central. The vital minimum doctrine in particular explains that the right to at least a minimal level of well-being is essential to the maintenance of the rights to life and human dignity. Since these rights are central to modern constitutionalism, so too must be the enforcement of socioeconomic rights.

Finally, and on the most practical level, the concept of the vital minimum helped the Court resolve the interpretive ambiguity regarding the enforcement of social rights by tutela. The notion of the vital minimum suggested that social rights would often be linked to rights that were clearly listed in the Constitution as fundamental, particularly the right to life and human dignity. Where a petitioner was denied a right to a pension or to healthcare in a situation where they needed the money or treatment to survive, and could not obtain it by other means, then the refusal violated not only her social right to the pension or treatment in question, but also potentially her rights to life and human dignity. Thus, the Court established its connectivity doctrine, which held that social rights could be enforced by tutela whenever they were connected to these kinds of fundamental rights.<sup>341</sup> The elderly man at issue had his tutela granted, because under the circumstances of the case the failure to grant him a pension endangered his right to life and violated his right to human dignity.

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<sup>341</sup> For example, in T-426 of 1992, the decision creating the vital minimum, the Court used a tutela to order the state to pay an impoverished elderly man a pension she argued she was owed due to the death of her spouse, where the administrative agency had delayed for almost two years in taking any action. *See* T-426 of 1992, June 24, 1992 (Eduardo Cifuentes Munoz). In T-534 of 1992, the Court used similar reasoning to order the state to pay for a soldier's cancer treatment, after the soldier had been discharged from the military due to the condition. T-534 of 1992, Sept. 24, 1992 (Ciro Angarita Baron). The Court has since moved away from the connectivity doctrine, holding for example that the right to health was fundamental in and of itself in some aspects. *See* T-760 of 2008 (Manuel Jose Cepeda). But the connectivity doctrine played a key role in initially establishing that socioeconomic rights could be enforced via tutela.

## **B. Reviewability and Judicial Supremacy**

A second major principle sought by the Los Andes group was to establish that the Court's power of constitutional interpretation were supreme and not subject to enclaves of discretion by other institutions. The Constitution had to be enforced by the Court irrespective of institutional barriers and formal limits on authority. This was particularly important given recent Colombian history and the overarching role played by presidential states of exception. Indeed, as Chapter 2 noted, much of the Supreme Court's historic jurisprudence revolved around the careful evasion of judicial review in certain classes of "politically charged" cases. Much of the Court's first year was dedicated to aggressively reversing that historic tendency. In so doing, the Court gave itself an enduring protagonist's role within the separation of powers. It put itself in a position to oversee the actions of other branches and levels of government. And it did so under the aegis of a coherent institutional conception: the realization of constitutional values was the paramount political goal, and the Constitutional Court was the institution charged with ensuring constitutional compliance.

Most importantly, the new Constitution left it ambiguous whether declarations of states of emergency such as States of Internal Commotion could be reviewed by the Court, or instead were left to the discretion of the executive branch. While the text clearly gave the court the power to review any decrees issued during the state of emergency, it said nothing that would give the Court the power to review the declaration of emergency itself.<sup>342</sup> The pre-1991 practice had made declarations of states of siege unreviewable beyond determining whether the formal requirements (signature of cabinet ministers, etc) had been met.

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<sup>342</sup> Article 214 of the Constitution says "The Government will send to the Constitutional Court, the day after issuing them, the legislative decrees that it dictates in the use of the powers to which the prior articles [on states of emergency] refer, so that the Court can decide definitely on their constitutionality."

Cifuentes noted that the first time a post-1991 Court declared a state of internal commotion, it was not even clear whether the president would send the declaration to the Court for review – he believes they may have given it to the Court as a mere “courtesy.”<sup>343</sup> Nonetheless, the Court heard the case and decided that it did have the power to review the declaration. It emphasized that the constituent assembly had aimed to prevent “the virtual expropriation of the legislative function on the part of the president” – the Court thus “interpreted the collection of norms that the Constitution dedicated to states of exception as limiting and checking abuses of discretion.”<sup>344</sup>

The Court stressed constitutional provisions establishing “the primacy of the Constitution as the norm of norms ... and the mission trusted to its guardian to preserve its ‘integrity and supremacy.’”<sup>345</sup> The Court noted that in the absence of provisions allowing review, the government could declare states of emergency that were “openly unconstitutional” without remedy, which would allow the president to claim “supraconstitutional” powers.<sup>346</sup> Moreover, if the president could violate the Constitution with “impunity,” the Court would not be carrying out its mission to defend the entire constitution, but only a part of it. In short, the Court based its reasoning on a combination of Colombian institutional history and an aggressive vision of its own institutional role. Under its reasoning, allowing any gaps in its powers of judicial review would be an abdication in its constitutional role. The Court resolved a genuine ambiguity in the Assembly’s work, but it did so in a way that seemed convincing both as a matter of Colombian

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<sup>343</sup> Personal interview, Eduardo Cifuentes, August 2009, Bogota, Colombia; CONST. COL., art. 214, cl. 6.

<sup>344</sup> See C-004/92 (May 7, 1992), § VII.4

<sup>345</sup> *Id.* The Court cited Article 4 of the Constitution, which states: “The Constitution is the norm of norms. In case of incompatibility between the Constitution and a law or other legal norm, the constitutional disposition will be applied.” It also cited Article 241, which states in relevant part: “The Constitutional Court is entrusted with guarding the integrity and supremacy of the Constitution, in the strict and precise terms of the article.” The rest of the provision lays out a set of specific powers of the Constitutional Court.

<sup>346</sup> *Id.*

political history and constitutional theory. And it ensured that the Court would play a role in all subsequent moments of political crisis.<sup>347</sup>

A similar textual ambiguity revolved around the Court's ability to review the decisions of the other courts, particularly the high ordinary courts such as the Supreme Court and Council of State. The answer to this question would largely determine the balance of power between the various courts, because a rule allowing review would effectively place the Constitutional Court hierarchically above these other institutions. The constitutional text again left the issue ambiguous, by stating merely that tutelas could be taken against any "public authority."<sup>348</sup> Nonetheless, President Gaviria used temporary constitutional authority to pass Regulation 2591 of 1991, which allowed the tutela to proceed against judicial decisions under certain conditions.<sup>349</sup> In October 1992, a plaintiff brought a challenge against the constitutionality of article 40 of decree 2591, on abstract review. Angarita, Cifuentes, and Caballero all sought to uphold this provision and establish that tutelas could be taken against judicial decision. But they were outvoted, 4 to 3, in one of the few cases where they met a unified opposition – justices with experience on the high ordinary courts took a unified stance against the provision. This was the

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<sup>347</sup> Uprimny argues that the pattern of the Court's jurisprudence was significant – it initially asserted the power to review declarations of states of emergency, but in its first several cases upheld the actual declarations at issue. Only later did it begin striking down both states of internal commotion and states of economic, social, and ecological emergency. This pattern of strategic deference may have allowed the Court to build up its institutional power. See Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 DEMOCRATIZATION 46 (2003). While Uprimny's theory is consistent with the theory developed in this dissertation, establishing a principle of reviewability – which allowed the Court to play a role in subsequent political crises that it would otherwise have been left out of – may have been more important than a pattern of strategic deference.

<sup>348</sup> CONST. COL., art. 86. There was considerable debate on this issue at the Constitutional Convention. An influential project in shaping and naming the tutela, that of the Conservative delegate Juan Carlos Esguerra, explicitly established that a tutela could not be taken against judicial "decisions with the authority of the cosa juzgada." See Gaceta Constitucional, No. 24, March 20, 1991, at 4. This language was struck in Committee, with the Committee report stating that the language at issue "is part of the natural meaning of the institution and does not need to be stated expressly." See Gaceta Constitucional, No. 77, May 20, 1991, at 9-10. During the second (and final) plenary debate on the tutela provision, an alliance of pro-ordinary-judiciary delegates from the Fourth Committee and conservatives who had opposed the Constitutional Court altogether attempted to amend the text to again state explicitly that the tutela could not be taken against judicial decisions, by replacing the reference to "public authorities" with one to "administrative authorities." The proposed amendment was defeated. See Gaceta Constitucional, No. 142, Dec. 21, 1991, at 18.

<sup>349</sup> Dec. 2591, arts. 11 & 40, Diario Oficial, No. 40165 (Nov. 19, 1991) (both arts. declared unconstitutional).

most important defeat for the Los Andes group during the Court's first year. The tutela against judicial decisions has always affected the high ordinary courts directly, and thus has always been an area where these tribunals have tried to exert influence on the Constitutional Court.<sup>350</sup> In other words, the issue organized the otherwise disorganized opposition on the court.<sup>351</sup>

The majority argued that the three jurisdictions – ordinary, administrative, and constitutional – were set up as equal in the Constitution, and argued that allowing tutelas against judicial decisions would instead put the constitutional jurisdictions ahead of the others.<sup>352</sup> In dissent, the Los Andes justices (in an opinion written by Angarita) spun a story that was consistent with their overarching frame of analysis. They hammered the majority's main argument as being marked by "[f]ormalism and foolish dependence on authority ... paradoxically offered under the aegis of the 1991 Constitution, whose linchpin is substantive rights and respect for the person and her rights." This reasoning emphasized the Los Andes group's framework: the constitution was a transformative document that had to be enforced without regard to formal institutional barriers.<sup>353</sup> Underlying this conception was a contrast between the transformative jurisprudence of the Constitutional Court and the justices of the

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<sup>350</sup> See C-543 of 1992, Oct. 1, 1992, 1992(6) G.C.C. 207.

<sup>351</sup> The tutela against judicial decisions often rallied the members of the high ordinary courts against the positions of the Constitutional Court, and at various points members of those courts relied on these decisions in calling for reforms to the tutela. See generally HERNAN ALEJANDRO OLANO GARCIA, *EL CHOQUE DE TRENES: GUERRA ENTRE CORTES?* 95-141.

<sup>352</sup> See C-543 at 225-29. The majority decision concluded with a strange read of comparative law: it relied heavily on the Spanish constitution to support its position that the autonomy of the judiciary was an important value, while ignoring the much more obvious point that Spain allows individual complaints to be taken from judicial decisions. See C-543 at 236-38.

<sup>353</sup> There was another piece to this assertion of judicial and constitutional supremacy as well: the Court aggressively held that its new power to review the constitutionality of international treaties applied to preexisting treaties as well as new ones. Using this power, the Court struck down many articles of the Concordat, the treaty with the Vatican, on the ground that they violated rights to religious equality. See C-027 of 1993, Feb. 5, 1993 (Simon Rodriguez Rodriguez). Jose Gregorio Hernandez dissented, asserting that the specific constitutional power to review treaties before they went into effect, see CONST. COL., art. 241, cl. 10, was exclusive in nature and meant that the Court had no power to review preexisting treaties. This decision thus cut off another area where the political branches had historically evaded judicial review.

ordinary judiciary, who Angarita argued were steeped in “formalism.”<sup>354</sup> In other words, the Court as the “guardians” of the Constitution had to carry out the task of transforming the legal order.<sup>355</sup>

For the moment, the Los Andes group would lose this particular battle, but they would, almost simultaneously, begin building a breach of indeterminate size in the hole they had just closed. The key case here was T-079 of 1993, where a three-judge panel of the Court, in a decision written by Cifuentes, allowed a tutela against a judicial decision of a family court judge in San Andres upholding an administrative measure that had declared a minor “abandoned” by his family and had begun the process of adoption. The mother filed a tutela against this decision, claiming a violation of her fundamental rights to due process and to defense. The chamber granted the tutela, relying on a vague remark in C-543 appearing to leave some room for use of the tutela against judges.<sup>356</sup> The Court held that all actions, including those by judges, were subject to constitutional control when “the conduct of the agent lacks an objective basis, obeys only its own will or caprice and has as a consequence the violation of the fundamental rights of persons.”<sup>357</sup> The Court held that not allowing review in those circumstances would itself clash with the constitutional principles of a social state of right and equality by allowing “arbitrary” actions to violate fundamental rights, and it emphasized that the violations in the case before it were “manifest.” Thus, while the group lost its major battle allowing reviewability of judicial decisions in general, it did establish a principle allowing review of some decisions that

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<sup>354</sup> See *id.* at § 17 (“Formalism is a mere technique of social domination, unfortunately very common among the judges of this country.”).

<sup>355</sup> *Id.* at §18.

<sup>356</sup> The relevant part of the decision read: “Nothing prevents the use of the tutela to order a judge who has engaged in an unjustified delay in the adoption of decisions under his charge that he must proceed to resolve the case or to observe diligently the judicial terms, nor does the use of this figure clash with constitutional precepts in the case of actions of fact [actuaciones de hecho] imputable to the functionary through which he is ignoring or threatening fundamental rights....” See T-079 of 1993, § 6 (Eduardo Cifuentes Munoz) (quoting C-543 of 1992).

<sup>357</sup> *Id.*

manifestly violated constitutional rights. This principle would continue to grow in subsequent years, as noted in Part III.B.

A final example of the “reviewability” doctrine in action was the Court’s assertion of a power to review international treaties. The best example is an important decision striking down parts of the Concordat treaty with the Vatican. This venerable treaty gave the Catholic Church special rights in fields like education and law, and gave the Church the power to evangelize in indigenous zones.<sup>358</sup> The treaty was substantially bound up in Colombia’s history as a Catholic nation, and was particularly significant to members of the Conservative party. Moreover, as noted in Chapter 2, the Supreme Court had often limited its ability to review treaties as a way to avoid sensitive political issues. The defenders of the treaty argued that the Court in fact had no jurisdiction to pronounce on the matter, drawing attention to yet another ambiguity in the text of the 1991 Constitution. The Constitution created a special, *a priori* procedure for review of treaties – newly negotiated treaties were automatically sent to the Court before going into effect.<sup>359</sup> Many of the defenders of the law, including members of the cabinet, argued that this was the *exclusive* way to review a treaty; a treaty was not in their view a law, and thus could not be reviewed using the public action form of abstract review. In effect, this would mean that any treaty predating the 1991 Constitution would be unassailable. This position was far from trivial: defenders of the treaty noted for example that it would be disruptive under international law for domestic courts to strike down a treaty as invalid long after the fact of ratification, because the international obligation would remain and would be violated.

A broad majority of the Court nonetheless swept this position aside with ease. The Court began by citing a study carried out by Ciro Angarita Baron in 1992 on the judicial review of

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<sup>358</sup> See C-027 of 1993 (Simon Rodríguez Rodríguez).

<sup>359</sup> See CONST. COL., art. 241, cl. 10.



treaties in the new legal order, which it noted had been approved by the Plenary Chamber of the Court. The Court cited this study and noted that the failure to exercise judicial review over treaties predating the Constitution of 1991 would leave an unacceptable lacuna in the legal order: “[T]he entire legal system (including the Decree-Laws and Legislative Decrees) is subject to constitutional control.”<sup>360</sup> The Court would go on to strike down much of the treaty, chiefly on grounds of equality and indigenous autonomy.

In short, the Court in its first year staked out an aggressive position on its authority to review the actions of other institutions and on its power to review broad swaths of the legal order. The Los Andes group attempted to resolve a series of ambiguities in favor of broader jurisdiction. The group temporarily lost a significant battle on the question of tutelas against judicial decisions, but it otherwise succeeded in implanting a set of doctrinal norms that privileged its substantive constitutional control over the entire legal order.

### **C. The Court’s Control over its Own Decisions**

A final key principle dealt with the Court’s assertion of broad powers to control the effects of its own decisions. The Court undertook an aggressive read of the text to hold that international law was a key source of constitutional law. In the process, it increased its own power. Moreover, the Court held that it had sole power to define the effects of its own decisions, laying the groundwork for the construction of a system of precedent and for a set of creative, aggressive remedies that would help to reshape the legal order.

In this early period, the Court focused on the construction of a “constitutional block” that allowed it to import international law into its own decisions. International human rights discourse had historically played only a very subsidiary role in Colombian constitutional reasoning – as

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<sup>360</sup> See C-027 of 1993 (Simon Rodriguez Rodriguez), § IX.

noted in Chapter 2, even the Supreme Court's pushback against states of siege was primarily rooted in structural factors and not in a conception of human rights. Yet certain provisions of the new constitution provided ammunition for a fundamentally different approach. Article 93 states that "[t]reaties and international covenants ratified by Congress, which recognize human rights and prohibit their limitation during states of exception, prevail in the internal order," and further that "the rights and duties consecrated in this Charter will be interpreted in conformity with the international treaties on human rights ratified by Colombia."<sup>361</sup> Article 214 states that even during states of exception, the government must respect "international humanitarian law."<sup>362</sup>

The Court aggressively read these provisions to establish the "constitutional block" – the idea that certain provisions of international law were considered part of the constitutional order. For example, in C-574 of 1992, Justice Ciro Angarita Baron upheld the constitutionality of Additional Protocol I to the Geneva Conventions<sup>363</sup> and laid out the "block" concept.<sup>364</sup> The Court noted that in light of article 93, the Protocol became part of the constitutional order once ratified. Moreover, in light of article 214 and the basic principle of human dignity, norms of customary international humanitarian law like those found in the Protocol would be part of the constitutional regime even without having been ratified. In other decisions, the Court began referring to international human rights law as part of its constitutional interpretation.<sup>365</sup> This "constitutional block" concept would become a core part of the Court's assertion of power: the

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<sup>361</sup> CONST. COL., art. 93.

<sup>362</sup> CONST. COL., art. 214, cl. 2.

<sup>363</sup> Under the Constitution, this review automatically occurred before the treaty could go into effect. *See* CONST. COL., art. 241, cl. 10.

<sup>364</sup> *See* C-574 of 1992, Oct. 28, 1992 (Ciro Angarita Baron).

<sup>365</sup> *See, e.g.*, T-409 of 1992, June 8, 1992 (Jose Gregorio Hernandez) (Geneva Conventions); T-426 of 1992, June 24, 1992 (Eduardo Cifuentes Munoz) (International Covenant on Economic, Social, and Cultural Rights). The Court did not, in fairness, coin the term "constitutional block" in those decisions. The term, which stems from a somewhat different usage in France, was first adopted by the Constitutional Court in 1995. *See* C-225 of 1995, June 7, 1995 (Jorge Arango Mejia). For an overview of the development of the concept, see, for example, MANUEL FERNANDO QUINCHE RAMIREZ, *DERECHO CONSTITUCIONAL COLOMBIANO: DE LA CARTA DE 1991 Y SUS REFORMAS* 111-20 (3<sup>rd</sup> ed. 2009).

importation of international law into domestic constitutional interpretation has both strengthened the legitimacy of the Court's decisions and allowed it to construct rights that are primarily present in international rather than domestic law.<sup>366</sup> This decision was the start of a line of decisions giving the Court plenary power over the effects of its own decisions. The continuation of this line is covered in the next section.

## **II. Strengthening and Expansion of the Doctrinal Synthesis: The First Full Court & Beyond**

The interim Court's 1992 interventions in defining a sense of mission and in outlining major doctrinal lines have proven remarkably durable. This has not meant, of course, that the construction process ended with the first Court, but most major lines were established in that first year. Four of the justices on the interim Court were placed on lists and reappointed to the first full Court, which took power in 1993; the other three either declined to run for reelection or were not reappointed. Angarita, in particular, was placed on a list but failed to win reelection: Cifuentes and Caballero both won reappointment to the Court. They were joined by another

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<sup>366</sup> A notable example is the Court's jurisprudence on the right of "prior consultation." The Colombian Constitution contains provisions on indigenous autonomy, including a provision providing that "Exploitation of natural resources in indigenous territories will be carried out without weakening the cultural, social, and economic integrity of indigenous communities. In the decisions that are adopted about that exploitation, the Government will seek the participation of the representatives of the respective communities." *See* CONST. COL., art. 330, paragraph. The Court has used this brief provision as the basis for an increasingly robust doctrine of "prior consultation," which requires rigorous consultation with indigenous communities before projects are undertaken on their land. This broad interpretation of this right has been significantly influenced by international law, and particularly International Labor Organization (ILO) Convention 169, which lays out rights of indigenous consultation in more detail. In Decision SU-383 of 2003 (Alvaro Tafur Galvis), for example, the Court expanded the right to include consultation on a widespread program to eradicate illegal crops by having government authorities drop herbicides on them. The Court held that in light of ILO Convention 169, the right was not restricted to include only natural resources, but instead included any project with a significant effect on the indigenous community. And in Decision T-129 of 2011 (Jorge Ivan Palacio Palacio), the Court relied heavily on articles 6 and 16 of the ILO Convention, which suggested that consultation should be carried out with an aim of getting the "free and informed consent" of the community at issue, as well as the Declaration of the United Nations on the Rights of Indigenous Peoples, in holding that in some cases, projects would require not simply consultation with affected groups, but their informed consent.

important and progressive academic voice, Carlos Gaviria, who had been a professor in Medellin.

Thus, one core task of the first full Court was to strengthen the major doctrinal lines established by the first court. For example, while the interim court established the principle that declarations of states of exception could be reviewed, the first full court began striking down these declarations.<sup>367</sup> Similarly, the first full court coined and deepened the concept of the constitutional block, solidified the principle that tutelas could be taken against judicial decisions, and made the enforcement of social rights routine. The first full Court also added new dimensions to the synthesis established in 1992: these were related to the role conception established by the first court, but built on it by adding a dimension of dignity and equality to the work of the interim court.

#### **A. A Sense of Mission, Developed and Expanded**

The interim Court's emphasis on socioeconomic rights, and particularly the Social State of Right principle and the vital minimum, continued on the first full Court. But these principles were expanded to link to two other key principles: dignity and equality. First, largely at the impulse of Carlos Gaviria, the Court interpreted the dignity principle to include a liberty dimension. He developed the dignity principle as meaning not just a right to enjoy a minimum level of subsistence, but also as implying a right to be free to make's one own decisions on fundamental matters. In landmark divided decisions authored by Gaviria, the Court held that drug possession of a "personal dose" and euthanasia were both constitutionally protected activities that could not be criminalized.<sup>368</sup> In crafting these decisions, Gaviria combined the

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<sup>367</sup> See, e.g., C-300 of 1994, July 1, 1994 (Eduardo Cifuentes Munoz); C-466 of 1995, Oct. 18, 1995 (Carlos Gaviria Diaz); C-122 of 1997, Mar. 12, 1997 (Antonio Barrera Carbonell & Eduardo Cifuentes Munoz).

<sup>368</sup> See C-221 of 1994, May 5, 1994 (Carlos Gaviria Diaz); C-239 of 1997, May 20, 1997 (Carlos Gaviria Diaz).

dignity principle with the explicit constitutional right to “free development of personality.”

Caballero and Cifuentes joined with Gaviria in these decisions, and Gaviria noted that he tended to make common cause with these justices on most issues.<sup>369</sup>

Further, this new coalition developed a transformative or material rather than formal conception of equality. In other words, the justices read the equality clause as requiring more than equal treatment under the law – the Colombian government was required to take affirmative steps to improve the lot of traditionally disadvantaged groups like women, minorities, and the poor.<sup>370</sup> For example, in decision C-410 of 1994, the Court upheld a 1993 law establishing a lower possible retirement age for women than men.<sup>371</sup> In upholding the law, Justice Gaviria noted that the Colombian Constitution has both negative and positive aspects, and that under the latter conception the state is required to take actions in favor of “discriminated or marginalized” groups. After reviewing the history of discrimination against women in the workplace, the Court concluded that the law was intended to remedy this history and thus upheld it despite the formal difference in treatment. Using similar reasoning, a unanimous court in an opinion again written by Gaviria upheld a system of quotas in the political system which required that women be offered a certain percentage of places on party and nominating lists.<sup>372</sup>

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<sup>369</sup> Personal interview, Carlos Gaviria Diaz, May 2010.

<sup>370</sup> Again, the text contained substantial ammunition for the construction of these arguments. The Constitution’s main equality provision, article 13, states both a basic non-discrimination clause as well as noting that “[t]he state will promote the conditions necessary in order that equality may be real and effective will adopt measures in favor of groups which are discriminated against or marginalized,” and that “[t]he state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction any abuse or ill-treatment perpetrated against them.” *See* CONST. COL., art. 13.

<sup>371</sup> *See* C-410 of 1994, Sept. 14, 1994 (Carlos Gaviria Diaz).

<sup>372</sup> *See* C-371 of 2000, Mar. 29, 2000 (Carlos Gaviria Diaz). Note that the key positive equality decisions of the first full court were used mainly to uphold governmental “affirmative action” measures. Subsequent courts have used this principle to require government action, particularly with respect to the handicapped. *See, e.g.*, T-595 of 2002, Aug. 1, 2002 (Manuel Jose Cepeda) (requiring mass transport in Bogota to be made accessible to the handicapped); T-553 of 2011, July 7, 2011 (Jorge Ignacio Pretelt) (requiring judicial buildings around the country to be made handicapped accessible).

## **B. The Expansion of the Concept of Reviewability**

The first full Court generally followed lines indicated by the interim court in emphasizing that the Constitution did not allow legal gaps, and such that all acts were subject to constitutional review. It reiterated the jurisprudence of the interim Court on states of exception, but began giving its doctrine teeth by actually striking down declarations. These decisions had a significant impact in the separation of powers and began changing the way the country was governed. While Colombia had generally been ruled under a state of exception in the years leading up to the enactment of the 1991 Constitution, in the years since its enactment successful invocations of either states of internal commotion or states of economic, social, and ecological emergency have been rare. The Court's core jurisprudence, for example, limits invocations of emergency to measures proportional to a sudden, grave threat. Events of a "chronic" or "structural" nature are not proper grounds for invoking emergency presidential powers. This principle occasionally caused political conflict and pressure the Court, as during Alvaro Uribe's first state of emergency in 2002, and was the genesis of some of the reform proposals taken against judicial power.<sup>373</sup> Since emergency powers had historically been used during the National Front to pass routine economic legislation and to enact measures on Colombia's long-running civil conflict, the Court's jurisprudence marked a significant change in the ways lawmaking was carried out.

The new Court also expanded the *via de hecho* doctrine to reach more judicial decisions. In T-231 of 1994, in another decision written by Cifuentes, the Court reviewed a decision of the Supreme Court allowing tutela review of judicial decisions only when the decision was formally inadequate – ie. it lacked any legal reasoning or ignored a process required by law. The Court disagreed with the view of the Supreme Court and held instead that significant material errors

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<sup>373</sup> See *infra* Chapter 8.

could constitute a *via de hecho*. This was, according to the Court, because “[t]he prevalence of substantive law as a criteria of interpretation is immanent to the social state of right.”<sup>374</sup> By the end of the first Court, it had established a clearer test for situations that could constitute a *via de hecho*,<sup>375</sup> and by the second court, the Court has established that violating its own precedent was a sufficient ground for allowing a tutela against judicial decisions.<sup>376</sup> This doctrine also caused considerable conflict with other actors, in this case chiefly the high ordinary courts, and served as the genesis for several proposals to weaken the tutela. These conflicts would periodically flare up into a *choque de trenes*, with the ordinary courts complaining openly about the Constitutional Court and demanding reforms.<sup>377</sup> Chapter 8 explains the ways in which the Constitutional Court consistently mobilized enough support to hold off attempts to weaken the Court.<sup>378</sup>

Further, the Court expanded the doctrine of reviewability to encompass new realms. It developed, for example, an extensive doctrine allowing review of legislative procedure. The Court asserted the power both to police constitutional requirements regulating how a law is made and, in certain conditions, of the Rules of Parliamentary procedure. This doctrine required, for example, that the Court hold the required number of debates and comply with other formalities mentioned in the Constitution. But the doctrine also, as it has developed, has a substantive valence – the Court has tasked itself with determining that the legislative process is sufficiently deliberative. Applying this standard, the Court for example has struck down laws where it

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<sup>374</sup> T-231 of 1994 (Eduardo Cifuentes Munoz), § 5.4.

<sup>375</sup> See Decision T-1017 of 1999, § 2 (Eduardo Cifuentes Munoz) (establishing four kinds of defects as the possible basis for a tutela against judicial decisions, “substantive,” “factual,” “organic,” and “procedural”).

<sup>376</sup> See, e.g., Decision C-590 of 2005 (Jaime Cordoba Trivino).

<sup>377</sup> For an overview of many of these disputes, see MANUEL FERNANDO QUINCHE RAMIREZ, *VIAS DE HECHO: ACCION DE TUTELA CONTRA PROVIDENCIAS* (5th ed. 2005).

<sup>378</sup> The high ordinary courts also had considerable power over composition, as noted in the next chapter – the Council of State and the Supreme Court controlled two-thirds of the lists for the Constitutional Court. The ordinary courts’ appointment powers have appeared to have some effect on the commonality of tutelas against judicial decisions, particularly those from the high ordinary courts. This has allowed an uneasy peace to develop between the Constitutional Court and the other high ordinary courts.

appeared that the Congress was trying to “elude” debate on an issue by, for example, declining to debate a provision in committee but instead leaving that provision to the full floor debate. In the most famous case in this line, the Court struck down a constitutional amendment proposed by Alvaro Uribe that would have enacted a number of new measures to fight terrorism. The measure would have, for example, allowed measures like the interception of communications, the search on domiciles, and the detention of persons without previous judicial warrant.<sup>379</sup>

Constitutional amendments must pass two different sessions of Congress by different majorities – simple majorities in the first round and absolute majorities in the second. At one of the constitutionally-required rounds, the President of the House of Representatives had trouble finding enough votes for passage. He thus held the vote open for an extraordinarily long period, and when that failed he deemed the session adjourned because of commotion on the floor, without announcing a result. He reopened the vote one day later, and this time at least 14 congressmen changed their vote, allowing the provision to pass. The Court held that the procedures used to pass this amendment were unconstitutional because the Chairman had illegally held the vote open and then declared the session adjourned. It also expressed dismay with the fact that 14 congressmen had changed their vote overnight. Finally, the Court laid out its general theory its control over legislative procedure:

In constitutional democracies in general, and specifically in Colombian constitutionalism, public deliberation and respect for the procedures of the

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<sup>379</sup> This was the third effort to pass a similar set of tough anti-terrorism measures. A first attempt, via ordinary law, was struck down by the Constitutional Court as violations of limitations on executive power. *See* Decision C-251 of 2002 (Eduardo Montealegre Lynett & Clara Ines Vargas Hernandez). A second attempt, via presidential invocation of a state of internal commotion, was partially upheld but expired automatically when the state of internal commotion expired. *See* Decision C-802 of 2002 (Jaime Cordoba Trivino) (upholding Uribe’s declaration of a state of internal commotion); *see also* Decision 1024 of 2002 (Alfredo Beltran Sierra) (striking down many of the key substantive measures issued by Uribe under the declaration); Decision C-327 of 2003 (Alfredo Beltran Sierra) (striking down an attempt to achieve a second, 90-day extension of the declaration because the Senate has not voted on the extension in a deliberative manner).



Chambers are not empty rituals; respect for those formalities has a profound meaning since they permit the formation of democratic will, in order to make it as public and impartial as possible, and because they also respect minority rights. The sessions of Congress are not then a space where decisions and negotiations made outside the Chambers are formalized or ratified.... Without denying that there can exist negotiations between political forces outside of parliamentary sessions, in as much as those meetings are inevitable in the modern world, it is clear that constitutional democracies, and specifically the Constitution of 1991, opt for a deliberative and public model of the formation of laws and legislative acts. The meeting of the chambers does not have as its object the mere formality of ratifying a decision that was adopted by political forces outside the parliamentary halls; sessions of Congress must be spaces where the distinct positions and perspectives ... are truly discussed and debated in an open form and before public opinion.... Congress is a space of public reason. Or at least that is what the Constitution postulates it should be.<sup>380</sup>

The decision thus encapsulated, in a blockbuster case, the reasoning under which the Constitutional Court would have the power to review the details of legislative procedure. In the Court's view, this procedure was not mere formality, but instead was key to the substantive transformation sought by the 1991 Constitution. The Constitution sought to transform an illegitimate clientelist democracy into a deliberative democracy that would be more open to minority groups. The Court, as guardian of the Constitution, was tasked with ensuring that the Congress, which was widely perceived as not having lived up to its constitutional promise, transformed into a more deliberative space. The Court's assertion of power to review legislative procedure, like its assertion to review the acts of other institutions, was thus closely bound up with its overall conception of role.

Finally, and most surprisingly, the Court asserted the power to review the substance of constitutional amendments themselves through the "substitution of the constitution" doctrine.<sup>381</sup> The course of this doctrine will be looked at in more detail in the next chapter, including the key cases involving the first and second reelection of President Alvaro Uribe. For now, it should be

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<sup>380</sup> See C-816 of 2004, § VII.138 (Jaime Cordoba Trivino & Rodrigo Uprimny Yepes)

<sup>381</sup> See *infra* Chapter 5.

sufficient to point out that this unusual<sup>382</sup> doctrine is the culmination of a theory that holds that the court must have the power to review all acts that pose a threat to the constitutional order, including in this case constitutional changes themselves. In its seminal case in this line, the Court held that the authorities carrying out a constitutional reform “did not have the competence to destroy the Constitution,” because that power was reserved to the people acting in their capacity as original constituent power (ie. rupturing the existing constitutional order and establishing a new one).<sup>383</sup> In other words, even the power of constitutional reform itself was subject to some constitutional limits. The Court has never dealt with a second dimension of the problem: why the Court is the institution tasked with policing those limits.<sup>384</sup> By this point, the kinds of explicit institutional reasons for judicial supremacy that it articulated in the cases involving emergency powers and the tutela against judicial decisions may have seemed intuitive. The Court now seemed to be the obvious institution charged with protecting all aspects of the constitutional order.

### C. Deepening the Court’s Power Over its Own Decisions

The first full court finally issued a series of important decisions affirming its sole power over the content of its own judicial decisions. Pragmatically, this had two important effects: it

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<sup>382</sup> Although not unprecedented. The Indian “basic structure doctrine” is perhaps the most developed example of a similar doctrine elsewhere around the world. *See generally* Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (2014) (unpublished Ph.D. dissertation, on file with author)

<sup>383</sup> *See* C-551 of 2003, § 37 (Eduardo Montealegre Lynett). The case involved a constitutional referendum proposed by Alvaro Uribe on a number of issues related to political reform. The Court struck down a number of the questions on the grounds that the questions were written in a leading fashion, which did not respect the principle of the will of the voter.

<sup>384</sup> As a matter of constitutional theory, an affirmative answer to the first question – that there are substantive limits on the power of constitutional reform – does not necessarily imply an affirmative answer to the second question – that the Court has the power to police those limits. The Hungarian Constitutional Court, for example, recently argued that there may well be limits to the power of constitutional reform, but held that it lacked the power to find those limits. *See* Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19 *CONSTELLATIONS* 182 (2012).

allowed the Court to construct a system of precedent within a civil law system, and it gave the Court the power to modulate the effects of its own decisions in ways that increased its influence over the political system. At the theoretical level, the Court deepened a principle that was consonant with its own developing constitutional ideology: the Court required autonomy in order to realize the material constitutional vision of the Constitution of 1991.

The first full Court issued a significant case in this vein almost immediately, when it was faced with a challenge to a provision of President Gaviria's Decree-Law outlining the powers of the Constitutional Court.<sup>385</sup> The provisions at issue purported to define the effects of constitutional court decisions by regulating the conditions under which decisions could have ex post facto effects and the conditions under which decisions would be entitled to *res judicata* effect.<sup>386</sup> The regulations were promulgated by the president who had pushed for the creation of the court, Cesar Gaviria, who was generally seen as supportive of the Court's mission. Nonetheless, the Court struck the provisions down, holding that Gaviria's attempt to regulate the effect of constitutional court decisions was a violation of the separation of powers. In particular, in considering the question of "[w]ho is the authority charged with determining the effects of the decisions of the Court," the Constitutional Court answered: "[O]nly the Constitutional Court, in conformity with the Constitution can in its own decision, determine the effects of it."<sup>387</sup> More succinctly: "[W]hen the Court is interpreting the [constitutional] text, not even a piece of paper may be put between them."<sup>388</sup>

In a second case shortly thereafter, the Court heard a challenge to a more significant provision of the Decree-Law, article 23, which stated that "constitutional doctrine enunciated in

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<sup>385</sup> Transitory article 23 of the Constitution had invested the president with this power.

<sup>386</sup> See Decree 2067 of 1991, art. 21.

<sup>387</sup> See Decision C-113 of 1993, § f (Jorge Arango Mejia).

<sup>388</sup> *Id.*

the decisions of the Constitutional Court, so long as it remains unmodified by it, will be an auxiliary obligatory criterion for the authorities and will correct the jurisprudence.”<sup>389</sup> As explained by Lopez Medina, this provision laid out a compromise between source traditionalists and political actors seeking a more progressive system of constitutional law.<sup>390</sup> The constitutional text laid out an orthodox civil law position under which caselaw was only an “auxiliary” source of law and judges were subjected only to the “empire of the law,” rather than to the binding force of prior cases.<sup>391</sup> Gaviria’s Decree-Law, again broadly favorable to the Court, sought to move the system of sources closer to a caselaw system in which the decisions of the Constitutional Court would have special weight, by stating that the decisions were simultaneously (and somewhat paradoxically) both “auxiliary” and “obligatory.” The Court, in a decision by Alejandro Martinez Caballero, struck the word “obligatory” down.<sup>392</sup> The decision is facially, and as noted by Lopez Medina, a significant blow to the Court’s own power, because it appeared to destroy the precedential value of its decisions.<sup>393</sup>

Beneath the surface, however, a more complex interaction appears: Martinez Caballero is strengthening the Court’s autonomy over its own decisions and shifting the system of sources while simultaneously maintaining the support of traditionalists on the Court who had a more typical civil law vision of sources. The decision, in other words, went some distance towards establishing a system of constitutional precedent despite the presence of a constitutional text that

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<sup>389</sup> See Decree 2067 of 1991, art. 23.

<sup>390</sup> See DIEGO EDUARDO LOPEZ MEDINA, *EL DERECHO DE LOS JUECES* 36-37 (2d ed. 2006).

<sup>391</sup> CONST. COL., art 230. The practice on this point in Colombia, as across all of Latin America, had not been uniform through time. Many of the systems created some mechanism for precedent. In 1896, for example, Colombia passed a law allowing for the formation of “probable doctrine” through a succession of three identical Supreme Court rulings on point. This followed a ten-year period in which the Court followed an even stronger notion of precedent by making decisions revocable by the Court of Cassation if they failed to follow “legal doctrine.” These laws were bound up with efforts to centralize the country in the wake of the 1886 Constitution. See LOPEZ MEDINA, *supra* note 390, at 7-28.

<sup>392</sup> See Decision C-131 of 1993 (Alejandro Martinez Caballero).

<sup>393</sup> See LOPEZ MEDINA, *supra* note 390, at 37. For example, Ciro Angarita Baron would commonly cite this clause in his opinions in support of binding effect on other judges and state authorities. See *id.*

was not merely ambiguous, but in fact hostile towards the construction of such a system. The Court cites key constitutional provisions creating the problem: the text clearly establishes that jurisprudence is merely an “auxiliary” source of law, and further states that judges are only subject to “the empire of the law” in taking their decisions.<sup>394</sup> In the Latin American tradition, these phrases are typically stand-ins for a position denying the binding effects of caselaw.

Starting from the inhospitable baseline, the Court nonetheless attempts to build towards a system of precedent. It cites the constitutional provision stating that decisions of the Constitutional Court on abstract review had binding, *erga omnes* effects, which meant that laws struck down would be erased from the legal order.<sup>395</sup> This was again a stock provision for civil law Constitutional Courts – as typically understood it meant only that a decision on abstract reviewing holding a law unconstitutional would require the erasure of that norm from the legal order. It was not the basis for a system of binding caselaw. Nonetheless, the Court carefully held that this binding effect extended beyond the “resolution” of a case to include parts of the reasoning that “maintained a unity of meaning with the disposition.” In other words, Martinez Caballero’s decision moved some distance towards creating a system of binding precedent by holding that some of the reasoning of a judicial decision would bind the ordinary courts. As the Court held, “[t]o consider the contrary, that is, that only the resolution had *res judicata* effect, would be to ignore that, admitting that a norm may be susceptible of different readings, the interpreter might accept the disposition of a *decisión* of the Constitutional Court and ignore the meaning that the Corporation – guardian of the integrity and supremacy of the Charter – has conferred on that norm to find it constitutional or unconstitutional.”<sup>396</sup> Martinez Caballero reiterated the jurisprudence of the prior case and noted that only the Constitutional Court was

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<sup>394</sup> See Decision C-131, § 2.2.

<sup>395</sup> CONST. COL., art. 243.

<sup>396</sup> Decision C-131, § 3.

competent to determine the effects of its own decisions. Thus, the norm of the Decree-Law at issue was unconstitutional because “the accused norm cannot regulate the effects of the decisions of this Court without violating the Constitution.”<sup>397</sup> Martinez Caballero again emphasized, in other words, that the Court was the body charged with determining the precedential effects of its own decisions.

The Court proceeded to construct a system of precedent off of this base. The key case was again written by Cifuentes.<sup>398</sup> The Court noted the system of sources in the constitution, which stated that judges were subject only to the “empire of the law” and that jurisprudence was only an “auxiliary” source of law.<sup>399</sup> But it held that equality norms underlying the constitutional order required the construction of a system of precedent. In the Court’s view, the principles of judicial “independence” and equality” could be reconciled within a system in which ordinary court judges could depart from the doctrine of the high courts (the Constitutional Court, Supreme Court, and Council of State), but would be required to consider the precedent and offer a reasoned decision for departing from it.<sup>400</sup> In Colombia, where courts had often ignored caselaw as a source of law, this was a significant step towards constructing a system of precedent.

This equality-based theory was quickly accepted by the less progressive-wing of the Court. For example, in a 1996 case involving a congressional justice reform, the Court reviewed a provision both laying out a traditional theory of sources and purporting to give Congress binding power to issue constitutional interpretations.<sup>401</sup> The provision stated that only the resolution of constitutional cases would be of “obligatory compliance,” and repeated constitutional language stating that the reasoning would merely constitute an “auxiliary” source.

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<sup>397</sup> *Id.* § 4.

<sup>398</sup> *See* Decision T-123 of 2005, § 4 (Eduardo Cifuentes Munoz).

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *See* Decision 037 of 1996 (Vladimiro Naranjo Mesa).

Furthermore, the provision stated that “[o]nly the authoritative interpretation done by the Congress will have general obligatory character.” In a decision written by the prominent conservative jurist Vladimiro Naranjo, the Court endorsed and quoted extensively from its entire prior line of cases. It upheld the provision defining the value of judicial systems, which closely tracked the constitutional language, only on condition that it be read in light of Cifuentes’ rule: if judges “decide to depart from the jurisprudential line..., they must justify in a sufficient and adequate manner their reasons for doing so, on pain of violating the principle of equality.” Further, the Court struck down the key pieces of the sentence giving the Congress binding authority to interpret the Constitution. This provision, Naranjo argued, was “openly unconstitutional” because it violated the principle that “the Constitutional Court, charged with guarding the supremacy and integrity of the Charter, ... is the body responsible for interpreting with authority and defining the meaning of the precepts contained in the Fundamental Law.”<sup>402</sup>

The Constitutional Court thus used a theory of judicial supremacy to construct a system of precedent.<sup>403</sup> The pathway to this has not been smooth – decisions have often been ignored by the ordinary courts, and the idea of constitutional doctrine became especially controversial by being intertwined with the question of tutelas against judicial decisions.<sup>404</sup> Nonetheless, the Court’s assertion of a system of precedent off of a dubious constitutional base has helped to reorient the system of legal sources in the country and has increased the Court’s own power.

The Court’s assertion of plenary authority over its own decisions has also helped the Court shape its decisions in a way that increased its political influence. In an academic article

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<sup>402</sup> Id. The Court also struck down most of a different article of the Reform purporting to define the cases in which Constitutional Court decisions would have retroactive effect. The Court again emphasized its autonomy and constitutional role: “[T]he legislator cannot limit the scope of or establish rules regarding decisions adopted by the Court in the exercise of its chief task as guardian of the Constitution.”

<sup>403</sup> A full consideration of the Court’s subsequent maneuvers in this regard is beyond the scope of this dissertation. A fuller treatment of later developments can be found in LOPEZ MEDINA, *supra* note 390.

<sup>404</sup> See *supra* text accompanying note 400 (explaining how the refusal to follow the precedent of the Constitutional Court became a basis for allowing the tutela against judicial decisions).

based on an international conference from 2000, Martinez Caballero laid out the case for what he called “modulated” decisions that did more than simply strike down the text of a law.<sup>405</sup> He drew extensively off of the practice of the Court since 1991, and distinguished several different types of decisions: “conditional” decisions, which upheld a norm but only if it were interpreted in a particular way specified by the Court, “temporal” or “deferred” decisions, which strike down a norm but leave it in place for a period of time in order to allow a legislative fix, and “integratory” decisions, which actually added content to legislation in order to make it constitutional.

Caballero argued that the power to issue these kinds of decisions was a natural consequence of the “function of the Court as a guardian of the integrity and supremacy of the Constitution,” and cited comparative experience from European and the United States to support his point.<sup>406</sup> The same theme arose in key decisions in this line. For example, in a 1995 decision written by Martinez Caballero, the Court defended integratory decisions: “Integratory decisions find their first basis in the normative character of the Constitution, given that the constitutional judge, with the goal of assuring the integrity and supremacy of the Charter, must incorporate constitutional mandates into the legal order.”<sup>407</sup> In another decision written by Martinez Caballero from 1997, the Court argued that “modulation of the temporal effects of decisions is not only a usual practice of constitutional tribunals but also a necessity deriving from the specific function of guaranteeing the supremacy of the Constitution.”<sup>408</sup>

These options were often presented as deferential to legislative power.<sup>409</sup> In some sense, they are weaker than a full-fledged holding of unconstitutionality, because they either leave the

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<sup>405</sup> See Alejandro Martinez Caballero, *Tipos de sentencias en el control constitucional de las leyes: la experiencia colombiana*, 2 REVISTA ESTUDIOS SOCIO-JURIDICOS 9 (2000).

<sup>406</sup> *Id.* at 17.

<sup>407</sup> Decision C-109 of 1995, § 18 (Alejandro Martinez Caballero).

<sup>408</sup> Decision C-221 of 1997, § 28 (Alejandro Martinez Caballero).

<sup>409</sup> See *id.* § 27; see also Martinez Caballero, *supra* note 405, at 15 (asserting that “conditional decisions are born from the profound respect of the Constitutional Court for the norms emanating from the legislative power...”).



norm in place with a particular interpretation or with additional content added, or at least leave it in place for some period of time. But from a game theoretic perspective, it is easy to show that they potentially increase the Court's power to shape policy. In a one-dimensional policy space, traditional judicial review models the Court as a veto point – it can either strike down legislation and cause a reversion to the status quo, or leave it in place. Conditional and integratory decisions allow the court to shift from act as a veto player to a policymaker, allowing the Court to reach closer to its ideal point by in some sense rewriting laws.

A prominent example from the first full Court should suffice to illustrate the point. In the late 1990s, a deep economic crisis originating in the financial sector threatened several hundred thousand middle-class homeowners with loss of their homes.<sup>410</sup> Chapter 7 explores this decision's importance in gaining the Court a popular base of support. The crisis caused a significant spike in the interest rates charged within the formal housing system, called the UPAC system. The political branches, which were under pressure from international financial institutions, did not take any action to bail out the homeowners. The Court, after receiving a large number of tutelas on the issue, took some piecemeal action to strike down parts of the system – for example laws forbidding prepayment of loans and allowing capitalization of interest.<sup>411</sup> But the fundamental problem faced by the Court was that it could not, by itself, construct a new housing system, and merely striking down the existing system would bring catastrophic results. So, after holding a public hearing with broad participation by economics,

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<sup>410</sup> See Rodrigo Uprimny, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* 127, 136 (2006) (stating that about 200,000 debtors were on the verge of default).

<sup>411</sup> See Decision C-747 of 1999 (capitalization) (Alfredo Beltran Sierra); C-252 of 1998 (Carmenza Isaza de Gomez) (prepayment). The Court also struck down a system by which the Central Bank was to set UPAC rates in accord with broader interest rates in the economy, holding that this might not maintain a fair balance between debtor and creditor because interest rates reflected factors other than the inflation rate, and pushing interest rates higher ran contrary to the promotion of housing in the Colombian Constitution. See Decision C-383 of 1999 (Alfredo Beltran Sierra).

civil society groups, and government officials, the Court struck down the entire existing system but gave the legislature some time to build a new one – it issued a deferred decision.<sup>412</sup> The executive, faced with few options, sent a redesigned system through Congress. The new system included more favorable interest rates than the old one and contained bailout money for homeowners. The Court then upheld the new law, but issued a conditional decision altering the shape of the new system in important ways. For example, it required that the law equalize the bailouts between homeowners not yet late on payments to those who were already late. Further, relying on the privileged status of housing within the Colombian constitution, it inserted a provision requiring that the interest rates charged to homeowners within the system be no higher than the “lowest real interest rate charged within the rest of the financial system.”<sup>413</sup> The combination of modulated and conditional decisions gave the Court increased power to shape housing policy during the UPAC crisis.

### **III. Conclusion**

This chapter has surveyed the Court’s construction of doctrine across three broad areas – the Court’s sense of role within the political system, its doctrine enabling to review the actions of other branches of government, and its assertion of power over its own judicial decisions. In all of these cases, the Court – led by a particular set of justices – resolved ambiguous issues in favor of greater assertions of judicial power. These acts of doctrinal construction were a basis for the Court’s activism across a range of issues: they enabled the Court with the tools to construct a

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<sup>412</sup> See Decision C-700 of 1999 (Jose Gregorio Hernandez). The decision relied on a contestable procedural rationale – the argument was that the system had been improperly promulgated as a delegated executive decree, because it belonged to a class of laws, called *leyes marcos*, that had to be passed by the Congress. As the dissent pointed out, the executive decree really just renumbered and reorganized existing legislation, rather than adding new content to the system. See *id.* (Eduardo Cifuentes Munoz & Vladimiro Naranjo Mesa, dissenting).

<sup>413</sup> See Decision C-955 of 2000 (Jose Gregorio Hernandez).

robust social rights jurisprudence and to oversee the actions of other branches of government, for example. But doctrinal assertions by themselves would have had little effect. The next several chapters explain how the Court constructed a support base of academic, civil society, and public support to complement the ideational basis for activism explored in this chapter.

## **Chapter 5: Institutionalizing Academic Influence & Maintaining Continuity**

The previous chapter demonstrated how the Court, in its first few years, constructed sets of doctrine giving it considerable power within the political system. This work was largely the product of a group of legal academics serving on the first Court. This chapter takes the story forward, explaining how the Court has managed to institutionalize a set of practices within the court that protected and perpetuated their read of the text, as I show in Part I. The clerkship structure in particular has made it increasingly costly and difficult to deviate from major doctrinal principles. These clerks have generally come from a few top universities. Together with the justices, these clerks have helped to constitute the sense of mission on the Court. No convincing right-wing “frame” for reading the constitution has emerged; instead, right-wing opponents of the court (chiefly allied with the executive) have found it easier to criticize the 1991 text itself. As a result, the Court’s fundamental doctrinal lines have been quite stable through time – it has institutionalized the basic contours of its role within the political system.

However, as I show in Part II, this institutional construction has shifted through times in ways that are important. In particular, through time the number of academics, and particularly public law specialists, on the Court has declined sharply. Meanwhile, academics have maintained an important presence in the clerkship structure of the Court. This has in many ways shifted the balance of power from the justices to the clerks, and has had predictable but important effects on the Court’s jurisprudence. Constitutional law has become increasingly technical in nature, and Court decisions now take as their most important referent prior decisions of the Court. This has made the major doctrinal lines of the Court largely impervious to change. The advantage of this rigidity is that the Court rarely seems to twist in the political winds. The major disadvantage is

that jurisprudential lines sometimes have taken on a life of their own, regardless of whether they effectively respond to social problems or serve the mission of the Court.

## **I. The Institutionalization of Ideology and the Clerkship Structure**

The prior chapter described the construction of a shared set of doctrinal principles and a shared ideology. As Nunes has noted with respect to the right to health, these principles formed the “ideational basis” for the Court’s consistent activism across issues.<sup>414</sup> But as important as the ideas themselves is the fact that the Court embedded institutions to transmit those ideas through time. At the core of these institutions is the clerkship structure, which has been important since the beginning of the Court but has taken on a more prominent role in recent years. It is important to note that the clerks are not the only institution providing continuity and stability to the Court. For example, the office of the Secretary of the Court has been staffed by the same officer since 1991 – Martha Lucia Sachica, the daughter of a famous constitutional jurist and a kind of living institutional memory for the institution.

The work in this section is based on close observation of the Court in 2009 through 2012. I show first that the clerkship structure matters – where, as in Colombia, the clerks are drawn from a small pool, spend a long time at the Court, have significant opinion-writing responsibilities, and are a homogenous group ideologically, they serve as a significant barrier against doctrinal change. This section thus confirms the work of a small group of recent scholars who have showed that the staffing procedures of a court have a significant influence in carrying out and passing on norms of behavior.<sup>415</sup> This institutionalization is enhanced by the nature of

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<sup>414</sup> See Rodrigo Nunes, *Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health*, 52 LAT. AM. POL. & SOC’Y 67 (2010).

<sup>415</sup> See, e.g., Diana Kapiszewski, *How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal*, in CULTURES OF LEGALITY 51 (Javier A. Couso et al., eds, 2010); David Law, *Why Has Judicial Review*

the Court's docket, which is highly repetitive in nature. The repetition tends to enhance the value of the Court's existing doctrinal lines and the Court's staff, which has the most experience in handling these lines. Further, the repetitive nature of the docket has fed activism in the Court's big, structural interventions.

### **A. The Clerkship Structure**

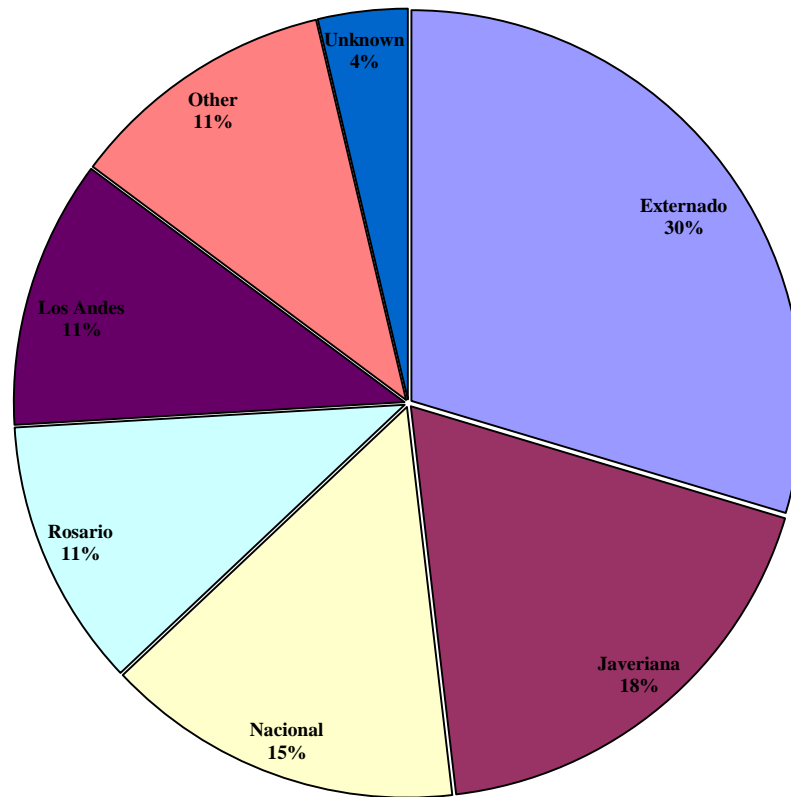
The clerkship structure has also been important in maintaining a durable form of activism. The influence of clerks over judicial opinion-writing in Colombia is very high, and the clerks are a relatively homogenous group, supporting the continuation of existing jurisprudential lines. Each justice has three *magistrados auxiliares*, and in turn these *magistrados auxiliares* are assisted by lower level lawyers.<sup>416</sup> These clerks generally stay on for a long time; many of them have worked for more than one justice, and there are a reasonable number who have been at the Court since its inception in 1991. Further, the status of these clerks is often quite high – they are generally professors at the top universities in Bogota, and several have been very high profile. The job pays quite well, so it is not simply a stepping stone to other positions.

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*Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011) (arguing that the institutionalized clerkship structure helps to maintain judicial passivity through time by limiting the influence of individual justices).

<sup>416</sup> On the first court, each justice has only two clerks; that number was increased to three beginning with the second full court.

**Figure 5.1: Constitutional Court Clerks by University Attended, 2012**



The clerks come from a fairly small group of elite law schools, mostly in Bogota. For example, Figure 5.1 graphs the universities for the clerks who were on the Court in 2012. As throughout the history of the institution, the vast majority of clerks attend one of five elite institutions in the capital – Externado, Los Andes, Javeriana, Rosario, and Nacional – and the plurality have always come from Externado.<sup>417</sup> These universities, although diverse in important ways, have generally been centers for the “new constitutionalism,” where a set of values and ideas favorable to the ideological framework of the Constitutional Court developed. The curricula in these schools put

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<sup>417</sup> Externado for example supplied 39 percent of all clerks in 1993, and 33 percent in 2003.

substantial emphasis on constitutional law and on its impact on other branches of law.<sup>418</sup>

Moreover, a high percentage of the clerks concurrently serve as professors at these elite institutions, sometimes with a high profile, and a large number have also have studied abroad in elite institutions. Rodrigo Uprimny, who graduated from Externado and received a doctorate in France, served as a clerk for Alejandro Martinez Caballero and Eduardo Montealegre between 1994 and 2005, while building a profile as one of the country's top constitutional scholars at Nacional and as a defender of the role of the Court.<sup>419</sup> Similarly, Rodolfo Arango, who graduated from Los Andes and received a doctorate in Germany, served as a clerk for Eduardo Cifuentes (1991-1996) and Manuel Jose Cepeda (2001-2003) while developing a reputation as an expert on the enforceability of socio-economic rights.<sup>420</sup>

Perhaps more importantly, there is considerable continuity on the staff of the Court – many clerks stay on for more than one justice, or leave the court and return later, working for a new justice. A few profiles may illustrate the point. Javier Tobo Rodriguez served as a clerk for Jose Gregorio Hernandez until 2001, then returned to the Court in 2004 to work for Clara Elena Vargas, and now works for Jorge Ivan Palacio Palacio. Christina Pardo worked for Vladimiro Naranjo on the first full court, Marco Gerardo Monroy on the second, and (briefly) Jorge Ignacio Pretelt on the third. Abraham Sanchez Sanchez served in the dispatches of Alejandro Martinez, Fabio Moron Diaz, Rodrigo Escobar Gil, and now Gabriel Mendoza. Jose Antonio Cepeda served, first in lower level positions and then as a clerk, in the chambers of Vladimiro Naranjo, Rodrigo Escobar, and Eduardo Mendoza, logging more than twenty years on the Court. Aquiles

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<sup>418</sup> For a more general perspective on changes in legal education, with examples drawn from Chile, see Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in CULTURES OF LEGALITY 141 (Javier Couso et al., eds., 2010).

<sup>419</sup> For examples of key works by Uprimny, see, for example, JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA (Rodrigo Uprimny et al., eds., 2006).

<sup>420</sup> See, e.g., RODOLFO ARANGO, EL CONCEPTO DE DERECHOS SOCIALES FUNDAMENTALES (2005).



Arrieta has a similar trajectory, working first for Manuel Jose Cepeda beginning in 2001 and then Maria Victoria Calle.<sup>421</sup> At the beginning of the second full court in 2001, at least 33 percent of all clerks had served for other chambers on the first full court; in 2012, the percentage was similar (37 percent).<sup>422</sup>

The clerks do most of the routine opinion-drafting in the Court. The Court has a fairly heavy workload (even though it can control the number of tutelas it receives), and clerks process most of the tutela and abstract review cases that come in, along with lower level staffers. Cases are initially assigned to one justice (the *ponente*) who is responsible for writing the opinion. Once the *ponente* drafts an opinion, it is circulated among the full Court (for abstract review and certain tutela decisions) or the three-member panel (for most tutela decisions), and the justices vote on whether or not to accept the draft. If it is rejected, a new *ponente* will generally be assigned, and the opinion of the old *ponente* can become a dissent. Even if the draft is accepted, other justices can ask the *ponente* to make changes in the majority opinion, or can write concurring opinions (*aclaraciones de voto*) or dissenting opinions (*salvamentos de voto*). Throughout this process, the clerks do most of the drafting -- the justices themselves sign off on the final opinions or require the clerks to make revisions, and are typically heavily involved in opinion writing only in very important cases.

In interviews, both justices and their clerks indicated that the clerks have a considerable impact both over the results of most cases and over the reasoning that is employed to reach that result. This was true even in the early days of the Court – it is clear that some of the clerks in the

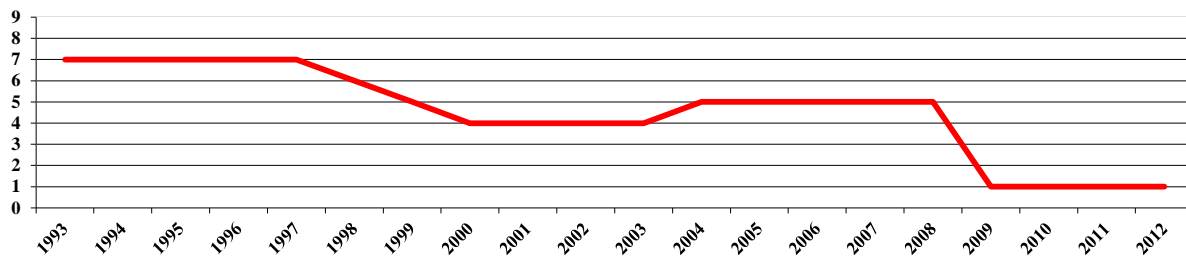
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<sup>421</sup> A few clerks have also been named to nominations for positions as justices on the Court: Rodrigo Uprimny was named to a Council of State list in 2008, Clara Elena Reales to an executive list in 2007 (although she renounced her position before the election), and Luis Guillermo Guerrero to a Council of State list in 2012. Guerrero, who served as a clerk for Rodrigo Escobar Gil and subsequently for Eduardo Mendoza, was elected to the position.

<sup>422</sup> Data compiled by author with assistance from the Office of the Secretary of the Court. Calculations in 2012 were made before Justices Henao and Sierra Porto left the Court. The dataset used in this chapter is substantially complete, but there are some missing entries.

chambers of justices like Eduardo Cifuentes, Alejandro Martinez, and Ciro Angarita Baron were instrumental in formulating the ideological framework developed by those justices. But the role of the clerks has become more important in recent years. The reason for this is that clerks, as noted above, often have had considerable prior experience on the Court – many clerks are drawn from the ranks of former clerks or from those holding lower level staffing positions. Furthermore, the clerks generally have expertise in public law and in the jurisprudence of the Constitutional Court in particular.

**Figure 5.2: Constitutional Law Specialists on the Court, 1993-2012**



In contrast, the justices themselves have become significantly less steeped in constitutional and public law through time. As Figure 5.2 shows, the number of justices with constitutional law expertise has dropped significantly since the Court's inception. Seven of the nine members of the first full court had expertise in constitutional law, but only four members of the second full court and, as of 2012, only one member – Humberto Antonio Sierra Porto – of the third. This has been coupled with a shift away from the very academic profile of the justices on the first court towards a court that has been more dominated by career judges, often civil, criminal, labor, or administrative specialists drawn from the Supreme Court or Council of State.

These career judges would have had relatively little prior exposure to the types of cases and problems faced by the Constitutional Court. New justices with little prior experience in constitutional law have difficulty adapting to the specialized and technical jurisprudence of the Constitutional Court. In interviews conducted in June-August 2009 and March-May 2010, many justices told me it was still difficult for them to adapt to the Court despite having been appointed in late 2008.

These justices are thus forced to rely heavily on their own teams for guidance. As a result, some of the incoming justices on the third full court maintained the staffs of their predecessors rather than conducting searches for new staffs. This was the case with Maria Victoria Calle, a judge and private/government lawyer from Pereira who maintained most of the staff of Manuel Jose Cepeda, Gabriel Eduardo Mendoza, a Labor judge from the coast who maintained most of the staff of Rodrigo Escobar Gil, Jorge Ivan Palacio, a former president of the Supreme Court who maintained most of the staff of Clara Ines Vargas, and Luis Ernesto Vargas Silva, a career civil judge who maintained most of the staff of Jaime Cordoba Trivino. In the case of Calle, staff members related that the former team of Cepeda decided to stay on only after having extensive conversations with the justice and assuring themselves that she would not undo the existing work of the institution.

Others assembled new teams but drew heavily on clerks with past experience, mixing them in with newer graduates and young professors of elite universities like Los Andes, Externado, Javeriana, and Rosario. It is notable that the justices considered closest to Uribe – Mauricio Gonzalez and Jorge Ivan Pretelt – initially attempted to retain clerks with past experience in the court, but these clerks generally left the court after a short time. These two

chambers have had relatively high turnover in personnel, and as noted in the last chapter, have had some difficulty altering the general course of the Court's jurisprudence.

## **B. Workload & Routine Activism**

The clerks are also empowered by the nature of the Court's docket. Existing theory on workload focuses on the argument that discretion helps to feed activism – courts without docket discretion have more trouble shaping policy because they are bogged down by high workloads. But composition may also be important in more complex ways. The Colombian Court's workload is moderate by international standards – in 2001 the Court decided 1,344 cases in total, 976 tutelas and 368 abstract review decisions. This is far more than the U.S. Supreme Court (73 in 2006-2007), although it is less than the Mexican Supreme Court (5464 in 2009) and far less than the Brazilian Supreme Federal Tribunal (110,000 cases in 2007).<sup>423</sup> Like the U.S. Supreme Court and the Spanish Constitutional Tribunal, the Colombian Constitutional Court has discretion over its docket – it has certiorari-like powers to decide what tutelas to take, which prevents it from being overwhelmed by massive amounts of work.

But much of the Court's work nonetheless has a "routine" and repetitive character. Since the first socio-economic cases came down, much of the court's work has been in dealing with socio-economics rights cases, for example in the pensions and healthcare areas. These two case types, requests for pensions and requests for health care, have subsequently dominated much of the Court's *tutela* jurisdiction – by 2008, about 40 percent of tutelas dealt with the right to health, with another 10 percent on pensions.<sup>424</sup> The court's jurisprudence in these areas is highly

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<sup>423</sup> See Julio Rios-Figueroa & Matthew Taylor, *Institutional Determinants of the Judicialization of Policy in Mexico and Brazil*, 38 J. LAT. AM. STUDS. 739 (2006).

<sup>424</sup> See Rodolfo Arango, *El derecho a la salud en la jurisprudencia constitucional*, in TEORIA CONSTITUCIONAL Y POLITICAS PUBLICAS 87 (Manuel Jose Cepeda et al., eds., 2007).

technical, dealing with a multitude of sub-rules to deal with specific situations.<sup>425</sup> For example, in the health area the Court has had to determine how to treat petitioners who have not been paying their health care premiums, how to treat claims from petitioners who have subsidized care and who claim their care is inferior, when to give petitioners access to care that is not included in plans, what sorts of delays are acceptable in rendering care, etc.<sup>426</sup> The repetition is related to both demand-side and supply-side factors: the Court invited these claims by first holding social rights justiciable and then by generally awarding victory to the petitioner, and the claims continue to flow because the government bureaucracy has not greatly improved its ability to process routine healthcare and pension entitlements.<sup>427</sup> The tutela, in contrast, is very fast and ordinarily effective. Further, the ordinary courts often ignore or resist the Court's precedents, meaning that the Court often is forced to reiterate clearly-settled law in order to protect a petitioner's rights.<sup>428</sup>

The composition of the Court's docket helps to further empower the clerks and other members of judicial staffs. Jurisprudence in these areas is so detailed, technical, and ubiquitous that justices are forced to rely on their teams to resolve them in light of existing cases. The Court's staff, for example, created detailed documents summarizing the existing doctrine in six major areas – health care, pensions, displaced persons, criminal procedure, labor law, and tutelas taken against judicial decisions. With the exception of the last document (on tutelas against judicial decisions), the documents reflect well-settled points – major lines of jurisprudence that have not changed in years. The documents are intended to serve as a kind of shorthand for

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<sup>425</sup> See Augusto Conti Parra, *Procedibilidad de la accion de tutela en material pensional. Sistematizacion y analisis de la jurisprudencia de la Corte Constitucional*, in *TEORIA CONSTITUCIONAL Y POLITICAS PUBLICAS* 293 (Manuel Jose Cepeda et al., eds., 2007).

<sup>426</sup> See Arango, *supra* note 420.

<sup>427</sup> See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 211-212 (2012).

<sup>428</sup> See, e.g., DIEGO LOPEZ MEDINA, *TEORIA IMPURA DEL DERECHO* 399-459 (2004) (explaining the fights between the Constitutional Court and the ordinary courts over the construction of a system of constitutional precedent).

opinion writing – they lay out the major cases and the resolutions of the various issues faced. A single judge attempting to change these doctrinal lines would face high costs, regardless of approach. Incremental but significant changes would require reworking dense lines of jurisprudence for only minor gains – conservative judges would kick a few cases out of the system, but would accomplish little else. Sweeping overhauls would be even costlier because they would require a rethinking of basic principles underlying the constitutional order.

The Court's tutela docket also feeds activism by playing a kind of informational function, as explored in more detail in Chapters 6 and 7. The very ease of filing tutelas means that the Court often perceives large-scale social problems before other political actors, and the pressure on the Court's docket often incentivizes it to resolve the situation. For example, large-scale floods of tutelas preceded the Court's structural interventions in the housing finance system in 1999 and in internally displaced persons in 2004.<sup>429</sup> The Court's structural intervention in health was preceded by years of massive docket pressure.

## **II. The Impact of this Academic Audience on the Court: The Institutionalization (and Ossification) of Doctrine**

The previous sections emphasized how the Court has been influenced by a primarily academic audience drawn from a small group of elite law schools. This group had a decisive influence on the construction of jurisprudence of the Court in its formative period. It has also supplied the backbone of the clerkship structure, which has become increasingly important in establishing the Court's jurisprudence.

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<sup>429</sup> See David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 354-62 (2010).

The purpose of this section is to trace the impact of that pattern on the Court's work. The shift in academic expertise away from the justices and towards the clerks, along with the increasing thickness of judicial doctrine, has made the Court's jurisprudence seem increasingly "technical" and "non-political" in character. The academic culture of the Court, and the professionalization of its staffs, has helped to mold justices and shape their opinions on constitutional issues. It has also allowed the Court to be relatively invariant to external political pressure. At the same time, the small and closed community around the Court threatens to become a kind of echo chamber: the most important referent for the Court's future decisions are its own past decisions.

There are numerous examples of this across areas – one of the core examples lies in the individualized enforcement of economic and social rights, where the Court has had a highly repetitive docket and which is considered in more depth in Chapter 7. Here I draw from three other doctrinal areas, in order to draw out both the good and bad consequences of such a pattern. I look first at the Court's emergency powers jurisprudence, where it has held firm on a course that reviews these declarations rigorously and strikes them down in the event that they have been caused by "chronic" factors rather than by new events. The Court's general steadiness in its decisions in a charged political area, in the face of sometimes substantial political pressure, demonstrates the Court's relatively high resistance to political pressure. Second I look at the Court's jurisprudence on gay rights and same sex marriage, which demonstrates how the academic community in the Court could influence the votes of conservative-leaning justices, taking an issue that was once controversial and forging a consensus. The issue shows how the Court's culture often overpowers the political leanings of individual justices. Finally, I consider the strange case of the Court's "substitution of the Constitution" or "unconstitutional

constitutional amendments” doctrine. In this case, I suggest, the Court may be turning into a kind of echo chamber, ossifying and expanding a line of jurisprudence with no real foundation.

### **A. Emergency Powers and Political Resistance**

The Court’s jurisprudence on emergency powers has proven remarkably consistent through time, despite often substantial pressure from influential political actors. The resulting decisions have had a major impact on Colombian politics, by making states of emergency a much less prominent part of the landscape. The country was in a state of emergency 82 percent of the time between 1970 and 1991; that number dropped to 17.5 percent of the time between 1991 and 2002. The Court upheld the first four emergency declarations to come before it in 1992 and 1993, but has since struck down more than half.<sup>430</sup>

The Colombian Constitution created two major emergency instruments: the state of internal commotion for guerrilla activity and other internal unrest, and the state of economic, social, and ecological emergency for non-security related crises such as economic catastrophes or natural disasters. The text contained a fairly detailed regulation of both instruments in terms of duration and other factors, but left open whether they could be judicially reviewed and if so, what the terms of the review would be. However, as noted above in Part I, in its first case reviewing a state of internal commotion, the Court declared that it had the power to review the declaration on substantive grounds in order to determine whether the president had properly motivated the declaration and whether the facts as written justified it. In other early decisions, the Court built up a framework for conducting this analysis: the Court must first determine whether there has been a “grave perturbation” necessitating the emergency, and then whether the government has

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<sup>430</sup> See Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Emergency Powers in Colombia*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 46, 57 tbl. 1 (Siri Gloppen et al., eds., 2004).



shown that ordinary police powers could not be used to deal with the crisis.<sup>431</sup> Further, states of emergency cannot be used to deal with problems of a structural or chronic nature; the declaration must instead be used for a confluence of new events.<sup>432</sup> This basic framework has remained invariant since its construction.

The doctrine allowing judicial review of declarations of states of emergency was a core part of the synthesis worked out by the Los Andes justices on the interim court. But it was initially controversial internally. In C-300 of 1994, the Court for the first time actually struck down a state of internal commotion – Cesar Gaviria had attempted to call the declaration in order to prevent the imminent release of prisoners due to delays in processing criminal actions.<sup>433</sup> Three justices, including the brilliant conservative scholar Vladimiro Naranjo, argued that on a proper read of the Constitution, the Court lacked this power. They argued that “it is clear enough that the Congress and not the Constitutional Court is the organ to which the government should explain its reasons for declaring or lifting a state of internal commotion....and for the Court to arrogate to itself the ability to judge these reasons, implies a clear interference not only in the powers of the executive, which is constitutionally entrusted with preserving public order and its reestablishment when has been disturbed, but also those of the Congress, which is charged with judging these motives.”<sup>434</sup> In other words, the justices wanted to go back to the pre-1991 position, where declarations of state of emergencies were political questions unreviewable by the courts. This internal dissent was nonetheless quickly ironed out – in the next major decision of the Court on states of internal commotion, C-466 of 1995, Naranjo and another justice who had signed the dissent, Hernando Herrera wrote concurrences where they stated that while they

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<sup>431</sup> See, e.g., C-300 of 1994, July 1, 1994 (Eduardo Cifuentes Munoz).

<sup>432</sup> See, e.g., C-122 of 1997, Mar. 12, 1997 (Antonio Barrera Carbonell & Eduardo Cifuentes Munoz).

<sup>433</sup> See C-300 of 1994, July 1, 1994 (Eduardo Cifuentes Munoz).

<sup>434</sup> C-300/94 (Hernando Herrera, Vladimiro Naranjo, & Fabio Moron, dissenting).

continued to believe that they believed it was now their “duty” to support the majority position of the Court.<sup>435</sup> They thus joined the majority decision of the Court striking down the state of internal commotion. By the second full court, there was a full consensus that the Court had this power.

Politically, the review of emergency powers was obviously one of the most politically charged contexts in which the Court worked. Even Cesar Gaviria, who as president helped to create the Court, expressed some ambiguity about judicial review of emergencies.<sup>436</sup> All of his successors have at times expressed displeasure with judicial review of their declarations, and indeed this has been one of the principal reasons why presidents have threatened or initiated court-curbing legislation.<sup>437</sup> In C-466 of 1995, for example, the Court struck down an emergency declared by Gaviria’s successor, Ernesto Samper. The Samper administration attacked the decision – the Minister of Justice for example declared that it would have “grave consequences.”<sup>438</sup> Samper, as detailed in Chapter 8, responded by proposing a court-curbing package that including taking away the Court’s ability to review declarations of states of emergency. In 1997, the Court struck down an important decree of Economic, Social, and Ecological Emergency used to deal with a deficit and balance of payments crisis that had also begun to cause a serious recession in the country. The Court struck down the declaration, holding that the facts underlying it were serious but could be dealt with using ordinary powers of the Monetary Board and the president. It also “reiterated” its doctrine that states of emergency could not be used to deal with problems of a “chronic or structural” nature, and noted that the

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<sup>435</sup> C-466/95 (Carlos Gaviria Diaz, dissenting).

<sup>436</sup> See, e.g., Words of the President of the Republic, Doctor Cesar Gaviria Trujillo, in the Installation of the First Ordinary Period of the Constitutional Court, Mar. 1, 1993, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991, at 384 (1992) (expressing praise of the Court for upholding his declarations in its first year).

<sup>437</sup> See *supra* Chapter 4.

<sup>438</sup> See *El Polvorin en la Conmoción Interior*, EL TIEMPO, Oct. 29, 1995, available at <http://www.eltiempo.com/archivo/documento/MAM-440206>.

fiscal deficit and exchange rate problems tackled with the declaration were of a “prolonged duration.”<sup>439</sup> Samper personally criticized the decision, reiterating its position that the Court lacked the power to conduct a substantive review of these declarations and stating that the Court ruled as it did because it disagreed with the economic model of the president.<sup>440</sup>

The Court faced similar pressures during the Uribe administration (2002-2010), who as noted in the previous chapter was a stronger president than Samper. Uribe enjoyed a solid coalition in Congress and very high public approval. After campaigning on the deteriorating security situation, Uribe took office vowing to take tough action against guerrilla groups. Mortar shells landed near the presidential palace during his inauguration. Uribe immediately declared a state of internal commotion, citing recent terrorist attacks, guerrilla threats against local officials such as mayors, and the fact that Colombia had recently recorded “the highest rate of criminality on the planet.” The Uribe administration, perhaps justifiably concerned that these events might be considered “chronic” or “structural,” warned the Court against interfering in the declaration. The Minister of the Interior, Fernando Londoño, stated that the Court had no constitutional power to review the declaration, and that it was being sent to the Court as a “courtesy.” Further, the declaration itself stated that the decrees issued during the state of internal commotion would be reviewed by the Court, thus implying that the declaration itself was not subject to judicial review. Further, Londoño threatened tough court-curbing measures aimed at limiting the Court’s powers, as reviewed in more detail in the previous chapter. The Court in the end upheld the declaration, although it struck down the piece seeming to prohibit judicial review of declaration

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<sup>439</sup> See C-122 of 1997, Mar. 12, 1997 (Antonio Barrera Carbonell & Eduardo Cifuentes Munoz).

<sup>440</sup> See *El Presidente y La Corte Constitucional*, EL TIEMPO, Mar. 26, 1997, available at <http://www.eltiempo.com/archivo/documento/MAM-553046>. The Court reviewed another attempt to issue such a declaration early in the term of Misael Pastrana (1998-2002), after the crisis had worsened. The Court held that the declaration was valid insofar as it dealt with a new crisis in the financial sector, but narrowed it so it would not apply to other areas where problems were more structural in nature. See C-122 of 1997.

of states of interior commotion and the factual finding that Colombia had the highest rate of criminality on the planet, which was unsupported by evidence.<sup>441</sup> Still, the Court struck down some of the key decrees issued during the emergency, as well as an attempt to extend the emergency for a third period of 90 days.<sup>442</sup>

During Uribe's second term, the Court aggressively controlled his declarations. Uribe declared a state of internal commotion in 2008 to deal with a judicial strike which was slowing down the processing of criminal cases and thus threatened to leave various criminals at liberty. The Court struck down the declaration, holding inter alia that the government had not shown that ordinary legal mechanisms would be insufficient to overcome the crisis.<sup>443</sup> Uribe declared a state of economic, social, and ecological emergency in 2009, in order to deal with serious but long-standing problems in the healthcare system. The Court again struck down the declaration, making reference to its "jurisprudential tradition" of refusing to allow the employment of emergency powers to tackle structural or chronic problems of an extended duration.<sup>444</sup> This decision, significantly, was unanimous in striking down the declaration – the Uribista president of the Court, Mauricio Gonzalez, noted that "[w]e are judges who act in the name of other judges. We are fixed on the shoulders of the giants who preceded us."<sup>445</sup> In other words, the Court had reached the point where there was an overarching consensus in its jurisprudence in this area.

The Court's jurisprudential framework has remained essentially unchanged since its first decisions. One would not want to overstate this argument and argue that the Court's *results* have

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<sup>441</sup> See C-802 of 2002, Oct. 2, 2002 (Jaime Cordoba Trivino).

<sup>442</sup> See C-327 of 2003 (holding that the Senate approval of a second extension had come too early during the State of Interior Commotion to be valid). The Court however approved a first extension of the state of interior commotion. See C-063 of 2003.

<sup>443</sup> See C-071 of 2009, Feb. 25, 2009 (Humberto Sierra Porto).

<sup>444</sup> See C-252 of 2010.

<sup>445</sup> *Corte tumbó la Emergencia Social, pero dejó vigentes hasta diciembre decretos que aumentan impuestos*, EL TIEMPO, Apr. 16, 2010, available at <http://www.eltiempo.com/archivo/documento/CMS-7608007>.

been invariant to the strong political pressure placed on it. There are at least two moments when it is plausible that political factors did impact judicial decision-making. First, in the early years of the Court, it upheld the first four declarations to pass before it. For example, in C-556 of 1992, the Court upheld a declaration of a state of internal commotion called because of judicial backlogs that could lead to the imminent release of many prisoners. Just two years later, in C-300 of 1994, the Court struck down a declaration called based on similar facts. The dissenters noted the point and even the majority seemed to admit it, noting that the earlier decisions were issued in a period of “constitutional transitional which well justified a prudent treatment.”<sup>446</sup> Thus, it seems that the Court recognized the weak position in which it existed in its early years when it made these decisions. Second, it seems plausible that the Court responded to political pressure in upholding the initial declarations of internal commotion of Alvaro Uribe, whose powerful administration made credible threats against the institution.

Nonetheless, the core doctrines show an impressive consistency through time. The Court has consistently asserted the power to conduct a substantive review of these declarations. During these reviews, the Court will examine whether the stated facts justify the declaration and whether the government has shown that ordinary measures would be insufficient to contain the crisis. Further, the Court will consider whether the problems are caused by a true emergency or instead are a product of chronic, structural factors in the economy or the security situation. Relatively quickly, a consensus developed on these issues, even in the face of significant external opposition from presidents and other officials. The Court’s jurisprudence on states of internal commotion and states of economic, social, and ecological emergencies thus shows how the Court’s culture and staff were able to forge an internal consensus on what has been a socially

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<sup>446</sup> See C-300 of 1994, July 1, 1994 (Eduardo Cifuentes Munoz), Part VII, § 6.

controversial issue. This consensus in turn has markedly changed the political environment in Colombia.

## **B. Same Sex Unions and Ideological Transformation**

While the emergency powers jurisprudence shows the Court maintaining consistency in doctrine despite political pressure, the gay rights area shows how the culture of the Court altered the positions of justices through time, constructing a consensus within the Court where one initially did not exist. This was one of the handful of social issues – along with Church-State relations, religious education, and abortion – where one would expect the traditional Liberal/Conservative divide, which was still predominant within the judiciary, to matter. Nonetheless, the group around Los Andes worked quickly to incorporate these sets of rights into the ideological synthesis constructed by the first court. It did this by working these issues into two of the major lines of jurisprudence emphasized in section I: the right to free development of personality, and the right to equality. In the former frame, the right is one of gay individuals to live as they want, while in the second, the right is one of a traditionally marginalized and weak social group seeking to avoid discrimination and to be accepted into Colombian society.

From the outset, those justices constructing the synthesis explained in Part I were active in developing an individual right not to face discrimination based on sexual orientation. The jurisprudence affected various spheres of Colombian society, since the traditional stigma against homosexual conduct ran deep. For example, in C-481 of 1998, Alejandro Martinez Caballero wrote that a law allowing teachers to be disciplined for being “homosexual” was unconstitutional.<sup>447</sup> This line of decisions rested on two bases. First, the constitution contained a

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<sup>447</sup> See C-481 of 1998, Sept. 9, 1998 (Alejandro Martinez Caballero).

right to “free development of personality,” which as noted above in Part I was the linchpin of a thick jurisprudence protecting rights to possess drugs, to euthanasia, etc. Second, the constitution contained an equality norm, and the Court by the time of C-481 of 1998 had reached a position whereby discrimination on the basis of sexual orientation was a “suspect class” that triggered a more demanding test – restrictions were “presumed unconstitutional and are submitted to strict constitutional control.” Thus, according to the Court, there was a “double constitutional protection” in this area, including both the right to free development of personality and the right to equality.

Those outside the core group constructing the synthesis generally did not attack it head on.<sup>448</sup> Some of the wing that was more closely allied with the Conservatives seemed persuaded by the reasoning to some degree. For example, Vladimiro Naranjo wrote an opinion in which he struck down a provision of the military code allowing discipline against homosexual soldiers.<sup>449</sup> Similarly, Fabio Moron Diaz reversed a school’s refusal to give seats to two students for being homosexual and noted the “unacceptable” “discriminatory and intolerant attitude” of the head of the school.<sup>450</sup> In other cases, justices danced around it or attempted to weaken its scope, without denying the core principles at stake. For example, the three dissenters from C-481 (Alfredo Beltran, Hernando Herrera, and Jose Gregorio Hernandez) complained that the majority had misread the intention of the provision at issue, and not fundamentally that the framework applied by the majority was wrong.<sup>451</sup> In another case involving a male student who left school because he faced pressure due to his sexual orientation and to his wearing of high heels and makeup at school, Herrera wrote a decision admitting that the free development of personality covered the

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<sup>448</sup> For a discussion, see Julieta Lemaitre, *Los Derechos de los Homosexuales y la Corte Constitucional*, in HACIA UN NUEVO DERECHO CONSTITUCIONAL 188-206 (Daniel Bonilla & Manuel A. Iturralde, eds., 2005).

<sup>449</sup> See C-507 of 1999, July 14, 1999 (Vladimiro Naranjo Mesa).

<sup>450</sup> See T-101 of 1998, Mar. 24, 1998 (Fabio Moron Diaz).

<sup>451</sup> See C-481 of 1998 (Hernando Herrera, Jose Gregorio Hernandez, & Alfredo Beltran, dissenting).

case, but denying the claim both because the student had left school voluntarily and because the student's dress had affected others at the school and thus transgressed the intimate sphere.<sup>452</sup>

Those constructing the synthesis faced far more problems when it came to the specific issue of whether gay couples should enjoy property and other rights traditionally reserved only for heterosexuals. Members of the coalition constructing the synthesis confronted here a more determined opposition from those outside it, as well as a specific constitutional provision appearing to define the family as between a man and a woman. Article 42 of the Constitution reads that "The family is the fundamental nucleus of society. It is constituted by natural or legal links, by the free decision of a man and a woman to contract marriage or by the responsible will to conform it."<sup>453</sup> They thus tread cautiously, and as commentators noted, never fully connected this issue to the broader line of cases involving discrimination on the basis of sexual orientation. Instead, in C-098 of 1996, Justice Cifuentes wrote for a unanimous court and rejected a challenge to a law defining marital unions in fact (a kind of common law marriage) and the property regime and rights governing participants in it.<sup>454</sup> The law restricted its benefits to "permanent partners" of the opposite sex, and the challengers argued that this restriction was unconstitutional. The majority opinion outlined the basic framework for protection, involving both free development of personality and equality. But it indicated that it would not act for reasons of prudence. It noted for example that the "marital union in fact" institution was itself a solution to a long-standing discrimination against women from certain social classes, and that while it would be desirable for the state to eliminate "all of the injustices, discriminations, and problems," in practice forcing the legislature to recognize same sex unions might make these solutions "politically more controversial," which would hurt socially weak groups. In other

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<sup>452</sup> See T-569 of 1994, Dec. 7, 1994 (Hernando Herrera).

<sup>453</sup> CONST. COL., art. 42.

<sup>454</sup> See C-098 of 1996, Mar. 7, 1996 (Eduardo Cifuentes Munoz).



words, Justice Cifuentes noted that the decision sat uneasily with its existing line and with its developing jurisprudential synthesis, but suggested that it was the only politically feasible response.

Several justices from the conservative wing of the Court indicated a fundamentally different rationale: that the family was defined in the Constitution as between a man and a woman, and this definition made the claim at issue nonsensical. For example, Justice Jose Gregorio Hernandez, who had a background as a Conservative, wrote that given this definition, the claim “made no sense” – “given the Constitution in force, there is not even a remote possibility that the law will regulate and of course accept marital unions between homosexuals.”<sup>455</sup> In other words, they argued that the framework governing discrimination simply had nothing to say about the issue of same sex unions.

The second full Court at first replicated this split rather than overcoming it. In 2001, the Court decided two major decisions involving the rights of gay couples. In the first, SU-623 of 2001, the Court decided that health care insurers had the right to exclude workers in same sex couples from linking their partners to their Social Security plans was constitutional.<sup>456</sup> In the second, C-814 of 2001, the Court upheld a law prohibiting same sex couples from adopting.<sup>457</sup> These were closely divided, five to four decisions. Majorities admitted that these exclusions worked against the free development of personality and equality rights of same sex couples, but argued that this was outweighed by the constitutional definition of family as being between a man and a woman. For example, in C-814 the Court reasoned as follows:

[T]he disposition at issue would appear to violate the equality principle, ... which expressly prohibits discrimination based on sex. However, in article 42 the Constituent power protects only one form of family, excluding other forms of

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<sup>455</sup> See *id.* (Jose Gregorio Hernandez, concurring).

<sup>456</sup> See SU-623 of 2001, June 14, 2001 (Rodrigo Escobar Gil).

<sup>457</sup> See C-814 of 2001, Aug. 2, 2001 (Marco Gerardo Monroy Cabra).

affective cohabitation, and in article 44 the rights of children are made prevalent over other rights. From which one can conclude that the superior interest of minors is in forming part of a family protected by the Constituent power. There is an evident conflict between the right to equality and to free development of personality of homosexuals ... who live in affective unions that do not constitute a family in light of the constitution, who try to adopt, and the right of a minor to form part of a family protected by the Constitution.... However, this tension is resolved by the Charter itself, which in article 44 signals the prevalence of the rights of children above those of other people.<sup>458</sup>

In contrast, the dissent argued that the majority read the Constitution wrongly in categorically excluding same sex couples from coverage, and that this line of decisions clashed with the equality jurisprudence of the Court in other areas.<sup>459</sup> In short, the majority argued that this line of decisions denying rights to same sex was a justified anomaly in the synthesis constructed by the Court, while the dissenters argued that it could not be reconciled with the synthesis and had to give way before the broader equality and liberty principles developed by the Court.

After the 2001 decisions, the Court would not return to issuing significant decisions on this issue until 2007. In the meantime, there was a conscious effort between the academic actors studied in this chapter and the civil society groups studied in the next to change the views of key actors. One of the core actors involved in this effort, the Los Andes law professor Daniel Bonilla, noted that around 2005, the nongovernmental organization Colombia Diversa and a group of faculty and students at Los Andes agreed to work together on projects to investigate and litigate on issues of sexual orientation.<sup>460</sup> The decision to again litigate the same sex union issue arose out of that effort. The actors also made a conscious decision to influence opinion around the Court in particular ways. While they made some effort to push the effort on television, the radio,

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<sup>458</sup> *Id.*, ¶ 22.

<sup>459</sup> *Id.* (Manuel Jose Cepeda, Jaime Cordoba Trivino, & Eduardo Montealegre Lynett, dissenting); *id.* (Jaime Araujo, concurring in part and dissenting in part).

<sup>460</sup> See Daniel Bonilla Maldonado, *Introducción: Igualdad, orientación sexual y derecho de interés público*, in PAREJAS DEL MISMO SEXO: EL CAMINO HACIA LA IGUALDAD SENTENCIA C-075/07, at 11, 15 (Daniel Bonilla Maldonado, ed., 2008).

and other media, they spent little money on the effort.<sup>461</sup> Instead, a core part of the initiative focused on finding elite allies to intervene in front of the court. For example, the ex-magistrate and then-Dean of Los Andes, Eduardo Cifuentes – who had written the initial 1996 decision denying benefits to same sex couples – wrote a key intervention explaining that the omission clearly had a negative impact on the same sex community and was an unjustifiable form of discrimination that had to be corrected by the Court.<sup>462</sup> Another Los Andes professor, Esteban Restrepo, coordinated a series of American scholars and NGOs to argue that changes in international law necessitated protection for same sex couples.<sup>463</sup> Finally, the Colombian NGO DeJusticia, which contains a large number of former Constitutional Court clerks and was led by the prominent former clerk and academic Rodrigo Uprimny, wrote an intervention explaining why existing jurisprudence on equality and free development of personality required a change in precedent: the existing

posture tries to deny that the restriction of state protection of the rights of homosexuals to the individual, intimate sphere harms the fundamental rights to equality, dignity, and free development of personality, but in as much as these rights can only be fully exercised between partners and in a family,... they are also protected in that dimension. Therefore, the current jurisprudence of the Constitutional Court establishes a pretty artificial distinction between the right to freely choose one's sexual preference and the right to not face discrimination for that reason. In effect, following the jurisprudence of the Court, a person can live with another of the same sex with the aim of constituting a significant life community.... But the partnership cannot contract marriage, nor construct a marital union in fact, nor solicit the right of residence of one of its members when one of them is a foreigner, nor be the beneficiary of an affiliation to social security, nor adopt the number of children that can be responsibly cared for.<sup>464</sup>

In short, the strategy was not one of mass mobilization or of having a substantial impact on broad swaths of public opinion. Instead, groups of elites with some influence over the Court, drawn

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<sup>461</sup> See *id.* at 26-27.

<sup>462</sup> See *id.* at 29.

<sup>463</sup> See *Intervenciones Ciudadanas*, in *id.* at 143, 143-179.

<sup>464</sup> *Id.* at 180, 192-93.

both from the academic community and civil society, sought to convince justices that the recognition of same sex partnerships was compelled by the dominant existing ideological framework.

The effort succeeded – a unanimous Court recognized property rights for same sex couples in C-075 of 2007.<sup>465</sup> The Court found both that the restriction hindered rights to free development of personality and that it constituted an unjustified discrimination between gay and straight couples. In other words, the Court found the result compelled by the existing framework. The opinion was authored by Rodrigo Escobar Gil, who was considered on and after his appointment to be one of the most conservative justices on the Court. He was selected from the Conservative list compiled by the Council of State and was a professor at Javeriana University, which is historically affiliated with the Conservative party. In an interview, Justice Escobar noted that previous petitioners had framed the issue in terms of the right to a “family,” while these plaintiffs framed it as a liberty and equality issue.<sup>466</sup> Viewed through the correct lens, Escobar argued, the Constitution “compelled” the result reached. In other words, the right wing of the Court found that the Constitution required the same sex unions be given rights, even though they might not constitute a “family” under the constitutional text. Escobar and two other conservative-leaning justices – Nilson Pinilla and Marco Gerardo Monroy – also wrote a special concurrence where they noted that the decision did not affect their constitutional understanding of a “family” as being constituted through a heterosexual relationship.<sup>467</sup> Escobar was subsequently appointed to

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<sup>465</sup> See C-075 of 2007, Feb. 20, 1997 (Rodrigo Escobar Gil).

<sup>466</sup> Escobar stated in another interview with *El Tiempo* that the decision merely recognized a “social reality,” and that “these partnerships deserve constitutional protection because of the need to ensure the dignity of persons, the free development of personality, and equality of treatment.” See *Es un reconocimiento de una realidad social: Escobar*, *EL TIEMPO*, Feb. 9, 2007, available at <http://www.eltiempo.com/archivo/documento/MAM-2383443>.

<sup>467</sup> See C-075 of 2007, Feb. 20, 1997 (Nilson Pinilla, Marco Gerardo Monroy Cabra, & Rodrigo Escobar Gil, concurring).

the Inter-American Commission on Human Rights, which required nomination by the Colombian government and approval by the General Assembly of the OAS.

The decision created a new consensus on the Court and led to a series of decisions where the Court recognized the right of same sex couples to health benefits, pensions, spousal immunity, reparation rights for victims of criminal acts, and rights of residence.<sup>468</sup> Most of these decisions were unanimous, and the Court easily found that there was no justification for withholding these rights from same-sex couples. Finally, in C-577 of 2011, the Court unanimously recognized that same sex couples still suffered from a “deficit of protection” because while they could now establish a “marital union in fact” in various ways, they could not formally marry.<sup>469</sup> The Court thus gave Congress two years to legislate on the issue, and ordered that if it did not issue an order by that date, same sex couples would be able to form formal marriages issued by judges and notaries beginning on that date.<sup>470</sup> The Court also recognized that same sex couples constituted a “family” and that article 42 did not limit recognition of families to heterosexual, monogamous relationships, but established a “malleable” form of protection that allowed for the recognition of other forms of relationships.

It would be tempting to tell two sorts of incorrect stories about the evolution of the Court’s jurisprudence on same sex unions. The first story is a political/social one: society changed rapidly on this issue in the 1990s and 2000s, and as key social and political actors shifted, the

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<sup>468</sup> For a general discussion of these decisions, see Mauricio Albarracín Caballero, *Protección constitucional de los compañeros permanentes del mismo sexo*, in ACTIVISMO JUDICIAL Y DERECHOS DE LOS LGTB EN COLOMBIA: SENTENCIAS EMBLEMÁTICAS 37 (Alejandra Azuero Quijano & Mauricio Albarracín Caballero, eds., 2009). Key decisions in this line include C-811 of 2007, Oct. 3, 2007 (Marco Gerardo Monroy Cabra) (affiliation to healthcare plan); C-336 of 2008, Apr. 16, 2008 (Clara Ines Vargas Hernandez) (survivor’s pension benefits); C-029 of 2009, Jan. 29, 2009 (Rodrigo Escobar Gil) (a litany of rights and duties including property rights, residency and migratory rights, spousal privilege, victims’ rights, family subsidies, duties relating to state contracts, etc.).

<sup>469</sup> See C-577 of 2011, July 26, 2011 (Gabriel Eduardo Mendoza Martelo).

<sup>470</sup> Maria Victoria Calle issued a partial dissent, arguing that the Court failed to give enough guidance to judges and notaries in the event that the legislature failed to fill the “deficit of protection.” See *id.* (Maria Victoria Calle Correa, dissenting).

Court shifted. This is partially true but incomplete: even after the Court's decision, Congress has had significant trouble legislating on the issue because of opposition to gay marriage. Even in the face of a judicial mandate to legislate, Congress did not take action within the two-year timeframe.<sup>471</sup> Thus a somewhat clearer consensus may exist on the Court than in broader political and social bodies. A second story would be a purely "legal reasoning" based one: the reasoning of the Court's first few cases in the line – emphasizing equality and the right to free development of personality – led inevitably to the recognition of same sex marriage. But the story that the legal reasoning compelled the result fails to explain why counter-narratives, such as the one emphasizing the literal meaning of Article 42, failed to take hold. Put another way, the reasoning only mattered because it was embedded in a larger framework about the interpretation of the Constitution and the role of the Court that was pushed by particular actors who were influential around the Court. The academic community around the Court slowly changed the minds of dissident justices and constructed a consensus where one did not initially exist.

### **C. The "Substitution of the Constitution" Doctrine: An Echo Chamber?**

Finally, I consider an area where the closed nature of the Court's core community has perhaps led it to continue along a doctrinal path that arguably has weak foundations and dangerous effects, without engaging in much self-criticism. The Court's "substitution of the constitution" doctrine holds that some constitutional amendments will be held substantively void if they "substitute" core principles of the existing constitutional order. Formally, the justification for the doctrine lies in the difference between "amendment" of the existing constitution and replacement of that constitution by an entirely new text. "Amendment," according to the

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<sup>471</sup> See, e.g., *Al legislar sobre matrimonio gay, Congreso cumple con un deber tardío*, SEMANA, Dec. 6, 2012, available at <http://www.semana.com/nacion/legislar-sobre-matrimonio-gay-congreso-cumple-deber-tardio/189268-3.aspx> (quoting the Director of Colombia Diversa as noting that "universities" and "civil society" has taken an interest in the topic, but political parties have not).

constitutional text, can be done in various ways – by approval of Congress in two consecutive sessions (the last round of which must be by absolute majority), by referendum, or by calling a Constituent Assembly.<sup>472</sup> “Replacement” in contrast may only be done by Constituent Assembly, which is expressly contemplated in the constitutional text.<sup>473</sup> The Court has held that this acts as a limit on the competence of other methods of amendment – Congressional approval and referenda can only be used to “amend,” and not “replace,” the constitutional text. Underneath this is an obvious functional reason for the doctrine – the Colombian Constitution is fairly easy to amend, and given the historic predominance of the executive and the weakness of the party system, there is a real risk that dangerous provisions will be easily enacted into constitutional law.

At the same time, the doctrine is clearly problematic from a democratic theory perspective. It threatens to choke off a democratic outlet around excessive judicial activism and may ossify the constitutional order. In short, the doctrine raises the idea of the “counter-majoritarian difficulty” in its most frightening form: the Court enacts its particular policy preferences and then prevents any route of undoing its choice. As a result, while the doctrine exists as part of the lore and theory of comparative constitutional law, and is sometimes used by courts such as the Indian Supreme Court, it is uncommon and looked upon by most commenters skeptically.<sup>474</sup>

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<sup>472</sup> See CONST. COL., arts. 375 (congress), 376 (constituent assembly), 378 (referendum).

<sup>473</sup> The text of article 376 reads as follows:

By means of a law approved by the members of both chambers, Congress may stipulate that the people decide by popular vote if a Constituent Assembly should be called with the jurisdiction, term, and members determined by that same law.

An affirmative vote of the people will convoke the Assembly, when they represent at least one-third of the electoral rolls.

The Assembly must be elected by a direct vote of the citizens, which may not occur concurrently with another election. During the election, the ordinary powers of Congress to amend the Constitution are suspended during the term stipulated so that the Assembly may perform its functions. The Assembly will adopt its own bylaws.

<sup>474</sup> On the Indian basic structure doctrine, see, for example, Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 107 (B.N. Kirpal et al., eds., 2000). For general scholarly commentary, see, for example, Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism* (2012)

Nonetheless, it was adopted by the Court in 2003<sup>475</sup> and has become increasingly important through time.<sup>476</sup>

As in the case of emergency powers, the Court began by stating this principle in a series of cases without actually applying it. It tended to reject claims by emphasizing that the “substitution of the constitution” doctrine was different than ordinary substantive review, and that the doctrine did not intend to ossify the existing constitutional text.<sup>477</sup> The most important early test-case of the doctrine occurred after a group around President Uribe managed to work through congress a constitutional amendment allowing him to get a second term.<sup>478</sup> The majority noted that the Constitution had been changed in important ways, but noted that the doctrine “does not inhibit the Congress from introducing significant amendments to the Constitution to respond to society’s evolution and citizens’ expectations.” It went on to hold that

it cannot be argued that a system which admits presidential reelection will lose its democratic nature by that mere fact, or that our presidential regime will [necessarily] be transformed into extreme presidentialism. Many examples could be drawn from comparative law where such a mechanism exists and does not imply a non-democratic state. On the contrary, in this kind of system the people, through elections, maintain their role as arbitrators in power processes.

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(unpublished manuscript, on file with author); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006).

<sup>475</sup> See C-551 of 2003, July 9, 2003 (Eduardo Montealegre Lynett).

<sup>476</sup> The Court formulated the basic test in C-1040 of 2005 in the following terms: ‘The method of a judgment of substitution requires that the Court prove that a defining core element of the 1991 Constitution has been replaced by a wholly different one. Consequently, to establish the major premise in a judgment of substitution it is necessary to (i) clearly identify [the defining core] element; (ii) define through reference to multiple constitutional provisions its specificity within the 1991 Constitution, and (iii) show why it has an essential and defining nature for the Constitution considered as a whole. Only in this way will it be possible to establish the major premise and avoid legal subjectivism. Subsequently, it is necessary to verify whether (iv) such a defining element is irreducible to a specific constitutional article, so as to avoid turning this article into an intangible clause, and whether (v) the analytic enunciation of this core element would be equivalent to the creation of material limits to the power of amendment, thus directing the judgment of the Court towards a material control of the violation of the Constitution, over which the Court has no jurisdiction. Once the Court has overcome this burden of argumentation, it has to move on to determine whether the defining element has been (vi) replaced by another one – and not simply amended, affected, infringed or contradicted, and (vii) whether the new core defining element is opposite or wholly different, to the point of incompatibility, with the defining elements of the identity of the previous Constitution.’ See C-1040 of 2005, Oct. 19, 2005 (per curiam).

<sup>477</sup> See, e.g., C-970 of 2004, Oct. 7, 2004 (Rodrigo Escobar Gil); C-1200 of 2003, Dec. 9, 2003 (Manuel Jose Cepeda & Rodrigo Escobar Gil).

<sup>478</sup> See C-1040 of 2005, Oct. 19, 2005 (per curiam).



In other words, the Court stressed here the space that was available for democratic actors in enacting constitutional change: even major changes like allowing one additional presidential term were not necessarily substitutions of the constitution.

After Uribe was reelected in 2006, a group around him managed to push through Congress a referendum that would have allowed a third presidential term starting in 2010. There is little doubt that given Uribe's personal popularity, the referendum would have been approved by the public. The Court nonetheless struck down the proposed referendum, holding that it both had procedural errors relating to its financing and passage through Congress and was a substitution of the Constitution.<sup>479</sup> The Court revisited its holding in the first reelection decision, noting that a second term was acceptable, but that any further terms would likely constitute substitutions of the Constitution. Moreover, the Court held that allowing a twelve-year presidential mandate threatened to undo the system of checks and balances enshrined in the text by ensuring that the president would exercise a substantial influence over most of the control institutions expected to monitor his exercises of power. Thus, the system would be transformed: "what would exist in truth would be a predominance of the executive that is so marked as to disfigure the typical presidential system and to convert it into the deformed version known as *presidencialismo*, which is characterized precisely by that exaggerated predominance and by the tendency to exceed the maximum time allowed for the exercise of presidential power in order to maintain the *caudillo* and his political project in power." The Court also noted that any incumbent who had already held two terms in office was likely to be very difficult to dislodge because of his extraordinary visibility, thus undermining equality rights of minority groups. In short, the Court held that the proposed amendment placed significant pressure on democracy principles enshrined

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<sup>479</sup> See C-141 of 2010, Feb. 26, 2010 (Humberto Antonio Sierra Porto).

in the Colombian constitution. The decision was criticized by circles close to Uribe but received favorably by much of the media and elite. The proposed amendment seemed plausibly to be the sort of basic alteration in the constitutional order that called for judicial intervention.

Yet other recent decisions have been more aggressive in carrying out the doctrine. Most of these decisions have been aimed in some way at protecting the Court's own turf by preventing efforts to work around its decisions. For example, in C-588 of 2009, the Court confronted a challenge to its jurisprudence on the civil service regime. The Court has long interpreted the constitution to require civil service appointment of the entire bureaucracy; moreover, it has held that this means existing office-holders cannot be retained in their posts without passing civil service exams. Congress has responded by attempting in various ways to insulate current office-holders; the Court has struck down all of these attempts as unconstitutional. Finally, in 2008 Congress passed a "temporary" constitutional amendment providing that for a two-year period, existing officeholders could be inscribed in the civil service regime without passing relevant exams or participating in public competitions. The Court struck down the attempt as a "substitution of the Constitution," holding that the provision conflicted with the basic principle of an "administrative career path" linked to meritocracy, that it was a "fraud upon the Constitution" because it tacitly amended the constitutional equality provision without doing so explicitly, and that it lacked the "generality" required of a constitutional provision.<sup>480</sup>

Similarly, in C-574 of 2011, the Court heard a challenge to a constitutional amendment proposed in response to its famous "personal dose" decision. As noted above in Part I, in a famous decision by Carlos Gaviria in 1994, the Court held that individual drug possession of a small dose was protected by the right to free development of personality found in the

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<sup>480</sup> See C-588 of 2009, Aug. 27, 2009 (Gabriel Eduardo Mendoza Martelo).

constitution.<sup>481</sup> This decision consistently provoked opposition, and political factions attempted for years to amend the constitution to effectively undo it. President Uribe finally succeeded in passing such an amendment specifying that possession of a personal dose was prohibited. The provision also stated that the legislature could adopt “pedagogical, prophylactic, and therapeutic” treatments for people consuming these substances, and submission to those measures would require the “informed consent of the addict.” A petitioner challenged the prohibition as constituting a substitution of the constitution by violating the constitutional principles to dignity and free development of personality, and the Court in response held that it was inhibited from reaching the merits because the petitioner had not also included the language limiting the state to “pedagogical, prophylactic, and therapeutic measures” taken with the “informed consent” of the person at issue.<sup>482</sup> The Court noted that this language fundamentally changed the meaning of the provision at issue: it interpreted the provision in light of other provisions like the right to life and free development of personality, to mean that possession of a personal dose was prohibited but not criminalized. Instead of criminal punishment, the state was limited to consensual “pedagogical, prophylactic, and therapeutic measures” The suggestion of the Court was that while the language at issue was probably not a substitution of the constitution, full-on criminalization of personal drug possession probably would be.<sup>483</sup>

Finally, in C-288 of 2012, the Court considered a challenge to an amendment adding a “principle of fiscal sustainability” to the Constitution.<sup>484</sup> The provision made this principle “an instrument to achieve in a progressive way the objective of the Social Rule of Law.” Further, the

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<sup>481</sup> See C-221 of 1994, May 5, 1994 (Carlos Gaviria Diaz).

<sup>482</sup> See C-574 of 2011, July 22, 2011 (Juan Carlos Henao Perez).

<sup>483</sup> Similarly, in Decision C-491 of 2012, June 28, 2012 (Luis Ernesto Vargas Silva), the Court held that a new provision of the criminal code criminalizing the carrying and trafficking of drugs was only constitutional on the understanding that it did not criminalize the personal dose. The Court noted that in its understanding, the constitutional amendment examined in C-491 allowed for the prohibition but not criminalization of the dose.

<sup>484</sup> See C-288 of 2012, Apr. 18, 2012 (Luis Ernesto Vargas Silva).

provision created a special appeal whereby high state officials could force any of the high courts to hear a “fiscal impact proceeding” to consider the impact of their decisions on the state budget. The amendment had been passed largely in response to long-standing concern that the Court’s decisions on social rights and other areas constituted an undue interference with the decision-making of other branches and strained budgets. The provisions argued that the provision undid the “social state of law” principle by placing the achievement of constitutional rights beneath the achievement of fiscal sustainability. In other words, it made the achievement of constitutional rights conditional on the existing budgetary situation, or at least required that judges weigh fiscal sustainability when deciding whether or not to issue orders of different types. Further, the “fiscal impact proceeding” breached the separation of powers by allowing executive and other officials to force courts to reconsider their own decisions in light of budgetary pressures. The Court rejected the demand, but only by reading the amendment narrowly. In particular, it held that the amendment did not create a new constitutional principle to be placed above or weighed against core ideals like the social state of law or dignity, but instead just an “instrument” that was subsidiary to those principles and would be used to achieve them. Further, the “fiscal impact proceeding” did not obligate the high courts to take any particular action, but merely gave them “discretion” to modify their orders. The Court upheld the amendment by gutting it of most of its content.

The evolution of the substitution of the constitution doctrine suggests a potential problem with the sociological grouping surrounding and supporting the court. A doctrine with shaky theoretical foundations and dangerous effects is given life in the Court. Once created, most of the

community supports the doctrine; criticism – although existent – is muted.<sup>485</sup> The Court then builds off of its own precedents rigidly, extending the doctrine rather than limiting it to extraordinary contexts. The doctrine now appears to be a routine mechanism for defense of the Court's major precedents, rather than an extraordinary defense for steps that threaten the basic constitutional and legal order.

### **III. Conclusion**

This Chapter has shown how a particular set of academic actors drawn from a small set of elite institutions, largely in Bogota, has been drawn to and in turn has influenced the Court's jurisprudence. The durability of the clerkship ranks has made it more difficult for new justices to radically alter the Court's jurisprudence. This in turn has helped to make these lines in turn quite resistant to external political influence, although the normative effects of this stickiness seem to be more mixed.

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<sup>485</sup> The most prominent exception on the Court is Justice Sierra Porto, who in a series of dissents and concurrences has challenged the existence of the doctrine on both textual and democratic theory grounds. *See, e.g.*, C-141 of 2010 (Sierra Porto, concurring).

## Chapter 6: The Court and the Strengthening of Civil Society

Since the seminal work of Charles Epp, political scientists have viewed courts as at least partly dependent on “support structures” of friendly civil society groups. In a comparison, for example, of judicially-attempted rights revolutions in the United States and India, Epp found that the activism in the United States under the Warren Court was largely successful because of the support of friendly groups, while the well-known activism of the Indian Supreme Court was largely unsuccessful because of the absence of such groups.<sup>486</sup> Epp noted how interest groups in the United States helped to bring cases to the Court, to enforce decisions, and to spread consciousness of the importance of those decisions within the broader political culture and society.

Epp’s thesis has never been seriously challenged: the ability of a court to affect legal and social change on a large scale is clearly dependent on the presence of a supportive civil society. Put this way, conditions in Colombia have been inhospitable to the kind of “rights revolution” that the Court and its supporters have aimed to carry out. The country’s civil society has historically been weak and disaffected from political participation.<sup>487</sup> For example, the flourishing of a student movement in the early 1990s provided some impetus for the constitutional replacement of 1991, but the student movement proved short-lived and the constitution-making process itself was more of an elite pact than a broad moment of

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<sup>486</sup> See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 200 (1998) (arguing that the Indian Supreme Court’s aggressive efforts to lead a rights revolution failed “because it lacked a broad and deep support structure in civil society.”).

<sup>487</sup> See Ann C. Mason, *Citizenship Scarcity and Weak States: The Colombian Experience* (Sept. 2002) (unpublished manuscript), available at [http://www.comm.ucsb.edu/faculty/mstohl/failed\\_states/2002/papers/Mason.pdf](http://www.comm.ucsb.edu/faculty/mstohl/failed_states/2002/papers/Mason.pdf).

participation.<sup>488</sup> It is difficult to see how a rights revolution could be as successful as it has been in Colombia under those conditions.

My argument in this Chapter is a modest but meaningful corollary to Epp's argument: while it is true that constitutional courts are to a meaningful degree dependent on both social and political support, they have some ability to structure their rulings so as to increase the organization and power of those groups. Put more simply, courts have some ability to create and strengthen their own support structures. This ability is not unlimited: courts are constrained by their existing political and social contexts, but they have some power to aid groups that will in turn increase the power and projects of the court itself. This chapter is written against a rich literature on the topic of how social movements use courts. A key claim in existing work is that court action and judicial decisions can help movements and groups to organize. For example, the symbolic power of a judicial fight may be helpful as a rallying cry irrespective of the merits of the claim.<sup>489</sup> But the claim here is not about how social movements can use courts: it is about how courts can self-consciously select strategies that draft friendly civil society groups into their enforcement models. In turn, under some conditions these strategies might increase the power of civil society groups by giving those groups more leverage over the state. In short, this chapter is about the tools that constitutional courts can use to "catalyze" civil society for particular ends.<sup>490</sup>

The evidence in this chapter is based on three of the Court's most important structural interventions: (1) the UPAC (housing) cases of the economic crisis of the late 1990s, (2) the

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<sup>488</sup> See *supra* Chapter 3 (discussing the student movement and the subsequent process in the Constituent Assembly).

<sup>489</sup> See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994) (making such an argument with respect to litigation by U.S. women for equity in pay, finding that they had little success in court but that litigation nonetheless was valuable as an organizing tool).

<sup>490</sup> See KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 167-91 (2012) (outlining a model of judicial enforcement of social and economic rights under which courts focus on using a variety of tools to catalyze civil society).

declaration of a “state of unconstitutional conditions” involving internally displaced persons (IDPs) in 2004, and (3) the broad structural intervention, after years of large-scale individual *tutelas*, on the right to health in 2008. These are innovative and well-known decisions that have spawned a significant literature. The displaced persons decision, in particular, has been examined as one of the Court’s most transformative, and existing work has considered the question of whether and how the Court achieved social change in this area.<sup>491</sup> This chapter is not an attempt to grapple with the sprawling and difficult questions of judicial success in spawning social change across these three areas, and thus is not a full account of these three massive cases. Instead, it focuses only on the narrower question of how the court interacted with civil society in designing remedies across the three cases.

In the UPAC litigation, the Court used its procedures to spawn a significant organization of civil society focused on the Court’s efforts to overcome a housing crisis. Debtors’ associations organized around the Court’s interventions and then turned back to Congress to force legislative change along with the Court. The organization of civil society in the UPAC case was ephemeral: the Court did not make any effort to institutionalize a continuing role for these groups in monitoring housing policy, and the groups themselves largely disappeared after the immediate problems of the crisis were resolved. In the displaced persons case, in contrast, the Court not only made itself the eye of the storm but also institutionalized a continuing role for civil society in monitoring the state and in providing information to the Court. The institutionalization of a role for civil society has both contributed to the successes of the court on the issue and strengthened civil society itself. In effect, the Court has managed to create a network consisting

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<sup>491</sup> The definitive work on the IDP decision is CESAR RODRIGUEZ GARAVITO & DIANA RODRIGUEZ FRANCO, *CORTES Y CAMBIO SOCIAL: COMO LA CORTE CONSTITUCIONAL TRANSFORM EL DESPLAZAMIENTO FORZADO EN COLOMBIA* (2010).



of its own staff, civil society actors, and state actors serving on checking institutions (like the National Ombudsman or *Defensoria del Pueblo* and the Attorney General or *Procuraduria General de la Nacion*) in order to extend its own ability to cajole a recalcitrant bureaucracy into compliance.

Finally, the healthcare case has combined some elements of both prior interventions. Like the IDP case, the Court has attempted to institutionalize a long term role for civil society groups by organizing Monitoring Commissions, holding multiple public audiences, and issuing follow-up orders. But the fragmented nature of civil society on the healthcare issue has made it much more difficult for the Court to create a cohesive Monitoring Commission that would act as the Court's watchdog for compliance. Instead, the civil society groups organized around the Court have focused on appropriating the Court's rhetoric in order to push a broader agenda of legislative change, thus helping to carry out changes that the Court itself seems to want but is powerless to demand. The case studies in this chapter show that the relationship between courts and civil society groups are complex and unpredictable. But the Colombian Constitutional Court has shown how a number of devices – symbolic decisions, public audiences, and monitoring commissions of civil society groups – can all be used by courts to construct a mobilization of civil society that will then pressure the other branches of government.

### **I. The UPAC Cases and a Momentary Flourishing of Civil Society**

The Colombian Constitutional Court's dramatic and massive interventions in the housing sector in 1999 and 2000 are worth studying from a number of different angles. Chapter 4 explored the Court's doctrinal creativity, considering how it used a suspended declaration of unconstitutionality in order to strike down the existing housing finance system and to pressure the political branches into constructing a new system that met the Court's criteria. Chapter 7,

below, will explore the Court's UPAC jurisprudence from the perspective of building a middle class constituency through the large-scale enforcement of social rights to housing, pensions, and healthcare. This chapter briefly considers the link between the design of the Court's remedy and its effects on civil society.

The deep economic crisis that hit Colombia towards the end of the 1990s had strongly negative effects on the system that had been set up by President Misael Pastrana (1970-1974) to finance housing for the urban middle class.<sup>492</sup> That system, called UPAC, indexed interest rates in housing to interest rates in the broader economy, but because of the economic crisis (which originated in the financial sector) the rates of interest on UPAC loans were driven up to extremely high levels. At least several hundred thousand debtors were threatened with foreclosure, but the political branches produced limited responses that were perceived by the emerging civil society of debtors' groups as insufficient.<sup>493</sup> Debtors instead turned to the courts, filing both *tutelas* to rectify their individual situations and abstract challenges to the laws governing the UPAC system. The Court proved responsive, and began issuing a number of decisions in favor of debtors. For example, it banned prepayment penalties and the capitalization of interest, as well as adjusting downward the way in which interest rates were calculated.<sup>494</sup>

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<sup>492</sup> For the construction of the UPAC system amid a crisis in the National Front, see Gabriel Silva Lujan, *Carlos Lleras y Misael Pastrana: reforma del Estado y crisis del Frente Nacional*, in 2 NUEVA HISTORIA DE COLOMBIA 237, 256-61 (1989).

<sup>493</sup> For relevant background on the UPAC system and its crisis, see, for example, Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR 127, 135-36 (Roberto Gargarella et al., eds., 2006).

<sup>494</sup> See C-747 of 1999, Oct. 6, 1999 (Alfredo Beltrán Sierra) (disallowing capitalization of interest for loans within the UPAC system); Decision C-383 of 1999, May 27, 1999 (Alfredo Beltrán Sierra) (requiring that interest rates be calculated solely in accord with the inflation rate, rather than automatically adjusting due to changes in the broader interest rates in Colombia, because the constitution required promotion of housing); C-252 of 1998, May 26, 1998 (Carmenza Isaza de Gómez) (upholding relevant provisions of the Commercial Code that allow creditors to penalize or disallow prepayment but holding that those norms are not relevant to long-term housing loans, where prepayment must be allowed under the Constitution);

The Court's interventions reached a high point in mid-1999, when the Court entertained a challenge to the entire UPAC system, on the grounds that it had been improperly promulgated by the president rather than the Congress.<sup>495</sup> The most recent law outlining the system (written in 1993) had been promulgated via presidential decree after Congress delegated its power; the complaint argued that under the constitution, the basic parameters of the financing system must instead be contained in a congressionally-promulgated *ley marco* or framework law.<sup>496</sup> In contrast to the narrow and technical grounds on which the complaint (and ultimate decision) rested, the Court entertained a free-wheeling debate on the problems with the UPAC system and its potential solutions. On July 27, 1999, the Court held a public hearing in which it invited the complainant, state officials, members of the banking sector, economists, politicians, and civil society groups.<sup>497</sup>

The civil society groups that attended the hearing were generally recently formed in response to the economic crisis. These included the National Association of Users of the Financial System and Public Services (ANUSIF) and the Solidarity Foundation of Users of UPAC. ANUSIF, for example, was formed by debtors in Cali in 1997 in response to foreclosures and spread quickly via email and internet.<sup>498</sup> These groups thus pre-existed the Court's interventions but many of their strategies were interlinked with judicial action. They viewed the responses of the political branches with skepticism and generally criticized them in

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<sup>495</sup> See C-700 of 1999, Sept. 16, 1999 (Jose Gregorio Hernandez Galindo).

<sup>496</sup> See CONST. COL., art. 150, cl. 14 (Giving Congress the power to "[d]ictate general norms, and signal the objectives and criteria to which the Government should be subjected for the following ends: ... Regulating financial, stock-market, savings and any other accounts related to the management, approval, and investment of the resources of the public."); see *id.* art. 189, cl. 24-25 (giving the executive the power to conduct regulatory interventions as well as inspections and control of these markets). In other words, the constitutional scheme gives the Congress power to regulate the broad framework of the financial system, while preserving power for the president to conduct specific interventions within that broad framework.

<sup>497</sup> See C-700 of 1999, § VI (describing the public hearing and its participants).

<sup>498</sup> See Juan Carlos Lopez, *Protesta contra la UPAC a la web*, EL TIEMPO, Oct. 13, 1998, available at <http://www.eltiempo.com/archivo/documento/MAM-842176>; Letter from Alvaro Jose Gomez R., SEMANA, Sept. 22, 1997, available at <http://www.semana.com/cartas/articulo/usuarios-del-sistema-upac/33719-3>.

the press. For example, they were harshly critical of a state of economic, social, and ecological emergency declared by the Pastrana administration in 1998, and which issued measures that the groups saw as too weak.<sup>499</sup> In contrast, they viewed the judiciary as a way to carry out their goals, filing both *tutelas* and petitions for abstract review to aid debtors and strike down the system.

The public hearing of July 1999 was an emotional affair, which was widely covered in the press and gave these civil society groups a platform from which to air their grievances. At the hearing itself, the civil society groups and other attendees viewed the Court as a policymaking body. The President of ANUSIF, for example, called for the system to be struck down because debtors were unable to pay their quotas, and criticized the behavior of the banks.<sup>500</sup> Representatives of the banking sector responded by defending the fairness and necessity of the current system for financing housing, and economists and politicians debated the merits of UPAC as a whole.<sup>501</sup>

In September 1999, the Court struck down the entire UPAC system but suspended that declaration in order to give the Congress and the president time to construct a new system for regulating housing finance.<sup>502</sup> The recently-formed civil society groups then moved to Congress, where they criticized aspects of the president's new proposal – called the UVR – for example as

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<sup>499</sup> See Usuarios piden acabar con el UPAC, EL TIEMPO, Nov. 18, 1998, *available at* <http://www.eltiempo.com/archivo/documento/MAM-853292>.

<sup>500</sup> See UPAC: se midieron las fuerzas, EL TIEMPO, July 28, 1999 (collecting remarks of Sixto Acuna), *available at* <http://www.eltiempo.com/archivo/documento/MAM-894490>. Luis Eduardo Garzon, the president of the Central Workers Union of Colombia (CUT), at the time the most important union in Colombia, testified in similar terms. *See id.*

<sup>501</sup> The director of the Colombian Institute of Savings and Housing (ICAV), a trade association of bankers, testified that the existing system was the best feasible way to ensure housing for the middle class and blamed the Court for creating “uncertainty” which was harming the financial markets. She also defended the need for capitalization of interest within an inflationary economy. *See id.*

<sup>502</sup> See C-700 of 1999, § VII.2 (striking down the UPAC scheme but deferring the declaration so as to give the Congress until June 20, 2000 to implement a new system, and requiring that the Court's existing jurisprudence on the rate of interest be applied immediately).

providing insufficient protection for wealthier debtors, and demanded that the bankers immediately refinance their debts on more favorable terms.<sup>503</sup> They alleged that the Congress, the president, and the bankers were violating the jurisprudence of the Court.<sup>504</sup> After the Congress passed the new law in December 1999, the civil society groups representing debtors again issued a demand against the new law. The Court upheld the new law in July 2000 but imposed important conditions on it.<sup>505</sup> For example, it required that the funds for refinancing be extended to all debtors on equal terms, whereas the law discriminated between delinquent and non-delinquent debtors in various ways (for example, by requiring delinquent debtors to make requests in writing within ninety days, rather than automatically refinancing).<sup>506</sup> It also held that the maximum real interest rates in the housing program must be no higher than the lowest real interest rates charged elsewhere in the financial market, as determined by the Bank of the Republic.<sup>507</sup>

The Court thus did not create the debtors' groups, but it did give them visibility and a policymaking role within the context of a massive structural case. During 1999 and 2000, the groups viewed the Court as the center of relevant policymaking, and went to the other branches of government primarily to chastise them for ignoring the pronouncements of the Court. However, the groups died out shortly after the structural interventions ended, and Colombia has not had a strong civil society on the housing issue. ANUSIF, for example, did not exist by

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<sup>503</sup> See *Deudores rechazan el nuevo UPAC*, EL TIEMPO, Nov. 9, 1999, available at <http://www.eltiempo.com/archivo/documento/MAM-956757>.

<sup>504</sup> For example, the president of *Colombia Renace* argued that the Minister of Finance had the power and obligation to refinance mortgage debts immediately, rather than waiting for Congress to pass a new law. *See id.*

<sup>505</sup> See C-955 of 2000, July 26, 2000 (Jose Gregorio Hernandez Galindo).

<sup>506</sup> *See id.* § V.B.21.

<sup>507</sup> *See id.* § V.B.4. The Court followed the statute in distinguishing the real return from nominal adjustments based in the new system only on the rate of inflation, and that the former, real returns, must be held at the lowest levels found in the Colombian economy.

2003.<sup>508</sup> This was not because the relevant problems went away: litigation has continued up to the present on issues including the terms under which already-delinquent debtors would be able to stop foreclosure processes that had been initiated against them and the right they might have to damages from the Central Bank and other entities involved in the crisis.<sup>509</sup> The nature of the issues involved in the UPAC cases may have contributed to the disintegration of civil society after the new UVR system was created: debtors mobilized around specific grievances connected with mass foreclosure (rather than around housing policy as a whole),<sup>510</sup> and the perception that the crisis had been at least partially solved as of 2000 may have weakened the power of these groups. The debtors' associations never adopted a broader platform and focused only on concrete problems with the UPAC system.

At the same time, the Court's model of intervention is worth some consideration, both because of the similarities and differences to what it has done subsequently. The Court's actions were not only interventionist, but also participatory. The move to hold a public audience in the midst of what should have been a technical case transformed the Court into the center of the issue, and gave the civil society groups a platform. This has continued to be an important tool in subsequent structural cases: the public audience is a way for the Court to allow civil society

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<sup>508</sup> See *Anusif, a liquidacion*, EL TIEMPO, Apr. 10, 2003, available at <http://www.eltiempo.com/archivo/documento/MAM-1049291>.

<sup>509</sup> See *El coletazo de UPAC*, SEMANA, Sept. 8, 2007, available at <http://www.semana.com/nacion/articulo/el-coletazo-del-upac/88098-3> (discussing ongoing litigation involving foreclosure actions in light of the 2000 law); *Corte constitucional nego multimillonaria demanda a afectados por UPAC*, EL ESPECTADOR, June 19, 2013, available at <http://www.elespectador.com/noticias/judicial/corte-constitucional-nego-multimillonaria-demanda-afect-articulo-428938> (discussing the Constitutional Court's decision to refuse to allow an indemnity action against the Central Bank to go forward for alleging contributing to the UPAC crisis).

<sup>510</sup> The growth of debtors' associations was explosive, but they were not well organized. An example of the fluidity and relatively weak cohesion of these organizations: at the Court's public hearing, Sixto Acuna was held out (in the media at least) as representing Anusif. After the meeting, Anusif claimed that he had in fact been expelled from the organization in June. See *Guerra en la cumbre*, EL TIEMPO, Aug. 1, 1999, available at <http://www.eltiempo.com/archivo/documento/MAM-922400>. Acuna subsequently issued a statement claiming that he represented Colombia Renace, and not Anusif, at the meeting, and that his organization voluntarily left Anusif and was not expelled. See Letter from Sixto Acuna, EL TIEMPO, Aug. 23, 1999, available at <http://www.eltiempo.com/archivo/documento/MAM-893410>.

groups to gain visibility and leverage over state officials. But unlike its later structural cases, the Court did not institutionalize a continuing role for civil society groups in monitoring state compliance with constitutional demands on housing policy. Subsequent decisions like the one upholding the UVR, for example, did not include a public audience, and demands since the UVR case have been brought by individual debtors, rather than by civil society groups. The Court's mode of intervention certainly strengthened the civil society around the UPAC issue; it may also have contributed to the ephemeral nature of those groups.

## II. The IDP Case and the Durable Institutionalization of Civil Society

The first full Court had experimented with turning the individualistic *tutela* action into a broader remedy, in particular by declaring a state of unconstitutional conditions [*estado de cosas inconstitucionales*]. The state of unconstitutional conditions is a way for the Court to issue a broad structural remedy in a *tutela* case technically involving only an individual or group of petitioners. The best-known early use was in a case involving prison overcrowding, where the Court declared a state of unconstitutional conditions because of the severity and nationwide scope of the problem and ordered a number of remedial measures.<sup>511</sup> It did not, however, institutionalize any real mechanism for monitoring compliance with its orders, and it is a matter of controversy whether the decision achieved its goals.<sup>512</sup>

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<sup>511</sup> See T-153 of 1998, Apr. 28, 1998 (Eduardo Cifuentes Munoz). The Court ordered the national institute of prisons and other relevant state actors to execute a plan within four years to relieve overcrowding. *See id.*

<sup>512</sup> Compare Cesar Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1694 (2011) (arguing that the absence of a monitoring mechanism beyond asking the Ombudsman and National Attorney General to monitor the judgment meant that little progress was achieved), with Libardo Jose Ariza, *The Economic and Social Rights of Prisoners and Constitutional Court Intervention in the Penitentiary System in Colombia*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 129, 152-54 (Daniel Bonilla Maldonado, ed., 2013) (presenting evidence that the decision did result in the construction of substantial new capacity in prisons to alleviate overcrowding, but that this may have increased incentives to incarcerate and did not result in a broader improvement in conditions for prisoners).

The second full court transformed the device by constructing a monitoring and enforcement system in which civil society played a critical role. The Court made this move in a case involving the problem of internally displaced persons (IDPs) – Colombians who were forced to leave their homes because of civil violence, but who migrated elsewhere in Colombia (generally larger cities) rather than leaving the country. The problem has been a huge one, perhaps involving just under ten percent of the total population, or 3 to 4 million people. Congress passed a law in 1997 creating a set of public policies for aiding IDPs, but most of the legislation was never really put into effect.<sup>513</sup>

Groups aiding the displaced argued that Alvaro Uribe’s policy of “democratic security,” which emphasized confrontation with guerrilla groups, augmented the scope of the problem, and claimed statistics showing rapid growth in the size of the displaced population.<sup>514</sup> As part of their strategy, they began filing *tutelas* in front of the Constitutional Court, asking for economic support and other benefits for groups of displaced persons. In 2004, after seeing a number of these *tutelas*, the Court consolidated a large number of individual cases and declared a “state of unconstitutional conditions.”<sup>515</sup> After reviewing the seven prior occasions in which the Court had issued a “state of unconstitutional conditions,”<sup>516</sup> the Court held that it had the power to make such a declaration if the following criteria were met:

- (i) The massive and generalized violation of various constitutional rights affecting a significant number of people; (ii) the prolonged omission of the authorities to

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<sup>513</sup> See Law 387 of 1997, available at <https://www.dnp.gov.co/LinkClick.aspx?fileticket=T8kz4amoBso%3D&tabid=1080>.

<sup>514</sup> See CODHES, De la seguridad a la prosperidad democrática en medio de conflicto, Documento CODHES 23, at 31-42 (presenting data to argue that the democratic security policy had not improved the IDP problem and in various respects had worsened the situation for vulnerable populations).

<sup>515</sup> See T-025 of 2004, Jan. 22, 2004 (Manuel Jose Cepeda Espinosa).

<sup>516</sup> See *id.* § 7. The Court had previously used the device in (1) the case involving overcrowding in prisons, (2) for social benefits involving teachers, (3) for lack of healthcare involving prisoners, (4) for the repeated failure to pay pension benefits in Bolívar and (5) Choco, (6) for gaps in the protection of the life of defenders of human rights, and (7) for failure to call a meritocratic competition to select notaries.



comply with their obligations to guarantee rights; (iii) the adoption of unconstitutional practices, like incorporating the tutela as a part of the procedure to guarantee the right at issue; (iv) the failure to pass legislative, administrative or budgetary measures necessary to avoid the violation of rights, (v) the existence of social problem whose solution requires the intervention of various entities, the adoption of a complex and coordinated group of actions, and demands a level of resources that demands an important additional budgetary effort, and (vi) if all the people affected by the same problem were to resort to the tutela to obtain the protection of their rights, greater judicial congestion would be produced.<sup>517</sup>

That is, the Court held that it had the power to create broader remedies for problems that were essentially “structural” in scope. Once such a state had been declared, the Court held that it possessed the power to issue whatever orders were necessary to the relevant authorities such that within their zones of competence, the state of unconstitutional conditions would be overcome.<sup>518</sup>

In the early state of unconstitutional conditions cases – most notably the prisons case – the Court issued structural orders but did not create any structure for following up on those orders.<sup>519</sup> A court may be able to rely on “fire alarm” mechanisms to enforce compliance with simple *tutela* orders, such as the provision of medicine to a single petitioner. If the medicine is not provided, the petitioner can return to the court and seek compliance or sanctions.<sup>520</sup> But these kinds of mechanisms are less effective for monitoring compliance with complex structural orders. Individual petitioners may have an insufficient incentive to return to the Court if their individual situation has been improved by governmental authorities. Further, monitoring improvement in government structure is costly and plausibly outside of the expertise of any individual litigant.

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<sup>517</sup> *Id.*

<sup>518</sup> *See id.* § 10.1.

<sup>519</sup> *See supra* note 512.

<sup>520</sup> Even in this simple situation, a study of compliance with constitutional decisions in Costa Rica found that publicizing the existence of monitoring mechanisms through a press conference substantially improved compliance. *See* Jeffrey Staton & Varun Gauri, A Monitoring Mechanism for Constitutional Decisions in Costa Rica (2012) (unpublished manuscript, on file with author).

The justice who wrote the displaced persons judgment, Manuel Jose Cepeda, held an LLM from Harvard Law School and had expertise in United States constitutional law. He was particularly influenced by the United States structural injunction, including the school desegregation cases following *Brown v. Board of Education*.<sup>521</sup> Cepeda thus reworked the state of unconstitutional conditions along these lines. The trademark of the United States structural injunction is that the Court not only issues broad structural orders – the desegregation of particular school districts, the reduction of prison overcrowding, etc – but also maintains jurisdiction over the case, issuing follow-up orders and sanctioning non-compliance as necessary. Recent work in U.S. constitutional theory has argued that structural litigation succeeds at reforming institutions when it is “experimentalist”: that is, when it aims to destabilize the status quo and embark on a dialogical, iterative process of reform, rather than attempting to have the judiciary legislate solutions top-down from the outset.<sup>522</sup> Typical U.S. structural injunctions can thus take years if not decades, and the literature on their effectiveness and appropriateness are mixed.<sup>523</sup> But there is evidence that they have achieved important change in some cases.<sup>524</sup>

In the United States context, enforcement of structural cases is typically carried out locally: a United States District Court judge manages the case, often with the help of a special

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<sup>521</sup> Personal interview, Manuel Jose Cepeda, Aug. 2009, Bogota, Colombia.

<sup>522</sup> See, e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

<sup>523</sup> For important critiques of U.S. structural or public law litigation, see, for example, JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF MISSOURI V. JENKINS (2008) (detailing the failures of a decades-long desegregation case in Kansas City); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 255-98 (arguing after a series of case studies that courts have serious limitations in fact-finding and policy-formulation).

<sup>524</sup> See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE (1998) (explaining that federal courts throughout the country had some slow but significant success in the 1960s and 1970s alleviating overcrowding and other inhumane conditions in American prisons).

master or masters.<sup>525</sup> The special master interacts with local officials and litigants and seeks to devise orders and oversee enforcement.<sup>526</sup> For example, when the United States Supreme Court issued sweeping rulings in its school desegregation cases, it relied on a series of federal – but locally embedded – judicial lieutenants to implement change.<sup>527</sup> Embeddedness within local or state-level political communities, along with knowledge of local conditions, offered important advantages in complex cases.<sup>528</sup> But the Colombian Constitutional Court lacked this luxury. *Tutela* decisions do go through two levels of the ordinary judiciary before reaching the Constitutional Court, but the ordinary judges were not feasible partners for the Court. Because of their high workload and particularly their very different senses of judicial role, they would not have taken on structural cases.<sup>529</sup> The puzzle for the Court, then, was to resolve the tasks of a structural judicial intervention – information-gathering, enforcement-monitoring, and policy-formulation – within a single, centralized, and rather small institution. The Court thus adopted a model that fit key elements of the U.S. structural injunction into the Colombian context.

At the core of the Court’s model were simple devices of monitoring and follow-up similar to those used in U.S. structural cases: the Court has solicited regular reports from the state and from other actors, has held a series of public audiences, and has issued numerous follow-up orders since the original decision.<sup>530</sup> These devices have allowed the Court to monitor

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<sup>525</sup> See *id.* at 299-311 (noting how district judges in these cases take on an administrative role and rely heavily on special masters and other forms of assistance).

<sup>526</sup> See *id.* at 308-09.

<sup>527</sup> See, e.g., DUNN, *supra* note 523, at 14-24 (describing shifts in Supreme Court doctrine and how these sent changing signals to the lower federal courts carrying out structural reform cases).

<sup>528</sup> See FEELEY & RUBIN, *supra* note 524, at 331-35 (describing the role of U.S. federal judges within the political system).

<sup>529</sup> See Manuel Iturralde, *Access to Constitutional Justice in Colombia: Opportunities and Challenges for Social and Political Change*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 361, 390-92 (Daniel Bonilla Maldonado, ed., 2013) (discussing disputes between the Constitutional Court and the ordinary courts on the proper role and theory of constitutional law); DIEGO EDUARDO LOPEZ MEDINA, *EL DERECHO DE LOS JUECES* 33-70 (2d ed. 2006) (same).

<sup>530</sup> The basic model is described in Rodriguez, *supra* note 512, at 1693-94.

the state of compliance with its orders and to give more or less detailed orders to state officials in order to cajole progress. But while these devices have been the most visible part of the Court's model, it has still needed to rely on a set of institutions both inside and outside of the Court to gather information, monitor compliance, and formulate the policy behind its follow-up orders. The complexity of the problem and the multiplicity of state actors involved have made these enormous tasks.

Internally, the Court created a special chamber of judges to hear all further proceedings in the displaced persons case. This panel was initially chaired by Justice Manuel Jose Cepeda and included Justices Jorge Cordoba Trivino and Rodrigo Escobar Gil; when those justices left the Court in 2009, they were replaced.<sup>531</sup> The most recent chair of the special chamber has been Justice Luis Ernesto Vargas Silva.<sup>532</sup> Further, the Court created a substantial team of staffers. This is headed by a clerk or *magistrado auxiliar* affiliated with the chair of the permanent panel. The clerk is tasked exclusively with working on the displaced persons case and is assisted by a team of lesser officials also working solely on that case.<sup>533</sup> These institutions, although costly to the Court, gave it some ability to carry out ongoing monitoring and information-gathering functions involving the issue.

Externally, the Court relied on a set of novel institutions. From T-025 itself up to the present, it has invited a set of state institutions to monitor compliance with the judgment and the

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<sup>531</sup> Cepeda and Cordoba are generally classified as progressive justices; Escobar Gil, although the author of the decision on same-sex unions in fact, is generally classified as a relatively conservative jurist. Yet the jurisprudence involving T-025 did not produce dissents and all three justices reported a consensus around the importance of the issue and the need for large-scale judicial intervention. Personal Interviews, Manuel Jose Cepeda, Aug. 2009, Bogota, Colombia; Jaime Cordoba Trivino, Aug. 2009, Bogota, Colombia; Rodrigo Escobar Gil, July 2009, Bogota, Colombia.

<sup>532</sup> On the third full court, the special chamber was initially staffed by Luis Ernesto Vargas Silva, Nilson Pinilla Pinilla, and Juan Carlos Henao. After Henao left the Court in 2012 to become Rector of Externado University, he was replaced by Luis Guillermo Guerrero Perez.

<sup>533</sup> Personal Interview, Ana Maria Charry Gaitan, Apr. 2010, Bogota, Colombia. Gaitan is a *magistrado auxiliar* in the chambers of Luis Ernest Vargas Silva, and a graduate of National University with a doctorate from Germany.

enjoyment of rights by displaced populations. Most importantly, these institutions have included the National Ombudsman or *Defensoria del Pueblo* and the National Attorney General or *Procuraduría General de la Nación*.<sup>534</sup> The former institution is charged with monitoring and reporting on violations of human rights, while the latter is charged with monitoring wrongdoing and incompetence by state officials. Both were designed by the 1991 Constitution to be independent “checking” institutions which in theory are not controlled by the executive and which are charged with cleansing and monitoring actions by the state.<sup>535</sup> The tasks carried out by both institutions in connection with the judgment have been diverse and included publicizing relevant jurisprudence and norms, issuing reports on the state of compliance, and suggesting responses by the Court.<sup>536</sup> Each institution also has a network of departmental and local officials who can help to monitor compliance. The drafting in of state institutions has thus helped the Court to remedy some of its weaknesses in such a complex structural case.

In August 2005, a Monitoring Commission composed of a mix of civil society groups, academics, and former members of the Court was formed. The Commission in 2009 consisted of

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<sup>534</sup> See T-025 of 2004, § 17 (communicating the decision to the national Ombudsman and Attorney General so that each institution could “monitor compliance with Decision T-025” “within the limits of its competence”).

<sup>535</sup> See CONST. COL., art. 276 (calling for the election of the National Attorney General for a four year turn by the Senate based on lists composed by the Constitutional Court, Supreme Court, and Council of State, requiring that she may not be of the same party, movement, or coalition as the president, and prohibiting reelection); art. 281 (calling for the election of the National Ombudsman for a four-year turn by the lower house of Congress based on lists elaborated by the Constitutional Court, Supreme Court, and Council of State, and prohibiting reelection).

<sup>536</sup> For example, in a 2008 follow-up order dealing specifically with vulnerabilities faced by displaced women, the Court issued the following order:

The contents of the present decision are COMMUNICATED to the national Attorney General, the National Ombudsman, and the National Comptroller, so that within their jurisdictions they may adopt the measures that they consider pertinent to protect in the most effective manner the fundamental rights of child, young, and adult women displaced by the armed conflict, en compliance with the present decision. The National Attorney General, Comptroller, and Ombudsman are URGED to exercise their constitutional attributes in the strictest manner possible to guarantee the restitution of rights by displaced women through the measures ordered in the present decision, and are SOLICITED to inform the Court about compliance with these orders and the measures that have been adopted from their respective spheres of competence to guarantee the effective enjoyment of rights by the effective, as they consider convenient.

Auto 092 of 2008, § VII, fifth order, Apr. 14, 2008 (Manuel Jose Cepeda Espinosa).

Eduardo Cifuentes, former justice of the Court and former National Ombudsman (Defensor del Pueblo); Rodrigo Uprimny, a former clerk, one of the most important constitutional academics in the country, and the director of the progressive constitutional think-tank DeJusticia, Jose Fernando Isaza, a well-known academic and rector of the Jorge Tadeo Lozano University, Pedro Santana, the leader of the civil society group *Viva la Ciudadania*, Patricia Lara, a leftist journalist and writer, Fanny Uribe, a sociologist; Jorge Rojas, the director of the Consultants for Human Rights and Displacement (CODHES); Luis Evelis Andrade, head of the National Indigenous Organization of Colombia (ONIC); the economist Jorge Luis Garay; Monsenor Hector Fabio Henao, the director of the social mission of Caritas in Colombia; and the activist and Nobel Peace Prize winner Rigoberta Menchu.<sup>537</sup> The technical secretary of the Commission is Marco Romero, a political scientist affiliated with CODHES.

The Commission was selected to be both politically savvy and technically skilled. Members of the Commission emphasized its technical ability to me as one of the main virtues of the Commission: the Commission had the ability to collect and evaluate information for the Court, and in this way could act as a check on information being provided by the government.<sup>538</sup> The Commission carried out extensive statistical surveys on various aspects of displacement, led by the Commission's economist Garay.<sup>539</sup> These surveys collected and analyzed data on a wealth of variables like the family size, motives, income, housing, job status, and healthcare of displaced persons. Some members of the Commission were also politically powerful figures

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<sup>537</sup> Orlando Fals Borda, a noted sociologist from the National University of Colombia, was also on the Commission but passed away in 2008. Roberto Meier, the Colombian representative of the United Nations High Commission on Refugees, was subsequently added. For a list, see *Comision del Seguimiento a la Politica Publica Sobre Desplazamiento Forzado*, 5 PROCESO NACIONAL DE VERIFICACION: EL RETO ANTE LA TRAGEDIA HUMANITARIAN DEL DESPLAZAMIENTO FORZADO: REPARAR DE MANERA INTEGRAL EL DESPOJO DE TIERRAS Y BIENES 13-14 (2009).

<sup>538</sup> Personal Interviews, Marco Romero, July 2009, Bogota, Colombia; Luis Jorge Garay, July 2009, Bogota, Colombia.

<sup>539</sup> The more recent surveys are available on CODHES's website at [http://www.codhes.org/index.php?option=com\\_content&view=article&id=95&TemplateStyle=10&Itemid=193](http://www.codhes.org/index.php?option=com_content&view=article&id=95&TemplateStyle=10&Itemid=193).

linked to the Court or to the state, and with some ability to influence policy. The technical secretary of the Commission, Marco Romero, understood the role of the Committee as being both in collecting information for the Court but also in shaping the Court's policy decisions and orders. Further, he noted that the Commission had the skill to interact with and influence members of the state bureaucracy.<sup>540</sup>

The Court's efforts to craft statistical measures, one of its earlier tasks following the issuance of the initial decision in 2004, probably best illustrates the technical expertise and policy influence of the Commission. Because the bureaucracy was not particularly attuned to the problem of displacement before the Court's decision in 2004, most aspects of the problem remained unmeasured at the time the decision was issued – a point the Court noted in its initial decision and repeated in many of its early follow-up orders.<sup>541</sup> The state ignored the Court's emphasis on designing and implementing statistical measures, and thus in 2006 the Court specifically ordered officials to develop a set of proposed indicators within a set timeframe.<sup>542</sup> The government's initial proposals of September and October 2006 were heavily criticized by the National Comptroller, National Attorney General, National Ombudsman, and the Monitoring Commission.<sup>543</sup> The Commission, for example, argued that the indicators proposed by the government did not in fact measure the "effective enjoyment" of the right but merely measured

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<sup>540</sup> See Personal Interview, Marco Romero, July 2009, Bogota, Colombia.

<sup>541</sup> See, e.g., T-025 of 2004, § 6.3.1.1(ii) ("Specific goals or indicators that would allow one to detect whether the ends of the policies have been met have not been set. Priorities or clear indicators do not exist."); Auto 175 of 2005, Aug. 29, 2005 (Manuel Jose Cepeda Espinosa) (again highlighting the problem and giving more detailed guidance on how to overcome it).

<sup>542</sup> See Auto 218 of 2006, Aug. 11, 2006 (Manuel Jose Cepeda Espinosa); Auto 337 of 2006, Nov. 27, 2006 (Manuel Jose Cepeda Espinosa).

<sup>543</sup> These critiques, by both the Commission and by state checking institutions, are extensively excerpted in Auto 337 of 2006. For example, the Court cited analysis by the National Attorney General showing that on the question of "security," the government's only proposed indicators were ones showing the extent of military operatives and operations in zones at risk of displacement, without linking those numbers to the extent of the displacement problem over time. See *id.* § 12.

the institutional effort being made by different state actors.<sup>544</sup> The Court thus ordered the state, the Commission, the Attorney General, the Ombudsman, and the Comptroller all to make their own proposals.<sup>545</sup> This process resulted in the proposal of more than 500 indicators, of which only 116 came from state officials and the others came from the Commission or the various checking institutions involved in monitoring compliance.<sup>546</sup> Based on complaints by the Commission and the checking institutions, the Court concluded that only nine of the 116 indicators proposed by the agency *Acción Social* were actually directed at the effective enjoyment of rights by the displaced population, and thus held that the government's proposed indicators remained "manifestly insufficient."<sup>547</sup>

The Court then called a "public session of technical information" in which the government, the checking institutions, the Commission, and the UN High Commission on Refugees all participated.<sup>548</sup> Based on that meeting and on subsequent written exchanges, the Court continued to reject many of the indicators proposed by the government and recommended the adoption of others proposed by the Commission and the checking institutions.<sup>549</sup> The Court held new public sessions in early 2008, after which it ordered the government to meet with the Commission.<sup>550</sup> The government agreed to adopt some of the proposals of the Commission at that meeting; the Court in another follow-up order required that the government apply other

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<sup>544</sup> See *id.* § 15.

<sup>545</sup> See *id.* § 19.

<sup>546</sup> See Auto 027 of 2007, Feb. 1, 2007 (Manuel Jose Cepeda Espinosa). 107 indicators stemmed from *Acción Social*, the executive agency primarily charged with compliance, while 9 came from the Department of Planning. See *id.* § 16.

<sup>547</sup> See *id.* § 19.

<sup>548</sup> See *id.* § 30.

<sup>549</sup> See Auto 109 of 2007, May 4, 2007 (Manuel Jose Cepeda Espinosa); Auto 233 of 2007, Sept. 7, 2007 (Manuel Jose Cepeda Espinosa).

<sup>550</sup> See Auto 116 of 2008, May 13, 2008 (Manuel Jose Cepeda Espinosa), §§ 17-21 (discussing hearings that were held on February 5 and February 28, 2008); § 26 (recounting meetings between the Commission and the state in early March 2008).



proposals made by the Commission.<sup>551</sup> The result of all this, as noted by Romero, was that the Court showed substantial trust in the technical skill of the Commission; in the end the Commission exercised substantial influence over the battery of indicators selected by the Court.<sup>552</sup> And then the Commission proceeded, through its national surveys of the displaced populations, to apply the indicators in order to take its own measurements of the state of enjoyment of rights by the displaced population. The dialogue over indicators thus shows the Commission's ability to act both as a source of compliance information and as a source of policy ideas. Put another way, the Court's trust in the Commission and willingness to adopt its policy solutions gave the Commission increased power over the executive bureaucracy.

The Commission's elite technical role imposed some costs in terms of representativeness. The Commission was not selected to represent the displaced community itself: only Luis Evelis Andrade of ONIC, the relatively well-organized indigenous organization, could plausibly be portrayed as representing a grass-roots organization.<sup>553</sup> The other civil society groups with representation on the Commission, like CODHES and Viva la Ciudadania, are more academic or technical groups. Much of the Commission, like Cifuentes and Uprimny, was made up of individuals who were close to the Court's academic community explored in the previous chapter. The Court may have worried that including grass-roots civil society would have fractured the firm consensus on the Commission and detracted from its ability to carry out its technical tasks.

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<sup>551</sup> The Court required that the government adopt 61 mandatory indicators proposed by the Commission and 10 more developed by the Chamber based on oral presentations of the government and the Commission. *See id.* § 65(j). This was out of a total of 163 mandatory indicators that were implemented. *See id.* The Court also included 52 other "optional" indicators developed by the Commission, which the government could choose to utilize or not. *See id.*

<sup>552</sup> Personal interview, Marco Romero, July 2009, Bogota, Colombia.

<sup>553</sup> Those entities that have worked most closely with the Commission and the Court on this case, like the Colombian Commission of Jurists and the United Nations High Commissioner for Refugees, share a basically technical orientation with either legal or social-scientific expertise.

The Court's engagement with a broader swath of civil society, then, has depended largely on the device of the public audience. As with the UPAC cases, the public audiences have often served as focal points for media attention and as opportunities for civil society groups to make their voices heard. The Court uses these events to pressure state actors and to hear from groups affected by state policies. The meetings are thus another key mechanism for gathering information and formulating policy. The key difference between the UPAC cases and the displacement case is that the Court has held these meetings regularly: 14 between January 2004 and January 2010, along with 84 distinct follow-up orders.<sup>554</sup> The Commission plays a significant role in the public audiences. At the widely-covered public audience of July 10, 2009, for example, the Commission gave its own factual assessment of the amount of displacement in the country and status of displaced persons, which varied in key particulars from the account given by the state.<sup>555</sup> The Commission also recommended various ways in which the Court should order the state to take more aggressive policy action and disagreed with certain policies being pursued by the state. The Court agreed with the Commission, and then presiding judge of the special panel Nilson Pinilla strongly criticized the government for failures in effort and coordination.<sup>556</sup>

But the public audiences involve a broader swath of civil society. In addition to including representatives of the checking institutions like the Ombudsman and the Attorney General, the audience in 2009, for example, was attended by a range of organizations closer to the grass-roots level including ONIC, the National Association of Displaced AfroColombians (AFRODES), the

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<sup>554</sup> See RODRIGUEZ GARAVITO & RODRIGUEZ FRANCO, *supra* note 491, at 14.

<sup>555</sup> See Pedro Santana Rodriguez, Desplazados y Corte Constitucional: Urge cambio de politicas publicas, July 17, 2009, available at <http://alainet.org/active/31803&lang=es> (describing the Commission's interventions in the public audience).

<sup>556</sup> See Corte Rajo a Accion Social en audiencia sobre desplazados, El Tiempo, July 11, 2009, available at <http://www.eltiempo.com/archivo/documento/MAM-3521127>.

Corporation Women's House (*Casa de la Mujer*), the Indigenous Authorities of Colombia (AICO), and representatives from national, departmental, and municipal Roundtables for the Strengthening of Organizations of Displaced Persons.<sup>557</sup> Other audiences on general compliance have included similar groups. The organizations participate in the audiences by giving their own account of problems faced by their groups and by posing questions for the state officials. Outside the 2009 public audience, an even broader swath of the displaced population participated in mass protests in the Plaza Bolívar.<sup>558</sup>

The carefully-designed structure of the Court's intervention has thus helped to incorporate civil society into the monitoring of its massive judgment on internally displaced persons. One of the Court's main goals in structuring its remedy has been to resolve the typical problems of the structural case: lack of access to adequate information about both the state of the world and the likely impact of public policy. Part of this solution was provided by checking institutions, particularly the National Ombudsman and the Attorney General, which the Court drafted in as a monitor of compliance. Part of it was also provided by the Monitoring Commission, which has served as an independent source of statistical and policy information. Finally, the public audiences have allowed the Court to get additional information from a wider range of groups representing the displaced. The results have been highly imperfect: both the Court and the central administration continue to struggle, for example, in getting information and policy coordination from many of the far-flung regions in which displacement originates.<sup>559</sup> But they have allowed the Court to manage an extremely complex case.

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<sup>557</sup> See Auto 225 of 2009, June 26, 2009 (Luis Ernesto Vargas Silva) (calling a public audience and developing a list of invitees).

<sup>558</sup> See Rodríguez-Garavito, *supra* note 512, at 1669.

<sup>559</sup> For a careful assessment of progress along a range of different dimensions due to the Court's interventions, see RODRIGUEZ-GARAVITO & RODRIGUEZ-FRANCO, *supra* note 491. In general, the authors find that great progress had

At the same time, the Court has provided benefits for the civil society groups that it has drafted into its compliance efforts. The Commission in particular gained policy leverage over the state. And the broader group of civil society groups representing displaced persons gained both a prominent symbol and a regular forum for discussion of the problems faced by their representatives. The Court has thus been able to construct and maintain a durable mobilization of civil society.

### **III. The Structural Health Decision: A More Complex Mobilization of Civil Society**

In Decision T-760 of 2008, the Court tried to do something similar for health as it had earlier tried to do for IDPs: organize a controlled mobilization of civil society to pressure the bureaucracy. The decision was again authored by Justice Cepeda, who viewed it as an attempt to respond to similar pressures. The healthcare system had long been seen as problematic because private-sector health care insurance companies (EPSs), poorly regulated and supervised by the state, often failed to offer elements of the standard package of benefits (the POS) that they were required to offer by law.<sup>560</sup> The sector was also dominated by corruption: the EPSs received funding from the state for each affiliated member but were routinely accused of mismanaging funds and not actually providing treatments.<sup>561</sup> Further, the POS itself, which was regulated by the government, was poorly-defined and excluded important, sometimes life-saving,

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been made on institutional effort: the budget and size of the relevant bureaucracy increased sharply, and coordination between different bureaucratic actors have improved. But they have found much more uneven progress in the actual enjoyment of rights by displaced populations.

<sup>560</sup> See, e.g., Alicia Ely Yamin, Oscar Parra-Vera, & Camila Gianella, *Colombia Judicial Protection of the Right to Health: An Elusive Promise?* in LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 103, 110 (Alicia Ely Yamin & Siri Gloppen, eds., 2011) (describing the system as “plagued by regulatory failure”).

<sup>561</sup> See, e.g., Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability from Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 190 (2013).

treatments.<sup>562</sup> This was particularly true for the many Colombians in the “subsidized” system for poorer citizens; the subsidized system was more poorly funded than the “contributory” system for formal-sector workers, and thus included a much smaller package of benefits, even though the law creating the healthcare system required that they be equalized through time.<sup>563</sup> Finally, although overall coverage improved markedly through time, many citizens still remained outside of either system.<sup>564</sup>

Beginning in the early 1990s but particularly from the later 1990s, citizens turned to the *tutela* as a way to remedy some of these defects. The Court, as detailed in Chapter 7, had by the later 1990s constructed the *tutela* so as to be hospitable to these sorts of claims, generally regardless of the individual resources of the petitioner. Many claims were for medicines and treatments included within the POS but wrongly denied by health insurers; others were for treatments seen as necessary but outside the POS for cost or other reasons.<sup>565</sup> The Court developed a detailed jurisprudence in which it granted *tutelas* for treatments both within and outside the POS. However, for the latter category of cases, it required the state to reimburse treatments provided by the insurer.<sup>566</sup> The health category of cases has grown until it has at times reached close to 40 percent of all *tutelas* filed in the country.<sup>567</sup>

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<sup>562</sup> See Yamin et al., *supra* note 560, at 109-110.

<sup>563</sup> See *id.* at 109 (reporting that those in the subsidized regime received approximately half the benefits and half the funding of those in the contributory regime).

<sup>564</sup> See PROCURADURIA GENERAL DE LA NACION, EL DERECHO A LA SALUD EN PERSPECTIVA DE DERECHOS HUMANOS Y EL SISTEMA DE INSPECCION, VIGILANCIA, Y CONTROL DEL ESTADO COLOMBIANO EN MATERIAL DE QUEJAS EN SALUD 74 (2008) (reporting coverage as being only 29.1% in 1995, but climbing to 68.1% by 2005).

<sup>565</sup> See DEFENSORIA DEL PUEBLO, LA TUTELA Y EL DERECHO A LA SALUD 2012, at 202 tbl. 39 (2009), *available at* <http://gestarsalud.com/logrosycriterios/images/PDF/tuteladerechosalud2012.pdf> (finding that as of 2012, about 70 percent of all health *tutela* claims were for treatments included in the POS, up from 56 percent in 2003).

<sup>566</sup> See Young & Lemaitre, *supra* note 561, at 189-90.

<sup>567</sup> See DEFENSORIA DEL PUEBLO, *supra* note 565, at 136 tbl. 7 (noting that health cases constituted 41 percent of *tutelas* in 2008 and 27 percent in 2012).

This jurisprudence helped to ameliorate some of the failures in the regulatory system: the Court allowed many petitioners to receive healthcare who would otherwise have been denied it. But it also created some perverse consequences. The very fact of the Court's intervention may have taken pressure off of the need for broader, systematic reform of the system (like improved supervision of the EPSs).<sup>568</sup> Thus, the benefits of intervention were mainly captured by those who chose to sue, and some research demonstrated that this was not an equitable cross-section of the population, but rather that the comparatively wealthy members of the contributory regime tended to sue more.<sup>569</sup> Further, the structure created by the Court actually encouraged the EPSs to favor individual litigation via *tutela*, rather than providing a service directly, because a finding that a treatment was not included by the POS would allow the EPS to perform the service and receive reimbursement by the state. Constitutional jurisprudence thus exacerbated endemic problems of corruption in the sector.<sup>570</sup>

This large number of *tutelas* encouraged the Court to finally step in in a systematic way, using some of the same tools that it had used in the IDP litigation. The Court thus consolidated a number of pending cases and issued structural orders requiring that the state: (1) undertake a comprehensive revision of the POS in a participatory manner that included relevant civil society stakeholders, in order to clarify it and ensure that its inclusions and exclusions responded to the Court's jurisprudence and rational criteria, (2) undertake periodic reviews of the POS at least once per year, (3) unify the subsidized and contributory POS, beginning on a strict deadline with children and moving on to other groups, (4) regulate the EPSs to ensure that they develop internal technical committees (rather than relying on courts) to regulate the provision of

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<sup>568</sup> See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 214-15 (2012) (finding that this large quantity of individual jurisprudence led to relatively few changes in the regulatory structure).

<sup>569</sup> See PROCURADURIA GENERAL DE LA NACION, *supra* note 564, at 170.

<sup>570</sup> See Young & Lemaitre, *supra* note 561, at 190.

treatments outside of the POS, (5) improve the system and budgetary resources for reimbursing the EPSs for non-POS treatments, and (6) take measures to move rapidly towards universal coverage.<sup>571</sup> The decision also notified the control institutions like the Ombudsman and Attorney General, and required that the state report back at regular intervals.<sup>572</sup> The decision had an important symbolic impact: it was seen as a landmark decision, particularly in affirming that analysis of the healthcare system should be underpinned by the fundamental right to health within a social state of law. Doctrinally, the decision is important for stating that the right to health is fundamental in itself, rather than depending on a connection with other rights like the right to life. More broadly, the analysis laid bare the faults in the existing system and emphasized how poorly the state was performing at fulfilling the right to health of its citizens.

Internally, the Court developed a structure much like that of the IDP case: it created a special panel to follow the judgment and a team led by a *magistrado auxiliar* to monitor compliance.<sup>573</sup> Further, it has issued a series of follow-up orders on different aspects of the judgment. As noticed by many commentators, the Court focused on fixing problems in the existing system of healthcare delivery rather than remaking the system. This has become a controversial aspect of the judgment, since many of the civil society groups who have been galvanized around the health issue believe that the problem cannot be resolved without a fundamental change of model. The Court has repeatedly suggested that a basic change in model

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<sup>571</sup> See Decision T-760 of 2008, July 31, 2008 (Manuel Jose Cepeda Espinosa), § III.

<sup>572</sup> See *id.*

<sup>573</sup> Personal interviews, Ivan Escruceria Mayolo, April 2010, Bogota, Colombia; Everaldo Lamprea Montealegre, Aug. 2011, Bogota, Colombia.

– say, by requiring the elimination of the private EPSs – would overstep the boundaries of judicial role and is a task that requires political action.<sup>574</sup>

In other ways, however, the structure of the health case has looked quite different from the structure in the IDP case. In particular, the Court had much more trouble relying on a strong and unified Monitoring Commission. In follow-up orders in 2008 and 2009, the Court attempted to organize a number of groups representing patients, doctors and other healthcare providers, institutions representing the EPSs, groups representing particular indigenous and Afro-Colombian populations, international organizations (the U.N. special rapporteur on the right to health), academic faculties, and groups close to the Court (particularly *Dejusticia*) into either a Commission or set of Commissions.<sup>575</sup> Yet unlike in the IDP case, such a body did not carry out any real functions in the early years following the case. Some of the difference had to do with lack of political will: the Court certainly issued fewer orders and fewer resources on the health case in the period immediately following its issuance, and held no public hearings before 2011. The health case, unlike the IDP case, fell in the last year of the term of most of the justices on the second full court, and the three justices who authored the opinion and served on the panel left the Court shortly after its issuance, before issuing many follow-up orders.<sup>576</sup>

Much of the difference also had to do with the different configuration of civil society between the two cases. In the IDP case, the Court was able to rely on a cohesive set of institutions with a more-or-less shared vision. In the health case, the Court faced a bewildering

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<sup>574</sup> See, e.g., Decision C-252 of 2010, Apr. 16, 2010 (Jorge Ivan Palacio Palacio), § 7.2.4 (striking down a declaration of economic, social, and ecological emergency in the health sector and calling on the government and Congress to coordinate to issue statutory laws and other laws to overcome the structural crisis in health).

<sup>575</sup> See Auto Auto S-39 of 2009, Dec. 3, 2009 (Jorge Ivan Palacio Palacio); Auto of Dec. 9, 2008 (Jorge Ivan Palacio Palacio).

<sup>576</sup> The three justices who issued the initial opinion in T-760, Manuel Jose Cepeda, Rodrigo Escobar Gil, and Jaime Cordoba Trivino, all had left the Court by 2009.



number of groups with different visions. Many patients' rights and medical groups, for example, were deeply critical of the status quo but favored scrapping the existing healthcare system entirely in favor of a fundamentally different one, like public healthcare. These groups were skeptical that the Court's modest efforts to reform the existing system would succeed. Other groups included in the monitoring, like those representing the EPSs and the healthcare industry, obviously had different interests from either the doctors or patients associations: they sought improved resources but also wanted to avoid reforms that would remove their intermediary role. At various points, the Court in fact has recognized the different entities following the decision as distinct "monitoring groups" rather than as a single monitoring group or commission.<sup>577</sup> This seemed to be a recognition that they were not functioning as a cohesive group but instead acting as independent entities informing the Court from their particular perspectives.

The key moment for civil society mobilization was not the Court's decision in T-760 but the Uribe administration's declaration of a state of economic, social, and ecological emergency in the healthcare system in late 2009. The emergency decrees added more resources to the system, but also sharply limited access to treatment and thus clashed with the Court's established jurisprudence on the right to health. For example, the decrees allowed for treatments outside the POS to be financed by the state only if approved by Scientific-Technical Committees, called for sanctions on doctors who ordered non-POS treatments, allowed the state to pay for non-POS treatments only within budgetary limits, contemplated copays and other charges on both POS and non-POS treatments, and required that non-POS treatments be financed by pensions and

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<sup>577</sup> See, e.g., Auto of Dec. 9, 2008 (recognizing two distinct "monitoring groups," one led by the trade group ACEMI, representing the EPSs, and the other led by foundations and academic faculties under the aegis of "Asi Vamos en Salud"); see also Auto 095 of 2010, May 21, 2010 (Jorge Ivan Palacio Palacio) (inviting certain groups to participate in the "monitoring groups" formed to follow T-760); Auto of Aug. 13, 2013 (Jorge Ivan Palacio Palacio (same)).

other retirement savings before state funding would kick in.<sup>578</sup> The government argued that it was attempting to restore fiscal stability to the healthcare system by responding to the problems raised in T-760,<sup>579</sup> but both patient organizations and groups representing doctors and other healthcare providers argued that the government was infringing the fundamental right to health recognized by the Court. They took to the streets and protested the decision, finally cheering the Court's decision to strike down the declaration of a state of emergency in early 2010.<sup>580</sup>

The emergency changed the discourse around the healthcare issue and made the Court's "rights" framing central. The presidential election in 2010 brought Juan Manuel Santos to power, and Santos, adopting a different tone from Uribe, quickly pushed a health reform bill through Congress. The new law established time tables for compliance with the Court's orders on unification and review of the POS, and created new sources of funding.<sup>581</sup> Further, in 2010 a group constituted by academic faculties of public health and law, associations representing doctors, and associations representing patients – that is, groups mobilized by the 2009 declaration of emergency -- sought and received recognition as a "Monitoring Commission for T-760/08 and of Structural Reform of Health and Social Security."<sup>582</sup> In 2011, the Court also brought in a new internal team to monitor compliance, led by a young expert on the issue; this new team worked on measuring compliance with the decision by using devices, like the construction of indicators, which had been used in the IDP case. Further, the Court held widely-

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<sup>578</sup> For an analysis of many of the problematic decrees, see Vanessa Sueli Cock & Gustavo Cote Barco, *Análisis constitucional y legal del estado de emergencia social y los decretos que reforman el sistema de salud*, 9 REV. GERENC. POLIT. SALUD 18 (2010).

<sup>579</sup> See C-252 of 2010, § II (reprinting the text of the decree at issue, which recognized the Court's jurisprudence on health as an autonomous fundamental right, problems with the reimbursement of no-POS treatments, problems with the flow of resources, and the differences between contributory and subsidized treatment as reasons for calling the state of emergency).

<sup>580</sup> See Young & Lemaitre, *supra* note 561, at 193-95.

<sup>581</sup> See Ley 1438 of 2011, Jan. 19, 2011. The unification of the subsidized and contributory POS was in fact carried out for working-age adults in 2012. See Acuerdo 32 of 2012, May 17, 2012.

<sup>582</sup> See Auto 316 of 2010, Sept. 28, 2010 (Jorge Ivan Palacio Palacio).

covered public audiences in both 2011 and 2012.<sup>583</sup> The first dealt with orders connected to the POS, while the second focused on the orders related to the flow of resources within the system. These audiences included a range of political actors as well as the Monitoring Commission, Dejusticia, and other groups representing doctors and the EPSs.

The Commission's interventions in both public audiences and on other occasions showed a more complicated relationship with the Court than was evident in the IDP decision. At both public audiences, representatives of the Commission moved beyond the specific judicial orders at issue and instead focused on broader issues relating to the system.<sup>584</sup> Representatives of the Commission called for a change in model that would eliminate the EPSs from the system and make it instead fully public. They argued for example that problems of corruption and mismanagement in the use of resources were intractable and could not be resolved within a system that provided a role for private intermediaries. After the second public audience in 2012 and a corresponding set of orders issued by the Court to ensure compliance with the decision, the Commission issued a statement criticizing aspects of the Court's orders. The statement acknowledged that many of the Court's measures would have "positive implications" for the system, but stated that they would be "insufficient for the proposed objective: the effective

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<sup>583</sup> See Auto 078 of 2012, Apr. 9, 2012 (Jorge Ivan Palacio Palacio) (calling a public audience on compliance with the Court's orders relating to the flow of funds within the system, for May 10, 2012); Auto 110 of 2011, May 27, 2011 (Jorge Ivan Palacio Palacio) (calling a public audience on compliance with the orders requiring the overhaul and unification of the POS and weaknesses in regulation, for July 7, 2011).

<sup>584</sup> See Pedro Santana Rodriguez, *Comision de Salud: La Crisis de la salud y la Corte Constitucional*, available at <http://www.viva.org.co/lobbying/comision-de-salud/146-la-crisis-de-la-salud-y-la-corte-constitucional> (giving the text of the intervention of Pedro Santana and Mario Hernandez, representatives of the Commission, before the Court's 2011 audience); Fernando Diaz Rincon, *Audiencia Publica de Rendicion de Cuentas T-760*, available at <http://www.asivamosensalud.org/politicas-publicas/sentencia-t-60/proyectosdeley.ver/3> (summarizing the intervention of Saul Franco for the Commission during the Court's 2012 audience). The full video of these two public audiences is also available on the Court's website at <http://www.corteconstitucional.gov.co/T-760-08/audiencias.php>.

guarantee of the right to health for all Colombians.”<sup>585</sup> The Commission also argued that some of the Court’s orders would actually have a “negative impact” and criticized the Court’s orders as “palliative measures” that would not succeed in “reversing the collapse of the model.”<sup>586</sup> The Commission argued that the goals required by the Court – the effective enjoyment of the right to health by the entire population – could only be achieved by basic legislative reform. In effect, they argued that “there is a court but no Congress” working on reform efforts, and that the latter institution needed to be activated.<sup>587</sup> The Commission itself spent much of its time and energy creating a draft statutory law outlining the broad contours of the healthcare system, which would have changed Colombia into a public model of healthcare provision and removed the role of the EPSs as intermediaries.<sup>588</sup> This proposal was worked on for about two years and finally presented to Congress in August 2012.<sup>589</sup>

The Court increasingly embraced the need for a broad legislative reform but emphasized its inability to impose those changes directly. In the decision striking down Uribe’s 2009 emergency in the health sector, the Court stressed the need for an overhaul of the sector but stated that such a reform required a broad participatory process in Congress, rather than being imposed by technocratic actors close to the president. In his remarks closing the second public audience, the president of the special monitoring chamber, Justice Jorge Ivan Palacio Palacio, went further and stated:

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<sup>585</sup> See Comisión de Seguimiento a la Sentencia T-760 y de Reforma Estructural del Sistema de Seguridad Social en Salud, Corte Constitucional Raja al Gobierno en Salud, Nov. 27, 2012, *available at* [http://www.viva.org.co/attachments/article/211/Pronunciamiento\\_de\\_la\\_CSR\\_Nov\\_27.pdf](http://www.viva.org.co/attachments/article/211/Pronunciamiento_de_la_CSR_Nov_27.pdf).

<sup>586</sup> *See id.*

<sup>587</sup> See Secretario General de la Comisión de Seguimiento de la Sentencia T-760/08 y de Reforma Estructural, *available at* <http://www.ustream.tv/recorded/15850433> (intervention of Pedro Santana for the Commission).

<sup>588</sup> See Proyecto de Ley Estatutaria en Salud y Seguridad Social, July 13, 2012, *available at* [http://www.viva.org.co/pdfs/comision\\_salud/Proyecto\\_Ley\\_Estatutaria\\_salud\\_CSR\\_version\\_13\\_07\\_12.pdf](http://www.viva.org.co/pdfs/comision_salud/Proyecto_Ley_Estatutaria_salud_CSR_version_13_07_12.pdf).

<sup>589</sup> See Fernando Galindo G., *Ley estatutaria para la salud*, EL ESPECTADOR, *available at* <http://www.elespectador.com/opinion/ley-estatutaria-salud-columna-369793>.

The state must seriously reflect about the need to have private entities, functioning as intermediaries, forming part of the healthcare system. Corruption, misuse of resources, administrative malfeasance and lack of control; contradict in great part the social state of law as a founding principle.

The healthcare system appears about to collapse, to the detriment of the fundamental rights of those who inhabit this. That makes it essential that the country decidedly discuss the redesign of the structure and change of procedures, tending to safeguard the right to health, as mechanisms that will permit them to have hope before the complex panorama mentioned.<sup>590</sup>

The Court continued to focus its follow-up orders on the narrower issues treated in its orders, but increasingly adopted a rhetoric that emphasized the need for broader reform.

The pressures of the Court, Commission, and other civil society groups, coupled with the perpetual sense of crisis in the healthcare sector, put pressure on the government to embrace a second major piece of reform legislative within the span of only two years. Eighteen members of Congress – largely but not entirely from the leftist *Polo Democrático* – supported the Commission’s model, but the Santos administration launched its own proposal. The government’s proposal adopted the Court’s framing by defining health as a fundamental right, but it also maintained the basic contours of the current system (including the participation of the private EPSs) while improving defects in the current system by expanding and unifying the package of benefits and improving the flow of resources.<sup>591</sup> The transmission of the law, which passed in October 2013, again revealed tensions within the civil society groups represented on the Commission, particularly between groups representing doctors and groups representing patients. Key associations of doctors and other medical providers played a role in drafting the

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<sup>590</sup> Jorge Ivan Palacio Palacio, Cierre de la Audiencia Pública en Salud 2012, *available at* <http://www.corteconstitucional.gov.co/T-760-08/CIERRE%20DE%20LA%20AUDIENCIA.pdf>.

<sup>591</sup> See Ministerio de Salud y Protección Social, Proyecto de Ley Estatutaria de Salud (June 2013), *available at* <http://www.minsalud.gov.co/Paginas/Reforma-a-la-salud-contenido.aspx>.

law.<sup>592</sup> Patients associations' and some other doctors were more critical of the final result, especially provisions that allowed exclusions from coverage for treatments that lacked a sound scientific basis. Associations representing patients with high-cost illnesses, and some doctors treating these patients, argued that this provision threatened experimental treatments that they needed.<sup>593</sup> These latter groups have called for the Court to strike down key portions of the new law.

The health case thus demonstrates a particularly rich relationship between the Constitutional Court and civil society. In the IDP case, the Court has relied on the Monitoring Commission primarily as a way to make progress on its policy goals; the civil society groups affiliated with the Commission have in turn gained some influence over both the Court's policies and the bureaucracy. Groups close to the Court have played a leading role in the Commission and civil society itself has been cohesive in rallying behind the Court's agenda. In the health case, civil society has proven less cohesive and the tether between Court and Commission has been less tight. The civil society groups have taken the lead in pushing a broader reform proposal requiring congressional action to change the model, and have used the forum of the Court – in public audiences especially – to push their agenda. The Court has also embraced, increasingly, a need for broad legal reform to fix the health sector, but has been unwilling to make those changes through constitutional jurisprudence or judicial action. Thus the Commission has served as a means for the Court to organize civil society behind a broad reform agenda that it could not pursue directly.

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<sup>592</sup> The most prominent example was the *Asociación Colombiana de Sociedades Científicas*, an association of doctors which was credited for constructing the basic principles on which the law was based. See *Gobierno y médicos defienden ley estatutaria de la salud, que tambalea*, EL TIEMPO, Jan. 30, 2014, available at <http://www.eltiempo.com/archivo/documento/CMS-13432776>.

<sup>593</sup> See *Enfermos con cancer temen por su futuro*, SEMANA, Feb. 5, 2014, available at <http://www.semana.com/nacion/articulo/reforma-de-la-salud-afectaria-pacientes-con-cancer/376158-3>.

#### IV. Conclusion

The UPAC, IDP, and health decisions show three different ways in which the Colombian Constitutional Court has used the clever design of judicial process and remedies to mobilize and organize civil society around particular agendas. None of the case studies examined in this chapter falsify the core argument that complex judicial interventions rely on support structures of friendly civil society groups. But they do qualify that thesis in important ways by showing that creative courts are far from powerless in influencing their potential support structures.

In particular, the examples in this chapter show how the Colombian Constitutional Court has relied on several different devices as a way to mobilize civil society around particular issues. First, all three interventions show the power of *symbolic decisions* as a mobilizing device: these decisions get picked up by social and political actors and may start a debate that was previously absent (as in the IDP case) or reframe an existing debate (as in the health and UPAC cases). A court cannot predict exactly which decisions groups will respond to or how they will use those decisions, but the evidence in this chapter shows that the Colombian Court did frame its key interventions with attention to timing and as an attempt to generate external interest. Second, all three cases also show the importance of the *public audience* as a device to give civil society groups a forum from which to discuss policy ideas and interact with state officials. Through the public audience, the Court makes itself into a center of public debate and policymaking, and civil society groups gravitate towards the Court for a chance to have a meaningful influence over the state. Finally, *the monitoring commissions* and *follow-up orders* used in both the IDP and health

case demonstrate ways in which the Court can construct a durable link to civil society groups, potentially using these groups to pursue long-term agendas with bureaucratic or political actors.



## Chapter 7: The Courting of the Middle Class

Previous chapters showed how the Court successfully garnered two support groups: an academic community and elements of civil society. Both of these have played key roles in aiding the Court: the academic community for example has been integral in staffing the Court and thus in helping to maintain doctrinal continuity, while civil society had helped the Court to enforce its orders. Both also help to act as part of the Court's shield against political retaliation, a point that will be explored in detail in Chapter 8. But the Court's linchpin defense against political backlash has been the middle class. This chapter will show how the Colombian Court constructed the *tutela* to be a powerful instrument for the realization of bread and butter issues for the middle class, particularly socioeconomic rights issues like healthcare and pensions. The Court's work at molding the *tutela* has helped citizens to identify the Court and its instruments with access to rapid and effective relief from the arbitrary actions of the state bureaucracy or private citizens. Moreover, at times – and especially during the deep recession of the late 1990s - the Court has engaged in forms of economic populism on a massive scale. The fragmented, deinstitutionalized Colombian political system made this a viable and potentially rewarding strategy: judges can issue rulings against the dominant political coalition and emerge as “political entrepreneurs” with opportunities to get elected to public office.

A small literature has considered the popularity of high courts with the public, including as a potential defense against political retaliation. But these models have largely viewed public opinion as a static variable, instead of considering the ways in which courts can take actions to increase their popularity.<sup>594</sup> An exception is recent work by Staton, who examines the way the

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<sup>594</sup> George Vanberg, for example, studies the effects of public opinion and transparency on implementation of German Constitutional Court decisions, and finds that implementation is most likely where the issue is high-salience

Mexican Supreme Court used press releases strategically to make the political environment more transparent and thus to increase the probability of government compliance.<sup>595</sup> This chapter considers a number of ways in which the Colombian Court used doctrine to build up middle class support. Part I considers the construction of the *tutela* as a powerful, open, and flexible instrument that was capable of becoming an important symbol for middle class Colombians, helping to serve their day-to-day needs on social and other issues. Parts II and III considers the Court's populist reaction to the recession of the 1990s, when it greatly increased its individualized interventions on socioeconomic rights issues and also turned to large-scale, structural interventions on housing and salaries. Part IV traces the reaction against those interventions and the Court's continued relevance to middle-class interests, especially through the *tutela*. Throughout, it is important to be aware that what was going on was a two-way street: the Court at times was being driven by increases and shifts in demand, particularly during the economic crisis of the late 1990s. But the Court also played a conscious role in catering to certain types of claims.

## **I. Constructing the *Tutela***

As detailed in Chapter 3, the 1991 Constitution supplemented the traditional Colombian public action with a new device, the *tutela*. The *tutela* was designed to be an individual complaint mechanism like the one found in Spain and most of Latin America. But the drafters

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and the Court is generally supported by the public. See GEORGE VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

<sup>595</sup> See Jeffrey K. Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 AM. J. POL. SCI. 98 (2006).

intentionally did not use the standard word for such a mechanism – the *amparo*.<sup>596</sup> They viewed the *amparo* in many countries as playing too many distinct functions apart from constitutional review and as being too encrusted with formalities. President Gaviria and the drafters in the Assembly instead sought a mechanism that would allow individuals to get effective recourse against arbitrary activity by state actors and in some cases private actors as well. The goal was to supplement Colombia's abstract, structure-focused jurisprudence during the National Front period with a concrete, rights-focused mechanism that would help to make constitutional rights real.

The text of article 86 thus has important features that would serve as the base for a powerful mechanism:

Every person has the right to file a *tutela* before a judge, at any time or place, through a preferential and summary proceeding, for himself or by whomever acts in his name for the immediate protection of his fundamental constitutional rights when that person fears they may be violated by the action or omission of any public authority. The *tutela* will consist of all order issued by a judge enjoining others to act or refrain from acting. The order, which must be complied with immediately, may be challenged before an appellate judge, and in due course must be sent to the Constitutional Court for possible revision.

This action will be available only when the affected party does not possess another means of judicial defense, except when it is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between filing the *tutela* and its resolution.

The law will establish the cases in which the *tutela* may be filed against private individuals entrusted with providing a public service or whose conduct seriously and directly affects the collective interest or in respect of whom the applicant finds himself in a state of subordination or defenselessness.<sup>597</sup>

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<sup>596</sup> For an overview of *amparo* mechanisms across different Latin American countries, see Allan R. Brewer-Carias, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2009).

<sup>597</sup> CONST. COL., art. 86.

For a constitutional individual complaint mechanism, this provision is unusually detailed and demonstrates the Assembly's desire to create a powerful mechanism. For example, the mechanism is not only stated to be "preferential and summary," but also given a specific time period of ten days for resolution. The mechanism can be filed before a judge at "any time or place." It may be used not only against "public authorit[ies]," but also in specified cases private actors. The legislative decree regulating the *tutela*, which was issued by President Gaviria in 1992, further fleshed out these points by making clear, for example, that the action was "informal" and could be issued through "memorial, telegram, or other means of communication" without necessarily stating the precise constitutional provision alleged to have been infringed.<sup>598</sup> Finally, the text of the article made it clear that the Constitutional Court had full discretion to review pick and choose which *tutela* judgments it wanted to review, after they had been issued and heard by a first appellate court. The discretion placed the Court in the somewhat unusual position, for a Latin American high court, of being able to influence the law without being overwhelmed by workload.<sup>599</sup>

The text left a number of questions open, and the way the Court resolved those questions had an important impact on the importance of the mechanism. The *tutela* was not the only instrument created by the Assembly: the drafters also constructed a "popular action" designed to promote collective rights.<sup>600</sup> This mechanism was given to the Council of State instead of the

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<sup>598</sup> See Decree 2591 of 1991, Nov. 19, 1991, § 14. The decree also made clear that *tutelas* had to be given priority over all other actions, with the exception of writs of *habeas corpus*. See *id.* § 15. The decree of course must be consistent with the constitutional text, and the Court has struck down provisions it considered inconsistent with the text. See, e.g., C-543 of 1992 (Jose Gregorio Hernandez Galindo) (striking down provisions of the decree allowing *tutelas* to be taken against judicial decisions, and regulating the circumstances and manner in which those actions could proceed).

<sup>599</sup> By contrast, the Brazilian Supreme Federal Tribunal has no discretion over much of its docket and a very high caseload. See Matthew M. Taylor, *Citizens Against the State: The Riddle of High Impact, Low Functionality Courts in Brazil*, 25 REV. ECON. POLIT. 418, 429 (2005).

<sup>600</sup> See CONST. COL., art. 88 ("The law will regulate the popular actions for the protection of rights and collective interests, related with patrimony, space, security and public health, administrative morality, the environment, free

Constitutional Court. The Council of State has done much less to develop the popular action than the Constitutional Court has the *tutela*, and thus the popular action, unlike the *tutela*, has not become an integral part of the legal landscape. The way courts use doctrine to shape the legal instruments at their disposal affects the demand and importance of those instruments.

Some of the key moves outlined by the Court have already been traced in Chapter 4. For example, the Court took a mechanism that appeared to have no precedential effect and constructed a system of precedent using constitutional equality norms and similar devices.<sup>601</sup> Also, it read the term “public authority” broadly to include certain decisions by ordinary judges.<sup>602</sup> Both of these moves helped the Constitutional Court to influence actors within the ordinary judicial system. Similarly, the Court’s invention of the “state of unconstitutional conditions,” explored in detail in Chapter 6, allowed it to convert an individual remedy into a device that could be used to carry out structural change. Here, I focus more narrowly on the set of moves that helped the Court to mold the *tutela* into a mechanism that would be attractive to middle class interests. This part focuses on three different dimensions: (1) the scope of rights covered by the *tutela*, (2) the limitation to situations where the “affected party does not possess another means of judicial defense,” and (3) the applicability to private parties “providing a public service or whose conduct seriously and directly affects the collective interest or in respect of whom the applicant finds himself in a state of subordination or vulnerability.”

As explained in Chapter 4, the text leaves open the scope of the rights protected via *tutela*, stating only that the provision can be used to protect “fundamental rights” without giving an exhaustive list of those rights. The Court from its first year – led by the progressive academic

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economic competition and other rights of a similar nature defined in the law.”); *see also* Law 472 of 1998, Aug. 5, 1998, § 15 (placing jurisdiction for popular actions in the Council of State).

<sup>601</sup> *See supra* Chapter 4.

<sup>602</sup> *See id.*

justices noted in Chapter 4 – interpreted the phrase in an inclusive manner and allowed the enforcement of socioeconomic rights. The connectivity doctrine allowed the *tutela* to be used to enforce socioeconomic rights whenever those rights were connected to rights clearly considered fundamental, particularly life and human dignity.<sup>603</sup> The related concept of the vital minimum, which the Court synthesized from a number of social rights in the text, gave citizens a right not to fall below a minimum threshold of dignified existence.<sup>604</sup> This right as well could be enforced via *tutela*. Together, these principles resolved an important ambiguity in the constitutional text and potentially opened the Court up to a broad audience of bread-and-butter claims involving positive rights.

The requirement that parties bringing a *tutela* “not possess another means of judicial defense” could potentially have been fatal to many *tutela* claims. The trouble is that most claims bringable via *tutela* could also be brought through some action in the ordinary judicial system. The main difference was speed and ease: *tutela* actions would be decided quickly and without formality, whereas ordinary actions were often expensive, byzantine, and slow. The conditions under which the *tutela* would be foreclosed by the existence of an alternative action were thus fundamental to its scope. President Gaviria’s regulation of the *tutela* stated that the appreciation of adequate alternative mechanisms should be carried out in “concrete ... considering the circumstances in which the complainant should find herself.”<sup>605</sup> The Court’s early jurisprudence made clear that if the actor was involved in an ordinary judicial process (say, a criminal process)

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<sup>603</sup> See, e.g., T-571 of 1992, Oct. 26, 1992 (Jaime Sanin Greiffenstein), § III.2 (“[H]ealth, which is not in principle a fundamental right, ... acquires this category when the inattention to sickness threatens to put the right to life in danger.”).

<sup>604</sup> See T-426 of 1992, Jun. 24, 1992 (Eduardo Cifuentes Munoz), § 5. This case is discussed in depth in Chapter 4.

<sup>605</sup> Decree 2591 of 1991, November 19, 1991, Art. 6, ¶ 1.

and failed to file an appeal or other mechanism, the Court would normally not allow use of the *tutela* to bail the actor out for his mistake.<sup>606</sup>

The bigger question was defining the cases where the complainant would be forced to enter the ordinary legal system in the first place, rather than acceding directly to the *tutela*. In pensions, for example, ordinary legal mechanisms generally existed for resolving these disputes, but these systems were notoriously slow.<sup>607</sup> The Court created a jurisprudence that closely tied the sufficiency of ordinary remedies to the gravity of the harm – ordinary remedies were generally insufficient in cases where the violation threatened the actor’s right to a vital minimum. In those cases the need for a quick resolution of the case outweighed the bypass of ordinary legal mechanisms, and at any rate the *tutela* had a separate purpose (protecting fundamental rights) from the ordinary legal systems governing labor, health, and pensions.<sup>608</sup> Thus, in the Court’s jurisprudence the *tutela* left ordinary legal mechanisms intact, but allowed complainants to displace them under roughly the same conditions allowing social rights to be considered “fundamental” via *tutela*. This construction of the *tutela* also helped to open the door for a significant number of social rights claims, especially if actors could plausibly claim that a denial threatened their right to a vital minimum. And the key point is that these exceptions were defined in an open-ended way, which enabled the Court through time to allow the exceptions to swallow the rule. For example, although the Court regularly stated that *tutelas* were normally

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<sup>606</sup> See, e.g., T-567 of 1998, Oct. 7, 1998 (Eduardo Cifuentes Munoz), § 6. Note though that this rule has exceptions in some cases where the failure was due to the fault of someone other than the actor, for example the actor’s lawyer. See *id.*

<sup>607</sup> See generally Augusto Conti, *Procedibilidad de la accion de tutela en material pensional. Sistematizacion y analisis de la jurisprudencia de la Corte Constitucional*, in *TEORIA CONSTITUCIONAL Y POLITICAS PUBLICAS: BASES CRITICAS PARA UNA DISCUSSION* 295, 312-20 (Manuel Jose Cepeda et al., eds., 2007).

<sup>608</sup> See, e.g., SU-995/99, Dec. 9, 1999, §5 (Carlos Gaviria Diaz).

improper in pension cases, it ended up with a “significant paradox” – “in almost all cases reviewed by the Court, they found a surplus of reasons to admit the *tutela*.”<sup>609</sup>

Finally, the definition of cases where the *tutela* could be used against private entities was fundamental to the use of the instrument for socioeconomic rights purposes. The reason was because many basic socioeconomic rights – education and health, for example – were provided by non-state actors in Colombia. For example, the health reform of 1991 created a system where the state was supposed to tightly regulate private health insurers (EPSs) providing a standard package of benefits called the POS.<sup>610</sup> In practice, the regulatory apparatus was badly deficient – the POS itself was left ambiguous, and insurers routinely denied claims for treatments that were actually included within the POS. Complainants would have been unable to obtain most forms of relief if they had been limited to suing the state.

This issue was largely resolved textually, since the text of article 86 explicitly contemplated the *tutela* against private actors in certain circumstances: those involving a party “providing a public service or whose conduct seriously and directly affects the collective interest or in respect of whom the applicant finds himself in a state of subordination or defenselessness.” The Decree regulating the instrument included healthcare providers and schools in its definition of “public service.”<sup>611</sup> Moreover, the Court gave a broad definition to “state of subordination or defenselessness” in order to include, for example, employer-employee relationships.<sup>612</sup>

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<sup>609</sup> Conti, *supra* note 607, at 312.

<sup>610</sup> For an overview of the healthcare system, see Everaldo Lamprea, *Colombia's Right-to-Health Litigation in the Context of Health Care Reform*, in THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY (Aeyal Gross & Colleen Flood, eds., forthcoming 2014).

<sup>611</sup> Decree 2591 of 1991, Nov. 19, 1991, art. 42, ¶¶ 1-3.

<sup>612</sup> In the Court's jurisprudence, subordination implies a legal relationship of dependence like the one between employee and employer or student and teachers or administrators. Defenselessness implies instead a factual relationship of dependence, particularly likely to be found with the elderly, handicapped, or people marginalized for economic and social reasons. *See, e.g.*, T-605 of 1992, Dec. 14, 1992 (Eduardo Cifuentes Munoz), § 8 (holding that



In general, the Court viewed the inclusion of private actors as a subject of *tutela* writs as a keystone to the philosophy of the new constitutional text. In a seminal decision by Justice Cifuentes, the Court explained the rationale as follows:

The relationships between individuals exist, as a general rule, on a plane of equality and coordination.... On the other hand, the equality between individuals is suspended or broken when some of them are charged with offering a public service, or possesses social power that, for other reasons, ... virtually places the other in a state of subordination or defenselessness. In these situations, it is logical that the law establishes the propriety of the *tutela* action against individuals who, given their relative superiority or forgetting the social purpose of their functions, harm the fundamental rights of the other members of the community. The idea that inspires the *tutela*, none other than the control of the abuse of power, declares against individuals who exercise power in an arbitrary manner.<sup>613</sup>

In other words, the allowance of *tutelas* against private actors was not an exceptional event or something on the periphery of the *tutela* instrument, but instead a possibility reflecting the major philosophical underpinnings of the text. The goal was to make rights effective against the arbitrary actions of both state and non-state actors.

These three points made the *tutela* a potentially usable instrument for a variety of positive rights claims. They did not automatically create a large audience for those claims. As Rueda shows, the vital minimum concept was initially little used by the Court. Further, when it was used it was cited in highly particularized ways: the Court would undertake a fact-specific inquiry into whether a given complainant actually had her right to a vital minimum infringed on the facts of a given case.<sup>614</sup> This kind of probing, fact-specific inquiry was unlikely to be the basis for a substantial line of jurisprudence, especially for the benefit of the middle class. Middle class

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a group of subsistence fisherman were “defenseless” vis-à-vis the owner of a beach who would not allow them access to the sea, because of their factually marginalized position); T-290 of 1993, Jul. 28, 1993 (Jose Gregorio Hernandez Galindo) (explaining the difference between the concepts of “subordination” and “defenselessness”).

<sup>613</sup> See T-251/93, Jun. 30, 1993 (Eduardo Cifuentes Munoz).

<sup>614</sup> See Pablo Rueda, *Legal Language and Social Change During Colombia’s Economic Crisis*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 25, 36-40 (2010) (describing some exemplary cases).

plaintiffs might have a difficult time showing that a given deprivation of a pension or healthcare treatment placed them below the minimum subsistence level required to show a violation of the vital minimum. In general, the *tutela* in this early period appeared to be a device used for a loose hodgepodge of claims: a device in search of a clear purpose.<sup>615</sup> According to one study looking at the first five years of *tutela* jurisprudence, for example, the right to health was only invoked in about 4 percent of all cases in this very early period.<sup>616</sup> This would change in the mid- and late-1990s, and particularly after the deep economic crisis of the late 1990s.

## II. The Middle-Class *Tutela* and the Crisis of the 1990s

In 1999, Colombia faced a severe crisis that began in the financial sector with the failure of a large number of domestic banks. The economy contracted very sharply during this period – losing 4 percent in 1999 alone. Unemployment spiked and peaked at over 20 percent in 2000, while the deficit ballooned to over 5 percent of GDP.<sup>617</sup> Plaintiffs responded by turning to the *tutela*. Figure 7.1 shows that there was a sharp spike in *tutela* claims in 1999 and again in 2000: only about 38,000 claims were filed in 1998, but 86,000 in 1999 and 132,000 in 2000.<sup>618</sup> The compositional data for the *tutela* also suggests that the instrument was increasingly being dominated by socioeconomic rights claims. The right to health was invoked in 25 percent of all

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<sup>615</sup> There is some evidence for this proposition in a study undertaken from the first five years of all *tutela* jurisprudence in the country, which considered a random sample of cases through December 1996. The authors of the study find a significant variety in the rights invoked, the situations giving rise to the violation, the nature of the complainants, and the nature of the defendants. See 1 Mauricio Garcia Villegas & Cesar Rodriguez, *La Accion de Tutela*, in EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA 423, 424-31 (Boaventura de Sousa Santos & Mauricio Garcia Villegas, eds., 2001). The right to health was only invoked in 4 percent of early cases, and social security only 7 percent. See *id.* at 427 tbl.2.

<sup>616</sup> The right to social security was only invoked in a further 7 percent of cases. See *id.* at 427 tbl.2. The methodology of the Garcia Villegas and Rodriguez study is not however directly comparable to the methodology of the Defensor del Pueblo data used in this study for more current compositional data.

<sup>617</sup> Andres F. Arias, The Colombian Banking Crisis: Macroeconomic Consequences and What to Expect 2 (Banco de la Republica de Colombia, Borradores de Economia No. 157, 2000), available at <http://www.banrep.gov.co/docum/ftp/borra157.pdf>.

<sup>618</sup> See DEFENSORÍA DEL PUEBLO, LA TUTELA Y EL DERECHO A LA SALUD, PERIODO 2012, at 110 tbl.1.

health cases in 1999, 19 percent in 2000, 26 percent in 2001, and 30 percent in 2002.<sup>619</sup> In a study by Conti of *tutela* claims reviewed by the Constitutional Court (as opposed to all cases filed), about half of cases in 2003 directly rely on socioeconomic rights.<sup>620</sup> This is broadly consistent with other data from the post-economic-crisis period, which find that in recent years the bulk of *tutela* claims filed in the country rely on socioeconomic rights claims.<sup>621</sup> The economic crisis, then, appears to have been a key event in making socioeconomic rights claims workhorse uses of the *tutela*.<sup>622</sup>

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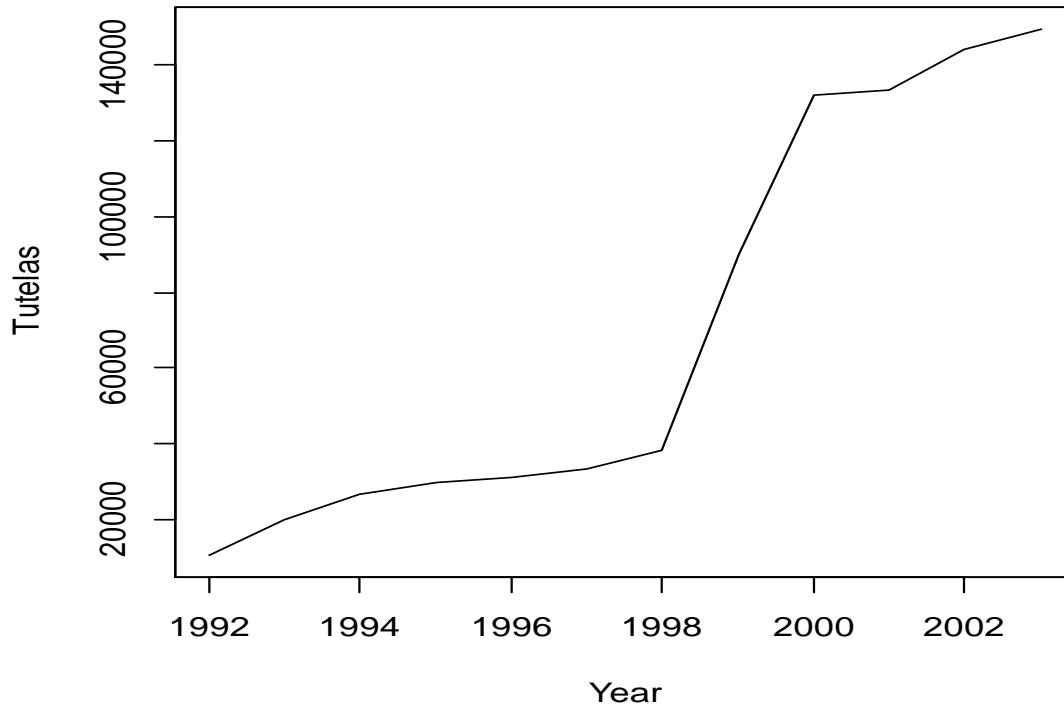
<sup>619</sup> This is the first year for which systematic data are available. *See id.* at 136 tbl.7 (2013).

<sup>620</sup> *See* Conti, *supra* note 607, at 363 tbls. 3-4 (showing that actions on pensions, salaries, and health made up about 54 percent of claims heard before the Constitutional Court in 2001 and 43 percent in 2003). Claims reviewed by the Constitutional Court are not, of course, a full picture of all claims filed, but they are indicative of the types of claims that the Court viewed as most pressing. Conti argues that “almost all” of the other claims have an “indirect” relationship with the same topics. *See id.* at 295.

<sup>621</sup> *See* DEFENSORIA DEL PUEBLO, *supra* note 618, at 111 tbl.2 (showing that in both 2011 and 2012, over half of claims directly rely on socioeconomic rights, chiefly health and social security).

<sup>622</sup> It is important to note, however, that the system appeared to be generating an increasing number of socioeconomic claims even before the economic crisis. In 1997, for example, Justice Cifuentes authored an opinion in which he expressed concern about the systematic effects of the healthcare jurisprudence and stating that relief should only be granted on a careful consideration of the individual need of the petitioner. *See* SU-111 of 1997, Aug. 9, 1997 (Eduardo Cifuentes Munoz).

**Figure 7.1: Total Number of Tutelas Filed, 1992-2003**



The economic crisis aggravated design flaws and other problems in the regulatory structures that were already extant and starting to produce claims.<sup>623</sup> 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. The pension system, as Conti notes, was sub-divided into a confusing welter of types of pensions, each with

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<sup>623</sup> A comprehensive analysis of the Court's impact on these complex systems is beyond the scope of this chapter. For an important contribution, see Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431 (2010).

its own sub rules—this confusion was a major cause of regulatory errors and thus of litigation.<sup>624</sup>

The health care system allowed private, HMO-like organizations called EPSs 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.<sup>625</sup> 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.<sup>626</sup> 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 POS was initially set to be much smaller than the contributory POS. Further, there were a very large number of citizens who were not attached to either system initially.<sup>627</sup>

Beyond basic design problems, both systems have been plagued by rampant noncompliance and by a lack of effective oversight. In many pension cases, there was no real dispute about the

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<sup>624</sup> See Conti, *supra* note 607, at 296–97.

<sup>625</sup> 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*, in REVISION A LA JURISPRUDENCIA CONSTITUCIONAL EN MATERIA DE SALUD: ESTADO DE LAS COSAS FRENTE A LA SENTENCIA T-760 DE 2008 29, 33–36 (Maria Lucía Torres Villareal, ed., 2009).

<sup>626</sup> See Diego López Medina, “Sistema de Salud” y “derecho a la salud”: Historia de su interrelación en la jurisprudencia constitucional 30 (April 24, 2008), available at <http://www.acemi.org.co/Docs/juridica/2.1.2.%20Diego%20López%20Sistema%20de%20salud%20y%20derecho%20a%20la%20salud.pdf>.

<sup>627</sup> See PROCURADURIA GENERAL DE LA NACION, EL DERECHO A LA SALUD EN PERSPECTIVA DE DERECHOS HUMANOS Y EL SISTEMA DE INSPECCION, VIGILANCIA, Y CONTROL DEL ESTADO COLOMBIANO EN MATERIA DE QUEJAS EN SALUD 74 (2008), available at [http://www.dejusticia.org/admin/file.php?table=documentos\\_publicacion&field=archivo&id=178](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%).

rule; instead the agency simply uses “trivial” arguments as cover to avoid paying the claim.<sup>628</sup>

On the health side, statistical evidence shows that the majority of *tutela* claims have been for things included in the POS, rather than for treatments found outside it.<sup>629</sup> EPSs were paid fixed fees per enrollee, rather than for treatments provided, so the EPS had no incentive to cover claims. And the entity charged with policing the health providers, the National Superintendent of Health, has done very little to regulate the conduct of the EPSs towards their consumers.<sup>630</sup> All of these factors seemed design to encourage litigation, and the economic crisis seemed to have exacerbated the problems.

The key question for our purposes is both why citizens used the *tutela* as their response to these problems and how and why the Court invited these claims. At least a partial answer is that the Court made the *tutela* into an instrument that invited middle-class claims. As noted above, initially the Court undertook a probing review of whether, on the concrete facts at issue, the situation inflicted on the complainant actually violated their right to a vital minimum and thus was justiciable via *tutela* instead of by other means. This kind of probing, individualized jurisprudence could not have been the basis for a mass jurisprudence. And indeed, initially the Constitutional Court spent little of its discretionary docket reviewing health claims.<sup>631</sup> But in the late 1990s, the Court increasingly admitted claims without conducting this kind of review. In the health area, the Court technically maintained the doctrinal requirement that the petitioner be

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<sup>628</sup> See Conti, *supra* note 607, at 297–98.

<sup>629</sup> See DEFENSORÍA DEL PUEBLO, LA TUTELA Y EL DERECHO A LA SALUD, PERIODO 2006–2008, at 56 (2009) (showing that 53.4% of all demands were for treatments included in the POS in the 2006–08 period).

<sup>630</sup> See, e.g., PROCURADURIA GENERAL DE LA NACION, *supra* note 564, at 134–36 (criticizing the performance of the Superintendent of Health in policing healthcare providers and handling complaints).

<sup>631</sup> A study by Arango shows that the right to health was involved in only 21 of 360 *tutela* decisions reviewed by the Constitutional Court in 1994 (5.8%), 79 of 565 *tutela* decisions in 1998 (14%), and 290 of 868 decisions in 2003 (33.4%). See Rodolfo Arango, *El derecho a la salud en la jurisprudencia constitucional*, in TEORIA CONSTITUCIONAL Y POLITICAS PUBLICAS: BASES CRITICAS PARA UNA DISCUSSION 89, 138–39 tbls.2–4 (Manuel Jose Cepeda Espinosa et al., eds., 2007). This data suggests that there was a significant increase in *tutela* claims on socioeconomic issues before the economic crisis, but also that the crisis was an important shock that raised the total number of claims.

unable to afford the treatment, but in practice paid little attention to it.<sup>632</sup> The approach, as Rueda points out, became more categorical: complainants who had suffered some type of harm (a denial of treatment or the wrongful denial of a pension) were likely to have their claims heard, regardless of the specifics of individual circumstances.<sup>633</sup>

This shift in jurisprudence predated the economic crisis, rather than merely responding to it.<sup>634</sup> In 1997, before the crisis broke, Justice Eduardo Cifuentes Munoz – the founder of the vital minimum doctrine -- authored an important opinion that demonstrated serious misgivings about the Court’s existing healthcare jurisprudence, which was already moving towards granting virtually most individual *tutelas* on the topic. Cifuentes emphasized that social rights were justiciable primarily under the “vital minimum” doctrine, whereby there is a “grave attack against the human dignity of persons pertaining to vulnerable sectors of the population and the State . . . has failed to provide the minimum material assistance without which the defenseless person will succumb before his own impotence.” In other cases, Cifuentes suggests, the *tutela* should only proceed when the person has no other legal mechanism (like the ordinary judiciary) to defend his rights, and only in order to gain access to services or treatments already created by law (in other words, only treatments found inside the POS).<sup>635</sup> The concerns expressed by Cifuentes show that the Court had already moved some distance from its particularized, context-specific vital minimum jurisprudence by 1997. The construction of a more categorical

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<sup>632</sup> See, e.g., López Medina, *supra* note 626, at 40 n.58 (noting that this doctrinal principle has been maintained but also stating that “[d]espite this doctrinal effort, it is clear that today the judges cannot discriminate adequately between the users of the system.”).

<sup>633</sup> See Rueda, *supra* note 614, at 45.

<sup>634</sup> See, e.g., López Medina, *supra* note 626, at 36 (presenting the state of the Court’s health jurisprudence as already developed by 1997).

<sup>635</sup> See SU-111 of 1997, Aug. 9, 1997 (Eduardo Cifuentes Munoz). The case itself involved a 64-year old woman who suffered from arthritis and whose treatments had been suspended by the state insurance company. The Court held both that she had not shown any injury to her right to a “vital minimum,” and that she had failed to exhaust the legal avenues open to her in the ordinary judiciary

jurisprudence converted the *tutela* into an effective refuge for middle-class citizens during the crisis.

When the crisis hit, then, the Court became an attractive option for a broad swath of social groups – not only or even primarily the marginalized – who were threatened with certain kinds of economic losses. And because the regulatory schemes were so dysfunctional and the ordinary judicial system was so slow, the *tutela* became a main way to gain benefits within the welfare state. The data on the profile of litigants in these garden-variety socioeconomic rights cases suggests that they were not particularly poor: a study by the Procuraduría found that 73% of all *tutelas* filed on the right to health in 2003 were filed by members of the contributory regime representing workers in the formal sector, even though this group only represented 35 percent of the population. Members of the subsidized regime, often informal workers or the unemployed who receive free health care through the state and represent 23% of the population, filed only 3% of *tutelas*. Those linked to the health care system (*vinculados*) but not formally a member of either group, who were generally also very poor, represented 38% of the population and yet filed only 13 percent of all *tutelas*.<sup>636</sup> The Court's individualized *tutela* jurisprudence thus became a largely middle-class concern. Even with an instrument as informal and easy to file as the *tutela*, middle-class groups were more likely to know their rights and to have the capacity to sue than the very poor. And in general, plaintiffs usually prevailed on these claims: in right-to-health cases, complainants won 86 percent of the time in cases between 2006 and 2008.<sup>637</sup>

The Court's individualized interventions were largely self-perpetuating: claims begat more claims. In the health care area, for example, a major reason petitioners would sue in the

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<sup>636</sup> See PROCURADURIA, *supra* note 627, at 170.

<sup>637</sup> See DEFENSORIA DEL PUEBLO, *supra* note 629, at 91.



first place is because the regulatory structure was deficient and EPSs had strong incentives to deny claims. Thus a lawsuit was often the only way to get treatments, even those clearly included within the POS. But the orders issued by a Court – generally requiring that individual treatments be provided to individual petitioners – did not order changes in the systematic practices of either regulators or EPSs. For EPSs, denying treatment and waiting for the petitioner to sue could be a rational strategy.<sup>638</sup> In some cases, the aggregate impact of the Court’s jurisprudence did affect the behavior of regulators: in 2005 through 2007, for example, the regulators changed the contents of the POS somewhat, adding for example treatments for chronic diseases like HIV and kidney disease which the Court had long ordered covered.<sup>639</sup> But the general quality of oversight was unchanged. Even when regulators tried to decrease the volume of litigation and fix problems internally, the solutions tended to be out-competed in the eyes of litigants by the *tutela*. For example, 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.<sup>640</sup>

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<sup>638</sup> See DEFENSORIA DEL PUEBLO, *supra* note 629, at 56 tbl.23 (finding that in the 2006 through 2008 period, 53.4 percent of all *tutelas* in this area were for treatments included in the POS, and only 46.6 percent were for non-POS treatments).

<sup>639</sup> See Lopez Medina, *supra* note 626, at 47.

<sup>640</sup> 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 PROCURADURIA, *supra* note 627, 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.*

Some of the Court's jurisprudence actually created new incentives to sue. For example, the Court's jurisprudence held that even treatments left outside of the POS would be covered if they were necessary to protect health or dignity interests of the complainant. But unlike services included within the POS, these services would be paid for by the state, which would reimburse the health insurers. The regulators responded to this change in the late 1990s by developing the concept of the "open POS," providing for treatments outside the POS on a case-by-case basis and making the state pay for those benefits.<sup>641</sup> The problem is that litigants could, in normal cases, only gain access to these benefits by suing. Indeed, the EPSs had incentives to encourage these kinds of suits, since a ruling that a treatment was covered but outside the POS got the insurer off the hook and allowed its affiliated providers to provide services paid for by the state. In some cases, health insurers and providers would actually provide the lawyer for individual litigants. By the end of the economic crisis, then, middle-class litigants were filing a massive number of *tutelas* on socioeconomic matters, a pattern that has persisted through the present. The distinctive feature of the crisis turned out to be the Court's wading into broader-scale interventions for the benefit of the middle-class, to which the next section turns.

### **III. Economic Crisis and the Court's Populist Moment**

The severe economic crisis in the late 1990s, which as shown in the last section led to a significant flood of additional *tutelas* on economic matters, also pushed the Court towards finding larger-scale solutions to economic problems. 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 key examples —

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<sup>641</sup> See Lopez Medina, *supra* note 626, at 41.

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 and dramatic policy 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 related to the financial crisis, the nominal interest rate on homes reached 33% (far higher than the rate of inflation), which caused mortgage payments to skyrocket and thus caused trouble in the mortgage market.<sup>642</sup> Yet the political branches did not react much to the crisis. Homeowners and associations of homeowners began bringing claims (both via abstract review and *tutela*) to the Court, which proved receptive. The Court emerged as the main forum through which debtors could get relief, and the Court began issuing decisions that alleviated debtors' burdens piece by piece. Key decisions from 1998 and 1999 banned the capitalization of interest and outlawed prepayment penalties.<sup>643</sup> Further, the Court held that a law tying interest rates within the formal housing system to interest rates in the broader economy was unconstitutional because it failed to account for the privileged status of housing within the Colombian Constitutional order.<sup>644</sup> The Court noted that the interest rate could be much high than the

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<sup>642</sup> 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>.

<sup>643</sup> See C-252 of 1998, May 26, 1998 (Carmenza Isaza de Gomez) (conditionally upholding provisions of the civil and commercial code dealing with prepayment, so long as those provisions were not applied to housing); C-747 of 1999, Oct. 6, 1999 (Alfredo Beltran Sierra) (striking down a law allowing loans that structured payments so as to capitalize interest within the housing system).

<sup>644</sup> See C-383 of 1999, May 27, 1999 (Alfredo Beltran Sierra).

inflation rate, and thus tying UPAC to inflation “complete distorts the just maintenance of the obligation.”<sup>645</sup>

As noted in the previous chapter, these piecemeal fixes had only a limited effect on the UPAC regime. The Court could not on its own reconstruct such a complex system. The key case came in mid-1999, when the Court heard a public action challenging the law creating the system.<sup>646</sup> The petitioner attacking the law raised a number of arguments, focusing both on the procedure through which the system was adopted and the substance of the law. On July 27, 1999, the Court held a public hearing on the case.<sup>647</sup> Public hearings are not abnormal in the Colombia public action; they often allow the petitioner, interveners, and government officials to explain technical arguments on the case. But in some cases – the public follow-up hearings on displaced persons and health are exemplary – the hearings become broad forums for the debate of public policy.<sup>648</sup> For example, at two recent hearing on the legal framework for peace talks with the guerrillas, President Alvaro Santos came to the Constitutional Court to ask that these laws be upheld.<sup>649</sup>

The UPAC hearing exemplified the latter type of broad policy debate: the Court invited leaders of an effervescent civil society movement that had bubbled-up around the issue, as well as business groups, heads of the financial sector trade associations, and economists. Further, the Court heard from a number of state officials including the Attorney General (Procurador), Ombudsman (Defensor del Pueblo), Minister of Finance and Public Credit, Head of the Central Bank, the Superintendent of Banks, and several Senators and members of Congress. In general,

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<sup>645</sup> *Id.* § 4.11.

<sup>646</sup> *See* C-700 of 1999, Sept. 16, 1999 (Jose Gregorio Hernandez).

<sup>647</sup> *Id.* § VI

<sup>648</sup> *See supra* Chapter 6.

<sup>649</sup> *See* Presidente Santos en la Audiencia Publica del Marco Juridico para la Paz, July 25, 2013, *available at* <http://www.youtube.com/watch?v=7OspeKet0dw>.

the civil society groups and members of Congress tended to attack the system as being unfair and as benefitting financial entities at the expense of debtors; state officials and business groups generally defended the law as a necessary way to finance housing, and warned that striking down the system would ultimately make consumers worse off. The hearing was widely covered in the press, the attendees openly cheered or booed the interveners based on their positions, and there were large demonstrations of debtors outside of the Court in the Plaza Bolívar.<sup>650</sup>

The Court's September 1999 decision struck down the heart of the UPAC system as unconstitutional, on controversial technical grounds.<sup>651</sup> The Court elided most of the substantive issues in its decision and instead held that the UPAC system, which had been promulgated by a presidential decree-law on authority delegated from the Congress, was unconstitutional because the President was legislating in an area – the basic contours of financial regulation – that the Constitution required be legislated exclusively by the Congress.<sup>652</sup> The problem, as the dissenters pointed out, was that the Decree-Law merely codified and reorganized preexisting norms; it did not add anything to the system. Further, the Court had previously held the UPAC decree-law valid against a similar attack, which would ordinarily preclude a subsequent attack of the same type.<sup>653</sup>

Finally, the dissent by Justices Eduardo Cifuentes Munoz and Vladimiro Naranjo Mesa contained a striking commentary on the political context in which the case was decided. The justices criticized the Court for holding a broad public forum, but deciding to issue a purely

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<sup>650</sup> See, e.g., *UPAC: Se Midieron las Fuerzas*, EL TIEMPO, July 28, 1999, available at <http://www.eltiempo.com/archivo/documento/MAM-894490>.

<sup>651</sup> C-700 of 1999.

<sup>652</sup> The Constitution provides that in certain areas like financial regulation, the Congress is required to make the law (called a *ley marco*) setting out the basic contours, and this power cannot be delegated to the president. See CONST. COL., art. 150, § 19 (giving this power to Congress).

<sup>653</sup> See C-700 of 1999 (Eduardo Cifuentes Munoz & Vladimiro Naranjo Mesa, dissenting).

formal ruling in a “matter of enormous complexity and transcendence”: “The Constitutional Court, as a tribunal of reason, if it decides to listen to the arguments of citizens and the authorities, ... may not decline to articulate their ideas and questions in a coherent discourse that responds to the issues raised and adjudicates the legal problem that underlies the controversy.”<sup>654</sup> The dissent also argued that the justices were stretching the content of constitutional law to fit a popular cause:

To insist on the assumption by the judiciary of more or less popular causes, outside of constitutional parameters, condemns the country to the impoverishment of its politics and of citizen participation.... The artificial constitutionalization of all social problems makes the Constitutional Court a power that approaches totalitarianism in scope and prevents the deepening of a true constitutional culture.<sup>655</sup>

This echoed the comments made by the same justices in their dissent from an earlier UPAC decision:

The Court in this decision mistakenly defines as a problem of constitutionality, a complex matter in which only reasons of convenience or design or policy correction under the responsibilities of the institutions charged with the economic management of the state. 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 extralimiting 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.<sup>656</sup>

The dissenters in other words credited the popular nature of the Court’s intervention and the lack of political action on an important issue, but criticized the Court’s responses as lacking roots in constitutional law.<sup>657</sup>

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<sup>654</sup> *Id.*

<sup>655</sup> *Id.*

<sup>656</sup> See C-383 of 1999 (Eduardo Cifuentes Munoz & Vladimiro Naranjo Mesa, dissenting).

<sup>657</sup> Justice Cifuentes, in a later interview with the author, reiterated his technical critique of the Court’s reasoning but expressed agreement with the basic thrust of the intervention and said he viewed it as one of the successes of the Court. Personal Interview, Eduardo Cifuentes Munoz, Apr. 2010, Bogota, Colombia.

The Court's remedy was unusual and tailored to the political context: it issued a deferred decision, where it gave the political branches about nine months (until June 20, 2000) to come up with a new system, while immediately applying the Court's own jurisprudence from prior cases. Moreover, the Court made clear that the new system would need to comply with the Court's own jurisprudence on housing issues.<sup>658</sup> This kind of a remedy incentivized political action and placed the onus of action on the President and the Congress. Had the Court struck down the system immediately, the Court would have been blamed for creating chaos and legal uncertainty. But deferring the effects of the decision until a date certain gave the politicians time to construct a new system subject to the Court's specifications. 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.<sup>659</sup> It also provided funds to bailout struggling homeowners and to refinance their debts.<sup>660</sup> Nonetheless, after the new bill was passed, it too was challenged on abstract review, and the Court used its 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 required that real interest rates charged above the rate of inflation be below the “lowest interest rates” being charged by the Colombian financial sector on other activities and required that all financing plans for housing require quotas that pay down principle and not just interest. Further, the Court struck down provisions that generally discriminated between debtors who were already behind in payments

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<sup>658</sup> See C-700 of 1999 (Jose Gregorio Hernandez), § VII.5.

<sup>659</sup> See C-955 of 2000, July 26, 2000 (reprinting the text of Law 546 of 1999).

<sup>660</sup> The law also took other important measures. For example it required a down payment of at least 30 percent of the value of the house so as to help ensure that the mortgage payments did not become unsustainable down the road. See Sergio Clavijo, *Fallos y Fallas Economicas de la Corte Constitucional: El Caso de Colombia, 1991–2000* (2001), p.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.

and debtors who were not in the receipt of bailout funds, and required both groups to receive bailout funds on equal terms.<sup>661</sup>

The Court's actions were heavily criticized, particularly by economists, state officials, and members of the media. 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."<sup>662</sup> 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.<sup>663</sup> 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.<sup>664</sup> 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

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<sup>661</sup> See C-955 of 2000.

<sup>662</sup> See Salomon Kalmonovitz, *La Corte Constitucional y la Capitalización de Intereses* (2000), at 2, available at <http://www.banrep.gov.co/documentos/presentaciones-disursos/pdf/K-Corteycapitalizacion.pdf>.

<sup>663</sup> See *id.* at 8. Kalmonovitz argued that because all mortgage-holders received the same capped interest rate, and all received the same terms of refinancing, most money went to wealthy mortgage holders or speculative investors. See *id.* (noting that the smallest mortgages of between \$0 and \$48 million pesos constituted 78% of all mortgages, but received only 51% of the new subsidies).

<sup>664</sup> See Clavijo, *supra* note 660, at 24–26 (explaining that the 1998 Economic and Social Emergency decree of President Pastrana would have focused bailout funds, at least initially, on the smallest mortgages, and then used leftover funds on wealthier homeowners).



economic considerations.”<sup>665</sup> There was considerable speculation that the decisions might be a starting point for a political campaign by key actors involved.<sup>666</sup>

The author of the two key decisions striking down the entire system and reviewing the new law passed by Congress, José Gregorio Hernández, gave several interviews in the press in which he defended his work in largely populist terms. When asked about the effect of his jurisprudence on the banking sector, he stated that “housing is not a business.”<sup>667</sup> 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 says, than their leaders. . . .<sup>668</sup>

This statement defends the work of the Court basically on grounds of public popularity, rather than legal justification. It pits public opinion against the political elite, and invokes the name of Colombia’s most famous populist leader, Jorge Eliecer Gaitán, whose assassination in 1948 set off the period of extreme public violence between the parties that preceded the National Front.<sup>669</sup> Almost immediately after leaving the Court in 2001, Justice Hernandez, who became known as the “housing justice,” was the unsuccessful Liberal candidate for vice-president in the 2002 presidential election. The press emphasized Hernandez’s popularity from the UPAC decisions

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<sup>665</sup> *La Dictadura de la Corte*, SEMANA, July 5, 1999, available at <http://www.semana.com/noticias-economia/dictadura-corte/39466.aspx>.

<sup>666</sup> *See Pelea de Gallos*, 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.”).

<sup>667</sup> *La Vivienda no es un Negocio*, SEMANA, February 18, 2000, available at <http://www.semana.com/noticias-economia/vivienda-no-negocio/14910.aspx>.

<sup>668</sup> Interview with José Gregorio Hernández, LA REPÚBLICA, November 12, 2000.

<sup>669</sup> *See* David Bushnell, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 196–203* (1993); *see also* HERBERT BRAUN, *THE ASSASSINATION OF GAITÁN: PUBLIC LIFE AND URBAN VIOLENCE IN COLOMBIA* (1985).

when explaining why he was put on the ticket.<sup>670</sup> Indeed, a significant number of the justices on the first full Court launched political careers after their terms ended.<sup>671</sup>

A second key structural decision 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 9% increase for government employees making less than twice the minimum wage, and no increase for government employees making more than that amount.<sup>672</sup> The 9% increase was running just about at the rate of inflation. The government's rationale was that it had to control spending and reduce the deficit; state salaries were a significant chunk of government spending. The Court nonetheless held the budget unconstitutional and ordered the government to provide every public worker with an increase in salary at least equal to the rate of inflation, a decision that affected about 600,000 government workers and provided all of them with the 9% increase originally slated only for poorer workers. Most of the Colombian public workers were relatively affluent – 75% belonged to levels 3 and 4 of the social stratification scheme, marking them as solidly middle-class – and thus were affected by the decision.<sup>673</sup> 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

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<sup>670</sup> See *El Efecto “Vice”*, 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).

<sup>671</sup> For example, from the first Court, Magistrate Carlos Gaviria subsequently served as Senator, and Magistrate Alejandro Martínez Caballero served on the municipal council, both for leftist parties. See *Ex-Magistrados Piden a Nilson Pinilla Retractarse De Afirmaciones*, EL TIEMPO (Mar. 30, 1999), available at <http://www.eltiempo.com/archivo/documento/CMS-4919789> (listing names of magistrates who subsequently served in political posts). Justice Eduardo Cifuentes, who dissented from the major UPAC decisions, subsequently served as national ombudsman (Defensor del Pueblo).

<sup>672</sup> See C-1433 of 2000, Oct. 23, 2000 (Antonio Barrera Carbonell), § 2.2.

<sup>673</sup> See *¿Aquí quién manda?*, SEMANA, Nov. 27, 2000, available at <http://www.semana.com/noticias-nacion/aqui-quien-manda/15528.aspx>.

emergency.<sup>674</sup> Overall, it was estimated that the decision would cost the state about 3 trillion pesos over several years, or roughly 2 percent of GDP.

The Court 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.<sup>675</sup>

The reference to the vital minimum principle is odd given how the government cuts were structured: the budget proposed nominal increases for poorer workers, and no change (equating to real losses) for middle class workers. In other words, the budget seemed to be structured so as to deal with an economic crisis by cutting salaries for wealthier workers while cushioning the blow for poorer workers, exactly as the vital minimum doctrine would seem to demand. Small real cuts to wealthier workers would not seem to threaten those workers’ entitlement to a minimum level of subsistence. As Rueda notes, by this point the vital minimum doctrine had been transformed into a largely middle-class doctrine.

The announcement of the decision in late October 2000, during the heart of the economic crisis, provoked a firestorm of criticism and overall received less support than the UPAC decision. Particularly problematic was the fact that the decision was retroactive to the start of the year, requiring payments of accrued wages to all state employees. Some commentators expressed support for the decision and attacked the neoclassical economists both inside the country and

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<sup>674</sup> See C-1433 of 2000, § 2.7.

<sup>675</sup> See *id.*

inside international financial institutions like the IMF.<sup>676</sup> Labor unions generally celebrated the decision. But economists, business groups, and politicians were extremely hostile, and the press generally condemned the decision. An editorial in *El Tiempo*, for example, asked “[h]ow an institution like the Court could cause so much damage without anyone being able to control it?”<sup>677</sup> These actors argued that the decision would adversely affect the macro-economy and that the group was exceeding its functions by decreeing social spending.<sup>678</sup> In particular, they pointed out that the decision would cost the state about as much as it had saved through a major recent tax reform, and more than it had saved through recent spending cuts designed to balance the budget.<sup>679</sup> A number of commentators argued that the Court needed to be reformed in order to lessen its influence over major economic matters. Finally, actors argued that the decision benefitted the wealthy at the expense of the poor by potentially leading to cuts in social investment: “We are worried about the situation of the middle class, but we are worried even more for those who are unemployed and who have nothing; if there is not enough for everyone, logical and constitutional priority goes to the last group”<sup>680</sup> Then pre-candidate and later president Alvaro Uribe suggested that the Constitutional Court should be abolished and its judicial review powers given back to the Supreme Court.<sup>681</sup>

Overall, the structural reactions of the Court to the economic crisis in the UPAC and salary cases arose out of many of the same factors as the sharp increase in *tutela* decisions. On

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<sup>676</sup> See Alfonso Hernandez Forero, *Corte Constitucional y Economistas*, EL TIEMPO, Oct. 27, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1235734>.

<sup>677</sup> *La Corte Constitucional y los Salarios*, EL TIEMPO, (Oct. 27, 2000), available at <http://www.eltiempo.com/archivo/documento/MAM-1272200>.

<sup>678</sup> See, e.g., *Llueven Crítica a la Corte*, EL TIEMPO, Oct. 31, 2000, <http://www.eltiempo.com/archivo/documento/MAM-1265692>; *Aquí Quien Manda?*, *supra* note 673.

<sup>679</sup> See *Aquí Quien Manda*, *supra* note 673.

<sup>680</sup> See *Editorial: La Corte Anticonstitucional*, EL TIEMPO, Oct. 27, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1258286>.

<sup>681</sup> See *La Corte esta en el Ojo del Huracan*, EL TIEMPO, Oct. 27, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1272897>.

the demand side, a large number of middle-class plaintiffs began conceptualizing their economic uncertainty as issues of socioeconomic rights, and they turned to the Court for relief. On the supply side, members of the Court were highly responsive to this demand, for a number of different reasons. The Court's own perceived mandate on socioeconomic issues had shifted by the late 1990s to include middle-class claims as well as claims involving the marginalized. Moreover, the perception that the other branches of government were ignoring both popular will and constitutional concerns (especially in the UPAC case) appears to have made the Court bolder in intervening. The perception of judicial role that developed around the Court, and is explored in Chapter 4, may have made the Court particularly likely to act in the midst of economic crisis. The judicial public audience held in the midst of the UPAC crisis embodies this conception of role. Finally, the political context, and particularly the fragmented and deinstitutionalized party system, may have made it attractive for members of the Court to make these kinds of interventions. Justice Hernandez used a spectacular intervention for the benefit of the middle class to launch his political career. This welter of different motivations and audiences pulling at the Court may explain why the critics of the Court had trouble characterizing its actions. On the one hand, the Court was accused of being "demagogic" or "populist,"<sup>682</sup> while simultaneously being accused of robotically enforcing the Constitution in an echo chamber, without sufficient attention to economic reality.<sup>683</sup>

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<sup>682</sup> See, e.g., *Editorial: Fallos Desconcertantes*, EL TIEMPO, Oct. 25, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1273955>.

<sup>683</sup> See, e.g., *Aquí Quien Manda?*, *supra* note 673.

#### IV. Course Correction: A Return to *Tutela*-Driven Jurisprudence & Targeted Interventions

The Court's structural activism during the economic crisis coincided with the end of most of the justices' non-renewable eight-year terms. The appointments procedure, which is looked at in more depth in the next Chapter, gave political forces at least some opportunity to influence judicial behavior. Although the selection of only one-third of the three-candidate lists from which justices were chosen was in the hands of the political branches (the president controlled three lists, while the Supreme Court and Council of State also controlled three each), the Senate carried out all selections from the lists. The behavior of the prior court was a significant issue in the selection process and was raised repeatedly at the congressional hearings to select the new justices.<sup>684</sup> The President of the Senate, Mario Uribe Escobar, began the hearings by praising the work of the Court but also by referring to its "excesses," including "some recent decisions in which it has extended its power as a positive legislator to the point of substituting for the proper powers of decision on economic and budgetary issues, without considering the viability of those measures and the damaging effects they may have for the health of the economy."<sup>685</sup>

Some of the aspirants for a new post stated publically – at the hearings or elsewhere -- that they favored a different approach on key issues from the current court. For example, Manuel José Cepeda, the presidential advisor to the Constituent Assembly who was on one of the president's lists and who won election to the Court in a close vote,<sup>686</sup> stated in relation to the Court's macroeconomic jurisprudence that "a new [legal analysis] is required that has the tools to

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<sup>684</sup> See, e.g., Rudolf Hommes, *La Nueva Corte Constitucional*, EL TIEMPO, Nov. 28, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1285740>.

<sup>685</sup> See Gaceta del Congreso 482, Nov. 30, 2000, at 2.

<sup>686</sup> See *Corte Constitucional de Avanzada*, EL TIEMPO (Dec. 15, 2000) available at <http://www.eltiempo.com/archivo/documento/MAM-1217594> (noting that the closest election was on Cepeda's list, and that he won in the Senate by only nine votes, 51 to 42).

be able to incorporate the effects of decisions without sacrificing principles.”<sup>687</sup> Eduardo Montealegre Lynett, another victorious candidate and a longtime professor at Externado University, pointedly stated in the Senate hearings that “the management of the economy is a task of the Government, of the Congress, and of the Central Bank,” and ended his intervention by emphasizing that he “would introduce in the analysis of fundamental rights an analysis oriented towards the consequences” and would “modulate” decisions to limit impact on the economy and society.<sup>688</sup> A third successful candidate, Jaime Cordoba Triviño, praised the “fundamental value” of the *tutela* but expressed concern with its “indiscriminate use.”<sup>689</sup> These were not, importantly, economists or others with fundamentally different values from those found on the Court. They were critiques made by the kinds of academic insiders studied in Chapter 5, defenders of the Court who were nonetheless calling for a course correction.

The new Court almost 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 Cordoba Triviño) changed its doctrine.<sup>690</sup> In a closely-contested, 5-4 decision, it conditionally upheld the 2001 budget and held that only relatively poor workers – those making less than a weighted average for all public sector salaries of four minimum salaries – had a right to keep their real salaries constant; smaller nominal increases would be acceptable for other employees. After holding that its consideration of the case was not precluded by the prior judgment, the new Court undertook a broad review of the “social state of right” and “vital minimum” principles. The Court emphasized that the conception of material equality “that inspires the social state of right is manifested plainly in the mandate of special protection for the weakest, in comparative

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<sup>687</sup> See *¿Aquí quién manda?*, *supra* note 673.

<sup>688</sup> See *Gaceta del Congreso* 482, Nov. 30, 2000, at 16.

<sup>689</sup> See *id.* at 29. Cordoba Trivino was assistant prosecutor of the nation and an Externado professor, having previously served in various other state posts and as a professor at a number of top law schools in Bogota.

<sup>690</sup> See C-1064 of 2001, Oct. 10, 2001 (Manuel Jose Cepeda & Jaime Cordoba Triviño)

terms, in the management and sharing of economic resources;” further, the social state of right principle gave a “broad margin of public policy options to the popularly elected authorities.”<sup>691</sup> Finally, the Court held that “balancing” was appropriate where the Court was weighing enforcement of constitutional duties that would have significant macroeconomic effects, because the achievement of a “social state of right” required the state to carry out a number of different – and sometimes conflicting – ends, and further because constitutional rights were not absolute.<sup>692</sup>

The Court thus used a proportionality analysis to test the constitutionality of the budget at issue.<sup>693</sup> The Court accepted the argument of the authorities that the reduction in the real value of salaries of high-earning public employees was necessary to maintain social spending at acceptable levels, which itself was a constitutionally-prioritized end. Indeed, the Court noted that textually, social spending was given priority over any other spending during times of resource shortages.<sup>694</sup> The Court also emphasized the genuine difficulties in the macroeconomic environment and the heavy cost of salaries within the budget.<sup>695</sup> Moreover, the Court emphasized the right to a “vital minimum,” which it held provided “reinforced” protection for lower-income

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<sup>691</sup> *Id.* § 4.1.2.

<sup>692</sup> *Id.* § 5.1.2.3-5.2.1.4.

<sup>693</sup> Proportionality analysis, as generally articulated, requires (1) that the end pursued by the measure be sufficiently important, (2) that the means involving the restriction on the right are rationally related to the achievement of the end and do not restrict its enjoyment more than necessary, and (3) that the social benefit in terms of the achievement of the end outweighs the harm done by the restriction of the right. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 95-97 (Sujit Choudhry, ed.). The Court found that the end of maintaining social spending was of great importance given its textual articulation in the Constitution and the definition of Colombia as a social state of law, that the real salary cuts appeared necessary to achieve that end given the great weight of salaries in the Colombian budget, and that the gain to poorer Colombians from maintaining social spending constant outweighed the harm to higher income workers. C-1064 of 2001, § 5.2.3.

<sup>694</sup> CONST. COL., art. 366 (“The general welfare and the improvement of the quality of life of the population are social ends of the State. A fundamental objective of its activity will be the solution of basic unsatisfied needs in health, education, environmental quality, and drinking water. For those effects, in the plans and budgets of the nation and the territorial entities, social public spending will have priority over all other spending.”).

<sup>695</sup> This was particularly relevant to the “necessity” stage of the proportionality inquiry, with the Court noting that “given the critical economic situation and the great demands imposed by the social spending ordered by the Constitution, on the one hand, and that spending on personnel is some of the most substantial spending sources, on the other, the Court considers that the means chosen by the Congress are necessary.” C-1064 of 2001, § 5.2.2.3.1.



workers because it provided income that they needed to access basic goods and services.<sup>696</sup> In contrast, limiting salary increases for higher-income workers did not affect their right to a vital minimum.<sup>697</sup>

The second salaries decision revealed a conflict within the Court over the meaning of the “social state of right” and “vital minimum” principles. Whereas the dissent and the authors of the initial decision argued that the social state of right implied that all workers receive at least a constant wage in real terms, the new majority was more concerned about developing a targeted right that would go primarily for the benefit of the poor. The Court’s large-scale interventions on the second full court basically followed the trend of that majority. For example, in 2003 the Court struck down parts of a tax reform that attempted to broaden the tax base by taxing a long list of basic necessities. As in the second salary case, the proportionality analysis in the VAT case was carried out in light of the constitutional principle of a social state of law and the right to a vital minimum. The Court emphasized that the taxation of primary necessities would “put persons with few resources at grave risk” by for the first time placing a tax on items that the poor would need to consume, such as food, housing, and transportation. It thus taxed “goods and services that are necessary to conserve a dignified life and which cannot be avoided without depriving [people] of them or substituting other goods taxed at an equal or higher rate.”<sup>698</sup> Similarly, the Court’s two structural reform cases examined in the last chapter – the displaced persons case of 2004 and the health case of 2008 – were undertaken for reasons that emphasized the protection of marginalized groups.<sup>699</sup> Much of the displaced population had its right to a vital minimum threatened. The health intervention affected a wider range of people, but a major

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<sup>696</sup> *Id.* § 5.2.2.1.

<sup>697</sup> *Id.* § 5.2.4.

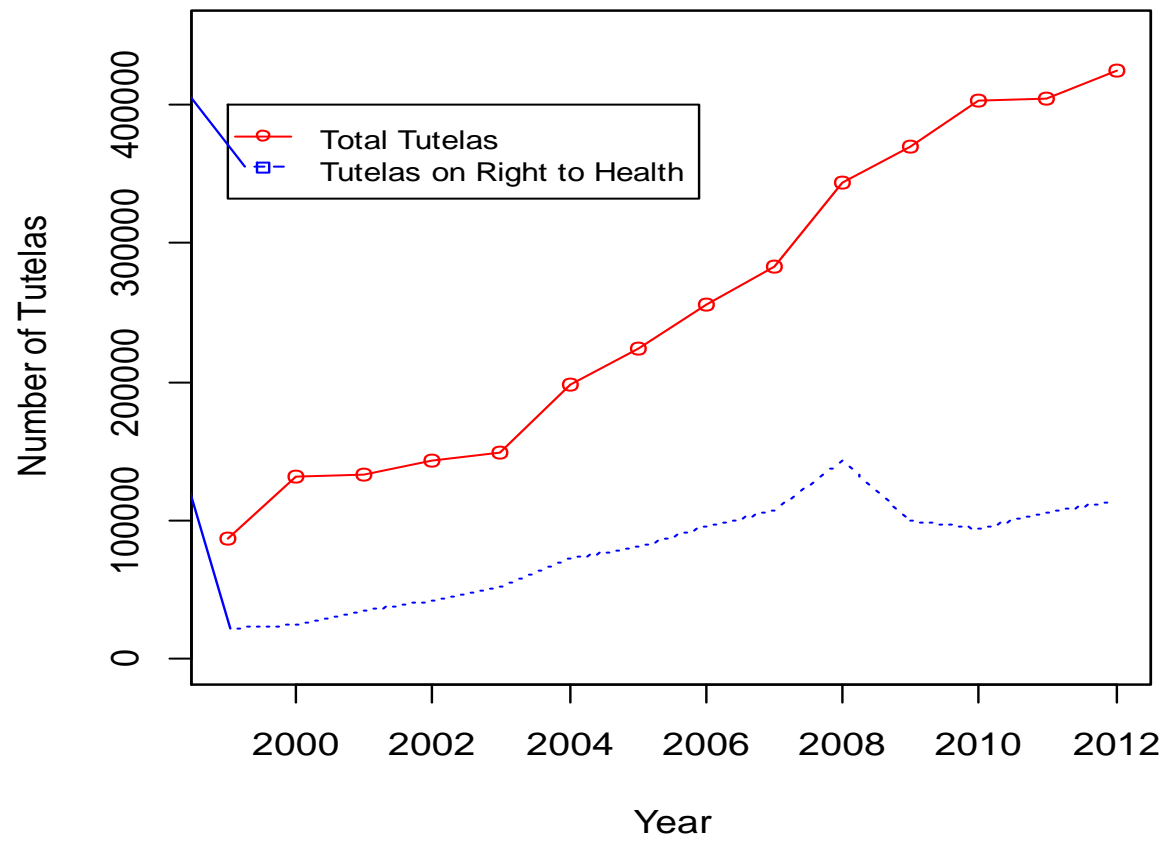
<sup>698</sup> C-776 of 2003, Sept. 9, 2003 (Manuel Jose Cepeda Espinosa), § 4.5.6.1

<sup>699</sup> *See supra* Chapter 6.

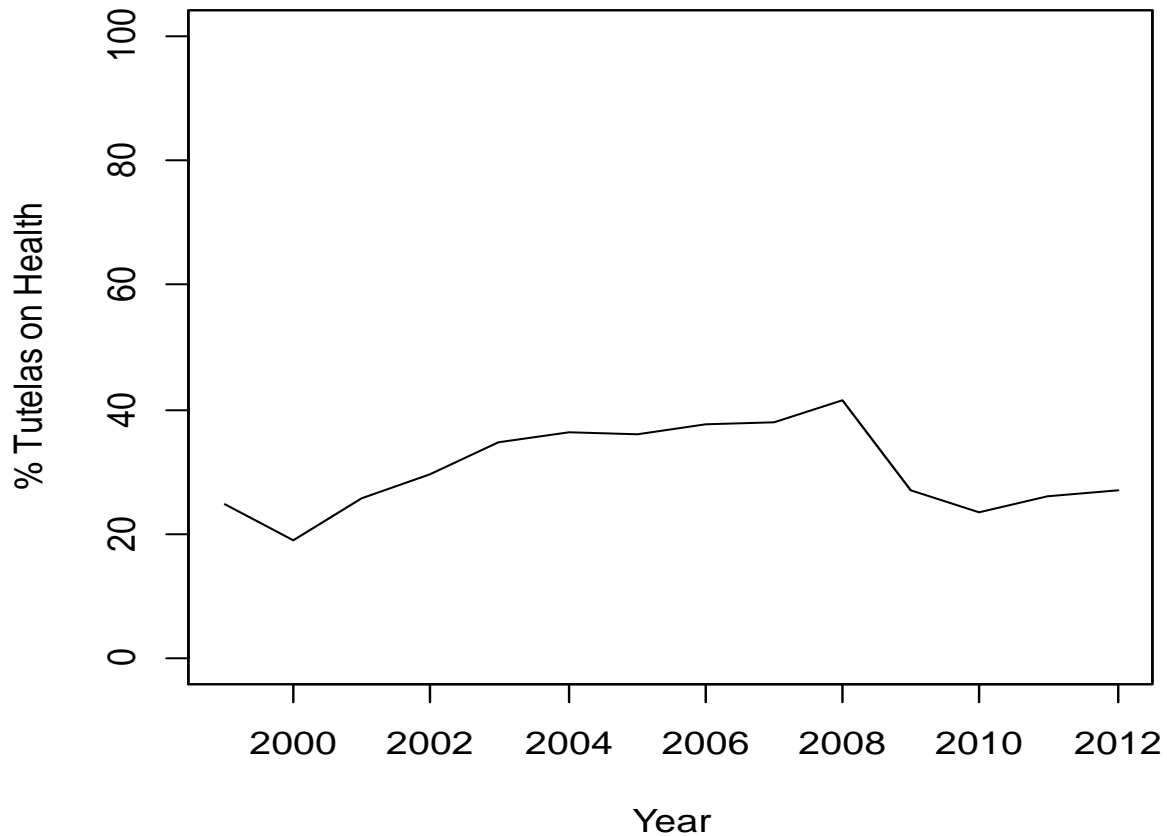
purpose of the case was equalizing the “subsidized” regime of the poor with the “contributory” regime of formal sector workers. In the wake of the first Court’s “populist moment” in the late 1990s, the second Court pushed back towards a targeted conception of the vital minimum doctrine in its structural jurisprudence. This careful targeting in large-scale cases seems to have made the Court less vulnerable to political attack.

Despite this course correction in structural cases, the Court has maintained the *tutela*’s canonical status as a refuge for the middle-class. Figure 7.2 plots both total *tutelas* and *tutelas* on the right to health since 1999, while Figure 7.3 plots health *tutelas* as a percentage of all *tutelas*, also since 1999. The general conclusion is that *tutelas* on the right to health continue to constitute a significant percentage of all *tutela* cases, almost always over 25 percent in recent years. Between 2004 and 2008, *tutelas* on health matters consistently represented almost 40 percent of the docket. And in 2012, health-related *tutelas* continued to constitute 27 percent of all *tutela* claims, and it would appear that a majority of all *tutelas* in the country still deal with socioeconomic rights issues. In health at least, petitioners continue to win most claims. Finally, there is much less systematic data on the composition of these claims, but data from the national Attorney’s General and Ombudsman on health claims suggests that they continue to be mostly middle-class claims. In short, the Court’s *tutela* jurisprudence has continued to play a bread-and-butter role for the basic material interests of middle-class Colombians on issues like healthcare and pensions.

**Figure 7.2: Total Tutelas and Health Tutelas, 1999-2012**



**Figure 7.3: Percentage of All Tutelas on Health, 1999-2012**



The key question is why the Constitutional Court failed to course correct in *tutela* cases by using a more targeted definition of the vital minimum, as it did in structural cases. A partial answer is that the incentives across these two classes of cases were different. The Court's decisions in UPAC and on public-sector salaries provoked strong outside attacks against the Court. While these decisions did mobilize middle-class and civil society support and could be rational for individual justices within Colombia's deinstitutionalized political framework, the external pressure placed on the Court seemed to have caused the academic community

supporting it to rethink both its sense of mission and core principles like the vital minimum doctrine and the social state of right. But the routinized *tutela* decisions, despite their aggregate effects on the budget, have rarely provoked the same level of political backlash. In contrast, the benefits for the Court in building up the perceived utility of the *tutela* and in making the instrument available for a range of popular causes are substantial. As detailed in the next Chapter, the popularity of the *tutela* seems to have acted as a shield against court-curbing measures.

One countervailing incentive against the spread of the *tutela* has been sheer docket pressure – the justices by the late 2000s, when the health cases reached staggering proportions, did express concern over the sheer volume of *tutelas* on the right to health. Although the Court itself has discretion over which cases to take, there was concern that the health cases were clogging up the Court system. According to its author Justice Cepeda and other justices, the structural decision of 2008 (explored in detail in the previous Chapter) was motivated largely by concern over the docket. And it is correlated with a drop in the percentage of health claims.<sup>700</sup> While health *tutelas* remain a key part of the system, they have dropped from their heights at around 40 percent of claims in the 2004-2008 years back down to around one-quarter of all cases. The healthcare case is more carefully targeted than the interventions of the late 1990s. The Court's decision to issue a structural remedy was based on ample, long-term evidence of systematic problems in the healthcare system. And the remedy was carefully tailored to the pathologies identified by the Court. Yet this decision has again placed the Court in the center of a popular economic issue, where it has prodded state authorities to improve the flow of funds within the system, the size of the POS for poorer households in the subsidized regime, and the overall clarity and content of

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<sup>700</sup> See Personal Interview, Manuel José Cepeda, Aug. 2009, Bogota, Colombia; Personal Interview, Jaime Córdoba Triviño, Aug. 2009, Bogota, Colombia.

the POS. The Court's public hearings have become heavily-covered events on the state of healthcare in the country.

In December 2009, President Uribe responded to the perceived crisis in the healthcare system by declaring a state of economic, social, and ecological emergency. Commentators noted that the 2008 structural decision by the Court was an impetus for the declaration because it placed financial pressures on the state.<sup>701</sup> The state's failure to reimburse EPSs for non-POS treatments was also leaving some institutions at risk of bankruptcy. Uribe's attempt to declare a state of economic, social, and cultural emergency ran flatly counter to the Court's accepted jurisprudence on emergency powers, which held that these powers could not be used to deal with "chronic" or "structural" factors like the long-running problems in the healthcare system. As noted in Chapter 5, even the conservative justices close to Uribe refused to uphold the measure, arguing that they had no choice under existing doctrine. The content of the decrees demonstrated the Court's consistent role as a defender of the middle class. Some of the decrees ordered new taxes to finance the system, and others attempted to increase control over corruption and other financial problems in the system. However, many decrees restricted rights that the Court has previously recognized. For example, they re-labelled no-POS treatments as "exceptional health outlays" and greatly restricted the conditions under which the state would need to fund those treatments.<sup>702</sup> For example, it forced patients to use pensions and other sources of savings to fund those treatments and limited state liability even for those patients with absolutely no resources. The decrees also placed new copays and deductibles on patients for both outpatient and inpatient services, and placed new sanctions on doctors who, *inter alia*, recommended or prescribed

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<sup>701</sup> See, e.g., Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431 (2010).

<sup>702</sup> See Decree 128 of 2010 (Jan. 21, 2010).

unauthorized treatments.<sup>703</sup> All of these measures burdened healthcare access for middle-class patients. The measures were exceptionally unpopular in the press, and the emergency overall was viewed as poorly crafted to respond to the crisis in the health sector. *Semana*, for example, stated that the emergency had “driven Colombians crazy” and that “practically the entire country was against the reforms.”<sup>704</sup> There were protests by patients groups, medical faculties, and unions of providers.<sup>705</sup> The Court’s decision to strike down the emergency, while leaving the new taxes intact for the year, was thus welcomed as a constitutional protection of the right to health.<sup>706</sup> The Court had again placed itself in the role as defender of middle class interests, this time against a still-popular president.

## V. Conclusion

This chapter has argued that the Court constructed the *tutela* to serve the material needs of the middle class on issues like healthcare and pensions, and the *tutela* has been devoted largely to serving this role since the late 1990s. During the deep economic crisis of the late 1990s, the Court went further and undertook broad structural measures for the benefit of middle-class constituencies. But these structural interventions proved unstable: while they did mobilize middle-class support and the ephemeral support of some civil society groups, and served the political careers of some individual justices, they also provoked substantial political opposition. Structural interventions since the late-1990s have become more carefully justified with respect to

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<sup>703</sup> See Decree 131 of 2010 (Jan. 21, 2010).

<sup>704</sup> See *Formula equivocada*, SEMANA, Apr. 17, 2010, available at <http://www.semana.com/nacion/articulo/formula-equivocada/115628-3>; *Cartilla para entender el lio de la salud*, SEMANA, Feb. 6, 2010, available at <http://www.semana.com/nacion/articulo/cartilla-para-entender-lío-salud/112858-3>.

<sup>705</sup> See *Formula equivocada*, *supra* note 704.

<sup>706</sup> See C-252 of 2010, Apr. 16, 2010 (Jorge Ivan Palacio Palacio).

core constitutional principles, but the mass use of the *tutela* to serve middle-class interests lives on.

In the Colombian political context, the Court's choice to serve a middle-class audience has been a rational strategy. In a weak-party environment, justices have incentives to seek support from the general public rather than seeking alliances with ephemeral political actors. The "populist" outburst of the late-1990s shows the extreme logic of this approach: justices were able to launch careers as "political entrepreneurs" by leveraging their fame from authoring prominent decisions. The longer-lasting deluge of socioeconomic *tutelas* has made the Court as an institution more difficult to attack by making elected actors gun-shy about curbing the Court's powers.

This chapter has also suggested how the different support coalitions of the Colombian Constitutional Court can conflict. The reactions to the UPAC and salary decisions are again illustrative: these decisions helped to mobilize middle-class support for the Court, but also caused consternation among some of the Court's academic supporters. The logic of these decisions and the nature of their beneficiaries appeared difficult to justify by using core principles like the vital minimum doctrine. Under political pressure, a group of new justices with close ties to this academic community remade the Court's structural jurisprudence in order to better target its economic interventions. At the same time, these justices chose to leave the Court's *tutela* jurisprudence largely intact.

An assessment of the effects of the Colombian Court's socioeconomic rights jurisprudence on Colombian politics and society is well beyond the scope of this chapter. But consistent with the general argument of the dissertation, the effects of judicial activism seem



complex and highly contextual. The Colombian example, in conjunction with other recent research from Latin America, shows that a robust socioeconomic rights jurisprudence may not be particularly pro-poor or redistributive. Reaching the poor through socioeconomic rights adjudication appears to be a difficult task for reasons both of remedial design and of judicial incentives. On the other hand, the Colombian experience shows how middle-class support strengthens judicial power and may allow aggressive judicial interventions on socioeconomic rights questions and in other areas. The Court's ability to issue decisions for the benefit of marginalized groups like displaced persons, and to undertake structural reforms of major areas like the healthcare system, may depend largely on the "shield" provided by consistent middle-class support. The protection of the Court from political pushback is the issue to which the next chapter turns.

## **Chapter 8: Explaining the Court's Success in Fending off Political Attacks: The Court Constructing its Own Shield**

A core question explored in this dissertation is how the Court was able to construct a *durable* form of activism. The past three chapters have shown how the Colombian Constitutional Court built alliances with three key communities – a set of academics, a subset of civil society, and the middle-class – through its jurisprudence. This chapter shows how these alliances have helped to protect the Court against political attempts to weaken it. In other words, it demonstrates how the Court constructed its own shield against attempts to engage in both court-curbing (or legislative attempts to weaken the powers of the Court) and court-packing (or attempts to reduce the activism of the Court through replacement of court personnel). Neither of these shields has been perfect, but both have been sufficient to protect the Court's power despite repeated political attacks.

The stock answers for why courts maintain political independence or power and avoid being curbed or packed rely on political competition or fragmentation. These theories are intuitive and easily stated. A more fragmented party system may make it more difficult for powerful political forces to curb a court because they make it tougher to get sufficient votes in the Congress. Similarly, conditions of divided governance where different parties control different political institutions (like the presidency and legislature) may increase the “zone of tolerance” in which a court can work without fearing successful legislative backlash. Finally, in so-called insurance models, parties presently in power in a competitive political system may hesitate to attack a court because they fear losing power in the future and want to rely on a Court as a hedge. And the same theories that explain an absence of successful court-curbing may

explain an absence of successful court-packing. For example, a more fragmented political system may make it more difficult for a single political force to dominate selections to a court and thus to pack it.

The existence of political competition and fragmentation are relevant to understanding the Colombian case, as explained in Part I. Legislative politics was dominated by the traditional Liberal and Conservative parties during the National Front, but these parties became increasingly factionalized through time. After outsider political movements won a number of seats to the 1991 Constituent Assembly, the two parties returned to hegemony in the post-Assembly Congresses of the 1990s but increasingly lost their meaning as coherent entities. By the mid-2000s, the two parties had lost a considerable amount of their support and an increasing number of seats was being won by new movements and “electoral microenterprises.” As explained in Chapter 4, the Court constructed its shared ideology largely around a sense that the Congress is a dysfunctional body because of the defects in the party system, and thus was incapable of responding to the “spirit” of the 1991 Constitution.

There is some evidence presented in this chapter that political fragmentation also made it more difficult to curb or pack the Colombian Constitutional Court. The presidents in the post-1991 period have generally either had legislative majorities but these majorities have been weakly unified (as with the Liberal party in the mid-1990s) or they have lacked these majorities and had to rely on different movements to cobble together a coalition. This complicated the task of building majorities either to rein in the Court’s power or to pack it. But the fragmentation theory is incomplete as an explanation of the Colombian case in at least two ways. It does not account for variations in the success of presidents across issue areas, and it does not account for the variation of presidents through time.

The argument here is that the Court's own actions and alliances substantially raised the costs of court-curbing and court-packing measures. Part II shows how court-curbing measures were met by mobilizations from both the court and its surrounding academic and civil society communities. These communities worked to raise consciousness about the reforms and to frame them as attempts to destroy the *tutela*. The Court and its allies have understood that because the Court has constructed the *tutela* to be a very popular middle-class instrument for acceding to basic services, frontal attacks on the *tutela* are politically difficult. These tactics have generally worked to prevent aggressive court-curbing measures. Part III shows how the Court's actions have constructed a similar buffer against court-packing. Both political fragmentation and the design of the selection mechanism for the Court have made it more difficult for a single actor to control appointments. But the three institutions (the president, Supreme Court, and Council of State) charged with formulating the lists from which justices are chosen have all, at various points, had strong incentives to weaken the Court. The Court has maintained continuity, then, by monopolizing the supply of individuals knowledgeable in the thick and detailed jurisprudential lines created by the Court. New arrivals have tended not to be experts in constitutional law and have found it impossible to enact changes in the Court's jurisprudence without the support of a qualified team (chiefly *magistrados auxiliares*). But these teams in turn have helped to maintain continuity while weakening justices who would make sharp changes in judicial culture. In essence, then, the Court's alliances with its academic and civil society allies, as well as with the middle class, have acted as a shield against efforts to weaken it.

The biggest test case for both of these mechanisms came during the path-breaking presidency of Alvaro Uribe (2002-2010), who enjoyed immense personal popularity, generally controlled a solid majority coalition in Congress, and who was able to amend the Constitution in order to

serve an unprecedented second term in office. Uribe made conscious efforts to influence the Court both through threatening court-curbing reforms and through controlling the selection process; by and large, these efforts did not succeed. Uribe's coalition threatened to fray over his court-curbing measures, and in particular many of his supporters did not want to launch a perceived attack on the *tutela*, which was a very popular mechanism. Uribe also appointed two justices who were very sympathetic to him and potentially dangerous to the Court, but the new justices had great difficulty in altering its major doctrinal lines. In the end, the Court maintained sufficient distance from Uribe towards the end of his second term to both strike down his attempt to declare an emergency in the healthcare sector (unanimously) and to strike down a constitutional referendum allowing his second reelection (by a seven to two vote).

### **I. The Context: A Deinstitutionalizing Party System Post-1991**

Mainwaring and Scully argue for the importance of party-system “institutionalization,” or the extent to which parties have stable, deep social roots.<sup>707</sup> Institutionalized parties tend to be internally disciplined, long-lasting, and to have clear ideological platforms.<sup>708</sup> Non-institutionalized parties lack these characteristics. The Colombian system in its heyday was highly institutionalized – the two traditional parties, the Liberals and Conservatives, virtually monopolized political power over long periods of time. Party identifications were durable, often being passed down through generations of a family. Further, at one point the system had a moderately high degree of polarization – the two parties had different visions on a range of issues, including the role of the state in the economy, the relationship between church and state,

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<sup>707</sup> See Scott Mainwaring and Timothy R. Scully, *Introduction: Party Systems in Latin America*, in *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 1* (Scott Mainwaring & Timothy R. Scully, eds., 1995).

<sup>708</sup> See *id.* at 4-5 (stating that institutionalization depends on whether patterns of party competition are somewhat regular, the parties have stable social roots and consistent ideological positions, the major political actors accord legitimacy to the process, and party organizations matter).

the extent of the franchise, and other issues. The National Front however had important effects on the party system. The ideological differences between the two parties waned, until the church-state dimension was virtually the only sharp distinction left. Moreover, the two parties became highly factionalized, largely because the system ensured a certain percentage of slots for both parties, making inter-party competition pointless but forcing bosses to squabble intra-party for their distribution of political power and spoils. By the 1980s, the two-party system was widely seen as corrupt, illegitimate, and unable to respond to the current needs of the people. The 1991 Constituent Assembly was seen as a way to overhaul the political and party systems.

The Assembly, which was largely controlled by a coalition of insider movements (chiefly the Liberals) and outsider movements (the M-19 and Alvaro Gomez's Movimiento de Salvacion Nacional), did enact important reforms to the system of political representation. Most importantly, it shifted the Senate from a system of regional representation to one where all Senators were elected via pure proportional representation, from a single nation-wide district.<sup>709</sup> The outsider movements favored these sorts of reforms, as well as other ones making party and movement registration and financing easier, because they viewed it as their opening into the traditional two-party monopoly.<sup>710</sup> However, the 1991 Constitution did not take any real steps to control factionalization and party indiscipline. For example, the legal framework continued to allow parties and movements to run multiple lists per party, and it utilized a system of quotas and remainders that tended to allow a high number of lists to win a single seat each.<sup>711</sup>

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<sup>709</sup> See CONST. COL., art. 171.

<sup>710</sup> See Lawrence Boudon, *Colombia's M-19 Democratic Alliance: A Case Study in New Party Self-Destruction*, 28 LAT. AM. PERSP. 73, 78-79 (2001) (explaining the agenda of the M-19); HUMBERTO DE LA CALLE, CONTRA TODAS LAS APUESTAS: HISTORIA INTIMA DE LA CONSTITUYENTE DE 1991, at 147-49; (2004) (same).

<sup>711</sup> See Matthew Soberg Shugart, Erika Moreno, & Luis Fajardo, *Deepening Democracy by Renovating Political Practices: The Struggle for Electoral Reform in Colombia*, in PEACE, DEMOCRACY, AND HUMAN RIGHTS IN COLOMBIA 202 (CHRISTOPHER WELNA & GUSTAVO GALLON, EDS., 2006).

**Figure 8.1: No. of Senate Seats held by the Liberal and Conservative Parties, 1991-2010**

**(Out of 100 Elected Seats & 102 Total Seats)**

1991	1994	1998	2002	2006	2010
85	91	88	79	35	40

This design had fairly predictable results. The system became somewhat more inclusive, although the hopes of the outsiders in the 1991 Assembly for a thorough remaking of the party system did not occur. Instead, the party system continued to deinstitutionalize. Throughout the 1990s, the Liberals and Conservatives continued to control most seats in both houses of Congress, although they tended to gradually lose support over time (as Figure 8.1 shows).<sup>712</sup> But the Liberal and Conservative parties became even weaker and more factionalized – these parties were now only loose coalitions of factions, each running a large number of competing lists. Virtually all Senators were now elected off of lists that elected only a single Senator, and those few lists electing more than one Senator elected only two or three each.<sup>713</sup> Unsurprisingly, studies found that party discipline in the traditional parties was quite low, and that most members of congress focused almost entirely on cultivating local rather than national bases of support.<sup>714</sup> Indeed, studies found that the Colombian electoral system in this period was the most personalist in the world, providing politicians with very strong incentives to cultivate individual bases of

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<sup>712</sup> See Eduardo Pierre Leongomez, *Giants with Feet of Clay: Political Parties in Colombia*, in *THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES* 78, 88 tbl. 3.3 (Scott Mainwaring, Ana María Bejarano and Eduardo Pizarro Leongómez, eds., 2006) (showing that the Liberals and Conservatives continued to control 85 of 100 Senate seats in 1991, 92 in 1994, 88 in 1998, and 79 in 2002).

<sup>713</sup> In 1994, 1998 and 2002, only 3 lists elected more than one Senator, and these lists elected a total of 6, 6, and 7 Senators respectively. All other Senators were elected from lists that elected only a single Senator. See *id.* at 86 tbl. 3.2.

<sup>714</sup> See Erika Moreno, *Whither the Colombian Two-Party System? An Assessment of Political Reforms and their Limits*, 24 *ELEC. STUD.* 485 (2005).

support rather than running on the party label.<sup>715</sup> Parties in these conditions could not serve as effective conveyors of ideological principles.

The Liberals and Conservatives also gradually lost support through time. One key moment came during a crisis of governance during the Liberal Ernesto Samper administration (1994-1998), where the president was nearly impeached for receiving money from drug cartels and where violence spiked considerably.<sup>716</sup> Another came when a dissident Liberal, Alvaro Uribe, won election in 2002 by running as a true outsider, the first president to be elected outside of the two-party system<sup>717</sup> By the start of Uribe's first term, the number of Liberals and Conservatives in Congress had decreased markedly. But the replacement parties were not ideologically coherent, well-organized, or stable enterprises. Instead, as Eduardo Pizarro Leongomez has argued, they were mostly "electoral micro-enterprises," which were small, personalistic vehicles used to elect single politicians or small groups.<sup>718</sup> These movements often lacked clear ideological platforms and were highly unstable, with many of them disappearing after each new election. Some of the members elected on these lists had serious interests in policy and became congressional leaders, but without parties to tie them together they had no real influence. Thus, the decline of the traditional parties did not immediately bring about a stronger party system, but instead created a kind of vacuum that was filled by a series of personalistic movements. In short, by 2002 the party system had become deinstitutionalized.

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<sup>715</sup> See John Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELEC. STUDS. 417 (1995).

<sup>716</sup> On the Samper impeachment, see, for example, Victor J. Hinojosa & Anibal S. Perez-Linan, *Presidential Survival and the Impeachment Process: The United States and Colombia*, 121 POL. SCI. Q. 653 (2006)

<sup>717</sup> In 1994, 1998 and 2002, only 3 lists elected more than one Senator, and these lists elected a total of 6, 6, and 7 Senators respectively. All other Senators were elected from lists that elected only a single Senator.

See Leongomez, *supra* note 712, at 86 tbl.3.2.

<sup>718</sup> See *id.* at 78.



During Uribe's two terms (2002-2010), however, the party system did undergo realignment in a way that lent it somewhat more coherence. A constitutional reform was passed in 2003 which required parties to run only one list per electoral district, and which changed the system of allocating quotas and remainders among different parties.<sup>719</sup> Subsequent statutory reforms in 2005 went even further, for example by allowing parties to sanction members who did not vote in accordance with the position of the party.<sup>720</sup> The result of these reforms has been to impose somewhat more coherence on the Colombian party system. By the end of Uribe's second term, the effective number of parties had fallen to a more moderate level, and the bulk of parties had fallen into a binary government-opposition pattern, forming either part of the governing coalition or opposing it. The legal reforms of the past decade have had important effects, it is important not to overstate what was achieved. The reforms brought fragmentation down and somewhat increased the stability of political movements. However, most parties still tend to lack a clear ideological definition; parties tend to revolve around individual personalities rather than clear ideological platforms. A good example of this is provided by the Party of the U, which was founded by Uribe in 2005 as his personal electoral vehicle. The party struggled to find a coherent ideological identity beyond its identification with Uribe, and recently suffered a significant split due to the fissure between ex-President Uribe (2002-2010) and current President Alvaro Santos (2010-present), both of whom pertained to the party.

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<sup>719</sup> See Shugart, Moreno, & Fajardo, *supra* note 711. In particular, the system of allocating remainders was switched from a simple quota and largest remainder system (SQLR), which tended to widely disperse seats across a large number of lists, to a D'Hondt system, which tended to allocate more seats to the more successful lists. Note however that the lists presented by parties could be either open (where voters had to vote for the list, and candidates were selected in the order parties placed them on the list) or closed (where voters could select individual candidates from a given list, even if they were further down that list). See Monica Pachon & Matthew S. Shugart, *Electoral Reform and the Mirror Image of Inter-Party and Intra-Party Competition: The Adoption of Party Lists in Colombia*, 29 ELEC. STUDS. 648, 649 (2010).

<sup>720</sup> See Ley 974 de 2005.

Further, the party system and the Congress have both suffered a severe legitimacy crisis since the 1990s, due to the widespread perception that political actors have been corrupted by illegal actors, particularly drug cartels and now paramilitary groups. An important moment in this de-legitimization occurred during the so-called Process 8000 in 1996, when the House investigated President Ernesto Samper for receiving money from the Cali Cartel to fund his presidential campaign, but eventually absolved him in a 111 to 43 vote that was widely seen as penetrated by corruption.<sup>721</sup> The United States temporarily withdrew Samper's visa and decertified the country's efforts to combat drugs. The problem of paramilitary penetration of congressional politicians remains visible and widespread. A huge number of congressional actors have been investigated or put in jail by the Criminal Chamber of the Supreme Court – in the 2006-2010 congressional term, for example, an astonishing 98 members of Congress (out of a total of 278) had been investigated and 35 convicted of links to paramilitaries by the end of 2011.<sup>722</sup> This has created a popular perception that the Congress is an illegitimate institution.

The Colombian party system thus deinstitutionalized in the 1990s and fragmented in the 2000s. Despite meaningful legal reforms, it has not fully re-institutionalized since that time. The deinstitutionalization and fragmentation of the party system is plausibly relevant to understanding why political attempts to rein in the Court's power have failed. The material in Part II below shows how presidents in both the 1990s and 2000s had to work hard to cobble together coalitions for court-curbing efforts; barriers would plausibly have been lower in systems with, say, a single dominant party. The material in Part III shows how presidents sometimes failed to get their preferred candidate for the Court through the Congress; this obstacle to court-

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<sup>721</sup> See Victor J. Hinojosa & Anibal S. Perez-Linan, *Presidential Survival and the Impeachment Process: The United States and Colombia*, 121 POL. SCI. Q. 653 (2006).

<sup>722</sup> These numbers are taken from Arco Iris, [www.arcoiris.com.co](http://www.arcoiris.com.co).

packing would again have been less important in political systems where the president controlled a substantial majority.

At the same time, the party system thesis leaves key questions unanswered. Colombian presidents have been able to pass substantial pieces of legislation in other areas. Even presidents like Ernesto Samper, often regarded as fairly weak, were able to pass meaningful legislative and constitutional proposals through Congress. Thus the fragmentation thesis on its own has trouble explaining why judicial power and independence are distinct topics from other areas where presidents had more success pushing their agendas. Similarly, the fragmentation thesis fails to explain the consistent lack of political success in reining in the Court over time. The post-1991 period has seen significant variation in the strength of presidents. While some presidents in this period have been regarded as weak, others like Alvaro Uribe have wielded substantial power both inside and outside of Congress. The Uribe administration had relatively low formal support in Congress (measured by party adherents), but in practice Uribe had a large coalition and substantial power to push through his agenda. The Uribe administration launched the most serious attacks against the Court; all failed.

## **II. How Court-Curbing Failed**

In this section I show that efforts to curb the Colombian Court by limiting its jurisdiction or powers have generally failed. I focus here on the three most important legislative efforts against the Court – an attempt by President Samper, the Supreme Court, and the Council of State to limit the Court’s powers in the 1996 and 1997 period, an attempt by President Alvaro Uribe to sharply

limit the power of the Court in 2002, and an attempt by the Uribe and Santos administrations to limit the Court's power by consecrating a constitutional principle of "fiscal sustainability." The Court's responses to these efforts, after the initial effort in 1996, show a common pattern: the Court and its academic and civil society allies mobilize in the Congress and in the press to frame the initiatives as mortal blows to the *tutela*. This effort generally blocks or at least weakens legislative action – the popularity of the *tutela*, explored in the previous chapter, makes it particularly difficult to attack.

### **A. Attacks Against the Court in the Samper Administration**

President Ernesto Samper (1994-1998) undertook a massive constitutional reform effort in 1996, aiming to fix what he saw as a series of problems with the new institutional order. Samper was generally critical of the new constitution, arguing that it unduly limited presidential power. His reforms thus generally aimed at increasing the power of the Colombian presidency. Vis-à-vis the Court, Samper's most important initiative would have taken away its power to review declarations of states of internal commotion. Samper had used this power twice in the first years of his government, first as a general measure against violence shortly after taking office, and second following the assassination of the prominent Conservative politician (and co-president of the Constitutional Assembly) Alvaro Hurtado Gomez. The Court completely struck down the first declaration, although it upheld most of the second one.<sup>723</sup> The Court's theory was that the State of Internal Commotion could not be used to deal with "endemic" factors or

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<sup>723</sup> See C-466 of 1995, Oct. 18, 1995 (Carlos Gaviria Daiz) (completing striking down a declaration of a state of internal commotion as being based on "chronic violence" best dealt with by ordinary means rather than on ); C-027 of 1995, Feb. 2, 1995 (Eduardo Cifuentes Munoz) (generally upholding a declaration).

“chronic violence,” which had to be fixed using ordinary legislative means, but rather was limited to dealing with “momentary, temporary” crises.<sup>724</sup>

Samper saw this limitation as a substantial impediment to governance, particularly since he governed during a difficult period in which guerrilla groups, paramilitary groups, and drug cartels all caused serious problems for the state.<sup>725</sup> Samper thus argued in his exposition of motives that the “great problem of the country is that of public order and of the powers of the President to dictate measures serving to overcome it,” and complained about the jurisprudence of the Court on this topic.<sup>726</sup> He argued that the Court had misinterpreted the 1991 Constitution in giving itself the power to review these declarations and stated that he was seeking to avoid “the constant problem that the value judgment about the nature of the disturbance ceases to be an exclusive judgment of the President of the Republic and instead being transferred to the Constitutional Court.”<sup>727</sup> Samper’s limitations on the Constitutional Court were part of a broader package of reforms aimed at strengthening his emergency powers: for example he would have taken away the temporal limitations on the emergency and allowed certain criminal measures to be permanent rather than expiring when the emergency ended.<sup>728</sup>

Samper also included two other important attacks against the Court: he sought to exclude the *tutela* from being taken against judicial decisions and he sought to prevent the Court from

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<sup>724</sup> See *id.* § VIII.

<sup>725</sup> See generally Alejandro Santos Rubino, *Vicisitudes del gobierno de Ernesto Samper*, in VIII NUEVA HISTORIA DE COLOMBIA 157 (1998).

<sup>726</sup> See 329 Gaceta del Congreso, Aug. 15, 1996, at 13. Regarding the Constitutional Court, Samper made the following statement:

Additionally, the interpretations that have come from the Constitutional Court have shut down the powers of the President to adequately confront the successive appearance of problems that are superimposed on the initial causes of the commotion. New facts accumulated with old facts demand, for the management of the public order problem, measures that seem distinct based on their causes, but are necessarily connected by their nature and dynamic. *Id.*

<sup>727</sup> *Id.* at 14; see also *Reducir Control de la Corte*, EL TIEMPO, July 10, 1996, available at <http://www.eltiempo.com/archivo/documento/MAM-439949>.

<sup>728</sup> See 329 Gaceta del Congreso at 13.

issuing so-called conditional or integrative decision. In the former type of decision, the Court upholds a norm but only subject to being interpreted in a certain specific way specified by the Court; in the latter type of decision, the Court actually added content to a norm in order to make it constitutional. Samper stated that this second provision was necessary in order to prevent the Court from “making law ..., which is a power of the legislator.”<sup>729</sup>

**Figure 8.2: 1994 Legislative Elections**

	<b>House</b>	<b>Senate</b>
Liberals	94	59
Conservatives	56	32
All other movements	13	11
Total	163	102

However, Samper had a difficult time pushing his initiatives through the Congress. He faced a difficult governability problem. As Figure 8.2 shows, Samper’s Liberal party maintained technical majorities in both houses. However, the partisan composition understated the difficulties of governance. Samper’s own liberal party was highly factionalized, and he often could not count on support from elements of his own party. Most delegates were elected via remainder from lists that won only one seat, and thus many of the liberals had no direct relationship to Samper. Further, the growing number of delegates not affiliated with either list were scattered among numerous movements. In the Senate, for example, the nine independent seats were won by nine different movements. Finally, Samper became personally unpopular – he faced an impeachment vote in the Chamber of Deputies in the summer of 1996, which decided

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<sup>729</sup> *Id.* at 14.

by a 111 to 43 vote against pursuing an impeachment process against him.<sup>730</sup> It was alleged that Samper's runoff election had been financed by members of the Cali cartel, and the opposition produced solid evidence – in the form of taped conversations – to attest to that fact. Samper's popularity plummeted in the early months following this disclosure, and subsequently hovered around 40 percent.<sup>731</sup>

Samper's proposals faced a markedly rough reception in Committee. The *ponentes* or managers in the respective Committees and the floor, for example (all led by Liberals), slowly chipped away at key proposals. The House watered down Samper's reforms to the State of Internal Commotion, arguing for example that the allowance of indefinite duration would represent a return to the past.<sup>732</sup> They also scrapped proposals reforming the *tutela* by prohibiting the high ordinary courts from hearing *tutelas* and prohibiting the *tutela* against judicial decisions. As the House Committee report found on the latter issue after surveying relevant Constitutional Court jurisprudence, "in some cases, very few in a state of law, when the judge infringes in decisions fundamental rights and there is no recourse to preserve this fundamental right, the *tutela* action can act as a defensive mechanism for the vulnerable right."<sup>733</sup> The House Committee thus decided to leave Article 86 of the Constitution, regulating the *tutela*,

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<sup>730</sup> See Santos Rubino, *supra* note 725, at 176-77.

<sup>731</sup> See, e.g., Hinojosa & Perez-Linan, *supra* note 721, at 664 f.1 (2006) (noting that President Samper "suffered a sharp decline in popularity" from over 80 percent support to less than 40 percent, when the accusations first came out). Those congressmen who voted against impeachment were then investigated by the Criminal Chamber of the Supreme Court on the grounds that their votes lacked a factual basis, but the Constitutional Court, in an important decision, held that political actors enjoyed immunity from being prosecuted based on their voting decisions. See SU-047 of 1999, Jan. 29, 1999 (Carlos Gaviria Diaz).

<sup>732</sup> See Year V, 421 Gaceta del Congreso, Oct. 4, 1996, at 16 ("Thus, to return to the indefinite character of the state of exception, and particularly the state of internal commotion is to return to the past and to relive the vices so strongly criticized by [scholars] of constitutional law and by public opinion.... [T]he government proposal on this topic is inappropriate because there has been and continues being a national clamor that the State of Exception must have a time limit."). The Committee Report agreed however with presidential proposals to strip the Court of jurisdiction to review declarations of states of internal commotions (as opposed to the decrees passed while it was in effect), and to take away the Court's power to issue conditional and integrative decisions. See *id.* at 19, 21-22.

<sup>733</sup> *Id.* at 7.

unchanged.<sup>734</sup> The Report argued that “the consecration of fundamental rights in our constitution and the...facility to protect them via a rapid, effective, opportune action in front of any judge, through the tutela, is one of the great conquests of the Colombian nationality in the 1991 Constitution. All of the arguments drive at the need to keep the institution as it was originally conceived.”<sup>735</sup> The reform that passed the House in the first round was thus quite different from the reform initially proposed.

The reception in the Senate was even rougher – the Senate Committee report (again headed by Liberals) rejected virtually all of Samper’s changes to the State of Internal Commotion. For example, the Report soundly rejected the idea that the Court should have its powers to review declarations of states of internal commotion revoked. The “proposal to suppress judicial control over the decrees declaring a state of exception represents a dark return to the epoch in which there were zones of action by powers that were immune to the control of the judges of the Republic.... [A]t root what is sought by these reforms is to weaken the system of inter-branch controls over the government....”<sup>736</sup> The Committee eventually voted to kill the entire reform proposal, but the floor of the Senate again took up the measure.<sup>737</sup> The floor debate, in December 1996, proved quite difficult for the government. Conservatives generally opposed the reform, as did many independents and a significant number of Liberals.<sup>738</sup> Opponents of the bill noted that it attacked institutions such as the Constitutional Court, and labeled it as a

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<sup>734</sup> Year V, 479 Gaceta del Congreso, Oct. 30, 1996, at 8.

<sup>735</sup> Year V, 421 Gaceta del Congreso, Oct. 4, 1996, at 16.

<sup>736</sup> Year V, 549 Gaceta del Congreso, Dec. 2, 1996, at 66.

<sup>737</sup> See *Se Hundio la Reforma Política*, EL TIEMPO, Dec. 6, 1996, available at

<http://www.eltiempo.com/archivo/documento/MAM-623148>. 5 Liberals, 4 Conservatives, and 2 independents joined in the committee vote to kill the project; only 1 Conservative joined 7 Liberals voting in favor of it.

<sup>738</sup> See *Duro Debate Final a la Reforma Constitucional*, EL TIEMPO, Dec. 17, 1996, available at

<http://www.eltiempo.com/archivo/documento/MAM-651909>.



“counter-reform” that would regress from the advances made in 1991.<sup>739</sup> The full Senate finally passed a version of the proposals in a vote at which there was arguably not a quorum, but the lack of a quorum and the vast differences between the House and Senate versions of the bill placed the project in jeopardy.<sup>740</sup> Further, members of the Cabinet thought that the prospects for the second round, when an absolute majority of all members of Congress would be required (rather than a mere majority of those voting as in the first round), were bleak. They thus killed the proposal in early 1997.<sup>741</sup>

Thus, in part what saved the Court in this round was the generally high level of fragmentation in the legislature, which prevented Samper from easily marshaling majorities to pass major and controversial pieces of legislation. There is also evidence that the Court’s popular decisions, especially on state of emergency powers and on the *tutela*, aided its cause. It is particularly striking that the Congress soundly rejected reforms to the *tutela* and that they referred to it as a critical instrument for the protection of fundamental rights. This was the first example of the *tutela*’s sacred status within Colombian political and social discourse, a theme that would play more prominently in subsequent episodes.

The Council of State and Supreme Court were sufficiently emboldened by Samper’s proposal to initiate their own reform of the *tutela* in early 1997. They argued that the volume of *tutelas* had overwhelmed their courts and that the *tutela* had gone too far in replacing other, ordinary actions, causing “trauma in the ordinary and contentious-administrative administration

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<sup>739</sup> See, e.g., 557 Gaceta del Congreso, Dec. 4, 1996, at 3 (minority report of Luis Humberto Gomez Gallo & Jairo Escobar Fernandez).

<sup>740</sup> See *Vicios de Tramite Amenazan la Reforma*, EL TIEMPO, Dec. 13, 1996, available at <http://www.eltiempo.com/archivo/documento/MAM-646291>.

<sup>741</sup> See *Gobierno Retira Reforma Politica*, EL TIEMPO, Feb. 12, 1997, available at <http://www.eltiempo.com/archivo/documento/MAM-585699>.

of justice.”<sup>742</sup> They thus proposed amending article 86 to hold that *tutelas* could not be taken or appealed to the high ordinary courts. Further, they proposed to abolish the *tutela* against judicial decisions, arguing that this threatened principles of legal certainty and the autonomy of the systems headed by the Council of State and Supreme Court.<sup>743</sup> In their remarks before the House Committee, the President of the Council of State raised broader concerns regarding the *tutela*, for example complaining about a case on the Atlantic Coast where a *tutela* judge supposedly “ordered the mayor to carry [a man] water every day on a mule,” because that man had no access to potable water.<sup>744</sup>

The proposal, like Samper’s proposal, met with a tough reaction in the Congress. The proposal initially passed in the first round in the House and Senate, but not without facing significant opposition. The coalition around the Court, perhaps mobilized by the Samper efforts from a year earlier, mobilized in force. The Deans of the Rosario, los Andes, and Externado University law schools all voiced strong opposition to the proposal, as did various civil society groups and members of the Constitutional Court.<sup>745</sup> Opponents of the reform framed it as an attack on the instrument itself. For example, Senator Parmenio Cuellar stated in debate:

The people have used the *tutela* action because it is the fastest instrument to resolve a right.... That is why Colombians care so much about the *tutela* and that is why I believe it should not be reformed so lightly....<sup>746</sup>

Further, Senator Hector Heli Rojas argued that the country “would pay a higher price for disrupting the entire system of human rights protection in Colombia than the pyrrhic victory that

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<sup>742</sup> Year VI, 59 Gaceta del Congreso, Mar. 19, 1997, at 1.

<sup>743</sup> See *id.* at 3.

<sup>744</sup> Year VI, 194 Gaceta del Congreso, June 10, 1997, at 26.

<sup>745</sup> See, e.g., Year VI, 263 Gaceta del Congreso, July 10, 1997 (recounting the first round of Committee debates in the Senate); Year VI, 413 Gaceta del Congreso, Oct. 7, 1997 (recounting the second round of Committee debates in the House).

<sup>746</sup> Year VI, 263 Gaceta del Congreso, July 10, 1997, at 27.

could be obtained because the [Supreme] Court and the Council of State have a few minor pieces of business.”<sup>747</sup> Finally, the then-President of the Constitutional Court, Antonio Barrera, argued on the floor of the House in the second round that the measure would “deal a mortal blow to the *tutela*.”<sup>748</sup>

In contrast, the proponents of the measure were forced to defend it as a narrow, technical one that dealt with a discrete group of problems and did not undermine the basic nature of the *tutela*. In response to Senator Cuellar, for example, Senator Jorge Eliecer Escobar stated that “[u]ndoubtedly in the country nobody disputes the transcendental nature and importance of the *tutela* action for the vindication of the fundamental rights of the citizenry....”<sup>749</sup> Similarly, the President of the Supreme Court, Didimo Paez, took to the floor of the Senate and argued that “the project that was presented did not touch the *tutela* in any sense, in any sense. I refer to the *tutela* institution as an instrument for the protection of human rights; it touches only the procedural aspect....”<sup>750</sup>

The proposal again passed out of Committee in the second round in the House of Representatives, but after several failed attempts to gather a quorum, failed to garner an absolute majority on the House floor. A vote of 75 to 37 approved a report bringing the Committee’s proposal to the plenary, but this fell short of an absolute majority of the House, which would be 83 members.<sup>751</sup> Those who favored the proposal argued that its defeat was a victory for the *tutela*. For example, Representative Alegria Fonseca announced that “the *tutela* had been

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<sup>747</sup> *Id.* at 29.

<sup>748</sup> Year VI, 451 Gaceta del Congreso, Oct. 31, 1997, at 20.

<sup>749</sup> Year VI, 263 Gaceta del Congreso, July 10, 1997, at 27.

<sup>750</sup> *Id.* at 36.

<sup>751</sup> See *Se Hundio Reforma a la Tutela*, EL TIEMPO, Nov. 19, 1997, available at <http://www.eltiempo.com/archivo/documento/MAM-701848>.

saved.”<sup>752</sup> The President of the Council of State expressed frustration with the political process, arguing that members of the Congress “did not understand the project” and that members of the Constitutional Court had “incited the population” by framing it as a “conspiracy against the *tutela*.”<sup>753</sup> He also admitted that the justices of the Supreme Court and Council of State had “difficulty organizing a quorum because they did not have the political skill, and could not offer anything.”<sup>754</sup> The President of the Supreme Court retired over the incident, after attacking both the Constitutional Court and the Congress.<sup>755</sup> The failure of this second court-curbing effort showed that the *tutela* was becoming an increasingly powerful symbol in Colombian politics. The Constitutional Court’s skillful management of the instrument and its corresponding importance to members of the middle class made it an increasingly difficult target to attack.

## **B. Attacks Against the Colombian Court in the Uribe Administration**

In 2002, Alvaro Uribe won the presidential office in the first round, winning a surprising 53 percent of the vote and thus obviating the need for a runoff. Uribe was popular when elected, and would subsequently reach levels of popularity never before seen in modern Colombian politics. Moreover, Uribe wielded more power over the legislative process than had his recent predecessors. Figure 8.3 shows that the two-party system had deteriorated since 1991; a series of highly fragmented independent lists made up the rest of the seats. Indeed, the effective number of parties in the House jumped from 2.82 in 1994 and 3.27 in 1998 to 7.39 in 2002, while a full 56 parties or movements won representation in the House and 47 in the Senate.<sup>756</sup> Most parties or movements won only a single seat. Yet Uribe, though lacking a party of his own, through

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<sup>752</sup> *Id.*

<sup>753</sup> See John Gutierrez, *Congreso no dio la Talla en Reforma de Tutela*, Nov. 28, 1997, available at <http://www.eltiempo.com/archivo/documento/MAM-680262>.

<sup>754</sup> *Id.*

<sup>755</sup> See *Presidente de la Corte Suprema Anuncia Retiro*, EL TIEMPO, Nov. 21, 1997, available at <http://www.eltiempo.com/archivo/documento/MAM-662843>.

<sup>756</sup> See STEVEN L. TAYLOR, VOTING AMID VIOLENCE: ELECTORAL DEMOCRACY IN COLOMBIA 93 tbl. 5.1 (2009).

personal popularity and political skill proved adept at gaining the support of a majority of legislators. He had the solid support of Conservatives, won factions of the Liberals, and tended to control many of the independent votes.

**Figure 8.3: 2002 Legislative Elections**

	<b>House</b>	<b>Senate</b>
Liberals	54	28
Conservatives	21	13
Other lists	86	61
Total	161	102

Moreover, in 2003 Congress passed a constitutional amendment that created a somewhat more cohesive set of parties. The reforms prohibited parties from running more than one list in each electoral district and changed the quota and remainder system allocating seats so that very small parties would be less likely to gain representation. This allowed a more coherent system of parties to emerge in 2006 when Uribe would be elected to a second term, as shown in Figure 8.4. Further, the system began to polarize into a clearer government-opposition pattern. Polo Democratico, a relatively small leftist movement, made up the core of the opposition; The Party of the U (Uribe's own movement), the Conservatives, and Cambio Radical formed a governing coalition. These movements held majorities or near-majorities of the House and Senate. Further, while the Liberal party was officially opposed to Uribe, he was again able to peel off some members of the movement in order to govern, and he also held the support of some independents. Uribe faced the fragmentation and factionalism that had increasingly plagued

Colombia in recent years, particularly in his first term. But he was generally able to cobble together a sufficiently large coalition to enact major legislative measures.

**Figure 8.4: 2006 Legislative Elections**

	<b>House</b>	<b>Senate</b>
Party of the U	29	20
Conservatives	29	18
Liberals	36	17
Cambio Radical	20	15
Polo Democratico (Left)	8	11
Other Independents	39	21
Total	161	102

Thus the Court faced a significant threat in 2002, when Uribe launched the most serious attack against the Court in its history. Uribe ran and governed on a platform of “democratic security,” which emphasized the need to take a tough line against guerrilla groups. One of his first orders of business, as detailed in Chapter 5, was to declare a state of internal commotion in order to take hard measures against the guerrilla threat. Members of his administration argued that the Court lacked the power to review the declaration, and warned the Court against striking down the measure. For example, Uribe’s Minister of the Interior, Fernando Londoño, stated that the decree was being sent to the court as a mere “gesture of courtesy.”<sup>757</sup> Further, the declaration itself stated that “legislative decrees issued under and as a consequence of this declaration will be

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<sup>757</sup> See *Polemica por Cortesía*, EL TIEMPO, Aug. 14, 2002, available at <http://www.eltiempo.com/archivo/documento/MAM-1328624>.

submitted to the Constitutional Court,” thus implying that the declaration itself would not be susceptible to the Court’s control. The Court nonetheless examined the substantive constitutionality of Decree 1837 of 2002 using its accepted standards of review, although it upheld most of it in a 7-2 decision.<sup>758</sup>

Londoño also launched a broader rhetorical attack on the Court. For example, he criticized the Court for ignoring economic constraints on the state – in an article written the prior year, he criticized *tutela* judges for not paying attention to economic constraints when issuing their decisions, and stated that this was the cause of “judicial stupidity, which though ignorance of everything in the economy, becomes an essential factor in the economy.”<sup>759</sup> He also had made statements suggesting that the power of judicial review should be returned to the Supreme Court, and pointedly made visits to the Supreme Court and Council of State, while declining to visit the Constitutional Court.<sup>760</sup> This rhetorical critique culminated in the presentation of a sweeping judicial reform proposal in Congress in October 2002.<sup>761</sup> As with Samper, Londoño sought to close off review of declarations of states of internal commotion or states of social, economic, and ecological emergency, stating that these measures were inherently political and should not be subject to legal control.<sup>762</sup> He would also have required a super-majority to strike down constitutional amendments and laws.<sup>763</sup> Finally, he proposed a number of important reforms to the *tutela*: (a) prohibiting the action from being taken against judicial decisions, (b) disallowing it from being used to protect social and collective rights, and (c) requiring that judges issuing

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<sup>758</sup> See Decision C-802/02, Oct. 2, 2002 Jaime Córdoba Triviño).

<sup>759</sup> See *Londono vs. La Corte*, EL TIEMPO, Jan. 26, 2002, available at <http://www.eltiempo.com/archivo/documento/MAM-999153>.

<sup>760</sup> See *id.*

<sup>761</sup> For the initially-presented initiative, see Gaceta del Congreso 484 (Nov. 12, 2002).

<sup>762</sup> See *id.* art. 15 (“In no case may the Court pronounce on the material contents of the decrees declaring the occurrence of the states of exception, whose political control corresponds to Congress.”).

<sup>763</sup> See *id.* art. 16, sec. 8 (“The decision that declares unconstitutional a legislative act [constitutional amendment] or an act with legal force must be adopted by a super-majority of the justices making up the Court.”)

orders in *tutela* cases consider the financial resources of government agencies, and abstain from altering the national or regional development plans or budgets.<sup>764</sup> These proposals would have greatly weakened the reach of the *tutela* by preventing it from being used to protect rights like the rights to pensions and to health (which by this time made up about half of the Court's docket) and from being used against judicial decisions (which was a key instrument by which the Constitutional Court could control the jurisprudence of the ordinary courts).

The Court and its allies immediately mobilized. Civil society organizations close to the Court, as well as ex-justices, attacked the proposal and pointed out the serious effects it would have on children and on other vulnerable social groups.<sup>765</sup> In the midst of other (and more pressing) articles of business like a referendum on political reform and the recent declaration of the state of internal commotion, the government quickly retired the proposal. However, in July 2003 Londono circulated another draft publically and to the various high courts. This revised proposal was very similar to the initial one. The Constitutional Court quickly met in special session and issued a unanimous condemnation of the measure. They argued that the measure, under the guise of being a technical reform, “would in reality eliminate the efficacy of the

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<sup>764</sup> See *id.* art. 3 (limiting the tutela to those rights “found in Chapter I or Title II of the Constitution,” and stating that “[t]here will be not tutela against judicial decisions, nor may it be used to impose obligations on the public authorities that are impossible to comply with or to alter the laws, ordinances, or accords of the Plan of Development or of the National, Departmental, or Territorial Budget.”).

The proposal also contained certain other measures that would have had significant effects on the system. For example, it would have explicitly allowed the high courts to create “jurisprudence” with force of law, but only by expressly signaling the precedential material in the Resolution part of the opinion. Other parts of the reasoning would not have precedential effect. See *id.* art. 9. Londono seemed trying to create a Mexican-style system of jurisprudence where binding precedent is signaled in very short notes accompanying decisions, rather than the more Anglo-Saxon form of jurisprudence actually create by the Constitutional Court (see Chapter 8). Moreover, the proposal abolished the National Council of the Judiciary, which had managed the judiciary since the 1991 Constitution and which had selected justices for the Supreme Court and Council of State, and proposed to restore the system of cooptation for selecting members of all three high courts. See *id.* art. 10.

<sup>765</sup> See *Polemica por recortes a la tutela*, EL TIEMPO, Oct. 31, 2002, available at <http://www.eltiempo.com/archivo/documento/MAM-1338708>.



*tutela*.”<sup>766</sup> They also again pointed out the effect of the measure in eliminating the protection of the right to health, and in leaving vulnerable populations such as children, pregnant and single mothers, and the disabled without effective mechanisms of protection. Finally, they stated that the measures would allow them to only issue symbolic orders when rights had been violated, rather than orders that would be effective at remedying the violation. The President of the Constitutional Court, Eduardo Montealegre, gave interviews to the press in which he first said that the proposals would “practically get rid of the *tutela*” and then stated that the objective of the reform was to “get rid of the Constitutional Court. But the road goes even further: Minister Londoño wants to carve up the Constitution, with a clear strategy of undoing the fundamental principles of the Constitution of 1991.... The minister wants a monarchy.”<sup>767</sup>

There is some evidence that these critiques had substantial political effects, not just among the opposition but also among many elements of Uribe’s coalition. Indeed, virtually all elements in Congress were vocal in criticizing the project. Antonio Navarro Wolff, the ex-president of the Constituent Assembly and one of the leaders of the opposition, stated that the project was “disastrous” because it hurt “the most important institution” of the 1991 Constitution, the *tutela*.<sup>768</sup> A prominent Liberal Senator noted that the project seemed based on the “hostility” that Londoño felt towards the Constitutional Court.<sup>769</sup> Finally, even those who were firmly in Uribe’s camp tended to criticize the project: Senator Rafael Pardo, for example, stated that he was “in agreement” with the Constitutional Court on all relevant points except the

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<sup>766</sup> See *La Corte se va Lanza en Ristre Contra la Reforma*, EL TIEMPO, July 31, 2003, available at <http://www.eltiempo.com/archivo/documento/MAM-991678>.

<sup>767</sup> Yamid Amat, *Londono Quiere un Estado Monarquico y Sin Controles*, EL TIEMPO, Aug. 3, 2003, available at <http://www.eltiempo.com/archivo/documento/MAM-1038668>.

<sup>768</sup> See *Reforma Agita Congreso*, EL TIEMPO, Aug. 1, 2003, available at <http://www.eltiempo.com/archivo/documento/MAM-1034549>.

<sup>769</sup> See *id.* (quoting Senator Rodrigo Rivera).

*tutela* against judicial decisions.<sup>770</sup> There were few supporters of the project, and they generally limited themselves to saying that it had not yet been studied thoroughly and should be worked out through agreements between the president and the courts. At any rate, the barrage of criticism prevented a proposal from ever being formally submitted to Congress.<sup>771</sup>

For the rest of Uribe's term, he tread more carefully on issues dealing with the Constitutional Court, particularly the *tutela*. For example, in 2004 he proposed another package of justice reforms, but these were weaker than the 2002 proposals and focused on judicial control of emergency powers rather than on altering the *tutela*.<sup>772</sup> The measures were withdrawn after the Court upheld a constitutional amendment allowing Uribe to run for a second term in 2005. In another round of proposed justice reforms in 2006, Uribe pointedly avoided making significant changes to the *tutela*. Indeed, he stated in the run up to the proposal of those reforms that "in my public life I have never made any declaration that was not in praise of the *tutela*."<sup>773</sup>

Unlike the Samper initiatives, the failure of Uribe to carry out any court-curbing measures cannot easily be explained by the political fragmentation of Colombian politics. Uribe operated with more power over the legislative process than Samper and was more effective at

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<sup>770</sup> *See id.*

<sup>771</sup> It is worth noting that Uribe always tread carefully around the *tutela*. For example, at a conference to celebrate the tenth anniversary of the 1991 Constitution, held in July 2001, Uribe referred to his former professor Carlos Gaviria, a justice on the first court, and stated: "[T]hanks to the *tutela* action today law and the Judicial Branch have been democratized, and have been made more accessible to the person on the street. Without a doubt, this is the most relevant effect of the *tutela*, to give citizens an expedited instrument to make their rights matter; to make them feel that they have some power against the State when it threatens their fundamental rights."

<sup>772</sup> The new proposals put forth by Londono's successor, Sabas Pretelt de la Vega, did however include some measures dealing with the *tutela*, although they focused primarily on the *tutela* against judicial decisions. For example, the initial proposals suggested that the *tutela* against judicial decisions of the high ordinary courts be abolished and be replaced by a special constitutional appeal that would be heard by a group of substitute judges (*conjuces*) from a different chamber of the same corporation and not by the Constitutional Court. *See Cambios estructurales a la tutela*, EL PAIS (CALI), Aug. 27, 2004.

<sup>773</sup> Hernando Guzman Paniagua, *Tutela o no Tutela: That is the Question*, EL PULSO: PARA EL SECTOR DE LA SALUD, June 2006, available at <http://www.periodicoelpulso.com/html/jun06/general/general-08.htm>. *See also* Elber Gutierrez Roa, *Uribe destapa sus cartas*, SEMANA, July 20, 2006, available at <http://www.semana.com/on-line/uribe-destapa-cartas/95995-3.aspx> (noting that in the installation of Congress, Uribe made a "cautious" defense of the *tutela* against judicial decisions).

pushing his agenda through Congress. Instead, as in the 1990s, the Constitutional Court was extremely effective at mobilizing its support from the public in order to fend off court-curbing measures. Above all, the *tutela* had by this point become a powerful symbol of citizen efficacy in an otherwise unresponsive Colombian state. This was the result of the Court's making this instrument attractive and useful to a broad swath of Colombian society, and especially to the middle class.

### **C. The Santos Administration and the Fiscal Sustainability Amendment: A Successful Court-Curbing?**

In 2011, the Juan Manuel Santos administration succeeded in passing a significant amendment that impacted the Court and that could be viewed as a species of court-curbing. The amendment establishes “fiscal sustainability” as a criterion for all branches of the state (including courts). But the watered-down nature of the final amendment, when compared to the original proposal, shows that the popularity of the *tutela* continues to protect the Court.

The amendment was originally proposed in the very last months of the Uribe administration, while Uribe was a lame duck and several weeks before Santos was inaugurated. In its original version, it defined “fiscal sustainability as “indispensable for achieving the ends of the social state of law” and thus as “a right of everyone and a duty of all the branches and organs of the public power to collaborate harmoniously, with their jurisdictions, to make it effective.”<sup>774</sup> Further, it seemed to give the Congress primary power to define the scope of socioeconomic rights, and required that Congress pay attention to fiscal sustainability when doing so.<sup>775</sup> The administration argued that the principle of fiscal sustainability was necessary to carry out the

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<sup>774</sup> Gaceta del Congreso 451/10, July 23, 2010.

<sup>775</sup> *Id.* (“The Congress of the Republic, when determining the concrete meaning of social and economic rights consecrated in this Constitution, must do so in a way that assures fiscal sustainability with the goal of giving them, in their entirety, continuity and progressiveness.”)

ends signaled by the Constitution and the Court in its prior jurisprudence, by ensuring that social spending was done in a responsible and progressive way. The exposition of motives avoided criticizing the *tutela* and instead made only a vague reference to the executive and the Congress having principle responsibility for defining general policies on economic and social rights. But in the press, the Uribe administration and its supporters framed the amendment as an attempt to rein in judicial decision-making that was too costly and expansive in scope.<sup>776</sup> A basic purpose of the amendment seems to have been to make it harder for the Court to issue judgments that would be very costly for the executive to comply with.

Once in power, the Santos administration picked up the amendment and worked to pass it through Congress. At the time, Santos could count on support from a broad coalition including Conservatives, the *Uribista* Party of the U, the Liberal party, and *Cambio Radical*. Given the balance of power after the 2010 election (see figure 8.5), these four parties dominated the Congress and gave Santos very comfortable majorities.

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<sup>776</sup> See, e.g., Guillermo Perry & Roberto Steiner, *La regla fiscal: una initiative crucial*, PORTAFOLIO, July 21, 2010, available at [http://www.portafolio.co/detalle\\_archivo/MAM-4061551](http://www.portafolio.co/detalle_archivo/MAM-4061551) (“[T]he advisors of the government, understanding that it may be difficult to guarantee fiscal sustainability if the Constitutional Court gives preference to the economic and social rights of citizens without greater consideration for the fiscal effects of its decisions, as has happened frequently, proposes to elevate macroeconomic stability to the constitutional rank of a superior good.”).

**Figure 8.5: 2010 Legislative Elections**

	<b>House</b>	<b>Senate</b>
Party of the U	47	28
Conservatives	38	22
Liberals	37	17
Cambio Radical	15	8
Polo Democratico (Left)	4	8
Other Independents	23	19
Total	164	102

The initiative nonetheless ran into substantial opposition, in both the House and Senate. Both those in favor of and those opposed to the amendment used the language of the Constitution as developed by the Court. The Santos administration, in contrast to the Uribe administration, has tended to rely on rhetoric that adopts rather than confronts the Court's jurisprudence.<sup>777</sup> Thus the government's supporters made extensive use of the Social State of Law and cited scholars like Robert Alexy to support their positions.<sup>778</sup> They argued that the initiative would not threaten the achievement of the Social State of Law but was merely necessary to make sure that achievement of that end was rational and progressive, given the inability of fulfilling all socioeconomic rights immediately and completely.<sup>779</sup> The supporters argued in effect that their proposal was adjusted to international standards on the enforcement of socioeconomic rights and

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<sup>777</sup> The best example of this incorporation is the Law of Victims and Restitution of Land, Ley 1448 de 2011, which appropriated much of the Court's framing of the armed conflict as one producing a defined set of victims who had a right to be protected and compensated by the state.

<sup>778</sup> See, e.g., Gaceta del Congreso 284/11, May 19, 2011 (report for second round debate on the Senate floor).

<sup>779</sup> See *id.* (using Alexy's "optimization" principle as support for a principle of fiscal sustainability in order to limit socioeconomic rights).

to the jurisprudence of the Court itself. They did however criticize particular decisions of the high courts on fiscal grounds, especially decisions by the Constitutional Court on health issues and those related to public sector salaries in the late 1990s, detailed in Chapter 5.<sup>780</sup>

The opposition in contrast again framed the amendments as threats to the *tutela*, the Constitution, and the Court's jurisprudence. Opposition politicians in both the House and Senate, for example, characterized the proposal as an attempt to turn Colombia back into a liberal state of law rather a social state of law.<sup>781</sup> They noted that some of the Court's most important and celebrated decisions, including T-760/08 (health) and T-025/04 (IDPs), had been very costly decisions.<sup>782</sup> Finally, they argued that the government's stated goals of fiscal discipline could be carried out at the sub-constitutional level and thus that the real thrust of the proposal was to attack the Constitutional Court and the *tutela*.<sup>783</sup>

Because of opposition to the proposal, it was amended repeatedly at all phases of the legislative process. The *ponente* for the House Committee initially charged with examining the proposal noted the discomfort expressed by both legislators and members of civil society over the possibility that the amendment could "open the door to retrogression in the advances of the social state of law" or "generate dynamics adverse to the will of the [Constitution]."<sup>784</sup> He thus

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<sup>780</sup> See, e.g., Gaceta del Congreso 723/10, Sept. 30, 2010 (report for first round debate before the House Committee). The House manager mentioned, for example, the health *tutelas* for no-POS treatments and the Constitutional Court decision requiring the construction of prisons, T-153 of 1998.

<sup>781</sup> See, e.g., Gaceta del Congreso 779/10, Oct. 15, 2010 (negative report for first round debate before the House floor of Alfonso Prada) ("This project of reform to the Political Constitution goes against the paradigm of the constitutional and social state of law, consecrated in the Charter of 1991, changes the natural hierarchy of its principles, and I would venture to say constitutes a substitution of the essence of our constitution."); Gaceta del Congreso 989/10, Nov. 30, 2010 (minority report of Nestor Ivan Moreno Rojas) ("Contrary to what the National Government claims, we believe that this project ... gets rid of the Social State of Law that our Constitution establishes.");

<sup>782</sup> See Gaceta del Congreso 779/10.

<sup>783</sup> See Gaceta del Congreso 189/11, Apr. 15, 2011 (minority report for second round voting before the House floor of Alfonso Prada & German Navas) ("Fiscal sustainability at the world level is consecrated in laws and not in the constitution.");

<sup>784</sup> Gaceta del Congreso 723/10.

proposed amendments that made clear that fiscal sustainability must “operate as an instrument to achieve the objectives of the social state of law in a progressive and programmatic manner” and that “spending destined for the ends of the social state of law will have a prioritized character.”<sup>785</sup> These amendments intended to weaken the possible tension between fiscal sustainability and the concept of a social state of right as expressed in the Court’s jurisprudence. For example, the manager argued that the reference to the progressive principle was meant to align the provision with the Court’s own jurisprudence requiring real and periodic advances in the enjoyment of social rights by the population.<sup>786</sup> The proposal was further weakened on the floor of the House in the first round by changing fiscal sustainability from a “right of all and a duty of all” to a “principle,” perhaps with the goal of clarifying and potentially limiting its binding force.<sup>787</sup>

After the modified proposal passed the House in the first round, it ran into even more problems in the Senate, where the Liberal party (a coalition partner) refused to support the bill on the grounds that it “works against the economic and social rights of Colombians, reduces the importance of the *tutela*, goes against the social state of law consecrated in the 1991 Constitution ... and weakens the judicial and legislative branches.”<sup>788</sup> The Senate committee made further changes to the law, including deleting the sentence that appeared to give the Congress primary

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<sup>785</sup> See *id.* This latter phrase was later amended, in the second round of voting before the House of Representatives, to say that “in all cases public social spending will be prioritized.”

<sup>786</sup> See *id.*

<sup>787</sup> See Gaceta del Congreso 919/10, Nov. 18, 2010 (giving the text passed by the House of Representatives in the first round Committee report of the Senate); see also Cesar Paredes, *La sostenibilidad fiscal: lo que va de la economía al derecho*, SEMANA, Jun. 8, 2011, available at <http://www.semana.com/nacion/articulo/la-sostenibilidad-fiscal-va-economia-derecho/241050-3> (explaining the relevance of that change and the fact that the Liberal party continue to oppose the measure despite it). But see Gaceta del Congreso 989/10 (noting, in both the majority and minority reports for first round debate before the Senate floor, that principles were enforceable parts of the Colombian constitutional order).

<sup>788</sup> See Gaceta del Congreso 989/10, Nov. 30, 2010 (communication included in the majority report for the first round debate before the Senate floor).

responsibility to define the meaning of socioeconomic rights.<sup>789</sup> Even so, the proposal initially tied 9-9 in Committee before a member of a small opposition party switched sides and supported the government.<sup>790</sup> Legislators then continued to weaken the project in the second round. In the second round Committee debate before the House of Representatives, the Committee added a sentence stating that “under no circumstance may any administrative, legislative, or judicial authority invoke the application of the principle of fiscal sustainability to undermine fundamental rights.”<sup>791</sup>

A final change occurred in the last debate before the Senate, when the Liberal party proposed that the existing proposal be substituted by a different proposal creating a new judicial mechanism, the “Incident of Fiscal Impact.” The mechanism allows the National Attorney General or any Cabinet Minister to request that a high court (Supreme Court, Council of State, or Constitutional Court) review any one of their own decisions within a defined period of time after its issuance, in order to determine its fiscal impact and evaluate whether the decision should be modified or deferred. Any modifications to the original decisions may not affect the “essential nucleus” of a constitutional right. The goal of the Liberals as stated by then-party leader Rafael Pardo was to “comply with the objectives proposed by President Santos ... without touching a hair on the *tutela*.”<sup>792</sup> Pardo viewed the incident of fiscal responsibility as a less intrusive alternative to the existing proposal because it would leave the courts with discretion about how

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<sup>789</sup> See *id.*

<sup>790</sup> See *En medio de polémica votación, avanza proyecto de sostenibilidad fiscal*, SEMANA, Nov. 25, 2010, available at <http://www.semana.com/nacion/articulo/en-medio-polemica-votacion-avanza-proyecto-sostenibilidad-fiscal/125030-3>.

<sup>791</sup> See Gaceta del Congreso 189/11, Apr. 15, 2011 (majority report for second round debate before House floor) (“An additional paragraph was added to article 1 of the project, which looks to protect the fundamental rights established in the Colombian social state of law from possible interpretations of the new norm that could put them at risk.”).

<sup>792</sup> See *Liberales llevaron al Senado propuesta de sostenibilidad fiscal*, EL TIEMPO, May 24, 2011, available at <http://www.eltiempo.com/archivo/documento/CMS-9432405>. The proposal was created by Humberto de la Calle, the Minister of the Interior during the Constituent Assembly.



to proceed. In the end, however, the proposal was added to the existing proposal in the second round of voting before the Senate rather than being used as a substitute.<sup>793</sup> The finalized fiscal sustainability amendment thus bears virtually no resemblance to the original proposal – almost every word had been changed.

Nonetheless, the amendment was challenged in front of the Constitutional Court as a “substitution of the constitution,” a possibility that had been raised by political opponents during its transmission.<sup>794</sup> The Court upheld the measure, but only by giving it a restrictive read.<sup>795</sup> After reviewing the legislative history in detail, the Court held that fiscal sustainability had the status of a “right” in the initial project, but was a mere “instrument” by the time the proposal had passed.<sup>796</sup> The various additions to the project clarified, in the Court’s view, that fiscal sustainability did not enjoy the same status as core principles like the social state of law, but was merely an instrument in the service of those goals. Further, the Court emphasized that the new “incident of fiscal impact” did not force the high courts to take any particular action, but merely gave them a discretionary power to hear challenges to the fiscal impact of its decisions.<sup>797</sup> Thus the amendment was upheld because it did not clash with core values of the Colombian Constitution, like the social state of law and the separation of powers.<sup>798</sup>

The passage of the fiscal sustainability thus shows, once again, how the popularity of the *tutela* and the Court’s socioeconomic rights jurisprudence continues to shield the Court from

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<sup>793</sup> See Gaceta del Congreso 360/11, June 2, 2011 (explaining the proposal and adding it to the existing text).

<sup>794</sup> See, e.g., *supra* note 781.

<sup>795</sup> See Decision C-288 of 2012, Apr. 18, 2012 (Luis Ernesto Vargas Silva).

<sup>796</sup> See *id.* §§ 32-60.4 (detailing the legislative history of the change); §§ 64-64.5 (holding that fiscal sustainability is an “instrument” in the service of other constitutional ends).

<sup>797</sup> See *id.* §§ 73-74.5.

<sup>798</sup> In 2014, the Congress passed a law to regulate the “Incident of Fiscal Impact”: the new law has caused controversy by stating, *inter alia*, that the action must be heard if procedural formalities are met, that it suspends the effect of all non-*tutela* judgments once filed, and that even if denied, the courts should consider the “concrete plan of compliance” of the government when measuring compliance. See Ley 1695 of 2013, Dec. 17, 2013, arts. 9, 14.

court-curbing. While the measure passed under the aegis of the president's then dominating legislative coalition, it was weakened considerably in the course of transmission because of repeated concerns about the effect of the amendment on the Court's jurisprudence. It was watered down enough for the Court to give fiscal sustainability a restrictive and subordinate read in deciding on the constitutionality of the amendment. The popularity of the *tutela* may not be a complete shield against court-curbing efforts, but it is a powerful weapon against it.

### **III. Why Court-Packing Efforts Failed**

Court-curbing efforts were relatively high profile events: they gave a chance for the Court and its allies to mobilize, and forced legislators to take public positions. But court-curbing is not the only way to control a court. Politicians can also use what we might call court-packing, where they utilize the selection mechanism as a way to influence judicial behavior. What is meant by court-packing, in this section, is not necessarily an effort to alter the size of the Court, as with Roosevelt's effort to appoint new justices in the United States during the New Deal. Instead, I use court-packing to refer to any effort to control the Court through appointment – dominant political actors or politicians attempt to influence the Court by selecting justices with ideologies that are very close to their own movement. Compared to court-curbing, court-packing has one clear advantage to politicians: it is relatively low-salience. Whereas a Court can only be curbed noisily and by taking positions that alter the public, it is often possible to pack it under the radar. Confirmation hearings for the United States Supreme Court are high-profile events, attracting lots of media attention, but selection processes in other countries tend to be much less salient as

political events.<sup>799</sup> In Colombia, the formation of lists has normally been done almost entirely without public scrutiny, and even the final vote in the Senate tends to receive little attention.

Presidents and political parties have exercised remarkably little control over the Court via the selection process. The reasons why can be found in the interaction of the design of the process with the academic community allied with the Court. The appointment mechanism allows three different actors to constitute lists of three nominees (called a *terna*): the Council of State, the Supreme Court, and the President.<sup>800</sup> Each of these actors is in charge of constituting lists for three slots on the nine-member court. The Senate then selects the prevailing justice, by plurality vote, from each *terna*.<sup>801</sup> The selection process itself makes the Court harder to pack by fragmenting appointment power between four different institutions. The weakness of the party system further compounds these tendencies by making Senate votes on *ternas* sometimes unpredictable.

But the design of the appointment process and political fragmentation leave significant facts unexplained. While the Council of State and Supreme Court may have had different preferences from the president, they at times demonstrated great hostility towards the Constitutional Court, in particular on the topic of the *tutela* against judicial decisions and the corresponding *choque de trenes* between the institutions.<sup>802</sup> It is initially unclear why their picks were unable to weaken the Constitutional Court's activism. Further, the presidential influence over appointments remains substantial, especially for presidents with the power to dictate the result of votes in the Congress. Alvaro Uribe, for example, made a substantial effort to influence the Court, placing

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<sup>799</sup> For some comparative perspective on these issues, see, for example, *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* (Kate Malleson & Peter Russell, eds., 2007).

<sup>800</sup> See CONST. COL., art. 239.

<sup>801</sup> See *id.*

<sup>802</sup> See *supra* Part I.A (detailing an effort by the high ordinary courts to abolish the *tutela* against judicial decisions).

two justices on it who were closely aligned with his views. I argue that the failure of both ordinary judicial and presidential court-packing efforts lies largely in the academic culture surrounding and staffing the Court, which was profiled in Chapter 4. The Court and its allied community monopolized knowledge of an increasingly complex constitutional jurisprudence, forcing hostile courts and presidents to appoint outsiders with little experience in constitutional law. But these outsiders were themselves heavily reliant on the academic community staffing the Court for technical expertise, and thus were unable to make substantial changes to the direction of the Court.

### **A. Supreme Court/Council of State Lists**

As noted in Chapter 2, the National Front initially split posts on the Supreme Court and Council of State evenly between liberals and conservatives, appointed for life (parity). It then allowed these bodies to choose their own successors when vacancies occurred (cooptation). The result of this selection system was a Court that was quite close to the prevailing political coalitions until late in the National Front. But eventually, by the 1980s, cooptation produced high courts that were fairly distant from prevailing political winds, and willing to make decisions that ran against the core interests of political elites. The high courts further remained relatively evenly divided between the traditional Liberal and Conservative parties, even as the political system evolved out of that mode. These trends continued post-1991, and have changed only very slowly.

It is probably unsurprising that the members of the Council of State in 1992 explicitly agreed that they would, for their three slots, choose one list of Liberals, one list of Conservatives, and

one list mixed between the two parties.<sup>803</sup> They have subsequently followed this practice consistently. The Supreme Court backed out of a similar arrangement, and has never followed such a rigid design.<sup>804</sup> Still, Supreme Court lists also tend to be mixed between members of the old Liberal and Conservative parties. Further, both courts, and especially the Supreme Court, have tended to place a high number of career ordinary judges on these lists. The percentage of career justices on the list has increased over time, as the Supreme Court and Council of State have come to understand the potential importance of the Constitutional Court in hindering their interests and affecting their jurisprudence.

These factors produce lists that often have relatively little alignment with the prevailing political system. First, the general balance between Liberals and Conservatives has prevented any one political movement from dominating list composition. Second, and more importantly, the relatively incoherent nature of the Liberal/Conservative divide means that political identification has little to do with their judicial behavior as judges. The Liberal/Conservative divide remained coherent into the modern era on Church/State issues, but on hardly anything else. For example, Jose Gregorio Hernandez was chosen from an entirely “conservative” Supreme Court list in 1993, yet he joined the progressive majority on most non-Church/State issues, and wrote the majority for many of the Court’s most sweeping social rights cases. After leaving the Court, he ran for vice-president on the Liberal ticket. Less dramatically, Rodrigo Escobar Gil was chosen from a “conservative” list of the Council of State in 2000 – he was considered identifiably conservative, yet authored the decision recognizing rights of same sex couples, a decision in which he has publically expressed great pride.<sup>805</sup> This effect – the distance

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<sup>803</sup> See *Corte Constitucional: Modelo Para Armar*, EL TIEMPO, Nov. 27, 1992, available at <http://www.eltiempo.com/archivo/documento/MAM-248211>.

<sup>804</sup> See *id.*

<sup>805</sup> Personal Interview, Rodrigo Escobar Gil, July 2009, Bogota, Colombia.

between nominees and an identifiable political alignment – is heightened by the appointment of a high number of career judges without clear political ideologies. Many of these career judges – for example Clara Ines Vargas Hernandez in 2000 (a civil judge elected from a Supreme Court list) and Luis Ernesto Vargas and Gabriel Mendoza in 2008 (elected from a Supreme Court and Council of State list respectively) arrived at the Court without elites having a very clear sense of their political agenda.

Conceivably, the voting process in the Senate might have been able to provide more political direction and coherence to the final selections: the Senate might have made selections from the *ternas* that aligned selections as much as possible with prevailing political winds. In practice, this did not occur, particularly with the presidents preceding Uribe. The high degree of fragmentation in the Senate has made it difficult to predict which coalitions would dominate judicial elections, and thus who would prevail from the lists. For example, in 2000 the popular weekly magazine *Semana* made predictions as to who would win each of seven slots on the Court just a few days before the vote: the magazine was wrong about three of the seven selections.<sup>806</sup>

Still, the Council of State and the Supreme Court both appointed justices who were clearly intended to weaken the power of the Constitutional Court. These justices were usually career judges picked from the very institution composing the list. For example, Nilson Pinilla arrived at the Constitutional Court in 2006 after serving as president of the Supreme Court and a member

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<sup>806</sup> See *La Corte se perfila*, SEMANA, Dec. 11, 2000, available at <http://www.semana.com/nacion/corte-perfila/15659-3.aspx>. The magazine incorrectly picked Alberto Rojas instead of Clara Ines Vargas Hernandez to replace Fabio Moron Diaz, and Jorge Enrique Ibanez instead of Rodrigo Escobar Gil to replace Vladimiro Naranjo. It hedged its bets on the replacement for Eduardo Cifuentes, but incorrectly guessed that Alvaro Tirado Mejia would prevail over Manuel Jose Cepeda. This is not meant to imply that the Senate had no consistent political currents, only that those currents were relatively weak. In 2000, for example, the Liberal party (which although factionalized still controlled a plurality of seats) met and announced positions on each list – all seven of the candidates favored by the Liberals prevailed in the voting. See *Corte Constitucional de Avanzada*, EL TIEMPO, Dec. 15, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1217594>; X Gaceta del Congreso 4, at 21-22 (intervention of Senator Luis Guillermo Velez Trujillo). In some cases, for example in the very close vote between Manuel Jose Cepeda and Alvaro Tirado Mejia, the endorsement of the large but factionalized party was clearly a decisive factor: Cepeda prevailed by nine votes, 51 to 42.

of the criminal chamber, from a list composed solely of former Supreme Court justices. All three were seen as having an “anti-tutela profile,” which roused alarm from academic and civil society groups close to the Court.<sup>807</sup> Pinilla was elected by Uribe’s coalition after making statements noting that his list was chosen “with the purpose of bringing some orthodoxy to the Constitutional Court ... So that it does not keep being so adventurous, so that it is not looking all the time to strange doctrines every time one of the magistrates reads a very good book in German.”<sup>808</sup> He also pronounced himself in favor of the 1997 reform by the Council of State and Supreme Court regarding *tutelas* against judicial decisions, complained about the way the Constitutional Court had mobilized support to defeat prior reform efforts by lauding the *tutela*, and argued that the current Court had left the “door completely open for *tutelas* against judicial decisions.”<sup>809</sup>

Yet once he arrived at the Court, Pinilla did not behave in ways that were markedly different from those of justices already on the Court. He appointed a set of clerks with profiles that were similar to those of other staffers on the Court (all three had degrees from Javeriana, and one had studied in the United States), although none had prior experience.<sup>810</sup> A more marked demonstration of the influence of the clerks occurred in 2008, when three career judges (including two former justices of the Supreme Court and Council of State) arrived at the Constitutional Court: Jorge Ivan Palacio Palacio (labor chamber of the Supreme Court), Gabriel Mendoza (Council of State), and Luis Ernesto Vargas (Civil Circuit Court of Bogota). Like

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<sup>807</sup> See *Primeros dardos a terna para Corte*, EL TIEMPO, Apr. 26, 2006, available at <http://www.eltiempo.com/archivo/documento/MAM-2000438>.

<sup>808</sup> Maria Isabel Rueda, *¿Por qué tachan de sospechosa a esta terna para la Corte Constitucional?*, SEMANA, May 13, 2006, available at <http://www.semana.com/nacion/articulo/por-que-tachan-sospechosa-esta-terna-para-corte-constitucional/78840-3>.

<sup>809</sup> *Id.*

<sup>810</sup> Data on file with author.

Pinilla, all are specialists in fields outside of constitutional law. Upon arrival at the Court, all three maintained most or all of the *magistrados auxiliares* of their predecessors.<sup>811</sup>

## **B. Presidential Lists and Uribe's Efforts to Influence the Court**

The president constitutes one-third of the lists on the Court, potentially giving him considerable control over the body. Because most of the Court has turned over en masse every eight years, only three presidents have had the power to propose lists: Cesar Gaviria (Liberal) in 1993, Andres Pastrana (Conservative) in 1999 and 2000, and Alvaro Uribe in 2007 and 2008. A reasonable inference in Gaviria's case is that he sought to strengthen the institution he had just created: he tended to stack his lists with high quality candidates and known progressive justices, without establishing a clear pecking-order as to which candidate he favored. Most of his justices were known members of the Liberal party.

The Conservative President Pastrana took a more varied tack in constituting the second full Court. He governed in a highly fragmented period, in which the Liberal and Conservative parties were losing their hegemony in the Congress. This fragmentation made it somewhat difficult for Pastrana to move his agenda through Congress. His lists reflect his attempts to hold together a fragmented coalition – he tended to produce lists that mixed Liberal and Conservative justices, and which did not reflect any clear ideology. For example, one of his lists in 2000 included the well-known Liberal jurists Alvaro Tirado Mejia and Manuel Jose Cepeda, while the other included the prominent Conservatives Marco Gerardo Monroy and Hernando Yepes Arcila.<sup>812</sup> As in the case of Gaviria, Pastrana tended to produce lists without establishing a clear pecking-order as to the favorite. Even when Pastrana favored a particular candidate, he ran into problems

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<sup>811</sup> Data on file with author.

<sup>812</sup> See John Gutierrez, *Tarjeton para la Corte*, EL TIEMPO, Nov. 23, 2000, available at <http://www.eltiempo.com/archivo/documento/MAM-1231127>



in pushing him through Congress. For example, in 1999 Pastrana nominated his Conservative legal secretary, Jaime Arrubla, to the Court, but the Senate instead elected another member of the *terna*, Alvaro Tafur Gavis, who lacked close ties to the President, by a 45 to 29 vote.<sup>813</sup> The vote was seen as a defeat for Pastrana's coalition.<sup>814</sup> In short, Pastrana demonstrated little willingness or ability to use selection in order to make major changes to the prevailing ideology of the Court.

Uribe, who took power in 2002 and governed until 2010, formed by far the most interesting test case for the Constitutional Court. As noted above, his administration at certain points was a vigorous critic of the jurisprudence of the Court. And the Court at times was a substantial obstacle to Uribe's political agenda: it struck down or modified several of his attempts to use emergency powers, and most importantly held unconstitutional a proposed constitutional amendment which would have given Uribe the right to run for a third term. Uribe was a stunningly popular president who skillfully managed broad majorities in Congress. Further, following the political reforms of 2003, Congress and the party system took on a somewhat more coherent shape. Legislators tended to fall in line as either part of the governing coalition, with Uribe, or as part of the opposition.

The evidence suggests that from early in his term, Uribe attempted to exercise more influence over composition than his predecessors, in order to make the Court less of an obstacle to his political agenda. But he still had to contend with the political fragmentation that had plagued prior presidents, particularly in his first term. For example, in 2004 the Council of State produced a list consisting of Humberto Sierra Porto, Consuelo Caldas, and Libardo Rodriguez. The President favored Caldas, an ideological conservative who had been the director of DIAN,

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<sup>813</sup> See *El Elegido*, SEMANA, June 21, 1999, available at <http://www.semana.com/nacion/elegido/40000-3.aspx>.

<sup>814</sup> See *Gobierno 4, Oposicion 3*, EL TIEMPO, June 9, 1999, available at <http://www.eltiempo.com/archivo/documento/MAM-917679>.

the national tax service. But the opposition supported Sierra, an academic from the coast, and coastal members of Uribe's own coalition broke ranks and supported Sierra, handing him a 51 to 41 victory.<sup>815</sup> On other occasions, such as 2008, the Supreme Court and Council of State produced lists with little alignment to the Uribe administration. The Supreme Court composed two lists consisting entirely of career judges, while the Council of State produced its usual eclectic lists. Both lists included members of an organization – Dejusticia – that promoted progressive judicial causes and was a sharp critic of the administration, although neither of these members (Rodrigo Uprimny and Danilo Rojas) was actually elected to the Court.

Still, Uribe had direct control through his ability to constitute three lists on the Court. He made a clear effort to appoint justices who would be ideologically close to him and who would uphold his measures. Further, unlike past presidents, Uribe constituted lists with a clear favorite, and had sufficient power in the Senate to push his preferred candidate through. Thus, in 2007 he constituted a list with his own legal secretary, Mauricio Gonzalez Cuervo, along with two well-respected jurists, Ilva Myriam Hoyos (a Conservative academic close to the Church) and Cristina Pardo Schlesinger (a former Constitutional Court clerk). Hoyos and Pardo both resigned from the list once they realized that they were not even being seriously considered by the Senate, since Uribe strongly favored Gonzalez.<sup>816</sup> The list was reconstituted with Gonzalez and two other (relatively unknown) candidates, and Gonzalez was elected by a huge margin.<sup>817</sup> The same dynamic was at work in 2008, when Uribe constituted two other lists – losing candidates complained that they were not taken seriously as candidates, and that decisions were made by the

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<sup>815</sup> See *Un Ortofoxo Gana Pulso por la Corte*, EL TIEMPO, Aug. 4, 2004, available at <http://www.eltiempo.com/archivo/documento/MAM-1524306>.

<sup>816</sup> See *La fallida terna*, EL TIEMPO, Aug. 15, 2007, available at <http://www.eltiempo.com/archivo/documento/MAM-2618664>.

<sup>817</sup> See *Mauricio Gonzalez, secretario juridico del Presidente, es nuevo Magistrado de la Corte Constitucional*, EL TIEMPO, Aug. 27, 2007, available at <http://www.eltiempo.com/archivo/documento/CMS-3698325>.

*Uribista* coalition well before the vote. Indeed, none of the losing candidates even bothered showing up for the vote.<sup>818</sup> He stacked one of these two lists with candidates who had an association with the University Sergio Arboleda, which is considered to produce some of the most conservative jurists in the country. The winner from that list, Jorge Pretelt, was considered to be very close to the president ideologically.<sup>819</sup>

Uribe still had to manage the complex dynamics of Colombian politics, which involved regional and personal as well as ideological elements. For example, while the Gonzalez and Pretelt lists were won by candidates who were very close to the President ideologically, the third Uribe list was won by a candidate, Maria Victoria Calle Correa, with strong ties to the coffee region of Risaralda. Calle, a politician and lawyer from the region, was supported both by Uribe's coalition and by members of the opposition from that region. Senators took the regional dimension of the vote very seriously; the vote was left in the hands of Senators from that department, and Senators from the area cried after Calle was elected.<sup>820</sup> That selection, in other words, was about Uribe paying a regional debt rather than trying to further stack the Court ideologically.

The justices that Uribe chose all had no prior connection with the Court or its academic circles. None of them had served, for example, as professors at the various feeder schools (Los Andes, Externado, Javeriana, Rosario) which served as training grounds for the bulk of the Court's staff. Justices drawn from the Court itself, from its academic circles, and to a lesser extent from the judiciary would generally have a strong orientation towards preserving the

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<sup>818</sup> See *Eligen Dos Nuevos Magistrados a la Corte Constitucional*, SEMANA, Mar. 25, 2009, available at <http://www.semana.com/justicia/eligen-dos-nuevos-magistrados-corte-constitucional/122103-3.aspx>.

<sup>819</sup> See *id.*

<sup>820</sup> See *Jorge Pretelt y Maria V. Calle, nuevos magistrados*, EL TIEMPO, Mar. 26, 2009, available at <http://www.eltiempo.com/archivo/documento/MAM-3374998> (noting that the formal presentation of the candidates was left to the Risaraldan delegation to the Senate, including members of majority and opposition parties alike).

existing doctrinal lines of the Court. Uribe likely chose outsiders because he thought that those outsiders would be least constrained by the existing practice of the Constitutional Court. But this strategy also had high costs – it reduced the new justices’ ability to maneuver on the Court, and to persuade other justices.

The new justices on the Court faced a kind of Hobson’s choice – they could either (1) draw their staff from people with experience working at the Court, or (2) they could try to find outsiders to do the job. The former option would raise the prospect of a new justice being unable to effect change because his clerks would push him towards conformity. The latter option would heighten the risk that the inexperienced new justices would be unable to maneuver the complex, technical discourse of the Court. Calle, who as noted was chosen partly for regional motives, maintained the staff of her predecessor Manuel Jose Cepeda. Pretelt and Gonzalez, after initially experimenting with the same approach, have instead relied more on outsiders. They have also experienced a higher turnover in the composition of their teams as compared to the Court as a whole.<sup>821</sup>

The result of all of this is that the two Uribista justices were isolated when they attempted to alter significant doctrines of the Court in order to uphold Uribe’s measures. On certain key measures, they were clearly influenced by the difficulty of making substantial changes to existing judicial precedent. For example, in late 2009, President Uribe declared a state of social, economic, and ecological emergency in order to issue a rash of decrees reforming the country’s healthcare system.<sup>822</sup> The declaration clearly seemed to run afoul of the Court’s existing doctrine on the use of emergency powers, which held that emergencies could not be declared to deal with

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<sup>821</sup> Data on file with author.

<sup>822</sup> Fernando Umana Mejia, *Uribe Declara la emergencia social*, EL TIEMPO, Nov. 20, 2009, available at <http://www.eltiempo.com/archivo/documento/MAM-3724428>.

chronic situations rather than a new crisis.<sup>823</sup> The healthcare system in Colombia had significant problems, but these were caused by long-standing factors – the government did not seriously contend that a new crisis either created or substantially aggravated these factors. The Court thus struck down the declaration unanimously in April 2010, although five justices on the Court did craft a compromise in which they upheld new taxes decreed during the emergency. Gonzalez, Uribe’s former legal secretary and then president of the Court, explained the result in the language of precedential constraint: “We are judges who act in the name of other judges. We are motionless [*parados*] on the shoulders of the giants who preceded us.”<sup>824</sup>

A more famous example of the isolation of the *Uribista* justices was the second reelection decision, taken in 2010. The case involved a proposed referendum which would have amended the Constitution to allow Uribe to run for a third term. It raised two sets of issues: the procedural rules by which the referendum had been financed and then pushed through Congress, and the substantive constitutionality of the proposed amendment. The Court had developed a robust jurisprudence to control legislative process, exercising a tight control over for example changes to proposed legislation in order to ensure that provisions were adequately debated.<sup>825</sup> As explained in Chapter 5, the Court had also developed a well-marked doctrinal line stating that

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<sup>823</sup> See, e.g., C-122 of 1997, Mar. 12, 1997 (Antonio Barrera Carbonell & Eduardo Cifuentes Munoz) (striking down declaration of State of Economic, Social, and Ecological Emergency to deal with balance of payments problems because problems were “structural” and of a “long duration”); C-122 of 1999, Mar. 1, 1999 (Fabio Moron Diaz) (partially striking down declaration of emergency during financial crisis because many of the problems were “chronic”).

<sup>824</sup> *Corte tumbó la Emergencia Social, pero dejó vigentes hasta diciembre decretos que aumentan impuestos*, EL TIEMPO, Apr. 16, 2010, available at <http://www.eltiempo.com/archivo/documento/CMS-7608007>.

<sup>825</sup> The doctrine found fertile terrain in the fragmented, often-corrupt Colombian legislative process. In a well-known example, C-816 of 2004, the Court struck down in its entirety a proposed constitutional amendment that would have given President Uribe sweeping anti-insurgency measures, for example by declaring special zones which would be placed under military control and where citizens would enjoy curtailed rights. But the proposal found soft opposition in the legislature, and one of the many required votes taken in November 2003 appeared short of the required majority. The failed vote would have doomed the measure, but the Uribe-allied president of the House instead closed the vote before it could be completed, arguing that “disorder” had prevented the vote from being completed. Several weeks later, without any new debate, a new vote was held, and fourteen members changed their vote. The Court held that the procedural irregularities meant that the bill had to be struck down as unconstitutional – the shift in votes was “questionable” and the process had “distorted the popular will.”

some constitutional amendments constituted such a radical departure from key principles underlying the 1991 Constitution that they constituted a “substitution of the Constitution” rather than an amendment to it. These changes could not be made by Congress through normal amendment procedures, but had to be done by a Constituent Assembly.<sup>826</sup> Finally, the Court had stated in its decision allowing Uribe to amend the Constitution to seek a second term in 2004 that one reelection would not constitute a substitution of the Constitution, but more than one likely would.<sup>827</sup> In that first decision, the Court pointed out that many democracies around the world allowed their chief executives to serve two terms, but few allowed for more than two. Moreover, the Court stated that allowing three or more terms would have dire consequences for the system of checks and balances established in the constitutional text, by giving the president the time and power to control most other parts of the state.

The decision thus pitted the two *Uribista* justices against substantial lines of precedent created by the Court. The press reported that Pretelt, aided by Gonzalez, made consistent arguments against the draft judgment produced by another justice, Humberto Sierra Porto.<sup>828</sup> But they were unable to convince any of the other justices of the correctness of their position. A seven to two majority struck down the proposed referendum.<sup>829</sup> This decision – taken to strike down a constitutional amendment proposed on behalf of an extraordinarily popular president

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<sup>826</sup> For core cases applying or discussing the doctrine, see, for example, C-551 of 2003, July 9, 2003 (Eduardo Montealegre Lynett) (considering although rejecting such challenges to a referendum proposed by President Uribe); C-588 of 2009, Aug. 27, 2009 (Gabriel Eduardo Mendoza Martelo) (holding that major constitutional changes to bypass the civil service system were a substitution of the constitution).

<sup>827</sup> See C-1040 of 2005, Oct. 19, 2005 (Manuel Jose Cepeda Espinosa et al.). Prior to 2005, the Colombian Constitution had limited its presidents to one four-year term.

<sup>828</sup> See *El Fallo Mas Transcendental*, EL TIEMPO, Dec. 19, 2010, available at <http://www.eltiempo.com/archivo/documento/MAM-4314011>.

<sup>829</sup> See C-141 of 2010, Feb. 26, 2010 (Humberto Antonio Sierra Porto). Note however that only five justices agreed that the amendment constituted a “substitution of the Constitution.” Justices Pinilla and Sierra Porto argued that the “substitution of the Constitution” doctrine should not exist, but agreed that it should be struck down on procedural grounds. The seven justice majority found problems in the financing of the referendum as well as in its passage through Congress.

with a broad congressional majority – shows that Uribe’s efforts to pack the Court failed. It was an extraordinary demonstration of judicial power against the core interests of the sitting president.

#### **IV. Conclusion**

This chapter has explained why the Colombian Constitutional Court has been able to maintain an activist role despite attempts to both curb and pack it. The background political environment, and particularly the deinstitutionalization and fragmentation of the party system, played some role in protecting the Court. So did the constitutional design of the selection mechanism, which made it more difficult for a single political force to control appointments. But the key elements of the Court’s “shield” against court-curbing and court-packing were elements constructed by the Court itself. The academic and civil society groups around the Court helped to frame attacks on the Court as attacks on the *tutela* (Chapters 5 and 6), which had become extremely popular due to the Court’s use of the device to protect a range of middle class interests (Chapter 7). And the academic community surrounding the Court has also helped to protect it against packing, by making it more difficult for justices to fundamentally alter the Court’s jurisprudential lines. In other words, the Court played a key role in shielding its active role from political reprisal; it has been an active subject in constructing its political space and not simply a passive product of its political environment.

Neither of these shields makes a strategy of court-curbing or court-packing impossible to pursue. The fiscal sustainability amendment, which will have a still undefined impact on *tutela* jurisprudence, shows that a strong president can pass court-curbing measures in some form despite the opposition of the community of the Court. This may be particularly true where, as

with that amendment, the president adopts the “insider” rhetoric of the Constitution and the Court rather than adopting “outsider” rhetoric opposing those institutions. Similarly, an effective selection strategy might depend on appointing insiders to the Court rather than the outsiders relied on by Uribe. Two of the last three selections to the Court – Luis Guillermo Guerrero and Gloria Stella Ortiz – have had extensive experience as *magistrados auxiliares* on earlier courts, each working in that capacity for two different justices. While Ortiz supports similar positions to those in the Court’s progressive wing, Guerrero has articulated a more conservative and deferential theory of judicial role. Thus the Court’s shields limit but do not prevent change, and a shift towards insider strategies – where political opponents coopt rather than oppose constitutional discourse – may signal a maturation in the constitutional system.



## Chapter 9: Conclusion

This dissertation has focused on explaining the puzzle of the Colombian Constitutional Court's durable activism, both in terms of its overall scope and the direction of the specific policy issues on which the Court has chosen to work. It has argued that the standard political competition model cannot persuasively explain the origins of the Court, its ability to withstand attacks, or its behavior.

Chapters 2 and 3 are dedicated to explaining the origins of the Colombia Constitutional Court. Chapter 2 demonstrates how the Colombian Supreme Court played a key role in state-building in Colombia from at least the passage of the 1886 Constitution, and particularly from the creation of the public action in 1910. It gained power through time by carrying out a number of tasks that were important to successive political regimes, including the centralization of power, the provision of "insurance" to partners in political coalitions, the reworking of public and private law to accommodate the political projects of incumbent regimes, and the marginalization and exclusion of outsider forces from dominant political coalitions. The important point is that the Court gained power through its usefulness to prevailing political coalitions, not its distance from them.

Chapter 3 shows, more particularly, that contrary to first appearances, the Colombian Constitutional Court was not a simple case of "independence by design." Constitutional designers were virtually unified in their desire to create new legal instruments that would empower individuals, particularly the *tutela*. The historical legacy of judicial power in Colombia helps to explain why members of the Assembly sought solutions to the country's problems with stronger courts and more developed legal institutions. At the same time, the design and composition of the Constitutional Court emerge as a way to rein in excessive political

independence rather than to create a more independent judicial body. The Court was attractive to the prevailing political coalition precisely because these groups to potentially have greater say in staffing the judiciary. In many ways, the creation of the Constitutional Court was thus a reaction against the judicial activism of the Supreme Court in the late National Front period.

Chapters 4 through 8 focus on the other two pieces of the standard model: the durability of the Constitutional Court and its ability to withstand repeated (and serious) efforts at court-curbing and court-packing. It argues that the key to understanding both dimensions is to understand the Court's role in constructing its own power. Members of the Court sued jurisprudence and other tools to build strategic alliances with certain key groups – elements of the elite academy, certain sectors of civil society, and the middle class. These groups in turn influenced the Court's behavior and helped to protect it against political retaliation. The justices of the Colombian Constitutional Court, in other words, were not merely a product of its political environment, but active participants in creating conditions under which it could exercise power without political backlash.

Chapter 4 demonstrates the ways in which a set of justices on the new Court built up a set of doctrines that lent coherence to the new Constitution of 1991 and which enabled the Court to intervene in a number of matters not necessarily under the Court's control from the face of the constitutional text, including socioeconomic rights, declarations of states of emergency, and constitutional amendments. More deeply, these justices constructed an enduring sense of role revolving around the need to act as guardians of the constitution in the face of institutional failure.

Chapters 5, 6, and 7 in turn show the Court has gained the support of three different communities – academics, civil society, and the middle-class public – as support. These three communities in turn played overlapping but distinct roles: the academic community surrounding the Court has chiefly provided its staff and thus helped maintain continuity in its doctrinal lines, the civil society community has helped extend the Court’s monitoring and enforcement capabilities, and the public has served as a bulwark against political attack. Further, the Court did not find these three communities ready-made in their support, but rather used jurisprudence and other devices to earn their support. For example, the civil society groups surrounding the Court were drafted in via doctrinal devices that formally gave them leverage over the state, while the public was won over through changes to the *tutela* that made it a useful instrument for mass use on bread-and-butter on issues like health care and pensions, where the ordinary state bureaucracy tended to break down.

Finally, Chapter 8 argues that the Court’s formation of particular alliances has helped to protect it against two forms of political backlash, court-curbing measures in the Congress and court-packing attempts by the president and the high ordinary judiciary. Court-curbing attempts have generally been defeated or at least weakened by a combination of the Court’s academic and civil society allies, who have repeatedly rallied to frame court-curbing efforts as fundamental attacks on the *tutela*, and the middle-class public, who view the *tutela* with such favor that attacks on it are politically very costly. Court-packing attempts are in turn made more difficult by the weight of the academic community surrounding and staffing the Court, which has made it hard for new justices to impose radically different visions of the constitution.

The argument developed in this paper has two payoffs, one in the literature on the independent variables that cause courts to be independent, powerful, or active, and the other in

the definition of the dependent variable itself. The causal literature has focused on the political environment, and in particular on political competition or fragmentation, as explanations for strong or independent courts. There is a growing sense that these factors in the political environment, while relevant, do not tell the whole story.<sup>830</sup> A large body of work has found statistical and case study evidence supporting the relevance of political competition or fragmentation,<sup>831</sup> but other work has shown that these causal pathways are neither necessary nor sufficient.<sup>832</sup> Alternative causal stories have been difficult to construct in a generalizable way. The argument here helps to fill theoretical gaps in the causal literature. It suggests first that historical arguments about judicial power, which have eluded precise definition, can be based on testable claims about the role judiciaries played in state building. It suggests second that theories of judicial power must take the agency of judges seriously, and should view courts as subjects and not just objects of their political contexts.

The second payoff of the dissertation is in potentially reframing the debate about the dependent variable or object of study in the judicial politics literature. Existing work has focused mostly on explaining judicial independence, or the ability of the court to rule without interference from the dominant political coalition. This variable remains an important object of

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<sup>830</sup> See, e.g., Gretchen Helmke & Julio Rios-Figueroa, *Introduction: Courts in Latin America*, in *COURTS IN LATIN AMERICA* 1, (Gretchen Helmke & Julio Rios-Figueroa, eds., 2011) (“If the separation of powers approach provides the theoretical linchpin of the book, for many of the authors, it merely serves as a starting point.”).

<sup>831</sup> See, e.g., REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES* (2004) (comparing across states in Argentina and finding evidence that states where political power is divided along party lines are more likely to have independent judiciaries); Mark Stephenson, “*When the Devil Turns...*” *The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUDS. 59 (2003) (finding statistical evidence the political competition is correlated with more independent judiciaries); Julio Rios-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002*, 49 LAT. AM. POL. & SOC’Y 31 (2007) (showing statistically that the Mexican Supreme Court became more independent as the political system became more competitive and power fragmented).

<sup>832</sup> See, e.g., TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007) (arguing that the Egyptian Constitutional Court gained power during a dictatorship because of a desire to attract foreign investment); Alexei Trochev, *Less Democracy, More Courts: A Puzzle of Judicial Review in Russia*, 38 L. & SOC’Y REV. 513 (2004) (arguing that the emergence of constitutional courts at the regional level in Russia was linked to the consolidation rather than fragmentation of political power).

study. But it is also incomplete, for reasons laid out in more detail in the introduction to this dissertation.<sup>833</sup> Calling a court independent tells us little about how it actually chooses to exercise its power or what impact its decisions have.<sup>834</sup> Further, recent work has shown that judicial independence is not an on/off switch, but rather than courts generally considered docile can exercise an independent impact on politics in some situations.<sup>835</sup> The literature thus needs to turn increasingly towards two more nuanced questions: (1) what explains cross-nationally the topics in which courts choose to exercise power, and (2) what impact do different exercises of judicial power have on the political system? An approach focusing on the historical development of judicial power and on the precise choice of alliances made by courts has the potential to illuminate these two questions. The two sections of this conclusion focus in turn on each of these two payoffs.

## **I. The Emergence of Judicial Power in Comparative Perspective**

This section looks at the causal question in comparative perspective. The dominant approach taken in the preceding chapters has been process tracing: the plausibility of the theories developed here was tested through a close analysis of the mechanisms in the Colombian case.<sup>836</sup> This conclusion supplements this evidence by considering some additional cases chosen through

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<sup>833</sup> See *supra* Chapter 1.I.B.

<sup>834</sup> See Diana Kapiszewski, Gordon Silverstein, & Robert A. Kagan, *Introduction*, in CONSEQUENTIAL COURTS: JUDICIAL ROLE IN COMPARATIVE PERSPECTIVE 1 (Diana Kapiszewski et al., eds., 2013) (focusing the debate not only on the power that courts have, but how they use that power).

<sup>835</sup> See, e.g., GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005) (arguing that the Argentine Supreme Court was generally compliant towards incumbent presidents, but “strategically defected” when incumbents seemed likely to lose power); Tom Ginsburg & Tamir Moustafa, *Introduction: The Function of Courts in Authoritarian Politics*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa, eds., 2008) (arguing based on a series of case studies that courts in authoritarian regimes are often granted or exercise power for a number of distinct reasons).

<sup>836</sup> See, e.g., David Collier, *Understanding Process Tracing*, 4 PS: POL. SCI. & POLS. 823 (2011).

the logic of the case study method.<sup>837</sup> The comparative cases studied here lend support to the hypotheses developed in the dissertation, but because they are based on secondary rather than primary evidence and because of lack of completeness, they should be seen primarily as tests of the plausibility of the hypotheses suitable for further work.

### **A. The Historical Development of Judicial Capacity and Judicial Independence**

Two key claims arise out of the historical development of judicial power in Colombia. The first is that the way the judiciary was inserted into the state-building process had a meaningful relationship to its role in the modern era. The second is that the relationship between the achievement of judicial “independence” and the construction of judicial power or capacity is highly complex. The Colombian Supreme Court tended to gain power in most periods not via neutrality or distance from political coalitions, but instead by demonstrating its utility for their state-building projects. The high court gained power over long periods of time by carrying out a number of different functions for political elites. Some of these tasks involved centralization of the state, while others involved maintaining political coalitions or reworking public and private law to favor incumbents.<sup>838</sup> Scholars studying the historical development of judicial power in the United States have observed similar patterns there: the United States Supreme Court consistently gained power by carrying out functions for dominant political elites, rather than by establishing itself as a neutral arbitrator between political coalitions.<sup>839</sup> Both countries, then, tend to support the hypothesis that courts gain power by being involved in state-building projects and to reject a

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<sup>837</sup> For an overview of the case study method applied to the study of judicial politics, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

<sup>838</sup> For an overview of these different tasks, running from 1886-1991 but focusing on the National Front period, see *supra* Chapter 2.

<sup>839</sup> See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2009); *see also* Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDS. AM. POL. DEV. 35 (1993) (finding that the U.S. Supreme Court has tended to intervene in major political disputes when political actors invited its intervention in order to avoid costly disputes that split political coalitions).

variant of the standard story under which strong courts are set up to be neutral umpires between competing political coalitions in competitive party systems.

These results can only be very cautiously generalized. Too little seems to be known about judicial histories in most countries to make the claim easily testable at this stage. Further, making causal claims about the role of history in the development of judicial power is especially complex. There are almost bound to be a number of different pathways to a powerful court. For example, countries with consistent or intermittent democratic histories may be very different from countries with recent regime changes from authoritarianism.<sup>840</sup> It will likely end up being easier to rule out the probability of some pathways than to claim one pathway as the dominant one for the achievement of judicial power. Finally, the causal links between the history of judicial power and the courts of the present day are often difficult to draw.

The goal in this section is thus more modest: to demonstrate that the “state-building” theory of judicial role may be useful for understanding a puzzle in judicial development: the weak judicial review of Chile. Chile serves as a kind of most similar case to Colombia. Chile and Colombia both boast long histories of competitive party politics within a democratic framework.<sup>841</sup> Further, both countries are known for having fairly strong political institutions and for taking law and legality seriously.<sup>842</sup> Yet the Chilean Supreme Court and Constitutional Tribunal are regarded by most observers as playing an extremely limited role within the political order. Even after some commentators have argued that the courts are displaying an “incipient

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<sup>840</sup> See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (studying the construction of judicial review in Canada, Israel, New Zealand, and South Africa, and arguing that at least in those contexts, judicial review was established in order to protect the hegemonic power of threatened elites).

<sup>841</sup> In the Chilean case, a long period of democracy in a stable party system was broken by the military coup of 1973, which overthrew Salvador Allende. See ARTURO VALENZUELA, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CHILE* (1978).

<sup>842</sup> See, e.g., Carlos F. Gomez Diaz & Jenny K. Rodriguez Ortiz, *Four Keys to Chilean Culture: Authoritarianism, Legalism, Fatalism, and Compadrazgo*, 19 *ASIAN J. LAT. AM. STUDS.* 43 (2006).

activism,” there is little debate that the Chilean high courts are much less powerful than the Colombian Constitutional Court.<sup>843</sup>

Some scholarship has focused on the internal historical development of the judiciary, arguing that the Chilean judiciary has been passive and conservative over the course of the 20<sup>th</sup> century, and that the bureaucratic nature of judicial politics in a civil law country has tended to replicate that ideology through time.<sup>844</sup> Another approach has focused on the nature of the political regime and the constitutional design of the 1980 Constitution, arguing for example that the right, which has usually been in opposition since the transition to democracy, has found other ways to influence politics and has not needed or wanted to lean heavily on courts, even though the Constitutional Tribunal was envisioned by Pinochet and constitutional architects primarily as a protection for right-wing interests.<sup>845</sup>

Both of these approaches are useful but may obscure broader and deeper questions. If political actors prefer to rely on other institutional mechanisms to attain their goals instead of courts, this must say something not only about those other mechanisms, but also about the perceived utility of courts. And judicial bureaucracies are not wholly self-contained entities: they can be and are influenced by political and social actors outside of the judiciary, through both

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<sup>843</sup> See Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideational Roots of Rights Adjudication in Chile*, in *COURTS IN LATIN AMERICA* 199 (Gretchen Helmke & Julio Rios-Figueroa, eds., 2011) (arguing that institutional reforms and changes in the political context have made the courts somewhat more active than they were previously).

<sup>844</sup> See LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007). A related approach focuses on the formal powers of the courts, and especially the fact that the Constitutional Tribunal, until recently, had only abstract review powers that could be triggered by certain actors. Recent reforms have also given the Court the power to hear certain kinds of concrete disputes. See Couso & Hilbink, *supra* note 843.

<sup>845</sup> See Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010*, 89 *TEX. L. REV.* 1517 (2011). On the design of the Chilean constitution by the military regime, see ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION* 234-39 (2002) (explaining the creation of the Constitutional Tribunal).



selection and *ex post* incentives. An approach that focuses on the relationship between the courts and other Chilean institutions through time may help to fill these gaps.

The course of Chilean judicial development appears to be strikingly different from the course of Colombian judicial development, despite the similarities in the overall political systems. The Colombian Supreme Court began life as a court of cassation, but its private law work had a public function: political centralization.<sup>846</sup> After the Court gained the public action in the early 20<sup>th</sup> century, it gained wide expertise in public law and thus attained the trust of political elites to carry out a range of functions. The public action funneled most major controversies towards the Court. In contrast, after a few successive attempts to pack the Chilean Supreme Court in the early 1920s and 1930s, it appeared to keep a consistently low political profile in an effort to defend its independence. The Court focused on private law matters and on keeping a tight grip over the rest of the judicial hierarchy.<sup>847</sup> In contrast, it rarely interfered in constitutional matters, rejecting about 90 percent of claims brought before it between 1925 and 1973 (the birth and death of the Constitution of 1925).<sup>848</sup> The Court also wilfully excluded broad areas of public policy from any judicial review: it held for example that many presidential decrees were “acts of authority” insulated from judicial review because they were properly within the province of specialized administrative courts contemplated in the 1925 Constitution, even though those specialized courts were never established.<sup>849</sup> The broad-brush portrait of the Chilean Supreme Court’s history is of a court that protected its independence from political

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<sup>846</sup> See JORGE GONZALEZ-JACOME, *ENTRE LA LEY Y LA CONSTITUCION. UNA INTRODUCCION HISTORICA A LA FUNCION INSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA* (2007) (explaining the creation of the cassation power in the 1886 constitution as part of a centralization project by winners of the country’s civil war).

<sup>847</sup> See, e.g., HILBINK, *supra* note 844.

<sup>848</sup> See Eugenio Valenzuela, *Labor judicial de la Corte Suprema*, in *PROPOSICIONES PARA LA REFORMA JUDICIAL* 143 (Eugenio Valenzuela, ed., 1991).

<sup>849</sup> See JULIO FAUNDEZ, *DEMOCRATIZATION, DEVELOPMENT, AND LEGALITY: CHILE, 1831-1973*, at 141-44 (2007).

interference by staying out of public law disputes and instead focusing on private law, rather than of a court that gained power through engagement with public law.

There is some evidence that the rest of the Chilean political system responded to this dynamic by working around the Chilean Supreme Court. Most importantly, the legal review of executive action focused not on the Court but instead on another institution, the Comptroller, which reviewed all executive decrees for both legality and constitutionality from 1927. The Comptroller's decisions were a soft or dialogical form of review because they could be overridden by a special government decree.<sup>850</sup> Parliamentary efforts to control executive power within Chile's competitive political system focused on the Comptroller and not the Supreme Court. After the institution took a relatively passive approach to the task in its first two decades, parliamentary leaders impeached the Comptroller, and the impeachment in turn led to a more aggressive use of legality review.<sup>851</sup> The Comptroller for example used his review powers to strike down decrees ending strikes and implementing price controls. And during the ill-fated Socialist administration of Salvador Allende in the early 1970s, the Comptroller was the main legal antagonist of the administration, consistently using its powers to limit governmental attempts to take over commercial enterprises and to break strikes.<sup>852</sup> When the government overrode the decisions with so-called *insistence decrees*, the Parliament would take that as a signal to impeach the Cabinet ministers signing the decrees.<sup>853</sup> In contrast to the Comptroller's increasingly important role, Faundez argues that there was a "widely held view among

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<sup>850</sup> See *id.* at 116-17.

<sup>851</sup> See *id.* at 119-23.

<sup>852</sup> See *id.* at 209-10 (detailing the major confrontations between the Contraloria and the presidency during Allende's administration).

<sup>853</sup> See *id.* at 213-14. Moreover, the courts eventually got involved in these disputes and sided against the administration, although they followed the Contraloria and parliament rather than leading them. See *id.*

politicians that neither the Supreme Court nor the rest of the judiciary could be trusted with delicate issues of public policy.”<sup>854</sup>

The Chilean Supreme Court was thus not involved in state-building projects in the same way as the Colombian or United States courts. It demonstrates an alternative model, where courts shrink from engagement with most public law issues as a way to preserve judicial independence. In effect, the Chilean Court won its independence from political interference by refusing to develop capacity or power in public or constitutional law. The region also appears to demonstrate at least two other variants in the historical relationship between judicial power and judicial independence. In Argentina, for example, the Supreme Court appears never to have developed either independence from political forces or the capacity/power to deal with public law issues. Instead, it was viewed primarily as a source of patronage by dominant political actors, which purged the court repeatedly in an attempt to replace opposition judges with members of then empowered-parties.<sup>855</sup> The result is a Court that is still widely distrusted, even by social and political actors that utilize it.<sup>856</sup> In Mexico, the Court developed little independence from the PRI over the course of the twentieth century, but was a relevant actor in state-building. The Court was particularly important in centralization efforts, developing doctrines that allowed the Supreme Court to review all decisions of state courts and thus effectively nullified Mexico’s

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<sup>854</sup> *Id.* at 128.

<sup>855</sup> See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 292 & tbl. 1 (2002) (noting that despite formal provisions giving Supreme Court justices life tenure, average tenure historically was in fact 5.6 years because new regimes generally purged the Court in order to install their supporters).

<sup>856</sup> See Catalina Smulovitz, *Judicialization in Argentina: Legal Culture or Opportunities and Support Structure?*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 234 (Javier A. Couso et al., eds., 2010) (arguing based on field research that civil society groups use the Argentine judiciary as one option in an arsenal to create political change even though they have a low opinion of the Supreme Court and broader judiciary).

paper federalism.<sup>857</sup> The Supreme Court has been the key institution, in the turn towards democracy in the 1990s, in adjudicating disputes between parties, branches, and levels of government.<sup>858</sup>

None of the Latin American countries appear to meet the standard story of judicial development where courts gain power over the long term as a result of gaining a reputation as neutral arbiters. Beyond this, the cases demonstrate the need for further research on the relationship between the development of judicial independence and the development of judicial capacity or power. It may be that the cost of achieving insulation from political forces is generally a judicial refusal to engage important political issues, as in the Chilean case. If so, it may be that being useful to state-building projects (as in Colombia and Mexico, as well as in some post-colonial contexts) has more explanatory power for the current role of courts than a history of political insulation. This is a topic on which much more cross-national research needs to be done.

## **B. The Role of Agency in Explaining Judicial Behavior**

A second key argument developed in this dissertation is that the Colombian Court was not just a product of its political environment; its choices helped to construct both the existence and direction of its activism. The Court's doctrinal choices helped to increase its ability to intervene in political matters, while its decisions built up alliances that in turn protected the Court from backlash.

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<sup>857</sup> See STEPHEN ZAMORA ET AL., MEXICAN LAW 102-31 (2004) (tracing the development of the *amparo* and the fact that errors in application of state law by state courts, as adjudged by federal courts, were considered violations of due process).

<sup>858</sup> See, e.g., Julio Rios-Figueroa & Matthew M. Taylor, *Institutional Determinants of the Judicialisation of Policy in Mexico and Brazil*, 38 J. LAT. AM. STUDS. 739, 746 (2006).

A serious consideration of this argument must begin from the premise that different courts operate both with different sorts of pressures both *ex ante* on judicial selection and *ex post* on backlash or punishment against judicial decisions. Both of these pressures are heavily influenced, for example, by the shape of a party system in which a court works. Justices in strong party systems (like Mexico) are more likely to be tied to those parties than justices in weak party systems (like Brazil and Colombia). But the value of the point made here is in demonstrating the opportunities for autonomous judicial action that often exist in both contexts. These choices in turn impact judicial behavior in meaningful ways.

Brazil forms a useful contrast with Colombia because both courts have operated within weak or relatively deinstitutionalized party systems in recent years. The Brazilian party system has long been classified as both inchoate and fragmented, and parties are further weakened at the national level by federalism.<sup>859</sup> Further, it appears – based on limited evidence on historical judicial development in Brazil – that both sets of federal courts played a meaningful state-building role historically: the historical trajectories may be similar.<sup>860</sup> Both the Colombian Constitutional Court and the Brazilian STF are protagonists within their political orders,

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<sup>859</sup> See Kevin Lucas & David Samuels, *The Ideological “Coherence” of the Brazilian Party System, 1990-2009*, 3 J. POL. LAT. AM. 39 (2010) (presenting evidence that the Brazilian party system has actually lost ideological coherence and become relatively more inchoate in recent years).

<sup>860</sup> See, e.g., ANTHONY PEREIRA, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA* 1-89 (2005) (tracing the history of the interaction between the Brazilian judiciary and national security concerns).

frequently playing an important role in public policy.<sup>861</sup> And both courts possess durable internal “court cultures” that protect their autonomy and ensure continuity in jurisprudential styles.<sup>862</sup>

Yet the two courts have forged somewhat different sets of alliances. The Colombian Court, as noted in the preceding chapters, is chiefly a court of the middle class, of a surrounding elite academic community, and of progressive civil society. The Brazilian judiciary also in important ways serves the interests of the middle class: like Colombia, Brazil has a massive individualized social rights jurisprudence on the right to health, most of which appears to accrue to middle class interests in eliding bureaucratic obstacles.<sup>863</sup> Unlike the Colombian Constitutional Court, the STF justices appear to place more emphasis on the career judiciary, from which both the justices and staffs are drawn. As Brinks argues, the Brazilian STF is a “corporatist” court with a “judicial constituency.”<sup>864</sup> Close observers of the Court have thus noted that it is much more likely to intervene in cases involving attempts to cut the pension benefits or similar benefits of the civil service.<sup>865</sup> These cases involve a confluence of the Court’s two main audiences: the middle class and the sprawling judicial bureaucracy. The Court has also shown unusual activism when it has heard challenges to the structure of the judiciary, and has tended to favor abstract review challenges brought by the bar association over those brought by

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<sup>861</sup> See Matthew M. Taylor, *Citizens Against the State: The Riddle of High Impact, Low Functionality Courts in Brazil*, 25 REV. ECON. POLIT. 418, 419 (2005) (noting that the Brazilian courts have been “important loci for policy debate,” while arguing that the courts have been distrusted by the public and have often functioned poorly).

<sup>862</sup> See Diana Kapiszewski, *How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 51 (Javier Couso et al., eds., 2010).

<sup>863</sup> See Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Economic and Social Rights in Brazil*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS IN THE DEVELOPING WORLD 100 (Varun Gauri & Daniel M. Brinks, eds., 2010) (finding that Brazilian courts are much more likely to rule for plaintiffs in individualized cases than they are in structural cases); Octavio Luis Motta Ferraz, *Harming the Poor Through Social Rights Litigation*, 89 TEX. L. REV. 1643 (2011) (arguing that the Brazilian pattern of enforcement benefits the middle class while harming the poor).

<sup>864</sup> Daniel Brinks, “Faithful Servants of the Regime”: *The Brazilian Constitutional Court’s Role Under the 1988 Constitution*, in COURTS IN LATIN AMERICA 100, 144 (Gretchen Helmke & Julio Rios-Figueroa, eds., 2011).

<sup>865</sup> See *id.* (noting the STF’s 1999 decision striking down substantial aspects of pension reform for civil servants).

other groups – like political minorities – able to bring such challenges.<sup>866</sup> The Court has been cautious in other types of cases, usually deferring to the executive. For example, the STF has shown no inclination to engage in the kind of academically and civil-society driven structural remedies found in Colombia.<sup>867</sup> It hews closely to traditional conceptions of judicial role.

The contrast is useful because it illuminates both points of similarity and difference in the development of judicial institutions. The existence of large-scale individualized social rights enforcement in both countries is telling and may indicate the cross-national importance of the middle class as an audience in political systems where parties are relatively weak.<sup>868</sup> The possibility of what Hambergren calls “judicial populism” may be highest in such systems, because courts have higher incentives to cultivate alliances directly with the middle class rather than working through the parties.<sup>869</sup> The possibilities for this kind of judicial populism – and more broadly of robust social rights enforcement – may be considerably lower where parties are strong, and courts retain ties to those parties rather than directly to the public.

The corporatism of the Brazilian STF may in contrast illustrate the Colombian Constitutional Court that may have been. Even though the Colombian Constitutional Court was designed to be outside of the ordinary Colombian judiciary, and was born partly out of frustration with the performance of that judiciary, the high ordinary courts retained a dominating role in selecting the members of the Court. The Council of State and the Supreme Court

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<sup>866</sup> See MATTHEW TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL 84 (2008) (presenting statistical evidence).

<sup>867</sup> See Hoffmann & Bentes, *supra* note 863 (noting that plaintiffs almost always lose structural cases, while generally winning individual cases on rights like the right to health).

<sup>868</sup> Another example of the same phenomenon occurred shortly after the transition to democracy in Hungary, where the new Constitutional Court gained immense popularity by stopping social security cuts that primarily harmed the middle class. There are well, the Court operated within a relatively inchoate party system without clear ideological definition. See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921 (2004).

<sup>869</sup> See LINN HAMBERGREN, ENVISIONING REFORM: CONCEPTUAL AND PRACTICAL OBSTACLES TO IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007).

combined had the power to select two-thirds of the lists from which the Court was drawn.<sup>870</sup> And on the transitional court of 1992, members with ties to the ordinary courts outnumbered outsiders by a four to three margin.<sup>871</sup> Yet the three outsiders – Alejandro Martinez Caballero, Eduardo Cifuentes, and Ciro Angarita Baron – dominated the jurisprudence by presenting a powerful and unified vision of judicial role and constitutional law. They forged both the jurisprudential foundations and ties with the middle class and academic community on which subsequent courts have built. Thus, even as the balance on the Court has moved decisively through time towards past members of the ordinary courts with no special expertise in constitutional law, the jurisprudential visions of those courts have had relatively little impact on the jurisprudence of the Constitutional Court. Justices have been able to make an intentional effort to shift lines on certain key issues – particularly the *tutela* against judicial decisions – but they have not had a broad impact because of the inertial effect of the Court’s jurisprudential lines and the power of its professional staffs. The Court thus has been less marked by corporatism than the Brazilian judiciary, despite the design of the Constitutional Court.

Strong party systems form a second useful point of comparison. The Mexican Supreme Court operates in an environment that transitioned from a dominant party system into a competitive three-party system in the 1990s.<sup>872</sup> Reforms to the Court in the 1990s strengthened its ability to play a role in disputes between levels and branches of government by creating a new form of abstract review, the constitutional action, that could be activated by various political actors and by strengthening an old device, the constitutional controversy, that allowed certain

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<sup>870</sup> See CONST. COL., art. 239.

<sup>871</sup> See *supra* Chapter 4.

<sup>872</sup> See Joseph L. Klesner, *Electoral Competition and the New Party System in Mexico*, 47 LAT. AM. POL. & SOC’Y 103 (2005).



types of structural disputes to immediately reach the Court.<sup>873</sup> In contrast, the traditional rights-protecting instrument in Mexico, the *amparo*, was not reformed either to simplify the instrument or to broaden its scope.<sup>874</sup> Empirical analyses have shown that the Court gained independence, measured as the ability to rule against the once-hegemonic Mexican president, as political competition increased.<sup>875</sup> But another interesting set of questions revolves around the scope of the Court's activism. The Court has focused in most of the post-democratization period on structural disputes involving the separation of powers and the role of the national versus subnational governments. For example, in a key early case the Court held that the president did have powers to veto the budget, filling a textual gap.<sup>876</sup> In other cases the Court and affiliated institutions (particularly the Supreme Electoral Court) have managed the developing party system for the benefit of the parties. In a key case, for example, the Court denied a would-be independent candidate standing to attack a set of rules prohibiting independent candidates.<sup>877</sup>

What the Court did not do much of was rights enforcement: it has spent little effort breathing life into the 1917 Constitution's rights provisions.<sup>878</sup> For example, socio-economic rights are essentially non-justiciable in Mexico, despite the fact that the Constitution is rich in those rights and was one of the first in the world to include them. And even first generation

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<sup>873</sup> See JODI FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, MEXICO, AND PERU IN THE 1990S 89-110 (2008).

<sup>874</sup> A set of important reforms was finally promulgated in 2011. See Suprema Corte de Justicia de la Nación, Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011, available at <http://www2.scjn.gob.mx/red/constitucion/inicio.html>.

<sup>875</sup> See Rios, *supra* note 831 (presenting statistical evidence).

<sup>876</sup> See Controversia Constitucional 109/2004, available at [http://www.diputados.gob.mx/LeyesBiblio/abro/Controv\\_PEF05\\_24oct05.doc](http://www.diputados.gob.mx/LeyesBiblio/abro/Controv_PEF05_24oct05.doc).

<sup>877</sup> See Accion de Inconstitucionalidad 61/2008, available at [https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20%C3%A9poca/2008/7\\_AI\\_61\\_08.pdf](https://www.scjn.gob.mx/Transparencia/Epocas/Pleno/Novena%20%C3%A9poca/2008/7_AI_61_08.pdf).

<sup>878</sup> See, e.g., Karina Ansolabehere, *More Power, More Rights? The Supreme Court and Society in Mexico*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 78 (Javier A. Couso et al., eds., 2010).

rights, like freedom of speech, have been relatively thinly protected by the Court.<sup>879</sup> The explanation for this pattern – robust structural enforcement and weak rights enforcement – seems to lie in part in the tether between the parties and the justices on the Court. The justices had historically been drawn from the historically-hegemonic PRI; these justices were historically adept at reading most rights out of the constitution through justiciability doctrines and other techniques.<sup>880</sup> After the reforms, an increasing number of justices were drawn from the PAN.<sup>881</sup> Yet the PAN, although partly a party of lawyers, did not seem particularly interested in pursuing a rights-driven agenda at the constitutional level. It may be that the ideological thrust of the constitution – which had social underpinnings despite neoliberal reforms – made such an approach unpalatable. The key point is that in Mexico, the justices have relatively strong links to the parties, and this helps to explain the thrust of constitutional jurisprudence in Mexico.

The links between justices and parties have acted as a constraint, but they have not prevented members of the Court from pushing a different agenda. A coalition on the Court, led by Justice Jose Ramon Cossio, has pushed a rights-oriented model of constitutional adjudication. This effort has focused both on changes in jurisprudence and related changes to the constitutional text. The centerpiece of these efforts was the constitutional reforms of 2011, which strengthened the *amparo* considerably, added a clause incorporating international human rights law into the domestic legal order, and empowered the National Commission on Human Rights.<sup>882</sup> A definitive narrative of the politics of these reforms has not been written, but it appears that they were pushed by a coalition of civil society groups in conjunction with leading constitutional scholars and members of the Supreme Court. These actors argued *inter alia* that recent decisions

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<sup>879</sup> *See id.*

<sup>880</sup> For an overview, see JOSE RAMON COSSIO, CAMBIO SOCIAL Y CAMBIO JURIDICO (2001).

<sup>881</sup> See Arianna Sanchez et al., *Legalist versus Interpretivist: The Supreme Court and the Democratic Transition in Mexico*, in COURTS IN LATIN AMERICA 187, 191-93 (2011).

<sup>882</sup> For the details on this reform, see *supra* note 874.

of the Inter-American Court of Human Rights against Mexico required more serious domestic attention to human rights. The shifts in jurisprudence have born some fruit, for example in *amparo* cases recognizing gay marriage rights and rights of indigenous groups.<sup>883</sup> In short, the shifting jurisprudence of Mexico may be driven by an effort of the Court to build alliances, similar to those built by the Colombian Court, that work around the party system in the academic and civil society communities.

A more extreme example from outside the region is provided by the South African Constitutional Court, which operates in a dominant-party system. Scholars working on the Court have generally influenced the influence of the dominant ANC in shaping the space within which the Court can work.<sup>884</sup> The Court's socioeconomic rights jurisprudence is extremely sophisticated but also far more deferential than the jurisprudence of the Colombian Constitutional Court. The Court rejected the individualized remedy model of enforcement for the right to health, holding that in a poor country, difficult resource tradeoffs needed to be made and the benefits of a given judgment ordering medicine or treatment could not be generalized to all plaintiffs.<sup>885</sup> The Court also rejected, in the famous case *Grootboom* and related cases on the right to housing, any attempt to impose structural remedies.<sup>886</sup> It instead settled for what Mark Tushnet has called a "weak-form" remedy: it declared that the government's existing housing program was unconstitutional because it did not deal adequately with those in dire short term

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<sup>883</sup> On same sex marriage, the Court is progressing slowly, issuing *amparo* judgments on a state-by-state basis. *See, e.g.*, Amparo en revision 152/2013 (Oaxaca); *see also* Amparo en revision 631/2012 (requiring consultation with indigenous groups before allowing major economic works on their land).

<sup>884</sup> *See, e.g.*, Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106 (2009); Sujit Choudhry, "He Had a Mandate": *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. (South Africa) 1 (2009).

<sup>885</sup> *See Soobramoney v. Minister of Health*, CCT32/97 [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (Nov. 27, 1997).

<sup>886</sup> *See Government of the Republic of South Africa and Others v Grootboom and Others*, (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (Oct. 4, 2000).

need, but it issued the plaintiff neither housing nor any other direct remedy.<sup>887</sup> Instead, it stated that the government had a constitutional obligation to fill the constitutional gap, without specifying how that was to be done or maintaining jurisdiction over the case. In subsequent cases, the Court has often relied on what it has termed “engagement”: forcing the government to dialogue with affected groups (often potential evictees) but declining to impose any particular substantive outcome on those negotiations.<sup>888</sup> In cases directly involving political issues – for example regarding the rights of minority parties – the court has been even weaker, generally declining to interfere.<sup>889</sup>

Explanations for the behavior of the Court inevitably begin with the ANC’s political position. And indeed, there is evidence that the justices feel constrained by the ANC and see it as their main audience. For example, unlike the Colombian Constitutional Court, the South African Constitutional Court is not well-regarded (and not well-known) by the general public.<sup>890</sup> It has declined to exploit possibilities that would have made the Court easier to access by, for example, allowing for direct standing before the Court.<sup>891</sup> Very little of its jurisprudence has worked to cultivate a middle-class following. As Roux shows in his careful analysis, this constrains the Court but does not kill the possibility of meaningful judicial action. In cases where the Court has been able to gain support from factions of the ANC or prod the party along a perceived shared ideological project, as in many of the socioeconomic rights cases, it can take meaningful

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<sup>887</sup> See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* 242-44 (2008).

<sup>888</sup> For an overview, see 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).

<sup>889</sup> See THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005*, at 334-64 (2013).

<sup>890</sup> See Roux, *supra* note 884.

<sup>891</sup> See, e.g., Jackie Dugard, *Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court*, 22 S.A.J. HUM. RTS. 261 (2006).

action.<sup>892</sup> In cases where it directly threatens core interests of the ANC (as in the political minority cases) it is much more constrained.

Domestically, the Court has faced an avalanche of academic critiques for not being aggressive enough in enforcing constitutional rights, and particularly socioeconomic rights.<sup>893</sup> Some commentators have called for the Court to develop doctrines in order to make constitutional justice easier to access. Many others have called for stronger remedies that move in the direction of structural injunctions. These efforts could be read in part as attempts to shift the audience of the Court by making it more attractive both to the middle class and to elements of civil society. Stronger remedies on socioeconomic rights like health, housing, and water may make the Court seem more valuable to ordinary South Africans, by showing how the Court is able to obtain a concrete impact. Remedies, in turn, could be shaped to draft in a more significant role for civil society groups as monitors of government action or as generators of policy ideas.<sup>894</sup> These remedies could also be crafted so as to increase the amount of media attention received, along the lines of the Colombian cases studied in Chapter 6. The extent to which these strategies would be effective in a dominant-party context (as opposed to the inchoate party system of Colombia) is a difficult question. A court that went too far in these directions might be weakened or abolished by the dominant party. But it seems likely there would be some opportunities to exploit. At the least, the framework developed here helps to guide questions about the extent and manner to which a constrained court could carve out more space within the political order.

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<sup>892</sup> See ROUX, *supra* note 884, at 292-303 (exploring the Court's relatively aggressive interventions in socioeconomic rights through this lens).

<sup>893</sup> See, e.g., DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS* (2007); Dugard, *supra* note 891.

<sup>894</sup> For a more detailed examination of this possibility, see David Landau, *Aggressive Weak Form Remedies*, \_\_ CONST. CT. REV. \_\_ (forthcoming 2014).

## **II. Beyond Judicial Independence: Understanding the Effects of Judicial Activism**

The literature on comparative courts has focused mostly on explaining why some courts are independent and others are not. The choice of dependent variable masks at least two key questions: (1) how courts use their independence, or the scope of judicial power, and (2) what impact these exercises of power have on the development of the political system, or the effect of judicial power. There has been relatively little research on both of these questions. Part I of this conclusion demonstrated that the analytic tools developed here are useful for answering the first question. All of the Latin American courts studied above – Colombia, Chile, Brazil, and Mexico – would be classified as independent in the sense that they are capable of ruling against the government. But a classification of all of them as independent misses the striking differences in what they actually do. Consideration of the historical development of judicial power and the main audiences of each court helps to construct a more nuanced argument about the scope of each court's power.

This Part very briefly considers the second question – the effects of judicial power. Again, this topic is understudied, and much existing work seems to break down into two dichotomous camps. Roughly speaking, some scholars see the promotion of strong, independent courts as a good thing because it increases accountability for government action, enables economic growth, etc. Others see the rise of strong courts as a bad thing because it simply transfers political power from democratic actors to non-democratic courts, allowing some groups to increase their power over others. The question matters both academically and because it informs international policy efforts like those prioritizing judicial reform and the rule of law. There is thus a need to develop more nuanced and more realistic portraits of the effect of judicial

empowerment in different contexts. Within Latin America, for example, “new constitutionalist” movements have strengthened constitutional judiciaries and lawyers, yet scholars have had a hard time taking stock of the movement and its impact.<sup>895</sup>

A focus on consequences suggests, *inter alia*, the following questions:

(1) Who benefits from increased rights interventions (for example, increased enforcement of socio-economic rights) in different contexts?

(2) Does increased judicialization tend to improve the performance of political systems through time, or does it tend to have the opposite effect on those systems?

(3) Can courts construct a constitutional culture in contexts where one has historically not existed or has not been very strong?

These are sweeping and difficult questions. The analysis in the prior chapters cannot give firm answers to any of them, even within the specific context of Colombia since 1991. However, the approach taken in this dissertation has the potential to offer a more nuanced set of answers, by focusing concretely on the kind of space that a court carves out in a given political regime and on the political coalitions on which it chooses to rely. This section briefly fleshes out two points: (1) the link between the Court’s bases of support and its jurisprudence, and (2) the shape of the constitutional culture that is emerging in Colombia.

### **A. The Middle Class, Academia, and the Shaping of the Court’s Jurisprudence**

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<sup>895</sup> On the “new constitutionalism” and its impact in the region, see Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15 (2006); Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 141 (Javier A. Couso et al., eds., 2010).

The Colombian Constitutional Court's courting of a middle-class audience was a predictable response to the weakness of the party system. As noted in Chapter 7, the Court almost from its inception constructed doctrinal tools allowing it to enforce socioeconomic rights via *tutela*, and quickly dropped the barriers that prevented non-marginalized groups from taking advantage of those tools. Most notably in the economic crisis of the late 1990s, the Court's reliance on middle-class support bubbled over into a kind of judicial populism, with the Court undertaking large-scale interventions for the benefit of the middle class on the issues of housing and public sector salaries.<sup>896</sup> These decisions in turn created some backlash against the Court – both external groups of politicians and lawyers and internal elements of the Court's own academic support structure sought a moderation and better targeting of these structural decisions. The result is that the Court's large-scale socioeconomic decisions since 2000 (on displaced persons and healthcare) have been better targeted towards the poor, but the Court has continued to encourage a large-scale individualized jurisprudence on rights like health and pensions.

The key question is in evaluating the consequences of this pattern of jurisprudence. On the one hand, it means that one can have a robust pattern of socio-economic rights jurisprudence where many of the benefits are captured by middle-class groups, rather than the poor. Similarly, a robust pattern of enforcement can coexist with, rather than correcting, badly dysfunctional bureaucracies: the widespread use of the *tutela* in Colombia to enforce the right to health exists as a kind of safety valve from the country's deficient healthcare infrastructure, rather than correcting or improving that structure. Comparative experience, particularly from Brazil, suggests similar patterns in other countries which rely heavily on individualized models of

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<sup>896</sup> See *supra* Chapter 7.



socioeconomic rights enforcement.<sup>897</sup> There as well, individualized enforcement is utilized mostly by the middle class, and mostly as a way to those citizens to jump over others waiting for the country's slow and unpredictable healthcare system.<sup>898</sup>

Understanding these patterns is important in evaluating the conditions under which socioeconomic rights, even if accompanied by robust judicial enforcement, are transformative in nature. They are also important in evaluating the relative value of different kinds of remedies for enforcement of these kinds of constitutional rights. The Colombian case, in particular, presents a disquieting possibility for human rights scholars interested in promoting socioeconomic rights: under certain political conditions, courts may enforce these rights in a way that will shore up a safety net for formal sector workers who are already relatively privileged rather than undertaking truly transformative projects. In some instances, this may be because reaching the poor requires more aggressive and creative remedies.<sup>899</sup> But in Colombia, creativity and judicial aggressiveness have never been the problem. Instead, a weak party system may create the political incentives for a court to use socioeconomic rights to cultivate a middle-class base.

At the same time, the Court's reliance on a consistent middle-class constituency has had some cross-cutting effects. As demonstrated in Chapter 8, the perceived popularity of the Court and especially the *tutela* has made the Court a difficult institution to attack. In this sense, the Court's *tutela* jurisprudence, with its mass enforcement of bread-and-butter rights like healthcare and pensions, has served as the Court's shield. And this shield has been important in allowing the Court to serve other constituencies and goals. While much of the Court's socioeconomic rights jurisprudence has benefitted the middle class, its two big structural decisions of the last decade

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<sup>897</sup> See Hoffmann & Bentes, *supra* note 863.

<sup>898</sup> See *id.*

<sup>899</sup> See *id.* at 131 (noting that Brazilian judges have a traditional conception of role and thus shy away from structural cases).

on displaced persons and healthcare have had both a more targeted impact on the poor and a more systematic impact on the bureaucracy. It is plausible that the Court's aggressive enforcement of socioeconomic rights for the middle class is what has allowed it to undertake these interventions without facing political backlash. The same might be said of the blockbuster decisions working against core interests of the Uribe administration, like those denying Uribe a potential third term or striking down his declaration of emergency in the healthcare sector. More broadly, the Court's widespread enforcement individual socioeconomic rights via *tutela* may be the basis on which the country is building a constitutional culture that is taken seriously by social and political actors – a point I return to in the next section.

One perceives a similar tension within the Court's reliance on support from the academic community detailed in Chapter 5. The academic community surrounding the Court, drawn particularly from a small set of elite universities, has had a disproportionate influence in forming the *magistrados auxiliares* and other elements of the Court's professional staff.<sup>900</sup> These staffers in turn have had an increasing influence on the content of judicial decisions as the percentage of justices who possessed expertise in constitutional law has dropped sharply. The staffers increasingly exercise influence over the decisions issued by the Court, and new justices entering the Court are acculturated into the prevailing approaches. The effect of this has generally to make the Court's core doctrines – in areas like same sex marriage, the substitution of the constitution doctrine, declarations of state of emergency, and indigenous consultation – relatively resistant to external change. The positive effect of this has been in increasing what might classically be called the “independence” of the Court – the Court has proven relatively resistant to external political interference, and willing to issue decisions that work against core interests of

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<sup>900</sup> See *supra* Chapter 5.

incumbents. The Court's decision in the second reelection of Alvaro Uribe is a spectacular demonstration of this phenomenon. But other cases, like the Court's relatively consistent position on state of emergency cases despite political pressure, illustrate the point as well.<sup>901</sup>

The flip side of this degree of insulation is that at times, the Court has fed off of its own internal audience of academics rather than being responsive to legitimate criticisms from political or other external actors. The best example of this may be in the substitution of the constitution doctrine, where the Court has over time ratcheted up a doctrine with fairly dubious legal foundations and potentially dramatic political effects. While use of the doctrine in cases involving serious threats to the constitutional order (like the second reelection of Uribe) may be justified, the doctrine seems harder to justify in other recent cases, like those involving the right to drug possession and the necessity of opening up posts held by incumbent civil servants to meritocratic competition. In these latter cases, the Court seems to be defending its own existing doctrines to the point of blocking any effort of democratic override.<sup>902</sup> Similar analyses might be undertaken of other doctrinal lines where the Court has ratcheted up its own doctrines through time despite the existence of potentially legitimate political critiques, such as the right to consultation of indigenous groups before undertaking economic projects on their territories (which has become something close to a veto) and the continuation of individual enforcement of socioeconomic rights. In all of these cases, the Court's academic buffer may provide it with too much independence.

The point here is that a more careful evaluation of the communities influencing the Court allows one to go beyond merely lauding the Court as "independent" or attacking its members as

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<sup>901</sup> For more detail on this point with respect to some of the Court's doctrinal lines, *see supra* Chapter 5.III.A-B.

<sup>902</sup> For more detail with respect to the substitution of the constitution doctrine, *see supra* Chapter 5.III.C.

politicians in robes. This kind of analysis seems important in evaluating the effect of different patterns of judicial activism within and beyond Latin America. A high degree of activism is unlikely to be either good or bad *en masse*, but rather different patterns of activism are likely to have a different mix of positive and negative attributes. A more complete picture of judicial activism, based on a broader cross-section of countries, may give scholars and policymakers more guidance on how to adjust this mix of attributes.

## **B. The Court, Democratic Institutions, and the Construction of a Constitutional Culture**

A related set of largely unanswered questions revolves around the impact of judicial activism on political institutions and on the existence and strength of constitutional culture. To what extent is the Colombian Constitutional Court improving the performance of the political system? And to what extent is it rendering the constitution more relevant to social and political discourse? Again, neither question is an easy one, but the evidence in this dissertation suggests that the Court has had some success along both dimensions.

On the first question, the Court's efforts in building up civil society and in improving the quality of the bureaucracy on certain issues, both detailed in Chapter 6, are notable. The evidence presented there showed that the Court has not been powerless in organizing civil society and in giving it a greater voice over questions of public policy. At the same time, the Court's efforts have plausibly improved the quality of the bureaucracy, particularly in the displaced persons case, where no coherent public policy existed before the Court's intervention in 2004. These findings leave open important questions about the extent to which a Court can generalize these sorts of interventions beyond a few limited areas, and the conditions under which they are likely to be successful, but they leave little doubt that Courts can exercise influence over both levers.

More broadly, one might ask whether the Court has had a positive influence on the relevance of the constitution to political and social actors. The existence of a robust “constitutional culture” does not seem to be a prerequisite for democratic consolidation, but most scholars seem to view it as a positive attribute.<sup>903</sup> A strong constitutional culture may act as a focal point, channeling the debate of different political actors into similar channels. It may also increase political stability by increasing the legitimacy of political system, thus making violence or revolution less likely. The scholarly literature on constitutional culture has been overshadowed by the case of the United States, where commentators often observe a distinctive shape: the constitution is revered by both those on the left and on the right, but the sense of what the constitution means is heavily dependent on political identification.<sup>904</sup> In this kind of a “politicized” constitutional culture, there is broad buy-in from across the political spectrum, but the constitutional visions differ widely. One might expect this kind of a constitutional culture to emerge in countries with strong party systems, where judges and other relevant actors are closely linked to political parties. Further, in the United States much of the construction of the constitution has taken place outside of the courts, largely by political actors.<sup>905</sup>

Comparative experience makes it clear that the “politicized” model is not the only form a constitutional culture can take. Germany may illustrate another pattern of constitutional development: a technocratic/social consensus model. There, the constitution has a more broadly

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<sup>903</sup> For some contributions to an extremely small and limited literature, mostly focused on the United States, see Jason Mazzone, *The Creation of a Constitutional Culture*, 40 TULSA L. REV. 671 (2005); CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE (John Ferejohn et al., eds., 2001); Jan Werner-Muller & Kim Lane Scheppele, *Constitutional Patriotism: An Introduction*, 6 INT’L J. CONST. L. 67 (2008).

<sup>904</sup> See, e.g., Reva B. Siegel, *Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

<sup>905</sup> See, e.g., KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

shared meaning that does not appear to differ as widely across political parties.<sup>906</sup> Constitutional judging is perceived as a more technocratic practice and the differences between the appointees of different political parties, while discernible, are not as marked as in the United States.

Further, a strong social consensus arising out of the events of World War II has created broad agreement on major constitutional principles and decisions, even ones that might appear peculiar in other contexts. In the “consensus” model of constitutional development, then, citizens both take the constitution seriously and agree on its essential meaning; in the “politicized” type, citizens agree to take the constitution seriously but contest meaning. At first blush, the “consensus” model might seem to be better at producing democratic consolidation than the “politicized” model, but both might be useful at providing at least a focal point for discussion between competing groups. Much more work, at any rate, needs to be done on the topic.

Colombia’s development since 1991 may illustrate yet a third model: a one-sided constitutional culture. In the Colombian case, a combination of technocratic judging and distance from political parties made it possible for the Court to develop a culture that is increasingly strong but which did not develop buy-in from all relevant political actors. The linchpin, as noted in prior chapters, is the *tutela*, which was constructed by the Court into a flexible and powerful instrument, particularly for the enforcement of socioeconomic rights.<sup>907</sup> At the same time, the fact that the Court’s jurisprudence has been consistently progressive, and that right-wing political forces have had little influence on the Court, has led to a peculiar pattern: most attacks on the Court have come from outside law and the legal academy, and an important group of politicians has continued to reject not just the Court but also the constitution. That is, the Court and other

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<sup>906</sup> See, e.g., DONALD KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 23-24 (3d ed. 2012) (contrasting the appointment processes in Germany and the United States).

<sup>907</sup> See *supra* Chapter 7.

actors in Colombia have constructed a constitutional culture that is increasingly strong but that unlike the “politicized” and “consensus” model, does not enjoy buy-in from all major political and social groups.

It is useful, in this light, to consider the reaction of the Uribe administration to both. As noted in the previous chapter, the Uribe administration upon arriving in office in 2002 launched what was probably the strongest attack against the court. Those in the Uribe administration appeared to view not only the Court but also the constitutional project itself as an obstacle to the program of “democratic security,” which emphasized the militarization of the state in order to combat guerrilla groups. Uribe’s point man in this judicial reform effort was his Minister of the Interior, Fernando Londoño Hoyos, who issued strong criticisms of both the Court and the Constitution in interviews: “This Constitution was made to defend the individual from a potentially aggressive state and forgets that there is an individual threatened by a real, not merely potential aggressor, terrorism. On that we have to do a 180 degree shift.”<sup>908</sup> Londoño also called the 1991 Constitution a “terrible constitution” and stated that it lacked “any line of thought or structure of any species.”<sup>909</sup> Londoño of course attacked the Court in strong terms, but his attacks extended beyond the role taken on by the constitutional court to the constitutional text itself.<sup>910</sup>

This original reform package would have made significant changes to the 1991 text – for example it would have made it much easier for the state to use emergency powers, it would have broadened state power during these emergencies, it would have converted the bicameral Colombian congress into a unicameral body, and it would have reversed the decentralization

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<sup>908</sup> *Entrevista: Nunca me verán fuera de casillas*, SEMANA, June 17, 2002, available at <http://www.semana.com/nacion/articulo/nunca-veran-fuera-casillas/51231-3>.

<sup>909</sup> Fernando Londoño Hoyos, *Sobre una pesima constitucion*, EL TIEMPO, July 6, 2006, available at <http://www.eltiempo.com/archivo/documento/MAM-2091805>.

<sup>910</sup> See Londoño Hoyos *Critica Funciones de la Corte Constitucional*, SEMANA, July 8, 2002, available at <http://www.semana.com/noticias/articulo/londono-hoyos-critica-funciones-corte-constitucional/51606-3>.

trends in the 1991 text. It attacked the constitutional court by, for example, eliminating the individual complaint against socio-economic measures or judicial decisions and eliminating the court's ability to judge whether a state of emergency should be declared.<sup>911</sup> As noted in the previous chapter, most of these early reform efforts by the Uribe administration did not bear fruit, but the discourse of the administration towards the 1991 constitution continued to be ambivalent.<sup>912</sup>

For example, during Uribe's campaign to amend the constitution in order to give himself a third term in office, his team took to calling his presidency a "state of public opinion," "a superior stage to the state of law."<sup>913</sup> A more striking illustration of Uribe's ambiguous attitude towards the constitution occurred at a symposium held in 2009 to celebrate Luis Carlos Galan. Both Uribe and Cesar Gaviria were invited to speak at the conference. Gaviria spoke first and, serving as a kind of founder, wielded the 1991 constitution as a kind of club against Uribe: he argued that the current president "was dedicated to de-legitimizing the constitution through a series of arguments, which contain many errors." He also stated that Uribe was trying to bring back "caudillismo" and that it was necessary "to revive the spirit of decentralization in the 1991 constitution."

Uribe responded by attacking flaws in the constitutional process and in the constitution itself. While he noted that the Constitution of 1991 had "positive aspects," he argued that it also had "negative aspects" and stated that the Constituent Assembly of 1991 was, in several ways, a flawed process. He emphasized that the convention had "exceeded the mandate under which it

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<sup>911</sup> "Proyecto de Acto Legislativo," Gaceta del Congreso No. 484/2002, Nov. 12, 2002. For more detail on these proposals, see *supra* Chapter 8.I.

<sup>912</sup> See *supra* Chapter 8.

<sup>913</sup> See Eduardo Posada Carbo, *Tiranía del Opinión*, EL TIEMPO, Aug. 21, 2009, available at <http://www.eltiempo.com/archivo/documento/CMS-5901191> (noting the president's repeated use of the phrase in 103 speeches since October 2008). Article 1 of the Colombian Constitution defines the Colombian state as a "social state of law," so the president's phrasing had a deliberately super-constitutional meaning.



had been elected” by asserting the power to revise all topics rather than simply those it was supposed to treat, that it had illegally revoked the mandate of the then-sitting congress more “because of political pressure than because of any necessity of the country,” and most strikingly that the constitution “lacked legitimacy in its origins” because of the “minimal voter turnout” in the referendum that called the assembly. Members of the media generally read the speech as an attack on the constitutional text.<sup>914</sup>

This kind of a one-sided constitutional culture, with significant political elements attacking the constitution, may be a destabilizing form of political development. The constitution, rather than being a source of cohesion, may appear by those in power to be an obstacle to their goals. The Uribe administration apparently calculated that since it could exercise relatively little influence over the Court itself, a better strategy was to attack the constitutional text directly. This pattern of constitutional development was a result, in other words, of both the objectives and rhetoric of the Uribe administration and of the pattern of constitutional development promoted by the Court. The “democratic security” program promoted by the Uribe administration was in some tension with aspects of the constitutional project. The militarization of some areas of the country in order to combat the guerrilla required, in Uribe’s view, a stronger president than had existed since 1991 and a sacrifice of some of the rights principles found in the constitution and in the international human rights law it incorporated. And the personal political style of Uribe – a strong presidentialism with elements of *caudillismo* -- demanded constitutional changes to allow reelection and to achieve other goals. At the same time, the progressive synthesis created by the first court and sustained by elements of the Court’s coalition

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<sup>914</sup> *Uribe v. Gaviria: duelo por la constitucion*, SEMANA, Aug. 18, 2009, available at <http://www.semana.com/politica/articulo/uribe-vs-gaviria-duelo-constitucion/106425-3> (“We were left with the impression that the president, in reality, was defending the so-called ‘State of Opinion’ in order to promote reforms like the third term, which is prohibited by the Constitution, and in order to de-legitimize the process by which the constitution was created.”).

(particularly the academic community surrounding the Court) made the existing text seem inhospitable to the Uribe's goals. Attacking the constitution was a more attractive option precisely because of Uribe's inability to rework the constitutional jurisprudence being promoted by the Court.

Notably, the Court and the constitution weathered these attacks during the Uribe administration without significant changes. The succeeding administration of Juan Manuel Santos has struck a somewhat different tone: it has generally embraced – at least rhetorically – the constitutional principles promoted by the Court rather than attacking them. The most prominent example is the Victim's Law, passed in 2011 and which largely ratified the Court's jurisprudence on displaced persons.<sup>915</sup> For example, the law created a set of special tribunals for the restitution of land, which has been one of the most difficult issues in the Court's orders connected to T-025 of 2004. Perhaps more importantly, the law itself embraced the line aggressively pushed by the Court for years, and which had been resisted by the Uribe administration: those affected by the armed conflict were victims who had rights under both domestic constitutional law and international human rights law.<sup>916</sup> A second example of this kind of framing is healthcare. Where the Uribe administration fought the Court's framing and instead treated the healthcare crisis as one of resources, the Santos administration has embraced the Court's framing, passing a law establishing health as a "right" and seeking to comply with the Court's major orders (as detailed in Chapter 6).<sup>917</sup> In both of these cases, the Court has acted as a generator of constitutional meaning, and the executive and Congress has largely accepted and

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<sup>915</sup> See Ley 1448, Jun. 10, 2011, *available at* <http://wsp.presidencia.gov.co/Normativa/Leyes/Documents/ley144810062011.pdf>.

<sup>916</sup> See *id.* art. 3 (defining victims under the law as those who have suffered violations of international humanitarian law or "grave and manifest" violations of international human rights law since January 1, 1985 as a result of the "internal armed conflict").

<sup>917</sup> See Proyecto de Ley 209 de 2013 (Senado); 267 de 2013 (Camara), art. 1, *available at* [http://www.consultorsalud.com/docs/Ley\\_Estatutaria\\_de\\_Salud\\_junio2013.pdf](http://www.consultorsalud.com/docs/Ley_Estatutaria_de_Salud_junio2013.pdf). ("The present law has as its object guaranteeing the fundamental right to health, regulating it and establishing its mechanisms of protection.").

adopted these meanings. This is relatively close to the German “consensus/technocratic” model of constitutional development.

A more complex example is the Santos administration’s signature issue, the peace process with the FARC. The Santos administration has aggressively argued that the peace process is constitutional, and indeed that it carries out the main purpose of the 1991 constitution: the achievement of peace.<sup>918</sup> Yet the administration has sparred with those around the Court on key issues like the granting amnesty and reduction in sentences for participants in the conflict. Santos has generally argued that the achievement of peace justifies flexibility on these issues. This line is in some tension with key decisions of the Court, which hold that international humanitarian law – incorporated into Colombian constitutional law through the constitutional block – imposes stricter limits on these reductions. The most dramatic moments have come in 2013 and again in 2014, when Santos himself twice appeared before public audiences at the Constitutional Court to argue that the framework constitutional reforms for the peace process were constitutional.<sup>919</sup> The Court continues to hear challenges against the law, most recently dealing with the conditions under which ex-combatants would be able to stand for election.<sup>920</sup> In general, the peace process shows a pattern where the president opposes the Court’s vision of the constitution with its own somewhat different one, and the Court cedes some ground to the president. These case, in other words, shows elements of the “politicized” model, where political groupings express their differences in constitutional terms.

Finally, there remain significant elements of “one-sidedness” in Colombian constitutional culture: not all major actors have bought in. Uribe returned to the Senate to lead the opposition,

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<sup>918</sup> See *Y la paz fue Ley: Marco juridico para la paz*, EL TIEMPO, Jun. 16, 2012, available at <http://www.semana.com/nacion/articulo/paz-ley-marco-juridico-para-paz/259640-3>.

<sup>919</sup> See *Corte la hara un examen al Marco para la Paz*, SEMANA, Apr. 10, 2014, available at <http://www.semana.com/nacion/articulo/el-examen-de-la-corte-al-marco-juridico-para-la-paz/383288-3>.

<sup>920</sup> See *id.*

and his forces have continued to call for sweeping constitutional change, including the calling of a Constituent Assembly to rewrite part or all of the text.<sup>921</sup> There is growing support from a number of political actors, in fact, for calling an Assembly in conjunction with the peace process.<sup>922</sup> It is unclear what such an Assembly would do, but it is clear that many political actors see it as an opportunity to unravel the 1991 bargain and to rework the major institutions of state. To that extent at least, the constitutional culture constructed by the Court may still be precarious.

### **III. Conclusion**

This dissertation has used the Colombian case to argue for a more nuanced understanding of the causes of judicial empowerment, in order to explain not only how judicial power is generated but also how that power is used. The literature's almost exclusive focus on judicial independence as a dependent variable, and political competition as an independent variable, are insufficient to explain important variations in the use of judicial power. Attention to the historical development of judiciaries and the ways in which courts choose to construct their power shows promise as a way to understand these variations. And as this conclusion has argued, ultimately such an approach helps to highlight important but overlooked questions about the effect of judicial power on political systems and on society.

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<sup>921</sup> See *Uribismo se la juega por la Constituyente*, SEMANA, Oct. 31, 2013, available at <http://www.semana.com/nacion/articulo/uribistas-insisten-en-una-constituyente/363076-3>.

<sup>922</sup> On this issue, Uribe has been joined by an odd coalition of supporters on the left, including the FARC. *See id.*