Political Institutions and Judicial Role in Comparative Constitutional Law

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Comparative constitutional law scholarship has largely ignored political institutions. It has therefore failed to realize that radical differences in the configuration of political institutions should bear upon the way courts do their jobs. This Article develops a comparative theory of judicial role that focuses on broad differences in political context, and particularly in party systems, across countries. I use the jurisprudence of the Colombian Constitutional Court (supplemented by briefer studies of the Hungarian and South African Constitutional Courts) to demonstrate how differences in political institutions ought to impact judicial role. Because Colombian parties are unstable and poorly tied to civil society, the Colombian Congress has difficulty initiating policy, monitoring the enforcement of policy, and checking presidential power. The Court has responded by taking many of these functions into its own hands. I argue that the Court’s actions are sensible given Colombia’s institutional context, even though virtually all existing theories of judicial role in American and comparative public law would find this kind of legislative-substitution inappropriate. Existing theories rest upon assumptions about political institutions that do not hold true in much of the developing world. The American focus on the anti-democratic nature of judicial action assumes a robust constitutional culture outside the courts and a legislature which does a decent job representing popular will—both assumptions tend to be false in newer democracies. The case studies demonstrate that comparative public law scholars must be attentive to political context in order to build tools suitable for evaluating the work of courts outside the United States.

INTRODUCTION

In the late 1990s, Colombia was confronted with a mortgage crisis that threatened several hundred thousand middle-class homeowners. The president and congress ignored the problem; the president was too focused on addressing international calls for fiscal austerity, while the legislature was too dysfunctional to take action. The Colombian Constitutional Court (the “Colombian Court” or the “Court”) began receiving a flood of constitutional complaints from the homeowners and decided to act. It held legislative-style hearings to which it invited homeowners’ groups, bankers, economists, and state agencies, and it received a myriad of reports from these actors. Although its approach was interactive and the final housing bill was


1. See infra Part III.C.1.
largely drafted by the president, the Court itself had a dominant hand in shaping the details of housing policy. Backed by the fairly precise information that it had received during its investigative process, the Court felt that it had sufficient information to play an on-the-ground role in drafting policy. By two measures, the Court’s work, although imperfect, was successful: it was very popular and it kept most homeowners in their homes.

How can we evaluate the Colombian Court’s actions in addressing the housing crisis? Under two potential rubrics, American constitutional theory and the emerging set of prescriptions on the enforcement of socio-economic rights in comparative constitutional law, the Court’s actions seem deeply problematic. American constitutional theory demands a certain respect for the sphere of legislative competence; certain policy domains should be off limits to the courts, and certain rules should be followed even within those domains. A middle-class housing issue is not an obvious case for judicial intervention, as middle-class actors generally have political recourse. And even if it were grounds for intervention, the way the Court intervened—holding legislative-style hearings, and drafting housing policy in a detailed manner—would seem to go beyond basic bounds of court-like behavior. Similarly, the emerging strand of work on socio-economic rights cast doubts on the Court’s action. This literature stresses that help should go to those most desperately in need, not to middle-class groups. Additionally, according to this literature, socio-economic rights enforcement should occur in a relatively deferential way: courts should point out where the legislature has failed to comply with constitutional principles, but should ensure that other branches of government take the lead in designing policy. The Colombian Court has been much more aggressive than the standard socio-economic rights model would imply.

I argue, nonetheless, that the Colombian Court’s actions should be judged in their institutional context. In that light, they are far more justifiable than either American constitutional theory or the comparative socio-economic rights literature would imply. The constitutional theories created to analyze the work of the U.S. Supreme Court are not suitable for direct exportation to the comparative context, at least in the developing world. Put briefly, this is because American constitutional theory rests on a set of assumptions about political institutions that does not hold true in many developing-world democracies. At the most basic level, American constitutional and comparative socio-economic rights theorists assume that there is a sphere of politics that should be reserved for legislatures and thus left to the democratic process, at least absent some special justification. Theorists disagree about exactly how large this sphere is or what kind of justifications allow judicial intervention, but they generally agree that there is an exclusive space for legislatures that should be left alone.

2. See infra Part I.A.

3. See infra Part I.B.
This basic assumption holds true in some contexts, but it is problematic in others, particularly in developing-world democracies. First, many theorists assume that other political institutions care about the constitution when conducting their policymaking; this would seem to require a "constitutional culture," at least among elites. While we take such a culture for granted in the United States, it is rare across the rest of the world. Second, and more importantly, political institutions need to function well in a basic sense: they must have the capacity and democratic legitimacy to represent "the people" in the way we normally expect in a democracy. But in many developing countries, legislatures lack both minimal capacity and minimal democratic legitimacy, primarily because of problems with their party systems. Any attempt to build a theory of judicial role in those countries must therefore begin with a comparative assessment of their political institutions, and not with theories borrowed from the United States. This Article thus embraces a trend in recent public law scholarship that seeks to consider the importance of political institutions, and especially party systems, for constitutional law.4

The core of this Article is a case study of the Colombian Constitutional Court since its creation in 1991. Colombia offers a classic example of a developing country that is democratic (in fact, it has been democratic for a very long time5), but that suffers from poorly functioning political institutions. In particular, the party system is very weak—the system is fragmented, parties tend to be short-lived and/or internally factionalized, and parties have only weak roots in society. As a result, the legislature has never been able to play a constructive policymaking role in Colombia, and presidents have dominated the policymaking process.

As I will show below, the Colombian Constitutional Court has viewed these political conditions as a license to become perhaps the most activist court in the world. Most importantly here, the Court has acted as a replacement for the legislature at various times by injecting policy into the system, by managing highly complex, polycentric policy issues, and by developing a thick construct of constitutional rights that it uses to check executive power. The housing litigation described above is an example of this strategy. Such legislative replacement would appear to be intrusive and at variance with existing American constitutional theory, since it wholly denies the concept of a separate legislative sphere. But, I argue, this strategy makes sense and has been productive given Colombia's institutional conditions. Because the

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4. See, e.g., Larry Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215 (2000) (arguing that the decentralized structure of parties in the United States protects American federalism, so courts do not need to protect this value via doctrine); Daryl Levinson & Richard Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311 (2006) (arguing that scholarship and judicial doctrine on separation of powers in the United States should show awareness of the fact that parties, and not branches of government, are the main forces in American politics).

legislature often is unable to take on the basic tasks of policy initiation, policy management and control, and executive checking, the Court has had to perform these functions itself, at least periodically. Further, the Court has proven able to develop many of the information-gathering and monitoring capacities that we usually associate with legislatures. For example, it has used its individual complaint mechanism, which gives individuals easy access to the Court, to assess important social problems, and it has relied on its own legislative-style hearings and a network of allied civil society and state institutions to gather policy information and monitor the results of its policymaking. Finally, the Court’s popularity, which suggests a direct link with the people, as well as its ability to stimulate discussion and engagement by civil society groups on prominent issues, suggests that it may not be as undemocratic as standard theory would claim.

The remainder of this Article is organized as follows: In Part I, I argue that existing academic work is ill-equipped to build a theory of judicial role that is appropriate for new democracies because it does not begin with an analysis of domestic political institutions. Part II explains the Colombian context, focusing on the incoherence of legislative politics in the country, while Part III describes and assesses both the failed and successful strategies used by the Colombian Court as reactions to that context. Part IV puts the Colombian experience in comparative perspective, explaining why the judicial role that has been necessary in Colombia has not been followed by two other strong courts, the Hungarian and South African Constitutional Courts, which have operated in different institutional contexts. The Hungarian Constitutional Court (the “Hungarian Court”) in the 1990s took on a role similar to the Colombian Court, but only for a brief time—as the party system improved in the post-communist period, the need for extraordinary judicial activism declined. For its part, the South African Constitutional Court has taken a more dialogical and deferential stance relative to the political branches; the existence of a single dominant party rather than an incoherent set of political actors renders this role explicable. Finally, Part V concludes by arguing that the comparative assessment of political institutions can help us figure out the kinds of questions we should be asking in assessing a court’s work. I also suggest a theory of judicial role that might work where, as in Colombia, legislatures function badly.

I. CONSTITUTIONAL THEORY AND COMPARATIVE COURTS

Scholars have devoted relatively little effort to constructing constitutional theory that is suitable for analyzing the work of courts outside the United States. While several disciplines have generated plentiful work on the phenomenon of judicial empowerment, most of this work seeks to explain the conditions under which judicial empowerment will occur rather than to create the tools for understanding what courts in new democracies should be
doing. This dearth of scholarship is surprising, given the obsession of generations of scholars with constructing constitutional theories to explain, justify, and critique the work of the U.S. Supreme Court. Unfortunately, as I explain, the extensive American literature on judicial role is unsuitable for many developing countries. And to the extent there are emerging theories of judicial role in comparative constitutional law, they are insufficiently attentive to the impact of differences in political institutions on what judges should be doing.

A. American Constitutional Theory Rests on Institutional Foundations That Are Not Applicable in the Developing World

Since the Nineteenth Century, U.S. law professors have been grappling with the normative question of the Supreme Court’s role in our democracy. This rich body of scholarship, although diverse, rests on a shared set of assumptions about the political process. The core idea is that the role properly played by the judiciary should be somehow limited, because of a separate role more properly played by legislatures. These scholars do not agree on the relative sizes of these two roles, but generally agree on the basic point that judicial role should be confined because there are tasks better suited to the legislature due to its greater legitimacy, its closeness to the people, or its institutional advantages.

Yet this fundamental point, which serves as a basis for constitutional theory, breaks down in many developing countries. As I show below, it tends to break down for three basic reasons—because the separation between ordinary and constitutional politics is unclear, because a widespread constitutional culture does not exist, and most importantly because legislatures often do not function as coherent entities. Where all three of these conditions are met (as they often are in the developing world), it is difficult to make deference to legislative role the basis for constitutional theory. We must find some other basis for limiting judicial power.

My objective here is not to give a thorough account of this huge literature; instead, I aim simply to point out that the basic factors underpinning the construction of judicial and legislative roles in American constitutional law are problematic in many other democracies. Nor is my goal to criticize

6. My focus here, which echoes the focus in the literature, is on legislatures. Of course, in presidential systems presidents are also directly elected, and thus could have an independent claim to a limited judicial role. But the case for judicial deference to presidents would seem weaker than the case for judicial deference to well-functioning legislatures, both because the president does not represent the same diversity of interests and because the idea of constitutionalism seems antithetical to rule by one person, democratically elected or not. See, e.g., Guillermo O’Donnell, Horizontal Accountability in New Democracies, in THE SELF-RESTRAINING STATE 29, 40–41 (Andreas Schedler, et al., eds., 1999) (noting that control of executive discretion is close to the core of constitutionalism). Also, presidents tend to be dysfunctional in the developing world, for some of the same reasons that legislatures have problems. For example, where party systems are not well-institutionalized, “outsiders” often win election to the presidency on vague platforms and then implement policies that are contrary to their prior promises, unchecked by legislatures or other institutions. See sources cited infra note 52.
constitutional theory—several of the authors discussed below explicitly limit their analysis to particular political contexts. I merely point out that these theories offer little guidance when certain political assumptions are unmet, and that different theoretical tools are therefore necessary in these contexts.

1. The Line Between Ordinary and Constitutional Politics Is Unclear

A core assumption in American constitutional thought is that constitutional issues represent a relatively small subset of all political issues. This assumption rests on an institutional story about judicial role: legislatures are given ample room in which to make ordinary policy, and only exceptionally, when they surpass certain limits—say, by attacking the political system itself or by undoing certain foundational bargains—should courts step in. Constitutions, in other words, are supposed to lay out frameworks for governance and to take certain fundamental issues off the table; they are not meant to displace most of ordinary politics.

This assumption does not mesh well with most new constitutions, and particularly those in developing countries. As Kim Lane Scheppele has noted, citizens of these countries tend to adopt “thick” constitutions, with large amounts of material—socio-economic provisions, group rights, etc.—that are normally left to ordinary legislation in the United States. They also tend to regulate items in great detail. Finally, they often expressly or implicitly construct a hierarchy of constitutional norms, with certain vague formulations, particularly human dignity, acting as super-norms within the system. The result of the interaction of these three characteristics is that it

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7. See, e.g., Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346, 1360 (2006) (making the existence of “democratic institutions in reasonably good working order, including a representative legislature[,]” a prerequisite for his attack on judicial power).

8. See, e.g., Stephen Holmes, Passions & Constraint: On the Theory of Liberal Democracy 143 (1995) (arguing that constitutional law is antithetical to majoritarian democratic politics); Bruce Ackerman, We The People: Foundations 6–7 (1991) (contrasting “ordinary lawmaking,” which are decisions made “daily” by the government, with “higher lawmaking,” which occurs “rarely,” and arguing that courts are charged with preventing politicians from “exaggerating their power” by overturning previous acts of higher lawmaking); John Hart Ely, Democracy & Distrust 87 (1980) (stating that “in fact the selection and accommodation of substantive values is left almost entirely to the political process,” and arguing that the constitution focuses on “ensuring broad participation in the processes ... of government”).


10. See id. at 38; Keith Rosenn, Brazil’s New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society, 38 AM. J. COMP. L. 773, 777 (1990) (noting the length and detail in Brazil’s post-authoritarian constitution, which “contain[s] 245 articles and 70 transitory provisions”).

11. See, e.g., Catherine Dupre, Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity (2003) (explaining how the Hungarian judiciary imported and used the dignity super-norm from German constitutional law); Heinz Klug, Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction 164–65 (2000) (explaining dignity as a potential super-norm in South African constitutional law); Ro-
is almost impossible to think of an issue that doesn’t potentially raise constitutional problems.

Scholars tend to decry this phenomenon as bizarre or at least very unwise, suggesting that these countries will choke on an excess of constitutional law, or that they fail to understand what a constitution is supposed to do. But there is logic behind the thickness of many constitutions in the developing and post-authoritarian world. Constitutions in developing countries are thoroughly transformative documents by necessity; no developing country wants to stay as it is. Because the ordinary political order is generally viewed as seriously flawed (for reasons I discuss in greater detail below), framers feel a need to transform not merely society and the economy, but politics as well. And here’s the rub: if ordinary political processes cannot be trusted now, there is no reason to believe that they can help to achieve a better social or economic order. Thick constitutionalization is thus a signal that ordinary politics won’t work as a solution to a country’s problems. Hence the large number of bodies (courts, ombudsmen, human rights commissions, etc.) given constitutional control power in many new constitutions. Thick constitutions do not necessarily give constitutional courts a mandate to step in for weak ordinary institutions; it could be, as many in the United States have argued, that the elected institutions and not the court are the best interpreters of the constitutional text. But they offer at least the opportunity for vigorous judicial intervention.

2. Constitutional Culture Is Weak or Non-Existent

Any case for non-judicial interpretation of constitutional texts is much weaker where political actors are unlikely to be attuned to the constitution. And here as well, U.S. constitutional theory is not very useful for developing countries. The most important recent strain of American constitutional theory, popular constitutionalism, suggests that there is and always has been a
vibrant culture of constitutional interpretation outside the courts in the United States, both within elected institutions and outside them. 18 This tradition would be even more vibrant, they claim, if the U.S. Supreme Court did not attempt to monopolize constitutional interpretation via claims of judicial supremacy. 19 Because elected institutions like Congress are also attuned to constitutional values and have more democratic legitimacy, they should take over some of the judiciary’s constitutional review functions. 20

There is some empirical evidence that, in the United States, Congress does care about the Constitution—committees routinely debate constitutional issues, for example, and historically the legislature and the executive have settled many issues of constitutional law without the help of the courts. 21 Further, non-elected actors, like civil society groups, the media, and the general public, seem to put many of their arguments in constitutional terms. 22 And it is plausible (although contestable) that these actors would take constitutional interpretation even more seriously if the courts did not claim to monopolize the task.

But in most countries outside the United States, it is wrong to think that political actors and ordinary citizens would develop their policy views in light of their constitutions, regardless of whether or not their courts are active. This is because the robust constitutional culture that the United States seems to have enjoyed for its entire history does not exist in many other countries. In most of the developing world, it is not uncommon for political elites and ordinary people to flout or ignore the constitution, rather than to take it seriously. 23 The reasons for this, according to scholars, stem


19. See TUSHNET, supra note 18, at 57–65 (arguing that judges’ claims to be supreme interpreters of the constitution and their activism in constitutional interpretation induces a “judicial overhang,” which reduces the incentives of other actors to take the constitution seriously).

20. See id. (defending popular constitutionalism on democratic grounds); KRAMER, supra note 18, at 252–53 (arguing for a departmental theory of constitutional interpretation rather than judicial supremacy, which would give Congress and the President some independent authority over constitutional interpretation); Whittington, supra note 18, at 848–49 (arguing for a reconsideration of the amount of deference owed to constitutional decisions by the courts).


22. See, e.g., TUSHNET, supra note 18, at 135–41 (describing ways in which citizens have developed their own constitutional meanings in reaction to significant U.S. Supreme Court decisions).

23. See H.W.O. Okoth-Ogendo, Constitutions Without Constitutionalism: Reflections on an African Political Paradox, in CONSTITUTIONALISM AND DEMOCRACY (Douglas Greenberg et al. eds., 1993) (noting that in Africa, most countries have adopted constitutions but political elites have not abided by constitutional principles); Miguel Schor, Constitutionalism Through the Looking Glass of Latin America, 41 TEX. INT’L L.J. 1, 5 (2006) (arguing that in Latin America, citizens support elections, but this has not translated into “support for constitutional limits on power,” and that political elites know constitutional rules “can be ignored or changed in the middle of a dispute”).
either from a lack of experience with constitutions, or, even worse, from a
long experience of constitutions being honored in the breach.\textsuperscript{24} In Latin
America, for example, countries have a long history of lofty constitutional
texts being flagrantly ignored by political elites, and in many countries con-
stitutions have been amended or even wholly rewritten with alarming fre-
quency.\textsuperscript{25} As Miguel Schor notes, "[T]here was little reason for citizens to
mobilize on behalf of rules that could be readily changed by those in
power."\textsuperscript{26} Thus, while American political scholars take it as a given that the
Constitution forms an important part of the glue holding society together,
political and social theorists working abroad understand that inculcating a
robust constitutional culture may be desirable, but is a rare achievement.\textsuperscript{27}

But if it is true that political actors and citizens in most of the developing
world are unlikely to take constitutions seriously, then it seems unwise to
give them much authority over constitutional interpretation, because there
is no reason to think that they would make much effort to realize the trans-
formative project embedded in these constitutions. By itself, this does not
constitute an affirmative argument for judicial interpretation of the con-
stitution—courts might not be any better attuned to constitutional values
than politicians—but one might think that if constitutional culture is going
to exist anywhere in a new democracy, it will rest with its constitutional
court. After all, constitutional interpretation is these actors’ entire reason for
existence (assuming they sit on specialized courts), and they are usually em-
bedded in transnational networks of judges and scholars who take constitu-
tional law seriously.\textsuperscript{28}

In Colombia, for example, the relationships posited in the standard popu-
lar constitutionalist literature seem to be exactly reversed. In the United
States, the Supreme Court’s claims to judicial supremacy are generally pos-
ited as an obstacle to the development of constitutionalism by the people,
and Congress is viewed as the proper mouthpiece of popular views about the
Constitution.\textsuperscript{29} In Colombia, the Constitutional Court itself appears to do

\textsuperscript{24} See Okoth-Ogendo, supra note 23, at 66 (stating that constitutions in Africa have failed to "regu-
late the exercise of power," and have rarely been valued as more than "rhetoric"); Schor, supra note 23, at
29 (noting that "[t]he constitutions of [Latin America] have been, behaviorally speaking, flexible rather
than rigid").

\textsuperscript{25} See, e.g., Atilio A. Boron, Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism, in CONSTITUTIONALISM AND DEMOCRACY 339, 339 (Douglas Greenberg et al. eds., 1993) (referring to the "proliferation of constitutions and weakness of constitutionalism" in the region).

\textsuperscript{26} Schor, supra note 23, at 25.

\textsuperscript{27} Germany shows us how difficult and historically bounded the process of building what Jurgen
Habermas has called “constitutional patriotism” can be. German citizens developed a deep attachment to
their constitution, but only in the wake of World War II, which both convinced Germans that they
needed to attach themselves to fundamental principles of human rights (like human dignity) and con-
vinced them of the problems of an ethnically-based nationalism. See Jan-Werner Muller, CONSTITU-

\textsuperscript{28} See, e.g., Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. RICHMOND L.
REV. 99 (1994) (discussing these sorts of transnational judicial networks).

\textsuperscript{29} See, e.g., KRAMER, supra note 18; Tushnet, supra note 18.
the best job of reflecting popular visions of constitutional transformation; in contrast, the Colombian legislature’s willingness and ability to carry out constitutional transformation is quite limited. The Colombian Court’s extraordinarily high institutional popularity—it has generally been more popular than either the congress or the executive—supports the view that it is the main bearer of the public’s vision of constitutional transformation. 30

3. Representative Institutions Are Highly Dysfunctional

At a more basic level, claims for judicial deference to legislative institutions—whether issues are framed in constitutional terms or not—rest on ideas about the democratic legitimacy and superior information-gathering and policymaking capacity of legislatures. American constitutional theory has long viewed the democratic credentials of the legislature as a reason to constrain judicial power. 31 Indeed, this notion underlies Bickel’s “counter-majoritarian difficulty”—judicial review can be “undemocratic” because it “thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.” 32 Another line of thought stresses the potentially superior institutional capacities of courts to formulate policy and check executive power. 33 Empirical work finds that the U.S. Congress has considerable capacity to gather and evaluate information, mostly through the committee system, which allows it to formulate complex policy initiatives and to evaluate and control the performance of executive and other actors. 34

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30. See, e.g., Julio Faundez, Democratization Through Law: Perspectives from Latin America, 12 DEMOCRATIZATION 749, 758 (2005) (noting that the court generally shows an above 50 percent approval rating, which is unusual for political institutions and courts in Latin America).

31. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986); ELY, supra note 8; TUSHNET, supra note 18; James Bradley Thayer, The Origin and Scope of the American Doctrine of Judicial Review, 7 Harv. L. Rev. 129 (1893); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346, 1406 (2006) (arguing that legislative procedures are the best way to “address, in a responsible and deliberative fashion, the tough and complex issues that rights disagreements raise”).

32. BICKEL, supra note 31, at 17.

33. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 230 (2006) (arguing on institutional grounds that courts are the best updaters of the constitutional text). But see ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1978) (arguing that courts are often poor policymakers because the judicial process is highly principle-bound); GERALD R. ROSENBERG, THE HOLLOW HOPE 15–21 (1991) (summarizing arguments dealing with shortcomings in judicial capacity); Neal Devins & Alan Meese, Judicial Review and Nongeneralizable Cases, 52 Fla. St. U. L. Rev. 525, 527 (2005) (noting that American courts, unlike legislatures, do not usually hold hearings); Lon Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 553, 594–95 (1978) (arguing that courts are poorly suited to deal with complex, polycentric problems because of constraints on their institutional capacities).

34. See, e.g., GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN (1993) (arguing that the United States has strong parties, and these parties help to coordinate tasks within the House of Representatives); KEITH Krehbiel, INFORMATION AND LEGISLATIVE ORGANIZATION (1991) (arguing that legislatures do much of their day-to-day information-gathering and policy work in committees); Matthew D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 451 (1989) (arguing that Congress successfully uses its committees to control agency action).
Both the democratic legitimacy argument and the capacity argument are problematic in the developing world. Sometimes, democratic legitimacy is constrained by outright electoral fraud, which bedevils many nominal democracies and weakens the link between legislator and populace.\textsuperscript{35} Also, many legislatures in the developing world have few resources, limiting their effectiveness as policymakers and as checks on the executive.\textsuperscript{36} But the most important source of problems with poorly-functioning legislatures is rooted in their party systems. As Daryl Levinson and Rick Pildes suggest, party systems are the key to understanding legislative behavior.\textsuperscript{37} Scholars familiar with American political behavior are accustomed to a system with two strong parties, each of which possesses a relatively clear ideological identity and relatively high party discipline (that is, most party members tend to vote together most of the time). These two parties compete for votes and tend to rotate in power fairly regularly.

But the portrait of party systems in the developing world is often much bleaker, where political parties are commonly plagued by two major classes of dysfunctions. In the first variety, seen for example in South Africa today and in the past in India and Mexico, one dominant party controls the system, rarely if ever losing its majority status. Contrary to what one might expect, strong and independent constitutional courts do appear to be possible (although fairly rare) within these systems, as both the Indian and South African examples show.\textsuperscript{38} Partly this is because these dominant parties are often framers of the constitution and therefore believe in it. They thus tolerate or even welcome the work of courts engaged in the same general project of constitutional realization. Further, these parties, by necessity, are not monolithic; instead they tend to include a wide variety of interests within the fold.\textsuperscript{39}

Still, such systems produce serious pathologies for democratic development, and indeed, in terms of adherence to civil and political rights, "inhabit an intermediate range between stable competitive party systems on the


\textsuperscript{36} See, e.g., Scott Morgenstern, \textit{Toward a Model of Latin American Legislatures}, in \textit{Legislative Politics in Latin America} (Scott Morgenstern & Benito Nacif eds., 2002) (noting that Latin American legislatures often have fewer resources and weaker committees than the U.S. Congress).

\textsuperscript{37} See Levinson & Pildes, supra note 4.

\textsuperscript{38} See, e.g., Carl Baar, \textit{Social Action Litigation in India}, 19 POL. STUD. J. 140 (1990) (noting that the Indian court is extremely active despite a dominant party context); Theunis Roux, \textit{Principle and Pragmatism on the Constitutional Court of South Africa}, 7 INT’L J. CONST. L. 106 (2008) (arguing that the South African Court has been fairly active and independent despite the political context); see also Jennifer A. Widner, \textit{Building the Rule of Law} (2001) (documenting the partially successful attempts of judges in Tanzania to build judicial independence and power in a one-party state).

\textsuperscript{39} See Steven Friedman, \textit{No Easy Stroll to Dominance}, in \textit{The Awkward Embrace: One-Party Domination and Democracy} 97, 102 (Hermann Giliomee & Charles Simkins eds., 1999).
one hand and authoritarian systems of rule on the other.” 40 They raise a strong probability that certain interests, left outside the party, will be permanently excluded from power. 41 Equally important, it is unlikely that factional intra-party competition will perfectly replicate a well-functioning system of inter-party competition. Even some interests and voices within the party may tend to be excluded from power for long periods of time. 42 Thus, legislatures in these systems are likely to be capable (the dominant party provides a certain level of coherence), but to lack democratic legitimacy. A court in this kind of system may see itself as engaged in the representation-reinforcing described by John Hart Ely in Democracy and Distrust, 43 but kicked up several notches because of the severe democratic dysfunctions brought on by a single-party system.

A more serious problem occurs where political parties are extremely weak entities, rendering the legislature a largely incoherent body. The key concept is one that Mainwaring and Scully call “party system institutionalization,” which measures the depth of the roots that parties have in society. 44 While developed democracies almost always have institutionalized party systems, newer democracies throughout the world often suffer from a lack of political party institutionalization. 45 Parties in non-institutionalized systems tend to have loose or non-existent ideological platforms; they are chiefly vehicles of convenience for individual candidates seeking office rather than collections of individuals with similar policy viewpoints. 46 These parties also lack ties to civil society groups (labor unions, employer organizations, interest groups, etc.). 47 Internally, these parties are usually undisciplined, and they commonly suffer defections from sitting politicians (what the Latin Americans call “shirt-changing”). 48 The systems as a whole are volatile: parties rise to prominence and then disintegrate within the span of a few years;

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42. See Friedman, supra note 39, at 102.
43. See Ely, supra note 8, at 102 (describing a judicial role for making sure that “everyone gets his or her fair say”).
45. See Cindy Skach, Rethinking Judicial Review, in Rethinking the Rule of Law After Communism 61, 65 (Adam Carnot et al. eds., 2005) (“In transitional polities, political parties and party systems often lack institutionalization.”).
46. See Mainwaring & Scully, supra note 44, at 5 (noting that parties in non-institutionalized party systems tend to change ideological positions frequently).
47. See id.
And finally, these party systems are often highly fragmented—there tend to be many parties in these systems, many of them so small that they have been called “taxi parties” because their national party conventions could be held in a taxi-cab.

Non-institutionalized party systems are likely to produce legislatures that have low levels of both democratic legitimacy and institutional capacity. Where parties lack clear ideological platforms and do not last very long, voters will usually be unable to use party identification as a tool for assessing the views of prospective legislators. But the party label is a necessary shortcut for voters: without it, they will often be unable to make an informed choice. And where the ideological meaning of a party label is malleable, voters will not get what they think they are getting even if they do try to rely on the party label. Finally, the internal dynamics of a legislature in a weak-party system disfavor democratically palatable outcomes. Coalitions will be unstable, and will be formed because personal favors are handed out to individual legislators, not because a coherent policy compromise has been reached. Outcomes in such a legislative body are unlikely to represent the views of a clear majority, or indeed of any large, identifiable social group.

The capacity of legislatures in non-institutionalized party systems is also generally low; they usually suffer from weak committee systems and an inability to formulate important policy initiatives. This is because leaders of older parties are constantly dying and new ones constantly springing up.

49. See Mainwaring & Scully, supra note 44, at 13–15.
51. See Mainwaring & Scully, supra note 44, at 25 (”Where a party system is less institutionalized, accountability is difficult to establish. Most citizens cannot evaluate vast numbers of individual politicians.”).
52. See id. (noting that politicians in such systems are “[u]nfettered by party platforms” and “make policy choices that tend to be short-lived and erratic”). These problems afflict presidents as well as legislators in non-institutionalized systems. Political outsiders who have won the presidency in Latin America have often taken measures directly counter to their (vague) platforms. See id. at 22–23; see also SUSAN C. STOKES, MANDATES & DEMOCRACY: NEOLIBERALISM BY SURPRISE IN LATIN AMERICA (2001) (discussing how Alberto Fujimori in Peru and Carlos Menem in Argentina imposed harsh neo-liberal measures after campaigning as populists).
54. Some scholars have argued that even where legislatures do not function as particularly democratic bodies, courts should defer to them because they are seen as more legitimate policymakers by the public. See William N. Eskridge & John Ferejohn, Super-Statutes: The New American Constitutionalism, in THE LEAST EXAMINED BRANCH 320, 325 (Richard W. Bauman & Tsvi Kahana eds., 2006). But this argument also tends to fail in countries with weak party systems: legislatures in those countries have serious legitimacy problems because they function so poorly and because the personalistic interests of legislators tend to lead to pervasive corruption. See, e.g., Scott Mainwaring et al., The Crisis of Democratic Representation in the Andes: An Overview, in THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES 1, 17 tbl.1.3 (Scott Mainwaring et al. eds., 2006) (showing that public confidence in parties and legislatures is extremely low in the Andean region of Latin America, which generally features non-institutionalized party systems); Kim Lane Scheppele, Democracy by Judiciary, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 25, 34 (Adam Carranza et al. eds., 2005) (noting that “the legitimacy of the new elective institutions has not been very high in the post-Soviet world.”).
strong parties with long-term interests have the incentive and ability to build up legislative power. Individual legislators in systems with non-institutionalized parties generally have no such interest; their main interest is in procuring particularistic benefits (money, jobs, etc.) for themselves and their allies, rather than in making broad policy or monitoring the executive. Also, party platforms and partisan think-tanks form a major source of serious policy ideas in modern politics. Thus, where parties are weak and platforms vague, fewer important policy ideas will enter the system. High fragmentation and low party discipline mean that these legislatures have difficulty passing even legislation that enjoys high support. Finally, the substantial instability in coalitions and in electoral outcomes helps ensure that legislators will be unable to accumulate the expertise necessary to manage policy initiatives.

In short, American constitutional theory rests on conceptions of institutional context that do not apply in much of the developing world. Where constitutions are thick because constitutionalism is a highly transformative project, where politicians have little interest in constitutional development, and where legislatures come close to being dysfunctional, the standard division between legislative role and judicial roles makes little sense. One must find other ways to evaluate judicial action.

B. Comparative Constitutional Law Does Not Rest on Institutional Foundations

American constitutional theory tends not to be useful for evaluating the work of courts in developing countries because it depends on assumptions about institutions, and particularly about legislative behavior, which are not met in much of the developing world. The emerging—and loosely defined—field of comparative constitutional law tends not to rest on institutional foundations at all. I argue here that this approach is a mistake: the field would be better situated if it rested on the comparative analysis of political institutions.
As Mark Tushnet points out, existing studies in comparative constitutional law have tended to come in two varieties, neither of which seems quite right as the basis for comparative constitutional theory. In the first variety, which Tushnet labels “expressivism,” the underlying assumption is that constitutional doctrine is deeply bound up in, and reflective of, the rich texture of a country’s underlying traditions and culture. The way in which courts should respond to various problems is seen as a response to deeply held cultural values and historical traditions. The problem with this approach is that it makes any kind of structured comparison between countries quite difficult; the jurisprudence of each individual country rests on its own unique historical factors, rather than on factors that might vary in predictable ways across countries. Theorizing therefore becomes nearly impossible and even evaluating or critiquing a court’s work is made difficult, again because most aspects of judicial work could be justified using some aspect of a country’s culture or traditions.

The other approach, which Tushnet calls “functionalism,” sees constitutional law as something that migrates easily across national boundaries. Functionalist start by seeking to explain how groups of countries deal with common problems, and tend to find similarities across systems. A recent example of a largely functionalist debate is the comparative literature on the judicial enforcement of socio-economic rights. This literature is diverse and of very high quality; one of its main conclusions is that, contrary to some earlier writings by American scholars, there is a plausible way to enforce socio-economic rights. That approach is one we might call the dialogical model. Under the dialogical model, which takes much of its inspiration from the prominent South African case *Government of the Republic of South Africa v. Grooteboom*, courts attempt to give content to rights, but in a way that gives due deference to the expertise and democratic legitimacy of the elected branches. Roughly speaking, this means courts tell the other branches that a socio-economic right has been infringed and give them an idea of why the right has been infringed, but then leave the plan for how to

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60. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1261–85 (1999). Tushnet also discusses and advocates a third approach, called “bricolage,” which seeks to borrow bits and pieces of doctrine in an opportunistic manner. See id. at 1287–1305. Bricolage depends on a theory of when and how doctrinal borrowing is appropriate; such an approach would thus likewise benefit from a foundation in the comparative analysis of political institutions.

61. See id. at 1238–69. In some ways, the debate between functionalism and expressivism maps onto a fundamental debate in comparative law between those who think that law is (and should be) easily transplanted across systems and those who see law as fundamentally non-transplantable and rooted in fundamental aspects of a country’s history and culture. See, e.g., Alan Watson, Legal Transplants: An Approach to Comparative Law (2d ed. 1993); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3d ed. 1998, Tony Weir, trans.); Carlos Rosenkrantz, *Against Borrowings and Other Non-Authoritative Use of Foreign Law*, 1 Int’l J. Const. L. 269 (2003).

62. 2001(1) SA 46 (CC) (S. Afr.).

remedy the violation to the discretion and expertise of the elected branches. This approach tries to make socio-economic rights effective while holding at bay concerns about judicial capacity and legitimacy.64

This literature around Grootboom makes an important contribution in highlighting a potentially important doctrinal tool for enforcement of socio-economic rights. But it is a tool that depends on political context, a point that has not been fully appreciated in existing work. As I explain in more detail in Part IV, the dialogical strategy was created in South Africa, a country that is ruled by a coherent dominant party that normally shares the same overarching constitutional vision as its constitutional court.65 Whether such an approach to socio-economic rights enforcement would work in other institutional contexts is questionable. For example, in a country with a non-institutionalized party system, it would seem more-or-less impossible to adopt the South African approach to rights enforcement. The dialogical approach seems to depend, at a minimum, on the presence of coherent political actors who will be interested in and capable of developing the right that the court identifies. Thus, as we see below, the Colombian Court has adopted a very different strategy in enforcing socio-economic rights—although it often interacts with other branches, it aggressively defines and monitors the details of policy in a way that would be anathema to the South African Constitutional Court.66

The general point here is that theories of judicial role and judicial strategy in comparative constitutional law should rest more than they do on the comparative analysis of political institutions. Such an approach is realistic, in that it recognizes that judicial role has to vary based on political conditions—for example, the same approach that will work in a country with an institutionalized party system will not necessarily work in one without it. It is also workable, in that it doesn’t make comparative constitutional theory depend on the unique historical circumstances of each individual country—instead, the salient differences between countries should depend on mid-level variables that are amenable to comparative analysis. The next sections will begin building such a theory by explaining the political context in Colombia and how the Colombian Constitutional Court has responded to this context.67

64. See, e.g., Tushnet, supra note 60, at 264 (arguing that weak-form review respects the right, grounded in democratic theory, for majorities to prevail when, acting through their representatives, they enact statutes that are consistent with reasonable interpretations of the constitution); Sunstein, supra note 13, at 237 (arguing that Grootboom successfully enforced socio-economic rights “without placing an undue strain on judicial capacities”).

65. See infra Part IV.B.

66. See infra Part III.C.

67. The idea that judicial role should vary based on the character of political institutions is not wholly alien to American public law scholarship. For example, Tushnet argues that a potential way to deal with emergency executive powers in the United States and elsewhere would be to force congressional approval where power is divided but conduct an independent substantive review where power is not divided. See Mark Tushnet, The Political Constitution of Emergency Powers, 91 MINN. L. REV. 1451 (2007); see also...
II. THE DYSFUNCTIONS OF COLOMBIAN DEMOCRACY AND THE DESIGN OF THE COURT

A. The Political Context—Weak Parties and an Abdicating Legislature

The 1991 Constitutional Convention that created the Colombian Constitutional Court was called because of pervasive violence, and because of a sense that the country’s political institutions were failing.68 Much of this sense of institutional failure ultimately stemmed from problems in the party system.

The country’s two traditional parties, the Liberals and Conservatives, formed in the nineteenth century as collections of notables who engineered votes by manipulating largely rural patronage networks.69 The two parties were originally separated by different stances on certain ideological issues, particularly federalism and religion, but more importantly they were separated by intense personal dislikes and factional conflicts.70 The personal hatreds between the two parties bubbled over into a sporadic but bloody civil war in the 1940s and 1950s; the violence ended when large factions of both parties set up a highly undemocratic power-sharing system, the National Front.71 During the National Front, which lasted in some form from 1958 until 1986, the two parties agreed to render election returns irrelevant: they would rotate the presidency, divide up cabinet posts equally between the two parties, and split the Colombian Supreme Court between their supporters.72 The pact ended the conflict between the parties, but at a price. First, social groups left outside the closed two-party system turned to armed conflict—the insurgent movements that have plagued modern Colombia grew rapidly during the National Front period.73 Second, as inter-party competi-

Levinson & Pildes, supra note 4 (suggesting that judicial doctrine should be responsive to partisan control of the various branches, rather than simply accepting that separation of powers ensures checks on the executive). A difference between my approach and these theories is that, in comparative work, characteristics of political systems can be treated as (relatively) constant structural features of the system, rather than as changeable variables like the partisan composition of the legislature, which may make them easier to incorporate in judicial doctrine and strategy. For example, as I explain below, the Colombian Court has had to treat legislative incoherence as a permanent feature of the system, and thus has adopted an extremely active role in making policy. See infra Part III.


69. See Frank Safford & Marco Palacios, Colombia: Fragmented Land, Divided Society 151–56 (2002) (outlining the origins of the two parties between 1831 and 1845).

70. Aside from the civil war in the 1940s and 1950s, there were also violent conflicts between the parties or their factions between 1859 and 1863, in 1885, and between 1899 and 1902. See id. at 221–24, 245, 249–50.

71. The pact that created the National Front was actually in opposition to a military dictator, General Gustavo Rojas Pinilla. Pinilla had seized power promising to stop the partisan violence, but had been largely ineffective at that end; further, his economic policies represented a mild form of populism that seemed threatening to elite interests. See id. at 321–24.

72. For a more thorough accounting of the civil war and National Front periods, see, e.g., Bushnell, supra note 5, at 201–48.

73. See id. at 244–48.
tion became meaningless, intra-party competition gained in importance. The parties lost most of the coherent ideological identities they originally possessed and instead became battlegrounds for rival factions, all organized around prominent families or individuals, to fight for positions of prominence within their own party. These trends were bolstered by sets of electoral rules that were considered "the most personalistic in the world," giving party leaders little leverage over backbencher members of congress. Further, the rules seriously overrepresented the importance of rural districts, particularly in the lower house; this further increased the importance of clientelism and decreased the importance of partisan ideology.

The incoherence of the party system caused important problems in the legislature. Individual legislators had little interest in building their party's name on a national level, and they won election chiefly by funneling pork and other small-scale benefits toward their clients. Party leaders were too weak and factionalized to impose discipline on the rank-and-file. Party discipline was low: parties voted with their individual factions rather than as a coherent unit.

The Colombian Congress was a classic example of a legislature that, to use Levinson and Pildes's terminology, preferred to "abdicate" its power rather than "empire build." Major policy proposals did not originate in the legislature; virtually everything important was crafted by the president and his team of technocrats. Moreover, the legislature did not usually engage the president's bills in an ideological way. Still, passing bills was not easy, because it required that the president shower individual legislators with sufficient amounts of pork and other particularistic benefits to buy their support. When, as commonly happened with important policy measures, presidents were unable to cobble together a sufficiently large coalition of legislators because of unwillingness or lack of resources, their proposals were
blocked. As a result, the president often used his sweeping emergency powers to legislate directly, bypassing congress altogether: between 1970 and 1991, the country existed under some kind of a state of emergency 82 percent of the time. Often, these states of emergency were not called to deal with genuine security crises, but rather to push through important economic or social reforms that were being blocked by Congress. Likewise, Congress delegated lawmaking over virtually unbounded policy areas to the executive.

The problems with the Colombian Congress, then, were multifaceted, but all were ultimately rooted in the weakness of its party system. First, the Congress’s approval of a bill said little about the bill’s compatibility with real social forces in Colombia, because Congress represented few of these groups other than rural bosses. Second, while the legislature could not initiate policy or participate in important policy debates, it could and did block many important pieces of legislation on dubious grounds (basically because a sufficiently large coalition could not be bought by the President). In essence, it was a veto point in Colombian politics, but a low quality veto point, because its disapproval of the bill was unlikely to represent a clear social consensus against it.

This basic structural problem of legislative dysfunctionality was interrelated with two other issues, executive overreaching via decree power and congressional abdication of large chunks of policy terrain to the executive. Both mechanisms allowed the President to create policy unchecked. Yet it is important to note that these two problems were in some sense coping mechanisms for the structural weaknesses of the Colombian legislature, since they at least allowed policy to be made by avoiding the blocking role generally

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83. See id. at 116 (“[T]he potential dominance of the Colombian presidency . . . often remained more potential than real, because the Congress was able to prevent presidents from effectively using their powers to move beyond what lower-ranking party leaders would tolerate.”).


85. There were actually two distinct types of emergencies under the old constitution, the State of Siege for security crises and the State of Economic Emergency for economic crises. Archer & Shugart, supra note 75, at 126–30. Both powers were often used by presidents to make an end-run around congressional blocking. Id. at 127, 129.

86. See id. at 117, 121–22 (giving examples of Congressional delegation to the Colombian executive, and noting that “[t]he delegation of extraordinary powers to the president . . . is merely a means of furthering [Congress’s] clientelistic interests by freeing members from the burdens of making policy”).

87. George Tsebelis articulates a general theory of political institutions that rests on the number of veto points within a political system and the preferred policy points of those veto points. See GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002). For our purposes, though, what matters is not simply whether an institution has the ability to veto policy, but also the quality of that veto point—does the veto represent the disapproval of some significant social group that democratic theorists ought to care about, or is it essentially random or based on the disapproval of groups that are unimportant from the standpoint of democratic theory?
played by the Congress.\textsuperscript{88} Under the old regime, the majority of important pieces of legislation were passed via some type of executive decree.

\textbf{B. A New Constitution and a New Constitutional Court—Responses to Institutional Weakness}

This sense that political institutions were not working well was a significant impetus for the 1991 Colombian Constitutional Convention (the “Convention”). There was a broad sense that certain institutions, particularly Congress, were failing Colombian society by failing to adequately represent it and by playing a purely negative, blocking role within the political system.\textsuperscript{89} Indeed, proponents of reform labeled Colombia as a “blocked society,” unable to reform itself because of the weakness of its political institutions.\textsuperscript{90} Rightly or wrongly, Colombians placed their hopes in institutional reform as a way to alleviate the social ills—the civil war and the culture of lawlessness—that were plaguing the country.\textsuperscript{91} The movements for a new constitution, which began in the 1980s, finally paid off in 1991, when President Gaviria succeeded in passing a referendum that called for the election of a constituent assembly. The assembly, meeting from January to June 1991, drafted an entirely new constitution.

A full accounting of the labors of this assembly is unnecessary here, but a few details are important. First, politically the assembly marked a strange moment in Colombian history where old political lines appeared to be breaking down. The Liberals sent a fairly large contingent to the Convention, but the Conservatives won only a few seats, while most of the remaining seats were won by the M-19, a guerrilla movement that had laid down its arms after a Gaviria peace offer, and the MSN, a breakaway faction of the Conservatives.\textsuperscript{92} This gave hope that the old party system was splintering, to be replaced by a stronger, more ideologically coherent set of parties.

Second, at an overarching level, the Convention was torn between two impulses that have since proven to be in considerable tension: constructing new institutions and devices that would in some sense make an end-run

\textsuperscript{88} Cf. Scott Mainwaring & Matthew Soberg Shugart, \textit{Conclusion, in Presidentialism and Democracy in Latin America} 384, 394, 431–34 & tbl.11.6 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) (arguing that there is an inverse relationship in Latin America between the strength of a president’s constitutional decree powers and the President’s cohesive, disciplined support levels in the legislature, because constituent assemblies will seek to compensate for bargaining problems faced by the president in the legislature).

\textsuperscript{89} See Segura & Bejarano, \textit{supra} note 68, at 220 (stating that the political system before 1991 was viewed as “extremely hostile to the incorporation of new parties representing new interests and demands beyond the traditional Liberal and Conservative parties”).

\textsuperscript{90} See \textsc{Manuel José Cepeda Espinosa}, \textit{Introducción a la Constitución de 1991}, at 265–66 (1991); see also \textsc{Ivan Vila Casado}, \textit{Nuevo Derecho Constitucional: Antecedentes y Fundamentos} 269 (2002). Another institution considered to play a regressive and purely blocking role was the old Supreme Court. See \textsc{Cepeda Espinosa, supra}, at 257.

\textsuperscript{91} See Segura & Bejarano, \textit{supra} note 68, at 219 (noting that “violence has long been interpreted as the outcome of a long process of decay in Colombia’s political system”).

\textsuperscript{92} See, e.g., Archer & Shugart, \textit{supra} note 75, at 148–52 & tbl.3.3.
around the old ones, versus reforming old institutions to make them work better. The first impulse was reflected in the assembly’s writing of an extraordinarily extensive bill of rights, including many socio-economic rights (largely lifted from the Spanish Constitution), and its creation of new institutions to enforce those rights, based on a suspicion that existing structures would not adequately enforce the constitution and transform Colombian society.\(^9\)

The Convention created a new ombudsman or “Defender of the People”—charged with protecting constitutional rights by investigating wrongdoing, mobilizing public opinion, and filing judicial actions—and strengthened the Procuraduría (the Attorney General), who was given wide-ranging powers to investigate and root out constitutional violations by state officials.\(^4\) As shown below, the Constitutional Court has at times enlisted these actors as allies in its efforts.

Most importantly, the Constitutional Convention created the Constitutional Court itself, and gave this body exceptional powers—indeed, the Colombian Court must be by any measure one of the strongest courts in the world. The Court has the power to hear abstract review petitions initiated at any time by any single citizen,\(^5\) rather than, as in Mexico, solely at the conclusion of the legislative process by a minority of political actors.\(^6\) Further, the Court has the power to hear appeals from lower court dispositions via an individual complaint procedure called the *tutela*. Tutelas are inexpensive to bring, are heard very quickly, and can be used to enforce any of the “fundamental” rights in the constitution against any public actor and, in many situations, private actors as well.\(^7\) The Convention constructed the Colombian Court to ensure that the constitution would have force even if the traditional political actors were not reformed.

Further, it is worth noting that the nine-member Court is relatively difficult to “pack,” because four different bodies are involved in the selection process. Justices serve non-renewable eight year terms, with three different bodies—the President, the Council of State (which is the high administrative court), and the Supreme Court each sending three lists of three names to the Senate. The Senate then picks one name from each of these lists to serve

\(^9\) See CEPEDA ESPINOSA, supra note 90, at 157–70.
\(^4\) Id. at 101–02 (discussing the creation and purposes behind these two institutions). The Defender of the People is a very common institution in Latin American countries, but the powers and importance of the post varies widely. Cf. Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKL J. 953, 961–64 (2007) (discussing the differences between ombudsmen in different Western and non-Western countries).
\(^6\) Patricio Navia & Julio Rios-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189, 208–09 (describing the Mexican version of abstract review and noting that these challenges, against federal laws, can only be brought by one third of deputies or senators, the attorney general, and political parties).
\(^7\) Id. at 552–54.
on the Constitutional Court.98 The relatively reduced role for the President helps to protect the Court's independence.

The other motivation, reforming existing political institutions to make them work better, was also reflected at various points in the Convention’s work. It can be seen in the assembly’s efforts to establish clearer rules for the President’s invocation and use of emergency powers and its efforts to give the Congress an enlarged role in supervising and checking the President’s use of those powers, as well as in naming certain officials.99 But the Convention did not focus on the underlying causes of congressional dysfunction. It made some superficial efforts to “clean up” Congress,100 but its changes to electoral rules actually made problems of legislative behavior worse, not better.101 The new rules maintained the open-list structure that gave parties little control over their candidates and allowed multiple lists from the same party;102 moreover, the rules made it easier for transient movements, rather than established parties, to gain representation.103

98. See Const. Col., art. 239.

99. See id., arts. 212–15; Cepeda Espinosa, supra note 90, at 296. The aim was not to abolish emergency powers, but to avoid abuses and make it clearer when they could be used. See Archer & Shugart, supra note 75, at 128, 130 (noting that state of siege powers remain substantial and economic decree powers were actually expanded in some respects under the Constitution of 1991).

100. For example, it outlawed one of the devices used by the President to “buy” individual legislators, the notorious auxilios parlamentarios or discretionary funds given to legislators for whatever project they desired. See Const. Col., art. 136, cl. 4. Despite the bar, funds of this kind continue to exist under different names. Longómez, supra note 74, at 96 n.25.

101. The assembly’s most important change in electoral rules was to require that all senators be elected via proportional representation from one nationwide district, which made it easier for new political forces to get elected but did nothing to strengthen the party system. See Const. Col., art. 171. The “outsider parties” who staffed the assembly were obsessed with representativeness, rather than the coherence or strength of the party system. Indeed, increasing the size of districts while retaining an open-list structure actually increases the pressures on a senator to seek an individually-based and not a party-based reputation. See Carey & Shugart, supra note 75, at 430–32.

102. See Longómez, supra note 74, at 84 & n.17 (noting that a 1994 law technically gave party lists control over the party label but that, in fact, “the traditional parties, as well as many new parties, make indiscriminate endorsements”); see also Brian F. Crisp, The Nature of Representation in Andean Legislatures and Attempts at Institutional Reengineering, in The Crisis of Democratic Representation in the Andes 204, 218 (Scott Mainwaring et al. eds., 2006) (noting the reformers’ failure to eliminate inter-party lists). A law that took effect in 2006 mandated one list per party per district, id. at 223 n.4, but it is unclear how much of an impact this law will have, given that factions can run as separate parties. It may simply lead to further proliferation of small parties. One study has found that the reform significantly reduced the number of lists in the 2006 election. 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, 251–57 (Christopher Welna and Gustavo Gallon eds., 2007).

103. See Const. Col., art. 108.
C. Political Institutions Since 1991—Continued
Deterioration of the Party System

Unsurprisingly, then, parties have become significantly less institutionalized since 1991 (although also significantly more open to new interests\textsuperscript{104}), and the behavior of the legislature has worsened significantly over the past fifteen years. Prior to the Constitutional Convention of 1991, the two traditional parties, although highly factionalized, at least occasionally operated as coherent entities, and gave some structure to Colombian politics. The post-1991 period of party deinstitutionalization reached its apogee in 2002, when a true outsider to the party system, Alvaro Uribe, was elected President.\textsuperscript{105} The two traditional parties have been in a long decline—neither is now a powerful entity, and the Conservatives are essentially dead. Two types of new political forces have filled this vacuum, but neither type bodes well for legislative performance.

First, there are off-shoots and factions of the traditional rural, patronage-based parties, now repackaged with new labels. These parties are personalistic and led by the same types of politicians who would have led factions in the Liberal or Conservative party.\textsuperscript{106} The difference is that they are even less tied to a coherent party label than before. As in the pre-1991 period, these legislators have little interest in making national-level policy.\textsuperscript{107} As a whole, their parties tend to be fairly small (because they are linked to individual actors who generally have support in only one region of the country), and they tend to appear and disappear frequently, showing little longevity.\textsuperscript{108} Further, empirical evidence suggests that party discipline remains low within these kinds of parties, rendering them incapable of voting as a coherent block.\textsuperscript{109}

The second kind of legislator in the new Congress belongs to what various authors have called the “electoral micro-enterprise.”\textsuperscript{110} These are very small bands of political figures, often celebrities from prior careers, who receive most of their votes from independently minded voters in the cities, and who often tend to serve niche political interests, like school teachers, indigenous communities, or protestant religious groups.\textsuperscript{111} These actors, on the surface,

\textsuperscript{104.} See Leongómez, supra note 74, at 88 & tbl.3.3 (“The scope of political and social representation has widened [since 1991]. . . . Many parties have gained representation in the Senate.”).


\textsuperscript{106.} See Leongómez, supra note 74, at 90–91.

\textsuperscript{107.} See Cepeda Ulloa, supra note 105, at 204 (“Colombian congresspersons prefer to use their power as a tool to obtain bureaucratic positions and other advantages and privileges. Public policy is not really their main concern.”).

\textsuperscript{108.} See id. at 212.

\textsuperscript{109.} See Crisp, supra note 102, at 218 (“Liberals and Conservatives showed virtually the same propensity to break discipline as they did in the pre-reform era.”).

\textsuperscript{110.} Leongómez, supra note 74, at 78.

\textsuperscript{111.} See id. at 90.
have considerable promise for making broad policy decisions. Leongómez notes that they tend to have programmatic mindsets and thus serve as policy-making leaders in Congress.\footnote{112. See id. (“[I]f the Colombian legislature occasionally produces some worthwhile legislation, it is because of presidential leadership and the leadership of these more programmatically oriented members of Congress.”).} However, isolated figures interested in broad political questions cannot by themselves create a functioning legislature, at least on most issues. Without parties to tie them together and forge coalitions, these micro-enterprise legislators have great difficulty coordinating at the institutional level.\footnote{113. See id. at 91–92.} Moreover, the lack of a real party label in these micro-enterprises weakens the link between elected representatives and their constituents; it is hard for people to know what they are getting when they cast a vote.

Corruption problems have greatly exacerbated the issue of legislative weakness. The Colombian legislature is riddled with legislators who have ties to illegal organizations, particularly paramilitary groups. This has resulted in a constant stream of investigations and expulsions, resulting in very high turnover and helping to further hamstring legislative activity. For example, of the 170 legislators elected to the 2006–2010 term in the House and Senate, 57 (roughly one-third) had either been removed from office or were under investigation as of early 2009 for links to paramilitaries alone.\footnote{114. Caludia López & Óscar Sevillano, Balance política de la parapolítica, CORPORACIÓN NUEVO ARCO IRIS, Dec. 14, 2008, http://www.nuevoarcoiris.org.co/sac/files/arcanos/arcanos_14_diciembre_2008_files/arcanos_14_informe_parapolitica.pdf.}

Several studies, then, have indicated that the behavior of the legislature as a body is even worse than before 1991. Most proposals initiated by legislators are either symbolic measures or pork-barrel measures targeted at a particular geographic constituency; virtually all important national policy proposals continue to be initiated by the executive.\footnote{115. See Leongómez, supra note 74, at 91–92 (citing a study which showed that seventy-eight percent of bills proposed by legislators between July 1998 and July 1999 had a strictly local or regional focus, while only twenty-two percent addressed national issues at all); see also Erika Moreno, Whither the Colombian Two-Party System? An Assessment of Political Reforms and Their Limits, 24 ELEC. STUD. 485 (2005) (finding, via a study of bill initiation patterns, that the new parties behaved like the old ones).} Moreover, the bargaining currency in the Congress continues to be pork-barrel and other particularistic, geographically-targeted resources, which are offered by the President to legislators (instead of policy compromises) in return for votes.\footnote{116. See Leongómez, supra note 74, at 92.} Thus, partially because of incomplete reforms and partially because of durable elements of political culture, the Congress has maintained its traditional role as a blocker of presidential policy\footnote{117. See id. at 91 (noting that fragmentation and legislative indiscipline combine to force "constant negotiation between the government and individual members of Congress," which "drastically increases the transaction cost of moving legislation forward").} rather than as an initiator or amender of national policy initiatives, and as a body willing to abdicate national power to the executive in exchange for particularistic payoffs.
III. THE COLOMBIAN COURT’S RESPONSES TO THE INSTITUTIONAL CONTEXT

The Colombian Constitutional Court, by any measure, has become one of the most powerful courts in the world. The Court’s rights jurisprudence, for example, is breathtaking in scope and activism. The Court has made wide use of the country’s long and detailed constitution and has developed a rigorous and creative jurisprudence. For example, the Court legalized personal drug consumption and euthanasia, based on rights to personal autonomy and human dignity. It has also developed a strong set of socio-economic rights, as evidenced by decisions forcing public entities to pay retirement benefits, requiring schools not to expel students who could not pay fees, and forcing public health agencies to pay for treatments for AIDS victims.

But my purpose here is not to describe the full corpus of the Court’s work; instead, I focus on the Court’s jurisprudence as a response to institutional context. As I argued above, Colombian executive-legislative relations involve three intertwined problems: executive overreaching, legislative abdication, and legislative dysfunctionality. It has not been easy for the Court to figure out how to respond to this tangle of problems, and in fact two of its three responses have backfired. The Court, particularly in its early years, tried to fix the dysfunctional legislature by exercising tight control over legislative procedure. At the same time, it put a tight clamp on autonomous executive policymaking—effectively ignoring the problem of legislative dysfunctionality by behaving as though the legislature were an appropriate policymaking partner for the executive. Neither approach worked well. Attempts to reform legislative behavior via judicial decision have failed because the problem is deeply rooted in the party system and, as such, is basically beyond judicial control. Preventing autonomous executive policymaking and forcing all policy through the legislature could be effective if the legislature functioned fairly well. But where the legislature is a low quality veto point, which blocks a large number of bills without engaging them on policy grounds, the effects of empowering the legislature are much murkier. The Court’s decision to eviscerate autonomous executive policy, which historically has been so important in Colombia, has blocked many important policy initiatives without producing clear gains.

I argue that the Court’s most effective response, which has dominated its more recent work, has been legislative substitution. Here, the Court, at least at some times and on some issues, steps in and performs core legislative functions. In other words, the Court refuses to recognize a clear line between judicial and legislative functions. While this kind of role would be improper

118. An encyclopedic overview of the Court’s key cases can be found in Cepeda Espinosa, supra note 95.
119. See id. at 578–81.
120. Id. at 616–51.
in a country with a well-functioning legislature, I argue that it is appropriate in Colombia. Legislative substitution involves substantively checking the executive’s policy choices itself, rather than relying on the legislature to do so. Similarly, it involves injecting new policies into the system across a range of issues, and monitoring those policies to ensure they are implemented.

The Court renders its performance of this substitution role more legitimate by taking on some legislative-like attributes. As discussed above, theories of legislative role generally stress two advantages held by legislatures—their democratic legitimacy and their institutional capabilities, particularly as information-gatherers. The Colombian Constitutional Court’s striking institutional popularity relative to other political institutions suggests that it has more democratic legitimacy than most judicial bodies. The public sees the Court, rather than the legislature, as the best embodiment of the transformative project of the 1991 constitution. The Court needs this popularity in order to receive compliance with its decisions and even to survive, because a large chunk of the political elite, particularly on the right, has been hostile to the Court since its inception: most presidents since 1991 have attempted to curb judicial power in some way, and these efforts appear to have failed primarily because of the Court’s network of civil society allies and its popularity. The main link between the Court and democracy comes from the fact that the Court must maintain high public support in order to maintain its power.

The Court has also taken steps to bolster its capacity to receive and evaluate information. As discussed in detail below, the standing rules for the Court make it easy for anyone to get their claim before the Court on an informal basis; this has helped the Court to learn about a range of significant social problems. Also, the Court has held administrative or legislative-style hearings, so that it can learn the views of civil society groups and experts on complicated problems. Finally, the Court has made extensive use of a set of allied institutions created by the 1991 Constitution, particularly the Defender of the People, as well as allied civil society groups, in order to gather and assess information in important policy areas.

In the following sections, I first lay out the Court’s discourse toward the other branches of government, and particularly toward the legislature. My point is that the Court has a fairly realistic understanding of the institutional context. Section B briefly looks at the Court’s failed responses to the problem—trying to fix the legislature and to crack down on autonomous executive policymaking. Finally, Section C looks at the legislative-substitution strategy the Court has adopted and explains why it is reasonable in the Colombian context.

121. See supra note 30 and accompanying text.
122. For a summary of these various efforts, see Cepeda, supra note 95, at 691 tbl.6.
A. The Court’s Discourse on the Legislature: The Court Understands the Institutional Context

Before we discuss the particular doctrinal moves made by the Colombian Constitutional Court, we should note that it is clear that the Court has a realistic view of the institutional context. The Court understands the legislature’s historically dysfunctional role within the system. This was clearly articulated in a set of interviews that I conducted with five current Justices and five former Justices of the Colombian Constitutional Court in the summer of 2009. Each of these current and former Justices pointed to the failings of other political institutions, and particularly the Congress, as a reason for the Court’s own significant role within the political system. For example, Justice Humberto Sierra Porto noted that because the legislature works so poorly and has so little legitimacy, “[P]eople demonstrate in front of the Court, rather than the legislature—the Court is more relevant to their lives.”123 Similarly, ex-Justice Manuel Jose Cepeda Espinosa argued that the Court based its work on the assumption that the “legislature is irrational, that it is such a bad legislature that we have been forced into a very tight form of political control.”124

These assumptions are also very clear from the Court’s jurisprudence. The Court often complains that the legislature is not acting like a deliberative body. Take, for example, an important case in 2003 where the Court on abstract review struck down reforms to the country’s value-added tax that would have broadened the base to include certain everyday items (like milk) that had previously been exempt.125 The Court harshly criticized the legislature for simply accepting a last-minute executive proposal without debating it substantively. Indeed, the Court stated that the reform “was the result of an indiscriminate decision to tax a great quantity of completely different goods and services that was not accompanied by even a minimum of legislative deliberation, raising the principle of ‘no taxation without representation’ . . . .”126 Similarly, in the course of striking down a pension reform bill which would have made it more difficult for certain employees to receive pensions, the Court took the legislature to task for the “complete absence of debate” on the relevant provisions. By omitting any discussion of these provisions, the legislature had negated constitutional principles aimed at ensuring that “popular representation is truly effective . . . and democratic values

123. Interview with Humberto Sierra Porto, Justice of the Colombian Constitutional Court, in Bogotá, Colombia (August 2009).
124. Interview with Manuel Jose Cepeda Espinosa, Former Justice of the Colombian Constitutional Court, in Bogotá, Colombia (August 2009).
126. Id. § VIII.4.5.6.1.
and the principles of transparency and publicity that should inform legislative activity are guaranteed.” ¹²⁷

Second, the Court’s discourse shows an awareness that legislative bargaining is about pork and not policy. In a decision upholding the constitutionality of what were essentially payoffs from the executive into funds that individual legislators could use for whatever they wished, the Court noted the “reasonableness” and “empirical rationality” of the following argument presented by an intervener, although it claimed to balk somewhat at accepting all of its normative implications:

> [G]iven the weakness of Colombian political parties, the open giving by the government of certain funds to congress-people to obtain their support . . . should be accepted . . . This is because in Colombia parties and political movements do not operate as coherent organizations but as associations of regional politicians, with purely local and very specific priorities. ¹²⁸

The Court is acutely conscious of the central dynamics of executive-legislative relations in Colombia.

The Court and its supporters consciously have drawn from this institutional context a new theory of separation of powers that focuses on the Court’s role as a check on the executive branch and even as a direct initiator of policies based on substantive values derived from the constitutional text. In a famous case from 1992¹²⁹ where the Court announced it would enforce socio-economic rights using the \textit{tutela} under certain conditions, it stated:

> The difficulties deriving from the overflowing power of the executive in our interventionist 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.¹³⁰

In other words, in an institutional order where the legislature is structurally incapable of checking the executive, a strengthened judiciary is the best hope to do so. Further, in the absence of “legislative action,” the Court determined that it must “give force” to constitutional principles, developing and directly enforcing even socio-economic rights: “It is clear that in

¹²⁷. C-754/04 § 3.3.2.2.2 [Colombian Constitutional Court] \textit{reprinted in Corte Constitucional: Sentencias-Tutelas} 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009).


¹³⁰. Id. § 1.C.
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.”

Thus, the Court has held that although separation of powers is an important principle in Colombian constitutional law, it is a flexible doctrine—the Court tends to emphasize the duty of the branches to “harmoniously collaborate” in achieving constitutional goals, rather than their rigid separation. At the forefront of the Court’s consciousness, as “guardian of the supremacy of the Constitution,” is whether society and the state are approaching the constitutional vision established in 1991; separation of powers is merely a tool for realizing that constitutional vision. As we will see repeatedly below, the judiciary is willing to step in to re-establish the constitutional vision when the other branches fail to act or act improperly. Ensuring any particular conception of judicial role is subordinated to the overriding goal of ensuring that constitutional change occurs.

B. The Court’s Failed Attempts to “Fix” Legislative Dysfunctionality and to Limit Autonomous Executive Policymaking

Given the Court’s pervasive awareness of the institutional context, it is not surprising that it has spent considerable energy responding to the problem of legislative weakness. But not all of its responses have been productive. Both the Court’s attempts to improve legislative behavior by controlling legislative procedure and its attempts to limit autonomous executive policymaking have blocked important policies without producing clear gains. The Court lacks the tools to improve legislative performance, and in the absence of improved legislative performance, forcing all policy through the legislature is not an effective strategy.

The Colombian Court has sunk substantial effort into improving legislative performance by developing extensive constitutional doctrines that regulate legislative procedure. The basis for its doctrines is the idea of

131. Id. § III.B, ¶ 19. Major supporters of the Court have echoed this analysis. For example, the brilliant jurist Manuel Jose Cepeda Espinosa, who eventually would become the Court’s president, noted that two major sources of the Court’s power were (1) the “central position that the President had traditionally exercised . . . over the Congress, which diminishes—and in many cases distorts—the system of checks and balances between the political branches,” and (2) “the perception that [politics] is clientelistic and beneficial for the politicians and not for ordinary people. . . . Citizens rarely think that laws represent the consensus of society or of a solid political majority.” See MANUEL JOSE CEPEDA ESPINOSA, POLEMICAS CONSTITUCIONALES 241–42 (2007).

132. For example, the Court’s conception of the “state of unconstitutional conditions” doctrine, see infra Part III.C.2, which is basically its ability to declare structural injunctions for situations that it considers openly unconstitutional, rests on this idea of “harmonious collaboration” and on the Court’s role as “guardian of the supremacy of the constitution.” See, e.g., T-068/98 § IV, ¶¶ 10–11 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009); T-025/04 § 6.3.2 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009).

133. See T-068/98 § IV, ¶ 11.
deliberation: the Colombian Congress "should be . . . a space of public reason," even if the legislature’s actual behavior is wildly divergent from that end. In other words, decisions should be made on the floor, not in back-room deals or party-based pacts: “[T]he validity of a majority decision does not reside solely in the fact that it has been adopted by a majority, but also in that it has been publicly deliberated and discussed . . . .”

Two lines of doctrine spring from the principles outlined above. In the first, narrower line, the Court focuses on preventing executive manipulation of the legislative process. For example, in a blockbuster 2003 case, the Court blocked President Uribe’s efforts to adopt a constitutional amendment that would have created sweeping anti-terrorist and anti-insurgent measures. In an initial vote, the amendment fell several votes shy of passage; the Uribe-allied chair of the chamber closed the vote on pretextual grounds before it could be finalized. Several weeks later, without any additional debate, fourteen legislators changed their vote. The Court held that the chair’s attempt to erase the first vote was invalid, and so the failed first vote had to stand, dooming the bill. But the Court’s underlying concern in the case was the likelihood that Uribe had bought additional votes. The Court commented particularly on the fact that fourteen legislators had changed their vote between the two sessions, holding that these legislators’ actions were “questionable” and had “distorted the popular will” because the “change in vote occurred without any new public debate on the floor.”

The second line of doctrine is aimed at the lack of legislative deliberation even in the absence of executive interference. 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 to proceed to a vote before any statements have been

134. C-816/04 § VII.138 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (“Congress is a space of public reason. Or at least, the Constitution postulates that that is what it should be.”).

135. Id. § VII.137; see also id. § VII.138 (distinguishing between “negotiations between political forces outside of parliamentary sessions,” which were “inevitable” but in some tension with constitutional requirements, and the “public and deliberative model” desired by modern “constitutional democracies”); id. § VII.127 (quoting C-222/97) (“This Court has clearly indicated that in the transmission of legislative acts, ‘voting founded exclusively on political accords external to the legislative session, celebrated by groups, parties, or coalitions, with the pretext of imposing a majority without previous debate,’ is excluded.”). Interviews with the Justices confirmed that these doctrines were a result of the perceived irrationality of the legislature. Justice Manuel Jose Cepeda Espinosa, for example, told me that “our view was that we had such a bad Congress that we had no choice but to try and do something.” Interview with Manuel Jose Cepeda Espinosa, Former Justice of the Colombian Constitutional Court, in Bogotá, Colombia (August 2009).


137. The chairman stated that the chamber had become disorderly because opposition legislators were protesting his decision to keep the vote open. See id. § VII.32.

138. Id. § VII.127.
made). 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. 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 and instead was trying to push back debate to a later stage of the legislative process.

While these doctrines have blocked a large number of important policy measures, little has been achieved in return. The Court is faced with the obvious difficulty of using a blunt instrument—legislative procedure—to fix a deep structural problem rooted in the party system and Colombian political culture. As noted by one Colombian legal scholar, the main problem with legislative debate is not that it fails to occur, but rather that it is “disorganized and ineffective” because the weakness of the country’s parties results in the legislature’s failure to coalesce into coherent ideological

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140. See, e.g., C-760/01 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking down numerous amendments to the new penal code because these amendments were not read or published before the vote). A concurring Justice pointed out that “[a]nyone familiar with parliamentary process knows that parliamentary representatives often vote on a proposal without knowing its content, including its essential pieces.” Id. ¶ 2. (Araujo Rentaria, J., dissenting in part and concurring in the judgment).

141. See C-801/03 § VI.5.1 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009). The Court’s doctrine has proven difficult to apply, because it is unclear how to determine when a committee is attempting to shirk its responsibility. See C-370/04 (Cepeda Espinosa, J., dissenting) § 1 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (explaining the doctrinal evolution). Justice Cepeda Espinosa, one of the founders of this doctrine, argued that it has become too broad, and now has the effect of “punishing parliamentary creativity and petrifying legislative projects to what was decided in the first debate.” Id. (Cepeda Espinosa, J., dissenting) § 1.

bands.\textsuperscript{143} Given this institutional context, the Court simply cannot radically strengthen parties via judicial decision.\textsuperscript{144} The doctrine aimed at executive interference is equally ineffectual because of problems of detection. And to the extent this case law does have effect, the impact on the political system is negative. As explained above, executive manipulation of the legislative process via the buying off of individual legislators is largely a coping mechanism for the incoherence of the legislative process; preventing it would simply grind legislative politics to a halt without improving performance.\textsuperscript{145}

The Court has also developed doctrines that have sharply diminished the President’s ability to make policy autonomously (that is, without going through the legislative process), either via delegated power\textsuperscript{146} or via emergency decree. The Court has held that legislative delegations of extraordinary power are disfavored and must be read “restrictively” in all contexts\textsuperscript{147}; its goal is to “reduce the capacity of the government to exercise legislative functions through congressional delegation.”\textsuperscript{148} Thus, the Court has devel-

\textsuperscript{143} Faiber Eucario Falla Casanova, Algunas Consideraciones Sobre el Principio Democratico y la Funcion Legislativa Parlamentaria en Colombia, in PRIMERAS JORNADAS DE DERECHO CONSTITUCIONAL Y ADMINISTRATIVO 201, 216 (2001) (Colomb.); see also id. at 221 (“We need to construct a party system in order to make democratic principles effective in congressional participation.”).

\textsuperscript{144} I do not argue that judicial doctrine has no impact on the party system. Obviously, much of the edifice of electoral law in the United States is based on the assumption that it can. Nor do I mean to imply that judicial control of legislative procedure is always futile—it may be, as Cass Sunstein has argued, that judges can and should force legislators to deliberate certain issues. See, e.g., Cass Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 338–39 (2000). My point here is simpler: where the problems in legislative performance are rooted in deep problems with the party system like those found in Colombia, judicial improvement of legislative performance is impossible.

\textsuperscript{145} Probably wisely, then, the Court has backed away from controlling legislative procedure in more recent case law. For example, in another, more recent blockbuster case involving a constitutional amendment to allow President Uribe and all future presidents to serve two terms instead of the one, the Court was confronted with legislative shenanigans similar to those present in the anti-terrorism amendment case. The legislative leadership failed to appoint opponents of the bill to write up the bill’s legislative report, opened and closed debates immediately, and allowed many legislators to vote despite having relatives with jobs in Uribe’s administration. See Leonardo Garcia Jaramillo, Dialogo con dos Profesores Colombianos, http://www.utdt.edu/ver_contenido.php?id_contenido=2452&id_item_menu=3561 (last visited July 17, 2008) (interviewing Catalina Botero Marino, Colombian constitutional law professor and auxiliary magistrate on the Constitutional Court). The Court nonetheless upheld the measure. See C-1040/05 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009).

\textsuperscript{146} Colombian presidents have several types of delegated decree power: they can make decrees that are equal in rank to statutes after being delegated extraordinary powers by the legislature, or they can create administrative decrees with a rank that is lesser than congressional statutes by elaborating or regulating those statutes themselves. See ALEXEI JULIO ESTRADA, LAS RAMAS EJECUTIVA Y JUDICIAL DEL PODER PUBLICO EN LA CONSTITUCION COLOMBIANA DE 1991, 75–88 (2003). I am discussing the first type of delegated power here; use of the second power is reviewed by a different body, the Council of State (Colombia’s high administrative court), and so I do not treat it.

\textsuperscript{147} See, e.g., C-702/99 § VI.4.3 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (“In adopting this decision, the Constitutional Court is also inspired by the restrictive character that should guide constitutional interpretation of emergency faculties granted to the government.”).

oped powerful doctrines voiding delegations as insufficiently precise (a Colombian version of the non-delegation doctrine) and limiting their scope.

With respect to emergency decrees, the raw statistics amply demonstrate judicial activism: of twelve presidential declarations of states of emergency since 1991, the Court has completely struck down three and partially struck down three more. Moreover, even when the Court has upheld a declaration of a state of emergency, it has often struck down substantive decrees issued while the declaration was in effect. Further, most of the judicial approvals of decree powers occurred in the early years of the Court’s existence: it completely upheld five of six decrees between 1992 and 1994, but has since struck down, at least partially, five of six declarations of emergency. The country spent 82% of the time under some kind of presidential state of emergency in the 1970s and 80s, but it has spent only 17.5% of the time under such a state between 1991 and 2002.

Key domestic commentators have hailed the Court’s emergency powers jurisprudence as “one of [its] most important and original interventions.” But this kind of structural jurisprudence—which aims to push all poli-

149. Like other courts that have tried to enforce a non-delegation doctrine, see e.g., David P. Currie, The Constitution of the Federal Republic of Germany 133 (1994) (explaining the German non-delegation cases as “numerous and not all easy to reconcile”), the Colombian Court has had trouble determining exactly which standards to apply, although the most often repeated standard is that a delegation must be “specific, certain, and exact.” C-050/97 § II.Tercera.a [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009). See, e.g., C-097/03 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking down a delegation as too vague, where it merely instructed the President to “organize a system of inspection, vigilance, and control, adaptable to distinct types of institutions and regions, to deal with special situations,” without saying what the purpose of the system would be or defining “special situations.”); C-1493/00 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking down language allowing the president to “dictate other dispositions” and to legislate “other norms related with this material”); C-1374/00 § V [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking delegation of powers to “dictate laws on the judicial police on issues not corresponding to the materials regulated by the criminal code and criminal procedure code,” on grounds that this delegation was amplisimo, or extremely broad).

150. See, e.g., C-734/05 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking down a decree that fixed the amount of salary used to calculate pensions on the grounds that the enabling legislation only allowed the President to fix the conditions under which “pension bonds” were to be floated, and not to affect the pensions themselves); see also Cepeda Espinosa, supra note 95, at 636 n.299 (listing numerous cases).


153. See id. at 65 & tbl.3.

154. Id. at 47.
cymaking through the legislature—ignores the problem of legislative weakness. Like executive manipulation of the policy process, autonomous executive policymaking has historically been a coping mechanism to deal with serious problems in legislative performance. So long as the legislature remains dysfunctional, forcing all policy through the legislature adds a low quality veto point to the policymaking process and is likely to block a significant number of bills without achieving positive results.155

Historically, Colombian governments have used emergency decrees to deal with severe economic crises. Because the Congress functioned so poorly, the President would often pass these bills alone. Understanding this need, the framers of the 1991 constitution created a “social and economic emergency” clause, which was meant to deal with socio-economic (rather than security) crises.156 The Court has severely limited this device by confining it to situations where there has been a significant exogenous shock to the system, like a natural disaster.157 For example, in 1997, the Court struck down the government’s attempt to declare a state of economic emergency in order to deal with serious balance of payments problems largely caused by an increasing fiscal deficit which threatened the economy.158 The Court emphasized that the problem was a “structural” one, with a “prolonged duration,”159 and held that “the expansive use of exceptional powers to resolve structural or chronic problems” was constitutionally prohibited.160 Structural problems were generally meant to be dealt with via the constitu-

155. The Court’s emergency powers jurisprudence is not devoid of merit. As Tushnet argues, there are two ways for a court to control emergency power: it can independently review executive action for substantive rights concerns, or it can attempt to place structural controls on executive action, telling the executive that he must go to Congress to get what he wants. See TUSHNET, supra note 63. Much of the Colombian jurisprudence is purely structural, which is inappropriate given legislative dysfunction. But some of the cases, particularly those where the President has invoked the “state of internal commotion” meant to deal with the ongoing insurgency, are really about rights. The Court is telling the political branches that what they want to do is unconstitutional, regardless of source. See, e.g., C-300/94 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (striking down a declaration of a state of internal commotion meant to prevent the imminent release of prisoners due to extremely long back-logs in handling cases, on due process grounds). In my view, this kind of judicial supervision suits the institutional context well and is part of the legislative substitution strategy outlined below because the Court is conducting its own substantive review of the measures rather than deferring to congressional controls. See infra section III.C.3.

156. CONST. COL., art. 215. The assembly also provided for two other states of emergency—the state of internal commotion and the state of external war. The first was meant to deal with serious internal unrest related to issues such as Colombia’s ongoing guerrilla insurgency, while the second, which has never been used, was meant to deal with states of emergency during war with a foreign country. See CONST. COL., arts. 213–14.


159. Id. § III.11.

160. Id. § III.6.
tionally “privileged” route of ordinary democratic debate in the Congress, which was the “natural forum for discussing and resolving critical [economic] issues.”

The Court reiterated this core doctrine in a 1999 emergency declaration during the same economic recession at a point when problems had spread to the financial sector. The government, adapting to the prior doctrinal moves of the Court, attempted to frame the crisis as one created by a shock: “the recent aggravation of the international financial crisis,” which had “generated a reduction in the net flow of external capital.” The Court rejected this premise, holding instead that the “aggravation of the international financial crisis, although an influence, did not constitute the specific, determining cause of the reduction in the net flows of external capital.” It held that the crisis rested largely on chronic fiscal factors like the budget and trade deficits, and substantially reduced the scope of the government’s emergency powers, which it maintained only for certain sectors of the financial industry.

The Court’s doctrine, which privileges external shocks over chronic, structural factors, is problematic in Colombia precisely because it is insensitive to the domestic institutional context. This kind of classification has tended to limit emergency powers to a defined class of events involving disasters, and has ignored the systematic institutional failures that have long plagued the country. Ignoring these factors does not make them go away; assuming the existence of a well-functioning legislature does not make it so. Pushing budget cuts and tax reforms through a dysfunctional

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161. Id. § III.5.
163. Id.
164. One of these was the UPAC debtors, on whose behalf the Court would intervene again and again in the 1999–2002 period. See infra section III.C.1.
166. The irony is that the Court’s distrust of the legislature’s ability to monitor the executive seems to be one reason why it tightened its structural jurisprudence. The constitutional framers intended for Congress to play an important role in monitoring emergency powers. For example, they required that certain prorogations of these powers beyond their initial time limits be approved by the Senate. Moreover, they allowed Congress to overturn any statutes made via emergency powers by joint resolution. After initially placing great weight on these political controls, see C-004/92 § VII.21 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (noting that Congress’s political controls “play a democratic checking function”), the Court has subsequently grown suspicious of Congress’s role in supervising the President, see C-327/03 §§ V.4.5, V.4.6 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (refusing to allow a Senate-approved prorogation of a state of internal commotion because the Senate’s session was too rushed and insufficiently deliberative, because the Senate did not produce a document explaining why the prorogation was necessary, and because the prorogation was approved less than halfway through the initial emergency period).
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legislature with weak parties is likely to be slow and might prove impossible. Scholars have found evidence for a link between Colombia’s post-1991 jurisprudence, which gives the President little ability to act unilaterally in economic matters, and the country’s worsening fiscal deficits. The economic crisis of the late 1990s did not pass quickly, but rather threw Colombia into one of the worst recessions in its history. Additionally, many key economic reforms could not be pushed through Congress until President Uribe took office in 2002.

The Court as a Partial Replacement for the Legislature

The Court’s attempts to “fix” the legislature and to steer policy toward it have not worked well because the problems in legislative performance are rooted in the party system and mostly outside the Court’s control. The Court has often been more effective when it has openly “replaced” the legislature. There are several ways in which this kind of replacement has worked. First, the Court has at times replaced the legislature’s policy initiation role, directly injecting major new policy initiatives into the political system when it feels that the other branches are ignoring an issue with constitutional significance. Second, the Court has sometimes carried out the legislature’s policy enforcement role, ensuring that the Court’s own policy initiatives have been carried out. Third, the Court has often taken over the legislature’s executive checking function by developing a dense rights jurisprudence which it uses to control executive policy, regardless of whether the legislature approved that policy. I discuss these three areas in turn.

1. Policy Initiation

The Court commonly steps in when it believes that other branches of government are not initiating policy in key areas. Most famously, it decided a series of cases in the 1999–2000 period that forced an overhaul of the mortgage system. Colombia experienced a mortgage crisis due both to rising interest rates and declining real wages (the underlying causes were the same fiscal and financial crises that spurred the presidential decrees discussed above). A large number of mortgagees (perhaps 200,000) in the previous several years had either gone into default or were in danger of defaulting.

The suspicion is justifiable and should lead to a closer substantive supervision of presidential decrees to ensure that they correspond to constitutional values. See supra note 155. However, using the suspicion of the legislature’s political control function to crack down on executive power on purely structural grounds is self-defeating because it empowers a dysfunctional institution.


and the elected branches had not formulated any response. The President was preoccupied with the macro-economic and mortgage crises from the standpoint of the state, the international financial agencies, and the financial sector, while Congress was too dysfunctional to swing into motion. An important component of the system was a formula, UPAC, which re-equilibrated mortgage contracts annually given inflation rates in the previous year. In a historically moderate to high inflation environment like Colombia, this adjustment formula was necessary to permit a market for long-term financing; in its absence, uncertainty around future inflation might prevent most mortgage contracts from existing. The Central Bank had discretion, in accordance with guidelines set by a 1993 delegated decree, to determine these adjustments.

The Court acted immediately to reduce overall interest rates by attacking aspects of the UPAC formula. In its first decision, it held unconstitutional a provision that required the Central Bank to set UPAC adjustments in accordance with the interest rates found in the Colombian economy. There was a difference, the Court noted, between the inflation rate (which measured the purchasing power of money) and the interest rate (which measured returns to money)—the latter was typically higher because of returns to capital and risk. Thus, the interest rate measure “destroyed” the balance between debtor and creditor and ran contrary to the promotion of housing, a constitutionally protected value. In other substantive decisions, the Court also banned the capitalization of interest and prepayment penalties in mortgages, holding that these too overburdened homeowners.

In yet another decision from September 1999, the Court stretched existing doctrines to find that the President had improperly promulgated UPAC regulations when a statute was required for such action. It thus held

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169. See Rodrigo Uprimny Yepes, *The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates*, in *Courts and Social Transformation in New Democracies* 127, 136 (Roberto Gargarella et al., eds., 2006) (noting that one quarter of the debtors in the UPAC system, 200,000 of 800,000, were in danger).


171. See id. § VII.4.7.


173. As the dissenters pointed out, the Court easily could have come to the opposite conclusion. The majority held that the basic financial regulations, including the UPAC guidelines, constitutionally constituted a *ley marco* that under the 1991 constitution had to be established by the legislature. Thus, the president’s legislation of the rules via delegated decree powers was void. See C-700/99 § VII.3 [Colombian Constitutional Court] *reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008* (DMS Ediciones e Investigaciones Ltda 2009). The trouble with the holding is that the 1993 decree merely integrated existing statutory material from several sources and renumbered it; nothing new was added to the system. See id. (Citizens Muñoz & Naranjo Mesa, dissenting). The Court had held previously, with respect to this very same statute, that such a power is not an attempt to create a *ley marco*, because it involves no substantive power or discretion. See id.
the entire set of existing regulations unconstitutional but delayed erasing them from the legal order until the end of the then-current legislative term (in 2000). As several dissenters pointed out, it was evident that the Court’s real motivation was to force legal changes to the entire structure, including some provisions that would have been difficult to strike down substantively. Also, the Court ordered that its prior substantive jurisprudence on calculating the UPAC formulas be given immediate effect and that debtors receive refunds on any excessive interest they might have paid in the past; thus, debtors were given some immediate relief from the crisis.

One month later, in October 1999, the President presented a new law to Congress, which was passed in early 2000. The law incorporated the Court’s earlier substantive jurisprudence—it banned capitalization and pre-payment penalties, and required that the new UPAC system reflect only changes in the rate of inflation—and made all of these changes retroactive, thus reimbursing debtors for overpayments. It also incorporated a myriad of other provisions that the Court had not explicitly required but which it liked, such as an infusion of state money to help cash-strapped debtors. Still, in the end the Court made extensive and creative use of the conditional decision doctrine—which allows the Court to condition the constitutionality of a bill on the grounds that it be interpreted a certain way—in order to effectively re-write large portions of the statute. Most importantly, it imposed specific caps on interest rates in housing, requiring that they be no higher than “the lowest real interest rate being charged in the financial system.” It also required that the bailouts for debtors who were already late on payments be the same as those for debtors who were not.

Ultimately, the Court succeeded in forcing a far-reaching reform in the housing finance system that was both more favorable to future debtors and protected many existing debtors. Yet the decision was criticized on several grounds. Dissenters in these cases, as well as others, argued that the Court was trying to solve social problems, rather than acting like a Constitutional Court. The dissenters admitted that the UPAC system had become a disaster and that the political branches were not fixing the problem, but they argued that the Court would ultimately weaken its own legitimacy if it started acting like a legislature:

175. See id. § 32 (Cifuentes Munoz & Naranjo Mesa, dissenting) (“In the absence of a true ‘constitutional problem,’ . . . what one perceives is the utilization of constitutional law for improper purposes . . . .”).
178. Id. § V.B.4.
179. See id. § V.B.21.
Respect for the rule of law and democracy requires the Court to abstain from extending its jurisdiction to social problems that require political instruments wielded by other organs of the state. The Court in this decision mistakenly defines as a constitutional problem what is in reality a complex topic involving only issues of convenience and of the design of policies by institutions charged with economic management. The lack of leadership in a country that fails to confront its great conflicts, momentarily hides the impropriety of the Court’s actions and allows the public to look with indulgence on the Court’s actions. But the enormous costs of these kinds of interventions, even if they may be for the moment very popular, will eventually reflect negatively on this Court.  

Procedural innovations in the case confirmed that the Court was taking on a new role. In July 1999, the Court held a public hearing in the style of a legislative committee or an administrative agency, in which it heard from about twenty-five leaders and officials, including the Colombian ombudsman, the Minister of Housing, the Head of the Colombian Central Bank, several deputies and senators, the heads of various trade groups, and the head of a labor union association. In addition, throughout the process the Court requested—and received—written comments on the problem at issue from an extraordinary number of figures, including economists, academics, public officials, and civil society groups. Finally, the Court received information about the mortgage crisis from the high number of tutelas it received on the topic. These mechanisms solved, at least partially, informational deficits the Court faced.

The Court was also criticized for using its housing jurisprudence to benefit the middle class, rather than the very poor. Only the middle class, and
not the poor, had mortgages, at least within the formal sector. The protection of the middle class rather than the poor is a fairly general feature of the Court’s jurisprudence: while the Court does protect extremely marginalized groups and has developed some representation-reinforcing constitutional theory (à la John Hart Ely) to justify its work, many of its important interventions have been on behalf of more middle-class groups. 184 Yet in a political system that functions as poorly as the Colombian system, this is not necessarily an indictment of the Court’s work. When the Court protects middle-class groups from mortgage defaults and salary reductions, it is protecting groups that should have had recourse within the political process. 185

A final point is that the Court’s work here is different from the dialogical model of socio-economic rights enforcement used, for example, in South Africa and described by Tushnet and others. 186 In this kind of dialogical model, the Court defines the constitutional right but intentionally attempts to leave considerable room for democratic processes to work in coming up with a specific plan of action. The Colombian Court’s strategy involved some cooperation from the other branches, particularly the President, but its primary goal was not to catalyze democratic processes, but rather to take whatever action it deemed necessary to solve policy problems. Thus, the Court was not afraid to issue precise directives from early on in the process or to extensively revise the bill that came out of the legislature. Again, this kind of approach seems more reasonable where the legislature’s ability to engage the bill was limited by the weaknesses of its parties.

2. Supervision of Major Policy Initiatives

The Court has not been content just to push new policy ideas into the system; it has also spent considerable effort on supervising the enforcement of these policies. The state of unconstitutional conditions doctrine serves as one of the Court’s major tools in this respect. When the Court declares a state of unconstitutional conditions, it holds that the treatment of a broad class of people, who are impacted by a range of institutions, is unconstitu-

184 See, e.g., C-1433/00 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009) (holding that the state could not freeze the incomes of state workers making more than twice the national minimum wage).

185 Kim Lane Scheppele, using the Hungarian example, offers a reason why domestic political actors often ignore middle-class groups in the developing world. See Kim Lane Scheppele, A Realpolitik Defense of Social Rights, 82 TEX. L. REV. 1921, 1941–49 (2004). Executives are heavily pressured by international organizations, which want them to cut costs and are often hostile to social spending targeting the middle-class. Other domestic institutions, like legislatures, should stand up for these groups but problems of representation are often serious enough to prevent them from doing so. Thus, the Court acts as the catalyst for a broad set of domestic interests that are wholly excluded from the rest of the process.

The state of unconstitutional conditions jurisprudence bears great resemblance to the American structural injunction but on a larger scale and in a more centralized manner. While American structural injunctions are typically supervised by individual district courts and usually involve institutions in one locality, the Constitutional Court itself supervises states of unconstitutional conditions, and often declares them over the reach of the entire country and for a nation-wide class. Also, while the Court has sometimes called states of unconstitutional conditions to deal with problems involving groups that might be poorly represented in a well-functioning system, like prisoners and refugees displaced by civil conflict, it has also been used to deal with groups that should be politically powerful, like pension recipients and lawyers trying to become notaries. The Court views the state of unconstitutional conditions doctrine less in terms of remedies for particular parties and more in terms of an entire state of affairs being out of compliance with the Constitution. The doctrine is thus consistent with the Court’s vision of the Constitution as a transformative document and with the Court’s role as the chief mechanism for ensuring that constitutional aspiration and reality begin to line up. It is also consistent with a conception of judicial role that relies on the “harmonious cooperation” between the branches, rather than a pre-defined set of roles.

The case of internally displaced persons is perhaps the most illustrative. It is estimated that there are perhaps two or three million people living in Colombia who are currently displaced from their homes due to the country’s long-running and complex guerrilla insurgency. The Colombian state has typically done very little for these people, despite the myriad of problems they face—they have trouble receiving food, shelter, or medical care, their children are often left uneducated, they face serious safety problems, they generally have trouble re-establishing rights to land that they have been forced to abandon, and they are often pressured to go back to their homes.


191. See supra text accompanying notes 132–133.

well before it is safe to do so. Thus, the problem is deeply polycentric and not the kind of problem that the Court typically tackles. But in 2005, the Court declared a state of unconstitutional conditions with respect to all internally displaced persons in the country, holding, after a statistical review, that the problems facing that population were massive and that the state’s response, in terms of capacity and budget, was “gravely deficient.”

Reflecting its typical approach in the state of unconstitutional conditions cases, the Court made the declaration only after receiving a flood of tutelas dealing with a particular issue over a sustained period of time. Thus, as in the housing cases, the Court leveraged its easily accessible individual complaint mechanism to receive good information about widespread problems raised by Colombian society. Since declaring the state of unconstitutional conditions, the Court has used a variety of techniques to receive reasonable policy-relevant information. It has issued numerous orders in the case subsequently; most of these orders have requested information from the various agencies, particularly about how much money they are spending on the problem and how they are spending it. The Court has also relied heavily on a set of friendly national and transnational NGOs, on groups of displaced persons, and on allied institutions created by the 1991 Constitution, especially the Attorney General and the Ombudsman, to monitor the performance of the agencies and to write reports, excerpts of which it has often appended to its subsequent orders. Additionally, as in the housing case, it has held several legislative-style hearings involving these groups and the relevant administrative agencies.

Finally, the Court has loosened standing

193. See id. at 6-7.
194. See T-025/04 §§ 3.6.2–3.6.3 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009). Article 2 of the Colombian Constitution holds that “guaranteeing the effectiveness of the principles, duties, and rights consecrated in the Constitution” is an “essential duty of the state”; the Court held that this created a positive duty on the state to do something about the displaced persons problem, even if it did not bear primary responsibility for creating the problem. See id. § III.8.
195. See id. § III.7 (noting the elevated volume of tutela actions presented by the displaced persons to obtain distinct forms of help).
196. See, e.g., Auto 337/06 [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 7, 2010) (requesting information on actual and proposed statistical indicators to measure the scope of the problem); Auto 218/06 § 4.A [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 10, 2010) (ordering the agencies to produce reports on compliance with prior Court orders in the case); Auto 176/05 Anexo [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 7, 2010) (summarizing prior reports required by the Court from various governmental organizations). An Auto is a decision that the Court issues on its own accord, exercising its inherent administrative powers or its jurisdiction over an open case.
197. See, e.g., Auto 178/05 Anexo [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 7, 2010) (summarizing reports or testimony that the Court had received from the Attorney General, the Defensor del Pueblo, several bar associations, and myriad civil society groups).
rules to allow third parties (particularly NGOs) to bring *tutelas* on behalf of groups of displaced people. As a result, the Court has placed itself at the head of a coalition of allied governmental and non-governmental institutions to amass and systematize vast amounts of information and to issue more specific orders where action has been delayed.

Remedially, the Court has gone well beyond merely pointing out the relevant constitutional principles; it has issued detailed guidelines for how other branches should implement the right. Thus, as with the mortgage cases, the Court here has interacted significantly with other government actors, but its work does not fit the classic dialogic model whereby the Court points out the right violated and leaves most of the implementation to the political branches, particularly the legislature. Instead, the Court is acting as a manager of the relevant agencies over a long period of time, using allied institutions and civil society groups as sources of information and policy. Moreover, the Court has not viewed the legislature as a key figure in its interactions. The Court stressed that it was not calling for any new legislation, and instead focused on issuing orders to a group of agencies with jurisdiction over the topic. The overall conception of the unconstitutional state of conditions doctrine is in harmony with the Court’s general view that separation of powers in Colombia must be flexible and should be subordinated to the more important goal of constitutional enforcement.

The Court has devised remedies that are multi-layered and complex. At the highest level of generality, it has ordered agencies to create specific programs (under purposes and rules that it generally outlines in considerable detail) to deal with the various particular problems involved in displacement during civil conflict. For example, the Court recently ordered the creation, within six months, of a “Program on the Differential Protection of Boys, Girls, and Teenagers Against Forced Displacement,” which it ordered must be geared toward a set of particular goals, like the prevention of “recruitment by illegal armed groups” and the prevention of injury from antipersonnel mines. The goal at this level of generality is primarily to build institutional capacity to deal with relevant problems. At a middle level of generality, the Court often requires specific policies to be implemented.

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199. *See* *Easterday*, *supra* note 192, at 43.
200. *See supra* section I.B.
Thus, the Court used information it had garnered from various groups to outline statistical indicators needed to measure the scope of the internal displacement problem; when the government agencies came back with proposed formulas for those various indicators, the Court rejected many of the formulas and replaced them with ones suggested by its civil society allies.\footnote{203}

At the lowest level of generality, the Court has issued numerous orders giving relief to specific displaced persons whom it has been able to identify. Even these orders are often issued to large groups of plaintiffs at one time. Thus, the Court in 2008 ordered that 1,800 named children receive standard humanitarian care packages within fourteen days and individualized assessments of educational, nutritional, and psychological needs within three months.\footnote{204}

It is difficult, and really too soon, to evaluate the work of the Court in this area. But based on the views of the commentators, NGOs, justices, and government officials whom I interviewed in summer 2009 about the case, it seems to have achieved some very real—albeit limited—results. There have been huge increases in funding spent on the problem and increases in other statistical areas, like the percentage of displaced children attending school and receiving medical care.\footnote{205} Better statistics are being kept on the size of the population and its characteristics and needs, and the government now has a coherent policy and a fairly large team working in this area. Progress has, of course, been fairly slow, and the Court has been reluctant to utilize contempt mechanisms, recognizing the complexity of the problem.\footnote{206} But the Court’s approach has had a significant impact.

3. Checking the Executive

Given that the legislature does not act as a productive, substantive check on executive decision-making, the Court itself has had to shoulder much of this burden. The Court’s development of an extremely thick rights jurisprudence has allowed it to review executive proposals, whether passed by the legislature or promulgated using autonomous executive powers, quite aggressively. But my interest here is not in summarizing the Court’s general activism and willingness to rethink executive policy decisions, which is a task others have undertaken.\footnote{207} Instead, I focus on how the Court has linked its aggressive rights jurisprudence to the institutional context.

\footnote{203. See Auto 116/08 [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 29, 2010).}
\footnote{204. See Auto 251/08 § V.3 [Colombian Constitutional Court], available at http://www.acnur.org/secciones/index.php?viewCat=97 (last visited March 7, 2010).}
\footnote{206. See CEPEDA ESPINOSA, supra note 90.}
\footnote{207. For an overview of the Court’s activism on rights questions, see, e.g., CEPEDA ESPINOSA, supra note 90, see also supra notes 118–120 (describing a few key cases).}
The Court uses weak legislative performance as a justification for judicial activism when considering executive-created proposals. One of the basic tools used by courts in comparative constitutional law is proportionality or balancing. Put simply, this kind of tool measures the interests served by a piece of legislation against those constitutional rights and values infringed by it. One of the keys to any proportionality or balancing test is the level of deference with which the legislation is reviewed: that is, how hard does the Court look at the political branches’ assessment of the interests served by a particular piece of legislation? The question is particularly important in a country with a thick constitution, because virtually all pieces of legislation potentially place burdens on some constitutional rights. The Colombian Court has stated its balancing test in an unusual way, with an eye on institutional considerations: “the measures must be proportional to the objectives pursued, to the care taken in the democratic debates, and to the sacrifices eventually imposed on [affected groups].” In other words, if the legislature properly vets a bill, the Court will defer to the political branches. Where it does not, the Court will exercise a more independent review of the executive’s proposal.

An important application of this principle occurred in a major executive-led tax reform bill in 2003. The executive sought to broaden the base of the country’s value-added tax (“VAT”), its biggest source of revenue, by taxing many traditionally exempted products. The fiscal crisis grew as the bill sat before Congress, prompting the President to expand 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.

The Court began by noting that, in principle, Congress was entitled to a “broad margin of configuration” in making tax decisions. The trouble here was the quality of debate on the provisions at issue. 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.” The Court emphasized that the VAT expansion was not in the original bill but instead represented a last minute presidential

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208. See Lorraine E. Weinrib, “The Postwar Paradigm and American Exceptionalism,” in THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 96 (Sujit Choudhry ed., 2006) (listing proportionality as part of the “postwar paradigm” in constitutional law around the world).
211. See id. § VIII.4.5.0.
212. Id. § VIII.4.5.0.
addition, driven by a deteriorating fiscal situation during the year.\textsuperscript{213} Reviewing the congressional record, it found that Congress had not engaged this part of the bill. Thus, Congress had never discussed the consequences of the provision for middle class and poor groups, and instead merely rubber-stamped the presidential proposal.\textsuperscript{214} Moreover, the bill itself evidenced an "indiscriminate" widening of the base to include many disparate items, suggesting a lack of deliberation.\textsuperscript{215}

Given these facts, the Court found that the legislature had not played its role properly and would not be given any "margin of configuration."\textsuperscript{216} Instead the Court independently reviewed, and struck down, the law in light of the constitutional right to life, influenced by the context of declining welfare spending, high tax evasion by the rich, and the fact that most of the new spending would go to national defense and not welfare.\textsuperscript{217}

This doctrinal line is a better way for the Court to vindicate the interests it has identified in its line of jurisprudence on legislative procedure.\textsuperscript{218} Like in those cases, the Court’s concern is that the legislature often acts in an insufficiently "deliberative" manner and that "congressional autonomy" is often breached by presidential strong-arm tactics during the legislative process.\textsuperscript{219} But the approach is less formalistic; the Court is able to look more at the substance of debate and not just at whether certain stages of debate occurred.\textsuperscript{220} And its remedy, where it finds problems, is to take an independent look at executive policy, not to automatically strike down the bill on procedural grounds. Finally, the policy is flexible; on those (rare) occasions where Congress does a thorough job engaging a presidential bill, the Court has exercised greater deference to the policy choice.\textsuperscript{221} Thus, the Court keeps

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\item \textsuperscript{213} Id. § VIII.4.5.6.1 (noting that the proposal "obeyed the necessity of attending to fiscal requirements that were not seen when the original bill was filed.").
\item \textsuperscript{214} See id.
\item \textsuperscript{215} See id. § VIII.4.5.7.
\item \textsuperscript{216} See id. § VIII.4.5.6.1.
\item \textsuperscript{217} Id. § VIII.4.5.
\item \textsuperscript{218} See supra section III.B.
\item \textsuperscript{219} C-776/03 § 4.5.6 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009); see also id. § 4.5.3.2.1 ("[D]eliberation makes effective the principle of political representation, by making known the position of the representatives of the people, expressed in public reasons known, or at least identifiable, by everyone.").
\item \textsuperscript{220} In this sense, the Court’s work resembles the recommendation of American theorists who advocate taking a harder look at legislative deliberations to ensure that they are sufficiently rational and do not rest on prohibited grounds. See, e.g., Cass Sunstein, “Interest Groups in American Public Law,” 38 STAN. L. REV. 29, 69–75 (1985) (calling for heightened rationality review that would look to see whether Congress actually considered a public justification for its project and a more probing analysis of the congressional record that would make sure laws did not actually rest on bias against disadvantaged groups).
\item \textsuperscript{221} A 2004 case involving deep reforms aimed at making the labor laws more flexible shows the flip side of the doctrine on those rare occasions where the Court finds that the legislature has conducted itself well. Under the Court’s own prior case law, these steps (making firing easier, reducing pensions, allowing pay reductions) were problematic because they reduced the economic security of the middle and lower classes. Generally, under the Court’s “progressiveness” principle in the socio-economic area, the state
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open the Congress’s ability to develop a legislative constitutionalism and gives it incentives to do so.

IV. THE COLOMBIAN COURT IN COMPARATIVE PERSPECTIVE: HUNGARY AND SOUTH AFRICA AS LESSER DEGREES OF ACTIVISM

It is difficult to perceive the weight of the burden that the institutional context in Colombia places on the Court without comparing its work to that of other important courts. In this section, I briefly compare the Colombian Court’s work to that of two constitutional courts that have been extensively covered in the comparative constitutional law literature: the Hungarian Constitutional Court and the South African Constitutional Court. Both of these courts are considered extremely “activist” by comparativists, in that both courts commonly intervene in important social and political matters. However, neither court has taken on the kind of role the Colombian Court has. I argue that the differences are due to institutional context. The Hungarian Court performed similar tasks to the Colombian Court in the 1990s but was able to phase out its activism through time due to rapid improvements in the quality of democratic institutions. The South African Court plays an important role in democratic politics but one that is far more deferential to the elected branches. In a single-party system, where coherent political forces exist, such a role is both possible and more appropriate. In contrast, in Colombia, where political parties are incoherent and where prospects of rapid improvement in the quality of democratic institutions are slight, the Court has been forced to play a highly interventionist role for an indefinite period of time.

A. The Hungarian Court: Temporary Activism

The Hungarian Court in the 1990s took on similar tasks to those undertaken by the Colombian Court, but its work was much more limited in duration. While there was no Hungarian constitutional culture after the fall of communism and representative institutions performed poorly, the Court could not make poorer social groups worse off via policy change. See Rodrigo Uprimmy & Diana Guarnizo, Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana 7–11, 14 (2008), http://www.dejusticia.org/interna.php?id_tipo_publicacion=2&id_publicacion=180. Thus, the Court found that there was a prima facie case for unconstitutionality. But the Court found, unusually, that the legislature had “carefully studied and justified” the measures, and thus deferred to the legislative judgment. C-038/04 § VII.25 [Colombian Constitutional Court] reprinted in Corte Constitucional: Sentencias-Tutelas 1992–2008 (DMS Ediciones e Investigaciones Ltda 2009); see also id. § VII.32 (discussing the concept of legislative deference on different issues, including empirical economic issues), § VII.36 (deferring to the aims stated in the legislative process). The Court noted for example that the majority reports presented before the debates studied the questions in a “detailed manner” and undertook a broad theoretical and empirical presentation aimed at defending the basic thesis that sustained the labor reform.” Id. §§ VII.33, VII.35. Further, the Court noted that although the proposal to reform labor laws had originated with the executive, large portions of the bill’s final content actually came out of the legislative process. See id. § VII.35.
tion improved rapidly in the 1990s. The context—a transition from fully authoritarian rule—made the prospect of rapid improvement in the performance of democratic institutions possible. In contrast, the Colombian Court was created in the context of an already long-running but poorly functioning democracy—a democracy with problematic democratic institutions—and these problems have not greatly eased since the Court’s creation. Unlike in Hungary, there is no obvious temporal dimension to the Colombian Court’s activism.

When Hungary transitioned to democracy in the late 1980s and early 1990s, its party system was weakly institutionalized. No parties existed in the communist period, and civil society groups were weak.222 Perhaps unsurprisingly in such a context, the organizations that began to spring up in the late 1980s were little more than vehicles for individuals seeking office; these individuals were linked by opposition to the communist regime, rather than by common policy positions or the goal of representing a distinct social group.223 In other words, these early parties were “elite initiated organizations” that “were rarely built on clear cleavages.”224 They often lacked ideological platforms, and the vague platforms that did exist were frequently changed.225 Their internal party structures were so undeveloped that, in the words of one commentator, “they would defy systematic study.”226 Links between parties and civil society groups were weak. Parties did not have ties to unions, employers’ groups, or other organizations, and so in a sense elected institutions were “built on sand.”227 Not surprisingly, party discipline in the 1990s was relatively low: 14% of legislators elected to the first parliament changed parties after being elected.228 In such a context, parliament behaved somewhat incoherently in its early years. It had trouble making decisions at all on some major measures and its policies often did not reflect majority will.229 For example, the first government in the early 1990s spent an inordinate amount of time debating issues like the nature of the national seal rather than dealing with the country’s serious structural problems.230 Compounding the problem was the country’s lack of any constitutional culture or constitutional tradition; politicians put no stock or effort into realizing any clear constitutional vision.

223. See id. at 159.
224. Id.
225. See id. at 164–65.
230. See id. at 40.
The incoherence in Hungarian politics produced an opportunity for the judiciary to carve out a substantial role for itself, and this possibility was strengthened by the Court’s strong powers, which rival those of the Colombian Court. The Hungarian Court, like the Colombian, has the ability to hear “popular actions,” or abstract review petitions initiated by any individual, as well as the ability to hear constitutional complaints arising from particular acts of the authorities. The country, according to Kim Lane Scheppele, became a “courtocracy”: through the mid-1990s, “the Constitutional Court was for all intents and purposes running the country.” The Court struck down about one-third of laws brought before it in the early years, and in many major areas of policy, the Court basically re-made entire programs.

Beyond the sheer power of the Hungarian Court in the 1990s, which is comparable to that of the Colombian Court, there are key ways in which the two courts were jurisprudentially similar. First, the Hungarian Court’s jurisprudence reflected its self-conception as an institution dedicated to developing a constitutional program and thus ensuring social transformation rather than a self-conception primarily based on role limitations. The Court had a clear sense of mission—its case law, for example, was overwhelmingly focused on using human dignity to ensure that the communist-era conception of the state as a ubiquitous presence in the private lives of its citizens was erased. Second, like the Colombian Court, the Hungarian Court commonly injected policy into the system, using its power to declare a situation “unconstitutional by omission” and ordering the parliament to enact new laws. In its early years, the Court used this power to force the enactment of new legislation protecting the environment and ensuring that the broadcast media was pluralistic and free from government control.

231. See HERMAN S CHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 77–79 (2000); see also id. at 75 (calling the Court, “[b]y both design and performance . . . the most powerful court in Eastern Europe.”).

232. Scheppele, supra note 227, at 44.

233. Id.


Finally, like the Colombian Court, the Hungarian Court was active on socio-economic issues, and much of its work was designed to protect the middle class rather than the very poor. The story is similar across both countries: the country faces an economic crisis, but domestic institutions are unresponsive both because of international pressure toward austerity and because domestic parties are so weakly tied to the public. In Hungary, an economic crisis in 1995 led the government to cut social spending for things like child payments, sick leave, and social security. In a developing and post-communist state like Hungary, most of this spending went to middle class workers rather than to marginalized groups. The Hungarian Court in its decisions allowed some cutbacks but struck down many others, generally by emphasizing the concept of "legal certainty," which prevents the state from drastically reducing someone's benefits over the very short term. While some commentators have criticized this line of decisions as developing social rights on behalf of groups that did not desperately need them, others have pointed out that, as in Colombia, the defense of social rights on behalf of middle class groups (who were actually quite poor by most standards) has a certain democratic logic in a political system that functions poorly. In such a system, the Court may be the branch of government that produces the most majoritarian policies.

The main difference between the Colombian and Hungarian Courts is simply that the institutional context in Hungary underwent rapid change in the 1990s while the context in Colombia has either been stagnant or has worsened since 1991. Hungarian parties matured rapidly in the first years of democracy and are now considered among the strongest in Eastern Europe. The identity of the parties themselves has proven stable, and the parties have succeeded in forging both more coherent identities and stronger...
links to civil society groups. Tracking the spread of constitutional values is obviously much more difficult, and the process itself is inevitably slow, but commentators have argued that, in large part because of the Court’s work, some key norms dealing with privacy and market autonomy have taken hold in both political actors and the general public. By the late 1990s, the need for a very activist Court had faded, and the new Court that was appointed around 1998 was composed of far less activist judges. The Court has subsequently played a key role in Hungarian politics on occasion, but it has never returned to anything like the “courtocracy” of the early years. Other democratic institutions have been given a fairly open space in which to operate.

I do not mean to argue that the “reining in” of the Hungarian Court that occurred in 1998 was entirely beneficial; real problems remained in Hungarian democracy, and it is likely that the pendulum of judicial power swung back too far in the other direction, too quickly. Nevertheless, the basic model of temporally limited judicial activism in the early years of a new democracy is one that was available in Hungary and may be available in many transitional societies. It is not, however, available in countries like Colombia that have been low-quality democracies for a long time. It would be troublesome to cut down on the Colombian Court’s super-strong role in Colombian politics until the performance of other political institutions improves—something that is unlikely to occur in the short term.

B. The South African Court: Activism Limited by Dialogue and Deference

The main difference between the Hungarian and Colombian experiences was the temporary nature of the Hungarian Court’s work, which occurred during a transition from an authoritarian regime. The main difference between the Colombian and South African experiences has been the manner in which the South African Court has related to other political institutions. The South African Court has attempted to inject certain policy debates into the system but in a way that respects the deliberative role of Parliament. In contrast, the Colombian Court (like the Hungarian Court in the 1990s) has gone much farther and has often dictated specific action to other political branches. Furthermore, the South African Court has generally agreed with the overarching projects of the political branches and has challenged them only when they either go too far in attacking poorly represented groups or

242. See, e.g., Attila Agh, Partial Consolidation of the East-Central European Parties: The Case of the Hungarian Socialist Party, 1 PARTY POL. 491 (explaining how the Hungarian Socialist Party developed a relatively clear platform and forged links with civil society groups).
243. See, e.g., SCHWARTZ, supra note 231, at 107.
reflect little thought. The South African Court is definitely not running
the country in the way that the Hungarian Court did or the way the Colombi-

an Court does from time to time.

This kind of more limited but crucial role fits the political context—the
problem with South African politics is not the existence of weak, incoherent
parties but rather the existence of a dominant party, the African National
Congress ("ANC"), which has been in power continuously since the end of
apartheid. This party had a huge hand in writing the country’s post-

apartheid constitution and shares the general mission of social transforma-

tion that underlies the document. Thus, rather than being confronted

with incoherent political forces that ignore the document, the Constitu-

tional Court has in the political branches, to at least a limited extent, a

partner in constitutional development. As noted above, these kinds of one-

party systems do create serious problems for democracy, and South Africa

has been no exception. Even though the ANC is a broad coalition of inter-

ests, its incentive and ability to represent certain minority groups, like the

white minority, has at times been suspect. Also, the internal bargaining

process within the party may have marginalized certain interests and ideolo-

gies. Finally, there is a real risk that the ANC’s conception of the project

of constitutional transformation will at various points become warped or

will focus completely on some priorities that are well-represented within the

party (like overcoming racial prejudice) to the exclusion of other constitu-

tional values (like poverty alleviation). In other words, the lack of political

competition may allow constitutional culture to develop in ways that do not

fully respect the breadth of the document.

246. See, e.g., Theunis Roux, Principle and Pragmatism on the Constitutional Court of South Africa, 7

INT’L J. CONST. L. 106, 138 (2009) (stating that the South African Court has forged a very close relationship

with the ANC).

247. For works on the South African political context, see generally, Kimberly Lanegran, South Africa’s

1999 Election: Consolidating a Dominant Party System, 48 AFRICA TODAY 81 (2002); Hermann Giliomee et

al., Dominant Party Rule, Opposition Parties and Minorities in South Africa, 8 DEMOCRATIZATION 161 (2001)

[hereinafter Giliomee, Minorities]; Hermann Giliomee, South Africa’s Emerging Dominant-Party Regime, 9 J.

DEMOCRACY 128 (1998) [hereinafter Giliomee, Dominant].

248. See Lynn Berat, The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of

Justice?, 3 INT’L J. CONST. L. 39, 42–43, 56 (2005) (noting that the ANC dominated elections to both

the constituent assembly that produced the interim constitution and the parliament that produced the final

constitution).

249. See supra section I.A.3.

250. See, e.g., Giliomee, Minorities, supra note 247, at 167 (noting that “the ANC does not need to win

the vote of the white minority and can treat it with indifference or contempt” and that “the new democ-

racy is working mainly for the racially defined majority”).

251. See id. at 172–73 (arguing that the ANC has stifled dissent within the party); Friedman, supra

note 39, at 106–07 (giving examples of the party leadership stifling dissident cliques within the party).

252. See Giliomee, Dominant, supra note 247, at 134–37 (noting that the ANC’s policies focus on

“narrow white-black inequalities” and tend to benefit the black middle-class, rather than addressing

issues of class-based inequality that would benefit the very poor); Simkins, supra note 247, at 58–59

(arguing that for political reasons, the ANC may be focusing on redistributing power from middle-class

whites to middle-class blacks rather than alleviating poverty).
The Court’s general partnership with the ANC is evident in the Court’s jurisprudence on affirmative action and similar policies. As Theunis Roux argues, the Court has basically acted to “legitimate transformation” in these areas; it has upheld most of the ANC’s efforts to redistribute power from white citizens to black citizens and has contributed to the legitimacy of these efforts by explaining why they are consistent with constitutional goals.253 In a series of cases, the Court has upheld attempts to redistribute money and staff from previously favored (that is, white) schools to previously disfavored (that is, black) schools.254 At the same time, however, the Court has sought to give some protection to excluded groups. In the school cases, the Court protected the rights of white students by giving them rights to adequate notice before having financial aid terminated.255 The Court’s basic role in this area has been to allow the ANC to formulate policy and then to provide a limited check on the rationality and fairness of that policy for the benefit of politically weak groups.

The South African Court has also at times injected policy into the political order when it has felt that the ANC has been too selective in its vision of constitutional transformation. But even in those kinds of cases, the Court has approached the task differently from the Colombian Court due to differences in political context. While the Colombian Court has been willing to act as a manager of policy on various issues, the South African Court has generally settled for defining a right and directing the political branches to act on the problem. The Court has very rarely been willing to tell other political branches precisely what to do.256 The famous case, Government of the Republic of South Africa v. Grootboom, is emblematic of this classic dialogical model.257 The Court in Grootboom held that the government’s plan for affordable housing was unconstitutional as it had no plan for people like the plain-
tiff who were in desperate need of housing because they were completely homeless. One way to see the case is that the Court was telling the ANC that its "read" of the constitution was too focused on racial considerations and not focused enough on protecting the desperately poor. The ANC's political strategy has often focused on distributing power to the black middle and lower-middle classes while ignoring the relatively politically weak poorest classes. The Court praised the general outlines of the government's plan but held that the lack of support for people in desperate situations was unreasonable.

However, the Court declined to give specific relief to the plaintiff and declined to tell the government what kind of plan to adopt. It held that the constitution "oblige[s] the State to devise and implement a coherent, coordinated program" and that "a reasonable part of the national housing budget" had to be devoted to people in desperate need, but it made no effort to give content to any of these terms. While Grootboom has been held up as a universally applicable way to enforce socio-economic rights, it may be more appropriately viewed as an institutionally contingent plan of attack. It would make no sense in Colombia or in Hungary in the 1990s because political institutions were not well enough developed to allow this kind of dialogue. Dialogue requires a level of coherence in party systems and political institutions that is often non-existent in the developing world. Both the Hungarian and Colombian Courts have interacted with other branches of government, but both Courts have been much more pro-active in telling these other branches exactly what to do.

I do not mean to imply that the South African model, any more than the Hungarian model, is beyond reproach. It may be that orders like Grootboom are not robust enough to actually achieve change even when facing coherent and generally friendly political forces. It may also be true that the Court...
has not done enough to defend the interests of groups that have been excluded from the ANC coalition.\footnote{264} The Court may be too close ideologically to the ANC, or its need for survival may limit its actions too much.\footnote{265} My point here is a more modest one, which is that the work of courts should be evaluated in their political contexts. Many judicial actions that are reasonable in Colombia would make no sense in South Africa and vice versa. The precise configuration of political institutions in Colombia has put an extraordinary burden on that Court to take an activist role in the democracy, which is not limited by either duration (Hungary) or scope/style (South Africa). The conclusion will focus on evaluating the Court’s contributions to Colombian democracy in an attempt to creep toward a theory of judicial role that is suitable to comparative constitutional law.

V. Conclusion: Toward a Theory of Judicial Role in New Democracies

The main arguments of this Article are twofold. The first is that American constitutional theory is a problematic export in comparative constitutional law because it is built upon a set of assumptions about political institutions that often do not hold in developing countries. In particular, the idea that there is a clear separation between the “legislative role” and “judicial role,” built on normatively justifiable foundations, does not translate to much of the developing world. Yet, constitutional theory in these countries continues to use tropes derived from this theory. Critiques of the Colombian Constitutional Court’s mortgage crisis decisions are illustrative and familiar from the U.S. constitutional experience. One main line of criticism focused on the legitimacy of the Court’s work—critics argued that the Court was engaging in “a subjective weighing of costs and benefits which should be left to elected officials.”\footnote{266} Another attack focused on the Court’s capacity: economic issues “are complicated and when they must be altered, the alterations should be done by Congress.”\footnote{267} The oddness of these critiques is that the vision of Congress is abstracted away, formalized, rather than having a basis in Colombian society. The weak democratic credentials and capacity of the Colombian Congress are ignored.

\footnote{264. See Roux, supra note 246, at 125–30 (noting several cases in which the Court “compromised on principle” by failing to protect minority parties).}
\footnote{265. Cf. id. at 136–38 (suggesting that because it exists in a dominant party regime, the Court must walk a fine line between “principle” and “pragmatism” in its actions); Berat, supra note 248, at 74 (“The carefully chosen justices are known to be ANC supporters, or, at the very least, sympathetic to the liberation movements.”).}
\footnote{267. Id.}
Nor do these critiques engage the possibility that the Colombian Court is developing both institutional capacity and democratic legitimacy that go well beyond the standard story about courts. The features that might allow the Court to aggregate information have already been discussed: citizens’ relatively free access to the Court through the complaint mechanism, the Court’s close alliances with civil society groups, and the Court’s willingness to hold legislative-style hearings have aided it obtaining fairly good information about social problems. Also, the Court’s alliances with certain friendly institutions created in the 1991 Constitution (like the Defender of the People) and civil society groups have allowed the Court to have some success managing complicated policy initiatives, as it did during the displaced persons litigation.

The institutional order has also, at least arguably, made the Court less undemocratic than the critics imply. The Colombian Court is constantly under threat from political elites, and its strongest bulwark against this threat has been its network of civil society allies and, like the Hungarian Court in the 1990s, its very high institutional popularity. Since the Court seems to depend on popularity, rather than relationships with political elites, for institutional self-protection, it may reflect democratic will quite well. Indeed, decisions like the mortgage interest case suggest that the Court doing a better job than either of the other branches in responding to a popular outcry. Unlike in the United States, where popular constitutionalists argue that judicial claims to supremacy in constitutional interpretation act as an obstacle to the development of constitutionalism through the Congress and the people, in Colombia, the Court itself appears to best reflect popular visions of constitutional transformation. The Colombian Congress’ willingness and ability to carry out constitutional transformation, in contrast, is quite limited.

Thus, the concept of judicial independence in comparative constitutional politics and law may need to be reframed. Rather than looking only at whether a court is insulated from other actors, we may be better served by focusing on exactly who the court views as its constituency and how these ties affect the functioning and legitimacy of the court. As an example, Roux argues that the South African Court has forged close ties to the ANC and had ordinarily ignored the general public because it need not depend on it.

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268. See supra text accompanying note 195.

269. See supra text accompanying notes 182, 196–197.

270. See supra text accompanying notes 180, 198.

271. See supra text accompanying notes 196–197.

272. See supra section III.C.1.

273. See, e.g., Tushnet, supra note 18; Kramer, supra note 18.

for its survival. The Colombian and Hungarian Courts demonstrate the opposite pattern; in a context of incoherent political forces, both chose to forge much stronger links with elements of the general public than with political elites. In all cases, what would at first appear to be a vulnerability of these courts—their relationship with non-judicial actors—may actually be a strength because it enhances the courts’ democratic legitimacy. At the same time, different patterns of ties produce different kinds of jurisprudence—the South African Court’s legitimation function and gentle but productive needling of the ANC is a quite different kind of work than the Hungarian and Colombian attempts to manage large portions of state policy.

The second main point of this Article is that the comparative analysis of political institutions can help guide the development of theories of judicial role. My comparative analysis of Colombia, Hungary, and South Africa suggests that differences between non-institutionalized party systems and dominant party systems may have a major impact on the role courts should play in new democracies. Understanding broad-brush differences in political institutions does not give us clear answers as to what courts should do, but it does help tell us what questions we should be asking.

As Roux points out, a first question in the comparative theory of judicial role must focus on survival. We may not always excuse a court’s actions if they were necessary to ensure the survival of the institution, but we certainly would tend to criticize a court that ordinarily engaged in self-destructive acts. And political institutions, as Roux suggests, play a significant role in defining the kinds of action that are necessary to ensure judicial survival. The South African Court, in an ANC-dominated political order, has no choice but to maintain a close relationship with the party; the Colombian Court, in an incoherent political order, has no choice but to maintain a high level of public support. But the quest for survival does not exhaust the issue, and beyond this core, it gets more difficult to figure out what courts should be doing. Roux’s call for courts to mix “pragmatism” (that is, survival and institution strengthening) and “principle” does not quite get us there because it is unclear what it means for a court to act in a principled manner or how the court should choose between different routes that might each appear principled. We need to get a bit more specific, and the analysis of political institutions offers guidance.

275. See Roux, supra note 246, at 107 (“Although social surveys suggest that the Court does not enjoy a great deal of public support, this fact may be attributed to the peculiar nature of South African politics, in which a dominant political party frees the CCSA from the need to court public opinion.”).
276. See id. at 116–18 (theorizing that protection of “institutional security” is important when assessing judicial work in new democracies).
277. See id. at 107.
278. See id. at 116–18 (arguing that new courts should adopt a mix of Dworkin’s principle and Posner’s pragmatism in order to build legitimacy and ensure institutional survival).
The Colombian Court, for example, cannot rely on the institutional separation of powers to discipline its work because the legislature does not have a clear role within the political system. Instead, the Court has to be evaluated based on whether it is helping to achieve constitutional transformation, moving Colombian politics and society closer to the order envisioned in the 1991 text. There are two basic ways by which the Court might do this: first, it could attempt a direct substantive transformation of aspects of the social order to make them correspond with the constitutional vision; or second, it could attempt to transform political institutions, which would then be in a better position to achieve constitutional transformation. Both are quite difficult. The first is difficult because the Colombian Court, like any other court, faces limits on its institutional capacity and on what it can achieve on its own. The Court can intervene in some important policy areas, but there are many things it does not have time or ability to undertake. The second task is equally difficult because, as explained above, the Court has few levers for improving the performance of the party system and representative institutions.

Still, it seems that the Court has made some progress in achieving both goals. It has achieved a fair amount of policy change directly, and most of these changes seem consistent with the vision of the 1991 Constitution. At the same time, its high-profile interventions seem to have helped spread constitutional norms both to the public as a whole and to an increasingly powerful group of watchdog government institutions and civil society groups. Additionally, the Court’s work in helping traditionally disadvantaged groups gain access to the system may be increasing the legitimacy of the democracy. Whether the spread of constitutional values or the increase in democratic legitimacy will actually improve the performance of democratic institutions in the long-run is unclear; the hope would be that both the public and the emboldened civil society groups are able to put pressure on representatives to be more democratically responsive and constitutionally attuned. Some scholars have suggested that the Court’s work is counter-productive for building better political institutions because it crowds out the possibility of democratic debate on controversial constitutional issues. This strikes me as doubtful for present-day Colombia because political actors have little interest in the Constitution. But the concern could be relevant in the long run, and would point toward a Hungarian-like reduction in the Court’s role through time.

279. See Faundez, supra note 30, at 761.
280. See id. at 761–62 (“[I]t could well be argued that the court is pre-empting political debate, thus confirming the argument of those who regard judicial review as undemocratic.”); see also Tushnet, supra note 18, at 57–65 (describing the impact of the “judicial overhang”). This mirrors an argument from the American popular constitutionalists, who suggest that judicial activism and particularly judicial supremacy reduce the incentive held by political actors to take the constitution seriously. The difference in the United States, of course, is that the constitution is an important instrument in popular culture and is commonly invoked by politicians.
The goal here, at any rate, is not to give a definitive assessment of the Court’s work; that task is well beyond the scope of this Article. The point, instead, is to debate the legitimacy of judicial review and constitutional jurisprudence in new democracies on their own terms and not with ideas borrowed from American constitutional theory. Comparative constitutional scholars can play an important role in this task by identifying the kinds of tasks that courts can perform under institutional conditions that look very different from our own. Building a comparative theory of judicial role is not easy and will not lead to clear answers, but it can help guide our assessments of constitutional design and the tasks of constitutional courts in new democracies.