CREATING A SENSE OF OBLIGATION:
LEGAL MOBILIZATION FOR SOCIAL RIGHTS

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CREATING A SENSE OF OBLIGATION:
LEGAL MOBILIZATION FOR SOCIAL RIGHTS

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How and why does legal mobilization for social rights emerge? What explains variation in legal mobilization for social rights in terms of who makes claims and on which issues? Leveraging comparisons within and across cases, I investigate legal mobilization for social rights in two social constitutionalist countries, Colombia and South Africa. In Colombia, legal claims to the right to health have become ubiquitous, yet relatively few housing rights claims have emerged. In South Africa, on the other hand, legal claims to the right to health have been rather limited, focusing on HIV/AIDS related issues, while claims to the right to housing predominate. Existing theories of legal mobilization rest on implicit claims about subjective beliefs and tend to examine only one part of legal mobilization, segmenting off the process by which grievances develop from the process by which claims advance through the courts from the process by which judges render their decisions. In contrast, this dissertation develops a constructivist account of legal mobilization, explicating the central role of beliefs and unearthing the importance of repeated interaction between claimants, activists, lawyers, and judges for both the filing of rights claims and the official response to those claims.

Legal mobilization for social rights represents a new phenomenon, wherein both ordinary citizens and judicial actors have come to view problems related to access to healthcare, housing, social security, and education through the lens of the law, in

effect pushing the question of social incorporation into the formal legal sphere. The goal of ensuring that each and every Colombian and South African is able to live a life of dignity remains unmet, but the legal recognition of social rights in both countries has empowered citizens to advance rights claims to the goods and services necessary for a good life. This dissertation investigates the changes in beliefs and institutions that allowed for this kind of claims-making to emerge, and it considers the manifold consequences of this kind of claims-making for state-society relations, access to social welfare, and the judicialization of politics.

For my parents,

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CHAPTER 1

INTRODUCTION

On a Sunday afternoon in early April, a woman named Doña Beatriz[1] told me about her life in Aguablanca, the densely populated neighborhood on the outskirts of Cali, Colombia, where she lived, operated an informal sewing business out of her living room, and weathered as best she could the interrelated threats of violence, drugs, and economic insecurity that swirled around her. Social service provision in Aguablanca is sorely lacking, and access to doctors and hospitals is particularly difficult. The state's presence appears to be limited to two sets of police officers, who – according to residents of the neighborhood – punch, kick, and shoot first, asking questions later, if at all. Doña Beatriz described how after she developed a problem with her trachea that made it difficult to breath, she attempted but failed to attain what she deemed adequate medical attention. In the midst of this difficult situation, what did she do? Surprisingly, she turned to the courts, filing a claim to the constitutional right to health through a legal procedure called the tutela, because, as she put it, "Everything happens through the tutela."[2] This kind of legal claim is understood as the only way to gain access to healthcare services.

Every year since the tutela was created in 1991, thousands upon thousands of citizens have used this mechanism to make claims to their constitutional rights. In fact, in 2008, nearly 143,000 Colombians filed legal claims regarding the right to

[1] The names of respondents in this chapter have been changed in an effort to protect their anonymity.
[2] Aguablanca interview 6.

healthcare using the tutela procedure – like Doña Beatriz. Not only did this occur in a country in which citizens routinely disparage the legal system, expressing little to no confidence in judges, but even more surprisingly, actors generally not associated with constitutional rights talk, such as doctors, pharmaceutical companies, and insurance companies, openly encouraged citizens to file these claims. A Constitutional Court decision in that year spurred massive changes to the Colombian healthcare system, changes that were debated and drafted not within the halls of the legislature but in the courthouse. Formal claims-making to the right to health continue at rates unheard of elsewhere in the world.

In South Africa, by contrast, legal claims-making to the right to housing is quite common. Patrick and Sifiso, two members of the Durban, South Africa-based shack-dwellers' movement, Abahlali baseMjondolo, described to me the ups and downs of their many efforts to improve the conditions of those living in informal settlements across the country.[3] These efforts have continued despite the fact that Abahlali members have been subject to acts of intimidation, assault, and even politically-motivated killings.[4] While Abahlali engages in disruptive protests among numerous other tactics, its signature victory came through a successful legal challenge to the KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act ("Slums Act") in the late 2000s. Sifiso reflected on this legal victory, noting, "Luckily,

[3] Interview 2017.11.29.10.02_01.

[4] In fact, the killing of Abahlali members has been linked to members of the African National Congress (various interviews with members of Abahlali; GroundUp 2018). Further, the movement's founder, S'bu Zikode, has told media outlets that "Everyone who joins our struggle accepts this risk. And we tell comrades from the onset that when they sign up to join Abahlali, they could die. We have buried comrades. We continue to bury comrades" (Kulkarni 2018).

our courts were there with us." The Constitutional Court decided in favor of Abahlali, holding that the Act was unconstitutional and that it would result in widespread evictions without the provision of alternative accommodation. In this case, housing and eviction policy was restructured as a result of formal legal review. This was one of well over one hundred housing rights cases heard in the post-apartheid period, a quantity that dwarfs all other social rights claims.

The most famous housing rights case in South Africa was decided years earlier, in 2000. Irene Grootboom, with about 900 others, had filed a legal claim regarding the right to adequate housing when faced with a potential eviction from their squatter settlement on land earmarked for low-income housing outside of the city of Cape Town. The Constitutional Court ruled in favor of Grootboom, staying the eviction and requiring that the state develop an emergency housing policy; however, eight years after the ruling, Grootboom died, still homeless and living in abject poverty.[5] The judgment in the subsequent Treatment Action Campaign case nevertheless cited Grootboom as precedent and mandated the government provision of an antiretroviral drug that inhibits mother to child transmission of HIV, an act thought to have saved many thousands of lives (Langford 2014). A series of housing rights cases emerged, including the Slums Act case, and this set of cases dramatically affected both state housing policy and the protections afforded to individuals in the face of potential evictions. Yet, while those living in informal settlements in and

[5] Importantly, the Court's decision included no promise to Grootboom that she or any of the other claimants had a right to receive a house as such, instead it declared that the government had the obligation to create reasonable policy directed toward the realization of access to housing, particularly for people like Grootboom, who number among the most vulnerable South Africans.

around the city of Durban – including members of Abahlali baseMjondolo, like Patrick and Sifiso – have vocally adopted the language of rights and handily navigated the legal system, not all those living informally have been able to leverage the legal system in their favor.

These are just a few examples of variation in legal mobilization[6] to assert rights to elements of social citizenship.[7] These instances of legal mobilization move beyond traditional understandings of citizenship rights defined in narrow legal and political terms. As such, they reflect claims to citizenship rights that include social benefits and new forms of social inclusion or incorporation. Deborah Yashar (2005: 6, emphasis in original) notes that citizenship regimes determine "*who* has political membership, *which* rights they possess, and *how* interest intermediation with the state is structured." She continues, "As citizenship regimes have changed over time, so too have the publicly sanctioned players, rules of the game, and likely (but not preordained) outcomes." Most of the time, citizenship regimes have been oriented around specific civil and political rights, with only limited recognition of social citizenship rights. The recognition of social citizenship rights and claims-making regarding those rights signal a shift in the ways in which societal and state actors interact.

[6] Legal mobilization refers to "the use of law in an explicit, self-conscious way through the invocation of a formal institutional mechanism" (Lehoucq and Taylor 2018: 4). In other words, it involves claims-making in the courts and quasi-judicial bodies, such as an ombudsperson's office. I explore the contours of legal mobilization in greater detail in Chapter 2.

[7] Marshall (1950: 11) defines social citizenship as encompassing everything "from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society." I describe social citizenship further in Chapter 3.

Traditionally, social incorporation or the provision of social welfare in developing societies has occurred through one of three dominant models of state-society relations: patron-clientelism, corporatism, or the market alternative. In a setting defined by patron-clientelism, social goods are not universal rights, but discretionary benefits that are selectively allocated by political authorities or brokers to individuals in exchange for political loyalty (Bratton and van de Walle 1997; Auyero 2001; Chandra 2004; Kitschelt and Wilkinson 2007; Stokes et al. 2013). Corporatism, on the other hand, enables access to social goods through segmented linkages between states or ruling parties and organized sectors of the formal economy, particularly workers with membership in labor unions (Schmitter 1974; Collier and Collier 1979; Yashar 1999). Finally, the neoliberal or market alternative holds that the marketplace and the private sector facilitate more just, rational, and efficient provision of social goods than the state. In this system, social goods become available to citizens on the basis of their ability to pay the market rate, with the state providing a minimal safety net for those who are incapable (e.g., due to age or disability) of meeting their needs in the marketplace (Hall and Soskice 2001; Adésínà 2009).

Recently, however, many countries have adopted constitutions that include substantial social rights protections for all citizens. This social constitutionalist commitment to promoting access to social goods on the basis of an understanding of inherent human dignity marks a stark difference from these traditional models. Social constitutionalism is grounded in principles of universal rights, in contrast to traditional models which offered social inclusion in a selective, discretionary, or politically mediated fashion that excluded large numbers of citizens – in particular, those who

lacked the partisan ties, organizational advocates, or market leverage required to access social benefits. Moreover, social constitutionalism assigns the courts a prominent role in processing and adjudicating claims to social goods, claims that traditionally have been channeled through political parties, legislative bodies, and state or municipal social service agencies, or simply depoliticized through their relegation to the private sphere of commodified market exchange.

What does it mean for the state to commit to formal legal promises to universal, de-commodified social incorporation? The consequences are potentially widespread. Questions of state-society relations and social incorporation have long implicated concerns about democratic engagement, state capacity and institutional performance, and welfare provision. Social constitutionalism opens up the possibility for new social actors to make new types of claims to social goods through the process of legal mobilization, while simultaneously raising new concerns about the nature of rights and the appropriate role of the courts in democratic states.

Comparative social policy scholarship has tended to focus on the differences in and determinants of formal welfare policies or types of welfare states (e.g., Esping-Andersen 1990; Powell and Barrientos 2004; Lynch 2006; Pribble 2011; Huber and Stephens 2012). Another strand of scholarship has explicitly examined why developing countries have failed to construct robust social welfare protections comparable to those in Western Europe (e.g., Gough et al. 2004; Haggard and Kaufman 2008; Rudra 2008; Mares and Carnes 2009; Huber and Stephens 2012; Garay 2016). Further work on developing countries has explored the role of conditional cash transfers as part of social welfare policy (Valencia Lomelí 2008;

Fiszbein et al. 2009; Ferguson 2015). Scholars have also begun to identify informal dimensions of welfare policy (Holland 2017), the role of non-state actors in the provision of social goods and social programs (e.g., Wood and Gough 2006; Martinez Franzoni 2008; Cammett and MacLean 2011), and the importance of shared histories and social identities for social policy development (Singh 2015; Wilfahrt 2018).

According to these accounts, with greater or lesser success, citizens pursue such channels as voting, lobbying, and otherwise pressuring elected officials to voice their preferences or make social welfare demands, or they look inward, to self-help or friends and family. In particular, existing studies of the development of social policy regimes emphasize the electoral determinants of social policy change or policy enforcement (e.g., Iversen 2005; Mares and Carnes 2009; Garay 2016; Holland 2017), the importance of the preferences of employers (e.g., Swenson 2002; Mares 2003), or the strength of the political Left (e.g., Esping-Andersen 1990; Huber and Stephens 2012). Yet, with the emergence of social constitutionalism, issues related to the provision of social goods were thrust into the legal sphere. On paper, the guarantees of social constitutionalism are universal in nature, though, like other universalistic guarantees, access to these social goods and services in practice often remains less than desired. In this context, social policy expands and contracts in part on the basis of the ability of individuals or groups to make legal claims and receive a positive response from courts. Here we see a new form of selectivity, one that differs from the selectivity inherent to clientelism, corporatism, or market-based access to social goods. In addition, the social constitutionalist model raises the question of who or what institutions will enforce the social rights claims that judiciaries may assert, but

cannot on their own deliver. A discussion of legal claims-making related to social goods, however, has remained beyond the scope of these studies on social policy – a gap this project seeks to fill.

While social rights appear in international law as a single, coherent idea, providing the minimum conditions necessary for a dignified life and conferring both positive and negative obligations on the state, the goods that comprise social rights relate to the market in very different ways and are claimable in very different ways as well. These goods can be constructed as public, private, or a mix of the two, and the extent to which the state engages in the public provision of each good may vary across time and place.[8] For instance, in the present day, most states provide for some degree of basic education and require school attendance, often through the end of secondary school. On the other hand, states vary substantially in terms of investment in large-scale public infrastructure and investment designed to provide access to other social goods. Healthcare can also be understood primarily as a private good, a market commodity accessible by individuals through private insurance plans, clinics, and hospitals, or as a mix of the two. The same can be said for housing. Generally speaking, the market alternative, clientelist, and corporatist models do not treat healthcare or housing as public goods in that some measure of formal excludability persists, which is not true of social constitutionalism. Social constitutionalism and ensuing legal mobilization for social rights, thus, fundamentally shift the boundaries of social policy and the nature of social incorporation.

[8] As Holland and Ross Schneider (2018) discuss, the extent to which the state delves into a welfare-related issue may depend in large part of whether the good falls within an "easy" forms or "hard" form of social policy provision.

I examine the construction and re-construction of notions of obligation, specifically with respect to the conditions under which the state has an obligation to protect the social needs of its citizens in Colombia and South Africa. Focusing on one particular site of contention over these notions of obligation – the legal sphere – I investigate the dynamics of legal mobilization for social claims in the context of social constitutionalism. In the process, I address issues related to the functioning of democratic institutions and the actors that operate within them, state-society relations, social welfare provision, and institutional change over time. The project turns on two central research questions: (1) How and why does legal mobilization for social rights emerge? (2) What explains variation in legal mobilization for social rights in terms of who makes claims and on which issues? Throughout this dissertation, I develop what I call the "constructivist account of legal mobilization." In doing so, I demonstrate how a careful consideration of the beliefs held by both citizens and judicial actors about the law, rights, and the state – and how those beliefs were constructed through myriad interactions between individual citizens, social groups, and judicial authorities – is crucial to answering these questions.

Overview of the Argument: The Constructivist Account of Legal Mobilization

Early law and society research, especially at the theoretical level and in studies focused on the United States, noted the status quo bias of law (e.g., Scheingold 1974; Bourdieu 1987; Kelman 1987; Rosenberg 1991), particularly the propensity of law to favor the more powerful in society (Galanter 1974; Nonet and Selznick 2001). Subsequent comparative scholarship has found significant but limited potential of

litigation-driven social change (McCann 1994; Epp, 1998; de Sousa Santos and Rodríguez Garavito 2005; Gargarella, Domingo, and Roux 2006; Gauri and Brinks 2008; Yamin and Gloppen 2011; Young 2012). For these authors, the question shifted from whether law ever results in substantive change at the societal level to which conditions produce opportunities for individuals or movements to engage the legal system, legal processes, or legal language to advance their goals. Still, these authors acknowledge that progress through the judicial system is no easy task. Scholars of social movements and judicial politics have pointed to the importance of grievances (Smelser 1963; Snow and Soule 2010; Simmons 2014; but see McCarthy and Zald 1977), support structures (Epp 1998), political opportunity structures (McAdam 1982; Tarrow 1994; McAdam, Tarrow, and Tilly 2001), and legal opportunity structures (Hilson 2002; Wilson and Rodríguez Cordero 2006; Vanhala 2012, 2018a), comprised of features of the legal system (Michel and Sikkink, 2013) and judicial behaviors (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 1999; Helmke 2005; Hilbink 2012). These structural and institutional variables provide incentives and disincentives for action, but they do not in fact cause agents to behave in particular ways. A turn to the beliefs that agents hold helps to address this gap.

The main theoretical claim of this dissertation is that while there are many theories of why legal mobilization occurs or why it is successful, all rest on implicit claims about subjective beliefs and all miss the interactive effect of different kinds of situated actors in context. In short, beliefs both underpin and mediate existing theories about the use of the law. Over the course of this study, I advance my constructivist account of legal mobilization, specifying how beliefs held by claimants and by judges

interact and influence existing theories of legal claims-making. Combinations of institutional and structural factors may create or close off opportunities for action, but without consideration of the beliefs held by constitutional designers, judges, and individual claimants, these factors offer an incomplete understanding of legal mobilization and cannot account for the variation in legal mobilization over time and across policy issues. Importantly, beliefs provide the impetus for action, encouraging individuals and groups to understand and respond to external stimuli in particular ways. These responses then augment or challenge existing institutional arrangements, leading to institutional continuity on the one hand, or institutional change on the other. This project investigates how the interaction between changes in ideas and changes in institutions triggers legal mobilization,[9] focusing on the antecedent conditions that give rise to the constitutional recognition of guarantees to social rights, as well as the response of legal actors and everyday citizens.

On Social Rights, Social Policy, and Democracy

Social rights refer to "claims to change the rules that govern the production and distribution of basic economic and social goods" (Gauri and Brinks 2008: 13) or to "a desired set of social outcomes – roughly, that the rights holders at no time should lack access to levels deemed adequate of subsistence, housing, health care, education, and safety or to the means of obtaining the same (say, through available, remunerated work) for themselves and their dependents" (Michelman 2008: 5).[10] In other words,

[9] Blyth (2002) investigates a similar dynamic with respect to economic ideas and institutions.
[10] Throughout this dissertation I refer to social rights rather than the broader category of socioeconomic rights, which also includes rights regarding conditions of employment (see, e.g., Articles 6-8 of the International Covenant on Economic, Social, and Cultural Rights). Both of these definitions actually

they refer to the conditions of access to things like food and water, health, housing, and education, the goods that form the foundation of an individual's livelihood and ability to participate in social and political life. Arguments about the meaning of social rights, the obligations they imply, and their feasibility abound (see, e.g., Beetham 1995; Sunstein 2005; Neier 2006; Michelman 2008; Tushnet 2008; Langford 2009a; Liebenberg 2010). These debates are negotiated and renegotiated, settled and resettled through political contestation, as states recognize (or do not recognize) rights in particular ways in particular historical moments and citizens make claims to those rights and push their boundaries (or do not).

In recognizing social rights, the state in question acknowledges both the content of the rights and some notion of obligation. Whether or not a state recognizes an obligation – and whether that obligation is negative or positive in nature – to protect, fulfill, respect, promote, or otherwise advance social rights is secondary to the initial recognition of the scope or content of these rights. Yet, the mode of recognition is central to the ways in which individuals and social groups can make formal rights claims. States have increasingly constitutionalized recognitions of social rights, often taking the International Covenant on Economic, Social and Cultural Rights (1966) as the definitional starting point. The national level, however, features substantial variation in the institutional arrangements and practices of different states regarding social rights protections (Langford 2009b). There are four primary models of recognition of these rights: constitutional codification, acknowledgment as directive

refer to socioeconomic rights, even though the definitions seem better suited to the more limited category of social rights.

principles of state policy, inclusion in statutory law, and non-recognition. Within these models of recognition, states may declare social rights justiciable,[11] justiciable insofar as they are connected to or emanate from other rights (usually the right to life or right to dignity), justiciable for particular disadvantaged groups, or not justiciable at all.[12] This project focuses on the first model – that of constitutional codification.

There are several reasons to examine the claims to constitutionally codified social rights. First, for those without access to health, housing, food, water, sanitation, and other social welfare goods, life is remarkably insecure. Absent a fundamental level of access to welfare, individuals cannot participate fully in political, social, or economic life. Second, a significant part of the transition away from an unrepresentative and violent state involves the shift from ensuring only life for some to ensuring livelihood for all, or in other words, developing wide protections for social rights. Moreover, states have increasingly recognized social rights in their constitutions and defined themselves as "*social* states under the rule of law" rather than simply "states under the rule of law." These shifts in constitutional norms suggest a commitment to social inclusion and the extension of social citizenship (Marshall 1950). At least on paper, these commitments to address inequality and specifically the unequal access to social goods dramatically change the nature of state-citizen relations. Here, poverty and inequality become not simply the byproducts of economic or social relations, but evidence of the failure of the government to live up to its obligations.

[11] Justiciability refers to whether or not the claim can be heard in a court of law.
[12] Interestingly, in the case of the United States, social rights recognitions tend to appear in state constitutions rather than at the national level. For more, see Zackin (2013).

Demands to social goods through the legal claims, then, demonstrate the ways in which social policy is understood to be inadequate. The ability of the poor to influence social policy historically has been limited due to challenges to effective political mobilization, including but not limited to labor informality, diverse and even contradictory interests, and exclusionary or clientelistic political contexts (e.g., Weyland 1996; Cross 1998; Roberts 1998, 2002; Kurtz 2004; Kitschelt and Wilkinson 2007; Haggard and Kaufman 2008; Abdulai and Hickey 2016).[13] Considering the limitations facing the poor and marginalized, social constitutionalism and legal mobilization potentially offer citizens who are otherwise cut off from formal channels of political access the chance to express need or discontent, an opportunity largely unavailable for individuals in the context of other modes of social incorporation. In this view, the courts serve the interests of the poor, perhaps more so than any other democratic institution, contrary to traditional views on the judiciary. Traditionally, though, courts are cast as conservative bastions of the old order, useful for advancing elite interests such as property rights protections, but hardly suited to defending individual or group rights to social needs like healthcare and housing (Galanter 1974; Scheingold 1974; Rosenberg 1991; Nonet and Selznick 2001). Further, some scholars point to the dangers of "counter-majoritarianism" (Bickel 1962), or the possibility that special interest groups representing the preferences of the few win out in the courts at the expense of the interests of the general population. The extent to which social constitutionalism contributes to the deepening of democracy or, in fact, thwarts

[13] Though see Garay (2016) and Holland (2017) for accounts of how the poor or marginalized have, under certain circumstances, more influence on social policy than would be expected.

democratic processes is an open empirical question, one that ought to be examined closely across contexts.

Research Methods: Logic of Comparison and Inquiry

At its most abstract, this dissertation involves a set of layered comparisons – it is a cross-national, cross-sector study of legal mobilization for social rights in Colombia and South Africa over the duration of the most recent constitutional periods in each country. Legal mobilization for social rights could occur in all countries;[14] however, I restrict my study to social constitutionalist countries. Social constitutionalism is a process characterized by constitutional reform to expand recognition of rights, particularly social rights, and to grant review powers to the judiciary.[15] When constitutions codify social rights, they set out a specific way of understanding the state's responsibilities vis-à-vis its citizens and create the possibility of mobilization around these rights.

Daniel Brinks, Varun Gauri, and Kyle Shen (2015: 294) summarize the historical and political context in which social constitutionalism emerged, noting that:

> A series of events – the dismantling of many European welfare states, the end of the Cold War and the incorporation of the 'Second World's' concern for welfare rights, the failure of earlier heterodox attempts to ensure a general

[14] For example, the United States Constitution does not explicitly recognize social rights, but cases like *San Antonio Independent School District v. Rodriguez* (1970), which at its core focuses on the right to education, have advanced to the level of the Supreme Court.

[15] See Angel-Cabo and Lovera (2015) for a discussion of social constitutionalism in the Latin American context in particular. Others refer to new constitutionalism instead (Hirschl 2004; Gill and Cutler 2015) and even neo-constitutionalism (Urueña 2013: 38). I adopt the term social constitutionalism because it more clearly describes the change enacted by these constitutional reforms – states are redefined as *social* states under the rule of law rather than simply *new* states. South Africa's experience is often defined as an experiment in *transformative* constitutionalism (e.g., Davis and Klare 2010), but the elements of this constitutional reform result in a *social* constitution. In short, social constitutionalism is the most substantive way to think about this process. See also Bonilla (2013) for a more general discussion of constitutionalism in the Global South.

> level of social welfare, and general disillusionment with neoliberal market prescriptions for bringing prosperity to all – seemed to call for a new approach to social democratic politics.

In this context, more and more states created new constitutional courts or constitutional chambers within existing courts and codified social rights, including the rights to health and housing. In fact, most of the constitutional reforms of the late 1980s through the early 2000s implicate some sense of social constitutionalism, suggesting a shift in constitutional models. One way to get a rough idea of whether or not a country has adopted this social constitutionalist model is to check for constitutional recognition of the rights to health and housing and the creation of a Constitutional Court. Admittedly, this is a rather static and superficial way to examine social constitutionalism, but it does allow us at a general level to identify the set of countries defined by social constitutionalism. Currently, 133 countries recognize the right to health, 74 recognize the right to housing, and 94 have Constitutional Courts (Constitute Project 2018). These countries span Latin America, sub-Saharan Africa, Europe, and even much of Asia.

I selected Colombia and South Africa following the logic of contextualized comparisons and analytically parallel cases (Locke and Thelen 1995; Simmons 2016).[16] Scholarship in comparative politics traditionally has drawn on some variant of Mill's methods to facilitate case selection for "controlled comparisons." Richard Locke and Kathleen Thelen (1995), who are careful to note the utility of matched comparisons – whether most similar or most different – also identify three key

[16] Of the "four traditions of validation" identified by Seawright and Collier (2014: 126), the contextualized comparison approach falls within the "case-based tradition," along with other comparative case study methods and historical institutional work.

limitations in the approach: (1) "these analyses often portray a set of external pressures (e.g., increased international competition, technological innovation, or industrial restructuring) as equally pervasive or intense to all national economies," (2) "traditional analyses often obscure stark differences in starting points and hence the significance of the changes," and (3) "traditional comparisons often assume that the same practice has the same meaning or valence across the various countries" (339-40).

Beyond these general limitations of Mill's methods, I chose to adopt the contextualized comparative approach, because both a most similar systems design or a most different systems design could apply to social constitutionalism in Colombia and South Africa, depending on how one truncates the process. The adoption of social constitutionalism is indicative of a similar outcome resulting from very different political contexts, which would call for a most different systems design. The subsequent patterns in claims-making better fit a most similar systems design, where similar constitutions prompt health rights claims in Colombia and housing rights claims in South Africa. I seek to explore the entirety of the process of social constitutionalism; thus, I move away from a classic controlled comparison.

A contextual approach allows for the examination of the differences that emerge within relatively similar processes. Here, the idea is to identify similar processes at work and explore the unfolding of those processes in their social, political, and historical contexts, rather than assuming those contexts away or flattening them into discrete variables. Erica Simmons (2016: 31) explains:

> We choose cases where we see similar dynamics or processes at work, allowing ourselves the flexibility to identify complex causal processes as they unfold. From this in-depth knowledge, we can develop portable insights. These

> insights are not contingent on problematic assumptions about what the theoretically relevant variation that needs to be controlled is or whether the same empirical phenomena work in the same ways across contexts.

This approach could be understood as a variant of the "paired comparison" (Tarrow 2010)[17] that effectively "relaxes" the assumption of control integral to Mill's methods. The focus is on processes as they unfold in expected or unexpected ways, rather than on pre-specified variables whose influence is assumed to be accounted for due to the combination of cases. By attending to how processes unfold researchers are able to pay more attention to context, which may in fact be crucial to understanding the cases under investigation. Further, as Erica Simmons and Nicolas Smith (2017: 126) advocate, the contextualized comparison approach allows for "comparison with an ethnographic sensibility," which involves "being sensitive to how informants make sense of their worlds and incorporating meaning into our analyses." In this case, social constitutionalism – both in terms of the process of creating new constitutional texts and the process of the social and institutional embedding this form of constitutionalism – serves as the process under investigation. I seek to understand the process of social constitutionalism in context, identifying both emergent similarities and differences between the constitutional projects as they are understood, implemented, and contested in Colombia and South Africa.[18]

[17] Contextualized comparisons could, in theory, involve more than two cases, though the ability of the researcher to consider in-depth the conditions and processes under investigation diminishes as the number of cases increases.

[18] Following alternative logics of case selection, scholars have also examined South Africa and various middle-income Latin American countries – often, but not always, Brazil – in other studies (e.g., Seidman 1994; Marx 1998; Lieberman 2003, 2009; Zuern 2011; Bonilla 2013; Garay 2016).

This approach is consistent with what Sean Yom (2015) has called "inductive iteration," which explicitly acknowledges that the practice of conducting research often differs from the kinds of deductive templates implied by controlled qualitative comparisons (as well as statistical analyses).[19] The practice of inductive iteration involves beginning with "hunches and constantly revising […] propositions in response to unexpected discoveries," and it ends only after "the researcher determines that a theoretically grounded and internally robust explanation has coalesced for outcomes of interest" (Yom 2015: 616, 618). In other words, rather than assuming that all relevant factors will be known ex ante, derived from existing literature, both the method of contextualized comparisons and the process of inductive iteration hold that data collection, theory generation, and theory testing are related in a recursive fashion.

To summarize, the project involves a contextualized comparison of the embracing, embedding, and enacting of social constitutionalism in Colombia and South Africa. I selected the cases of Colombia and South Africa not on the basis of an ability to control away existing explanations for legal mobilization, but with the goal of examining how seemingly similar processes emerge and develop in different ways in different contexts. Within this national-level comparison, I compare legal claims-making related to different social rights in each country, thus leveraging comparisons within and across cases to help me understand the dynamic process of legal mobilization. The project relies on the practice of inductive iteration, which allows for

[19] As Yom (2015: 616) notes, "Inductive iteration is not so much a new technique [as] the formalization of existing practices collected from different methodological traditions."

the continuous updating and incorporation of propositions about legal mobilization that surface through the process of conducting research.

Cases: Colombia and South Africa, and the Rights to Health and Housing

Colombia and South Africa appear very similar with respect to structural indicators measuring economic and human development, inequality, and levels of violence over the last three decades (see Figures 1.1-1.4 below). Yet, even in the midst of these structural similarities, the two countries have been defined by substantially different state configurations, different party systems, and different historical legacies. The South African National Party implemented apartheid in 1948, developing a state that at the same time was highly legalistic, violent, discriminatory (toward non-white South Africans) and featured an interventionist, welfare-oriented economy policy (for white South Africans) (e.g., Abel 1995; Meierhenrich 2008; Nattrass and Seekings 2011). Just ten years later, a different form of exclusionary governance was formed in Colombia, with the National Front Agreement, which mandated power sharing between the Liberal and Conservative Parties and further marginalized those outside of these traditional networks of power. Around the same time, guerrilla groups took up arms in a revolutionary challenge to the state (e.g., Palacios 2006; Tate 2007). Just as apartheid and the anti-apartheid struggle indelibly marked South African political development, so too did the protracted war between the revolutionary Left and the state, albeit in different ways. Following the end of apartheid, the African National Congress has dominated South African politics, certainly at the national level and to a large extent at the provincial level, rendering the country a de facto one-party

democracy. On the other hand, the historical dominance of the Liberal and Conservative parties in Colombia has faltered, with the Colombian party system veering toward deinstitutionalization (Mainwaring 2006; Morgan 2013; Albarracín et al. 2018).

Figure 1.1. GDP/Capita

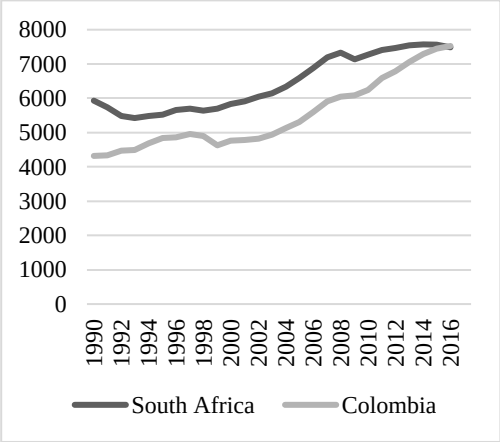


Figure 1.2. Human Development Index

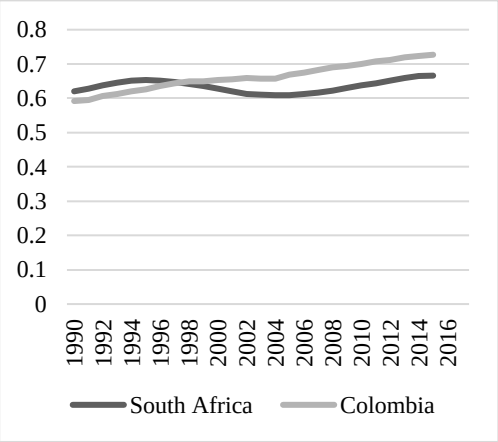


Figure 1.3. GINI Score

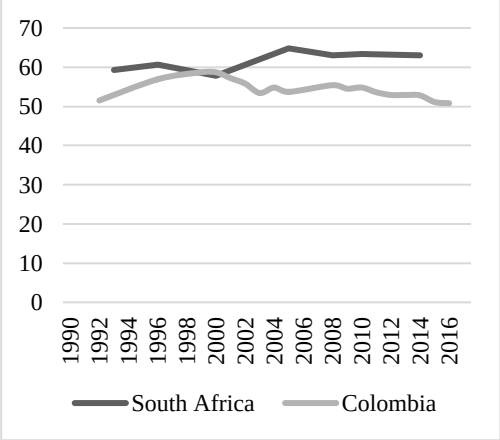
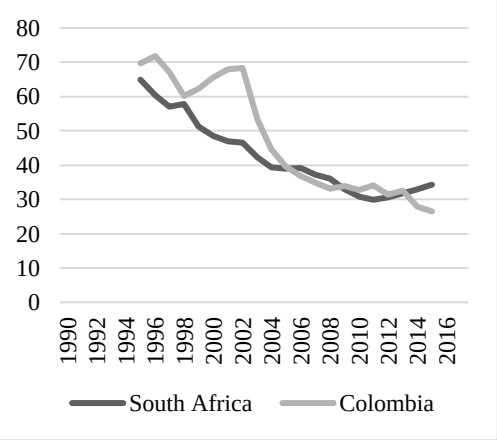


Figure 1.4. Homicides per 100k People



Citizens in both Colombia and South Africa pushed for fundamental changes to the state, and especially its foundational legal order in the early 1990s, and in response, policymakers adopted new constitutions in both countries. As in South Africa, Colombia historically had been defined by its long-standing – if differently operationalized – commitment to formalism in law. Yet, the combination of decades

of war between Leftist guerrillas and the state that showed little sign of abating, a consistently unresponsive legislature, and the emergence of a student movement, comprised largely of law students, resulted in demand for a new legal experiment, one that ultimately would recognize a new set of rights and empower the judiciary (Dugas 2001; Lemaitre 2009). Interestingly, as Jens Meierhenrich (2008) demonstrates, in South Africa, features of the apartheid state actually promoted shared stabilizing expectations among elites, many of whom trained as lawyers, about the role of law in the transition to inclusive democracy. In this context, a basic level of confidence in the idea of law and constitutional rights permeated throughout society, regardless of race. Further, the Constitutional Court – at least initially – was understood and understood itself to be engaging in a joint constitutional project with the other branches of government (Fowkes 2016). Considering these factors, the empowerment of the courts, the recognition of social rights, and citizen trust in the legal process are less surprising that they might initially appear.

These contrasting combinations of structural and institutional factors provide the background for legal mobilization for social rights throughout the 1990s, 2000s, and 2010s in both Colombia and South Africa. Within the similar adoption of social constitutionalist models by these two countries, important differences emerge in terms of institutional design and development. I will explore both the differences and commonalities in the unfolding of social constitutionalism in more detail in the empirical chapters of this dissertation. Deserving special mention, however, are the differences in institutional mechanisms to expand immediate rights protections and access to the courts.

In Colombia, the *acción de tutela*, at least in theory, allows all citizens to make claims on the courts, as long as those claims refer to "fundamental" rights. Ordinary courts must prioritize tutelas over other legal claims, and all tutelas are sent to the Constitutional Court for the possibility of review. As such, the tutela procedure offers individuals the chance to make claims without paying legal fees or enduring the time-intensive process of traditional litigation. Initially, social rights in the Colombian Constitution were not recognized as fundamental or fully justiciable in themselves, which means that, formally, individuals could not use the tutela to make claims about social rights; instead, only civil and political rights were considered justiciable. Over time, however, judges reinterpreted social rights as justiciable, at least in some cases. Between 1992 and 2016, the Constitutional Court heard an average of 243 abstract review claims and reviewed an average of 709 tutela claims per year. According to data provided by the Defensoría del Pueblo, health tutelas alone made up on average 30% of all tutelas filed in the country between 1999 and 2012, and a sample of tutelas reviewed by the Constitutional Court reveals about 25% of these reviewed tutelas related to the right to health between 1992 and 2016. In contrast, only 3.4% of these reviewed tutelas claimed the right to housing.[20]

South Africa's new constitution, on the other hand, immediately recognized all enumerated rights as justiciable, including social rights. Rather than creating a new legal mechanism to expand access to rights, the South African Constitution lowered standing requirements, as described in Article 38. These lowered standing

[20] The Defensoría del Pueblo does not track the number of housing rights tutelas nationwide, arguably reflecting the fact that few tutelas overall pertain to housing.

requirements allow individuals not directly affected by a rights violation to file claims on behalf of those who are. Further, though most constitutional claims must begin at the High Court level, under certain conditions, claimants can directly petition the Constitutional Court, asking the Court to serve as the first and last instance because of the urgency of the issue in question, though this direct access mechanism has been used quite infrequently. The courts have adopted what is known as the "reasonableness" standard for social rights, examining whether government policies and actions are justifiable in light of the state's constitutional duty to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights." Between 1995 and 2016, the Constitutional Court heard an average of 30 cases per year, issuing about three decisions per year on cases involving the right to housing, education, social security, health, or water.[21] Housing cases make up 61% of all social rights cases (across the High Court, Supreme Court of Appeal, and Constitutional Court) and 52% of social rights cases at the Constitutional Court, eclipsing all other types of social rights cases.

The cross-national comparison between Colombia and South Africa, in combination with the cross-sector comparison between the rights to health and housing demonstrate that there is no necessary feature of any one social right that makes it uniquely amenable to legal mobilization. While legal claims to the right to health predominate in Colombia, housing rights claims are much more common in

[21] Importantly, as Justice Richard Goldstone (2008: x) notes, "rights are realized not only when the officials responsible for providing them take appropriate action in consequence of litigation but, more frequently, when they do so in order to preempt litigation."

South Africa. These layered contextualized comparisons reveal the contingent and context-specific nature of legal mobilization for social rights.

Sources of Data

In this project, I examine the beliefs that both societal and judicial actors hold about the law, rights, and the state, and the relationship between those beliefs, the social construction of legal grievances, legal opportunities, and judicial behavior. I am interested not only in variation in beliefs about law, but also in where these beliefs came from, or how ideological framing, social mobilization, and political conflict and compromise resulted in shifts in understandings about law, rights, and citizenship over time. In short, why did both societal and judicial actors who have not traditionally thought that courts have a role to play in adjudicating social rights claims come to think that they did? How did these understandings vary across actors, rights, and contexts?

In order to investigate these questions, I draw on three principal sources of data: legal documents, interviews, and surveys. I first established general trends in mobilization in each country and then examined patterns of mobilization and beliefs in particular communities in closer detail, incorporating inductively-gleaned insights as the data collection progressed. An analysis of archival documents regarding the official constitutional debates, as well as of legal documents of cases that reached the Constitutional Courts, from the time the Courts began accepting cases (1992 for Colombia and 1995 for South Africa), helped me to determine trends in the beliefs that undergird mobilization. By examining patterns in claims-making across policy

spheres, the spatial distribution of claimants, and the variation in legal outcomes and judicial reasoning, I was able to properly situate information revealed in interviews.

After uncovering general patterns, I could then determine the contemporary history of variation in legal mobilization, especially regarding the timing of different claims. In Colombia, this involved retrieving documents from the *Asamblea Nacional Constituyente*, which are available online and at the Biblioteca Luis Ángel Arango. I collected legal documents in two ways. All decisions are available online, which allowed me to scrape a random sample of tutela from the Constitutional Court's website and to organize that sample into a dataset.[22] I obtained information about abstract review cases from the *Congreso Visible* project at the Universidad de los Andes. In South Africa, I examined documents in the archives of the Constitutional Court. Information on legal cases comes from the Constitutional Court's website and the Southern African Legal Information Institute (SAFLII). From these sources, as well as NGO reports, I created an original database of social rights cases in South Africa covering the High Court, Supreme Court of Appeal, and Constitutional Court.

I conducted interviews with both "legal elites" – lawyers, judges, law professors, and activists at non-governmental organizations that include litigation within their strategies – and, to a lesser extent, potential claimants or everyday citizens. This amounted to 82 interviews with 90 legal elites, as well as 74 interviews with 93 non-elites in Colombia, and 80 interviews with 88 legal elites in South

[22] Thank you to Josh Meyer-Gutbrod for help with web scraping.

Africa.[23] These interviews allowed for the probing of the orientation of the judicial establishment, as it appears on the inside (to judges and lawyers) and the outside (to academics and activists), as well as to those who have tried to traverse those boundaries (including claimants and activists). Furthermore, these interviews facilitated the identification of beliefs about the appropriate role of legal institutions in democratic society and the status of social rights (specifically to what extent they are justiciable or claimable).

Finally, I fielded surveys in both countries to further assess the understandings potential claimants have about the law and state. The Colombian survey involved 310 respondents, all of whom could be considered "claimants," and the South African survey covers 551 respondents with a mix of both "claimants" and "non-claimants." The designs of these surveys will be described in greater detail in Chapters 5 and 6. The identification of these beliefs is fundamental to exploring the role of judges or legal culture in opening space for legal mobilization for social rights and the role of beliefs about the legal system and the state in influencing when and how individuals make rights claims.

Plan of the Dissertation

Chapter 2 details my constructivist account of legal mobilization. Drawing on scholarship from multiple disciplines, ranging from judicial behavior to social movements and contentious politics to political psychology, it clarifies the ways

[23] Several elite interviews involved two interviewees at a time, and many of the non-elite interviewees involved two or more interviewees. Often, this occurred because I sought out an interview with a particular individual who then invited a colleague or neighbor to join our conversation.

beliefs play a foundational, but underexplored, role in existing explanations of legal mobilization. Further, the chapter describes and justifies a dual focus on mobilization from above and below, or mobilization from the perspective of state actors (particularly judges) and from the perspective of societal actors, and in doing so, it highlights the advantages of the combined approach over a singular focus on either societal or state actors.

Chapters 3 and 4 offer a historical discussion of constitutionalism in Colombia and South Africa. Chapter 3 focuses on the development of constitutional law in each country, while Chapter 4 examines more particularly the emergence of social constitutionalism in the early 1990s. Together, these chapters trace the development of the idea that law can and should be responsive to the needs of citizens, examining the macro-level process of transnational diffusion and the localized processes by which particular ideas emerged at particular times. In both Colombia and South Africa, perceived crises opened space for new ideas about the role of the state and the role of constitutional law to gain adherents and to become embedded in new institutions. Following these critical junctures, newly empowered actors, including the Constitutional Court and everyday citizens defended social constitutionalism, ensuring that it would be institutionally-embedded over the course of the 1990s and 2000s in both countries.

Adopting a "from below" perspective, Chapters 5 and 6 assess how societal actors understand and use legal institutions in Colombia and South Africa, respectively. Drawing on original surveys, as well as interviews with claimants, potential claimants, and non-claimants in each country, these chapters investigate the

following questions. What is the relationship between perceptions and use of the legal system? When do individuals choose to advance claims in the legal system versus in other forums, and when do they instead choose to "lump" their grievances, to do nothing rather than making a formal claim? How does legal mobilization affect citizens – both in terms of access to the goods and services sought and in terms of their views on the state? Further, these chapters examine the disconnects between not only law on paper and law in practice, but also between law on paper and social understandings of the law. Importantly, Chapter 6 adopts a dramatically different empirical approach from the rest of the dissertation. It sets out and test hypotheses within a positivist framework. This difference in approach stems from differences in access to respondents, particularly access to individuals who had made social rights claims in the formal legal sphere.

Chapter 7 explores the development and modification of these new legal institutions "from above," specifically focusing on the impact of judicial interpretation on legal system change in the realm of social rights. How do judges interpret their changing roles in the context of new constitutional rights provisions? What are the determinants and consequences of these role conceptions? What explains the differential interpretation of constitutionally recognized social rights across countries? Why were judges willing to offer both individual and structural remedies beyond the scope of the written text of the constitution in Colombia and more hesitant to do so in South Africa, where they instead focused on the constitutionality of policy, rather than outcome? This chapter introduces the concept of judicial agency and demonstrates the ways in which constitutional judges in Colombia and South Africa have adjudicated

questions related to rights protections and affected the opportunity for legal mobilization for social rights.

Chapter 8 engages a cross-national, cross-sector comparison, examining variation in health and housing rights claims in Colombia and South Africa, tying together the relationship between claimants, judges, and the various societal actors that mediate the process of legal mobilization. The chapter highlights the key role of contingent factors in explaining differential legal mobilization, calling for attention to be paid to the complex ways in which diverse societal actors – from pharmaceutical and insurance companies to advocacy networks to individual claimants – are able to create, capitalize on, adapt, and even manipulate opportunities for mobilization. Institutional design influences legal mobilization indirectly, through the ways in which its features are perceived by these societal actors.

Chapter 9 follows with conclusions, laying out the broader lessons that can be taken from this study of the Colombian and South African contexts, and calling to light the limits of constitutionalism and rights discourse, as well the tensions between concrete advances for the few, enduring inequality, and the challenge of structural change.

CHAPTER 2

ON LAW, BELIEFS, AND CHANGE

This dissertation is fundamentally about how law influences lived experience, from the everyday to the exceptional, as well as the meaning of rights and the ways in which people struggle to improve their lives. Specifically, the project examines the constitutional codification of social promises as rights and the ability or willingness of citizens to make claims to those rights. For some, a "politics of rights" (Scheingold 1974) is fraught, as the language and tools of rights claims appear to necessarily limit, moderate, and dilute challenges to existing modes of thinking and allocations of goods (Glendon 1991; Rosenberg 1991). Yet, as others have demonstrated, these concerns may have been overstated as individuals and movements deftly and selectively use rights talk and legal tools in pursuit of their goals (McCann 1994; Ewick and Silbey 1998; Epp 2009; Lovell 2012).

This chapter first defines legal mobilization and then overviews the various ways in which political scientists and sociologists have considered attitudes, beliefs, and ideas. Next, it introduces my constructivist account of legal mobilization and situates it with respect to social movement theory and scholarship on judicial politics and behavior. In contrast to existing explanations for the occurrence and frequency of legal mobilization, my constructivist account explicitly foregrounds how potential claimants, intermediaries, and judicial officials understand the law, rights, and the state. The chapter closes with methodological concerns related to the observation and

measurement of beliefs and a discussion about the link between beliefs and legal mobilization.

Understanding Legal Mobilization

Definitions of legal mobilization abound. For instance, Frances Zemans (1983: 700) suggests that "[l]aw is mobilized when a desire or want is translated into a demand as an assertion of rights," while Richard Lempert (1976: 173) offers that legal mobilization refers to "the process by which legal norms are invoked to regulate behavior." More recently, Lisa Vanhala (2011) has proposed that legal mobilization encompasses "any type of process by which an individual or collective actors invoke legal norms, discourse, or symbols to influence policy or behavior." Scholarship on legal mobilization has proliferated, though often in the absence of a clear operationalization of the term and not always in a coherent, additive research agenda.

In this project, when I refer to legal mobilization, I mean the explicit, self-conscious use of law involving a formal institutional mechanism (Lehoucq and Taylor 2018: 4). In other words, legal mobilization corresponds to the intentional invocation of the formal legal sphere by claimants. The actions encompassed by the term legal mobilization then include administrative procedures, quasi-judicial procedures (such as those complaints processed by human rights or gender commissions and ombudsman's offices), and litigation. This definition offers several concrete advantages. First, as Emilio Lehoucq and I detail elsewhere, this definition allows scholars to clearly distinguish legal mobilization from related concepts, like legal framing or legal consciousness. In doing so, it avoids the pitfalls of conceptual

stretching and promotes systematic theory-building in the interdisciplinary subfield of legal mobilization (Lehoucq and Taylor 2018). The focus on legal claims made in the context of formal institutions rather than any number of activities potentially related to law – such as bargaining in the shadow of the law (Mnookin and Kornhauser 1979) or using the discourse of rights in everyday settings to frame problems as legal in nature – facilitates careful comparison across contexts, assuring that comparisons involve similar cases.[24] The focus on the political dimension of legal mobilization acknowledges that legal claims in the aggregate (if not always individually) reflect disagreements about the proper distribution of resources and about the proper way or ways in which societal actors ought to interact, thus they imply political demands (see, e.g., Zemans 1983; Marshall 1998; M. Gallagher 2006, 2017; Gallagher and Yang 2017), as well as particular understandings of the rights of citizens and obligations of states. Legal mobilization can involve a wide array of agents acting in apparently independent ways without overt or self-conscious political motive. They may not view themselves as mobilizing law, but they collectively are part of the mobilization of law. Second, as a practical matter, this definition is easily operationalized across contexts.

Legal mobilization implicates an internal process (of defining a struggle in terms of legal language or symbols) and an external process (of sharing that definition with outside actors, through engagement with litigation).[25] The process of legal

[24] Importantly, such a focus does not foreclose the study of related but not sufficiently similar activities. The claim here is simply that these other activities ought not be considered legal mobilization.
[25] Per Fligstein and McAdam (2012: 69), "The conferral of new rights or legal protections is inevitably accompanied by considerable conflict and contention *and* the creation of a host of new state fields to safeguard the gains achieved. This has resulted in something of a self-perpetuating cycle of legal expansion – the creation of new strategic action fields by groups intent on taking advantage of the new opportunities open to them, which forces states to fashion new regulatory and compliance fields to oversee the resulting non-state fields." Whether or not one draws on field theory, the insights that many

mobilization can take on many forms, whether individual (Zemans 1983) or collective in nature (Burstein 1991). In other words, we can observe both individual citizens and social movements engaged in mobilizing the law. When individuals or civic groups decide to mobilize, they must identify proximate and ultimate targets of their actions. In this project, I focus on when the judiciary is the proximate target. The ultimate goal might be, for example, to require healthcare providers to cover specific medications or procedures (here, the ultimate target would be the healthcare provider), or it might be to convince the state to change or enforce laws regarding the provision of primary education (here, the state). The disputing parties involved in each scenario differ, but the judiciary is the focal point for action.[26]

Legal mobilization may vary in content, form, or character. Most studies of legal mobilization explicate the content of mobilization under investigation, focusing on, for instance, claims related to the right to health or claims falling under a specific regulation. Legal mobilization can also vary in form, for instance with the advancement of individual versus collective claims. At the cross-national level, this project investigates the form of legal mobilization, while at the sub-national level, this project investigates its content. The project also takes up the question of variation in the character of legal mobilization. By character, I mean the sentiment underlying legal mobilization. For example, while some may turn to the law because of their belief that the legal process is to be trusted and will adequately resolve their disputes,

different groups have a stake in defining, expanding, or limiting rights and legal mechanisms and that law is the site and means of strategic action are important in understanding mobilization.

[26] It should be noted, however, that this definition of legal mobilization also allows for the consideration of pseudo-judicial or administrative procedures that take place outside of the formal judiciary as such.

others may do so with ambivalence or at the failure of other options. The former example offers an idealized vision of legal mobilization. Yet, scholars have demonstrated that legal mobilization in practice may be ambivalent in nature instead (e.g., Hendley 1999, 2012; Gallagher 2006; Smulovitz 2010; Gallagher and Yang 2017; Taylor 2018).

What does it mean to engage in legal mobilization? Scholars have argued that the turn to legal strategies for claims-making is a "hollow hope" (Rosenberg 1991; see also Glendon 1991) or reflects the hegemonic status of law in everyday life (Ewick and Silbey 1998; Silbey 2005). The concern, in large part, is a practical one, that the use of legal language and tools reduces what is grievable, claimable, and changeable, that instead of resulting in tangible improvements in the lives of those most in need, existing power arrangements and allocations of goods will simply be recreated and reified. Yet, individuals or movements may advance legal claims strategically or partially, without fully endorsing the legal system, what it represents, or what it protects. For example, George Lovell (2012: xii), in a study of civil rights claims made in the late 1930s in the United States, concludes that at least some of the time, "people used idealized legal discourses not to express faith in the law but because those discourses could also accommodate and help to communicate resistance and contestation." He goes on to say,

> … people used language of law, rights, and constitutionalism to make novel demands or contest official legal outcomes. People also used legal discourses to assert dignity, challenge the integrity of legal authorities, and express constitutional bases for alternative systems of justice. Many [] did these things as they expressed resistance in the face of towering injustice and shocking official indifference.

Lovell's study provides further evidence of the varied role that the role law plays in particular struggles. Some of the time it may moderate or constrain claims makers, while other times, it may be a transformative or even revolutionary force. Legal institutions that normally protect elite interests may, in the face of pressure from below, yield outcomes autonomous from these elite interests. Still other times, law may simply be a tool that might help to solve a problem. The point here, however, is that the impact of law – and legal mobilization – is an open empirical question.

Terminology: Beliefs, Attitudes, and Ideas

Before detailing explanations of legal mobilization, a few words on terminology are necessary. Despite greater attention to the role of non-material forces on political outcomes, a shift termed "the ideational turn" in comparative politics (Jacobs 2009), relatively few scholars explicitly define what they mean by ideas or beliefs, while definitions of "norms," "identity," and "culture" abound. Similarly, ideas have taken center stage in work on international relations and foreign policy (Haas 1990; Goldstein and Keohane 1993; Risse-Kappen 1994; Wendt 1999), as well as on international and comparative political economy (Hall 1993; Berman 1998; McNamara 1998; Blyth 2002). Within the field of judicial decision-making, substantial attention has also been paid to ideational factors, specifically to "judicial attitudes" (Rohde and Spaeth 1976; Segal and Spaeth 1994, 2002; Spaeth and Segal 1999) and "judicial role conceptions" (Howard 1977; Hilbink 2007; Nunes 2010a, b; Couso and Hilbink 2011; Ingram 2012).

I argue that the terminology of "beliefs" better reflects colloquial descriptions of our mental states ("I believe…") than either attitudes or ideas. The language of beliefs is flexible enough to describe the variety of mental states held by different actors, which is not the case for the term "judicial attitudes." Further, it does not imply a standard of coherence that may or may not, in fact, characterize our mental states, as can be the case with the language of ideas. Belief, unlike idea, also implies an agent, a believer, reminding us of the contextual and embodied nature of the social world. In this project, I am interested not only in changes in patterns of claims-making (i.e., behavior), but also in how these claims are understood (i.e., the beliefs that shape behavior), who makes them and who does not, and how they are constructed, received, and responded to. This requires attention to institutional and social context as well as to the different actors involved. For these reasons, I use the language of beliefs throughout this dissertation.

In short, beliefs refer to subjective truth-claims about the world. I adapt this definition from Neta Crawford (2002: 49), who defines beliefs as "arguments that we have become convinced of, whose conclusions we take for granted," and Daniel Bar-Tal (1990, 2013: 18), who refers to beliefs as "proposition[s] to which a person attributes at least a minimal degree of confidence."[27] Importantly, beliefs may be factually correct or incorrect, and they may or may not be grounded in moral

[27] See also the social psychology upon which these accounts are based (e.g., Bem 1970; Fishbein and Ajzen 1980; Kruglanski 1989). I adapt these definitions because I am not convinced that beliefs must have "taken for granted" status – perhaps that is true of strongly-held beliefs specifically – and because I find the language of "a minimal degree of confidence" to be distracting rather than informative. "A minimal degree of confidence" refers to "the likelihood that the proposition will be valid and truthful from a personal perspective" (Bar-Tal 2013: 18), though it is unclear how confidence can be measured here.

assessments. Beliefs are socially constructed, but individually held. They form the constituent parts of a worldview and the basis for meaning-making, which is defined as the "social process through which people reproduce together the conditions of intelligibility that enable them to make sense of their worlds" (Wedeen 2002: 717). Further, every identifiable belief exists among (at the very least, implicit) alternative beliefs. Given the existence of alternatives, beliefs become more impactful when compelling to others, though a belief that is not compelling to many people might be particularly influential for a particular individual.

Beliefs form the basis upon which individuals act, whether elite or grassroots actors. As Alan Jacobs (2009: 252) holds, "By leading them to reason about certain causal possibilities and data and to ignore and discount others, politicians' and policy makers' mental models can powerfully shape their causal belief sets and, in turn, their policy preferences." This is true for all actors, politicians, policymakers or otherwise. Similarly, Elisabeth Wood (2003: 231) describes beliefs as "understandings of the probable consequences of various courses of action." While *causal* beliefs are particularly illuminating when considering the relationship between beliefs and action, beliefs need not refer explicitly to consequences, to cause and effect logic. For example, each of the following statements are expressions of beliefs:

> (1) I should report this to the police.
> (2) I should report this to the police, because it is the right thing to do.
> (3) I should report this to the police, but it won't matter, because they never investigate this type of case.

The first statement is a simple assertion about appropriate behavior. The second adds a rationale for why the behavior is understood as appropriate. Only the third offers an

explicit (expected) consequence-driven claim. Yet, all three reflect an understanding an individual might have about how he or she should act in the world; as such, all three statements are truth-claims (adding "It is true that…" to the start of each statement makes this clear).

In this project, I focus on beliefs regarding the kind of legal claims that can or should be made, or the kinds of issues that can or should be resolved through the legal system, as well as the way that the judiciary can or should respond to these claims. These beliefs will be described in more detail in the subsequent empirical chapters, but in short they define the contours of a *legal citizenship regime*, or a situation in which state-society relations are refracted through the legal system.[28] This project centers on the intersection of social citizenship and a legal citizenship regime. In other words, the focus is on legal claims invoking social rights. This category of legal claims subsumes a wide range of grievances related to the allocation of goods and services, and, importantly, it is by no means a given that claims to these goods and services will be advanced using the language of rights or in legal forums. Any number of other strategies could be feasible. Citizens might opt to advance claims to these goods and services through appeals to political parties, lobbying in legislatures, or patronage ties to particular public officials, or they might turn to NGOs or civic organizations or even the market to try to attain access. Yet, at times, citizens advance legal claims to these social goods and services, and at times, judges respond positively to such claims. I turn now to extant explanations of legal mobilization.

The Central Role of Beliefs in Explanations of Legal Mobilization

[28] For a general discussion of citizenship regimes, see Yashar (2005).

In this section, I develop my constructivist[29] account of legal mobilization, which is both prior to and constitutive of explanations focused on grievances, opportunity, and judicial behavior. Beliefs play a foundational, though often unacknowledged, role in legal mobilization. Through the constructivist account of legal mobilization, this project unearths the ways in which beliefs about the law, rights, and the state influence legal mobilization, and it clarifies how the recursive interaction of different types of actors impacts both the filing of legal claims and the response to those claims in the context of social constitutionalism.

Grievance-based theories may yield important insights as to why claims are made about a particular issue in a particular context, but alone they cannot account for why claimants turn to one forum and not another to air those grievances. In this case, a theory that can account for the social construction of *legal* grievances is needed – in other words, the theory must be able to explain not only how a particular state came to be understood as objectionable but also how that particular situation came to be understood as legal in nature or as legally claimable. Theories based on institutional design or opportunity structures suffer from a similar limitation. Opportunity is best understood as a permissive condition. Though the lack of perceived opportunity could be sufficient to head off mobilization, its mere possibility does not imply the mobilization will, in fact, occur. Theories based on judicial behavior indicate when judges will be more or less likely to render rights-protective decisions, but these

[29] Typically, international relations scholars working in the constructivist tradition focus on norms, rather than beliefs. I hold that norms are comprised by and enacted as a result of beliefs. In some ways, then, this divergence is a matter of the level of analysis.

explanations also miss the process by which cases come before the courts. For all three sets of explanations, an assessment about the beliefs relevant actors hold about the law, rights, and the state helps to fill these gaps.

Further, in order to understand the process of legal mobilization, I hold we ought to consider it "from above" as well as "from below," which is to say that we ought to consider those factors that influence not only the ways in which lawyers argue cases and judges decide them, but also the willingness and ability of citizens to turn to the legal system to make claims. In practice, the process of legal mobilization is both iterative and interactive. As Charles Epp (1998: 18) notes, judges cannot make cases or issues appear before them "as if by magic" – claimants must bring cases, they must make claims. This involves a prior process of identifying a problem as legally grievable, as one that can or should be advanced through the courts. In addition, claimants cannot realize their rights simply by making rights claims. They must navigate the legal system, which is often both complicated and expensive, to bring claims before judges, and judges must respond to those claims. Past judicial decision-making will influence current claims-making, as knowledge and understandings of the judicial system change and spread, and current claims-making will influence future judicial decision-making, as judges are presented with new problems and new arguments. By integrating perspectives "from above" and "from below," I attempt to capture this complex claims-making environment. I turn now to a discussion of grievance-based explanations for mobilization, before moving to explanations based on institutional design and opportunity structures, and then a discussion of various theories of judicial behavior.

1. Grievances and Legal Needs

Early work on social movements and social mobilization drew attention to the amount or severity of grievances, "relative deprivation," or "breakdown," arguing that once grievances were felt to be sufficiently serious, mobilization would follow (Davies 1962; Smelser 1963; Gurr 1970; Gurney and Tierney 1982).[30] Subsequent scholarship sought to integrate grievances into a comprehensive social movement agenda. This literature focuses less on material need as such than on the process of framing issues to facilitate mobilization around them, along with the mobilizing structures and political opportunities that allow grievances to be acted on (Snow et al. 1986; McAdam, Tarrow, and Tilly 2001). Oftentimes, the existence of grievances is taken as a given. For many scholars, the perpetual presence of grievances and relatively infrequent occurrence of mobilization of any kind indicates that there is little explanatory leverage to be gained with a specific focus on grievances (McCarthy and Zald 1977; Tarrow 1994; McAdam, McCarthy, and Zald 1988). More recent scholarship on social movements has sought to reconsider the role of grievances in mobilization processes, focusing on the meanings ascribed to grievances, rather than simply their material existence (Simmons 2014, 2016).[31]

Similarly, early scholarship on access to justice and legal needs paid scant attention to the ways in which individuals understood the problems in their lives, instead demonstrating the existence of material grievances and the relatively

[30] Quantitative studies that operationalize grievances as some measure of material need (e.g., poverty) implicitly make this argument.

[31] Simmons argues that threats to goods that tapped into notions of "quotidian communities" (as compared to Anderson's "imagined communities") spurred significant protest activity – specifically around water in Bolivia and corn in Mexico.

infrequent use of law to address those material grievances (see critiques in Cahn and Cahn 1964 and Zemans 1982). These works and the broader access-to-justice movement focused on how to streamline legal services and increase legal education. The underlying expectation was that if knowledge about the law, rights, and legal services increased, more and more people in need would turn to the legal sphere to make claims; however, no such deterministic link exists (e.g., Zemans 1982; Massoud 2013). Moving beyond the work of Frances Zemans to studies focused on legal consciousness (e.g., Ewick and Silbey 1998), it becomes clear that both claimants and the claims they make exist in social context. This context can encourage a shift from viewing something as unfortunate to something *legally* objectionable (or a *legal* grievance). On the other hand, this context can also discourage such a shift.

Thus, existing explanations for legal mobilization based on grievances are wanting for several reasons. First, they over-predict the occurrence of mobilization (especially in their material-centric forms), and as access to social goods tends to be highly correlated, they offer limited leverage on questions related to why mobilization differs significantly across issues. They also under-explain the forum in which a grievance is raised.[32] Further, without acknowledging the interactive nature of the legal process, we may miss the impact of rights education campaigns on the social construction of grievance and legal framing on the development of a sense of

[32] Generally speaking, grievances are not tied to any particular forum in which they might be expressed. For example, if I understand myself to be aggrieved by existing housing policy, it is not immediately clear that I should choose to pursue any particular claims-making strategy or combination of strategies over others. In theory, I could file a legal claim, lobby, protest, or take many other actions. Which of those actions I undertaken will be influenced by a number of factors (most of which are summarized as political and legal opportunity), but the occurrence of a grievance will not be a direct influence.

entitlement, and we may miss the impact of information about prior judicial decisions as well.

An example from South Africa helps to illustrate these limitations. Between 1996 and 2016, more than 200 social rights cases were heard (across the High Courts, the Supreme Court, and the Constitutional Court). Around 60% of those cases advanced housing rights claims, just under 20% pertained to the right to education, about 8% each for social security and health, and 4% dealt with the right to water. To the extent that material grievances determine mobilization, we should expect the distribution of claims to match the degree of need. The 2014 Afrobarometer survey provide a rough measure of perceived need through a question asking respondents to select the most important problems facing the country (respondents may identify more than one problem). About 27% of respondents mentioned housing, while 22% pointed to education, and 13% singled out both health and water. Numerous reports put together by NGOs as well as scholarly analyses confirm widespread difficulties in each of these issue areas (e.g., Black Sash 2004; Mayosi and Benatar 2014; Pieterse 2014; Fish Hodgson and Khumalo 2016; Dugard et al. 2018; Khunou 2018). Even if grievances related to housing significantly outnumbered those related to any other social right, the question of why legal claims rather than protests or other forms of claims-making would remain.

Building on Erica Simmons' insight about the key role of social meanings in grievance formation (2014, 2016), my constructivist account of legal mobilization seeks to remedy the limitations of grievance-based accounts of mobilization. In doing so, it draws out the two-stage process by which legal grievances are socially

constructed. First, a condition must be understood as objectionable, as a grievance, and second, that objectionable thing must be understood as (potentially) legal in nature or (potentially) claimable in the legal sphere. The argument here is not that every person who envisions a problem in his or her life as legal in nature will then proceed to initiate a court case. We know that most of the time people simply deal with or "lump" their problems (Levine and Preston 1970; Felstiner 1974; Engel 2010). However, in the aggregate, these beliefs will be associated with legal mobilization. Table 2.1 details the differences between extant grievance-based explanations for mobilization and the way grievances factor into my constructivist account of legal mobilization. The left-hand column summarizes extant explanations, while the right-hand column offers the constructivist corrective.

Table 2.1. Accounting for Grievances and Legal Needs

Existing Accounts: Grievances, Legal Needs	The Social Construction of Legal Grievances
The greater the amount or severity of material need, the greater the claims-making. [Material existence of grievance]	A two-stage process of legal grievance formation, where each stage is the manifestation of a belief, allows for legal mobilization: (1) Something comes to be understood as objectionable. (2) That objectionable thing comes to be understood as (potentially) legal in nature or as (potentially) claimable in the legal sphere. However, accounting for legal grievance formation is not sufficient to explain legal mobilization. Both legal opportunity and judicial behavior must also be considered.
The meanings ascribed to material conditions shape the social construction of grievances, resulting in certain issues catalyzing mobilization and not others. [Meaning of grievances]	
Knowledge of rights and the law leads to greater instances of claims-making. [Knowledge of grievances]	

The constructivist account of legal mobilization, while focused more on the understandings actors have about the nature of the law and its place with respect to the relationship between citizens and the state, does not deny the importance of material grievances. It does, however, emphasize the importance of the meanings ascribed to the goods or services found lacking. Although individuals face challenges in realizing their social rights around the world, the difficulties faced are by no means uniform or understood in a uniform way. For example, issues related to access to housing take on special significance in South Africa given the history of apartheid. Present-day public housing developments located far from city centers are challenged not simply as inadequate but as the manifestation of spatial apartheid. This understanding, the ideational component of the grievance, becomes central to the legal claim advanced. It is not simply that many people are without adequate housing (though they are) and they advance claims related to their constitutional right to have access to housing (though some do), but that the lack of adequate housing is particularly meaningful considering the legacy of apartheid. In the constructivist account, the analysis hinges on the way potential claimants and legal elites consider this ideational component of the grievance relative to the duties and predilections of the state.

2. Opportunity, Institutional Design, and Support Structures

Law and society scholars have adapted the political opportunity structure framework from social movement studies (McAdam 1982; Tarrow 1994; McAdam, Tarrow, and Tilly 2001) to focus more specifically on the conditions under which social actors are able to mobilize law to make demands (e.g., Hilson 2002; Andersen 2005; Wilson and Rodríguez Cordero 2006; Vanhala 2012; Tam 2013). Legal

opportunity encompasses both institutional and contingent factors. Lisa Vanhala (2018a: 112) holds that while more systematic comparative study is needed, "at least three factors matter across jurisdictions and across policy areas: legal stock, standing rules, and rules on costs." Legal stock refers to the existing body of law and delimits the kinds of legal arguments that can be advanced, while standing rules determine who can bring claims before the courts, and rules on cost set out the amount of risk litigants undertake when opening up a court case. In addition to these factors that limit both access to the courts and the types of claims that can formally (or reasonably) be advanced, scholars have also highlighted the importance of judicial receptivity and the social and material resources available to claimants (e.g., Epp 1998; Hilson 2002; Andersen 2005; Pedriana 2006; Keck 2009; Evans Case and Givens 2010; Vanhala 2011). Cases do not simply come before judges out of nowhere, and navigating justice systems can be notoriously difficult (Galanter 1974). A support structure of "rights advocacy organizations, supportive lawyers, and sources of financing" facilitates litigation by helping to alleviate the knowledge-based and material barriers to access to the legal system (Epp 1998: 23; Epp 2009; Teles 2010; Tam 2013; Botero 2015).

The Colombian case demonstrates how different features of legal opportunity combine, where the existence of certain features mitigates the need for others.[33] With the *acción de tutela* procedure, an individual can initiate a legal case that advances a rights claim against a public or private actor without having to pay any fees whatsoever, as the claim can be delivered verbally and does not require the use of a

[33] See Wilson (2009) for a presentation of this argument through a comparative study of Colombia and Costa Rica.

lawyer. Importantly, the claimant does not technically need to articulate a legal argument about their rights; the judge of first instance must make sense of the situation described by the claimant and determine whether or not a constitutional rights violation occurred. The formal rules regarding the tutela procedure – particularly those on standing, procedure, and costs – enable legal mobilization without the need for a support structure.

Yet, the existence of an opportunity for legal mobilization, whether on the basis of liberal standing requirements or something else, is not sufficient for mobilization to actually occur. As Doug McAdam, Sidney Tarrow, and Charles Tilly (2001: 43) hold, "no opportunity, however objectively open, will invite mobilization unless it is a) visible to potential challengers and b) perceived as an opportunity." Still, many studies of mobilization have focused – perhaps to a fault – on the environment in which mobilization decisions are made, rather than on the decisions themselves and the agents who made those decisions.[34] Lisa Vanhala (2012: 525) argues that, in contrast to "the static, snapshot image[s] of 'structure'" prevalent in many opportunity-based theories, "movement activists are not passive actors simply responding to externally-imposed legal opportunities but instead play a role in creating their own legal opportunities" (see also Hilbink 2012). In fact, activists have been shown to advance specific legal cases to test opportunity, in addition to providing education and training services, thus deepening the future support structure and potentially convincing judges of new ways of understanding legal issues (Hollis-Brusky 2015; González-Ocantos 2016; J. Gallagher 2017). Certainly, the concept is

[34] See Jasper (2004) for more on this critique.

flexible enough in theory to take better account of the choices individuals, movements, and movement organizations make over time, how those choices are a response to a specific context, and how those choices, in turn, influence that context down the line.

While discussions of political opportunity also incorporate notions of "threats" (e.g., McAdam, Tarrow, and Tilly 2001; Einwohner 2006; Maher 2010), studies of legal opportunity have focused exclusively on the opportunities side of the equation. Yet, in practice, actors may engage with the legal sphere not because they envision a successful outcome but because they must, because a case has been opened against them (a situation that Zemans (1983) terms "mandatory legal mobilization") or because there is a legal threat to their identity, possessions, or livelihood. In these instances, the existence of threats is more consequential than whatever opportunities exist or do not exist in the formal legal sphere. For example, all evictions in South Africa are technically a matter of mandatory legal mobilization, as both constitutional and legislative provisions require that evictions proceed only after a court order (though this does not mean that evictions will always be litigated or that the proper procedure will always be followed). Significantly, an issue may be understood to fall within the scope of mandatory legal mobilization, even if it this is not technically true. An example of this situation is healthcare in Colombia. As will be detailed in Chapter 5, Colombian citizens have come to understand the filing of legal claims as central to their ability to access healthcare services, though the Constitutional Court has clearly stated that the filing of tutela claims cannot be a formal requirement for accessing healthcare (C-950/07).

My claim here is not that the legal opportunity argument is necessarily wrong but that it is incomplete. Namely, the existence of widespread legal mobilization in Colombia through the tutela procedure in the absence of a clear support structure suggests the limited applicability of some of the constituent parts of this argument. My constructivist approach seeks to deepen the focus on agency, taking opportunity and resources not as static, but as ever-changing features, and not as determinative but as permissive conditions. Importantly, with respect to resources, threats, and opportunity, perceptions are key, a proposition increasingly recognized by scholars, but one that they do not always adopt. In short, an opportunity that is not perceived cannot be acted upon, and resources that are not understood as potentially available cannot be made use of, regardless of their actual availability. Without discounting the importance of "real" states (non-existent support structures cannot be made material simply by wishing), the constructivist approach seeks to account for the necessary role of individual beliefs and actions within the context of dynamic resources and opportunities. Table 2.2 summarizes expectations based on perceptions of legal opportunity, legal threat, and support structures, situating existing explanations relative to the constructivist corrective.

Table 2.2. Accounting for Perceptions of Opportunity, Threat, and Support

Existing Accounts: Legal Opportunity, Support Structures	Combinations of Perceived Opportunity, Threat, and Support
Where the judicial system is "open" to potential claimants – due to "stock, standing, rules on costs" and/or judicial receptivity – the ability of individuals or groups to advance rights claims in the courts is greater.	Combinations of perceived legal opportunity, threat, and support serve as permissive conditions for legal mobilization. A particularly "open" opportunity structure can mitigate the need for a support structure, and a robust support structure can overcome a

[Legal opportunity] Where support structures exist, the proclivity and ability of individuals or groups to advance rights claims in the courts is greater. The key features, organization, or role of the support structure may vary: • Existence of rights advocacy organizations, supportive lawyers, and financing (Epp 1998) • Combination of distinct types of support organizations (J. Gallagher 2017) • Provision of education and training in community-building efforts (Hollis-Brusky 2015; Gónzalez-Ocantos 2016) [Support structure]	relatively "closed" opportunity structure. Legal threats may prompt mobilization even where neither legal opportunity structures nor support structures would indicate. However, accounting for perceptions of legal opportunity, threat, and support is not sufficient to explain legal mobilization. Both the formation of legal grievances and judicial behavior must also be part of the explanation.

In short, the constructivist account of legal mobilization holds that combinations of perceived legal opportunity, threat, and support serve as permissive conditions for – rather than determinants of – legal mobilization. None of these features are necessary in and of themselves for legal mobilization. For example, a particularly "open" opportunity structure can mitigate the need for a support structure, or a robust support structure can overcome a relatively "closed" opportunity structure. Further, legal threats may prompt – or require – mobilization through the courts even where neither legal opportunity nor support structures would indicate. Finally, the constructivist account also acknowledges both the prior process of the social construction of legal grievances, which then feed into opportunities, threats, and

support, as well as the subsequent process of judicial decision-making (as well as the possibility of feedback or recursivity between all three of these stages).

3. Judicial Behavior

In general terms, theories about judicial behavior consider the preferences of judges (attitudinal approaches), their institutional context (institutional approaches), the broader political incentive structure (separation of powers approaches), and/or the demands of particular audiences (reputational approaches).[35] In an overview of judicial behavior, James Gibson (1983: 9) summarizes judicial decision-making as "a function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." But which factors hold the most causal weight, how are judicial preferences constructed, and what influences the ways in which judges seek to realize those preferences? Each of these dominant approaches to judicial behavior stakes out a different position on these questions.[36]

The attitudinal approach to judicial behavior has historically predominated in the United States context, particularly with respect to the Supreme Court (e.g., Rohde and Spaeth 1976; Segal and Spaeth 1994, 2002; Spaeth and Segal 1999). Attitudinal explanations suggest that judges attempt to implement their ideological and policy preferences when deciding cases. The argument is not that judges ignore the law or the particular facts of the case in question, but that within these constraints, the preferences of judges significantly affect which decision is ultimately taken. In these

[35] Additionally, legalistic accounts focus on the theoretic judicial role, where apolitical judges simply apply the law to the particular set of facts in question. Because these accounts have been largely discounted by political science and law and society studies of judicial politics, I do not detail them here.
[36] Questions of judicial empowerment are beyond the scope of this project. See Hirschl (2000), Ginsburg (2003), Finkel (2008), and Brinks and Blass (2017) among others, on these debates.

models, judicial preferences are situated at the individual level, and judges act on their individual preferences sincerely, rather than strategically. Scholars, however, have pointed to the importance of unique institutional features, such as life tenure, formal judicial independence, and decisional discretion (rather than mandatory jurisdiction), in offering United States Supreme Court justices leeway in ideological decision-making (Rodríguez-Raga 2011). These institutional features do not necessarily travel to either the lower courts in the United States or to most other countries. Tom Ginsburg (2010: 94) puts it bluntly: "the attitudinal model is unlikely to work as a basis for comparative research."[37]

Reflecting these concerns, a second set of explanations focuses less on the attitudes or preferences of judges as such and more on the institutional arrangements in which judges make decisions. According to this line of scholarship, institutions "mediate between preferences and outcomes by affecting the justices' beliefs about the consequences of their actions" (Maltzman, Spriggs, and Wahlbeck 1999: 14). Lisa Hilbink (2007: 34, emphasis in original) highlights the importance of both "institutional *structure*, [or] the formal rules that determine the relationship of judges to each other and to the other branches of the state, and thereby offer incentives and disincentives for different kinds of behavior," and "institutional *ideology*, [or] the understanding of the social role of the institution into which judges are socialized, the content of which is maintained through formal sanctions and informal norms within the institution." In other words, in addition to formal features of institutions, social and

[37] See Roux (2015) for a similar, though more nuanced, position.

cultural factors may affect the ways in which preferences are constructed, selected, or mediated within judicial institutions.

In institutional accounts, judges may act strategically or sincerely on their preferences, but the key is that their preferences and their understandings of how best to realize those preferences are conditioned by the institutional arrangement in which judges find themselves (Knight and Epstein 1998). Formal institutional rules may constrain judicial behavior through, for example, the construction of precedent (Knight and Epstein 1998) or what are known as "jurisprudential regimes" (Richards and Kritzer 2002). Further, the appointment and tenure process,[38] as well as rules regarding independence,[39] discretion over workload and case selection, and even procedure may also influence the range of decisions open to judges and their proclivity to take particular decisions.

Informal features of institutions may also influence judicial decision-making. Here, the concept of the judicial role orientation or conception is particularly informative. Woodford Howard Jr. (1977: 916) defines role orientations as "normative expectations shared by judges and related actors regarding how a given judicial office should be performed." The focus is not on the issue-specific preferences of individual judges, but on a more general sense of what judges understand to be appropriate

[38] See Ramseyer and Rasmusen (2001).

[39] Judicial independence can be separated into a negative and a positive component (Hilbink 2012). Negative judicial independence refers to the institutionalized recognition that the executive and legislative branches of government must refrain from interfering with judicial decision-making, whereas positive independence refers to behavior, nothing whether or not judges act as if they are independent from the other branches of government. Positive judicial independence can be more strongly stated as *judicial assertiveness*, which, according to Kapiszewski (2012: 11), occurs when courts challenge powerful actors in their rulings, issuing decisions "that seek to nullify, restrict, or change" the behavior of those actors. Independence is an important feature of both institutional and separation-of-powers accounts.

behavior. Role conceptions may sit at the level of the individual, but they also may be the product of socialization within the courts or selection into the courts (Hilbink 2007, 2012; Nunes 2010a, b; Couso and Hilbink 2011; Ingram 2012). For instance, Hilbink (2007) illustrates the ways in which these mechanisms combined in Chile around the time of democratic transition, forming a judiciary that, while formally independent, conceived of its role as aggressively "apolitical," rendering it a largely conservative, deferential, status quo oriented force, even after the country's return to democracy. As such, both formal and informal institutional rules may affect judicial behavior.

A third set of explanations, referred to as separation-of-powers accounts, emphasize the relative position of courts within the political regime and the incentives or constraints implied by that position. The main difference between these approaches and institutional ones is the primary focus not on the independent impact of institutions on judicial behavior but on power considerations and jockeying between the branches of government. Within these accounts, both politicians and judges are thought to act strategically, in contrast to the assumption of sincere motivations in attitudinal approaches. Exemplifying the separation-of-powers approach, John Ferejohn and Barry Weingast (1992: 263) hold, "if a court's decision fails to reflect external political reality, it cannot stand for long. In this sense, interpretation is inevitably political whether consciously so or not." The core claims are that judges want their decisions to stand, that judicial decisions are political matters, and that political matters are never fully settled. To the extent a judicial decision accords with the desires of dominant political actors, it will stand, and the to the extent it does not,

it will be challenged and potentially overturned. Following this logic, judges will attempt to decide cases with the preferences of the legislature (and the executive) in mind, rendering decisions as close to their optimal choice that will not be overturned or circumvented through the legislative process (Gely and Spiller 1990, 1992).

The standard separation-of-powers argument would expect strategic pro-government decision-making the majority of the time, or at least the majority of the time on matters important to the government, even if judges sincerely hold opposed preferences (Iaryczower, Spiller, and Tommasi 2002).[40] Whether these decisions are "rights-protective" or not will depend on the position of the executive and legislature. Pro-government decision-making will not always rule the day, however. As Gretchen Helmke (2005) shows, judges may "strategically defect," also in spite of any sincere preferences they hold, in an effort to signal allegiance to an incoming government and distance themselves from the failing sitting government. Without considering the broader political context, according to these accounts, conclusions about judicial behavior will be misguided.

A fourth approach emphasizes the importance of specific audiences in influencing judicial behavior. Scholars have pointed to the social incentives implied by relationships between judges, courts, and various audiences (Baum 1994, 2008; Woods 2008; Garoupa and Ginsburg 2015; Hollis-Brusky 2015). For Nuno Garoupa and Tom Ginsburg (2015: 2), "courts need to establish some type of reputation with their audiences in order to facilitate compliance, influence and legitimacy," and

[40] An approach based on role conceptions would have similar observable implications here, assuming the judicial role in question involved a strong position on the appropriateness of judicial deference or restraint.

individual judges must also be attuned to their reputations, as their personal reputation may affect their professional prospects as well as their legacies. Lawrence Baum (2008) highlights the importance of audiences organized around a social identity, ideology, or interest. For example, a conservative male judge may not be overly concerned with his reputation among progressive feminist groups, though he may be particularly aggrieved by critiques from conservative social groups. These reputational concerns are not only important in encouraging judges to maintain steadfast in their ideological positions (or to moderate or otherwise change their ideological commitments over time), but also in helping them to rank preferences and even identify the stakes of a particular case or their view on the relevant issues (see also Hollis-Brusky 2015). Patricia Woods (2008) details a similar theory based on the notion of "judicial community," though in her account, judges and lawyers who comprise the community influence one another through the spread of ideas and arguments or "legal norms generation," not as the result of reputational pressures. These explanations of judicial behavior share an emphasis on the social context of judges and courts and their audiences.

All four of these explanations of judicial behavior focus on what judges do once a case comes before them. However, as Patricia Woods and Lisa Hilbink (2009: 746) observe, "courts cannot shape, influence, or constrain political outcomes unless judges are able to assert themselves in politically salient cases." While this is true, the limits on courts go even further. Even where judges have control over their docket –

except in rare circumstances[41] – judges are formally bound by the cases that come before them (and often formally or informally bound by the particular pleadings of those cases that come before them). In other words, cases do not come before judges out of nowhere or simply as a result of the preferences of judges, whether sincere or strategic. Further, implicit in many of the aforementioned accounts is the notion that potential claimants recognize the problems in their lives as grievances (that is, not only as something unfortunate, but as something that is understood to be something objectionable), and specifically as legal grievances, or grievances that should be aired in the legal sphere. Even after potential claimants have conceptualized an issue as legal in nature, they must then bring their claim to the courts, a process rife with challenges.

Beliefs course through all of these explanations of judicial behavior, whether explicitly, as is the case with judicial attitudes, role conceptions, and communities, or implicitly, as is the case with perceptions of independence or social and political pressure – factors key to determinations of strategic judicial decision-making. The belief-based account of legal mobilization foregrounds the role of beliefs in driving judicial behavior, though it remains largely agnostic about the extent to which institutional factors, strategic political factors, and social factors influence decision-making in any given situation. In short, the account holds that judges must decide cases in such a way to promote – or at least not inhibit – future claims-making, whatever the reason for decision-making. Further, the constructivist account seeks to

[41] Consider the investigatory and initiatory powers of the Indian Supreme Court, as well as the possibility the exercise of *ex mero motu* powers in other jurisdictions.

integrate the complementary role of the social construction of legal grievances, legal opportunity, threats, and support, and judicial behavior in explaining legal mobilization rather than bracketing the question of the kinds of cases that come before the courts. Below, Table 2.3 summarizes four propositions related to the conditions under which judges may be likely to respond positively to rights claims, based on the four explanations of judicial behavior discussed in this section, and contextualizes these propositions relative to my constructivist account for legal mobilization.

Table 2.3. Accounting for Judicial Behavior

<table>
<tr><th>Existing Accounts: Judicial Behavior</th><th>Beliefs and Judicial Decision-Making</th></tr>
<tr><td>Judges who hold “sincere ideological and policy preferences” that encompass a rights-protective stance by the judiciary are likely to facilitate legal mobilization by accepting rights claims and deciding those cases in ways that promote further rights-claiming.

[Attitudinal explanations]</td><td rowspan="3">Under different conditions, judges may decide cases in rights-recognizing or rights-expanding ways. Such rights-protective judicial behavior may hinge on:

• Strategic responses to political or institutional incentives,
• Understandings of the appropriate judicial role,
• Attempts to appease specific audiences, and/or
• Shared understandings of issues cultivated through judicial communities.

The constructivist account does not privilege any one of these explanations for judicial behavior and is consistent with one or more operating in a given context at a given time.

However, accounting for judicial behavior is not sufficient to explain legal mobilization. Both the formation of legal grievances and perceptions of legal</td></tr>
<tr><td>Judges operating in a sufficiently independent institutional context will be likely to facilitate legal mobilization by accepting rights claims and deciding those cases in ways that promote further rights-claiming where precedent and jurisprudential regimes encourage such decision-making and/or where judicial role conceptions do so.

[Institutional explanations]</td></tr>
<tr><td>The political environment will influence judicial decision-making. In the context of a strong executive and aligned legislature, judges engage in strategic pro-government decision-making (whether that is rights-protective or not</td></tr>
</table>

depends on the stance of the executive). Where political fragmentation occurs, judges will "strategically defect," rendering decisions that cut against the current (soon to be outgoing) government. [Separation-of-powers explanations]	opportunity, threat, and support also must be considered.
Where judicial audiences or communities that promote rights-protective stances exist, judges are likely to facilitate legal mobilization by accepting rights claims and deciding those cases in ways that promote further rights-claiming. [Audience-based explanations]	

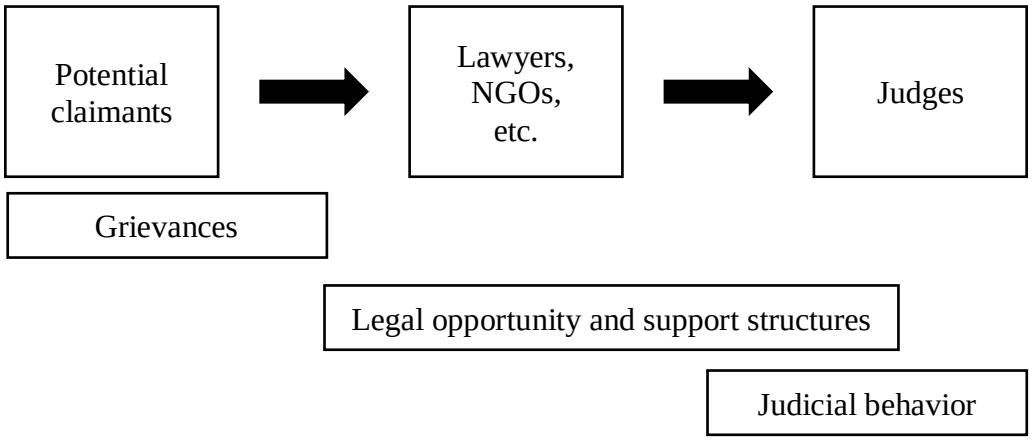
4. Tying it All Together: The Constructivist Account of Legal Mobilization

In the preceding, I demonstrated how separately the existing explanations for legal mobilization based on grievances, opportunity, and judicial behavior offer at best a partial understanding of the process of legal mobilization. In other words, they are individually insufficient to explain legal mobilization. Figure 2.1 (below) situates existing explanations for legal mobilization relative to the part of the process of legal mobilization (and the actors involved) that each helps to explain. Figure 2.1 depicts a stylized representation of legal mobilization, where when faced with some kind of legal problem, potential claimants decide to reach out to lawyers or civil society actors, who then facilitate the filing of a legal case, which then comes before a judge.[42]

[42] Of course, some of the time the directional arrows might be reversed or run in multiple directions, for instance, as lawyers or NGOs can initiate a case themselves, seeking out claimants for a test case or to fill out a class, or as potential claimants sidestep lawyers, NGOs, or other intermediaries and present

Grievance-based explanations help to explain who might be a potential claimant. Opportunity and support-based explanations offer insight into the role of intermediaries, such as lawyers and NGOs, in facilitating claims-making, as well as why some of the time particular judges might be more or less receptive to rights claims. Finally, judicial behavior-based explanations explore how and why judges render the decisions they do.

Figure 2.1. Stylized Representation of Legal Mobilization



As noted earlier, the constructivist account of mobilization seeks to remedy two gaps in these existing explanations for legal mobilization. First, it explicitly recognizes the crucial role of beliefs underlying the process of legal mobilization. Beliefs about the law, rights, and the relationship between the state and its citizens influence which issues are understood as legally grievable. These beliefs also condition how actors perceive both opportunities and threats in the legal sphere, as well as how judges decide rights cases. Second, in adopting a perspective both "from

their claims directly to judges (decidedly more common in Colombia with the tutela procedure compared to elsewhere).

above" and "from below," it underscores the interplay between different kinds of actors in social context. How potential claimants view their rights and the legal system is not independent from how judges and intermediaries, such as lawyers or NGOs, do. A fully-fledged explanation of legal mobilization must be able to account for the conditions under which potential claimants might want to advance rights claims, the conditions under which they are able to make such claims, and the conditions under which judges are likely to respond positively to such claims. Importantly, it must also recognize that these three sets of conditions influence one another. The constructivist account for legal mobilization offers such an explanation.

In the discussion above, Tables 2.1, 2.2, and 2.3 presented the core components of existing explanations based on grievances, opportunity and support, and judicial behavior next to the relevant segment of the constructivist account for mobilization. Table 2.4 offers the three constructivist correctives to existing theory. Rather than simply examining the extent of material need, the constructivist account focuses on the social construction of legal grievances – examining not only how certain issues come to be understood as particularly meaningful or grievable, but also why certain issues come to be viewed as legal in nature or legally claimable. The constructivist account supplements existing explanations based on legal opportunity and support structures by drawing on the notion of threats, which featured prominently in the political opportunity structure theory from which the concept of legal opportunity was developed. It also acknowledges how different combinations of opportunity, threat, and support can combine to prompt similar outcomes. Finally, the constructivist account integrates judicial behavior into demand-side explanations of

legal mobilization. It does not claim that any one explanation of judicial behavior – whether based on perceptions of strategic incentives, role conceptions, or audiences and reputation – always or necessarily best explains rights-protective decisions.

Table 2.4. The Constructivist Account of Legal Mobilization

A two-stage process of legal grievance formation, where each stage is the manifestation of a belief, allows for legal mobilization: (1) Something comes to be understood as objectionable. (2) That objectionable thing comes to be understood as (potentially) legal in nature or as (potentially) claimable in the legal sphere.
Combinations of perceived legal opportunity, threat, and support serve as permissive conditions for legal mobilization. A particularly "open" opportunity structure can mitigate the need for a support structure, and a robust support structure can overcome a relatively "closed" opportunity structure. Legal threats may prompt mobilization even where neither legal opportunity structures nor support structures would indicate.
Under different conditions, judges may decide cases in rights-recognizing or rights-expanding ways. Such rights-protective judicial behavior may hinge on: • Strategic responses to political or institutional incentives, • Understandings of the appropriate judicial role, • Attempts to appease specific audiences, and/or • Shared understandings of issues cultivated through judicial communities. The constructivist account does not privilege any one of these explanations for judicial behavior and is consistent with one or more operating in a given context at a given time.

While convenient to display these three revised explanations as if distinct from one another, ultimately each one affects the others. For instance, judicial decision-making may appear to come at the end of the process of legal mobilization,[43] but prior judicial decisions may encourage potential claimants to understand problems through

[43] However, see studies on impact, for instance, Keck and Strother (2016), for considerations of the lives of judicial decisions outside the courtroom.

legal or rights-based frames (or not to do so) and judicial decisions come to comprise part of legal opportunity (namely, judicial receptivity). Likewise, a support structure may feature prominently in the social construction of legal grievances, as NGOs reach out to potential claimants, running rights education workshops and/or offering legal aid services on some issues but not others (implicitly suggesting that the issues for which they offer services are more legally grievable). A support structure can also influence the ways in which judges understand their preferences or roles, and exposure to repeated claims-making about a specific grievance – whether propelled by a support structure or not – may encourage judges to rethink their opinions on that issue. My constructivist account of legal mobilization provides the tools to examine how these factors are related, as well as how they influence each other over time.

Finally, it should be noted that the goal is not to predict when exactly individuals will turn to law and when they will not. Nor is the goal to explain why any one individual turns to law while others do not. Instead, I seek to identify and explore broad social patterns related to legal claims-making. I turn now to a discussion of the historical changes that led to the possibility of advancing legal claims to social rights in Colombia and South Africa.

CHAPTER 3

THE HISTORICAL DEVELOPMENT OF CONSTITUTIONAL LAW

Historical accounts trace the development of legal systems to the changing nature of the relationships within groups. Formalized law derives from the informal rules fashioned to create or maintain social relationships, and this formalized law governs not just horizontal relationships between equals but also vertical relationships between rulers and those they rule. In other words, law as such emerged to regulate the behavior of members of a political community, limiting the relative power of leaders through a system that exchanged protection (from internal repression and external threat) for resources in the form of taxes (e.g., Tilly 1990) and developing standards to support economic growth (e.g., North and Weingast 1989). Others argue that rulers consent to constitutional regulation in order to avoid revolutionary overthrow (e.g., Acemoglu and Robinson 2006) or as a response to specific electoral pressure (e.g., Ginsburg 2003; Hirschl 2004). In none of these conceptions did the state need to ensure, through universal legal principles or "rights," the basic welfare of its citizens. However, over time, understandings about the appropriate relationship between state and citizen have changed.

Specifically, the fourth wave of constitutionalism (Van Cott 2000) marks a significant change in the thinking underlying the relationship between the law, the state, and the citizenry. Namely, this form of constitutionalism, which was prominent in the 1980s and 1990s, includes an expansive recognition of rights, particularly social

rights, and, often, broad review powers for the judiciary.[44] Scholars have termed this model "social constitutionalism" (Brinks and Forbath 2014; Angel-Cabo and Lovera 2015).[45] In this conception, constitutional law is understood as an appropriate tool to address social ills, at least under certain conditions. At times, this shift in the function of constitutional law has been accompanied by the creation of mechanisms to allow citizens to claim their rights with relative ease.

The rights implicated in social constitutionalism encompass not only the most immediate provisions necessary to make participation in political and social life theoretically possible (e.g., the right to assemble or the right to vote), but also those provisions necessary to make participation in social and political life actually feasible (e.g., access to healthcare, housing, and education). In many ways, social constitutionalism may be thought of as implying formal social citizenship in T.H. Marshall's terms. Marshall (1950: 11) defines social citizenship as "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[46] Here, social citizenship is described in relation to social and economic rights (or at least the right to participate in social and economic life – a minimum standard). The extent to which rights recognitions lead to changes in the social structure is debatable;[47] however, it is important to note that this

[44] None of this is to say that the recognition of social rights or declarations of state attention to citizen needs were necessarily absent before this period.
[45] Others have referred to these changes as new constitutionalism (Hilbink 2008) or social rights constitutionalism (Brinks and Gauri 2014; Brinks, Gauri, and Shen 2015).
[46] See also Powell's (2002) interesting discussion of Marshall's social citizenship and subsequent works on the topic.
[47] Marshall proclaims, "National justice and a law common to all must inevitably weaken and eventually destroy class justices, and personal freedom, as a universal birthright, must drive our

understanding of citizenship does not necessarily entail full equality – it simply poses limits on inequality. Formal social citizenship suggests only equality of opportunity in social and economic realms, while substantive social citizenship might go a step further, requiring some basic level of social welfare provision, though even substantive social citizenship does not imply complete equality.

In this chapter and the one that follows, I trace the development of the idea that law can and should be responsive to the needs of all citizens, examining the macro-level process of transnational diffusion of ideas about constitutional law and rights, the localized processes by which particular ideas took hold at particular times, and the political contestation that followed the emergence of social constitutionalism. This chapter focuses specifically on the historical development of constitutional law in Colombia and South Africa, while the next will consider more explicitly why and how social constitutionalism took hold in each country. In detailing these processes, I draw on semi-structured elite interviews, archival documents covering the debates at each of the national constituent assemblies, and secondary sources.

The paths to social constitutionalism differed substantially in Colombia and South Africa. While Colombia featured a long history of constitutionalism and judicial review, the South African state, on the other hand, was long-characterized by parliamentary supremacy. Despite these differences, the political and legal institutions of both countries remained largely inaccessible to much of the population until the reforms of the early 1990s. As each country faced deepening political crises and calls

serfdom" (1950: 30). Later scholars do not necessarily share his optimism, pointing to the ways in which seemingly national, common, or equal law continues to benefit the already privileged at the expense of the poor, racial minorities, and others (e.g., Motta Ferraz 2011).

for the re-founding of the state in the late 1980s, would-be reformers turned to international legal models, ultimately deciding to adopt social constitutionalism. In short, domestic social pressure in each country accounts for the timing and form of constitutional change, while transnational ideas account for the content of the change.

A Brief History of Colombian Constitutional Law

"Colombianos, las armas os han dado independencia. Las leyes os darán libertad."[48]

- Francisco de Paula Santander (inscription on the façade of the Palacio de Justicia)

This section describes the growth of social constitutionalism in Colombia, dividing Colombian constitutional history into four parts: early constitutional history (pre-1886), the era of the Constitution of 1886 (1886 to 1970), crisis and failed reforms (1970s and 1980s) and the 1991 *Asamblea Nacional Constituyente*.

1. Early Colombian Constitutional History

In 1821, delegates at the Congress of Cúcuta drafted Colombia's first national constitution, following years of regional constitutional orders.[49] This constitution is alternately known as the Constitution of 1821, the Constitution of Cúcuta, or the Constitution of Gran Colombia. A commonly told story features the independence-fighter and then-vice president Francisco de Paula Santander opening the constitutional text and laying it out over a sword, stating, "The swords of the liberators must now be subject to the laws of the republic."[50] Notably, this constitution called for the progressive emancipation of slaves. While the constitution remained a far cry from

[48] "Colombians, guns have given you independence. Laws will give you freedom."
[49] See, for instance, the Constitution of Socorro of 1810 and the Constitution of Cundinamarca of 1811.
[50] See *El Tiempo* (29 March 1992). President Simón Bolívar y Palacios was out of the country during this time, continuing to fight battles of independence against Spain throughout Latin America.

implementing social rights and protections, the Constitution of 1821 does mark the beginning of the intersection of national politics and constitutional law.[51]

From 1821 to 1886, the country had seven constitutions, each marking intermediate points in conflicts between conservative and liberal political actors, where the victorious side was able to draft a guiding document to consolidate its power.[52] None of these constitutions lasted more than 23 years. The longest lasting of these, the 1863 Constitution, which also known as the Constitution of Rionegro, was implemented by a Liberal government. The Constitution featured a sizeable bill of rights and introduced a federal governing arrangement, and is said to have been dismissed by Víctor Hugo as being "a constitution fit for angels," rather than one fit for Colombia (Cepeda 2004: 532).[53] The Constitution of 1863 abolished the death penalty, mandated the separation of church and state, and recognized many individual rights.

2. The Conservative Constitution of 1886 and Early Reforms[54]

Following yet another internal armed conflict, which culminated in the Battle of Humareda, Rafael Núñez came to power. In that moment, he is said to have declared, "The Constitution of 1863 has died."[55] A constituent assembly comprised

[51] For more on the early history of constitutionalism in Colombia, see Restrepo Piedrahita (1993).
[52] These constitutions include went into force in 1821, 1832, 1843, 1853, 1858, 1863, and 1886.
[53] Juan Carlos Henao (2013), former magistrate of the Constitutional Court and rector of the Universidad Externado del Colombia, points out that historians have challenged whether or not Hugo actually said this, and importantly, notes that whether or not the quote is true, the constitution in fact "expressed the intellectual aspirations and convictions of people of flesh and blood, not angels, people who believed in freedom of conscience, in the free development of the personality, of the balance of powers, of freedom of expression and information."
[54] For thorough histories of the 1886 constitution, see Valencia Villa (1987) and Cajas (2015) (both volumes).
[55] Or more colorfully, as Henao (2013) attests, "La Constitución de Rionegro ha dejado de existir, sus páginas manchadas han sido quemadas entre las llamas de la Humareda." (The Constitution of Rionegro (1863) has ceased to exist. Its pages have been burned in the flames of Humareda.)

primarily of Conservatives drafted a new constitution, one that affirmed the power of the Catholic Church, defined a centralized state, and rolled back many of the liberal reforms of the 1863 Constitution. As Julieta Lemaitre notes, throughout the twentieth century, in Colombia, "there has been a consistent liberal and a consistent conservative identity. And the Constitution [of 1886] has been a symbol of this polarization."[56]

Judicial review in Colombia began with the 1886 Constitution, which empowered the Supreme Court to examine the constitutionality of legislative bills under certain circumstances. A 1910 reform introduced the public act of unconstitutionality, which allowed citizens to challenge the constitutionality of any law before the Supreme Court (Cepeda 2004: 538).[57] The reform in 1910 is just one of the 74 reforms to the constitution in its 105-year existence. These reforms began to "introduce a series of guarantees, particularly with the reform of 1936, which brought social rights into the Constitution … [including the idea of] the social function of property and the first land reform law in Colombia."[58] The 1936 reforms, which included substantial changes in matters of agriculture, education, and taxes, and allowed the state to play a more active role in the economy, came at the initiative of Liberal president Alfonso López Pumarejo. Hernando Herrera traces the ideas behind these reform efforts to "the influence of the German [Weimar] Constitution and the Mexican Constitution of Querétaro [of 1917]."[59] Lemaitre points to broader regional

[56] Interview 160906_0020.
[57] For more on the 1910 reforms (as well as a general discussion of the development of administrative control in Colombia) see Malagón (2012).
[58] Interview160920_0028.
[59] Interview 160927_.

trends, arguing that Liberal efforts "to push through modernizing constitutional reforms … echoes the wider Latin American aspiration to modernity and development in the '50s and '60s. The 1936 reforms are part of social reforms all over the world, which include the New Deal. These are Western trends, and not particularly Colombian."[60]

Subsequent reforms in the 1950s recognized the right of women to vote (1954) and instituted a power sharing agreement between the Conservative and Liberal parties called the National Front (1957). This power sharing agreement was meant to stymie the continued expression of bipartisan violence, which had been a reoccurring feature of Colombian politics since the late 19th century. The 1957 reform also brought into effect a system of "co-option" on the Supreme Court, which meant that the Court would nominate new justices internally, as long as political balance was maintained between the two major parties (Cepeda 2004: 540). Amendments in 1968 paved the way for a transition out of the National Front and into competitive elections, in addition to modifying congressional rules on a variety of matters. The National Front came to an official end in 1974, when both the Conservative and Liberal Party ran competitive candidates for president.

3. Continued Violence and Failed Reforms

Institutional inadequacies became abundantly clear late 1970s and 1980s, as violence between the state, guerrilla groups, paramilitaries, and drug cartels continued, multiple attempted constitutional reforms flopped, and the country remained under an almost constant state of siege. Violence perpetrated by the state and paramilitaries in

[60] Interview 160906_0020.

the name of combatting the guerrillas often took the form of human rights violations against ordinary citizens.[61] Throughout this period, the infamous Medellín drug cartel grew in strength and prominence, wreaking havoc across the country through car bombings and other violent tactics, oriented both at state and non-state actors. The judiciary especially became the target of cartel violence, as a result of the possibility of extradition to the United States for drug-related offenses. This led to the creation of *jueces sin rostro* in the early 1990s, an effort to hide the identity of judges such that they would be able to decide cases having to do with the drug cartels without being subject to threats and homicide attempts.

Further, in 1985, the M-19, an urban guerrilla group, stormed the Palacio de Justicia, home to the Supreme Court and the Council of State, taking hostage the sitting Supreme Court justices as well as hundreds of others. The standoff ended 28 hours later, following what has been described as an "excessive and disproportionate" military raid.[62] In the end, more than 100 people, including twelve of the Supreme Court justices, died, and about dozen guerrillas were disappeared. According to Julieta Lemaitre (2009: 66), the violence at the Palacio de Justicia became "a symbol of the reality of the war and the impossibility of peace." Solidifying this perception of the impossibility of peace was the near-continual state of siege, which expanded presidential powers, but also indicated an inability of the government to respond to the challenges it faced. Mauricio García Villegas (2001) found that between 1970 and

[61] See Palacios (2006) and Tate (2007) for additional information on the recent history of violence in Colombia.
[62] See Cosoy (2015) for the BBC. Cosoy cites historian David Bushnell, who suggests that the military may have acted on its own, rather than waiting for the orders of President Belisario Betancur.

1991, the Colombian government declared a state of siege more than 80% of the time, creating what he calls a "constitutional dictatorship."[63]

This violent context did not inspire faith in the ability of the state, including the judiciary, to respond effectively to citizen needs. Economic inequality and insecurity further exacerbated citizen mistrust in the state. As Donna Van Cott (2000: 49) notes, "economic dislocations made more apparent the extreme concentration of wealth, productive resources, and positions of authority in the hands of a small elite, and the extent to which this elite ruled in its own economic interest." Further, efforts to address any of these concerns seemed futile. Two Liberal presidents – Alfonso López Michelsen in 1978 and Julio César Turbay Ayala in 1981 – attempted, unsuccessfully, to initiate constitutional reforms.[64] The Supreme Court blocked both reforms on procedural grounds. In the case of the López Michelsen reforms, the Court argued that constitutional reform fell within the duties of the Congress, and that Congress could not delegate these duties. With the Turbay reforms, which had received Congressional approval, the Court pointed to other procedural problems. In 1987, the Supreme Court announced that future plebiscites would be prohibited. Plebiscites had in the past, for example in 1957, led to constitutional reforms. John Martz (1997: 248) notes that "by early 1988 the topic [of constitutional reform] was the single hottest political issue in the media." That year, President Virgilio Barco proposed a plebiscite on the issue of plebiscites. In an interview, Fernando Cepeda, the Minister of the Interior under

[63] See also Antonio Barreto (2011).
[64] One Conservative president, Belisario Betancur, was able to implement a proposed constitutional reform, which decentralized the Colombian state, creating local political participation mechanisms and allowing for the direct election of mayors.

President Barco, described this proposal by referring to a Colombian saying, "*en derecho, las cosas ser rehacen como se hacen*, [or] in matters of law, you un-make laws the way you make them."[65] The plebiscite was blocked by Congress, and other efforts by the Barco government to advance a constitutional reform were stymied by the Supreme Court and the threat of cartel violence (Van Cott 2000).

Three presidential candidates were assassinated in 1989 and 1990, including a young, popular Liberal Senator by the name of Luis Carlos Galán.[66] As Van Cott (2000: 53) states, Galán's death "seemed to symbolize the deaths of hundreds of judges, politicians, journalists, and common citizens." Inspired especially by Galán's death, but also by the general climate of seemingly unending violence, students throughout the country protested, calling for constitutional reform. Alejandra Barrios, one of the leaders of the student movement recalls their motivation:

> This series of events caused us to mobilize for the right to live, for the right to die of old age … What we saw was no future, there was no way out. Impossibilities of negotiation, impossibilities of institutional changes. When we created the student movement, we were looking for a social pact. We understood the constitution not as a charter of rights or a legal agreement, but, in truth, as a new social pact … It was not so much about the content of the constitution as the chance to say, "This country has to find another way besides war."[67]

In 1989, the students organized a silent march to the Plaza de Bolívar, the site of the Palacio de Justicia and frequent culminating point for protest marches. The following year, the movement asked voters to fill out an additional, seventh ballot (*séptima*

[65] Interview 160808_0010.
[66] Candidates Bernardo Jaramillo Ossa (Unión Patriótica) and Carlos Pizarro Leongómez (AD/M-19) were both killed in 1990. Another prominent member of the Unión Patriótica, Jaime Pardo Leal, had been assassinated in 1987.
[67] Interview 161019_0042.

papeleta) in support of the creation of a constituent assembly. Though the Barco government supported such an effort, the possibility of an official plebiscite and constitutional reform had to pass through the Supreme Court, which had blocked several previous reform efforts. Surprisingly, the Court accepted the Barco government's arguments that the *séptima papeleta* represented the will of the people and that the president's state of siege powers allowed him to convoke a constitutional assembly, as the country was in crisis. Voters overwhelmingly approved the proposed assembly.[68]

4. The *Asamblea Nacional Constituyente* and the New Constitution[69]

On December 9, 1990, Colombian voters elected 70 members to the constituent assembly, including 25 members of the Liberal Party, 19 of the demobilized Alianza Democrática M-19 (AD M-19), 11 from the *Movimiento de Salvación Nacional* (MSN), nine from the *Partido Social Conservador*, and two each from the *Movimiento Unión Cristiana*, the *Unión Partriótica*, and indigenous movements. Fernando Carrillo Flórez, one of the leaders of the student movement was elected from the Liberal Party list. The government appointed four additional members, two from the demobilized *Ejercito Popular de Liberación,* one from the *Partido Revolucionario de Trabajadores*, and one from *El Movimiento Armado Quintín Lame*. Álvaro Gómez Hurtado of the MSN, Antonio Navarro Wolff of the AD M-19, and Horacio Serpa Uribe of the Liberal Party shared the presidency of the constituent assembly.[70] Juan Carlos Esguerra, a constituent from the MSN list, notes

[68] See Dugas (2001) and Lemaitre (2009) for more detailed accounts of the student movement.
[69] For more detail on the workings of the constituent assembly, see Van Cott (2000).
[70] See Banco de la República (n.d.) for more information on each of the constituents.

the importance of this diversity in composition of the assembly: "The one main difference between [the 1991] Constitution and all the others before … is the fact that it was drafted a group of Colombians that were representing the entire republic, that were directly elected by the people, and they were a very small but comprehensive and full picture of Colombia."[71]

The constituents divided themselves into five commissions, with each member deciding which of the commissions to participate in. All proposals had to be approved during two plenary debates. David Landau (2014: 89) argues that members of the constituent assembly "view[ed] solutions to the grave problems that the country was facing in 1991 in terms of judges and law" in large part due to the historical involvement of the Supreme Court "in a broad range of political disputes." Even within the context of this legal focus, the constituents had a wide range of viable options from which to choose as they drafted a new constitution.

The final draft of the Constitution enshrined social rights, created a new Constitutional Court, redefined the Colombian state as an *estado social de derecho*, or social state under the rule of law, and adopted an easy to use mechanism called the *acción de tutela* that allows citizens to make formal claims to their constitutional rights. With respect to the debates over social rights, Juan Carlos Esguerra recalls:

> When the systematization process of the constitution took part, we divided [the Bill of Rights] into fundamental rights, socio-economic, and then cultural rights, and then what we called the collective rights. They correspond mostly to what the experts call the first, the second, and third generation of rights … [Every right was] thoroughly discussed, and in some cases even aggressively discussed … There were debates about whether or not and to what extent to include the socio-economic and cultural rights. Some people said it was absolutely mandatory that they would be approved as fundamental rights.

[71] Interview 160923_0035.

> Others that they should be approved in other ways, and some others who said well, to put it in the constitution, but of course we have to understand, that the country has to understand, that that is like a dream for one day that might come when they are going to become reality, a *carta al niño dios*.[72]

These debates over the content of the Bill of Rights could have ended differently, for instance with the decision not to recognize social rights at all. For example, some members of the constituent assembly, like Alberto Zalamea Costa, cautioned against over-inclusiveness in listing rights: a "list of the thousand and one rights is not necessary, but the enumeration of the essential ones plus the rights that, for certain reasons, have been more violated in Colombia are not necessary." For Zalamea, the rights to life, equality before the law, free association, and the prohibition of torture were these key rights.[73] Yet, these debates were resolved with the acceptance of enumerated social rights, a solution that is especially surprising given Colombia's status as a highly conservative and oligarchic political system during the height of the Washington consensus for neoliberalism. The Constitution was promulgated on July 4, 1991, and the newly-created Constitutional Court began to hear cases the following year.

The Development of Constitutional Law in South Africa

The following sections describe the major contours of South African constitutional law, a history of constitutional development that differs substantially from its Colombian counterpart. I start with the unification of the South African state

[72] A *carta al niño dios* is roughly similar to a letter to Santa Claus. Interview 160923_0035.
[73] Tramite de Proyectos 34, Comisión Primera "Derechos y Deberes Humanos" (7 March 1991).

as the Union of South Africa in 1909 and move through to the post-apartheid adoption of social constitutionalism.

1. The Construction of a National Legal Order and Apartheid

In 1909, the South Africa Act codified the creation of the Union of South Africa, unifying four settler states in the process. This move solidified the geographic and political bifurcation of white and non-white South Africans at the recommendations of the Lagden Commission.[74] Around this time, a group of white delegates met at the National Convention to determine the future of the Cape, Natal, Transvaal, and Orange River (or Orange Free State) colonies, as well as the status of non-white South Africans in the new united South Africa. As John Dugard (1990a: 354) notes, these colonies had separately developed distinct constitutional traditions:

> First, there was the Orange Free State's highly successful experiment with a binding United States-type constitution, with guaranteed rights (although largely for whites only). Second there was the Transvaal's rejection of the idea of fundamental law in favor of the supremacy of the Volksraad [the People's Council]. Third, there was the Cape and Natal experience of British Parliamentary institutions.

Ultimately, the National Convention favored the Cape-Natal-British model, though a prominent judge by the name of John Gilbert Kotzé had pushed for a constitution with a bill of rights and some measure of judicial review prior to the convention (Klug 2000: 32). Dugard (1990a: 355-56) shows that a plurality of delegates at the Convention were trained as lawyers trained under the parliamentary system and that, with the exception of Judge Kotzé, most viewed the US constitutional order with skepticism. The 1910 Constitution of the Union of South Africa had many features of

[74] For a more detailed assessment of race and racial classification in pre-apartheid and apartheid-era South Africa, see Posel (2001).

Westminster-based constitutions; however, it also included severe limitations on the franchise.

Among other changes, the Union of South Africa sought to dramatically reframe land access and ownership with the passage of the Native Land Act of 1913, which caused the mass dispossession of black South Africans of land and implemented the foundation of territorial segregation. This mass dispossession helped to perpetuate black poverty throughout South Africa. The national government, however, was concerned more with white poverty, which endured in parts of the country. The Carnegie Commission of Investigation on the Poor White Question of 1932 served as a platform to address this situation. Francis White, a labor economist involved in the second Carnegie inquiry in the 1980s described this first commission as having been "hijacked" by the National Party and used as an "intellectual source" for apartheid (Carnegie Commission Oral History Project: 118-19). The Commission's report led to the creation of a government department for social welfare. No similar effort was made to understand and ameliorate the conditions contributing to black poverty in South Africa.[75] Instead, pre-apartheid and apartheid-era laws served to institutionalize black poverty and subjugation (in the name of "separate development").

In 1948, the National Party came to power and implemented a series of laws further distinguishing between the rights of South Africans of different races, establishing the apartheid system. Throughout this period, the constitutional order remained the same, while the state became both more and more exclusionary and more

[75] See also Nattrass and Seekings (2011) on this point.

and more interventionist (particularly through efforts to create and maintain so-called "homelands" as well as the system of pass laws[76]). Undoubtedly, two of the most destructive and disruptive features of apartheid involved the theft of land and restriction of access to cities and centers of employment, but apartheid also precipitated the inequitable allocation of resources for health, education, housing support, and social security. While constructing systems of state support for white South Africans, these resources were diverted away from or were severely limited for black and other non-white South Africans.[77] These exclusionary measures were developed within a legal framework, one that recognized parliamentary sovereignty above else, but a legal framework nonetheless.

2. A Widening Debate about Constitutional Law

These legal developments did not proceed unchallenged. In 1955, the African National Congress, along with the other members of the anti-apartheid coalition known as the Congress Alliance, drafted the Freedom Charter at the Congress of the People in Kliptown, which set out a vision of an inclusive, rights-protective state ruled by and for the people. The ANC solicited input from residents of both townships and rural areas (Mandela 1995: 170-76), and the Congress of the People involved nearly three thousand delegates. Ultimately, the Freedom Charter included demands for democracy, equality before the law, human rights protections, access to land and work, education, housing, and peace. Although the Freedom Charter – unsurprisingly

[76] For more on the pass law system specifically, see Abel (1995: chapter 3). For a detailed history of homelands or "Bantustans," see Phillips (2017).
[77] For more detailed discussions of the construction of and life in the apartheid state, see Abel (1995), Mandela (1995), O'Meara (1997), and Clark and Worger (2011), among others.

– did not influence the National Party's stance on constitutional questions, the legacy of the Freedom Charter is significant. For one, the Freedom Charter impacted the organization of the resistance movement. In 1959, the Pan-African Congress split off from the ANC, citing displeasure with the Freedom Charter as one of their primary rationales for the move. Additionally, the Freedom Charter impacted the policy platform of the ANC as the country transitioned out of apartheid. In fact, the ANC adapted the Freedom Charter into a document entitled "Ready to Govern," and it featured heavily in the ANC's policy platforms as it began to lead the country.

Throughout the 1960s and 1970s, even as apartheid deepened, the debate about constitutional law widened, particularly with respect to the inclusion of a Bill of Rights.[78] Specifically, an opposition party known as the Progressive Party routinely pressed for the addition of a bill of rights to the South African constitution.[79] In 1960, following the advice of the Molteno Commission, the Progressive Party adopted the policy goal of drafting a bill of rights. Members of the United Party also voiced support for this proposal. In the following year, the country left the Commonwealth, developing a new constitution and renaming itself the Republic of South Africa. This new constitution did not bring with it the addition of rights recognitions or the possibility of judicial review. Instead, the Parliament continued to reign supreme, passing new national security laws that allowed for detention without trial and abolished habeas corpus protections. In 1973, as John Dugard (2015: 48) recalls, "a

[78] Importantly, throughout this period, South Africans contested apartheid law through the legal system (Abel 1995). As Meierhenrich (2008: 142) observes, "Black South Africans could not be voters under apartheid, but they could be plaintiffs – and successful plaintiffs at that."
[79] This paragraph and the next draw heavily on Dugard (1990b) and (2015).

group of South Africans of all races, comprising most black leaders, Progressive Party representatives, newspaper editors, and academics, adopted a declaration of consensus which proposed that 'the rights of each individual be protected by a bill of rights entrenched in the federal constitution.'" This expanded debate, though, had yet to influence the National Party's position.

Popular calls for consideration of a bill of rights continued to grow through the early 1980s, as South Africa moved toward the creation of another constitution. The resulting 1983 Tricameral Constitution did not feature either judicial review or a bill of rights. Surprisingly, the state's policy toward a bill of rights shifted, when in 1986, "with no explanation the Minister of Justice, Mr. J. H. Coetsee, announced in Parliament that he had requested the South African Law Commission to investigate the role of the courts in protecting group and individual rights and to consider the desirability of instituting a bill of rights" (Dugard 1990b: 448). In 1989, the same year that F.W. de Klerk assumed the presidency, the Commission released a report which recommended a draft bill of rights that included civil and political rights recognitions for all South Africans, regardless of race or gender, but did not include any social rights recognitions. During the following year, the National Party released Nelson Mandela from prison and "unbanned" the African National Congress and other opposition parties, signs of progress that indicated the likelihood of some kind of transition and a new legal order. Still, the content of the new legal order and the extent to which the transition would be peaceful were unknown. Even to the extent that external pressure, whether through civil society-led boycott campaigns or economic and diplomatic sanctions, pushed for South Africa to move toward democracy and

support of human rights, there remained substantial choices within these broad categories about how to design and orient the new South Africa.

3. "We Want Freedom and We Want Bread"

Building from the Freedom Charter as well as the "Ready to Govern" pamphlet, the ANC began to more frequently and in greater detail outline its preferences as apartheid drew to a close. In 1990, the ANC announced a working document on its vision of "A Bill of Rights for a New South Africa," which argued:

> … we do not feel that it is necessary to make a constitutional choice between having freedom or having bread. We do not want freedom without bread, nor do we want bread without freedom. We want freedom, and we want bread … Our approach has been to identify certain needs as being so basic as to constitute the foundation of human rights claims, namely, the rights to nutrition, education, health, shelter, employment and a minimum income. In South Africa, it is not just a question of dealing with poverty such as you might find in any country, but with responding to the social indignities and inequalities created as a direct result of State policies under apartheid. The strategy proposed for achieving the realization of these rights is to acknowledge them as basic human rights, and require the State to devote maximum available resources to their progressive materialization (vii-ix).

Thus, the ANC's commitment to some kind of constitutional framework that would guarantee access to social goods (though not necessarily as justiciable social rights) is readily apparent. Further, the choice of constitutional design was not one belonging to the ANC alone.

The constitutional negotiations took place between 1990 and 1993, and they included the Conventions for a Democratic South Africa (CODESA I and II) and the Multi-Party Negotiating Process (MPNP).[80] The resulting Interim Constitution of 1993 introduced judicial review, created the Constitutional Court, and established a Bill of

[80] For more detailed accounts of these negotiations, see Mandela (1995), Sparks (1995), Klug (2000: chapter 4), and Meierhenrich (2008), among numerous other sources

Rights.[81] This Bill of Rights did not include robust social rights protections, but neither did it preclude them from being added later in the Final Constitution, which is precisely what occurred. Following the establishment of the Interim Constitution, a Constitutional Assembly consisting of both houses of the newly-elected Parliament was convened to draft a Final Constitution, which would be certified by the newly-created Constitutional Court.

As part of this final drafting process, the major political parties established several theme committees, which were tasked with providing expert advice on constitutional design questions, including on the inclusion and scope of rights protections. Theme Committee 4 handled these rights questions. The First Report of Theme Committee 4 in January 1995 notes that all of the parties to the Constitutional Assembly agreed in principle that the Universal Declaration of Human Rights (1948) and International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights (1966) could "be used as important references for identifying universally accepted fundamental rights," that "[t]he Bill of Rights should be entrenched, justiciable and enforceable," and that the final list of included rights should not be limited to the rights listed in the Interim Constitution (41-42). This last point was important in that the Interim Constitution recognized a rather limited set of

[81] For Ginsburg (2003: 55), South Africa's adoption of judicial review was a "textbook example of the insurance theory," wherein minority veto players seek out judicial review to protect their interests from a dominant majority in the future. Yet, insurance theory cannot account for the shift to social constitutionalism in particular – white South Africans may have sought limits on the ANC's power, but they were not expressly concerned with the broad realization of the rights to health, housing, or education, for example.

social rights (including basic education and an "environment which is not detrimental to… health or well-being").

All of the major parties submitted documents outlining their preferences regarding constitutional rights protections to the Theme Committee 4. The ANC's preliminary submission to the committee, entitled "Our Broad Vision of a Bill of Rights for South Africa,"[82] indicated deep support for a substantive set of social rights, as well as a clear role for the courts in helping to realize those rights (48-49). The Inkatha Freedom Party (IFP) and Pan African Congress (PAC) also advocated for the inclusion of justiciable social rights, expressly noting that the Bill of Rights should be geared toward supporting the wellbeing of citizens. The IFP's proposal suggested that the constitution should allow for "the updating and evolution of human rights protection, which are historically an ever changing field of law," and called for the constitution to recognize "all fundamental human rights and all those other rights which are inherent to fundamental human needs and aspirations as they evolve with the changes and growth of society …" (59).[83] The PAC called for the creation of "an institution modeled along the lines of the European Human Rights Commission" to help with what they called the "practical enforceability" of rights.[84]

The Democratic Party, on the other hand, raised a number of concerns about the separation of powers and enforceability of rights. Their submission held that

[82] This document is distinct from the document, "A Bill of Rights for a New South Africa," referenced at the start of this section. Part of the Constitutional Assembly Theme Committee 4 Fundamental Rights Report on Block 1 (Constitutional Court archives, 46-48).
[83] Part of the Constitutional Assembly Theme Committee 4 Fundamental Rights Report on Block 1 (Constitutional Court archives, 57-62).
[84] Part of the Constitutional Assembly Theme Committee 4 Fundamental Rights Report on Block 1 (Constitutional Court archives, 68-71).

"policy formation – from the detailed provision of health services to the allocation of housing – is preserve of parliament, not the constitution" and suggested that relatively few civil and political rights be explicated in the Bill of Rights. They also noted, however, that "because the promises of a Bill of Rights could be empty, cruel words echoing in a wasteland of deprivation and denial, the Bill must provide for a standard of justification which empowers the citizen to obtain from government the entitlements to the means of survival" (51).[85] The National Party also raised strong concerns about social rights, stating "the inclusion of more socio-economic rights [presumably beyond those included in the Interim Constitution] in the bill of rights itself, is legally untenable and will, moreover, give rise to immense practical problems for government" and advocated for the use of "alternative mechanisms" to address issues related to social rights, such as "directive principles" (66-67).[86]

While there was significant disagreement as to the scope and application of the Bill of Rights in these initial submissions, it is important to note that all parties framed their proposals in terms of international human rights discourse, not as a result of coercion or even explicit suggestion by external actors, but as a result of a shared understanding among domestic elites of the legitimate sources of constitutional examples. Further, these debates were less heated than those regarding the question of land and property. As one expert involved in the drafting process as a member of the

[85] "Submission on Constitutional Principle 2: Fundamental Rights," part of the Constitutional Assembly Theme Committee 4 Fundamental Rights Report on Block 1 (Constitutional Court archives, 49-56).
[86] Part of the Constitutional Assembly Theme Committee 4 Fundamental Rights Report on Block 1 (Constitutional Court archives, 63-67). The Vryheidsfront Party also expressed skepticism about socioeconomic rights – specifically whether or not they were "universally accepted" and whether or not they were enforceable in practice. The African Christian Democratic Party submission noted that the party would support rights of any generation, as long as they were "not condemned by the Word of God" (Constitutional Court archives, 45).

Technical Committee to advise the Constitutional Assembly on Drafting of Bill of Rights noted, "The debate on property rights was much more vigorous and intense … Social and economic rights went through quite easily. The ANC supported social and economic rights, and the Technical Committee was unanimous in its support … We did keep that very separate from the property rights issue."[87,88] In fact, the Technical Committee achieved early consensus. The same expert recalled, "The Committee unanimously supported the inclusion of socioeconomic rights in the Bill of Rights. That is how the decision was taken. And then came the drafting … We relied heavily on the Covenant [on Economic, Social, and Cultural Rights]." He went on to say, "There was no great philosophical debate … We were all lawyers."[89]

Further, by the time that the Constitutional Assembly negotiations were in full swing, another expert advisor on the Technical Committee holds that "the debate at that point focused on the justiciability issue and where the courts should have a specific role" in the adjudication of social rights. That same expert further notes that for some, including many ANC members, "the idea was to see the Bill of Rights as a tool to transform society." Others, including members of the National Party and the Democratic Party, were more skeptical (for various reasons). However, there "was a convergence because they also saw [that] the more you've got in the Bill of Rights, the more protection there would be for minority group as well."[90] Generally speaking, then, elite political actors seemed to agree on the language of debate (oriented toward

[87] Interview 170825_0141.
[88] Though land and property may logically fit within the conceptual category of social and economic rights, they have typically been referenced separately in discussions of rights in South Africa.
[89] Interview 170825_0141.
[90] Interview 180514_.

existing international human rights law), and the experts appointed to advise these political elites expressed even less variance in their views on the potential Bill of Rights.

These robust protections were a cause of consternation for some black South Africans at the time, however, who expressed displeasure or skepticism at the strength of these protections for minorities, calling the Bill of Rights "the Bill of Whites." Relatedly, as Stephen Ellman (1995: 473) writes, "The transitional agreements the ANC endorsed are the product of compromise rather than a simple expression of the ANC's preferences. Moreover, they are the product of a process in which lawyers – whose disposition toward legal arrangements may not have been shared by those they represented – played a major role." Not everyone agreed that judges should play this role in protecting social rights, as former justice Albie Sachs noted in an interview:

> [T]here [was] some concern about whether the rights to health, education, housing and so on should be left in the hands of the judges who … I think it was by training, by social background inherited thinking from a rather conservative section of society and who wouldn't have that kind of vision to go along with the vision in the new constitution. However, at that stage, we were already thinking on having a Constitutional Court and a new kind of judiciary responsive to understanding of the all-around development of human beings.[91]

Thus, while the inclusion of social rights as justiciable rights was not a foregone conclusion, it was not a particularly contentious issue either, certainly not among those experts tasked with recommending an approach to the Constitutional Assembly. While these experts and elites may have drawn heavily from existing international law and legal thought, the specific arrangements that resulted were not externally imposed so much as chosen.

[91] Interview 171003_0170.

The commitment of the ANC with respect to justiciable social rights is perhaps more debatable than the previous sections have let on. On the one hand you have people like Albie Sachs arguing that "to understand socioeconomic rights in South Africa, you've got to understand the importance the Bill of Rights in our whole constitutional order … It was central to the opposition [to apartheid]."[92] Additionally, another justice on the first bench of the Constitutional Court suggested, "It was almost taken for granted that there would be socioeconomic rights. It wasn't seriously contemplated that there wouldn't be. I think the attitude – certainly as I understood [it] – of the ANC was that if the Constitution was to mean anything to the people, it wouldn't be sufficient just to deal with [civil and political rights]."[93] On the other hand, a prominent lawyer involved in the transition noted:

> The ANC supported [the inclusion of social and economic rights], even though it was obvious that they were going to bear the burden … And the ANC has not been particularly enthusiastic about implementing social and economic rights [since then] … But I think even at that stage the ANC realized that they would be the party that would be in charge of enforcing these rights and I don't think they were particularly enthusiastic about that. They had no option.[94]

Additionally, as Fowkes (2016: chapter 8) holds, the ANC had been internally divided on the issue of social rights, not about their importance, but about the relative role of elected representatives and judges on their protection and promotion. He attributes some of the pushback the Constitutional Court would face from the ANC in the 2000s to this division. Overall, there seems to have been overall support for the development

[92] Interview 171003_0170.
[93] Interview 170718_0115.
[94] Interview 170825_0141.

of a constitutional order that featured justiciable social rights protections prominently, despite certain points of contestation.[95]

The Constitution was adopted in May 1996, with the support of nearly 90% of the members of the constitutional assembly, though it was almost immediately challenged in court, and the Constitutional Court refused to certify the text. The Court instead asked the constitutional assembly to review and revise eight sections of the constitutional text. In December, the Court certified the revised text, which entered into force early the following year.

Conclusion

This chapter has described the development of constitutional law in Colombia and South Africa, from exclusionary constitutional structures established in the 18th, 19th, and 20th centuries, up through the adoption of social constitutionalism by each country in the early 1990s. Despite an early history of repeated constitutional replacement, Colombia has had a long tradition of constitutional supremacy and judicial review. Even so, conservative understandings of the role of courts, combined with political arrangements that affected the appointment process and the enduring threat of violence against judges, meant that the courts did not historically serve as a viable forum for rights claims-making. The late 1980s brought a social and political crisis that left Colombians with the perception that some kind of foundational legal change was necessary. Members of a national constituent assembly in 1991 drafted a

[95] One of the particular concerns of many South Africans was how the new government would approach land restitution and property rights. I bracket the question of land and property rights, focusing on social rights, and the broader category of socioeconomic rights. See Hall (2004) and Klug (2016) for discussions of the debates on land during the transition and in recent years.

new, social constitution. In contrast, South Africa's political system featured long-standing parliamentary sovereignty and a legal system that at once served to implement the structures of apartheid and provided tools for occasional successes in the fight against it. With resistance to apartheid coming to a head in the late 1980s, the sense that some kind of fundamental change to the structure of the state was necessary prevailed. During the negotiated transition to democratic rule, members of the constitutional assembly adopted a new social constitution. The next chapter considers how we ought to understand the adoption and institutionalization of social constitutionalism in Colombia and South Africa, considering various models of the institutional change.

CHAPTER 4

CRITICAL JUNCTURES AND THE EMBEDDING OF SOCIAL CONSTITUTIONALISM

The previous chapter detailed how crises, which shook popular confidence in the underlying structure of the political system, opened space for new ideas about the role of the state and the role of constitutional law to gain adherents and to become recognized in the new constitutions of Colombia and South Africa. The crises in Colombia and South Africa, though different in structure, were similar in effect, giving way to calls for modernization of the legal systems of each country and to calls for a solution to specific social problems in the form of the creation of new constitutions.

This chapter focuses on how we ought to understand the institutional changes that came with these new constitutions in the aftermath of perceived social and political crises. I demonstrate that new options about how exactly to modernize the legal system and to address these social problems suddenly became not only feasible but desirable in these moments. The confluence of domestic crises, which led to the perceived need for a re-founding of the state – including the drafting of new constitutions – and the ideas about constitutions and constitutionalism that happened to be prominent at the time of these crises formed the critical juncture from which social constitutionalism emerged in these two countries. Stated differently, the antecedent conditions for social constitutionalism included crises that had been propelled to the fore by domestic social pressure, which provided the incentive for

constitution-making, as well as a specific set of transnational ideas. These transnational ideas served as the set of examples from which constitution-drafters would cull as they constructed these new constitutions. Popular and elite constituencies proved receptive to the rights and mechanisms embedded in the newly-drafted constitutions, ensuring the constitution's relevance to subsequent social and political struggles.

Yet, I argue that it was by no means inevitable that either Colombia or South Africa would adopt social constitutionalism in the aftermath of these crises, nor was it inevitable that the turn to social constitutionalism would endure. These crises led to critical junctures, or "moments in which uncertainty as to the future of an institutional arrangement allows for political agency and choice to play a decisive causal role in setting the institution on a certain path of development, a path that then persists over a long period of time" (Capoccia 2015: 148). In these moments, individual choices leave a lasting impact on institutional forms, forms that at other points in time may seem natural or immutable. While the adoption of social constitutionalism had before seemed impossible considering the exclusionary political systems that existed in each country, this move became possible and even came to be seen as inevitable itself, after the fact. Political contestation around the newly-created and newly-empowered actors, institutions, and mechanisms of social constitutionalism would determine the precise legacy of this change.

In these cases, several historically plausible alternative outcomes existed, including the adoption of liberal constitutionalism, the inclusion of social rights protections as parchment promises or directive principles, and even failed

constitutional negotiations. Considering the conservative, oligarchic structure of the Colombian political system and the preferences of the still-powerful South African white elite, constitutional change could just have easily resulted in liberal commitments to democratic governance and the rule of law without social commitments to recognizing the rights to health, housing, education, and social security. In addition, neighboring countries that adopted new constitutions during these times did not necessarily turn to social constitutionalism – for instance, the 1990 Namibian Constitution does not include protections for social rights like health and housing, and the 1993 Peruvian Constitution recognizes a much more limited set of rights than does the Colombian or South African Constitution. A watered-down social constitutionalism, featuring the inclusion of social rights simply as directive principles, was also plausible in each country. Finally, in the case of South Africa, constitutional negotiations were fraught, and analysts at the time repeatedly cautioned that failed negotiations and a descent into all-out civil war were not only plausible, but likely. Yet, what occurred in both Colombia and South Africa was the adoption of social constitutionalism.

This move to social constitutionalism reflects the result of contingent choices during critical junctures, though the juncture in Colombia differed somewhat from the one in South Africa. Rachel Riedl and Ken Roberts (2019: 11) distinguish between activating and generative critical junctures, where a greater degree of antecedent conditioning features in activating junctures, while a greater degree of choice prevails in generative junctures. The Colombian case better reflects an activating juncture, while the South African case is emblematic of a generative juncture. The difference

between the two types is not one of magnitude but of the degree of contingency during the juncture itself. In Colombia, there was greater predisposition toward constitutionalism particularly and certain features of constitutionalism, such as the recognition of an *estado social de derecho*, or social state under the rule of law, in particular.[96] In South Africa, on the other hand, the turn to any kind of constitutionalism was foreshadowed by fewer pre-existing conditions, as Heinz Klug (2000) details. Importantly, in both countries, we see that, as Riedl and Roberts (2019: 27) anticipate, the antecedent conditions – whether the juncture is activating or generative – "influence institutional innovation during the critical juncture, yet take on new values and shape possibilities in new ways given the transformed context."

The rest of this chapter details different models of institutional change that could explain the emergence of social constitutionalism, before demonstrating that the critical juncture model best applies to these cases. It closes with a discussion of the events that ensured the institutionalization of social constitutionalism in each country.

Perspectives on Institutional Change

In comparative studies of institutional development three models predominate: gradual institutional change, chronic instability, and critical junctures. The model of gradual institutional change involves relatively continuous, minor changes that cumulatively result in consequential changes to institutional outcomes. In other words, this model highlights the enduring quality of institutions while also noting that not all

[96] In short, the *estado social de derecho* distinguishes between a state that is simply bound by the rule of law and one that also recognizes some kind of social commitment. For more on the concept of *estado social de derecho* in Latin America, see Brinks (2012).

institutional changes are drastic shifts following exogenous shocks; instead, changes may result from "endogenous developments that often unfold incrementally" (Mahoney and Thelen 2010: 2). The mechanisms of gradual institutional change include displacement, layering, drift, and conversion (Streeck and Thelen 2005). Displacement involves the replacing of old rules or institutions with new ones and can be an abrupt or slow process. Layering, by contrast, refers to revising, updating, or adding to existing rules or institutions. In cases of institutional drift, the rules or institutions are the same in form, but differ in consequence. Similarly, conversion involves rules or institutions that do not change in form, but that are interpreted in new or different ways (see also Schickler 2001; Thelen 2004; Hacker 2005). The likelihood of each mechanism occurring at a given point in time depends on characteristics of the political context (specifically who can block change) and characteristics of the targeted institution (namely the amount of discretion in the interpretation and enforcement of institutional rules).

The second set of accounts of institutional change includes chronic instability (Bernhard 2015) and serial replacement (Levitsky and Murillo 2013). Chronic instability refers to "multiple, frequent, and connected episodes of disjunctive change" (Bernhard 2015: 977). An emblematic example of this phenomenon is the repeated cycling between democracy and dictatorship experienced by many countries in both Europe and the Global South. In these cases, political institutions were short-lived, and institutional changes were both radical and abrupt. Chronic instability results when an institutional arrangement does not become self-reinforcing. Exogenous shocks, the existence of confounding conditions, and unexpected behavior by the actors involved

in the institutions in question may all serve to inhibit institutional perseverance. Steven Levitsky and María Victoria Murillo (2013: 96) detail the similar process of "serial replacement" in their examination of constitutional reforms, economic liberalization, electoral reforms, and decentralization in Latin America. Where institutions are not "born strong (or in equilibrium)" meaning that they are not "designed more or less in line with (1) domestic power and preference distributions and (2) existing social and political norms," serial replacement or chronic instability are likely to occur.

The third model emphasizes critical junctures. A critical juncture refers to "(1) a major episode of institutional innovation, (2) occurring in distinct ways, (3) and generating an enduring legacy" (Collier and Munck 2017: 2). Critical junctures involve discontinuous change, where the weakening of institutional environments during moments of perceived crises allows for the possibility of substantial abrupt and enduring change (Capoccia and Kelemen 2007).[97] An important part of the analysis of critical junctures is the identification of critical antecedent conditions. Some antecedent conditions may simply serve as background context and may not provide empirical leverage on a case, while others may actually be best understood as rival hypotheses, potentially accounting for the outcome of interest directly (Slater and Simmons 2010). The assessment of critical antecedents, in contrast, is necessary to understand the choice set available to actors during a critical juncture (see also Riedl and Roberts 2019).

[97] Importantly, as Roberts (2014: 46) holds, these other models of institutional change "are not necessarily antithetical to a critical juncture approach. They may, in fact, represent alternative institutional legacies of a critical juncture that also produces patterns of discontinuous but self-reinforcing institutional change – that is, the conventional punctuated equilibrium model – in a specified set of cases."

Also integral to the study of critical junctures is the existence of alternative outcomes that are "not simply *hypothetically* possible," but, more importantly, "*historically* available" (Capoccia 2015: 159, emphasis in original). Here, it must be conceivable that the critical juncture could have precipitated an alternate institutional arrangement than the one that emerged. Contingent choices result in radical institutional changes, and following these changes, "new rules become institutionalized and actor autonomy contracts due to constraints posed by new structures" (Bernhard 2015: 976). The extent to which these new institutional arrangements endure depends on mechanisms of production and reproduction, reactive sequences, and the results of political contestation about these new arrangements. As Ken Roberts (2019: 7) describes, "institutional legacies do not necessarily crystallize during the critical juncture itself." Reactive sequences may take years or even decades to fully unfold, making it difficult for analysts to ascertain the full consequences in the immediate aftermath of the critical juncture.

Key to distinguishing between these models of institutional change are two factors: (1) whether the change was continuous or discontinuous, and (2) whether the change leaves an enduring institutional legacy or not (Roberts 2019). Roberts (2019: 2) notes that the "essential hallmarks [that] distinguish critical junctures from other models of institutional change [are their] discontinuous character and the enduring quality of the institutional transformations they produce." Gradual institutional change may leave an institutional legacy, but it is better conceptualized as continuous rather than discontinuous. Chronic instability and serial replacement suggest repeated discontinuous change, but these situations do not leave enduring institutional legacies.

As I will detail in the sections that follow, institutional change in the form of the adoption of social constitutionalism occurred abruptly in Colombia and South Africa, and in each country, reactive sequences resulted in the embedding of social constitutionalism – factors that together indicate that the emergence of social constitutionalism can be best understood through the framework of critical junctures.

How Should We Understand Social Constitutionalism in Colombia?

In contrast to much of the rest of Latin America, after 1886, constitutional change in Colombia was limited to amendments rather than abrupt and repeated replacement – up until the drafting of the 1991 Constitution, which remains in effect today. Thus, the logic of chronic instability or serial replacement does not offer much insight into Colombia's adoption of social constitutionalism. In the sections that follow, I consider first whether the turn to social constitutionalism reflected gradual institutional change or a rupture in Colombian constitutional development. I then consider the plausibility of something other than social constitutionalism emerging from the 1991 constituent assembly. I finish with a discussion of the legacy of the adoption of social constitutionalism, examining in particular the reaction – and interaction – of relevant constituencies, including political elites, judges, and everyday citizens.

1. Incrementalism or Rupture

One might interpret the historical antecedents of the 1991 Constitution as a demonstrating evolutionary, incremental change with social commitments being gradually layered atop of liberal constitutionalism. The 1886 Constitution did not by any means include widespread recognitions of social rights, but a series of reforms

expanded the scope of this liberal constitution.[98] The most significant change related to social rights came with the 1936 reform package. This reform was "practically a new constitution,"[99] and it introduced the idea that property and other rights may have "social functions" as well as some basic protections for workers, agrarian reform, and changes to the educational system. As Julio Ortiz, who formerly served as a justice on the Supreme Court, described it, these reforms could be understood as a "restricted social constitutionalism."[100]

However, the 1936 reforms were quickly undermined. For one, they did not impact judicial decisions.[101] In other words, these rights were not claimed in the legal sphere, and judges did not expand the scope of these rights through decisions. As one Colombian lawyer colorfully described, "it was a case of sterilization by judicial interpretation."[102] In addition, conservative elites opposed to President López Pumarejo attempted to initiate a constituent assembly to remove the legal foundation for these reforms. While these elites were unsuccessful in their efforts to once again reform the constitution, they did manage to roll back the reforms in the legislature.[103] Further, Gustavo Gallón, the founder of the Colombian Commission of Jurists, argues that "not only did [the reform of 1936] not become a reality, but it also gave rise to a very strong reaction on the part of the landowning sectors and was later translated into the violence of the '50s and the [violence] which we have lived until today."[104] Thus,

[98] Importantly this is "small-l" liberalism – the 1886 Constitution was an artefact of the Conservative Party.
[99] Interview 160906_0020.
[100] Interview 160922_0032.
[101] Interview 160908_0021.
[102] Interview [number redacted].
[103] Interviews 160906_0020, 160916_, and 160921_00300.
[104] Interview 161104_0053.

while the 1936 reforms can be thought of as "constitutional antecedents" to the 1991 constitution, as Hernando Herrera put it,[105] these reforms did not set off a period of gradual movement toward the robust recognition of social and economic rights or the sense that the judiciary ought to play a significant role in promoting and protecting social and economic rights.

Between 1936 and 1991, popular and legal debates largely turned away from the issue of social constitutionalism or social rights recognitions. On the one hand, the two main political parties coalesced around a power-sharing agreement, which stymied efforts at institutional reform. As the power-sharing agreement broke down in the 1970s, various elected officials attempted to initiate constitutional reforms, though these were almost all blocked by either other elected officials or the Supreme Court.[106] On the other hand, this period saw the emergence of several leftist guerrilla groups, who preferred extra-institutional contestation. These groups also attempted to promote non-government-driven social restructuring (ultimately combined with significant and, at times, indiscriminate violence). The closed nature of the party system and the "opting-out" of traditional politics by the guerrilla groups made incremental moves toward social constitutionalism highly unlikely.

2. Alternative Plausible Outcomes of the Constituent Assembly

When we take a close look at the ideational considerations of the constituents, we see that the adoption of social constitutionalism was neither inevitable nor necessarily expected by actors involved in the constitutional debates. Constituents

[105] Interview 160927_.
[106] Chapter 3 describes these reform efforts in greater detail.

evaluated many approaches to constitutional law, and, perhaps more importantly, they did not always anticipate the consequences of the choices they made as they drafted a new constitution.

Manual José Cepeda, describes the preparation he and other advisors to President Gaviria undertook before the constituent assembly:

> [E]very Saturday morning we had a discussion on comparative constitutional law with the President. From 9:00 am to 12:00 or 1:00 pm, we discussed how different problems were approached in different countries, problems that were relevant for Colombia. And we didn't look only at the text of the constitution but [also] at the decisions rendered by the respective courts.[107]

Hernando Herrera, who worked as an assistant during the assembly, explains that the "primary function [of the assistants] was investigative, looking at comparative law and what happened in other countries," especially with respect to "how certain institutions in Colombia could work better." In assessing the resulting constitution, Herrera estimates that, in terms of rights protections, "one could say that about 25% come from Germany, 15% from Mexico, another 15% from Spain, 10% from North America, and the rest from Colombia." He further recalled that "a fundamental element was the jurisprudence of the high courts of the United States, Germany, Mexico, and Spain."[108] Diana Fajardo confirms this comparative law approach within the assembly, and points specifically to the constitutions of Spain, France, and the United States as having inspired different parts of the resulting 1991 Colombian Constitution.[109] In addition, constituents referenced international law, including the Universal Declaration of Human Rights, in their draft proposals.

[107] Interview 170223_0060.
[108] Interview 160927_.
[109] Interview 160928_0038.

Rodolfo Arango holds that the "German and Spanish Constitutional Courts were the motor of constitutional development in the post-war period … and, in fact, Spanish law – due to language – was perhaps most influential [on Colombian law]." Arango points specifically to Spanish author Eduardo García de Enterría and his book, *La constitución como norma y el tribunal constitucional* (1982) as key in developing the ideas that constitutions could have normative form and immediate, direct application, rather than serving as programmatic guides.[110] Mario Cajas adds that "Manuel Aragón Reyes and other Spaniards had some influence on the constitution … [The constituents] were looking at the Spanish model of *estado social de derecho*, and, in fact, the definition [of *estado social de derecho*] is the same" in the constitutions of both countries.[111] Still others point to Manuel García Pelayo – a prominent Spanish jurist and expert in comparative constitutional law – in tracing the connection between German legal thought (specifically that of Carl Schmitt), Spanish legal thought, and Latin American legal thought. Constituent Jaime Ortiz (1991), drawing on the French constitutional theorist Georges Burdeau, defined the modern constitution as the proper guide for the 1991 assembly:

> The modern constitution draws the contours, not of the existing order, but of the future. They indicate the place of the individual, the family, [and] the intermediary groups, define the rules to govern economic activity, the role of limits of property, indicate to the state the activities to be undertake and the needs to be met. They specify the extent and nature of the help [a citizen] can expect from the society as well as [his or her] duties within it. This idea of the future society that the text lays out is nothing other than the 'idea of right' that power must be dedicated to realizing.

[110] Interview 160825_0016.
[111] Interview 160916_.

These guides suggest a forward-looking constitution and one that pays some attention to social needs, but not necessarily a commitment to social constitutionalism.[112]

During this perceived crisis, citizens also pushed for change from below, and one might imagine that this pressure from below included concrete ideational directives for how to change the existing constitutional order. In fact, however, this was not the case. Citizens did not necessarily advance a specific ideology or legal agenda other than change from the existing constitutional foundation. Julieta Lemaitre (2009: 74) holds that:

> Colombian legalism, the inheritance of Santander ('el hombre de las leyes'), had been attacked and questioned by the right and the left since the middle of the 20th century … For the right, this legalism signaled the inability to understand the urgency of the defense of life and property. For the left, liberal rights were an illusion; they were the masked face of oppression. As such, both positions despised the foundation legalism (of Colombia).

As a result, social groups on both sides of the political spectrum felt the need for legal reform. Several guerrilla groups, including the M-19 and *El Movimiento Armado Quintín Lame*, demobilized around this time as well and were granted the opportunity to participate in the constituent assembly directly as constituents. In addition to these political actors who sought changes to the existing legal infrastructure, students formed a student movement for constitutional reform. Rodolfo Arango explains, "the student movement opened the door for constitutional change that had not been possible before."[113] However, this pressure focused on the need for constitutional change toward equality, democracy, and peace without necessarily going into

[112] In fact, though the concept of the *estado social de derecho* is often associated with social constitutionalism, the idea that the state is limited both by social concerns and the rule of law does not imply a robust recognition of social rights per se.
[113] Interview 160825_0016.

details.[114] It would be a stretch to relate directly this social pressure for change and any specific model of government responsiveness.

Importantly, however, as Eduardo Cifuentes recalls, the constituent assembly took place in the context of several other constitution-drafting experiences in Latin America, referencing explicitly to the Brazilian constitution of 1988:

> [T]hese constitutions generally introduced a very broad charter of fundamental rights … and the new Latin American constitutions recognized of economic, social, cultural rights as well as collective rights, together with fundamental rights. This was not an innovation of the 1991 constituent assembly, but it follows the current trend that was then in fashion in Latin America.[115]

This context provided a set of examples of other states in the region exploring social constitutionalism, in whole or in part. Still, the Colombian constituents often went further in terms of rights recognitions and the development of mechanisms or institutions meant to promote and protect rights than their neighbors. For instance, the 1993 Peruvian Constitution did not include the right to housing or shelter, and the 1988 Brazilian constitutional reform did not involve the creation of an entirely new court to hear rights claims (though it did include the creation of a new constitutional chamber within the existing Supreme Court). While these ideas related to social constitutionalism were being experimented with in neighboring countries, constituents still made choices about whether and how to implement these ideas in the Colombian context. Rather than expanding these ideas, they just as easily could have adopted more restrictive versions, such as expressly non-justiciable social rights, a position favored by many experts on human rights law.

[114] Interview 161019_0042.
[115] Interview 160726_0006.

Further, Colombia had long been a holdout relative to the rest of Latin American legal development, most clearly in their late adoption of a mechanism similar to the *amparo* (a writ of protection for constitutional rights found throughout Latin America).[116] While Mexico adopted the mechanism in 1857, Guatemala (1879), El Salvador (1886) and Honduras (1894) followed suit soon after. In the early 20th century, Nicaragua (1911), Brazil (*mandado de segurança*, 1934), Panama (1941), and Costa Rica (1946) adopted similar mechanisms. Next came Venezuela (1961), Bolivia, Paraguay, Ecuador (1967), Peru (1976), and Chile (*recurso de protección*, 1976). Colombia adopted the *acción de tutela* a full 15 years after Chile, and 134 years after Mexico. In other words, it was by no means obvious, in historical perspective, that Colombia would adopt regionally or inter nationally trending ideas about constitutional law at any particular point in time.

One could imagine the constituent assembly instead embracing a new vision of liberal constitutionalism, revising the rules governing the Congress and its duties (which it did in part), and stopping there. Considering Colombia's historically conservative political sphere, as well as the interests of still-powerful elites, and the violence that ensued after the previous attempt at social reform in 1936, the drafting of a liberal constitution seems to have been highly plausible. While the 1991 constituent assembly was more representative than any previous constituent assembly in Colombia, more than 30% of delegates came from the Liberal Party, more than 11% from the Conservative Party, and more than 15% came from the *Movimiento de Salvación Nacional*, whose delegates largely came from circles of political and legal

[116] For more on the development of the amparo and its legacy in the region, see Brewer-Carías (2009).

elites. The assembly did include many "non-traditional" members, including delegates from demobilized guerrilla groups, but traditional political elites still maintained a majority. Instead of doubling down on liberal constitutionalism, however, the constituent assembly embraced a robust social constitutionalist rights discourse and empowered new institutions (including the Constitutional Court and the Defensoría del Pueblo) to defend these rights.

Some view the 1991 Constitution as the unlikely combination of neoliberal economic policy and social constitutionalism, at once affirming the value of non-interference in the market and the state-led protection of social rights – with the implicit suggestion being that a liberal constitution and a neoliberal economic policy would be more typical. On average, interviewees distinguished between a tension or contradiction in the Constitution in terms of its economic orientation and its social rights commitments – President Gaviria, after all, was an economist by training. Some respondents, however, hold that the Constitution does not necessarily set forth an economic orientation, suggesting that this tension might be overstated.[117] Either way, the twin pressures of neoliberalism and social constitutionalism were undoubtedly present in Colombia in the early 1990s.

Thus, a variety of sources – in terms of legal thinkers as well as international, national, and regional legal traditions – came together and influenced the environment surrounding the constituent assembly, specifically with respect to how constituents understood which promises and rights-protections belong in modern constitutions. The preceding political crisis that led to the creation of the constituent assembly gave

[117] Interviews 170223_0060 and 161102_0048.

constituents the opportunity to examine these diverse sources of legal thought – some of which had existed for decades and even centuries – that previously had not been possible to incorporate into the Colombian constitutional order, whether because of a lack of imagination or political impediments. While liberal constitutionalism had been the only conceivable option prior to this crisis, new possibilities were suddenly imaginable.

Contingent choices made by constituents during the assembly had significant, and sometimes unexpected, downstream effects.[118] For example, Juan Carlos Esguerra uniquely proposed the *acción de tutela* instead of the more common *amparo* procedure to protect the newly-enshrined constitutional rights. Rodolfo Arango, who worked with Manuel Jose Cepeda on the government's constitutional assembly team, recalls that many groups proposed some version the amparo procedure, intended to "give teeth to constitutional rights," arguing that "it was in the air."[119] Yet, it was Esguerra's proposal that made its way into the constitution. Esguerra clarifies what set his proposal apart:

> The tutela was intended to be the remedy for those rights who have no remedy at all … there was a reason for that, a reason for which has been disappeared over time unfortunately, and that is the following. We had to recognize that we had lots of very effective [and] some less effective remedies for the protection of rights … The Mexican amparo is a very generic remedy. We needed a very specific remedy. And so I didn't want people to think that we were going to bring that generic remedy, which would be good for almost everything. But a specific one which would be good for those cases and rights were there was no remedy.[120]

[118] Alberto Zalamea, a member of the constituent assembly, criticized the process, suggesting that these choices were not well thought out: "I considered that it had been an unsuccessful, improvised experiment, in which out of the first articles, which correspond to [fundamental] rights… are an important part, [but] I believe that the rest was done on the run (Peña 2011).
[119] Interview 160825_0016.
[120] Interview 160923_0035.

The unexpected development with the tutela was its expanding scope. Esguerra summarizes:

> At the beginning, if you would look at the Constitution, the first answer would be tutela is not for social rights. Because for tutela is constructed for the fundamental rights and fundamental rights are chapter number one and the social rights are chapter number two in title number one. So tutela is [technically] not for them.[121]

Julieta Lemaitre noted how surprising the growth of the significance of the tutela was, stating that "I don't think in 1991 anybody could have seen the importance of tutela, but by 1994, 1995, certainly, people were starting to get it. By the end of the decade, it was clear that it was important, the only game in town."[122] Another example comes in the story of how the proposal for a new constitutional court gained steam. Cepeda (2004: 550) highlights President Carlos Gaviria's leadership:

> [The initial] arguments [in favor of a new Court] were not enough to build a solid majority within the Constituent Assembly in favor of creating a constitutional court. Nonetheless, a blunt, timely, and persuasive address by President Gaviria to the delegates, in which he encouraged them to redefine the system of constitutional judicial review in order to preserve the new Constitution, changed the minds of many delegates.

These key features of Colombian social constitutionalism, then, resulted from political agency and contingent choice during the constituent assembly.

Perhaps the best way to conceive of the connections between the Colombian Constitution of 1991 and its historical antecedents is as follows. Colombian legal thought owes much to traditions developed in Germany, France, and Spain. However, as Isabel Cristina Jaramillo notes, "Ideas travel, but [there has to be] some fertile

[121] Interview 160923_0035.
[122] Interview 160906_0020. Other interviewees echoed this notion.

ground for them to [take] hold."[123] President Gaviria called on his team of constitutional advisors, as well as on the constituents of the constituent assembly to investigate potential solutions to the problems plaguing Colombia through a study of comparative constitutional law. While few provisions of the Spanish or German constitutions were adopted without strong modifications, the ideas undergirding these constitutions – that the state ought to serve a social role, protecting citizens beyond simply offering the right to vote every few years – were available to the delegates and advisors at the constituent assembly, who had unique freedom to debate and adopt a new model of constitutionalism due to the existence of a social and political crisis. Political agency and contingent choice led to the unique institutional form of Colombian social constitutionalism.

3. The Legacy of Institutional Transformation

The mere adoption of social constitutionalism did not guarantee that it would become institutionalized. Examples of constitutional false-starts and neutralization by political reactions or "sterilization by judicial interpretation" abound globally. Here, an examination of reactive sequences and political contestation clarifies why and how social constitutionalism became both embedded and strengthened in Colombia.

This new institutional arrangement clearly empowered the Constitutional Court (and gave the justices the opportunity to empower themselves even more), and it had the potential to empower everyday citizens through the tutela, but it was not clear how exactly citizens would view constitutional law or the types of legal claims they would bring. With respect to the Constitutional Court, Landau (2014: 128) shows how the

[123] Interview 160919_0027.

first set of justices and their law clerks came together to shape "the doctrines of the Court in a way that would maximize its influence over the rest of the political and judicial system."[124] Mario Cajas shares a similar view:

> If one goes to the debates of the constituent assembly looking for how they attributed meanings to a series of articles and clauses to then understand the jurisprudential development of the [Constitutional] Court, one realizes that the Court built a narrative beyond what the constituents said.[125]

More specifically, the Court asserted its primacy in the judicial system, while also expanding the nature of rights protections through the tutela procedure. The tutela had seemed to be limited to a defined set of "fundamental" (in this case civil and political) rights in the text of the constitution. As Esguerra describes, however, this changed:

> But, what happened? The Constitutional Court and people started to [think], wait, let's, let's make the social rights real, and [they did this] first through what they called the idea of connecting rights. There are, they said, rights that are connected to fundamental rights and through that way they kind of must be treated as fundamental."[126]

Chapter 7 provides greater detail on the mechanics of these judicial innovations, but what is most important here is that the expansion of rights protections furthered the social constitutionalist ideological visions of at least a core faction of the Constitutional Court justices (see also Nunes 2010b; Landau 2014), visions that were not necessarily shared by drafters of the constitution. The furthering of these visions also resulted in the strengthening of the Court with respect to other organs of state, especially the rest of the judiciary.

[124] Landau (2014, chapter 4) further identifies the importance of a set of justices and advisors connected to the Universidad de los Andes.
[125] Interview 160916_.
[126] Interview 160923_0035.

In addition to facilitating tutela claims related to social rights, the Constitutional Court also expanded its role by allowing tutela claims against judicial decisions (the *tutela contra sentencias*) and by developing the idea of an unconstitutional state of affairs (*estado de cosas inconstitucionales*), which would then be remedied through structural decisions. The Court issued structural decisions in cases about the healthcare system, the prison system, and the status of internally displaced people. With the *tutela contra sentencias*, not only does the hierarchy of the judiciary shift, but, as Juan Carlos Esguerra noted, essentially, "lawsuits do not end in Colombia … [because there are] seven opportunities to decide the same thing."[127] Members of the judiciary recoiled at the notion of the *tutela contra sentencias*, in a move commonly described as a "*choque de trenes*" (literally, a train crash). Landau (2014: 160) notes that in response, "the ordinary courts complain[ed] openly about the Constitutional Court and demand[ed] reforms" by way of eliminating the *tutela contra sentencias*.[128] Further, the Court began to strike down emergency decrees and ruled that while President Uribe could run for a second consecutive term, he could not take a third term.

The Court could not have made such aggressive moves, especially with respect to the tutela, had citizens not embraced the mechanism. In the early 1990s, citizens did not necessarily understand the purpose, promise, or limits of the tutela, but nonetheless experimented with it. As Julieta Lemaitre describes, "It was more an expression of despair and hope than anything."[129] Subsequent chapters detail how exactly the tutela

[127] Interview 160923_0035.
[128] See also Quinche (2007) and Olano (2013).
[129] Interview 160906_0020.

came to be ubiquitous, particularly in the realm of health. For now, though, what is most significant is that the citizenry embraced the tutela, which rendered the tutela politically untouchable (which in turn ensured a large role for the courts in Colombian life), despite political coalitions that included President Álvaro Uribe and his Minister of the Interior, Fernando Londoño, that were strongly in favor of eliminating the tutela or at least limiting its scope. Proposed limitations to the tutela included ending the possibility of the *tutela contra sentencias* and the tutela for social rights claims. The President of the Court at the time, Eduardo Montealegre, gave an interview with *El Tiempo*, in which he critiqued one of Londoño's proposals to reduce or eliminate the tutela, holding that Londoño's real goal was to:

> … end the Constitutional Court. But the road goes further: Minister Londoño intends to break the Constitution, with a clear strategy of dismantling the fundamental principles of the Constitution of '91. I say dismantle because he is doing in parts, in pieces. If one begins to join those pieces, one discovers that he is going after a totally different model of state.[130]

However, as Landau (2014: 129) demonstrates, the Court was able to weather these proposals, with current and former justices going on the offensive, alongside various supporters. He further explains that:

> … the Court cultivated a number of different bases of support, and these bases of support – elements of the academic community, civil society, and the general public – have protected the Court at key moments. The Court's aggressive exercises of judicial review, in other words, were supported by communities of actors with the ability to maintain continuity within the Court and to protect the Court against political backlash.

Thus, the combination of the newly empowered Court and newly empowered citizens safeguarded the expansive model of social constitutionalism in Colombia.

[130] Amat (2003).

In more recent years, as many of the lawyers and legal academics I interviewed noted, members of Congress seem to have developed a new strategy to try to reduce the power or effect of the Constitutional Court, through "mediocrity-packing." In other words, rather than trying to limit the Court through changes in the institutional structure or through the nomination of formalistic or conservative judges,[131] Congress has tried to cut off the sense of connection between the Constitutional Court and the people by nominating judges who are not viewed as "superstars."[132] It remains to be seen whether or not this strategy will pay off. For now, though, the reactive sequences following the adoption of social constitutionalism have stabilized in such a way that social constitutionalism endures – or perhaps more accurately, the Constitutional Court and its proponents have won social and political battles throughout the 1990s and 2000s that have ensured that social constitutionalism has endured in Colombia.

What Explains the South African Adoption of Social Constitutionalism?

The proposition that social constitutionalism would not have been adopted had apartheid not ended seems impossible to dispute, but this does not mean that the same configuration of factors that led to the end of apartheid also resulted in the adoption of social constitutionalism. As other scholars have described and debated in depth, the end of apartheid had to do with a combination of many factors, including the role of specific individuals, namely Nelson Mandela and F.W. de Klerk; as well as social

[131] Some commentators have documented a clear conservative shift in the preferences of nominated judges (Graaff 2012), however, it remains to be seen the extent to which that shift translates into Constitutional Court decisions. As Néstor Osuna (Interview 160808_0009) suggested, "There is a tradition in the [Constitutional] Court of progressivism from day one. Judges of the conservative tradition who came to the Court became moderates at least."
[132] Interview 160906_0020.

pressure from domestic, transnational, and international sources; and the demands of political compromise (Klotz 1995; Mandela 1995; Sparks 1995; Mbeki 1996; Waldmeir 1997; Meierhenrich 2008; Skinner 2010; among many others). I will leave the question of the relative importance of each of these factors to these other scholars and instead focus on the emergence of social constitutionalism. As was the case with Colombia, the logic of serial replacement or chronic instability does not offer much insight into the adoption of social constitutionalism in South Africa, because the prior legal order primarily featured stability, not flux. Therefore, in the sections that follow, I examine first whether the turn to social constitutionalism reflected gradual institutional change or a rupture in South African constitutional development. I then evaluate the likelihood of something other than social constitutionalism emerging from the constitutional negotiations of the early 1990s. I close with a consideration of the legacy of the adoption of social constitutionalism in South Africa.

1. Incrementalism or Rupture

Although certain judges did offer rights-protective positions on occasion during the apartheid era, the system itself before the end of apartheid in the 1990s was profoundly discriminatory and the modal legal system official did nothing to challenge that.[133] Even so, as Jens Meierhenrich (2008) argues, the system conformed to specific legal principles, which despite their myriad flaws established the foundation necessary for a relatively peaceful transition. He notes, "in apartheid's endgame, the memory of formally rational law – and agents' confidence in its past and future utility in the

[133] See Abel (1995) for a detailed accounting of law and legal struggles under apartheid.

transition from authoritarian rule – created the conditions for the emergence of trust between democracy-demanding and democracy-resisting elites" (Meierhenrich 2008: 4). In other words, a shared belief in the idea of law allowed these otherwise diametrically opposed elites to negotiate together the end of apartheid and the start of democratic rule.

What resulted from these negotiations was the adoption of a social constitutionalist model, with the constitutional recognition of a robust set of justiciable social rights and the development of an independent court to hear claims to those rights. Looking at the negotiations in isolation, one might be tempted to consider the 1996 Constitution as an incremental development layered on top of the 1993 Interim Constitution – moving from a racially-inclusive constitution that included relatively few rights to one that with all the core features of social constitutionalism. After taking a step back, however, it becomes clear that the phased negotiations together represent a break with the past. Even though apartheid supporters and apologists remained in positions of power through the early 1990s, the argument that the country could move forward without substantial changes had become increasingly indefensible. The notion that the constitution would be racially inclusive in itself indicated a radical change. Add to that the end of parliamentary sovereignty, the creation of a new constitutional court, and the massive expansion of rights protections and it becomes even more clear that the adoption of social constitutionalism should be thought of as an example of discontinuous change (Klug 2000).[134]

[134] Klug (2000) develops this argument that the adoption of constitutionalism in South Africa ought to be thought of as a clear break with the past. Where I depart from Klug is my focus on *social*

2. Alternative Plausible Outcomes of the Constitutional Assembly

The need to break with the past offers little by way of a roadmap for the changes that would come; a break with the past could have come in many different ways. In fact, several alternative outcomes of the constitutional negotiations are not only imaginable today, but seemed likely at the time. These alternatives included failed negotiations and all-out civil war, the development of a racially-inclusive but liberal constitution, and the recognition of social rights as non-enforceable directive principles (what might be considered a partial move toward social constitutionalism).[135]

The fear that the constitutional negotiations would end with something other than constitutional commitment was palpable. As Allister Sparks (1995) documents, the National Party and the ANC had diametrically opposed preferences about the role and functioning of the Convention for a Democratic South Africa (CODESA). While the National Party sought long, drawn-out negotiations that would determine as many provisions of the constitution as possible, the ANC sought short, broad-strokes negotiations. The first phase of negotiations came to end an in December, and the Convention reconvened five months later for CODESA II. Despite a move to the standard of "sufficient consensus" (i.e., agreement between the government and the ANC), this set of meetings ended in failure. Working Group Two, which dealt with

constitutionalism rather than constitutionalism generally. The turn to any form of constitutional supremacy in South Africa would have been dramatic considering its prior commitment to parliamentary supremacy, but the adoption of a constitution with explicit social features merits explanation in its own right.

[135] In an article published in 1991, Albie Sachs identified five potential constitutional outcomes, or "schemes," that were under discussion. Four of these schemes retained the basic features of apartheid.

matters related to the compromise between power-sharing and majority rule, could not come to an agreement. Some delegates lamented that the sitting government sought a "permanent interim constitution" (Sparks 1995: 105).

Further, during each set of negotiations, racially- and politically-motivated violence, including violence between the Inkatha Freedom Party (IFP) and the ANC, continued, while police reportedly did little to nothing to ensure order or public safety in townships.[136] As the Truth and Reconciliation Commission reports, more than 14,000 were killed and "many more thousands" injured in the early 1990s (TRC Volume 6, 1999: 579). Many viewed this reticence as evidence of a "third force" effort directed by the military and the police to destabilize the ANC and inhibit the negotiated transition. State security forces debated the possibility of creating a "third force" that would run parallel to the military and the police in the late 1980s and early 1990s (O'Malley n.d.). While officially a third force was never constructed, the popular belief at the time was that the military and police forces went ahead with these plans. The Truth and Reconciliation Commission (Volume 6, 1999: 584) found "little evidence of a centrally directed, coherent or formally constituted 'Third Force'" but suggested that sufficient evidence of a "network of security and ex-security force operatives, frequently acting in conjunction with right-wing elements and/or sectors of the IFP" to provoke violence, including both indiscriminate and targeted killings, did exist. Most pointed, however, was the assignation of Chris Hani, who had been both the head of the Communist Party and Umkhonto we Sizwe, the ANC's armed wing, in

[136] See also the Goldstone Commission report. The Commission investigated political violence during the transition, including possible third force activities.

April of 1993 – just after the Multi-Party Negotiation Process had begun. A far-right, anti-communist white man by the name of Janusz Walus shot Hani, using a gun lent to him by Clive Derby-Lewis, a MP from the Conservative Party. Walus was immediately apprehended, but many people were killed and hundreds injured in the ten days following the assignation of Hani. The *Washington Post* ran a story quoting Archbishop Desmond Tutu saying, "I fear for our country" (Taylor 1993). Yet, rather than dissolving the constitutional negotiations, the negotiating parties signed a new Declaration of Intent and soon after set the date for the 1994 elections.

Another plausible alternative outcome was liberal constitutionalism. Considering that the ANC could reasonably expect to win both the presidency and a clear majority in the legislature (and maintain a strong hold on those offices in the medium-term), a strategic view might suggest that the ANC would be in favor of retaining parliamentary sovereignty, or at least limiting judicial oversight of its actions. There may be some credence to this view, at least early in the negotiations. As Hugh Corder, who served on the Technical Committee on Fundamental Rights during the Transition as a nominee of the ANC, recalls, "the ANC wanted a minimalistic Bill of Rights … I remember bumping into Arthur [Chaskalson][137] in the passages of the World Trade Center [where CODESA took place] and he said to me, with some sarcasm, he said, 'have you reached a hundred [rights] yet!'" (Patel 2012: 8). Further, popular concern that the Bill of Rights would protect the interests of white South Africans at the expense of black South Africans (exemplified by the advent of the

[137] Chaskalson would go to become the first Judge President (later termed "Chief Justice") of the Constitutional Court.

pejorative term "Bill of Whites"). In addition, white South Africans may have had an interest in adopting judicial review, as well as clear language rights provisions, but to the extent that any other rights recognitions might prompt changes to the existing economic order or distribution of resources (especially land), this group could be expected to oppose these rights recognitions vociferously. The combination of these interests could have led to the adoption of liberal constitutionalism in the new South Africa, where robust civil and political rights protections were accompanied by limited judicial oversight and substantial space for the ANC-dominated parliament to pursue its own policy prerogatives, but that did not occur.

Yet another outcome of the constitutional negotiations seemed probable: a constitution featuring social rights as non-justiciable directive principles. Many South African lawyers, judges, and intellectuals had expressed doubts about justiciable social rights in the late 1980s and early 1990s. Etienne Mureinik stands as a notable exception.[138] He argued that "the formal content of a bill of rights is often less useful than the fact that it brings under scrutiny the justification of laws and decisions" (1992: 471). Considering this feature of constitutional review, why not include social rights? However, the more common approach was one of skepticism. For example, John Didcott, a South African judge who would go on to serve on the Constitutional Court bench, in a symposium on the Bill of Rights held at the University of Pretoria in 1986 declared that social and economic rights should not be included in the Constitution in any capacity, as they were not justiciable.[139] The South African Law

[138] The same goes for Nicolas Haysom (1992).
[139] Cited in Dugard (1990: 460, at fn. 127).

Commission echoed this view in a working paper from 1989.[140] Another camp advocated for the recognition of non-justiciable social rights. Prior to the constitutional negotiations, Albie Sachs (1991), a member of the ANC, who like Didcott would go on to serve as a justice at the Constitutional Court, argued that the realization of social and economic rights should be pursued through state policy, backed by constitutional support, but not constitutionally-recognized justiciable social and economic rights. Similarly, Kate O'Regan, another Constitutional Court justice-to-be, helped draft a proposal on social and economic rights with other legal intellectuals based in the Western Cape province, including Hugh Corder, that advocated for their inclusion as directive principles (Corder 1992). Corder would go on to be part of the Technical Committee on Fundamental Rights during the Transition (i.e., during the CODESA negotiations). Further, John Dugard (1990a: 461) pointed to the Indian Constitution, which includes justiciable civil and political rights and non-enforceable social and economic rights as a potential model (see also De Villiers 1992 and Davis 1992). Many experts, thus, pushed for the inclusion of social rights as directive principles. Still, as one member of the Technical Committee to advise the Constitutional Assembly on Drafting of Bill of Rights recalled, by the time the Committee came together, the idea of including social rights as directive principles "was not considered,"[141] and the approach did not find its way into either the Interim or Final Constitution.

So how exactly did social constitutionalism replete with enforceable social

[140] Cited in Dugard (1990: 449, at fn. 57).
[141] Interview 170825_0141.

rights come to be? Although societal groups that pushed for an end to apartheid also often highlighted the importance of ensuring adequate standards of living or access to social goods ("bread") and not only civil or political rights ("freedom") and some even participated in the constitutional process by creating individual or group submissions on the Bill of Rights,[142] the proposal of justiciable social rights limited by progressive realization did not emerge from below. No systematic report on the public submissions was ever drafted, and no organized collection or archive of these submissions exists either. If the submissions had any impact, that more likely had to do with emphasizing the importance of an issue already on the table or with providing negotiators with additional sources of support for their favored arguments. Experts offered divergent opinions on the advisability of including social rights recognitions early on, but by the time of the Constitutional Assembly, there seemed to be a convergence of opinions among those involved in the negotiations on the question of social rights.

In South Africa, as in Colombia, transnational ideas about rights and constitutionalism – specifically regarding the entrenchment of social rights and the creation of Constitutional Courts – found fertile ground following domestic social pressure for legal and social change (Klug 2000). Moving toward the various constitutional negotiations, the language of internationally- or "universally-accepted rights" had become commonplace. Political elites and appointed experts explicitly sought examples from the Universal Declaration of Human Rights and the International Covenants, as well as from the Canadian Charter and the German Basic

[142] In fact, the Constitutional Assembly received more than two million public submissions on the Bill of Rights.

Law, but they did not necessarily interpret these documents or rights commitments in exactly the same way.[143] Members of the Constitutional Assembly, experts advising on the Bill of Rights, and elites otherwise involved in these debates tended to agree on the importance of international human rights law, including the covenants corresponding to social rights. Importantly, as Heinz Klug (2000: 82), concludes, "the architects of the ANC Constitutional Guidelines [that indicated support for justiciable social rights] did not see the entrenchment of a bill of rights as altering the fundamental power of the democratically-elected legislature." An initial debate came to the fore regarding whether social rights should be recognized as justiciable in themselves or simply as directive principles, but that debate fell away over time, due to the stated commitment of the Technical Committee (even the experts appointed by parties that initially opposed the justiciability of social rights) and the ANC to the inclusion of justiciable social rights in the new Bill of Rights.

Contingency in the midst of a "crisis-driven negotiating process" also played an important role in the emergence of social constitutionalism (Sparks 1995: 102). For example, as Hugh Corder recounts:

> People used others there [at CODESA] whom they knew in order to put their arguments, for example, a sexual orientation bit is there [in the Interim Constitution], because Edwin [Cameron] is a close friend of mine and because Edwin spoke to me. And then there was a guy called Kevin Botha, who was running something called the Equality Foundation of South Africa, which is again a Gay and Lesbian equality organization. I remember a long telephone conversation with him … and I then went to the committee and we'd originally said, no unfair discrimination whatsoever on any ground. Then the politicians said to us, but where[?] …[Y]ou haven't outlawed race, sex, and gender discrimination. So we had to start listing. So when we started listing, that's

[143] As described by several interviewees (e.g., interviews 180514_ and 170814_0133).

> when Edwin phoned me and we had these conversations and I said to the guys, I think we should put sexual orientation in there.[144]

People cared about many issues in South Africa during the early- to mid-1990s, but only certain individuals or groups had close ties to negotiators or advisors. Further, certain issues were more fundamentally contentious than others. A phone call from an old friend likely would not have resulted in a change to the text outlining the right to property, for instance, as any such change could have threatened not only the constitutional negotiations, but the political transition itself.

Another example of contingency influencing these negotiations and the emergence of social constitutionalism comes by way of the choice to include enforceable social rights rather than social rights as directive principles. The Freedom Charter and pressure from below may have provided incentives for the recognition of social rights in some way, but neither explain the choice of justiciability over directive principles. Etienne Mureinik's argument in favor of justiciability won out, and even some experts who had promoted the directive principles approach before the negotiations came to push for justiciable social rights once they served as advisors during the negotiations. As was the case in Colombia, political agency and contingent choice, along with the existence of transnational ideas that could serve as partial constitutional models and a perceived social and political crisis that opened the space for consideration of ideas previously unimaginable led to the adoption of social constitutionalism.

[144] Patel (2012: 10).

3. The Legacy of Institutional Transformation

Again, that social constitutionalism was adopted does not necessarily imply that it would become institutionally embedded. The shift to social constitutionalism empowered certain actors, like the Constitutional Court (and potentially everyday citizens), while threatening the power of other actors. How the ensuing political contestation played out determined that social constitutionalism would endure in South Africa.

One important set of actors that felt threatened by the emergence of social constitutionalism was the business community. As an expert advisor on the Technical Committee remembers:

> [A]t the point of the Constitutional Assembly, there wasn't really active opposition coming to their inclusion [social and economic rights] from NGO groups but at that time of the certification of the Constitution there was then an objection from groups like the Free Market Foundation … But, you know, they didn't make very active submissions at that time of the drafting of the Constitution.[145]

The Constitutional Court rejected these arguments in the decision certifying the 1996 Constitution. Here, we see efforts to limit the institutionalization of social constitutionalism that were ultimately stymied by key actors empowered by the adoption of social constitutionalism. Arguably these business-oriented actors missed their opportunity to influence the new constitutional order – it might have been much easier to contest the constitutional recognition of social and economic rights during the constitutional assembly, a period of time during which a much more liberal constitution (the Interim Constitution of 1993) prevailed. Once these rights were

[145] Interview 180514_.

recognized, and once specific actors were empowered to adjudicate these rights, it became less likely that relatively limited, factionalized contestation would lead to their dismissal. It both fit the strategic interests (if we assume an institutional drive to expand or increase its power, as power fragmentation accounts do) and the ideological interests of the Constitutional Court justices to reinforce the commitment to social constitutionalism through judicial decisions. Chapters 7 and 8 explore these judicial decisions in greater detail.

In addition, there was a sense of a shared constitutional project on the part of the Constitutional Court and the executive that seems to have set out the parameters for inter-branch relations in South Africa, at least through the presidencies of Nelson Mandela and Thabo Mbeki. As James Fowkes (2016: 70) meticulously documents, early Constitutional Court decisions reflected an effort to "start as actors jointly working to build a new and better system – an utterly defining, and widely neglected, feature of the post-1994 South African polity." Fowkes refers to this as a "constitution-building approach," in which judges weighing the costs and benefits of intervention not only against their preferences, the likelihood of an immediately desirable outcome, or the political survival of the institution. Instead, judges considered also "the building work that can be done by letting other institutions do their jobs and by expressing trust in them" (70). Thus, the new institutional framework empowered the Constitutional Court, but the Constitutional Court under the guidance of Judge President Arthur Chaskalson also sought to avoid unnecessary conflicts with the executive branch.

Likewise, President Mandela demonstrated deference to the Constitutional Court's rulings. Just months after the justices of the Constitutional Court had been sworn in, the Court struck down two presidential proclamations and the act of parliament that had authorized the president to issue proclamations (thus deciding against both of the other branches of government at once).[146] President Mandela publically accepted the Court's decision. Albie Sachs (2016: 159) refers to that day as equally "significant in the life of the nation as the day when we all voted as equals for the first time." In responding that way, President Mandela recognized the legitimacy of the Constitutional Court and the new constitutional order.

Early interactions between newly-empowered and newly-constrained actors formed the reactive sequences that stabilized and institutionalized social constitutionalism in South Africa. The Constitutional Court carefully expanded and protected its role, while being mindful of its relationship with the executive branch. Especially under the leadership of President Mandela, the executive branch reciprocated with deference to the courts, a precedent that the executive branch under President Mbeki's would follow in the *Treatment Action Campaign* case regarding the court-mandated provision of anti-retrovirals to HIV-infected mothers across the country, despite the Mbeki administration's AIDS-denialism. As Chapter 8 demonstrates, citizens turned to the courts frequently to make claims about their social rights, especially regarding the right to adequate housing. The continued use of the

[146] *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* (1995).

courts further empowered the judiciary and especially the Constitutional Court, which in turn helped to cement social constitutionalism in South Africa.

Conclusion

This chapter has documented how the constitutional assemblies in both Colombia and South Africa served as critical junctures, in which the countries adopted social constitutionalism. The adoption of social constitutionalism represented a clear break with past modes of constitutionalism in each country, and it came about as a result of contingent events following a perceived crisis. In both Colombia and South Africa, perceived crises created the opportunity for new ideas about the role of the state and the role of constitutional law to come to the fore. As Chapter 3 showed, the crises differed substantially in form – with apartheid and the resistance to it defining the South African case and the context of war, criminal violence, and government ineffectiveness defining the Colombian case – but both spurred a sense of the need for fundamental legal, political, and social change.

During the constitutional assemblies, political elites and their legal advisors considered various models of constitutionalism and – in South Africa – sought to avoid the seemingly likely possibility of failed negotiations. Transnational ideas and domestic pressures influenced the set of models examined in constitutional debates. In Colombia, prominent models included the Spanish and German traditions, as well as more local legal forms (namely the amparo/tutela). In South Africa, these models included the Canadian and German traditions, and, more importantly, the international human rights regime (with the UDHR, ICCPR, and ICESCR). Still, these models had

existed for years without being incorporated into either country's legal order. Without the preceding crises and the relaxing of institutional constraints, the move to social constitutionalism would not have been possible. Contingent events and political contestation following these crises paved the way for the adoption and institutionalization of social constitutionalism. Reactive sequences in which newly empowered actors sought to protect social constitutionalism ensured that social constitutionalism would be embedded in each country.

These were the basic contours of constitutional debate in each country and the basic features of the constitutional orders adopted in the early 1990s. Still, as Klug (2000: 3) notes, "Even if we accept the empirical evidence that more and more nations have adopted written constitutions with bills of rights and have empowered their courts to uphold these new charters as the supreme law of the land, it is not self-evident that the outcome, or even the meaning of these new institutions, is the same in all these societies." The crystallization of the legacies of social constitutionalism in Colombia and South Africa has come through agentic practices, as a result of the effects of legal mobilization for social rights in each country. In the chapters that follow, I detail the constructivist account of legal mobilization, in the process exploring how the meaning(s) of these new legal institutions have been constituted and reconstituted over time in both Colombia and South Africa.

CHAPTER 5

PERCEPTIONS OF JUSTICE AND THE USE OF THE TUTELA IN COLOMBIA

Legal Mobilization "From Below"

The changes to the constitutional architecture outlined in the previous chapters in theory provided new opportunities for Colombians and South Africans to enact and contest the bounds of the legal citizenship regime, examining the extent to which these new legal promises, institutions, and actors would meaningfully impact their lives. This chapter and the next focus on legal mobilization "from below," or the perspective of citizens of Colombia and South Africa as they chose – or chose not to – seek resolutions to their problems in the formal legal system. This "from below" perspective is a vital part of my constructivist account of legal mobilization, providing information about how, why, and the conditions under which particular kinds of claims come before the courts. These two chapters weave together a consideration of the formation of beliefs about rights, law, and the state, as well as the consequences of those beliefs for patterns in mobilization.

Chapter 5 uses evidence drawn from 74 interviews and a 310-person survey to examine the relationship between legal consciousness and legal mobilization in Colombia. In the Colombian case, we see that beliefs encourage citizens to file legal claims through the tutela procedure, not because they firmly have confidence in the legal system, but because they see the tutela procedure as their only option for seeking redress. Thus, legal mobilization results not from a legal consciousness defined by admiration for the law, but from a sense of ambivalence. Chapter 6 investigates the

micro-foundations of legal claim-making in South Africa, drawing on a 551-person survey that assesses when South Africa citizens turn to the formal legal sphere when they face problems accessing social welfare goods. The survey indicates that peoples' beliefs about when they should file a legal claim differ from when they actually do file claims, and that this difference derives from citizens' beliefs about what are encompassed by constitutional rights and their beliefs about the purpose of the courts. Although Chapter 6 diverges from Chapter 5 in that it does not examine legal consciousness as such, both chapters demonstrate the centrality of beliefs to understanding when citizens turn to the formal legal sphere to air their grievances. I turn now to the Colombian case.

Legal Mobilization "From Below" in Colombia[147]

> We have rule of law, but I say anything can be said on paper, because [the law as it is written] is wonderful, but we have a very, very deep problem in terms of the application of justice, because we have a lot of corruption… Justice is crap, of course.[148, 149]

So responded an upper-class resident of Bogotá, Colombia, when asked to evaluate the country's legal system. National surveys indicate that the negative view expressed above is far from unique.[150] These perceptions give reason for alarm, according to long-standing theories about the judicial role in democratic states. Specifically, the triadic logic of conflict resolution sets out that the impartiality of courts directly feeds into their legitimacy, giving reason for both parties to the dispute to consent to the court's involvement and, in particular, for the loser to accept the judgment (Shapiro 1981). This legitimacy then reinforces judicial independence, as the executive and legislature are both less able and less willing to place undue pressure on the courts, allowing the courts to continue to decide cases impartially, which results in a virtuous circle.[151] In the Colombian case specifically, David Landau (2010a: 153, 2010b)

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[147] This chapter is adapted (slightly) from Taylor (2018). "Ambivalent Legal Mobilization: Perceptions of Justice and the Use of the Tutela in Colombia." *Law & Society Review* 52 (2): 337-67.

[148] Bogotá interview 34. "Pues estamos en un estado de derecho, pero yo digo el papel aguanta todo porque es una maravilla, pero sí, tenemos un problema muy, muy profundo en términos de la aplicación de la justicia, porque tenemos una corrupción muy, muy grande… la justicia es una porquería, evidentemente."

[149] All translations in this chapter are my own. Quotations are presented in English with the Spanish in footnotes to preserve each respondent's actual words. Minor edits were made to facilitate understandability.

[150] For instance, Latinobarometer surveys between 1996 and 2015 show that between 22.8% and 41.3% of Colombian respondents reported "some" or "a lot" of confidence in the judiciary, with the 20-year average sitting at 32.5%. A study of judicial needs conducted in fourteen urban areas in Colombia between 2011 and 2013 found that 81.8% of respondents thought that justice came at a "slow" or "very slow" pace, and 54.8% of respondents evaluated judicial officials as either "corrupt" or "very corrupt" (La Rota, Lalinde, and Uprimny 2014: 80).

[151] See also Benesh (2006) on the importance of public support for the courts in bolstering the rule of law.

demonstrates how the emergence of the Constitutional Court as a "workhorse for middle-class claims" and its ensuing popularity bolstered its power and its ability to sidestep political influence. Here, we might expect this reported lack of confidence in the judiciary overall, which is by no means limited to Colombia, to translate into limited use of the courts.[152] Yet, this is not so.

Each year, the number of citizens filing legal claims grows, even after accounting for population growth. The most common legal mechanism used is the *acción de tutela*, which was created with the 1991 Constitution, alongside various other institutional reforms meant to address what has been called a "crisis of representation" (Mainwaring 2006) and to bolster an ailing, inefficient, and untrusted legal system. The tutela, which is an appeal for immediate relief, allows citizens to make claims to their constitutionally protected fundamental rights without need for a lawyer. In theory, an individual – verbally or in writing – can simply detail a problem in his or her life to a judge, whose job it is to assess whether or not a rights violation may have occurred, whether or not the individual characterized the problem as one related constitutional rights. All judges in the country must hear tutela claims and must respond to each claim within ten days in the first instance, making the tutela a relatively cheap, easy, and quick legal mechanism. Still, filing a tutela claim is not costless – individuals must travel to the courthouse during business hours and often wait in long lines to submit their paperwork. These time and resource costs pale in comparison to the costs of filing other kinds of legal claims, but they are not negligible

[152] See Hendley (1999, 2012) on Russia, Benesh (2006) on the United States, Gallagher (2006) and Gallagher and Yang (2017) on China, and Smulovitz (2010) on Argentina, among others.

for those of relatively little means. The Constitutional Court has the power to review every tutela decision, though given the sheer quantity of tutela claims, the Court only formally reviews a small fraction of cases.[153]

In the early 1990s, the Colombian government engaged in a multi-pronged educational campaign, featuring a television program, smaller advertising spots, board games, and comic books – in addition to mandatory teaching in schools – to spread information about the new constitution and the tutela. Regional-level bodies in some, but not all, departments have also held outreach programs, from the early 1990s to the present day. Even so, it is not immediately clear why citizens who express a near total lack of confidence in the judiciary would seize upon this tool to air their grievances. In this context, the volume of constitutional claims advanced by Colombian citizens is shocking. Thousands upon thousands of Colombian citizens turn to the judiciary every year to demand the protection of their rights through the use of the tutela procedure – from claiming the right to receive a response to a petition request to the right to a minimum standard of living. By 2014, nearly 500,000 tutelas were filed, which is roughly equivalent to 1% of the total Colombian population.[154] As is clear, Colombian citizens often turn to the courts to make claims to their constitutional rights.

Drawing on 74 interviews[155] and an original 310-person survey, this chapter examines this apparent disconnect between expressed assessments and action, moving

[153] Fidelity to existing jurisprudence and proper legal reasoning are understood to drive the revision process, but the decision about whether or not to review is ultimately subject to the discretion of the magistrates of the Constitutional Court, specifically whichever magistrates are "on duty" in a particular week.
[154] According to data collected by the Defensoría del Pueblo.
[155] With 93 total interviewees.

from the aggregate to the individual level to examine the dynamics of mobilization decisions. The data under investigation fall under three categories: perspectives shared by the general population, by a marginalized community (or a "least likely" group), and by claimants. Together, these three sources of data allow for the analysis of two foundational research questions. Why does profound skepticism of the ability of the judiciary to provide justice and fair treatment seem to coexist with high levels of use of the legal system? How do perspectives on rights and the legal system relate to this observed mobilization of the law?

A robust literature on legal consciousness has demonstrated the complicated and sometimes contradictory nature of beliefs about and mobilization of law (Feeley 1979; Engel 1984; Bumiller 1988; Sarat and Felsinter 1989; Yngvesson 1988; Sarat 1990; Ewick and Sibley 1998). Though initial studies concentrated primarily on legal consciousness in the United States, subsequent studies have expanded this focus both in terms of geography (Gallagher 2006; Engel and Engel 2010; McMillan 2011; Boittin 2013) and substantive area (Nielsen 2000; Hoffman 2003; Hull 2003, 2016; Wilson 2011; Young 2014). This chapter further expands the geographic and thematic scope of these studies.

In addition, this chapter makes two primary substantive contributions. First, unlike most previous contexts studied, Colombia is what we might call a high mobilization environment. That is, individuals (and groups) have turned with great frequency to the legal system to make claims. This frequency of claims-making is made possible by a uniquely permissive institutional arrangement (whose core feature is the tutela procedure). Not only has legal consciousness in this kind of setting not

previously been studied, but it is also a setting in which the contours of beliefs about law are perhaps most paradoxical. While Colombian citizens express little to no trust in the legal system, they continue to file constitutional rights claims at unheard of rates. Second, the chapter pinpoints the concrete pathways through which legal consciousness affects individual mobilization decisions. In doing so, it builds on Patricia Ewick and Susan Silbey's (1998) foundational work on legal consciousness. A central claim of legal consciousness scholarship is that it matters how people understand their worlds and their relative positioning in those worlds, specifically that these understandings affect the actions people take. Yet, relatively little is known about the process by which legal consciousness – a complex, dynamic phenomenon – translates into individual action or inaction. This chapter seeks to fill that gap.

Specifically, I investigate how beliefs about the state, legal system, and rights in Colombia relate to the use of the tutela procedure to make claims about constitutionally protected rights. In other words, the focus of this chapter is on the relationship between legal consciousness and legal mobilization in the realm of constitutional rights, expressly identifying the constituent parts of legal consciousness – beliefs – that encourage or discourage the use of legal tools to make claims. Throughout this chapter, whenever I use the term legal mobilization, I am referring specifically to the individual use of the tutela procedure.[156] Following Frances Zemans (1983), I consider legal mobilization as a form of political participation. Importantly, the use of the legal procedures to make rights claims is a political act, not only a legal

[156] See Chapter 2 for a more detailed – and more general – discussion of the concept of legal mobilization.

one. When citizens make claims on the state, they are implicitly calling for changes in relationship between state and society, in the provision of goods by the state, and in the protection of rights. While the claim in question may be purely personal in nature for the individual claimant, the consequences of that claim – or the aggregation of many individual claims – are political.[157]

I find that in Colombia, understandings of law and the state encourage the use of the tutela procedure, not due to the realizable promise of the state to protect rights or the majestic power of the law, but because the tutela offers one possible ray of hope in an otherwise limited choice set. The tutela is understood to be the only mechanism through which citizens can access their rights – the goods that they absolutely need or that have been constitutionally promised to them. In other words, there is no other alternative.[158] In what follows, I present a discussion of the scholarship on legal consciousness and behavior, before introducing three sources of originally collected data. Next, I offer an assessment of these data and a discussion of the consequences of this paradoxical relationship between beliefs about the law in Colombia. Conclusions follow.

Legal Consciousness, Logics of Behavior, and Legal Mobilization

This section first defines what consciousness is, before specifying the meaning of legal consciousness and connecting legal consciousness with legal mobilization. Within the discussion of legal consciousness, I summarize the three ideal types –

[157] While in some ways, this understanding pushes contemporary thinking on legal mobilization, which tends to focus on group claims, often in the form of strategic litigation, this approach is consistent with the roots of legal mobilization theory (Zemans 1983).
[158] Thanks to Ben Manski for this phrasing.

"before the law," "with the law," and "against the law" – first introduced by Ewick and Silbey (1998). I then describe the conceptual and methodological challenges in connecting consciousness, which operates at the collective level, with individual behavior. Finally, I introduce three expectations, or working hypotheses, that explore how legal consciousness and legal mobilization might be connected.

Consciousness, as Ewick and Silbey (1998: 39) explain, refers to:

> …a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning making…Through language, society furnishes images of what those opportunities and resources are: how the world works, what is possible, and what is not.

Here, consciousness is not reducible to the sum of individual experiences and understandings. Consciousness, instead, operates at the collective level, though it is comprised by and can be demonstrated in the beliefs and actions of individuals. These experiences, understandings, and beliefs – and the actions they prompt – come together in a reciprocal and inter-subjective process to form consciousness.

Before moving on to the idea of legal consciousness, a discussion on beliefs is necessary. Beliefs refer to subjective truth-claims about the world. They may be factually correct or incorrect, and they may or may not be grounded in moral assessments. They form the constituent parts of a worldview – or consciousness – and the basis for meaning-making, which is defined as the "social process through which people reproduce together the conditions of intelligibility that enable them to make

sense of their worlds" (Wedeen 2002: 717).[159] Further, every identifiable belief exists among (at the very least, implicit) alternative beliefs. Given the existence of alternatives, beliefs become more impactful when compelling to others, though a belief that is not compelling to many people might be particularly influential for a particular individual. Historical contexts and present-day power relations impact the likelihood and viability of specific beliefs and their alternatives. Beliefs form the basis upon which individuals act, whether elite or grassroots actors.

In everyday life, we point to beliefs as motivators or justifications for actions, even when we do not use the language of beliefs. Take, for example, these two sentences: I voted because it is my duty to vote. I did not vote because my vote does not matter. Each sentence declares two things, 1) that an action did or did not occur, and 2) that the decision about whether or not to act was prompted by a belief that voting is a duty or that voting does not matter. Social life – personal experiences or the experiences of similarly situated individuals in terms of race, class, gender, or other social categories – may encourage one person to believe that voting is a duty and another that his or her vote does not count. Even so, individuals may have a near infinite number of beliefs upon which they do not act (Lane 1973). The mere presence of a belief is not sufficient to provoke any particular action. Further, neither beliefs nor individuals exist in social vacuums. No crisp causal arrow moves unidirectionally from beliefs to actions all the way up to the construction of the social world; instead,

[159] Importantly, all beliefs held by individuals or shared across a group need not always be entirely coherent or logically consistent with one another, though Festinger (1957) suggests that individuals who hold discordant beliefs or behaviors experience a feeling of discomfort and subsequently aim to remedy their inconsistencies.

these relationships are characterized by feedback and co-constitution. Again, the emergent construct that derives from the expression and interaction of beliefs, through language or nonverbal action, is consciousness.

Legal consciousness is commonly defined as "the ways people understand and use the law … the way people conceive of the 'natural' and normal way of doing things, their habitual patterns of talk and action, and their common-sense understanding of the world" (Merry 1990: 5). Thus, beliefs about law that emerge from individual and collective experiences in the world form legal consciousness. It is crucial to note that legal consciousness is not synonymous with legal knowledge. The veracity of the beliefs that make up legal consciousness is, relatively speaking, less important than the fact that those beliefs are held. For example, whether or not one actually is required to have a lawyer to file a particular claim is, in a given moment, less significant than whether or not a potential claimant believes a lawyer is necessary. Legal consciousness research seeks to explain "how the different experiences of law become synthesized into a set of circulating, often taken-for-granted understandings and habits" (Silbey 2005: 324).

Ewick and Silbey (1998) offer three ideal types of legal consciousness – "before the law," "with the law," and "against the law." "Before the law" refers to a context in which law is understood to exist outside of, separate from the messiness of everyday life – "law is majestic, operating by known and fixed rules in carefully delimited spaces" (28). In the "with the law" model, law takes on a game-like form. Here, one can strategically manipulate the rules of the game to attain personal benefits.

"Against the law" refers to a setting in which individuals are subject to "arbitrary and capricious" power, though that does not preclude the possibility of resistance. The conventional wisdom is that more marginalized populations are more likely to experience this arbitrary and capricious power of the law and view the law as a peripheral force in their lives.[160] While these ideal types delineate specific understandings that individuals have about the ways in which law broadly interpreted affects their worlds, these understanding are neither fixed nor unitary within or across groups or over time, nor are these ideal types mutually exclusive.

The focus, consequently, is not simply on formal legal institutions, but on the ideas, beliefs, and perceptions individuals and groups have about the purposes of legal actors, institutions, and mechanisms, as well as the impacts they have. These ideas, beliefs, and perceptions need not be fully articulated to be impactful. As Kathleen Hull (2003: 653) finds, "social actors can engage in practices that both reflect and produce legality without necessarily describing or recognizing those practices as in any sense 'legal'." Further, as Laura Beth Nielsen (2000: 1059, emphasis in original) argues:

> Legal consciousness also refers to how people do *not* think about the law; that is to say, it is the body of assumptions people have about the law that are simply taken for granted… Thus legal consciousness can be present even when law is seemingly absent from an understanding or construction of life events.

This unconscious or subconscious level is especially significant for the study of legal consciousness. Still, even consciously negative or ambivalent views on law may correlate with legal mobilization. Kathryn Hendley (1999, 2012) finds that in the

[160] See Sarat (1990) on this point. See Boittin (2013) and Mellema and Levine (2001) for case studies challenging this conventional wisdom.

Russian context a profound sense of apathy toward the broader legal system can exist in conjunction with high levels of litigation, where resignation, not hope, defines the views of litigants toward the legal process.[161] Similarly, in the case of Argentina, Catalina Smulovitz (2010: 238) shows that "although in the last twenty years normative perceptions about the law and evaluations about performance of the judiciary have worsened, the use of legal procedures and the process of judicialization has intensified." In sum, studies of legal consciousness investigate not only what people say about their worlds – whether explicitly in terms of law or not – but also how people act in their worlds (Merry 1990; McCann 1994; Ewick and Silbey 1998).

This chapter builds on the legal consciousness tradition, taking as its starting point that while seemingly objective conditions such as institutional design, structural inequalities, and responsiveness or openness of both governmental and non-governmental agencies may impact mobilization, this impact will be indirect, through the way various actors interpret, subjectively and inter-subjectively, those very conditions. This line of reasoning leads to a specific claim about legal consciousness, that *beliefs held by potential claimants condition when and on which issues legal mobilization occurs*. In other words, individuals make rights claims on the basis of their understandings of the law and the state, and these views are reinforced by the experience of making rights claims. Importantly, neither beliefs nor potential claimants exist in a vacuum. The proposition here is not that a particular belief *causes* rights mobilization, but that one's understanding of the world – which, again, is

[161] See also Baxi (1985), Gallagher (2006), and Gallagher and Yang (2017) on disenchantment with the legal system.

socially constructed but individually held – encourages and discourages certain sets of actions, rendering X thinkable and doable, while Y unthinkable and therefore undoable. More specifically, the way individuals understand the state, the legal system, and their rights has the effect of inspiring them to make (or not to make) a given legal claim.

Many studies point to structural and institutional variables rather than legal consciousness as drivers of mobilization. If this were the case, we would see a relationship between the severity of grievances, openness of formal judicial institutions, openness of other state institutions, and/or strength of civil society actors and legal mobilization, regardless of the way citizens think about and understand their rights, the legal system, and the state. Undoubtedly, grievances matter for the process of legal mobilization. The question for an explanation based on the severity or frequency of grievances is what explains *legal* grievance formation, or how something unfortunate comes to be understood as something legally objectionable. Much of the time, grievances go unclaimed, or even unrecognized. With respect to institutional openness, *perceptions* of openness are key. Yes, formal institutional rules matter, but if citizens do not view institutions as potentially open, responsive, useful, then it is unlikely that they will turn to those institutions. In the Colombian case, it is fundamental that the tutela procedure exists in the form that it does – its design allows citizens to utilize it relatively easily. Still, formal design alone cannot explain why citizens use the tutela to make claims to some right in some situations but not to other rights in other situations. Finally, legal clinics as well as several state institutions, such as the Personería and the Defensoría del Pueblo, do help citizens file legal claims,

suggesting that civil society may have an important role to play. However, while these organizations may facilitate the ability of citizens to present tutelas, they do not explain why citizens come to view the legal system option as the correct way to pursue the solution to their problems. Thus, I hold that the linkages between beliefs about the law and the state and mobilization should be explored in greater detail, and I set out to do that here.

Drawing on inductively gleaned insights – in dialogue with existing literature on legal consciousness and legal mobilization – I generate three behavioral expectations from studies of legal consciousness and broader theories of political behavior. These expectations should not be taken as hypotheses to be formally tested, but rather as propositions to be explored. Importantly, as scholarship on both legal consciousness and legal pragmatism indicates, individual behavior cannot reasonably be separated from the social context in which it is embedded (Ewick and Silbey 1998; Baum 2008). The goal here is to identify pathways along which individuals might make decisions about how to proceed with their lives. Some of the time, these decisions in Colombia might result in turning to the formal legal system to file tutela claims, and sometimes these decisions might not. These context-specific decisions have implications for the individuals making the decisions as well as for the social contexts in which they operate.

The first behavioral expectation draws on the idea that behavior is the manifestation of how individuals understand themselves relative to their social contexts, or what I call here their "orientation." Certain orientations catalyze certain behaviors and foreclose others. I add the qualifier "naïve" to indicate the rather

simplistic logic linking ideal types of legal consciousness and behavior, which discounts the possibility of complicating beliefs, needs, or experiences from intervening in behavioral decisions. This expectation should be thought of as a baseline. The second expectation suggests that individuals engage in cost-benefit calculations when deciding whether or not and how to mobilize, where material concerns, or more specifically expected material gains weighed against the expected difficulty of making claims, determine strategic mobilization decisions (Gallagher 2006; Hendley 2012).[162] The third expectation, on the other hand, suggests that common sense about what one does – or what one ought to do – drives behavior. It may be useful to consider expectations 2 and 3 in light of the logics of consequences and appropriateness (March and Olsen 1988) as well as in the logic of practice (Bourdieu 1977).[163] Each of these expectations refers to a different set of beliefs. The table below lays out these three behavioral expectations in more detail.

Table 5.1. Legal Consciousness Behavioral Expectations

Naïve Orientation Expectation (1)	Individuals must view themselves as "before the law" or "with the law" in order to engage in legal mobilization. Those who understand themselves to be situated "against the law" do not turn to the courts to make rights claims.
Outcome Expectation (2)	Prospects for a remedy are good if I pursue this kind of claim in the courts, *or* it will not be overly difficult for me to make this kind of claim in the courts.

[162] As Gallagher (2006: 803) notes, this strategic calculus reflects the "with the law" ideal type described by Ewick and Silbey (1998), wherein actors consider the law as a sort of game that can be played effectively or poorly and whose rules can (sometimes) be manipulated.

[163] Often the logics of practice and appropriateness are separated into two distinct explanations for behavior. I combine them here for the sake of simplicity. Neither explanations focuses on the expected outcome, which would be the case following a logic of consequences (the outcome expectation), or on how the actor understands him- or herself (the orientation expectation).

Practice Expectation (3)	Making this kind of claim in the courts is simply what one does, or it is appropriate for me to make this kind of claim in the courts.

The naïve orientation expectation (1) suggests that the way an individual understands him- or herself relative to the law will strongly influence their likelihood of mobilizing, specifically that individuals who understand themselves to be situated "against the law" at a given moment will be more likely to view formal legal institutions as sites of, at best, the replication of inequalities or, at worst, sites of punishment, rather than as sites of promise, thus making them less likely to turn to the courts under any circumstances.[164] In other words, the implication is that those who fall within the lower class or are otherwise marginalized are expected both to express less confidence in the organs of the state and to make legal claims using the tutela procedure less often. In the outcome expectation (2), a means-end calculation drives decisions about whether or not to air grievances in the courts. Importantly, the focus here is on the way individuals understand the process and expected outcome of legal mobilization, not on "objective" measures of access to the legal system. Claimants must believe that they have a high probability of success or that the process of making the claim will be relatively easy. This calculation might involve, for example, an assessment of whether or not the state seems to be inherently biased against the claimant and whether or not rights are meaningful in real life, and not just on paper. In real terms, then, the expectation is that an association between confidence in the legal

[164] The argument is not that certain individuals or groups always understand themselves as "against the law." These understandings are both dynamic and contingent, but even so, they have real consequences in specific situations.

system and in propensity to file tutela claims will emerge. Instead, however, it could be that mobilization has assumed a taken-for-granted quality, and individuals simply do not make the assessments implicated in the second expectation; in other words, mobilization becomes what one does, which is the practice-based expectation (3). Here, the expectation is not that claimants will exhibit an unthinking acceptance of the tutela, but rather will suggest that it is appropriate, right, or common sense to file such a claim. The logic underlying this explanation is further detailed below.

Data and Methods

This chapter draws on three sources of data collected in the three largest cities in Colombia – two sets of interviews and an original survey. One set of interviews was conducted in Bogotá in February and March 2017. With the help of a Colombian research firm, the *Centro Nacional de Consultoría*, respondents were randomly selected within three class categories (lower, middle, and upper). Interviews were conducted in locations chosen by the respondent – usually the respondent's home. Over the course of an hour-long semi-structured interview, respondents were asked to share their views on their neighbors and neighborhoods, on any difficulties they or their family members had in terms of topics ranging from healthcare, housing, education, social security or pensions to minor disputes between neighbors, and, at the end of the interview, on the Colombian legal system.

I conducted the second set of interviews – 24 unstructured individual and group interviews with 43 people – in Comuna 14 of Aguablanca, Cali during April and May of 2017. Aguablanca is a marginal district of Cali, comprised of several smaller

units called *comunas*. The district is densely populated and is home to approximately 700,000 people. Disproportionately high levels of violence and poverty characterize the district. These interviews took place in respondents' homes and more often than not took the form of informal conversations about justice in Aguablanca or in Colombia. A local interlocutor connected me with each interviewee and was present for the majority of these interviews – as such, interviewees were primarily part of her social network and are not necessarily representative of the district as a whole. Frequently, family members, friends, or neighbors of the primary respondent wandered into the room in which we were conducting the interview. At times, some of them would decide to join in.

After transcription, both sets of interviews were organized, coded, and analyzed. I grouped responses by question to facilitate comparisons across gender, class, and location. From there, I created sub-groupings that corresponded to the implications of each of three behavioral expectations outlined in the previous section, looking specifically for patterns of support as well as statements that did not accord with these expectations. I translated illustrative quotations, which appear in the discussion below.

The survey was based on a convenience sample of people waiting in line outside the Palacio de Justicia in Medellín to file a tutela claim in April 2017. As such, they reflect the views of individuals who have already decided to file a legal claim, rather than the views of the general population. In total, 310 respondents were surveyed. Importantly, this survey only includes claimants – individuals who had already recognized something in their lives as problematic and who had decided to

turn to the legal system to address that problem. These individuals are not necessarily representative of the broader population.

Together these three sources of data offer a far-reaching perspective on how Colombians view the law, their rights, and the legal system, in addition to the times in which they have, in fact, used the courts to make legal claims. By conducting interviews in Aguablanca, I was able to examine how marginality, and the violence and economic difficulties that accompany it, affect both beliefs about the law and legal mobilization. People living in Aguablanca might be more likely to face difficulties accessing their rights and thus have a higher rate of grievances than other communities. On the other hand, people living in Aguablanca may also be more likely to hold negative views on the state and the judiciary due to more frequent experiences with the state's coercive power. The survey allows me to focus in on the experiences of claimants – those individuals who have decided to make legal claims – and the randomly sampled in-depth interviews give me an overview perspective on how individuals of different socioeconomic statuses who may or may not have filed a legal claim view these issues. I turn now to an analysis of these data.

Assessing Beliefs and Action

In the following section, I examine the expectations described above, drawing on data from each of these sources. First, however, I make the case that individuals who fall within the samples of interviewees and survey respondents have, in fact, made constitutional rights claims in the courts. Importantly, individuals across all three sources of data reported having used the tutela procedure to claim their

constitutional rights. Respondents across class categories in the Bogotá sample said they already had filed a tutela claim, or that someone close to them had. Only one respondent who had used the tutela previously said that he would not in the future. Around 10% of respondents said they would not use the tutela procedure, and 13% responded that they were unsure. More than three-quarters of respondents said they would – generally adding the condition "if necessary" and generally interpreting the question with respect to a hypothetical health problem (though the question itself offered no such specification). Residents of Aguablanca reported less experience with the tutela than interviewees in the Bogotá sample, though most did state that they would file a tutela claim in the future if need be. Those who said that they had filed tutela claims exclusively had filed with respect to a health rights claim. Of course, all individuals surveyed were planning to file a tutela claim – that was a condition of their selection for the survey. Two-thirds of survey respondents identified themselves as belonging to the lower class, while just about one-third reported middle class status. Only two respondents belonged to the upper class.[165] Interestingly, just 8% of those surveyed were filing a tutela claim for the first time, and the average number of tutelas filed per person was 3.7. About 55% of respondents were filing a tutela claim related to a healthcare need, just over one-quarter were filing an information request (*derecho de petición*), and nearly 17% were filing to claim victim status or benefits. The use of the tutela procedure as reported by interviewees and survey respondents largely reflects national-level statistics – health claims make up a large percentage of all

[165] Following the substantive questions, respondents were asked about the *estrato* that appears on their electric bill. Cut coarsely, *estrato* 1 and 2 are considered lower class, 3 and 4 middle class, and 5 and 6 upper class.

tutelas filed each year, as do *derecho de petición* claims. I turn now to a discussion of each of the three behavioral expectations in light of these data.

1. Naïve Orientation Expectation

The naïve orientation expectation suggests that individuals who understand themselves as situated "against the law," facing an arbitrary and powerful state institution, will be relatively-speaking not very likely to turn to the courts to make rights claims. As such, this section begins with an examination of the perspective of residents of the marginal sector of Aguablanca, where the presence of the state has generally been limited to a police presence understood as both coercive and capricious, before moving on to a discussion of the views expressed in the Bogotá interviews.

Across the interviews in Aguablanca – whether with men or women, relatively better or worse off individuals, Afro-Colombians or mestizos – respondents noted that money determines treatment by the state in several senses. In one sense, money matters insofar as corruption rules. In the words of one respondent, "Corruption is blatant; it's everywhere in the justice system."[166] Several interviewees shared a story about a young man from the neighborhood who had been beaten up by someone from another neighborhood. This young man and his mother filed a legal complaint. The story continues with the second man's family hiring a good lawyer and paying off both the police and the judge. Ultimately, the first young man was cast as the aggressor and threatened with jail time. Instead of finishing the legal process, he fled

[166] Aguablanca interview 5. "La corrupción tan verraca que hay. Por todo lado [en el sistema de justicia]."

to the countryside. While I cannot verify the details of these events, this story speaks to the widespread perception that the justice system, from the police to the courts, is unjust, capricious, and driven by money rather than truth or fairness. In another sense, money matters because the legal system is complicated, the public defenders are inadequate, and having a good lawyer will change your outcome. Further, as one respondent held, "The public defenders are thieves, not all of them, but the majority."[167] The perception is that they charge even though they are supposed to represent clients for free. Other lawyers are so costly as to be out of reach for most residents of Aguablanca. Finally, in a third sense, money matters because it confers respect; poor people are simply not respected by state authorities.[168] Here, among residents of Aguablanca, the "against the law" positioning is clear. Yet, as mentioned above, Aguablanca is not characterized by the absence of legal claims, as would make sense given the naïve orientation expectation. Residents routinely file legal claims (including those who were interviewed) – though they only discussed the tutela in relation to health, and some stated (inaccurately) that the tutela could only be used to make claims about healthcare.[169]

Interestingly, many of the views espoused by residents of Aguablanca were echoed in the interviews conducted with residents of Bogotá, regardless of class, though the expectation would be that those who are worse off would be more likely to understand themselves as situated "against the law." Almost no one reported a belief

[167] Aguablanca interview 1. "Los abogados del estado … son ladrones, no todos, pero la mayoría."
[168] Aguablanca interview 23.
[169] They also file *demandas* or lawsuits related to police conduct and report crimes like theft. The dynamics of these claims are beyond the scope of this project, but should be the object of study in future research.

close to the "before the law" positioning, instead pointing to wide gaps between law on paper and law as it is applied or to external factors that rendered the legal system unjust. One respondent from the lower class said, "It seems to me that the justice system is something terrible … For example, a person who steals a yogurt serves four years, and a person who goes and kills someone else or rapes a girl serves two years … I say that is not justice."[170,171] Similarly, an interviewee from the middle class remarked, "[The application of justice] must be the same for all, not that there is justice for some in one way and for others, another. As they say, 'a los de ruana unas leyes y a los privilegiados otra' [for the poor, some laws, and for the privileged, others]. That should be the same for everyone. There should be one law."[172] An upper class respondent echoed this perception, also referring to the saying "la ley es para los de ruana." She continued, "The people who have more money have more ways to solve their problems."[173] Here, across class categories, the dominant assessment of the legal system points not to its majesty, but to its fundamental inequity. Still, as noted in the previous section, most interviewees either had filed legal claims themselves or a friend or family member had. These interviews, combined with the Aguablanca interviews, indicate that a simple linkage between one's positioning and expected

[170] Bogotá interview 36. "Me parece que [el sistema de justicia] es algo terrible … Por ejemplo una persona también se roba un yogur y va y paga 4 años y una persona va y mata a otra o viola una niña y va y paga 2 años … digo yo eso no es justicia."
[171] This quote in particular maps on to a subset of law and society scholarship known as "gap studies," which demonstrate in various contexts the substantial differences between law in theory and law in practice (see discussion in Sarat and Kearns 1995).
[172] Bogotá interview 4. "[La aplicación de la justicia] debe ser igual para todos, no que haya justicia para unos de una forma y para otros de otra. A las personas como dicen a los de ruana unas leyes y a los privilegiados otra. Eso debe ser igual para todos. La ley debe ser una sola."
[173] Bogotá interview 34. "La gente que tiene mucho dinero, tiene más posibilidades de solucionar muchas cosas."

behavior offers an incomplete story about the relationship between beliefs about law and legal mobilization.

2. Outcome-Based Expectation

The outcome-based expectation holds that individuals rely on means-ends calculations about whether or not to engage in legal mobilization. These calculations involve an assessment of the ease of making claims and the likely effectiveness of doing so. Almost everyone in the Bogotá sample evaluated the legal system negatively. One lower class respondent stated simply, "It would be better to say that Colombian law does not exist,"[174] and an upper-class respondent likewise noted, "Justice here in Colombia does not function; there are no laws."[175] Isolating the differences of rights on paper and how the law functions in everyday life, one lower-class interviewee noted that "in some ways, one is sold the image that things have tended to improve [with the Constitution of '91], but one does not see that change,"[176] a view echoed by the upper-class interviewee quoted at the outset of this chapter. Another lower class woman further stated, "Realistically, people of few resources have not been the beneficiaries of any constitution,"[177] questioning the idea that law anywhere helps the poor. Yet another lower class respondent noted that corruption impedes the judiciary from being a useful forum in which to seek justice, perhaps especially for the worst off: "Corruption takes over the whole world … The one who

[174] Bogotá interview 29. "Mejor dicho la ley Colombiana no existe."
[175] Bogotá interview 6. "La justicia acá en Colombia no sirve; no hay leyes."
[176] Bogotá interview 11. "En cierto modo a uno le venden la imagen de que tienden a mejorar [con la Constitución del 91] pero uno no ve ese cambio."
[177] Bogotá interview 39. "Pues realmente digamos que las personas de bajos recursos no han estado muy beneficiados, digamos que con ninguna constitución."

gives the most money is the one who is right. The people who have the least resources are vulnerable, and they are not given justice."[178] Members of the upper class shared similar views. One reported, "This is how I see it; it is money everywhere. Judges are bought. Magistrates are bought. Prosecutors are bought. Everything is money. There is no justice here!"[179] By and large, assessments of the judiciary's inefficacy do not appear to vary along class lines.

Interviewees in Aguablanca reported similar views on the large gap between rights and laws as they are written in the Constitution and in the codes and how they work in practice. As one respondent described, the major problem facing the legal system is that "There is the absence of the application of the laws as they are. Here we have laws, but they are not applied as they are [or as they should be]," and that the same applies to rights.[180] This perception contrasts to that of other residents who tended to state things like, "There is no law," or, "The law does not exist."[181] These views are not necessarily incommensurate, as the former is a statement of objective fact (there are technically laws in Colombia) while the latter offers a subjective, experiential view (residents rarely experience the law outside of delegitimizing factors such as violence and corruption). Another resident explicitly referenced the differences between the constitutional text and everyday life: "It is one thing what the

[178] Bogotá interview 13. "La corrupción se lleva a todo el mundo… Al que le entre más dinero es él que tiene la razón. Las personas que tienen menos recursos son vulnerables ante que no se les de justicia."
[179] Bogotá interview 50. "Así es como yo lo veo, es dinero por todos lados. Se compran los jueces, se compran los magistrados, se compran los fiscales. Todo es con dinero. ¡Aquí no hay justicia!"
[180] Aguablanca interview 6. "Falta aplicar las leyes como son. Aquí hay leyes, pero no se aplican como son."
[181] Various Aguablanca interviews). "No hay ley. La ley no existe."

Constitution says and another what happens … the rights, every day they are violated. All of them are violated."[182]

Few respondents in Bogotá gave any suggestion that they viewed their constitutional rights as effective tools in and of themselves. Instead, interviewees appeared to have more confidence in the idea that rights could have real consequences on their everyday lives only through the use of the tutela procedure. One respondent from the middle class, for example, pointed to the key role of the tutela in transforming what is written in the Constitution into substance: "I think it is important to know what [the tutela] is, to know that it is a right that is in the Constitution that, in fact, allows us to fight for the rights we all have. The tutela allows us to assert what is constitutionally written.[183] An upper-class respondent similarly reported that he viewed the tutela as "an excellent mechanism to access and assert my rights."[184] Across classes, interviewees shared views that suggested skepticism about the value of their rights, especially in the absence of the tutela.

Survey respondents reported very similar views. Nearly 70% stated that they were unconfident or very unconfident that the judiciary treated all citizens equally. Only 19 out of 310 respondents said there were confident in the judiciary, and zero respondents reported that they were very confident. Thus, respondents reported little confidence in encountering a fair judiciary. Twenty percent of respondents pointed to

[182] Aguablanca interview 5. "Una cosa lo que dice la Constitución y otra cosa lo que hacen … los derechos, todos los días los violan. Todos los violan."
[183] Bogotá interview 35. "Creo que es importante saber lo que es [la acción de tutela], conocer que es un derecho que está en la Constitución, que pues que de hecho nos permite luchar por los derechos que todos tenemos. Una acción de tutela nos permite hacer valer lo que constitucionalmente está escrito."
[184] Bogotá interview 32. "[La acción de tutela es] un excelente mecanismo para poder acceder y hacer valer mis derechos."

the view that the state should protect their rights as the primary reason for filing a tutela claim, which could be interpreted as minimal support for the idea that their constitutional rights are "real" or claimable. The nature of the survey does not allow for the same level of nuance that emerges in responses to open-ended interview questions; however, the survey does yield evidence that the evaluations of the general population in questions about the judicial system carry through to individuals who use the legal system. Here, claimants do not appear to be fundamentally different from non-claimants in their assessments of the state and the judiciary.

In this context of general lack of faith in the state, the judiciary, and rights, perhaps citizens view the tutela as distinct from the rest of the state's legal apparatus, as an effective tool in an ineffective system. During a group interview in Aguablanca, members of one family (living in extreme poverty, even for Aguablanca) explained that "We have filed many legal claims, and they do not care [or respond]," no matter what type of claim, whether to obtain access to government services or to report the excessive use of force by the police.[185] One woman described the process of filing a tutela claim for the right to health as follows:

> You do not need a lawyer, but when you go to the Palace of Justice, there is a man in front who does everything for 10.000 or 15.000 COP [$3-5 US] – a processor. And you say, "Good morning, what happened is … [I would like] to place a tutela," and the man processes it for you. You have to have a copy of your ID and wait in line … and after a few days, you get the response. If you do not pay a processor here, nothing happens.[186]

[185] Aguablanca interview 1. "Ponemos una cantidad de demandas y ellos no les importa."
[186] Aguablanca interview 6. "No necesitas un abogado, pero vas al frente del Palacio de Justicia y hay un señor en frente que hace todo por 10 o 15 mil – un tramitador. Y tú dices buenas señor, lo que pasa es … para colocar una tutela y el señor tramite. [Tienes que tener una] fotocopia de la cédula y [esperar en] la fila … y después unos días, la respuesta. Si usted no paga un tramitador aquí, no hacen nada."

Ultimately, the judge found in favor of this woman's right to health claim; however, in the decision, he declared that she should have access to diapers and creams, not the 24-hour nurse she had requested. In Aguablanca, citizens rarely, if ever, reported believing that the tutela was effective in protecting their rights.

In the Bogotá sample, however, views on the tutela procedure were mixed. One respondent of the middle class described that the tutela the following way:

> [The tutela] gave the ordinary citizen the possibility to enforce their rights or show difficulties in the fulfillment of some fundamental right … Before the tutela, there was nothing one could do. It was necessary to wait for a politician to be elected, and if he cared about that community, wait for him to intervene in some way. Not now. Now, an individual, a single person, can file a complaint with the tutela.[187]

An interviewee from the upper class similarly considered that "[The tutela] helps, it is a tool that makes those responsible respond to what one is asking for."[188] Further, a middle class respondent held, "[The tutela] is the only thing that works – we use it because it works."[189] On the other hand, some respondents critiqued the way the tutela procedure functions in practice. As one member of the lower class noted, "The tutela is good, but what happens is that they do not comply … the people do not comply."[190] Others argued that too many tutelas have been filed, that judges are overburdened by tutelas and that sometimes people abuse the procedure. An interviewee from the lower

[187] Bogotá interview 9. "… le dio la posibilidad al ciudadano común de hacer cumplir o de mostrar que hay dificultades en el cumplimiento de algún derecho fundamental … antes de la acción de tutela no había nada que hacer, tocaba esperar a que un político se eligiera y que le importara esa comunidad para que interviniera de alguna manera, ahora no. Ahora un individuo, una sola persona, con una acción de tutela puede poner una denuncia."
[188] Bogotá interview 6. "[La tutela] le ayuda a uno, es una herramienta que hace que los responsables de lo que uno está tutelando le respondan por lo que uno está pidiendo."
[189] Bogotá interview 44. "[La tutela] es lo único que funciona – lo usamos porque es lo que funciona."
[190] Bogotá interview 13. "[La acción de tutela es] buena, [pero] lo que pasa es que no se cumplen … la gente no cumple."

class noted, "Lately, the courts are so full of tutelas … Already [the tutela] lost its efficiency."[191] One member of the upper class spoke specifically about the over-use of the tutela, stating, "People abuse the tutela a lot and it takes up a lot of time to resolve [the tutela claims]," stressing an already overtaxed legal system.[192] Finally, some respondents simply held negative views on the tutela. As one lower-class respondent remarked, "[The idea of the tutela is] to assert our rights, but that does not work … that is a lie, it does nothing for you."[193] Similarly, a woman from the middle class noted that filing a tutela "seems to me a waste of time and above all fills the courts … the perception I have is that it is of no use."[194] Thus, while respondents in Bogotá generally agreed that the justice system as a whole leaves much to be desired, perspectives on the effectiveness of the tutela procedure were more varied.

Surprisingly, the ease of filing a tutela procedure does not appear to have impacted the decisions of respondents whether or not to make a legal claim. When asked to describe the process of filing a tutela claim, why they filed a tutela claim – if they had – and if they would file a tutela claim in the future, no respondents mentioned that the process was easy, nor did anyone volunteer the idea that one should file the tutela in the face of rights violations. In fact, several respondents reported having to wait in long lines to file their claims and reported dissatisfaction with the length of time that passed between the presentation of the claim and the resolution of their case.

[191] Bogotá interview 1. "Últimamente como que las acciones tutela como los juzgados están tan llenos de ella… Ya perdió su eficiencia."
[192] Bogotá interview 33. "La gente abusa mucho y eso quita mucho tiempo también para poder resolver las cosas."
[193] Bogotá interview 29. "[La idea de la tutela es] hacer valer nuestros derechos, pero eso para que, eso nunca sirve para nada … eso es mentira, eso no hace nada por uno."
[194] Bogotá interview 18. "Me parece una pérdida de tiempo y un desgaste y sobre todo llenar más allá esos juzgados … la percepción que yo tengo es que no sirve para nada."

These views resonate with those reported in Aguablanca. When interviewees did talk about the process of filing a tutela, they spoke of the lines one must wait in and the costs one must pay (for example, to the "processor" described above). While the tutela process in this view is not necessarily something that is difficult to navigate, it does require time and financial resources, rendering it somewhat less accessible for citizens. Even among survey respondents – who had all committed to the tutela process at the time of the survey – only 32% pointed to the relative ease as the primary reason they chose to file their claim. About one-third of respondents envisioned a positive outcome resulting from their tutela claim and that nearly one-third offered the view that the tutela is the best tool to address the problem at hand. Nearly half of respondents, on the other hand, thought a favorable outcome was unlikely or very unlikely. Importantly, the best tool is not necessarily a good tool – it may be the only tool or the best of a set of sub-par options. This response simply means that relative to all other options, the tutela is better. Here, across all three groups, concerns about ease and effectiveness of the tutela appeared determinative only for a small portion of respondents.

Overall, neither set of interviewees nor the survey respondents reported confidence in the state or the judiciary. Some suggested that they thought the tutela would effectively allow them to claim their rights, though others reported skepticism about the utility of the tutela. Similarly, some respondents argued that the tutela was not difficult to use and pointed to that ease as a reason to file a tutela claim, while others argued that the tutela was more difficult to use that they had expected or that the ease of use was not a primary determinant in whether or not to file a claim. This

discussion should not be taken to mean that no one uses means-ends calculations when considering a tutela claim, but it does offer reason to question the utility of this outcome-based framework for describing broad patterns of behavior in this case.

3. Practice-Based Expectation

Finally, the practice-based explanation of this seeming disconnect between citizen use of the tutela procedure and their reported beliefs about the state and, more specifically, the legal system would suggest that a logic of practice is at play, where citizens, regardless of the costs or consequences of doing so, file legal claims, simply because that is what one does, or because that is what is understood as appropriate to do. In defining practice theory, Iver Neumann (2002: 629) explains that practices are "incorporated and material patterns of action that are organized around the common, implicit understandings of the actors." The thought process is not one of careful deliberation, of weighing the expected consequences of option against another, but instead of common sense.[195] Here, filing a tutela could be understood as a practice or as an "appropriate" course of action. Evidence in support of this explanation would include statements such as "It's the right thing to do," or "It's what we do."

One example of this perspective is evident in one in-depth interview with an upper-class resident of Bogotá. The interviewee noted that "today, the way to resolve problems is through the tutela. Nowadays, it is used for health issues, but you can use

[195] Importantly, however, as Schmidt (2014: 819) notes, habits – in a pragmatist theory of practice – are not "purely unreflective modes of thought and individual (nonsocial) action." Schmidt clarifies that habits may be considered, in Dewey's terms, as "standing predilections and aversions." In this sense, habits may play a similar role to the role I describe with respect to beliefs above. For an alternate view on the extent to which practices are reflexive or representational in nature, see Pouliot (2014).

it for any right that you feel is being violated."[196] This statement could be read as support for the idea that filing tutelas is simply what one does, especially in the realm of health, thus following the logic of practice. However, given its reference to "the way to resolve problems," it could also be read as following outcomes-based reasoning. Further, among all interview and survey respondents, there were no other responses that indicated support for the logic of practice explanation.

Even so, the tutela appears to become taken-for-granted as part of the terrain of Colombian life. It is ubiquitous, appearing in news stories, op-eds, and podcasts, as well as in colloquial conversation (in verb form, *entutelar*). It could be, however, that the ubiquity of the tutela at the discursive level has not translated evenly or concretely into thinking about how individuals claim their rights in real terms. At any rate, neither the interviews nor the survey results offer support for the logic of practice explanation for mobilization.

So What Explains Mobilization and Why Does It Matter?

All three sources of data offer perspectives on the legal system and rights that do not easily harmonize with high levels of use of the legal system to make rights claims. When asked why the tutela is used so frequently, judges and lawyers repeatedly report that "everyone knows the tutela" and that citizens see the tutela "as the solution for everything," or "today, with the tutela, the judge is in your hands,"[197] yet when asked directly, citizens rarely if ever report these views. More commonly

[196] Bogotá interview 20. "Hoy en día la manera de resolver los problemas es a través de la tutela, digamos que hoy en día se utiliza todo los temas de salud pero ya tú la puedes poner para cualquier cosa algún derecho que tu sientas que se está vulnerando lo puedes poner o algún derecho."
[197] "Hoy con la acción de tutela, el juez está a mano."

people reported filing tutelas – especially those claiming the right to health – not because they have faith that it will work or that it is simply what one does, but because that is what one *has to do* given the reality of limited options. In the words of one respondent from the middle class, "Unfortunately, in Colombia, in order to access health services, you have to file tutelas,"[198] and a woman from Aguablanca noted, "Everything [in healthcare] happens through the tutela."[199] Similarly, an upper class resident of Bogotá reported:

> The only way to claim that right [to health] so that they listen is through the tutela. To me, it is sad that we have come to this, because health should be an issue that is mandatory, but as it is not, we have to resort to this, and not everyone gets a satisfactory answer [or result].[200]

In this sense, then, the tutela is understood as the effective entry-point into the healthcare system.[201] Tutelas may or may not be effectual, but no other options exist, except for doing nothing. If the problem is deemed to be important enough, doing nothing may not be considered a viable option.[202] In other words, the tutela might be the only potential solution for anything. Accordingly, even if the judiciary is biased, even if the procedure might not work, pursuing any other strategy is likely to be

[198] Bogotá interview 9. "Desafortunadamente en Colombia para acceder a algunos servicios de salud hay que poner tutelas."
[199] Aguablanca interview 6. "Todo funciona a medida de tutelas."
[200] Bogotá interview 46. "La única manera de reclamar ese derecho [a la salud] y que los oigan es a través de la tutela. Me parece que pues tristemente hay que llegar a eso porque el tema de la salud debería ser un tema que es de carácter obligatorio pero como no es así entonces hay que recurrir y no todo el mundo obtiene una respuesta satisfactoria."
[201] As might be expected, the Constitutional Court has ruled that the tutela cannot be a required part of the process of obtaining healthcare (see C-950/07, among other cases). However, this ruling does not mean that citizens do not perceive the tutela to play such a role.
[202] What differentiates those who do not act from those who do is an open question and should be the subject of future research. Generally speaking, mobilization – both social and legal – occurs at rates lower than might be warranted by possible grievances or "justiciable events" (e.g., McCarthy and Zald 1977; Genn 1999).

futile.[203] The options are to file a tutela or simply continue to live with the problem; there is no other alternative.[204] Legal consciousness informs the response set available to citizens. Beliefs about law and the state lead citizens to be skeptical of the likelihood that the tutela procedure will lead to a positive outcome, but these beliefs also lead them to view other options as less favorable. Even those who understand themselves to be situated "against the law," subject to arbitrary decisions on the part of judges or other actors, thus, will engage in legal mobilization through the tutela.[205] This finding largely corresponds with Mary Gallagher's work on "informed disenchantment" (2006). Individuals continue to make legal claims, despite less-than-fully-satisfactory experiences with the courts and despite less-than-positive expectations for future interactions with the courts.

How exactly citizens learn about the tutela might have a significant impact on their propensity to use the mechanism to make claims. When asked how they learned about the tutela procedure, nearly half of the survey respondents pointed to a lawyer as

[203] In some ways, this conclusion meshes with Hendely's (2012) findings on the use of Russian courts. She argues that a combination of need and capacity explain the continued use of courts despite professed distrust. In the Colombian case, however, capacity of the claimant appears to be less relevant, as a large percentage of lower class individuals file tutelas, rather than use of the courts being the domain of wealthy individuals or firms. This may be the result in part of the relatively low time and resource costs associated with the tutela procedure.

[204] The key difference between my account and a practice- or habit-based account is that while it may be common sense to file a tutela to gain access to healthcare, the justification offered goes beyond that. Filing a tutela is not only understood as common sense; it is understood the only option. Filing is not simply what one does, but instead it is what one has to do.

[205] This account has focused on the views of (potential) claimants, not on service providers or judges. I make no claims as to the accuracy of the views held by those interviewed. Whether these views are "true" or "right," they have an impact on the way citizens interact with the world around them. Interestingly, one former lawyer for a large health clinic reports that patients often try to game the system, engaging in dangerous behaviors in the clinic – such as submerging recently repaired wounds in the toilet to try to contract an infection – that might allow them to gain *pensión de invalidez* status and therefore receive more resources from the state. These patients might fit better the with the law ideal type, using the tutela strategically to acquire something wanted, like a state pension. However, this view was not expressed by claimants or potential claimants themselves and thus is not part of the main analysis.

the source of their information. 21% said they learned from civil society or an NGO, while 16% said friends or family. 10% recalled learning about the tutela in school. One man remembered seeing a program on television that explained what the tutela was. Even in the case that a lawyer was the primary source of information, the question of why legal cynics would turn to the legal system for redress remains. Some individuals reported that in the case of healthcare, their insurance companies directed them to file tutelas (after having denied coverage for a needed medication or procedure). Overall, then, there appear to be several pathways through which citizens learn about the tutela, and the way in which citizens learn about the tutela does not appear to be associated with decisions about whether or not to use it. The no other alternative explanation is consistent both with these various sources of knowledge about the mechanism and with the observed aggregate negative evaluations of the legal system, though these pathways should be explored in more detail in future research.

Regardless of relative marginality, class, or claimant/non-claimant status, Colombian citizens report strikingly little confidence in judicial institutions, despite continued use of legal tools to make rights claims. The case of legal mobilization in Colombia has offered little support for the idea that those individuals who find themselves situated "against the law" will not engage in legal claims-making. Respondents across samples and across socio-economic statuses expressed the view that Colombian law is capricious and unfair, yet individuals in all groups filed legal claims. Outcomes-based calculations based on the ease and effectiveness of filing legal claims may influence the decisions of some individuals, but they do not seem to

account for the broad patterns of claims-making identified here. Finally, though the use of the tutela has become something of an accepted part of the process of accessing healthcare for many Colombians, using the tutela is understood not so much what one does (as suggested by the practice-based explanation), but what one has to do, the only option one has – and it is understood as an option that may or may not be effective. Importantly, the tutela is not, strictly speaking, the only route through which citizens can pursue access to their rights. In some cases, individuals or groups could file other kinds of legal claims, they could pressure their elected representatives directly, they could protest, or take any number of more specific actions. Yet, in this context, the tutela is understood to be the action one can take.

These findings should not be taken to mean that legal consciousness does not impact legal mobilization. Rather, they show that legal consciousness affects mobilization in complex ways. The beliefs and understandings actors have about their rights, the state, and the legal system encourage the use of the tutela, because citizens come to understand their rights through the lens of the tutela, viewing the tutela as their only possible option for accessing something they want, whether that thing is the response to a petition request or access to a specific medication or formal recognition by the state.[206]

The consequences of this emergent understanding that the tutela is the only means through which Colombians can realize their rights (or simply access the goods

[206] It might be most accurate to say that while these things are rights in accordance with the way the Constitutional Court has interpreted constitutional provisions, those citizens included in this study generally did not describe them as rights. Instead, citizens referred to something they wanted or needed that could be procured (possibly) through the use of the tutela procedure.

and services they want or need) are substantial. Perhaps most important in this case is the filtering of social and political demands into the legal sphere. As Susan Silbey (2005: 325) notes, "the seemingly individualized, disparate decisions of legal actors cumulate to reflect the wider array of social forces more than the facts of specific incidents." Though the judicialization of politics has been a global process, it has taken on a unique form and depth in Colombia through the ability – and apparent necessity – of citizens to file individual rights claims. Nowhere is this more apparent than in the realm of healthcare provision, in large part due to the understanding that one must file a tutela claim to even access the healthcare system. Shifts towards judicialization change the nature of obligation between citizen and state. Specifically, citizens have access to the rights promised to them in the constitution not as the result of implemented public policy or their ability to demand accountability from their elected officials, but because of their ability to file legal claims.

Importantly, even with the tutela, the realization of rights is not uniform. In fact, class appears to play a significant role. Rodrigo Uprimny and Juanita Duran (2014: 41) find that middle and upper class citizens have generally benefitted more from the judicial protection of health through the tutela procedure, because they are better able to access the legal system than the impoverished and marginalized, despite the 1991 constitutional changes meant to improve conditions of access.[207] Landau (2014) similarly concludes that the most disadvantaged citizens have not benefitted from these legal changes to the degree than their wealthier counterparts have. These

[207] Notably, even though *judicial* protections of healthcare seem to be unequal, significant reforms to the healthcare system in 1993 resulted in the expansion of coverage from about 25% of the population in 1995 to 90% of the population in 2011 (Lamprea 2015: 61).

initial studies affirm insights from broader law and society literature on how material and social resources influence the ability of citizens to realize their rights (Galanter 1974). All Colombians may have the right to claim their rights but not everyone can, in fact, claim their rights, and not everyone has the right to an implemented solution to their rights claim in practice.

The long-term significance of the existence of the tutela procedure and the persistent lack of confidence in the state remain to be seen. At this point, more than 25 years after the constitutional reform, the impact of what may have been a good faith attempt to expand citizenship by virtue of broader rights guarantees appears to be a reiteration of the same old story, that all citizens are equal, but some are more equal; that everyone has rights, but some have a better ability to realize their rights. This is not to say that the 1991 Constitution and the tutela have had no effect on the lived reality of citizens; such a conclusion is undoubtedly false. The claim here is more limited, that the implementation of the 1991 Constitution has not resulted in substantive citizenship gains for all. Just as the existence of the tutela procedure should not be taken to mean that a thick or robust citizenship has been realized, continued use of the tutela should not be taken to mean uncritical faith in either the tutela itself or the legal system more generally. Instead, the persistent use of the tutela indicates the paucity of other options. Citizens use the tutela because there is no other alternative.

Conclusion

This chapter has explored the relationship between legal consciousness and legal mobilization among everyday Colombian citizens, drawing on three sources of originally collected data. Across the three largest cities in Colombia, regardless of class or relative marginality, citizens report a profound lack of faith in the judiciary's ability or willing to provide justice and in the broader state's ability or willingness to protect their rights. Yet, every year in large numbers, citizens turn to the court to make rights claims, requesting that judges call on state and private entities to change their behavior. In Colombia, as is the case elsewhere, citizens continue to make claims through the legal system, participating in the construction of "hegemonic legal consciousness" (Silbey 2005: 349), where formal legal institutions maintain functional legitimacy "despite repeated evidence of law's failure to live up to its own ideals" (Hull 2016: 553). This disconnect presents an interesting puzzle – if citizens have so little trust in the courts, why do they turn to them with such frequency?

The argument advanced here is that the beliefs that citizens hold about the state, the legal system, and their rights – developed through personal experiences and on the basis of word of mouth – condition them to view the *acción de tutela* as the one possible way to resolve their problems, especially for – but not limited to – issues related to health. Though citizens do not necessarily see the judiciary as an ally or the tutela as an easy and effective tool, every other option is less promising; there is no other alternative to the tutela. Some individuals are what we might call "true believers," professing full faith in the tutela's transformative potential in the country, while others view the tutela procedure negatively, as a waste of time. Overall, however, claimants seem to be largely ambivalent, employing the tutela because it is

the best option of a limited choice set. This conclusion runs contrary to declarations made by legal elites and media outlets, which tend to report exuberant and even overuse of the tutela by everyday citizens.

This study has introduced empirical evidence of the deep skepticism with which Colombian citizens view the state, especially with respect to the state's ability to provide justice and protect constitutional rights. The high frequency of use of the legal procedures, especially the tutela, obscures this profound distrust in state institutions. Examining legal mobilization in conjunction with legal consciousness allows for a fuller understanding of the dynamics at play. Though it may be tempting to dismiss some of these perceptions as someone simply misunderstanding the legal process – for example, getting caught up in rumors of corruption or not recognizing that delays often result from the protection of the rights of both those bringing cases before the courts and defendants – these findings should be taken on their own terms. This is how Colombian citizens across socioeconomic statuses from three major cities report their views on the state, the legal system, and their rights.

This chapter has examined two aspects of my constructivist account of legal mobilization: legal grievance formation and legal opportunity. By adopting a "from below" perspective, we can see not only that cases do not come before judges "as if by magic" (Epp 1998: 18), but more specifically just how fraught and complicated the process of legal claims-making actually is. Chapter 6 takes on this perspective in the South African case.

CHAPTER 6

EXPLORING CLAIMS-MAKING PRACTICES IN POST-APARTHEID SOUTH AFRICA

Legal Mobilization "From Below" in South Africa

While the previous chapter examined the relationship between legal consciousness and legal mobilization in Colombia, this chapter turns to the South African case to explore legal claims-making in the absence of a mechanism that dramatically reduces the difficulty of accessing the formal legal sphere (such as the tutela). Gabrielle Kruks-Wisner (2018: 124) defines claims-making as "action – direct or mediated – through which citizens pursue access to social welfare goods and services, understood as publicly provided resources intended to protect and improve well-being and social security." Contemporary scholarship on legal claims-making, or legal mobilization, has been largely divorced from the broader conceptual category of claims-making. Yet, the rationale for such a hardline separation is unclear. As George Lovell (2012) demonstrates, even those who engage legal language and legal strategies enthusiastically hold complex understandings of the potential and limitations of the turn to law, and the turn to law does not necessarily or wholly close off the advancement of claims in other forums. Further, a broad view of claims-making can help to uncover how individuals make claims in expected and unexpected ways, and in expected and unexpected forums. In doing so, I focus on the following question: when do individuals choose to advance claims to social welfare goods in the formal legal system?

South Africa represents one of the most complete commitments to social constitutionalism (at least on paper). Further, South Africa is a country defined by stark inequalities, and many of its citizens lack access to the basic goods and services that a dignified life demands. While some indicators, such as access to electricity, piped water, and flush toilets, suggest significant improvement over the last twenty years, others, such as the percentage of the population living in poverty and the housing backlog, indicate stasis at best. South Africa shows both dramatic transformation in terms of rights recognitions and the creation of new avenues for claims-making as well as enduring poverty and significant barriers to the access of social goods and services.

My examination of claims-making practices in South Africa draws on an original 551-person survey. The survey focused on experiences of and responses to a set of problems related to housing, water, sanitation, electricity, work, education, and health. I refer to this set of problems as "social welfare goods" in this chapter. We know relatively little about the micro-foundations of legal claims-making. As such, I engage in a theory-building exercise, examining the determinants of both the belief that one *should* turn to the formal legal system when faced with difficulty accessing social welfare goods (the normative-evaluation outcome) and actual legal claims-making in those situations (the behavioral-turn-to-law outcome). More specifically, I investigate whether or not these outcomes are associated with knowledge about the courts, confidence in judicial institutions, legal system experience, exposure to legal resources, and an individual's perceived status relative to his or her neighbors. In my analyses, I find striking differences between the factors that influence when people say

they should file a legal claim in response to a rights violation and when they actually do so. Interestingly, the way an individual interprets his or her own material conditions, especially relative to his or her neighbors influences these outcomes. Having experienced fewer life difficulties is associated with the normative-evaluation outcome, while having experienced more life difficulties and is associated with the behavioral-turn-to-law outcome. Surprisingly, those who view themselves as better off than their neighbors turn to law when faced with difficulties accessing social welfare goods, though they are not more likely to view the turn to law as normatively appropriate. Both neighborhood context and beliefs about the meaning of law and rights impact legal claims-making practices in ways that have not yet been adequately studied or theorized.

These findings contribute to our understanding of claims-making and mobilization practices. First, they demonstrate that the relationship between normative evaluations of when one ought to file a legal claim do not necessarily coincide with the actual use of the courts to advance rights claims. In addition, they point to the importance of examining a largely under-studied set of factors related to how claimants perceive the material conditions of their own lives relative to those of their peers. In fact, what drives people to turn to the courts may have as much to do with how they understand themselves as with how they understand the courts.

Constitutional Commitments and Access to Social Goods

From the time of the Freedom Charter (1955) up through the construction of the post-apartheid South African state, the African National Congress insisted on the

indivisibility of rights, of the need for both access to political freedoms and those goods necessary for human flourishing. The 1996 Constitution accordingly recognized not only civil and political rights, but also economic, social, and cultural rights, making it one of the most progressive constitutions in the world. This constitutional framework has been described as fundamentally "transformative" in nature (Klare 1998; Davis and Klare 2010), with the idea being that the Constitution would set out the path leading the country from a social and political order embedded in discrimination and exclusion to one founded on justice and dignity.

The new constitutional framework encouraged changes meant (1) to allow for the dismantling of the apartheid state and to replace it with one defined by inclusive, participatory institutions, and (2) to encourage claims-making on the basis of individual constitutional rights rather than on the basis of group membership. In addition to recognizing individual rights, this new framework instated new mechanisms through which citizens could advance social claims not only more easily than during apartheid but also relative to other young democracies – these mechanisms include new Constitutional Court, "Chapter 9 institutions," such as the Human Rights Commission[208] and Public Protector,[209] as well as local governance bodies that would

[208] The South African Human Rights Commission (SAHRC) refers to itself as "the national institution established to support constitutional democracy" on its website, https://www.sahrc.org.za/. The SAHRC's mandate includes promoting, monitoring, and assessing human rights. In practice, the SAHRC is involved in research, advocacy, and legal services. South Africans are able to file complaints with the SAHRC, some of which are taken up in litigation or mediation, and the organization is also able to initiate investigations and legal cases of its own volition.

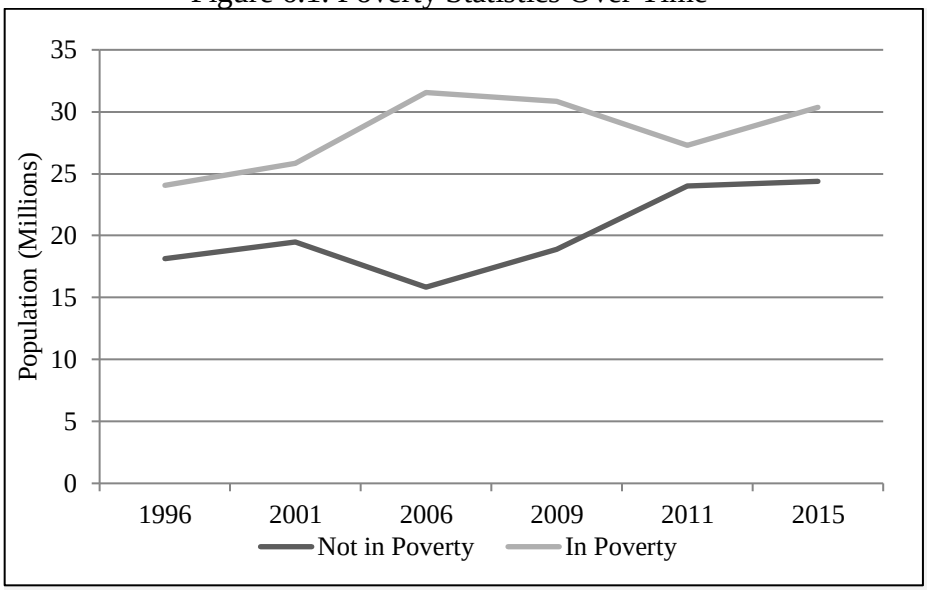
[209] On its website, the Office of the Public Protector bills itself as: "an independent institution established in terms of section 181 of the Constitution, with a mandate to support and strengthen constitutional democracy," having "the power to investigate, report on and remedy improper conduct in all state affairs," and as accessible to all South Africans: "Anyone can complain to the Public Protector," http://www.pprotect.org/.

be required by law to seek out citizen participation in decision-making processes. These changes not only dramatically reconfigured the expressed obligations of the state to its citizens, but also opened up new avenues for claims-making.

Since the end of apartheid, various government initiatives have been developed with the aim of improving basic living conditions. First and foremost, the Mandela government sought to implement what was called the "Reconstruction and Development Program" (RDP) following the transition to democracy. The first policy initiative of this program focused on "meeting [the] basic needs" of the general population, facilitating access to things like employment, housing and land, water and electricity, and healthcare and welfare (Ministry in the Office of the President 1994: 9). Though this program was ultimately abandoned, each subsequent government has continued to promise the expansion access to basic goods and services (and government housing is still colloquially referred to as "RDP housing"). As of 2016, the Department of Human Settlements reports that more than four million homes and housing subsidies have been delivered since 1994, and census figures show that access to electricity, piped water, and flush toilets has also increased substantially since the mid-1990s (Statistics South Africa 2017).

Yet, income inequality has increased since the end of apartheid, from a GINI score of 59.3 in 1993 to 63.4 in 2011(World Bank 2017). Further, as Figure 1 shows, in raw numbers, more people currently live in poverty than did at the end of apartheid, with more than 30 million people living in poverty in 2015 compared to about 24 million in 1996. In terms of percentages, we see only a marginal improvement from 57% living in poverty in 1996 to 55% in 2015.

Figure 6.1. Poverty Statistics Over Time[210]



What is more, despite the large number of houses built, the Department of Human Settlements (2017: 15) reported that "housing backlogs within both the subsidy and affordable market segments have almost doubled since 1994 and the number of informal settlements have increased." This housing backlog comes in the midst of complaints regarding unreliable demand databases, unspent budgets, and "queue jumping."[211]

As is clear from this discussion, despite overt constitutional promises regarding the promotion of social welfare, access to the goods and services that provide the basis for a dignified life is far from assured. This chapter examines how citizens have responded to this mix of promise, need, and frustration. I turn now to a discussion of claims-making within the legal sphere and outside it.

[210] Data for 1996 and 2001 from HSRC (2004) and for 2006-2015 from Statistics SA (2017).
[211] Queue jumping in this context refers to unfairly moving ahead on the housing waitlists. Despite the transition to an alternate system of monitoring and allocation that does not involve a waitlist, the myth and language of queue jumping remains common. See overview in Tissington and Munshi (2012).

Beliefs about Law, Rights, and the State and Claims-Making

Much of the time, individuals experiencing difficulties are thought to "lump" their problems (to do nothing) or to rely on self-help, family members, or friends and neighbors rather than to turn to formal institutions (e.g., Levine and Preston 1970; Felstiner 1974; Engel 2010). This may be particularly true of minorities or otherwise marginalized individuals (Bumiller 1988; Ewick and Silbey 1998; Nielsen 2000). Yet, even if mobilization or claims-making is not inevitable, neither is it uncommon. Across contexts and categories of difference, and even under the possibility of great personal risk (Wood 2003), individuals make claims on the state, demanding goods in services in the streets, in courtrooms, and in the offices of political officials.

Comparative scholarship on claims-making, both within the legal sphere and beyond it, indicates that knowledge, experience, and social status are key factors influencing when and how individuals raise grievances. This literature points to the importance of grievance formation, or the process by which individuals come to recognize difficulties in their lives as difficulties that ought not to exist, that are changeable, and upon which they can make claims (Simmons 2014, 2016). Yet, the existence of grievances is not sufficient to result in claims-making (McCarthy and Zald 1977; McAdam, McCarthy, and Zald 1988; Genn 1999; Tarrow 2011). As Kruks-Wisner (2018: 133) clarifies, "[a] person must… both aspire to make claims on the state and have the capacity to do so. Claim[s]-making aspirations reflect underlying beliefs about what the state can and should deliver, as well as about if and how the state will respond … Claim[s]-making thus rests upon a sense of entitlement

and efficacy." What exactly catalyzes such a sense of entitlement and efficacy in different social or political contexts has yet to be identified.

This chapter examines the correlates of claims-making via formal legal institutions. The literature reviewed in this section gives rise to several hypotheses to explain the response of individuals to difficulties in their lives. The first hypothesis stems from the idea that problems must be recognized as grievances to act on them. Though someone without knowledge of his or her rights may still make claims on the basis of appeals to something other than rights (e.g., some sense of justice or ethics), knowledge of rights may reasonably be assumed to provide one strong rationale for claims-making. Level of formal education could also serve as a proxy for this type of foundational knowledge. In a study of labor law and legal mobilization in contemporary China, Mary Gallagher (2017) finds a statistically significant relationship between level of education and propensity to file a legal claim related to workers' rights or other employment issues, but she also finds that legal knowledge gleaned through experience can take the place of formal education in spurring mobilization.

> Hypothesis 1: Individuals who have higher levels of formal education and/or who are more knowledgeable about their rights are more likely to make legal claims than individuals who do not (Knowledge and Education).

Two additional hypotheses focus on the impact of experience with, exposure to, and confidence in institutions on claims-making. There exists a robust literature on institutional legitimacy (particularly focused on the U.S. context) that purports that confidence in the judiciary translates into use of the legal system and compliance with its rulings (e.g., Tyler 1990; Levi 1997; Tyler and Fagan 2008). This literature has

found personal experience (Benesh and Howell 2001; Wenzel, Bowler, and Lanoue 2003; Benesh 2006), perceptions of procedural justice (Tyler 1990; Tyler and Huo 2002; Huq et al. 2013; Tyler and Jackson 2014; Tyler and Sevier 2014), perceptions and experiences of crime and corruption (Chanley, Rudolph, and Rahn 2000; Della Porta 2000; Pharr 2000; Seligson 2002; Kelleher and Wolack 2007; Booth and Seligson 2009; Levi, Sacks, and Tyler 2009; Fernandez and Kuenzi 2010; Clausen, Kraary, and Nyiri 2011; Carreras 2013; Salzman and Ramsey 2013), and knowledge of the judiciary (Murphy, Tanenhaus, and Kastner 1973; Casey 1974; Gibson, Caldeira, and Baird 1998; Wenzel et al. 2003; Gibson 2007)[212] to be the primary correlates of judicial legitimacy. While this literature has identified the correlates of judicial confidence or legitimacy, the consequences of expressed confidence or lack thereof continue to be largely assumed rather than demonstrated. Further, this literature remains mostly isolated from discussions of claims-making.

Even so, this literature does give rise to additional hypotheses regarding claims-making. One anticipates that previous direct, personal experience with or more general exposure to lawyers, legal clinics, and judges will be positively associated with filing legal claims. The other expects the same relationship between general confidence in the judiciary and legal claims-making. Individuals who express little to no confidence in formal legal institutions are expected to be more likely to lump their

[212] To be clear, the claim here is that knowledge leads to confidence (because learning more about the institution means learning that it works well) and that confidence translates into positive evaluations, compliance, and use. Contrast this with Gallagher's study, which indicates that knowledge may be associated with what she calls "informed disenchantment" (2006, 2017). In her account, negative evaluations may still be associated with continued use of the judicial system. See Hendley (1999, 2012), Smulovitz (2010), and Taylor (2018) on similar processes in Russia, Argentina, and Colombia, respectively.

problems or to advance claims outside the legal sphere. More specific beliefs about the legal system's efficacy or utility are also expected to be associated with propensity to make legal claims.

> Hypothesis 2: Individuals who have *personal experience* with or *exposure* to legal institutions, actors, or procedures will be more likely to turn to the courts to make legal claims than individuals who do not (Experience/Exposure).
>
> Hypothesis 3: Individuals who express general confidence in the legal system will be more likely to make legal claims (Institutional Confidence).

A final hypothesis indicates that social context rather than knowledge, institutional experiences, or evaluations drive claims-making. It emphasizes that individuals are concerned not only with their own access to goods and services, but also with the access that their neighbors have. This variable of context, of neighbor-to-neighbor relations, is potentially of vital importance to the ways in which individuals interpret both what they have and what they need, yet it has often been overlooked in scholarship on mobilization and claims-making.[213] In a comparative study of the United States and South Africa, Gwyneth McClendon (2018) focuses on how relative status concerns, particularly as they relate to envy, spite, and esteem, motivate behavior. The reference groups against which individuals evaluate their relative status may include neighbors, coworkers, co-ethnics or any other group that seems reasonably similar to the individual in question. While McClendon does not explicitly examine legal claims-making as such, her findings map on nicely with this literature. She finds that in at least some South African municipalities, relative status concerns help to explain why housing budgets may remain unspent despite significant need for

[213] For an exception that explicitly considers the impact of social relations or "weak ties" across neighborhoods, see Kruks-Wisner (2018).

housing, arguing that it may be politically expedient not to build new formal housing units, as individuals who see their status diminishing relative to their peers may protest or later punish local officials at the polls.

The implication here is that individuals who see their neighbors as doing better than they are in terms of access to basic goods and services might be more likely to make claims to those goods and services than other individuals who are similarly situated in terms of lacking access but who view themselves as better off, or at least not worse off, than their neighbors. Feelings of jealousy or fairness concerns might motivate those who are less well-off but who are exposed to those who are more well-off to see the problems they personally face (that perhaps their neighbors do not) as grievances or as claim-worthy. In other words, witnessing inequality may prompt a sense of entitlement ("if someone like me has access to these goods, then I deserve to as well"). Alternately, this same group of less well-off individuals may mobilize or make claims following the example of their more well-off neighbors who might have previously advanced their own claims, out of a sense of efficacy and possibility. Regardless of the pathway, this hypothesis focuses on the motivating potential of relative status.

> Hypothesis 4: Individuals who perceive themselves to be worse off relative to their peers are more likely to make legal claims than those who perceived themselves to be better off, regardless of class or income (Relative Status).

In what follows, I detail the survey design and sampling strategy before presenting analyses that explore the relationship between claims-making and knowledge about the law or rights, experience with the formal legal sphere, exposure to legal resources, institutional evaluations, and relative status concerns.

Survey Design

In order to investigate individual attitudes on rights, law, and the state, and individual claims-making practices, I use data from an original survey that engages a novel sampling strategy. A South African survey firm fielded the survey in November 2017. The questionnaire lasted about 45 minutes and was available in four languages, English, Tswana, Xhosa, and Zulu.[214] Potential respondents were asked what language they were first and second most comfortable using, and if their responses did not correspond to one of the four languages of the survey, they were excluded in the survey. Though respondents were not selected on the basis of race, the percentage of respondents belonging to each of the four major racial categories ("Black," "White," "Coloured," and "Asian/Indian") largely reflect national statistics.[215]

The survey targeted 551 respondents, with an effort to specifically sample both individuals who had prior experience with the legal system as well as those who did not. For this reason, the design deviates slightly from a standard random sampling design, wherein all individuals are both randomly selected and have an equal probability of being selected. The 2014/2015 wave of the Afrobarometer survey shows

[214] The four languages were chosen on the basis of the languages most commonly spoken in the "claimant communities" included in the survey. Though Afrikaans is frequently spoken in the Western Cape, few Afrikaans speakers do not speak one of the four survey languages. Of those individuals who indicated that they were most comfortable with a language other than one of the four survey languages, 20 were Afrikaans speakers, 11 spoke Tsonga, seven were Sotho speakers, and one spoke Shona. All of these respondents noted that they felt "second most comfortable" speaking one of the four survey languages, and they then took the survey in that second language.

[215] In the survey Black respondents comprised 80.6% of the total, compared to 80.2% nationally, White respondents were slightly overrepresented at 11.2% of the survey, compared to 8.4% nationally, Coloured respondents were slightly underrepresented at 6.5% of the survey and 8.8% nationally, and Asian/Indian respondents made up 1.6% of those surveyed compared to 2.5% of the national population.

that only 246 out of 2,388 total respondents in South Africa reported having experience with the courts in the previous five years.[216] With an N of 551, a random sampling strategy and the same rate would result in only 57 respondents with experience in the courts.[217] Because I specifically wanted to be able to compare claimants and non-claimants, I chose to devise an alternative sampling strategy, one that I believed would allow for the overrepresentation claimants.

This alternative strategy relied on two sampling procedures. The first procedure focused on the (presumed) oversampling of claimants and involved randomly selecting respondents from pre-identified communities (Ratanang, Marikana,[218] and Thusong) that had been involved in housing rights litigation at the High Court level within the previous five years or that are currently involved in housing rights litigation.[219] The idea was not that 100% of respondents from these communities would identify as "claimants" or acknowledge legal system experience (certainly there may have been some in- or out-migration since the communities' legal cases ended), but that a larger percentage would than in the general population. A South African NGO facilitated contact with the governing bodies representing three

[216] Afrobarometer, http://www.afrobarometer.org/.
[217] The South African Social Attitudes Survey of 2014 found that 16% of respondents had been involved in some way in a court case in the previous 20 years (Democracy, Governance, and Service Delivery Research Programme: 2015), which with a sample size of 551 would have resulted in 88 "claimants," higher than the estimate derived from Afrobarometer.
[218] This is not the Marikana of the massacre of striking mine workers perpetrated by state police forces in North West province. Instead, this is an informal settlement located in the Philippi area of Cape Town in Western Cape.
[219] The choice of housing rights litigation was made for several reasons. First, housing rights litigation has emerged as the most common type of social rights litigation in South Africa, comprising about 60.8% of all social rights litigation in the country and 51.7%. Second, housing rights litigation historically has involved communities, a feature that makes identifying and contacting a substantial number of "claimants" possible. It is feasible that claimants involved in other forms of litigation differ fundamentally from housing rights litigants. Third, an NGO focused on housing rights litigation was willing to work with me.

communities, all three of which correspond to informal settlements. The communities were chosen because of their involvement in litigation and their relationship with the NGO. In other words, these communities are likely not representative of the whole population of "claimants" in South Africa (though due to the lack of public official records regarding litigation, that population is unknown). Again, though the communities were named litigants, it was by no means a given that the individual respondents living in these communities would identify as litigants. In fact, whether or not these individuals understood themselves to be claimants was a question of interest in the survey.

The second sampling procedure involved randomly selecting respondents from within the provinces in which the three "claimant communities" are located, Gauteng, North West, and Western Cape (shown in Figure 6.2). All respondents, thus, were randomly sampled, but they did not have an equal probability of being selected, as individuals living in "claimant communities" were more likely to be selected than respondents living elsewhere in the provinces.

Figure 6.2. Map of South Africa

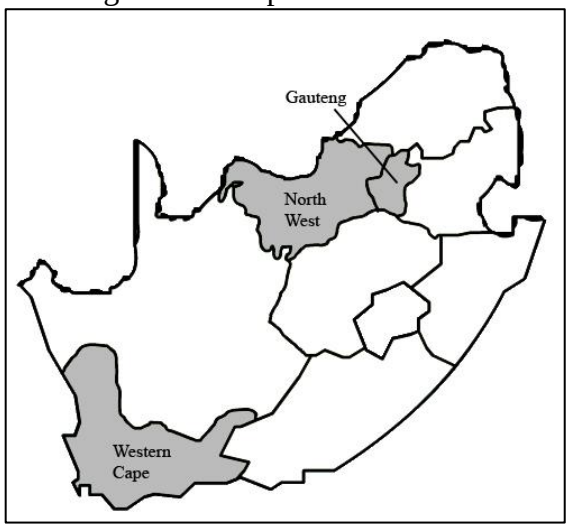


Table 6.1 offers a comparison of these three provinces in terms of their population, unemployment rate, and GDP/capita. The goal here is neither compare provinces, nor to generate a sample representative of South Africa as a whole. Instead, I aim to perform an exploratory investigation of the claims-making behavior of South Africans from three provinces.

Table 6.1. Province Comparison

	Gauteng	North West	Western Cape
Population[220]	12.3 million	3.5 million	5.8 million
Unemployment[221]	30.2%	26.2%	21.9%
GDP/capita[222]	$9,681 US	$6,677 US	$8,694 US

Table 6.2 shows self-reported experience with the legal system, including those who reported having filed a legal claim to defend their rights and those who reported having been involved in a legal case for another reason. Compared to about 9% of respondents in the general population survey who identified as having legal system experience, just under 31% of community members identified themselves as such. This finding is interesting in its own right: though every respondent based in Ratanang, Marikana, or Thusong may be assumed by outside observers to be a litigant or to have experience with the legal system, as the communities in which they live were named in legal cases within the last five years, not every resident reported understanding him- or herself in that way.[223] Still, 92 respondents reported having

[220] Statistics South Africa (2015).
[221] South African Market Insights (n.d.).
[222] World Atlas (n.d.).
[223] The NGO foresaw this possibility. It may be that while litigation about a potential eviction appears important, unique, or memorable to outside observers, it was not understood that way in these communities. Instead, this kind of legal contestation might be understood as the continuation of a normal state of affairs, of insecurity. It is also possible that the family member answering the survey questions was often, due to chance, not the family member involved in discussions with the NGO or community leaders about the litigation and therefore the person surveyed did not understand him- or

brought a case to defend their rights or having been involved in a legal case for any other reason, a number that allows for statistical analysis.

Table 6.2. Self-Reported Legal System Experience

Province	Community Sample	General Population Sample	Total
Gauteng	30/68 (Thusong) [44.1%]	4/103 [3.9%]	34/171 [19.9%]
North West	27/66 (Ratanang) [40.9%]	24/139 [17.3%]	51/205 [24.9%]
Western Cape	5/67 (Marikana) [7.5%]	2/108 [1.9%]	7/175 [4.0%]
	62/201 [30.9%]	30/350 [8.6%]	92/551 [16.7%]

Beliefs about the Law and Claims-Making Practices

This section details the results of the survey. The survey asked respondents about whether or not they had ever faced difficulties in access to the following goods: housing, water, sanitation, electricity, work, education, and health. These seven life difficulties were selected upon consultation with the housing rights NGO with the goal of covering the basic necessities of daily life. Problems accessing any one of the seven goods could be understood in the context of the 1996 Constitution, or, stated differently, could be understood as rights violations[224] (though whether or not such a claim would hold up in court is a different question).

herself to be a litigant. Finally, it is possible that in- and out-migration in these areas meant that some of the survey respondents were, in fact, not involved in discussions about anti-eviction litigation.

[224] The right to adequate housing is enshrined in Section 26 of the Constitution – and that right has been referenced in cases about both sanitation and electricity. Both water and healthcare are covered by Section 27 (as is food and social security). Rights associated with access to employment and employment conditions fall within Sections 22 and 23. Finally, Section 29 lays out the right to education.

Between 74% and 79% survey respondents reported having experienced difficulties related to housing, water, sanitation, electricity, work, education, and health. When asked the primary way in which they responded to those difficulties, they pointed to several different responses, from doing nothing or asking friends and family for help, to engaging formal channels, such as turning to law (operationalized as talking to a lawyer, entering into litigation, or filing a formal complaint with the Human Rights Commission) or to public officials, to participating in protests. In keeping with previous findings on the frequency with which grievances are "lumped," most respondents noted that they did nothing in the face of each these difficulties. Importantly, a not inconsequential number of respondents reported having no difficulties related to these goods and services. In what follows, I present analyses of two distinct outcomes: (1) when respondents reporting that they should turn to law in response to these life difficulties and (2) when they reported actually doing so.

In Figure 6.3, we see that agreement with the statement, "If my rights are violated, I should file a legal claim, because the government has the obligation to protect my rights" over-predicts the likelihood of filing a legal claim. Importantly, simply because something *can be* understood as a rights violation does not mean that it *will be*, and agreement that you should do something does not mean that you actually will. What this level of agreement does suggest, however, is that a substantial proportion of survey respondents envision the legal system as a forum in which rights claims can or should be advanced.

Figure 6.3. Agreement that One Should File a Legal Claim

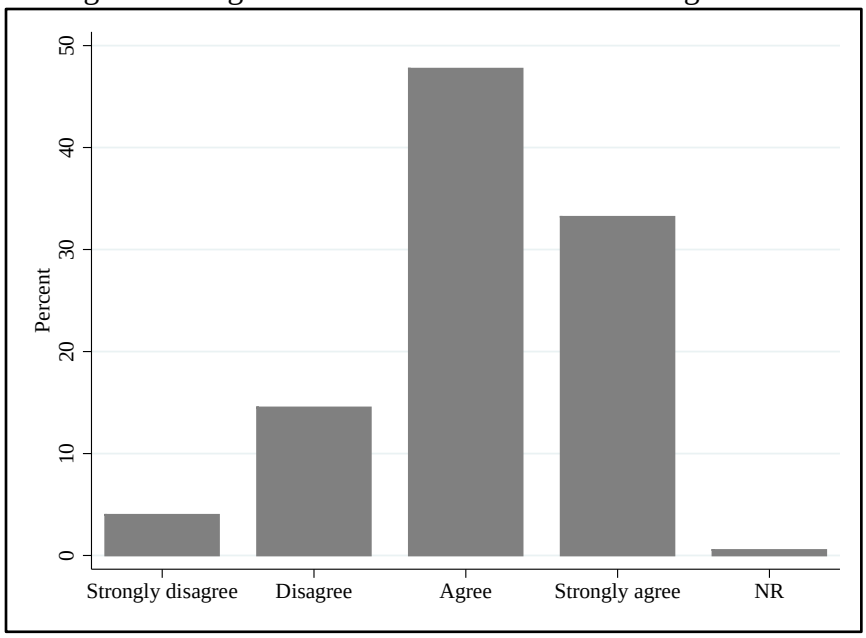


Table 6.3 shows analyses of the correlates of agreement with this statement in contrast to reported behavior. The dependent variable of Model 1 is comprised of the four response options to the question, "If my rights are violated, I should file a legal claim, because the government has the obligation to protect my rights," ranging from strongly disagree to strongly agree. The dependent variable of Model 2 is a count of the times respondents turned to law following problems with the seven life difficulties. This variable is coded as "1" if the respondent reported having met with a lawyer, litigated, or filed a claim with the Human Rights Commission in response to any one of the difficulties, "2" if the respondent had turned to law in response to two difficulties, and so on, or "0" if the respondent reported never having met with a lawyer, litigated, or filed such a claim. Importantly, this variable represents not the actual occurrence of litigation, but the stated willingness or likelihood to turn to the

law when faced with a problem. Respondents who reported never having faced difficulties accessing any of the social welfare goods were excluded from both models.

A standard array of demographic variables is included in the models: age, gender, income level, and race. Income level refers to self-reported monthly income, organized along the official Statistics South Africa (2015) yearly household income categories of no income (0 Rand), low income (R1 to R19,200), middle income (R19,201 to R307,200), and upper income (R307,200 and above).[225] Race is a dummy variable indicating whether or not the respondent defined him- or herself as Black. The models also include province-level fixed effects.

Both models incorporate a set of variables meant to account for the impact of formal education and knowledge of the law, including education, having read the Constitution, and correctly identifying that the Constitution includes a right to housing. Education is operationalized as a dummy variable indicating whether or not the respondent finished high school and received a matriculation certificate (described in the shorthand "matric"). These three measures serve to proxy knowledge of constitutional rights. The models also include variables measure exposure or experience. In each model, there is a variable corresponds to self-reported litigation involvement, having met with representatives of an NGO or legal clinic, and belonging to the claimant community. Belonging to a claimant community could serve to expose respondents in a more diffuse way to the legal system than being involved in litigation personally or directly meeting with an NGO or legal clinic. These variables are based on a yes or no question in the survey, and thus are included as dummy

[225] In November 2017, when this survey was fielded, 1 USD was worth roughly 14 ZAR.

variables. In the normative evaluation model (Model 1), the variable indicating having turned to law in response to difficulties accessing any of the social welfare goods is included (the dependent variable of Model 2).

The two models also include another set of variables that reflect different views held by individuals about the judicial system. These variables consider perceptions of the speed, ease of use, cost of the judicial system, as well as the honesty or corruptness of its officials. Assessments of how much respondents trust judges specifically, as well as the extent to which respondents believe that "In practice, no one in South Africa is above the law" and "the Constitutional Court protects my rights and the rights of people like me" are also included. In addition, Model 2 includes a variable indicating whether or not the respondent believes one should file a legal claim in response to a rights violation (the dependent variable of Model 1). These variables are operationalized along a four-point scale.

A final set of variables corresponds to the impact of the difficulties the respondent has faced in his or her life, as well as more generalized beliefs about how those difficulties have changed over the course of the respondent's life and the status of the respondent relative to his or her neighbors. The models include two measures of difficulty accessing the seven social welfare goods. The first denotes the number of issue areas (from zero to seven) in which the respondent reported having faced problems. The second indicates the frequency with which the respondent reported facing a difficulty operationalized along a four-point scale, averaged across the seven issue areas. Finally, the models include two variables representing the perceived relative quality of life of the respondent. Each respondent was asked to assess his or

her personal quality of life as well as the general quality of life enjoyed by those in his or her neighborhood. The difference between these two assessments provides the basis of the relative quality of life measures. The measures included here are two dummy variables, one combining all positive assessments (where both neutral and negative assessments are coded as "0"), and one combining all negative assessments.

Table 6.3. Assessing the Correlates of Legal Claims-Making

	(1) Should File a Claim	(2) Turn to Law
Education	-0.03	0.12
	(0.09)	(0.18)
Read Constitution	-0.10	-0.06
	(0.10)	(0.17)
Know Right to Housing	0.29***	-0.29*
	(0.11)	(0.16)
Reported Legal System Experience	0.03	0.11
	(0.13)	(0.20)
Reported Turn to Law	0.04	---
	(0.03)	---
Exposure to Legal Clinics	0.03	0.12
	(0.15)	(0.28)
Claimant Community	-0.11	0.51***
	(0.09)	(0.18)
Judicial System: Speed	0.05	-0.24***
	(0.06)	(0.09)
Judicial System: Ease	-0.09	0.16
	(0.06)	(0.11)
Judicial System: Cost	0.07	-0.04
	(0.05)	(0.07)
Judicial System: Honesty	0.01	0.18**
	(0.06)	(0.09)
Trust Judges	0.01	-0.05
	(0.05)	(0.07)
Should File a Legal Claim	---	0.11
	---	(0.10)
No One Above the Law	0.24***	0.10
	(0.05)	(0.08)
Con Court Protects Rights	0.29***	0.12
	(0.06)	(0.10)
Difficulties (Number)	-0.12***	0.22***
	(0.04)	(0.08)
Difficulties (Frequency)	0.22**	-0.28

	(0.11)	(0.21)
Relative Quality of Life (+)	0.12	0.66***
	(0.09)	(0.18)
Relative Quality of Life (-)	0.16	-0.04
	(0.11)	(0.17)
Age	0.01	0.01
	(0.00)	(0.01)
Female	-0.03	-0.37**
	(0.08)	(0.15)
Income Level	-0.04	0.20*
	(0.09)	(0.12)
Black	0.10	-0.04
	(0.13)	(0.20)
Constant	1.01***	-0.87
	(0.37)	(0.67)
N	325	325

* $p < 0.05$, Results reported with robust standard errors.

Neither having graduated from high school nor having read the Constitution is associated with agreement that one should file a legal claim or with turning to law in practice. However, correctly recognizing that the Constitution contains a provision related to the right to housing is statistically significant and positively associated with agreement that one should file a legal claim, yielding some support for the notion that knowledge of rights might be thought of as an important predictor of legal claims-making. On the other hand, correctly identifying that the South African Constitution includes a provision related to housing is associated with this behavioral outcome, but in the opposite direction of Model 1. Unlike with the normative evaluation, knowledge of rights here is associated with a lower likelihood of turning to law in practice. Disaggregating between the seven social welfare goods suggests differential relationships, at least in the bivariate context, between this kind of rights knowledge

and claims-making practices, something worth investigating further in future research.[226] Overall, though, these analyses yield little support for Hypothesis 1.

None of the four variables meant to proxy experience with or exposure to the formal legal system appear to be related to how respondents evaluate whether or not they should file a legal claim in the event of a rights violation. Turning now to the relationship between these variables and the turn to law in practice, we see that neither litigation experience or exposure to legal clinics is significantly associated with the filing of legal claims. Belonging to the claimant community sample, however, is statistically significant and positively associated with reportedly turning to law in response to difficulty accessing social welfare goods. In other words, if the respondent was from Marikana, Ratanang, or Thusong, all else equal, he or she was more likely to report turning to law.[227] Several pathways to this adoption of legal claims-making exist. For one, the respondent may not recognize him- or herself as a prior litigant or may not have personally interacted with legal clinics, but knowledge about the legal process or even a generalized propensity toward litigiousness may have traveled more diffusely through neighborhood or community ties. Additionally, respondents from the claimant communities may have been more likely to have met with a lawyer than respondents from the general population. Because the dependent variable here comprises having initiated a legal case or a formal complaint with the Human Rights Commission *and* having simply met with a lawyer, so it is very possible that a respondent could identify as not having legal system experience as such but could

[226] Full results of these bivariate analyses are available upon request.
[227] This finding was expected, but not necessarily guaranteed considering the sampling strategy, which sought to over-sample individuals with legal system experience.

have turned to law (by meeting with a lawyer) in response to difficulty accessing the social welfare goods.[228] Overall, however, there is little support for Hypothesis 2.

The variables meant to assess evaluations of how the judicial system functions as a whole – its speed, ease of use, cost, honesty, or trust in judges – are not significantly associated with whether or not respondents think that a claim should be filed. In contrast to the normative evaluation model, assessments of the speed of navigating the judicial system and the honesty of judicial system employees are significantly associated with the reported propensity to turn to law to advance claims. Interestingly, those who believe the judicial system moves quickly are less likely to report turning to law. This finding could indicate that a subset of the population views the courts as handling cases too rapidly or too flippantly, though what actually underpins this finding merits additional study. Those who view judicial system employees as honest (rather than corrupt) are more likely to report turning to law after a difficulty accessing social welfare goods, indicating some support for the institutional confidence hypothesis. Assessments of the cost and ease of engaging the judicial system employees are not, however, associated with the turn to law in practice. Interestingly, the abstract evaluation of the relationship between law and South African citizens (the statement "no one is above the law") and the more specific evaluation of the Constitutional Court (the statement that the "Court protects rights") are both statistically significant and positively associated with agreement that one should file a legal claim. Yet, neither variable is associated with turning to law in

[228] In fact, 60 respondents reported having legal system experience without ever responding to difficulties accessing the seven social welfare goods by turning to law, and 87 respondents reported turning to law without identifying as having legal system experience.

practice. Overall, then, there is mixed support for the institutional confidence hypothesis (Hypothesis 3). Here, the mechanics of how the judicial system functions appear to be less important than how the respondent interprets the apex court (which he or she is unlikely to have had any direct personal engagement with) and how the respondent interprets the status of law in the country.

The number of social welfare goods that the respondent faced difficulty in accessing is statistically significant and negatively correlated with agreement that one should file a legal claim. The opposite relationship characterizes the turn to law in practice. The number of issue areas in which the respondent reported having faced difficulties is statistically significant and positively associated with the stated propensity to turn to law. Here, it could be that those facing difficulty accessing a larger quantity of social welfare goods were more likely to have filed a legal claim in the past and had a negative experience with that claim, rendering them less likely to positively evaluate the appropriateness of filing a legal claim.

In contrast, the frequency of difficulty accessing social welfare goods is statistically significant and positively associated with agreement that one should file a legal claim, suggesting that if a problem persists, individuals might be more likely to view filing a legal claim positively. The frequency of difficulty accessing social welfare goods is not associated with turning to law in practice, however. Again, there is a disconnect between the factors that are associated with the belief that one should file a legal claim and the factors that impact self-reported behavior. Future research should more closely examine these relationships between the quantity and frequency

of difficulties accessing social welfare goods and both the belief that one should file a legal claim and the filing of legal claims in practice.

Evaluations of relative status, whether positive or negative, are not associated with the belief that one should file a legal claim following a rights violation. By contrast, Model 2 indicates the importance of status for turning to law in practice, but not necessarily in the direction expected by Hypothesis 4. Once again the results corresponding to reported behavior differ from expressed beliefs about the appropriateness of a filing a claim. In Model 2, negative assessments of relative quality of life are not statistically significant, while positive assessments of relative quality of life are statistically significant and positively associated with the turn to law. In other words, individuals who view themselves as better off than their neighbors appear to be more likely to file a legal claim than individuals who view themselves as worse off or doing about the same as their neighbors, the opposite of what was expected by Hypothesis 4. This finding meshes with arguments about the cost and difficulty of accessing the legal system, suggesting that those with more resources are better able to access the legal system and benefit from legal claims-making. Here, the implication is that these resources may be "real" (where an individual actually does have a higher level of income than his or her peers) or perceived (where an individual understands him- or herself as having access to more resources than peers, regardless of actual differences in resources). To use Kruks-Wisner's (2018) term, this comparison to neighbors may prompt in individuals a sense of efficacy, an ideational

shift ("yes, I am the kind of person who can file legal claims") that effectively lowers barriers to accessing the courts.[229]

Finally, turning to the demographic control variables, neither age nor race is associated with agreement that one should file a legal claim or with the turn to law in practice. A survey with a larger sample size might be better able to parse potential differences across racial categories, examining for instance differences in reported claims-making across self-identified Black respondents and self-identified Coloured respondents, comparisons that were not possible in this survey. Gender and income level are both statistically significant related to turning to law in practice, but not the belief that one should file a legal claim. Women were less likely to report turning to law in practice than men, and those with higher levels of income were more likely to do so than those with lower levels of income. These gendered dynamics should be examined in future studies. The finding with respect to income is consistent with the idea those with more resources are better able to navigate the legal system and take advantage of opportunities to make legal claims (Galanter 1974).

Interestingly, about 70% of those respondents who reported turning to the law in response to a difficulty accessing at least one of the social welfare goods reported agreement with the statement, "If my rights are violated, I should file a legal claim, because the government has the obligation to protect my rights." However, analyses

[229] Alternately, it could be that individuals who made claims in the legal sphere benefitted materially from those claims and are now better off than their peers (or see themselves as better off), even if they were not at the time when they made the claim in question. One limitation of the survey design is that I am not able to assess the temporal sequencing of claims-making and (changes in) the other included variables. Cultural expectations about who benefits from the law may also drive this finding, if the relatively better off assume that the law might work for them, while the relatively less well-off assume that the legal system exists to protect elite interests.

reveal that the relationship between agreement with this statement and the self-reported propensity to turn to law following difficulty accessing at least one of the seven social welfare goods is not statistically significant in the multivariate regressions shown here and even in a bivariate regression.[230] This finding could be interpreted as partial indirect evidence that survey respondents did not understand difficulty accessing the seven social welfare goods to be violations of their rights.[231] Still, there is no necessary reason to expect respondents to take a conservative or limited view of constitutional rights provisions – everyday "rights talk" often reflects a more expansive understanding of rights than is indicated by jurisprudence or legal thought (Lovell 2011).

In sum, these results indicate a divergence in the correlates of evaluations of the appropriateness of filing legal claims and the correlates of self-reported turning to law in practice. Overall, we see little support for the notion that education or knowledge of rights robustly predicts either normative or self-reported legal claims-making (Hypothesis 1). The same holds for experience or exposure to the judicial system (Hypothesis 2), though Model 2 indicates that community- or neighborhood-level exposure might influence claims-making in practice. Abstract evaluations of the status of law, namely that no one is above the law in South Africa, and specific views on the Constitutional Court appear to influence normative views on legal claims-making, while evaluations of the judicial system's ease, speed, cost, and corruptness

[230] Full results of this bivariate analysis are available upon request.
[231] On the other hand, it could be that respondents, following their own experience in the legal system, became disillusioned with the courts and thus did not agree that one should file legal claims after rights violations.

do not (Hypothesis 3). For self-reported claims-making, however, these abstract and specific evaluations do not appear to be influential. Instead, evaluations of the honesty or corruptness of judicial officials hold more weight. Finally, with respect to relative status, there is evidence that the ways in which respondents understand the problems in their lives relative to the problems facing their neighbors influence legal claims-making in practice, though not in the way expected by Hypothesis 4. Instead, those who view themselves as better off than their peers are the ones who actually file legal claims.

Normative and Actual Claims-Making: What's at Stake?

So what should we make of this apparent disconnect between the determinants of normative and actual claims-making? First, it could simply be that the survey respondents did not view the life difficulties as rights violations, meaning that they thought about these two sets of questions differently. If this is the case, there may not be a disjuncture between normative claims-making and claims-making in practice, but there is a disconnect between constitutional rights recognitions and citizens' understandings of the substance of those rights. That citizens could have interpreted these problems through the lens of constitutional rights but did not would be an interesting puzzle in its own right. If this is the case, the challenge is informational. Assuming the goal is to ensure that rights recognitions on paper are met with rights protections in practice, rights education campaigns could serve to remedy this disconnect.

Alternatively, though, it could be that respondents did think of these life difficulties as rights violations and therefore on average also thought that they *should* advance legal claims but did not actually do so as frequently might be expected for some reason – whether that reason has to do with the cost of making legal claims, the difficulty of doing so, apathy, or something else. There may also be a deeper thought process behind this choice of when it is appropriate to engage the formal legal sphere. For example, Patricia Ewick and Susan Silbey (1998) found that for a subsection of their interviewees, that they viewed the legal system as legitimate and important was the reason they chose not to take everyday problems to the courts.[232] The courts were understood to be too important for measly, everyday situations; instead, the formal legal system was understood as the set of institutions you turn to only when others might be in danger or when a problem has become sufficiently serious. Considering the role that the South African Constitutional Court took on in response to the scandals of the Zuma presidency (ensuring a modicum of government oversight, accountability, and transparency), this seems highly plausible in the South African case as well. If this is the case, the challenge is not simply differences in beliefs about the meaning of rights, but has to do instead with competing understandings of the purpose of the courts.

Why does this matter? There are certain bedrock assumptions about the ways in which legal systems work and their relation to the rest of the state. These assumptions connect the legal system's legitimacy to the willingness of disputing

[232] Ewick and Silbey (1998: 28) classified these respondents as falling within the "before the law" ideal type, meaning that this group tended to view the law as objective, removed from their daily lives, and "majestic, operating by known and fixed rules in carefully delimited spheres."

parties to turn to the formal legal sphere and to accept decisions handed down by the courts (e.g., Shapiro 1981; Tyler 1990). However, as evidenced in this chapter, these connections may not be present in all contexts. Beliefs about the substance of rights (or what constitutes a rights violation) and beliefs about the purpose of the courts can instead play an outsized role in when potential disputants turn to the courts. Further, assessments of the legitimacy of the courts can, at least under certain circumstances, actually suppress claims-making in the formal legal system. In these situations, the gulf between normative and actual claims-making may widen and in fact leave citizens with fewer perceived ways to confront the challenges in their lives.

One concern might be that where citizens see fewer institutionalized venues in which they feel they can or should make claims, they might be more likely to turn to extra-institutional means. In fact, service delivery protests have become a common feature of South African life, particularly since the mid-2000s (Alexander 2010; Zuern 2011). Interestingly, however, evaluations of the judiciary (as measured by the variables included in Models 1 and 2 above) are not associated with having protested as a response to difficulty accessing any of the seven social welfare goods. The same is true of evaluations of the president, the ANC, and the local government. If the lack of institutional options for claims-making drove a turn to extra-institutional modes of claims-making (such as protesting), then we would expect to find negative relationships. The number and frequency of difficulty accessing social welfare goods and relative status concerns likewise are not significantly associated with having protested. There is, on the other hand, a statistically significant negative relationship between education and protest, with those having completed matric being less likely to

have protested. Having read the constitution is positively associated with the protest outcome, although there is a negative association with correctly noting that the constitution recognizes the right to housing. It might be that some knowledge of rights primes a willingness to protest, but a greater degree of knowledge of the constitution indicates skepticism about the utility of protesting. Membership in a claimant community and identifying as Black are both positively associated with having protested in response to issues related to accessing the seven social welfare goods.[233]

These findings complement prior studies focused on service delivery protests, which found that individuals simultaneously engaged in institutionalized forms of political participation, like voting, and extra-institutional forms, like protesting (Booysen 2007). In other words, there is not necessarily an antagonistic relationship between claims-making through formal institutions, whether by voting or filing legal claims, and claims-making outside of those institutions. Even so, the challenge posed by the perception of limited opportunities for claims-making remains.

Conclusion

This chapter has detailed an exploratory investigation into the claims-making practices of present-day South Africans. An original 551-person survey fielded in 2017 asked South Africans in three provinces about their views on the legal system and the state more generally, as well as if they had ever had problems with respect to health, housing, education, work, sanitation, electricity, or water and how they responded to those problems (i.e., what kinds of claims – if any – they made in what

[233] The full results of this analysis are available upon request.

kinds of forums). Clear differences emerged in the comparison between agreement with the statement that one should file a legal claim in response to a rights violation and actual – or more accurately, self-reported – turning to law when faced with a life difficulty. Agreement that no one is above the law and that the Constitutional Court protects rights is associated with the belief that one should file legal claims, but neither of these variables was associated with actually turning to the law after experiencing of the seven life difficulties. These divergent findings suggest that respondents may not have understood the social welfare goods as potential legal grievances or as rights violations in the first place. In other words, although respondents apparently have high confidence in their ability to file legal claims and in the appropriateness of the legal system adjudicating rights claims, they may not view everyday challenges in their own lives as rising to the level of rights violations. Another possibility is that something else is inhibiting the filing of legal claims, perhaps including both structural and ideational barriers. The analyses presented in this chapter demonstrate the importance of neighborhood context and relative status for understanding the ways in which citizens interact with the law and with the state. How individuals view themselves, the access they personally have to goods and services, as well as how they might deal with challenges in accessing those goods and services depends on social context. Where individuals see others having differential access and differential options for redress can motivate certain types of claims-making, while making other kinds of claims-making seem less possible or desirable.

As was the case in Colombia (explored in Chapter 5), belief in the legitimacy, effectiveness, and/or appropriateness of the legal system as a site of rights claims-

making does not appear to drive actual patterns in legal claims-making. High levels of claims-making can coexist with negative evaluations of the formal legal sphere, and low levels of claims-making can occur despite positive perceptions of the courts. Instead, the drivers of legal mobilization are much more complicated. The perceived array of options available to prospective claimants influences the choice to turn to the law, as is particularly evident in the Colombian case. Other social-contextual factors, such as perceptions of relative status also impact the extent to which citizens advance legal claims to social rights, as is clear from the South African case. Thus, the "from below" perspective of how potential claimants understand the law, the state, and their rights has illuminated the complex way in which citizens engage the state through the formal legal system. Chapter 7 will turn to "from above" perspective and examine the role of judges and other legal elites in the legal mobilization process, and Chapter 8 will tie the "from below" and "from above" perspectives together, demonstrating the interconnection between and co-constitutive nature of these experiences with the law.

CHAPTER 7

JUDICIAL AGENCY AND THE ADJUDICATION OF SOCIAL RIGHTS

Traditionally, the judiciary has been characterized as "the least dangerous branch" (Bickel 1962), a non-representative part of the government best suited to address property rights, contract disputes, or other issues falling within the realm of civil and political, but not social, citizenship (Marshall 1950). In this model, legislatures represent the concerns and needs of citizens, and, as such, scholarship on the state provision of welfare has tended to focus on parties and labor movements. Of late, however, citizens around the world have begun to mobilize the law to make social claims on the state, demanding access to the goods and services that provide the foundation for full social citizenship, including health, housing, education, and social security. Previous chapters have probed the ways in which citizens of both Colombia and South Africa understand rights, the role of the courts, and their own needs. This chapter turns to how judges interpret the legal order in which they find themselves and links these understandings to the ways in which judges approach the task of adjudicating social rights claims.

In this chapter, I explore the development and modification of new legal institutions "from above" and further elaborate the constructivist account of legal mobilization, specifically by focusing on the impact of judicial agency on legal system change in the realm of social rights. What explains the differential interpretation of constitutionally recognized social rights across countries? Why were judges willing to offer both individual and structural remedies beyond the scope of the written text of

the constitution in Colombia and more hesitant to do so in South Africa, where they instead focused on the constitutionality of policy, rather than outcome?

In answering these questions, I introduce the concept of *judicial agency* and demonstrate how contingent choices made by constitutional court judges in Colombia and South Africa influenced the opportunity for legal mobilization for social rights. Judicial agency refers to actions undertaken by judges as they fulfill their judicial functions – they decide cases, and in doing so, they interpret law that is often ambiguous. Further, they must make decisions in their non-neutral social environments, and these decisions have political consequences. In short, judges ought to be conceptualized as situated political actors. Judges make choices about which cases to hear and how to decide the cases they do hear, and these choices have potentially long-lasting and unforeseen consequences.

By looking to role conceptions, attitudes, and strategic incentives, existing scholarship on judicial decision-making seeks to explain the kinds of choices judges make.[234] Importantly, though, with each decision a judge takes, he or she *could have chosen otherwise*. If a judge (1) holds progressive attitudes about rights, (2) envisions his or her role as one that protects the rights of citizens, and/or (3) sees an opportunity to expand the power of the courts, he or she may issue a rights-protective decision in a given case. Still, even within this choice to issue a rights-protective decision, the judge has leeway in how to delimit the decision and what legal foundation to rely on, among other things. Thus, contingency and judicial agency play a larger role in the judicial process than often acknowledged.

[234] See Chapter 2 for a more detailed overview of theories of judicial behavior.

In the Colombian and South African cases, Constitutional Court justices created opportunities for mobilization for social rights by changing understandings about and uses of pre-existing institutional arrangements, through the contingent exercise of judicial agency. This exercise of judicial agency was particularly influential in the moments following constitutional transition, where understandings of rights, state obligation, and the role of judges were unsettled. Contingent choices made by judges during this period would have outsized effects on the justiciability of social rights and the institutionalization of social constitutionalism.

These judges "layered" (Mahoney and Thelen 2010: 15; Streek and Thelen 2005) new rules about the protection of social rights on existing rules regarding fundamental rights, expanding the purview of each court in the process, but they did so in profoundly different ways across the two countries. While Colombian judges relied on the notions of the interconnectedness of rights (developing a doctrine called *conexidad*) and the essential content of rights (developing a doctrine called *mínimo vital*), South African judges turned to a robust understanding of human dignity, which posited that the lack of recognition of the dignity of one person also harmed the dignity of others (while largely avoiding the push to define the essential content of rights). Judges were able to utilize the popular media to spread the message that each Constitutional Court would respond positively to rights claims, which encouraged citizens to turn to the courts with social claims. These contingent choices spurred the massive, yet unforeseen expansion of the tutela procedure in Colombia and precipitated policy-oriented judicial decision-making and the centrality of what is

known as "meaningful engagement" in South African constitutional rights litigation.[235]

To advance this argument, I draw on semi-structured elite interviews and an analysis of Constitutional Court documents. I conducted interviews with 90 Colombian "legal elites" – or judges, lawyers, law professors, activists, and public officials – in the major cities of Bogotá, Medellín, and Cali, as well as in two small towns in the western part of the country. These interviews took place between July 2016 and May 2017. I also conducted interviews with 88 South African legal elites in Johannesburg, Pretoria, Durban, and Cape Town between July 2017 and May 2018. Participants were selected by virtue of their expertise on constitutional law, rights activism, or social service provision in each country. The interviews took place in the respondent's office, home, or a public setting, like a coffee shop, and lasted up to two hours. The interviews followed a semi-structured interview guide, and they were transcribed in the language in which they were conducted.[236]

A second source of data – Constitutional Court records – supplements these interviews. The Colombian Constitutional Court has the power to review the decisions of every tutela procedure in the country. After a multi-stage process, Constitutional Court justices select about 1% of the tutelas filed across the country each year for review. Each revision decision is published on the Constitutional Court's website and

[235] While this chapter focuses on changes within the Constitutional Court in each country, Chapter 4 details the political contestation that occurred as actors outside these courts reacted to these expansions in the significance of constitutional law and constitutional claims-making.
[236] All 88 South African interviews were conducted in English. 69 of the 90 Colombian interviews were conducted in Spanish, the rest in English.

is publically available. All South African Constitutional Court decisions are published online on the Court's website, and lower court decisions are often available on the Southern African Legal Information Institute website as well. Importantly, justices at the two Constitutional Courts have resolved to take on drastically different workloads. While the Colombian Court decides nearly 1,000 cases each year (including both tutela and constitutionality claims), the South African Court hears only about 30 cases per year.[237]

Explaining Legal Mobilization in the Aftermath of Institutional Change

This chapter examines the role of judicial behavior in influencing the contours of legal mobilization for social rights following the adoption of social constitutionalism. As described in Chapter 2, the constructivist account of legal mobilization is compatible with major theories of judicial behavior. Where it diverges is its overt focus on beliefs and agency. Many accounts of judicial behavior in Colombia and South Africa privilege ideological considerations (e.g., Nunes 2010; Fowkes 2016), though some also refer to strategic concerns as well (e.g., Rodríguez-Raga 2011; Roux 2013). However, both strategic incentives and ideological incentives are indeterminate – judges always have choices, and while either strategic incentives or ideological preferences may make certain choices unimaginable, alone they cannot explain why judges choose one of a set of closely related choices.

[237] Chapter 8 further details these differences in caseload.

In what follows, I introduce the concept of "judicial agency" to capture the contingent nature of judicial decision-making.[238] This concept of judicial agency best explains what led to changes in legal categories and institutions that then allowed for legal mobilization for social rights to occur in both Colombia and South Africa during the 1990s, 2000s, and 2010s. I also demonstrate how early ideological orientations and decisions had long-term effects in each Constitutional Court. In both cases, two mechanisms for ideational change were present. First, in the early 1990s, progressive judges – including judges who had not been part of the traditional ranks of the judiciary – gained access to the Constitutional Court, and once there, they began to issue progressive decisions on issues related to constitutional rights. Second, this progressive orientation became embedded in each Court, encouraging ideational conversion on the part of later judges, who were did not necessarily share these progressive legal visions prior to joining the Court.[239] In this way, exercises of judicial agency and long-lasting effects.

In Colombia, progressively-minded judges created opportunities for legal mobilization by changing understandings about and uses of particular pre-existing judicial institutions. Rodrigo Nunes (2010b) identifies the origins of these progressive decisions as primarily ideological in nature rather than as responses to strategic considerations. Even so, the progressive orientation of the early Constitutional Court became so ingrained that even conservative judges appear to have put up relatively

[238] This approach is similar to Landau's focus "on the choices made by justices to carve out their own political space" (2014: iv).
[239] The argument here is not that these progressive orientations are immutable – in fact, in recent years in each country, observers have variously lamented shifts away from rights protections, toward mediocrity, or toward conservatism.

little resistance upon assuming their position as Constitutional Court justices. As Néstor Osuna, a former justice in the Consejo Superior de la Judicatura[240] and alternate Constitutional Court justice explained, "There is a tradition in the [Constitutional] Court of progressivism from day one. Judges of the conservative tradition who came to the Court became moderates at least."[241] This progressivism was manifest in rights-protective stances, particularly in stances that allowed for the justiciability of social rights through the tutela procedure and generated a larger role for the Constitutional Court in the broader judicial system than previously envisioned.[242] I build on Nunes's argument, showing that in addition to the progressive ideological orientation of early justices, which became embedded in the institution of the Court, we must also consider the agentic and contingent elements of judicial decision-making in order to explain legal mobilization for social rights in Colombia. In the Colombian case, judicial agency resulted in changes in the political and legal opportunity structures, as judges reinterpreted the bounds of formal features of the legal system.

Similarly, South African Constitutional Court justices also shaped the terrain of opportunity for legal mobilization through judicial decisions that influenced shared

[240] The Supreme Judicial Council oversees the administration of the judiciary.
[241] Interview 1600808_0009. A former auxiliary justice in the Sala de Seguimiento de Salud of the Constitutional Court, confirmed this view (interview 1600818_0012). Although in Colombia, the term "magistrate" is used rather than "justice," I use justice here to refer to both Colombian and South African judges for consistency.
[242] Interestingly, neither the Colombian nor the South African Constitutional Court was formally the head of the judiciary at the time these new constitutions were written. The Colombian system featured four high courts, but the tutela contra sentencias (described in Chapter 4) meant that the Constitutional Court could review the decisions of the other high courts. The South African system initially divided matters into the categories of constitutional and non-constitutional, with the Supreme Court of Appeal being the highest court for non-constitutional matters. The 17th Amendment to the Constitution expanded the jurisdiction of the Constitutional Court in 2013. Since then, it could hear all matters of "general public importance," effectively rendering the constitutional/non-constitutional divide meaningless.

understandings of the purpose of the courts and meaning of constitutional rights guarantees. In contrast to the typical member of the legal profession in South Africa at the time (and a sizeable group of lawyers throughout the 1990s and 2000s), the justices of the first Constitutional Court bench viewed social rights as potentially and appropriately justiciable.[243] In fact, rather than simply dismissing these issues as falling outside the purview of the judiciary, these Constitutional Court justices rooted decisions recognizing the justiciability of social rights in a particular conception of human dignity and sought to orient these decisions toward evaluations of state policy. These choices in early decisions altered the bounds of the Court's work and had long-lasting impacts on the type and scope of future judicial decisions.

In both Colombia and South Africa, judges layered new rules about the protection of social rights on existing rules regarding constitutional rights, expanding the purview of each Constitutional Court in the process. These new rules reflected the implications of contingent choices made by judges. Further, these judges were able to spread their understandings about the role of the Court in protecting constitutional rights to potential rights claimants. In each case, to greater or lesser degrees of success, the media connected the new Constitutional Court to the broader citizenry, filtering information about operation of the Court to citizens. Through news reports and other media content, largely created by legal elites, citizens came to learn about the Court and view it as a potentially effective site of claims-making. In sum, judicial agency and contingent choice, specifically the layering of new rules on old ones and

[243] Interviews with one career judge (2017.10.18_14.54_01) and several advocates (e.g., 170725_0120, 170811_0128, 170828_0143 and 170929_0168) confirm this point.

the utilization of the media as a broker to inform citizens about the Constitutional Court, explains the institutional change underpinning the emergence of legal mobilization for social rights in Colombia and South Africa.

On Agency and Activism

Before examining legal mobilization for social rights in Colombia and South Africa, a discussion on terminology is necessary. In this chapter, I argue that judicial agency best explains changes in the ability and likelihood of citizens to mobilize for social rights in the legal sphere. Judicial agency should be differentiated from judicial activism.[244] Judicial activism refers to behavior defined as inappropriate or beyond the proper judicial role in pursuit of a political agenda. The term suffers from two related limitations. First, what is considered judicial activism is often, in common usage, the product of the analyst's own political preferences rather than an assessment of the judicial role in context. Even in legal-academic terms, then, what exactly counts as judicial activism is open to interpretation. Keenan Kmiec (2004) notes four acts that fall within the concept of judicial activism: overturning or striking down constitutional actions undertaken by other branches, ignoring precedent, engaging in judicial lawmaking, and moving from accepted methods of judicial interpretation to unaccepted ones. A blatant example of any of these four types could certainly be identified, but what about when the appropriate precedent is up for debate or when existing precedent is inconsistent with the values underpinning the constitutional

[244] Judicial receptivity – theorized as part of the legal opportunity structure (Hilson 2002) – also differs slightly from judicial agency. Receptivity implies that the litigants bring forward specific arguments that judges then adopt. Judicial agency leaves open the origins of the particular arguments that judges promote in their decisions.

order, for example?[245] Or what if reasonable observers disagree about the scope of acceptable methods of judicial interpretation? For one observer, the decision may reek of judicial activism, while for another, the decision may be an example of meticulous legal reasoning. Second, the term requires a judgment about the intentions of judges, an inference about whether or not the judge in question deliberately seeks to ignore precedent or commit any of the other acts noted above that comprise judicial activism. The ability to conclusively ascertain the motivations or intentions of judges is by no means guaranteed.[246]

The term "judicial agency" avoids these limitations, withholding judgment without evidence. Judicial agency refers to the fact that judges are *political* actors, even if they are not *politicized* actors. Malcolm Feeley and Edward Rubin (1998: 8), while carefully distinguishing between types of judicial action, including interpretation and policy making, note that "all judicial action is political." Judges do not simply apply general legal provisions to specific cases in a vacuum, disconnected from political and social life; instead, they make decisions that have normative and distributional consequences – in fact, they are empowered to do exactly that. These

[245] Further, in a system characterized by judicial discretion (often considered a fundamental feature of judicial independence), judges need not *always* follow precedent.

[246] Interestingly, in the case of Colombia, specifically, the 1991 Constitution in defining the state as an *estado social de derecho* (social state under the rule of law) pointed to a vision of the state that embraces an active role for judges in the promotion and protection of the rights of citizens. As argued by Justice Ciro Angarita Barón in the tutela case T-406/92, this vision of the state imposes a positive obligation on the judiciary, one that includes a lawmaking function: "*El juez, en el Estado social de derecho también es un portador de la visión institucional del interés general. El juez, al poner en relación la Constitución – sus principios y sus normas – con la ley y con los hechos hace uso de una discrecionalidad interpretativa que necesariamente delimita el sentido político de los textos constitucionales. En este sentido la legislación y la decisión judicial son ambas procesos de creación de derecho*." The decision later notes how this vision of the judicial role supplements the separation of powers, by checking the legislature, rather than subverting it. See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-406-92.htm.

decisions are based on understandings of what the law means, on views of their duties as judges, and on beliefs of how the state ought to interact with citizens. To be clear, the claim here is not that judges exercise politicized functions, serving the interests of specific politicians, political parties, or private interests – though at times certain judges might. Rather, the claim is that judges are actors in the political sphere. They make choices, they interpret the law in this way or that way, and the choices they make have important political implications. Judicial agency, thus, is a rather expansive concept, covering a wide range of potential acts. This expansiveness is not a conceptual weakness, but a strength – judicial agency is descriptively accurate, recognizing that judges take many different kinds of actions and make many different kinds of choices (in comparison to judicial discretion, for instance, which refers only to decisions about whether or not to follow precedent in a given case).

In contrast to early models of judicial decision-making, this perspective that acknowledges the political context in which judges find themselves and their political function has become more or less commonplace in contemporary scholarship. Even so, the majority of scholarship that examines legal mobilization or legal claims-making takes the judiciary and judicial receptivity as relatively static factors. The adoption of this political perspective has important, yet often overlooked implications for understanding rights adjudication. The most pressing of these implications is that judicial decision-making should not be viewed in isolation, as if it were divorced from ongoing social or political trends. Judges make choices about how to think about and decide cases, choices that may be influenced by political, institutional, and social context. This approach further requires carefully attention to the long-term effects of

decisions, not just on jurisprudence or on the power of the judiciary vis-à-vis other political actors, but also on everyday lived experience. The rest of this chapter demonstrates the utility of this approach to situated judicial agency, with explicit reference to the emergence of legal mobilization for social rights in Colombia and South Africa, respectively. Chapter 8 further explores the impact of social context on judicial receptivity and legal mobilization.

Early Colombian Constitutional Court Decisions and Judicial Agency

Before turning to early Colombian Constitutional Court decisions, it is important to note who exactly comprised the early Court and consider the initial design of the tutela procedure. During the first year of the Court's operation (a period typically described as the "transitional court"), there were seven justices. Three had served on the Supreme Court (José Gregorio Hernández, Fabio Morón, and Jaime Sanín), one on the Council of State (Simón Rodríguez), and three came from academic backgrounds (Ciro Angarita, Eduardo Cifuentes, and Alejandro Martínez). The three justices with academic backgrounds had also been associated with a commitment to human rights and a more expansive view about the appropriate role of the judiciary.[247] Cifuentes, Martínez, Hernández, and Morón were selected to continue to serve on the court for a full eight-year term following this transitional period.

According to the 1991 Constitution, tutelas could not be used to make claims about social rights violations; instead, they were meant to serve as a mechanism through which citizens could make claims about civil and political rights violations. In

[247] For more detail on these early justices, see Nunes (2010b).

other words, the institutional design allowed no opportunity for legal mobilization on issues related to social rights, despite substantial opportunity for claims-making in the realm of civil and political rights. Moreover, the drafters of the Constitution did not imagine that the tutela would apply to social rights. For instance, Martha Zamora, who served as the Secretary of the Justice Commission at the 1991 constituent assembly, suggested that the constitutional designers "never imagined that it would be as important for a society like ours to have the tutela. If we turned the film back, I think they imagined it as something very important but not as important as it came to be."[248] Similarly, Néstor Osuna held that:

> No person at that time had the ability to predict the dimensions that it would have. What we wanted was to have was a cheap and simple tool for citizens for simple problems. We did not think that new rights were going to be created. We were [just] looking for a simple tool available to citizens.[249]

Juan Carlos Esguerra, the member of the constituent assembly who actually proposed to call this mechanism the "tutela," concurred, noting, "It was not meant to grow that much."[250] Still, there was a push to ensure that the tutela would be included to serve as mechanism to "give rights teeth," in the words of Rodolfo Arango,[251] an auxiliary justice during the early 1990s, or as former justice Eduardo Cifuentes put it, "the idea [was] that it is not enough to consecrate a bill of rights, but that these rights must be surrounded by guarantees through instruments that would make them effective [or claimable]."[252]

[248] Interview 160930_.
[249] Interview 1600808_0009
[250] Interview 160923_0035. Many other interviewees confirmed these points.
[251] Interview 1600825_0016.
[252] Interview160726_0006.

In the following years, the use of the tutela did expand, and quite quickly. Decisions on several tutelas filed in 1992 set the stage for the development of the justiciability of social rights in Colombia. Early that year, Pastora Emilia Upegui Noreña filed a tutela (T-002/92), claiming a violation of the right to education.[253] Both the lower courts and the Constitutional Court rejected this tutela claim. However, in rejecting the claim, the Court asserted that the categorization of rights in the Constitution should be an auxiliary rather than determining factor in the decision about whether or not to hear tutela cases.[254] It also suggested that education could, in other concrete cases, be considered a fundamental right. A few months later, in deciding a tutela regarding health, the Court noted, "today, with the new constitution, rights are what judges say they are through tutela decisions."[255] Together, these decisions helped to stake out a larger role for judges in determining the status of constitutional rights. Esguerra suggests that these decisions should be interpreted as an

[253] Briefly, after the claimant had failed mathematics three times, the Universidad Tecnológica de Pereira refused to allow her to re-enroll in the industrial engineering program.

[254] "*El hecho de limitar los derechos fundamentales a aquellos que se encuentran en la Constitución Política bajo el título de los derechos fundamentales y excluir cualquier otro que ocupe un lugar distinto, no debe ser considerado como criterio determinante sino auxiliar, pues él desvirtúa el sentido garantizador que a los mecanismos de protección y aplicación de los derechos humanos otorgó el constituyente de 1991*." See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-002-92.htm. Further, the decision noted that judges ought to examine constitutional rights with respect to one another rather than in isolation:

[255] The complete paragraph is worth quoting here: "*Existe una nueva estrategia para el logro de la efectividad de los derechos fundamentales. La coherencia y la sabiduría de la interpretación y, sobre todo, la eficacia de los derechos fundamentales en la Constitución de 1991, están asegurados por la Corte Constitucional. Esta nueva relación entre derechos fundamentales y jueces significa un cambio fundamental en relación con la Constitución anterior; dicho cambio puede ser definido como una nueva estrategia encaminada al logro de la eficacia de los derechos, que consiste en otorgarle de manera prioritaria al juez, y no ya a la administración o al legislador, la responsabilidad de la eficacia de los derechos fundamentales. En el sistema anterior la eficacia de los derechos fundamentales terminaba reduciéndose a su fuerza simbólica. Hoy, con la nueva Constitución, los derechos son aquello que los jueces dicen a través de las sentencias de tutela*." See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-406-92.htm.

attempt by the Constitutional Court justices make social rights "real" or meaningful in everyday life.[256] Cifuentes similarly notes:

> Everything is the discretion of the judge…. It would be the Constitution [that] obviously introduces the figure and gives possibilities for the constitutional judge to expand it, but the expansion of the tutela, the guidelines of the guardianship were not drawn by the Constitution but in my opinion developed [by judges].[257]

Here, as Cifuentes sees it, judges – exercising judicial agency – determined not only that the tutela procedure would expand, but also how it would expand. Importantly, the justices who wrote these decisions were two of the three academics appointed to the Court, Justices Martínez (T-002/92) and Angarita (T-406/92).

This expansion of the tutela procedure continued, as the Constitutional Court justices began to establish principles for analyzing concrete cases. First, the Court declared that the fundamental status of rights would be evaluated on a case-by-case basis in response to the unique facts presented by an individual tutela, per the decision T-406/92.[258] In this case, a resident of the Campestre neighborhood of Cartagena filed a claim asserting that an ongoing public works project violated his rights to sanitation, health, and a healthy environment. The court of first instance rejected the claim on the grounds that these rights are not fundamental rights recognized by the Constitution. The Constitutional Court revoked this decision, granted the tutela, and noted that all future cases with similar fact patterns should be decided in the same manner. The Court sustained this approach in its decision on a case filed by *SAS Televisión Ltda*, a

[256] Interview 160923_0035.
[257] Interview160726_0006.
[258] "*Es importante tener en cuenta que la eficacia de las normas constitucionales no se puede determinar en abstracto; ella varía según las circunstancias propias de los hechos*." Ibid.

cable television provider (T-451/92).[259] The company claimed that the denial of a final operating license (it had been granted a provisional license) violated the right to work, to private property, and to culture. The Third Superior Court of Ibagué rejected the claim, and the Constitutional Court upheld that decision.

Within this case-by-case analysis, judges developed two doctrines: the *conexidad* (connection) doctrine and the *mínimo vital* (vital minimum) doctrine. Neither doctrine necessarily flows from a particular ideology, though both allowed for the expansion of progressive rights protections. The connection doctrine refers to the possibility of understanding a non-fundamental right as fundamental, and therefore justiciable, insofar as its violation also results in the violation of a fundamental right. The doctrine derives from decisions made in 1992, starting with T-406/92, which indicated that the right to health could be understood, in certain circumstances, as being essentially connected to the right to life. Later that year, Víctor Narváez Paredes filed a tutela (T-506/92) and claimed the confiscation of his car by the national police not only went beyond the appropriate function of the police, but it also violated his right to property. The Court denied the tutela, citing doubts about who was the true owner of the car and noting that the authorities appeared to have acted appropriately. Even in denying this property rights claim, the Court nevertheless affirmed the case-by-case approach and the possibility of connecting fundamental rights with non-fundamental ones. In this, the Court – or more accurately, the three academic justices,

[259] Refering back to T-406, the decision holds, "…*el carácter fundamental de un derecho no se puede determinar sino en cada caso concreto, atendiendo tanto la voluntad expresa del constituyente como la conexidad o relación que en dicho caso tenga el derecho eventualmente vulnerado con otros derechos indubitablemente fundamentales y/o con los principios y valores que informan toda la Constitución*." See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-451-92.htm.

Ciro Angarita, Eduardo Cifuentes, and Alejandro Martínez, who wrote these decisions – recognized the ability to make tutela claims related to social or cultural rights in some instances.[260]

The second doctrine of justiciability, called *mínimo vital*, emerged in the decision T-426/92 (written by Cifuentes), which notes that although the Constitution does not include a right to subsistence, such a right is implied or can be deduced from the existence of other, included rights.[261] Subsequent decisions, such as T-005/95 (again written by Cifuentes), which focused on the rights to health and social security, more fully articulated what was to become the vital minimum doctrine, noting that although health was not a fundamental right, access to medical services were necessary to a life with dignity in the particular case.[262] The standard implied by this doctrine requires that "the petitioner show both that the failure to receive treatment was severe enough to threaten his rights to life, dignity, or personal integrity, and that the petitioner lacked the resources to pay for this treatment or to attain it under some other plan" (Landau 2012: 421). In this conception, otherwise progressively realizable

[260] "*La posibilidad de considerar el derecho a la propiedad como derecho fundamental depende de las circunstancias específicas de su ejercicio. De aquí se concluye que tal carácter no puede ser definido en abstracto, sino en cada caso concreto. Sólo en el evento en que ocurra una violación del derecho a la propiedad que conlleve para su titular un desconocimiento evidente de los principios y valores constitucionales que consagran el derecho a la vida a la dignidad y a la igualdad, la propiedad adquiere naturaleza de derecho fundamental y, en consecuencia, procede la acción de tutela.*" See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-506-92.htm.

[261] "*Aunque la Constitución no consagra un derecho a la subsistencia éste puede deducirse de los derechos a la vida, a la salud, al trabajo y a la asistencia o a la seguridad social*." See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1992/T-426-92.htm.

[262] "*El derecho a la salud no es en principio un derecho fundamental de aplicación inmediata. Sin embargo, la Corte ha estimado que este puede ser protegido por medio de la acción de tutela en casos especiales en los cuales se presente conexidad palmaria con un derecho fundamental... En estas circunstancias, la efectividad de su derecho al servicio médico se encuentra en conexidad evidente con su derecho al mínimo vital indispensable para la subsistencia en condiciones dignas*." See the full decision here: http://www.corteconstitucional.gov.co/relatoria/1995/T-005-95.htm.

rights (those that are regarded as not immediately applicable) become justiciable, as they are necessary for a minimal standard of living. Ultimately, judges decided to recognize the vital minimum as a right in itself.

Throughout this period, certain Constitutional Court justices actively expanded rights protections, often through the purview of the tutela procedure,[263] viewing the constitutional parameters as artificial limitations on the legal tool that resulted not from societal preferences but political maneuvers and compromises. Cifuentes recalls:

> The challenge was to change the judicial culture … to demonstrate that the Constitution was a performative constitution … The Constitution had to be binding on all public powers and private powers, so that constitutional guarantees could effectively address general conditions of citizenship and equality. The constitutional judge should not only be a counselor to the state… The second challenge of the Court was for rights to mean more power for the weak… and for that reason the extension of borders of economic, social and cultural and fundamental rights was guided by the Court directly.[264]

Importantly, judges were able to suggest and implement alternate understandings of the proper scope of the tutela procedure and the nature of rights, in part due to their independence and in part due to the continued (and expanding) filing of tutelas by aggrieved citizens. Decisions made by judges in the years immediately following the creation of the new constitution allowed citizens to file tutelas that made claims to a wide variety of social rights. In other words, these expansions did not apply singularly to any one right.

Further, as Rodolfo Arango, an auxiliary justice during the first years of the Court, remembers, "from the beginning of the Court we had a very, very aggressive

[263] Interestingly, many of these extensions were suggested in tutela decisions that actually rejected the original applicant's claims.
[264] Interview160726_0006.

strategy of delivering the decisions and explaining them very pedagogically, directly to the media… every week on the front page of the newspaper [you read] a surprising decision, one that protected someone's rights." Arango also notes that the tutela procedure "allowed [for] a growing awareness that people had rights and that they could defend them through the judges."[265] In addition to these outreach efforts by the Constitutional Court itself, the government of President César Gaviria also promoted the work of the Court and particularly the tutela. Manuel José Cepeda – then a legal advisor to President Gaviria and later a justice of the Constitutional Court – recalls:

> We created a program called *La tutela factor humano*. *La tutela factor humano* was like a soap opera … It was a representation of a case. There was someone who intervened and said what happened [in the case] … someone who says, 'And then this happened in the procedure, and then the judge decided [this way]' … It was in primetime and it was viewed by the people.[266]

As such, Constitutional Court judges did not decide cases in a vacuum, separated from the people. Instead, both the Court and the government sought to bring the Court closer to citizens, so they would be aware of the work of the Court.

These early developments should not be taken to mean that all tutelas filed result in positive outcomes. Moreover, a successful decision does not necessarily result in compliance or the delivery of a remedy. A pilot study on compliance with tutela decisions across issue areas found "alarmingly low" compliance rates, even for the issue areas with the best rates (Gauri and Staton 2013).[267] Still, even with

[265] Interview 1600825_0016.
[266] Interview 170223_0060.
[267] Among legal professionals there does not appear to be a consensus about whether or not Constitutional Court orders are, in fact, complied with (Juan Carlos Henao, a former Constitutional Court justice, interview 161108_0054; Hernán Olano, a former *oficial mayor* of the Constitutional Court, interview 160920_0028; Pablo Rueda, former auxiliary justice, interview 161104_0052).

alarmingly low rates of compliance, the courts might be the most responsive democratic political institution accessible to Colombian citizens. Rodrigo Uprimny and Mauricio García-Villegas (2006: 71) point to a "crisis in representation" in the Colombian state as well as the general weakness of the social movements and opposition parties as partial explanations for the emergence of an activist Constitutional Court. The exercise of judicial agency thus led to the creation of opportunity for legal mobilization through the tutela procedure. Specifically, the iterative and path-dependent nature of the legal process (the continued processing of tutelas and the drafting of doctrine and precedent) allowed Constitutional Court judges to expand rights recognitions. A massive, yet unforeseen increase in the usage of the tutela to claim constitutional rights, including social rights, followed.

Notably, though the early Constitutional Court decisions could have applied to all social rights, different rights evolved along different trajectories. Specifically, health tutelas increased more dramatically through the 1990s and early 2000s than tutelas invoking other social rights. This subsequent development can be explained, in part, by a rise in grievances related to the new healthcare system. Between 1995 and 2011, the percentage of the Colombian population included in the healthcare system expanded from 25% to 90%, increasing further to 95% by 2016 (Lamprea 2015: 61; Lamprea and García 2016). This expansion resulted in substantially increased levels of coverage, but that coverage did not necessarily translate into real access to healthcare services for newly covered individuals, which, in turn, resulted in an increased quantity of grievances. Importantly, however, without these early decisions that opened the space for legal mobilization on social rights, the tutela procedure could not

have been used to make claims related to the right to health. Further, these early decisions helped propel the necessary shift in understanding health problems as something as unfortunate to something *legally* objectionable. Chapter 8 further describes this process.

What is more, the early Constitutional Court decisions appear to have set in motion specific patterns of decisions. These patterns reflect what Paul Pierson (2000) describes as increasing returns and lock-in effects. Seemingly small changes in institutional rules can compound over time, leading to substantial consequences. Figures 7.1 and 7.2 (below) depict trends over time in tutela decisions by the Court, from the transitional court (1992) to the first court (1993-2000), second court (2001-2008), and third court (2009-2015[268]). Figure 7.1 shows the percentage of reviewed tutelas in which the Court chose to concede the rights claim and the percentage of reviewed tutelas in which the Court confirmed the lower court's decision. Figure 7.2 restricts the sample to social rights claims. The percentage of social rights claims reviewed increases over time, as does the percentage of claims conceded in both samples, while the percentage of decisions confirmed decreases over time. Subsequent courts continued to follow the transitional court's commitment to protecting social rights, conceding these claims directly and overturning lower court decisions that denied these rights claims. Figures 7.1 and 7.2 are based on a random sample of tutela revision decisions taken from the Constitutional Court's website.

[268] This sample was taken before the end of the third term in 2016.

Figure 7.1. Tutela Decisions by the Con. Court (%)

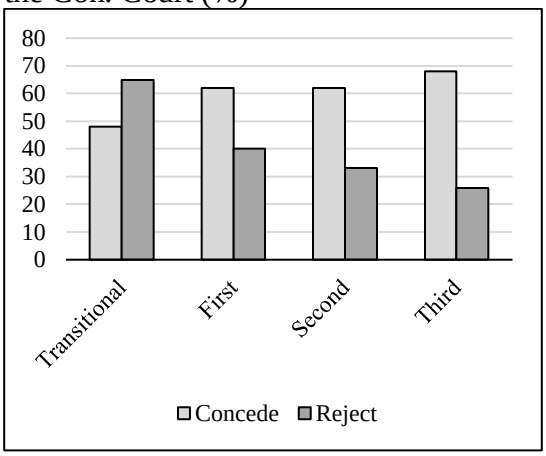
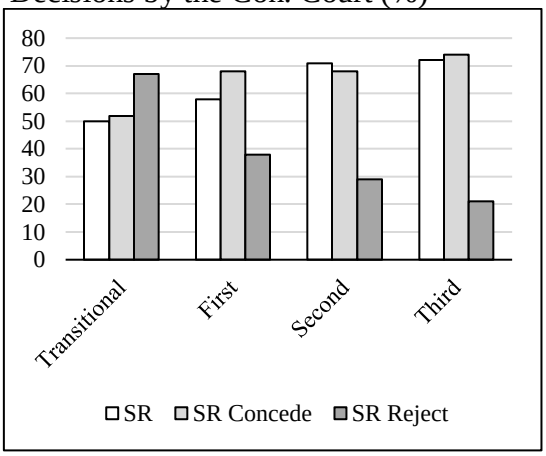


Figure 7.2. Social Rights Tutela Decisions by the Con. Court (%)



Contingent choices made by new Colombian Constitutional Court justices – in other words, the exercise of judicial agency – kicked off processes that resulted in unexpected changes to the institutional and ideational environment, which the influenced opportunities for social rights claims-making. Progressive attitudes about the role of the judiciary or the purpose of the law are indeterminate: two judges who share the belief, for example, that social rights are justiciable may disagree about the basis on which social rights cases should be decided. More specifically, nothing about a progressive orientation necessarily indicates that judges would turn to an analysis of the interconnectedness of certain rights or on a "vital minimum" standard of living to adjudicate social rights. In fact, looking to South Africa, we see that judges made different decisions in the wake of constitutional transition about how to best expand social rights protections. Rather than considering which enumerated rights should be considered "fundamental" or considering the specific connection between a social right and a fundamental right, South African judges instead situated decisions about the justiciability of social rights with respect to an understanding of human dignity and

the conditions necessary for a dignified life. This focus on human dignity led not only decisions granting recourse for violations of social rights, but it also shaped the ways in which judges adjudicated different kinds of rights claims.

Judicial Agency in South Africa and the Expansion of Housing Rights

The creation of the South African Constitutional Court was followed by the appointment of a mixture of justices who had been part of the traditional legal establishment and justices who had not. According to the Interim Constitution of 1993, the first bench had to include four sitting members of the Supreme Court of Appeal – Laurie Ackermann, Richard Goldstone,[269] Tholie Madala, and Ismail Mohamed were chosen in this capacity. President Mandela selected advocate and founder of the Legal Resource Centre, Arthur Chaskalson, to serve as the first Judge President of the Court. From a list of ten potential justices nominated by the Judicial Services Commission, President Mandela selected John Didcott (a judge on the Natal Division of the Supreme Court), Johann Kriegler (a judge on the Transvaal Division of the Supreme Court), Pius Langa (an advocate), Yvonne Mokgoro (an academic, who had served as a prosecutor in the Mmabatho Magistrate's Court years prior), Kate O'Regan (an academic), and Albie Sachs (an activist and academic). These appointments made for a diverse bench in terms of experience. Further, as Penelope Andrews (2006: 567) notes, "In 1994, South Africa's judiciary was overwhelmingly white, male, drawn from the ranks of the middle and upper classes, and Afrikaans speaking … [T]here were two black judges and one female judge amongst the two

[269] Justice Goldstone was finished his term as Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, so Sydney Kentridge served as an Acting Justice between 1995 and 1996.

hundred or so judges that made up the judiciary." The appointment of two women (Mokgoro and O'Regan), and four people of color (Langa, Madala, Mohamed, and Mokgoro) represented a significant shift in terms of descriptive representation. The choice of these eleven justices also meant that the Constitutional Court would be a site in which judges thought differently about rights protections and the possibilities of constitutional law than they did in other courts across the country, as was the case in Colombia.

In contrast to Colombia, however, social rights in the South African Constitution are expressly limited by the international standard of progressive realization, meaning that the state is obligated to take concrete steps ("reasonable legislative and other measures") to ensure improved access to social goods and services, but not to immediately provide those goods and services to all citizens. This limitation comes from the South African constitutional drafters' focus on "universally-accepted rights" and international human rights law.[270] Further, while the Section 38 of the South African Constitution officially lowered standing requirements, allowing easier access to the courts than ever before, the litigation process in South Africa remained both costly and time-consuming. There is nothing similar to the tutela procedure in South Africa. Instead, cases concerning constitutional rights questions tend to be heard first in the High Courts and then may be appealed to the Supreme Court of Appeal and eventually to the Constitutional Court, a process that can take

[270] The progressive realization standard explicitly appears in the International Covenant on Economic, Social and Cultural Rights.

several years and requires the involvement of two different kinds of lawyers (attorneys and advocates).

The South African Constitutional Court has heard an average of just under three social rights cases each year (with a maximum of six social rights cases in a given year) between 1996 and 2016, and of these cases, the majority have dealt with the right to housing. In fact, as of 2016, the Court had decided 31 housing rights cases, compared to 15 education rights cases, five social security cases, seven health cases, and two cases involving water. Overall, social rights cases make up about 9% of the Court's work.

Underpinning the early Court's work and many early discussions of South African constitutional law is a robust conception of human dignity.[271] As Edwin Cameron (now a Constitutional Court justice) wrote in 2014 (95-96):

> [T]here is sound reason why dignity, for all its indeterminacy, has taken so central a place in the formative jurisprudence of the Court. It is to be found in South Africa's past of racial indignity – where racial subordination was both premised on and enacted shamefulness and disgrace. Apartheid laws deprived black South Africans of their citizenship, gave them education that was inferior to whites', segregated and confined them on land both urban and rural, and relegated them to poorer jobs and economic roles. But those laws represented, and did, more. They derived from the view that black South Africans were subordinate and inferior humans, and treated them accordingly. They enunciated and practiced the condition of 'non-whiteness' as legally shameful.

Accordingly, the Court has emphasized the importance of dignity regardless of rights issue in question. In the Court's first case, one involving the constitutionality of the death penalty, *S v Makwanyane and Another* (1995), Judge President Chaskalson concluded:

[271] See Liebenberg (2005), Barnard-Naudé, Cornell, and Du Bois (2009), Chaskalson (2011), and Cornell (2014), among many others.

> The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does …[272]

Each justice in this case wrote a concurring decision. Seven of the nine relied on a discussion of the right to dignity, and four explicitly discussed *ubuntu* instead of or in addition to dignity. The central status of dignity in the thinking of the first bench of the Constitutional Court is clear.

As another example, Justice Sachs wrote, "It will be noted that the *motif* which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity" in the case *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998, emphasis in original).[273] Interestingly, civil society actors, namely the Centre for Applied Legal Studies (CALS), challenged this approach, encouraging the Court to view the right to equality as distinct from dignity, rather than as fundamentally interconnected. CALS argued that a focus on equality as such would allow for the Court to take more robust action in promoting substantive equality instead of primarily responding to overt discrimination after the fact.[274] Justice Sachs further noted in this decision that, "it [is] plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected" (emphasis in original). In these cases, as well as other early cases dealing

[272] See the full decision here: http://www.saflii.org/za/cases/ZACC/1995/3.html.
[273] See the full decision here: http://www.saflii.org/za/cases/ZACC/1998/15.html.
[274] See Section 120 of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998) for Justice Sachs's summary of CALS's argument (ibid.).

with issues as varied as presidential powers, criminal law, regulations, and freedom of speech,[275] the Court, largely regardless of the justice writing the main opinion, highlighted the significance of dignity in the constitutional law of the new South Africa.

Turning to the Court's analysis of social rights, we see a continuation of this pattern. The first social rights case[276] to come before the Court, S*oobramoney v Minister of Health (Kwazulu-Natal)* (1997), involved a claim regarding the right to health, advanced by a man suffering from kidney failure who was seeking access to a dialysis machine at a state-run medical facility. In deciding the case, Judge President Chaskalson wrote:

> There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[277]

He noted the "constitutional commitment" to address these conditions was expressed in Sections 26 and 27, which detail the rights to have access to adequate housing, healthcare, food, water, and social security and social assistance. Ultimately, the Court decided against Mr. Soobramoney, with Judge President Chaskalson concluding, "The State has to manage its limited resources … There will be times when this requires it

[275] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1996), *President of the Republic of South Africa and Another v Hugo* (1997), *Prinsloo v Van der Linde and Another* (1997), and *Harksen v Lane NO and Others* (1997), among others.
[276] In 1996, the Court heard a case related education, *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995*, but did not actually reference the Section 29 constitutional right to education.
[277] See the full decision here: http://www.saflii.org/za/cases/ZACC/1997/17.html.

to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society." In a concurring decision, Justice Sachs held that an acknowledgement of the dignity and equality of all citizens required the rationing of healthcare services.[278] Overall, this case challenged the Court to navigate a commitment to the realization of social rights and human dignity and a concern with balancing individual needs and collective consequences.[279]

The next substantive social rights case, *Government of the Republic of South Africa and Others v Grootboom and Others*, came before the Court in 2000.[280] This case involved the attempted eviction of 900 people living in a squatter settlement near the city of Cape Town. At the start of the decision, Justice Zak Yacoob wrote, "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream."[281] Here again we see the centrality of dignity in South African constitutional rights jurisprudence. Justice Yacoob later noted that "[s]ocio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only." This move can be interpreted as an attempt to indicate that social rights are meaningful in South Africa, despite the *Soobramoney*

[278] Specifically, he wrote, "In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care."
[279] The public reacted with outrage to this decision, as Mr. Soobramoney died shortly after the decision was handed down. Chapter 8 discusses this case in more detail.
[280] Technically, the Court released two decisions on an education-related cases earlier. The first, a case known as *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal* (1998), involved the right to education insofar as it dealt with schools, but the case was decided on the basis of administrative law. The second case, *Christian Education South Africa v Minister of Education* (2000), centered on whether or not corporal punishment should be allowed in private religious schools. The analysis did not rely on the right to education as such (though it did engage with the right to maintain independent educational institutions), but instead on the balance between religious freedom, privacy, culture, dignity, equality, security of the person, and the rights of children.
[281] See the full decision here: http://www.saflii.org/za/cases/ZACC/2000/19.html.

decision. Yet, how exactly rights would exist beyond their inscription on paper would be defined by judicial decisions. The *Soobramoney* decision made clear that they would not exist, at least in the judicial sphere, at the level of the individual claimant. The *Grootboom* decision further clarified a focus on the "reasonableness" of policy decisions, drawing on the phrase "reasonable legislative and other measures" included in Constitution (reasonableness was not quite defined, though the decision did indicate that clear respect for human dignity would be integral to an assessment of reasonableness).[282] Ultimately, the Court found that the state's housing policy was unreasonable and therefore unconstitutional because it neglected to provide for those in desperate need, and the decision mandated that the government develop an emergency housing policy. The justices of the Constitutional Court could have decided these cases differently, and many analysts and observers have suggested that they should have.

Social rights cases continued to make it to the Constitutional Court, numbering two or three per year through the early 2000s. Between 2000 and 2002, the Court considered three additional education-related cases, declining to hear one, deciding one on the basis of the Minister of Education's powers (while explicitly refraining from addressing any constitutional rights questions), and relying on an analysis of just

[282] "It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasize that human beings are required to be treated as human beings" (Section 83).

administrative action in the third.[283] In 2001, another housing-related case came before the Court, though the case hinged on whether or not the state could build a temporary transit camp on a specific piece of public land rather than on an interpretation of the meaning of the right to housing as such.[284]

The next case that resulted in a substantive development to social rights jurisprudence was *Minister of Health and Others v Treatment Action Campaign and Others* (2002).[285] The *Treatment Action Campaign* case involved the rollout of a state-led program meant to combat mother-to-child transmission of HIV through a medication by the name of nevirapine. Initially, the state wanted to make the medication available only at certain medical facilities (two per province), arguing that it had concerns about the safety and cost of nevirapine, though then-President Mbeki's AIDS denialism likely also played some role in this approach. The Treatment Action Campaign attempted to hone an argument focused on policy reasonableness (Heywood 2009), and the Court's decision in this case once again affirmed the commitment to evaluating the reasonableness of policy designs. Unlike previous cases, this decision does not rely on an explicit assessment of dignity in its evaluation of policy reasonableness. Still, the case served as an important move for the Court in challenging a prominent national policy and in considering the right to health care as justiciable in practice like the rights to housing and education.

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[283] *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College* (2000*), Minister of Education v Harris* (2001), and *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* (2002), respectively.
[284] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001).
[285] See the full decision here: http://www.saflii.org/za/cases/ZACC/2002/15.html.

The *Soobramoney*, *Grootboom*, and *Treatment Action Campaign* cases are typically recognized as setting out the parameters of social rights jurisprudence in South Africa. Together, they point to an approach that combined focuses on policy choices – specifically the "reasonableness" of those choices – and a respect for human dignity. Whether a policy was reasonable and whether it afforded sufficient protections to the dignity of South Africans would be decided on a case-by-case basis. South African judges made clear an aversion to firmly defining the substance or content of rights – contrasting with the declaration of the Colombian Constitutional Court in T-406/92 that "today, with the new constitution, rights are what judges say they are through tutela decisions" and contrary to the preferences of prominent civil society organizations and human rights lawyers, which favored the minimum core approach to outlining the content of social rights establishing in international law. Instead, South African judges focused on policies, processes, and societal rather than individual effects, and, as one former clerk and current advocate noted, "the way our Court interpreted its role made it very clear that it was secondary to the role of the elected representatives … I think it created a very restrained role for itself."[286]

The key here is that judges could have decided differently, even considering their commitment to a transformative constitutional order. For instance, as noted above, the Court has rejected the "minimum core" approach to rights adjudication. In a unified decision in the *Treatment Action Campaign* case that reaffirmed the approach set out in *Grootboom*, the Court held that:

[286] Interview 170803_0123. James Fowkes – another former clerk – reiterated this view in an interview (170905_0153) and in his 2016 book.

> [E]vidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.[287]

This remains a point of contention among the human rights legal community – whether or not the minimum core is officially dead and whether or not the Court should have rejected the minimum core approach at all.[288] Further, many jurists and legal experts around the world – disagreeing with the South African Court – have determined that the concept offers a useful legal tool for understanding and adjudicating rights claims. As another example, the Court has also chosen to limit direct access to the Court, preferring to allow lower courts to hear cases first, though the appeals process can draw cases out for years, potentially limiting the impact of rights decisions for individual claimants (Dugard 2006, 2015). The justices offered reasons for these choices, but other progressive judges may very well have made different choices, despite a shared commitment to a progressive vision of constitutional law. In short, the justices of the Court exercised judicial agency as they developed South African constitutional law.

One further addition to the jurisprudence worth discussing in detail comes by through the creation of the concept of "meaningful engagement."[289] The emergence of the idea of meaningful engagement clearly demonstrates the importance of

[287] Section 34.
[288] Various interviews with former clerks, as well as current activists and legal professionals.
[289] There is something called "consulta previa" in Colombia, which is conceptually similar to "meaningful engagement" in South Africa, though the application of consulta previa has been much more limited – namely to indigenous communities and the social/environmental impacts of mega-projects.

contingency in judicial decision-making. Meaningful engagement essentially refers to an obligation to attempt mediation or some kind of formalized, direct face-to-face interaction between relevant parties outside the courtroom before a case is decided. This doctrine fully emerged in the Constitutional Court's decision on the *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) case, though it has roots in a case four years earlier, *Port Elizabeth Municipality v Various Occupiers* (2004).

The *Port Elizabeth Municipality* case involved the potential eviction of 68 people, including 23 children, living in 29 shacks that had been built on privately-owned land. In writing for the Court, Justice Sachs highlighted the promise of "respectful face-to-face engagement or mediation through a third party" and noted:

> [T]hose seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.[290]

Justice Sachs did not use the phrase "meaningful engagement" in his written decision, but he did hold that the eviction would not meet the "just and equitable" standard – a standard set forth in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 – for a number of reasons, one of which had to do with the complete lack of any attempt to "listen to and consider the problems of this particular group of occupiers."

[290] See the full decision here: http://www.saflii.org/za/cases/ZACC/2004/7.html.

The *Olivia Road* case involved the potential eviction of more than 400 occupiers of unused or abandoned buildings in downtown Johannesburg. The Court issued an interim order which stated in part:

> The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.[291]

This interim order, written by Justice Sachs, and the subsequent decision in the case, written by Justice Yacoob, detailed the concept of meaningful engagement.[292] Justice Yacoob's decision once again noted the connection between a recognition of and respect for dignity and reasonable policy, but the case is best known for the meaningful engagement doctrine. Here, I will quote at length from an interview with former justice Albie Sachs:

> I introduced the notion [of meaningful engagement] … The eviction must be just and equitable, and there are some cases where there's no right answer. The answer in favor of some might go against others, so you give it your best shot to balance out the competing interest, and I said since mediation hadn't been tried, meaningful engagement involving mediation hadn't been tried, it would not be just or equitable to order their eviction.
>
> That now has become part of the court doctrine. Where you have competing interest, the court doesn't give a ruling that defines who technically is in the right or in the wrong … It gets the parties to engage meaningfully with each other and report back to the court.

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[291] See the full decision here: http://www.saflii.org/za/cases/ZACC/2008/1.html.

292 Justice Yacoob articulated that "[e]ngagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c)whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations" (Section 14).

> It serves quite a profound democratic justice element. It gives the voice, direct voice, to the poor. The poor are not just an anonymous mass out there to be protected by the judiciary. The poor become participants in deciding on their own fate. They become families. They become people with names, with the history, with biographies, with particular interests and so it's part of the human dignity aspect that's found in our Constitution.
>
> At the same time, it compels the authorities to humanize the processes … to take account of the impact of the measures on the poor. And it's the process, I think, [that] has been very educative for many bureaucrats, and it humanizes what otherwise could be a very cold abstract form of judicial intervention. And it reconfigures the role of the judiciary to manage the process rather than simply to define rights.[293]

Meaningful engagement thus is based on the way in which early justices understood the concept of dignity and how that ought to play out in contemporary South African life. It also sets out a specific, broad role for the Court, beyond hearing and deciding discrete cases as they are presented in the courtroom, there is a concern for shaping the relations between different sets of actors in the "real world."[294]

This turn to meaningful engagement was prompted not by civil society or arguments put forward by litigants, but by the Constitutional Court justices themselves. As an advocate who was working at the Court as a clerk at the time noted, "my recollection is that this whole idea of meaningful engagement wasn't raised by the parties, wasn't the basis on which the case was argued. It was raised by the judges

[293] Interview 171003_0170.

[294] Interestingly, in a prior case, *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001), Judge President Chaskalson seems to suggest that mediation prior to the determination of where to build a transit camp to house flood victims was unnecessary and undesirable: "If all persons with an interest in the choice of the location of the transit camp would have had to be heard before the choice was made, the process would almost certainly have been contentious and drawn out. The decision, however, was one that had to be made expeditiously because the urgent needs of the flood victims called for prompt action on the part of the government" (Section 105). This is not necessarily inconsistent with the later developed concept of meaningful engagement, as it could be argued that the Kalaymi Ridge case involved extraordinary circumstances (the flood) and that the location of a transit camp is a substantively different issue than whether or not/how an eviction will proceed. See the full decision here: http://www.saflii.org/za/cases/ZACC/2001/19.html.

at the hearing, and then kind of pushed by them."[295] Another former clerk suggested that meaningful engagement derives from the transition experience of negotiated settlement, stating, "It's basically the Court taking what happened in CODESA and putting it into law."[296] Thus, the elaboration of the concept of meaningful engagement is an example of the exercise of judicial agency.

Interestingly, Heidi Barnes, one of the advocates representing the applicants against the City in the *Olivia Road* case, recalled that the initial meaningful engagement decision "was quite frustrating for us at that time" though she also noted that "in the end, meaningful engagement has become quite a powerful and useful tool in litigating in this area." In addition, the emphasis on meaningful engagement outlived Justice Sachs and the other justices comprising the first Constitutional Court bench, and future judges applied the concept to new types of cases, including both education- and water-related cases in addition to housing rights cases. Not only did Constitutional Court justices adopt the language of meaningful engagement, but so did High Court judges, who, considering the historical composition of the judiciary, might be less likely to favor progressive or expansive interpretations of constitutional law.[297] The trajectory of meaningful engagement reflects again the patterns of critical

[295] Interview 2018.03.01_14.36_01.
[296] Interview 2018.03.29.15.51_01.
[297] These cases include: *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* (2011 – Constitutional Court, education); *Rand Leases Properties v Occupiers of Vogelstruisfontein and Others* ('Rand Leases') (2011, 2013, 2014 – High Court, housing); *Federation for Sustainable Environment and Others v Minister of Water Affairs and Others* (2012 – High Court, water); *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* (2012 – Constitutional Court, housing); *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (2013 – Constitutional Court, education); *Ngomane and Others v Govan Mbeki Municipality* (2016 – Constitutional Court, housing); *Daniels v Scribante and Another* (2017 – Constitutional Court, housing).

junctures, path dependence, and increasing returns described by Paul Pierson (2000). Here also we see evidence that "large consequences may result from relatively small or contingent events [and that] particular courses of action, once introduced, can be almost impossible to reverse" (Pierson 2000: 251).

As was the case with Colombia, justices considered publicizing decisions as part of their work, not just handing those decisions down. Integral to these outreach efforts were the formation of a media committee and the introduction of television cameras into the courtroom. In an interview, former Justice Goldstone recalled:

> We had seminars with senior journalists. We had annual meetings with the editors of the main newspapers and a lot of things came together from that. One of them was issuing a press summary together with judgments. The summary was drafted by the judge who wrote the lead opinion. That was very useful for the journalists … because, you know, sometimes it was a 150-page judgment.[298]

These press summaries allowed journalists to more easily engage with potentially complicated legal decisions and translate what the Court was doing to the public. Further, because the South African Broadcasting Company carried almost live court proceedings, citizens – at least those with access to television – could see the Court in action and learn about its work for themselves.[299] Constitutional literacy remains a challenge in South Africa,[300] but in this way, the Court attempted to close the gap between citizens and constitutional law.

Through the early years of the South African Constitutional Court, justices made contingent choices related to how to consider social rights, which led to changes

[298] Interview 170718_0115.
[299] There was a slight delay so that in the event that any confidential information was shared, the Chief Justice could halt the broadcast.
[300] Various interviews with activists and lawyers.

to the institutional and ideational environment, in turn influencing opportunities for social rights claims-making. These choices also resulted in the expansion of the workload and the content of the work of the Court over time. Unlike in Colombia, however, the South African story does not hinge on a particular legal tool. In fact, although the 1996 Constitution did lower standing requirements through Section 38, and although Section 167 allows for claims to be brought directly to the Constitutional Court (in other words, allowing the Court to serve as a court of first instance), the South African Court hears only a small fraction of the claims the Colombia Court decides each year (up to 55 rather than well over one thousand, respectively). Even so, the Court's decisions on social rights have had significant impacts on South African social policy and the ability of South Africans to make claims to their constitutional rights.

Conclusion

In sum, the ways in which judges interpreted constitutional provisions for fundamental rights structured opportunities for legal mobilization in both Colombia and South Africa. These contingent choices, these exercises of judicial agency had long-lasting impacts on the shape of legal procedures and social rights jurisprudence, as a result of the dynamic of path dependence. Initially in Colombia, individuals experimented with the new tutela procedure by making rights claims across issue areas. Judges used early tutela decisions as opportunities to clarify and expand the purview of existing legal categories. Here, judges engaged in layering, through the addition of new institutional rules to pre-existing rules. In this case, new legal

doctrines (*conexidad* and *mínimo vital*) regarding the ability to claim rights with the *acción de tutela* were layered on the old standard of determining the fundamentality of a right (its location in the constitutional text). Judges and allies in the executive branch also sought to spread information about the work of the Court through the popular media. Through news and television reports, citizens were able to learn about the rights-protecting stance of the Court and the existence of the tutela procedure. Legal mobilization increased dramatically in the subsequent years, as citizens continued to use the tutela procedure more and more frequently to make social rights claims. Judicial agency – on the one hand through the expansion of existing legal categories and mechanisms through tutela decisions and on the other through efforts to inform citizens about the Court through the media – helps to explain the emergence and contours of legal mobilization for social rights in Colombia.

Similarly, in South Africa, citizens, NGOs, and social movements experimented with the new constitutional framework, bringing different kinds of claims and legal arguments before the Constitutional Court. Justices responded by engaging in judicial agency – making choices about which cases to hear, the basis upon which to decide those cases, and how to publicize their work. These choices led to the development of a jurisprudence based on human dignity and policy evaluations. Upon the foundation of the progressive realization of social rights outlined in the 1996 Constitution, Constitutional Court justices layered new rules, such as the requirement for meaningful engagement prior to eviction proceedings and the privileging of policy evaluations over individual rights claims. These new rules took on greater importance over time, with lower court judges adopting them and with judges across jurisdictions

applying them to a wide range of cases – for instance, requiring meaningful engagement between parties in cases not dealing specifically with evictions or housing rights. These choices and rules impacted opportunities for legal mobilization for social rights over time, stymying individual claims-making and encouraging housing rights cases. By publicizing the work of the Court through television broadcasts and media summaries, judges ensured a greater possibility of citizen knowledge of and engagement with the Court.

This chapter builds on previous studies that point to the fact that some of the time, though not always, judiciaries serve as vocal advocates in favor of rights protection or other progressive goals, willing to challenge the policies and beliefs of other state actors in defense of a disadvantaged minority (Gargarella et al. 2006; Gauri and Brinks 2008; Brinks and Gauri 2014).[301] Chapter 8 investigates the relationship between judicial receptivity and variation in legal mobilization, drawing out the influence of societal actors on this relationship in both Colombia and South Africa. In doing so, it connects the "from above" perspective detailed in this chapter with the "from below" perspective explored in Chapters 5 and 6, tying together the constructivist account of legal mobilization.

[301] For an overview of US-focused accounts regarding the role of judicial attitudes in legal struggles, see e.g. Segal and Spaeth (2002).

CHAPTER 8

LEGAL MOBILIZATION IN COMPARATIVE PERSPECTIVE

Citizens have advanced claims to social rights in very different ways across countries (Gauri and Brinks, 2008). Leveraging comparisons within and across cases, this chapter investigates legal mobilization for social rights in Colombia and South Africa. Even though the constitutions of Colombia and South Africa protect a similar set of rights, these protections have translated into very different patterns of claims-making in the formal legal sphere. In Colombia, legal claims to the right to health have become ubiquitous, particularly through the tutela procedure,[302] yet relatively few housing rights claims have emerged. Legal claims to the right to health in South Africa, on the other hand, have been rather limited, focusing on HIV/AIDS related issues, whereas claims to the right to housing predominate. Why is that the case? What explains in legal mobilization across countries and issue areas?

To better understand patterns in legal mobilization, I argue that a holistic approach is necessary, one that assesses both legal claims-making and judicial behavior together – in other words, an approach that views legal mobilization "from above" and "from below" is necessary. In this chapter, I show that patterns in legal mobilization derive from a highly contingent and recursive process of grievance construction and a reinterpretation of the meaning and scope of fundamental constitutional rights. In doing so, I draw on the constructivist account of legal

[302] The *acción de tutela* is a legal procedure that allows individuals to make immediate claims to constitutional rights before any judge in the country and does not require the service of a lawyer.

mobilization develop in Chapter 2. The model offers an explanation for the shift between the initial period of experimental claims-making with unpredictable outcomes that came in the wake of the creation of new constitutions when understandings about rights, the law, and state obligations held by both potential claimants and judges were unsettled and later, established patterns of claims-making and judicial decision-making. This shift involves the social construction of some issues and not others as "legally grievable," as well as the development of judicial receptivity to some but not all kinds of claims. Thus, this model helps to clarify "the *process* of mobilizing the law" (Arrington 2018: 24). Further, the constructivist account recognizes the agency of judges, claimants, and counter-claimants as they contest the meaning of rights. Neither judges nor claimants are passive actors; instead, both play vital roles in producing the feedback loops that reinforce cycles of legal mobilization.

Legal Opportunity, Support Structures, and Claims-Making

The concept of "opportunity" features prominently in contemporary analyses of both social and legal mobilization. Within the political process model, developed to explain social movement and protest activity (McAdam, Tarrow, and Tilly 2001), scholars refined the notion of the "political opportunity structure," which refers to "consistent – but not necessarily formal or permanent – dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure" (Tarrow 2011: 163). Importantly, however, opportunity alone is not enough to cause mobilization. As Doug McAdam and Sidney Tarrow (2018: 4) note, the original political process model held that "[i]t is

the confluence of political opportunities, indigenous organizational capacity, and the emergence of an oppositional consciousness (or 'cognitive liberation') that shape the rise of a movement and its prospects for success." Building from this framework, studies refining the concepts of political opportunity, organizational capacity, and, to a lesser extent, the cognitive or ideational elements of mobilization have proliferated.

Chris Hilson (2002) adapted the concept of political opportunity to focus specifically on the conditions under which social actors are able to mobilize law to make demands (see also Andersen 2005; Vanhala 2012). Legal opportunity encompasses both institutional and contingent factors. Lisa Vanhala (2018b: 112) notes that "at least three factors matter across jurisdictions and across policy areas: legal stock, standing rules, and rules on costs." Legal stock refers to the existing body of law and delimits the kinds of legal arguments that can be advanced, while standing rules determine who can bring claims before the courts, and rules on cost set out the amount of financial risk litigants undertake when initiating a court case. In addition to these factors that limit both access to the courts and the types of claims that can formally (or reasonably) be made, scholars have also highlighted the importance of judicial receptivity and a "support structure" of social and material resources available to claimants (Galanter 1974; Epp 1998; Andersen 2005). The classic support structure model (Epp 1998) demonstrates how societal actors facilitate litigation, easing constraints on would-be claimants by providing financial support, technical knowledge, and other such resources.

Like political opportunities, legal opportunities are not static in nature and can be created, or at least altered, by would-be mobilizers in a political process that

involves contestation over ideas, actors, and institutions. This has to do with the nature of court-society relations. As Julio Ríos-Figueroa (2016: 20), "the dialogue between the court, the public, and the political actors runs both ways, because the court sometimes sets the public debate going, but other times it starts from what the majority, a minority, or a specific political actor raises as a critical issue." Studies of diverse topics such as environmentalism in England and Scotland (Vanhala 2018b), human rights movements across Latin America (González-Ocantos 2016), and mobilization against political violence (M. Gallagher 2017) demonstrate how actors can modify the conditions of legal opportunity through educational campaigns and the formation of multi-dimensional support structures that simultaneously agitate for change and facilitate ties with the state.[303]

Yet, it is not rules and resources as such that meaningfully and directly impact the possibility of legal mobilization, but the perceptions of potential claimants (Andersen 2005). The beliefs that potential claimants have about institutional purpose or orientation, institutional rules, as well as their own resources and external support impact when opportunities are recognized and acted upon. In other words, theories of legal opportunity implicitly rest on assumptions about the beliefs of the actors involved. Opportunities must be understood as such to be acted on. As McAdam (1982: 48) wrote in his seminal study of the "black insurgency" in the United States, "Mediating between opportunity and action are people and the subjective meanings

[303] For an overview of the ways in which courts are "activated," see Hilbink and Ingram (forthcoming).

they attach to their situation." Legal opportunity is thus subjective, flexible, and contingent.

Building on these works, I develop the constructivist account of legal mobilization, which explains both the emergence and endurance of legal claims-making regarding social rights. The account also clarifies the importance of societal actors – from pharmaceutical and insurance companies to advocacy networks, NGOs, and community organizations – for legal mobilization. In moving from the period immediately following the adoption of new constitutional frameworks, which set out new opportunities for legal mobilization, to subsequent periods, during which patterns of claims-making and judicial decision-making are more firmly established, societal actors impact the judicialization of grievances and judicial receptivity.

In this model, societal actors play an integral role in legal mobilization, not only materially supporting claimants in their efforts to seek redress, but also actively contributing to the social construction of grievances by helping to frame certain issues as "legally grievable."[304] In other words, societal actors encourage potential claimants to view a specific problem through the lens of the law and to make claims in the formal legal system rather than doing nothing or advancing a claim in some other setting. Many investigations of mobilization either assume that grievances are based on "underlying activity" (following Casper and Posner 1974) or are simply ever-present (following McCarthy and Zald 1977), or they fail to articulate a stance on

[304] The social construction of legal grievances goes beyond "rights consciousness" as it is less about knowledge of rights than about the development of a sense of entitlement to certain goods or services as well as the understanding that claims to those goods or services can/should be advanced in legal forums.

where grievances come from and how actors recognize something as a grievance. My constructivist approach, in contrast, acknowledges that grievances, and especially legal grievances, develop through social interaction rather than appear unmediated as the result of material conditions (Simmons 2016). As activists, lawyers, judges, and government officials participate in the framing of an issue as legal in nature (whether by advancing such a frame, accepting it, or failing to actively contest it), this legal frame may spread and come to be incorporated diffusely into everyday understandings of the issue in question (McCann 1994; Pedriana 2006; Paris 2009; Vanhala 2016, 2018a; Schoenfeld 2018).

There is also a more direct process by which NGOs, legal aid services, and other actors reach out to individuals who have a particular problem and explicitly argue that the problem is a legal one, encouraging potential claimants in their networks to understand that problem and problems like it in legal terms. This kind of action is most clear in strategic litigation campaigns, but it is potentially much broader than that. In fact, as will be demonstrated in greater detail below, in the case of health rights claims in Colombia, insurance companies that were targeted in legal claims ultimately came to encourage continued claims-making in this direct fashion, as the legal cases counterintuitively offered these companies the possibility of financial gain rather than sanction. Another variant of the direct process involves NGOs and legal aid services convincing potential claimants to actually pursue litigation, vouching that there is viable argument and reasonable chance of winning. Through this process, whether in a diffuse or direct form, potential claimants come to view issues that previously they were willing (or resigned) to ignore or to deal with in other ways as

legal issues, as legally grievable. The material reality of people's lives does not change, but their understandings of that reality does.[305]

Societal actors impact not only claimants and the process by which grievances are socially constructed, but also judicial receptivity to particular claims through the mechanism of public exposure to problems. Two key holdings of my constructivist account of legal mobilization are that judicial receptivity is not static and that it does not fall solely within the domain of judges. Existing studies have identified two mechanisms through which societal actors can influence judicial receptivity to particular claims: changes in argumentation about specific points of legal interpretation and changes in personnel. With respect to argumentation about legal interpretation, Ezequiel González-Ocantos (2016) and Amanda Hollis-Brusky (2015), in studies of transitional justice in Latin America and the Federalist Society in the United States, respectively, show how civil society organizations can play a pedagogical role, introducing and supporting new arguments about rights or interpretation to sympathetic judges. They further demonstrate how societal actors may focus on personnel changes, advocating for the replacement of opposed judges and for the nomination of favored judges.

I identify an additional mechanism: public exposure to problems. This mechanism involves a joint public and legal process, where an issue becomes visible to judges in their lived experience outside the courtroom as well as legible to judges as *legal* in nature. Judges come to see that a problem is legal in nature and that it is not being dealt with well in the context of the legal system. They then become more open

[305] See Lake, Muthaka, and Walker (2016) for a related argument.

to new legal approaches to the issue. In other words, through this process, a problem is made "real" to the law.

The exposure mechanism differs from the argumentation mechanism in that the contention is not that judges become swayed by new legal arguments, but that the persistence or increase of claims related to a specific grievance cumulatively inform judges about an issue, causing them to become comfortable with the scope of the issue and more aware of the issue's salience, and to identify with claimants.[306] This can spark a consideration or reconsideration about the correct legal response to that issue – and therefore those claims. Though Malcolm Feeley and Edward Rubin (1998: 160) examine judicial policy-making rather than legal mobilization, they identify a similar process at play in their analysis of the judicial response to reprehensible prison conditions in the United States, suggesting that "these conditions had existed for a century, of course; what changed suddenly, in 1965, was the judiciary's perceptions of them." Here, continued claims-making (and thus continued exposure) ultimately resulted in a change in judicial receptivity.

Breaking this process down, an initial confluence of exposure in daily life (i.e., life outside the legal system) and exposure within legal system plays an important role in the development of judicial receptivity, inspiring judges to connect an issue that they have perhaps seen on television or in their everyday lives with the format, scope, and tools of law. Repeated exposure to similar cases within the formal legal system has several concrete effects. As Julio Ríos Figueroa (2016: 29) outlines, "where there

[306] For arguments that focus on how judges' awareness of and responsiveness to an issue may shift over time, see Feeley and Rubin (1998), Hilbink (2014), Petrova (2016), and Ríos-Figueroa (2016).

is a "continuous flow of cases [judges] will not only get more and more varied information, but will also be more able to express their jurisprudential preferences under more favorable circumstances." By contrast, if there are only a handful of cases on a particular topic over a longer period of time, judges may have less flexibility in their decision-making, as they are bound by the facts of the cases before them, and they may be forced to decide cases in unfavorable political environments. The mere existence of many potential cases does not necessarily mean that judges will seek to resolve those cases at all or in novel ways. This is where repeated exposure to the issue in daily life and assessments of how that issue come into play. When judges view the issue as oppositional to contemporary socio-legal values, such as country-specific understandings of what constitutes justice or dignity,[307] this exposure results in judicial receptivity.[308] In short, the combination of different kinds of exposure can lead judges to come to understand an issue as appropriately resolved in the formal legal sphere and therefore increase their receptivity to that issue.

Where sustained legal claims-making related to a particular issue, following the identification of the issue as legally grievable, prompts judicial receptivity by exposing judges to that issue, a positive feedback loop forms. Receptivity then inspires further claims-making, especially if judges signal to potential claimants the kinds of arguments or claims they are most likely to evaluate favorably by staging pedagogical

[307] I use the combined form "socio-legal" intentionally here, acknowledging that social and legal values will not always align – take, for example, the South African Constitutional Court's decision against the death penalty despite widespread public support for it.

[308] This assessment of contemporary socio-legal values is an interpretive move, reflecting one choice among many that judges in each country could have made. In this way, contingency again becomes central.

interventions or offering "cues" (Baird 2007), spreading information to potential claimants about the kinds of arguments or claims likely to be accepted.

Patterns in Legal Mobilization for Social Rights in Colombia and South Africa

In order to identify and assess patterns in legal mobilization, I draw on 178 interviews, as well as an analysis of constitutional rights claims. Over the course of nearly two years of fieldwork in Colombia and South Africa, I conducted semi-structured interviews with current and former Constitutional Court justices (8) and clerks (82), other lawyers and judicial system actors (51), members of NGOs (50), and academics (37).[309] I also compiled databases of social rights cases (those that explicitly referred to the right to education, health, housing, social security, and/or water) in both countries. Colombian case information comes from national-level summary statistics about tutelas published by the *Defensoría del Pueblo* and a random sample of tutelas reviewed by the Colombian Constitutional Court between 1992 and 2016 that I collected from the Court's website. Information about the South African cases (1996-2016) come from the South African Constitutional Court's website and the Southern African Legal Information Institute (SAFLII), as well as NGO reports and case law books.

While both the Colombian Constitutional Court (CCC) and the South African Constitutional Court (SACC) have been lauded as among the most progressive, rights-protective courts in the world, they have taken on significantly different workloads. On average, the CCC hears 243 constitutional abstract review cases, or "c-cases," in

[309] Many interviewees fit in multiple categories.

addition to reviewing 709 tutelas, or "t-cases," each year. Because t-cases comprise a much larger portion of the CCC's work and because a much larger portion of t-cases than c-cases involve social rights claims, I focus on t-cases.[310] Since the early 2000s, social rights claims have made up somewhere between about 47% and 65% of all tutelas each year in Colombia.[311] In contrast, the SACC has heard about 30 cases per year, though that number is increasing. In South Africa, social rights cases reflect between zero and nearly 20% of all SACC cases each year.

Beyond these differences in total volume of cases, we also see differences in the types of social rights claims advanced in each country. In Colombia, health rights tutelas have emerged as the most common type of social rights claim – and at times, these claims have even eclipsed all other types of tutela claims. For example, in 2008, Colombians filed just under 345,000 tutela claims, of which about 143,000 involved the right to health. The next most common claim involved the right to receive a response to a petition request, at about 113,000. Figure 8.1 shows the nationwide variation in social rights tutela claims between 2003 and 2014. While health claims remain the most common, other types of social rights claims have increased in frequency.[312] In South Africa, housing rights claims are by far the most common of the 204 social rights cases across the High Court, Supreme Court of Appeal, and Constitutional Court levels, as demonstrated in Figure 8.2. Though the number of

[310] In a random sample of 349 c-cases – originally coded by the *Congreso Visible* project – only 41 involved social rights (of which about 75% related to social security/pensions).
[311] Social rights cases amounted to 50% of my sample of tutelas reviewed by the Transitional Court (1992), 58% for the First Court (1993-2000), 71% for the Second Court (2001-2008), and 72% for the Third Court (2009-2016).
[312] The Defensoría del Pueblo only distinguished between health, education, and "other" social rights cases until 2010, when social security cases were included.

claims differs from year to year, no other type of claim rivals housing. These trends hold when examining the 60 social rights cases at the SACC level independently.

Figure 8.1. Social Rights Tutelas, 2003-2014

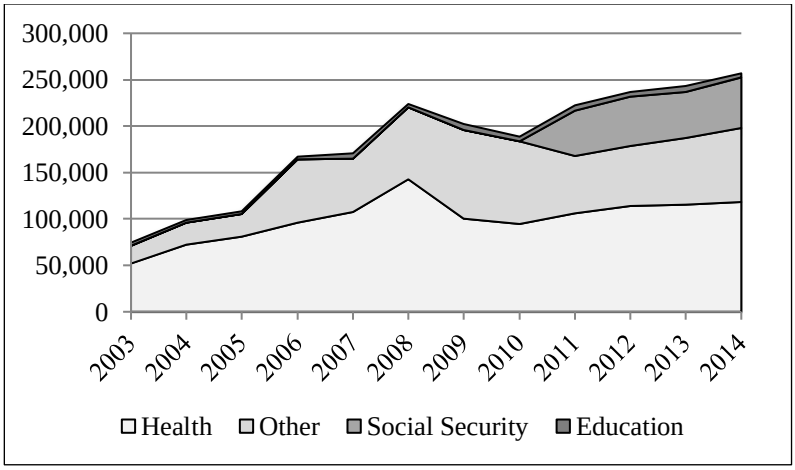
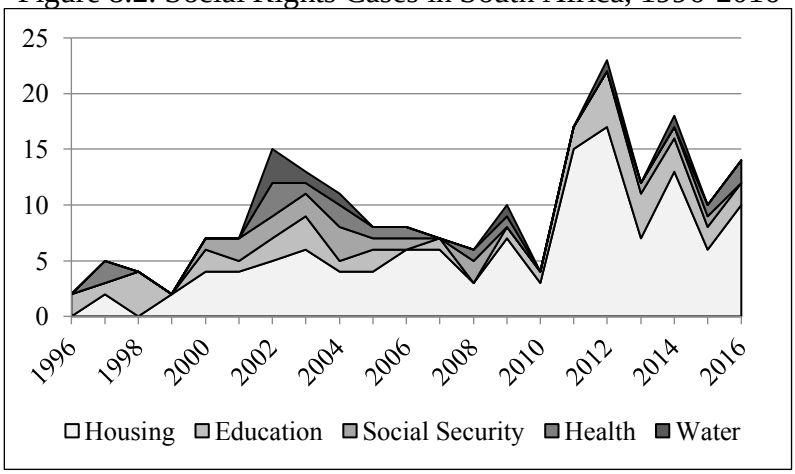


Figure 8.2. Social Rights Cases in South Africa, 1996-2016



There is substantial variation in the form that legal mobilization for social rights takes in each country. In fact, by examining differences in the modal type of claimant, as well as the degree of centralization and mediation of claims-making, we can view the Colombian and South African cases as representing two distinct forms of legal mobilization. In Colombia, the tutela encourages individual claimants to make relatively unmediated, decentralized claims. My sample of tutelas reviewed by the

CCC shows that nearly 85% were individual claims. The tutela procedure does not require that a claimant advance a formal legal argument, merely that he or she suggest that his or her rights had been violated. In theory, the tutela can be presented directly to a judge without any mediation, though in practice, potential claimants may seek advice or assistance from legal clinics or NGOs, government human rights offices such as the *Defensoría del Pueblo* or the *Personería*, or private individuals sometimes referred to as processors ("*tramitadores*").

In South Africa, on the other hand, the applicant named in a social rights claim is generally a collective actor, such as a social movement or NGO, or all residents of a particular parcel of land, or unrelated applicants who all are affected by the same problem. Further, constitutional rights claims tend to be both heavily mediated and heavily centralized, with some combination of NGOs, legal clinics, movement organizations, and/or lawyers offering pro bono legal services being involved. This type of claims-making is encouraged by institutional rules that require the use of two types of lawyers over the course of a lengthy, costly litigation campaign. As such, a traditional support structure (Epp 1998) becomes an almost necessary feature of legal mobilization for social rights in South Africa.

Explaining these Patterns: Manufacturing Opportunity within Constraints

So why does claims-making congregate around the right to health in Colombia and the right to housing in South Africa? The subsequent sections of this chapter take up this question, demonstrating the importance of the social construction of legal grievances and judicial receptivity through public exposure to problems. They also

highlight how the way legal professionals came to understand which rights were judicially enforceable coincided with the way the general population came to understand which of their rights were most claimable in the formal legal sphere.

1. Litigating the Rights to Health and Housing in Colombia

The formal rules regulating the tutela procedure help mitigate the need for a traditional support structure (Wilson 2009). As a result, the form of legal mobilization that has emerged with the tutela is primarily individual in nature, features decentralized claims-making, and is largely unmediated. Even so, as this section will detail through a comparative examination of legal mobilization related to health rights and housing rights, societal actors help to shape legal claims-making. In the case of health claims, actors not usually associated with the legal system, such as insurance and pharmaceutical companies, have helped to cement the understanding that access to healthcare is a fundamentally legal issue among claimants. Through the influx of legal claims related to the right to health, judges were exposed to the extent of the healthcare system's inefficiencies and inequities, and they began to reinterpret the meaning of the right to health, expanding rights protections in the process and encouraging further claims-making through a positive feedback loop. Housing-related claims did not emerge with frequency, and societal actors related to the provision and regulation of housing did not see value in offloading service-provision onto the legal system, while those related to the provision and regulation of health did. In other words, problems with access to healthcare became understood as legal grievances, while problems with access to adequate housing did not.

By examining patterns of tutela claims rather than taking an individual case as the unit of analysis, I reveal two key incentive structures in the realm of health rights claims. On the one hand, individual citizens found practical incentives to file tutela claims, and on the other, insurance and pharmaceutical companies[313] found monetary incentives to encourage the use of the tutela procedure. These incentive structures spurred changes in beliefs about how law could and should be used in the realm of healthcare. Two primary incentives motivated individual citizens. First, the massive yet uneven expansion of the healthcare system generated many potential grievances, as citizens gained access in theory (if not delivery in practice) to more and more services and developed a greater sense of entitlement to those services. Second, individual citizens came to understand the filing of tutelas as what one must do to receive healthcare services, and the relatively low cost of the tutela procedure allowed many citizens to file claims.

The main monetary incentive motivating insurance companies came about because under certain circumstances the state would help to pay for medicines and procedures out of an established fund called the *Fondo de Solidaridad y Garantía*, relieving the insurance company of that duty, after the filing of a tutela. The idea behind this fund was to ensure that individuals would not be inhibited from accessing the medicines or procedures they needed simply because of a gap in coverage, yet the system was particularly susceptible to fraud and manipulation by actors in the health sphere who could deny coverage or access to a medical service that should have been covered and suggest that the patient file a tutela (Hussmann and Rivillas 2014;

[313] By "insurance companies," I mean *empresas promotoras de salud*.

Lamprea 2015).[314] While some insurance companies have better reputations than others on these matters (and some seem to perform better than their reputations would suggest), the general understanding is that the healthcare sphere is characterized by mismanagement, understaffing, fraud, and corruption.[315] It is unclear exactly how frequently this kind of fraudulent activity occurs (though news reports suggest it has not necessarily been uncommon[316]), but it is less important for my account that this behavior was, in fact, pervasive than that it is *viewed as* pervasive and that the behavior of insurance companies was interpreted as encouraging the use of the tutela in the realm of health.

Relatedly, Everaldo Lamprea (2015) has documented the existence of financial ties between pharmaceutical companies and patients' organizations engaged in the filing of tutela claims with the hopes of expanding the scope of covered medications. These kinds of connections can be interpreted as a manipulation of the tutela process, but they also reflect the convergence of interests between patients who need specific medications and companies that would like to increase access to and the purchasing of those same drugs. Regardless of the interpretation here, as with insurance companies, we see a pathway through which pharmaceutical companies encourage the use of the tutela with respect to the right to health.

The Minister of Health from 2012 to 2018, Alejandro Gaviria, summarized the factors that influenced the increased use of the tutela for health rights claims as follows:

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[314] Interviews 160804_0008, 160819_0013.
[315] *El Espectador* (2012a).
[316] See, e.g., *El Espectador* (2012b) and *El Tiempo* (2012).

> People started to see in the tutela a way to expand the benefits plan one by one. For patients very sick with cancer, the basic plan did not include the medication they needed, so they would go before a judge … I believe that this is the first dimension. And the basic plan was never updated [early on]. The tutela was a way to update [the plan] and [get it to] include [the medicines you needed]. I believe that there is a second point that has to do with collective learning. Society and, above all, lawyers learned that this was the way to do things. And then there were agents among the pharmaceutical industry who began to see in the tutela a way to incorporate the latest innovations into the health system and [in the process] capture public resources.[317]

As a result, the tutela and the healthcare system came to be inextricably linked. Further, as noted in Chapter 5, citizens commonly report that "Unfortunately, in Colombia, in order to access health services, you have to file tutelas," and "Everything happens through the tutela." In response to this perception the Constitutional Court ruled that the tutela *cannot* be a required part of the process of obtaining healthcare in 2007 (C-950/07). The fact that the Court felt the need to issue such a declaration indicates the prevalence of the view that the tutela was a necessary part of accessing healthcare. Because of the way the healthcare system became judicialized, problems related to access to health became understood as legal grievances.

The argument is not that in every case these insurance and pharmaceutical companies explicitly call on individuals to file tutela claims (though sometimes that does happen), but that a generalized linkage of healthcare and the tutela has emerged, that the combination of incentives for insurance and pharmaceutical companies and incentives for individuals reinforce the understanding of health as a legal issue. These incentives are particularly influential considering the dominant form of legal mobilization in Colombia – one that is individual, decentralized, and unmediated. The

[317] Interview 161102_0048.

understanding that one must file a legal claim in order to have access to health services would be less likely to prompt litigation in a setting where litigation is costly and time-consuming.

An analysis of housing rights claims demonstrates that the expansion of rights claims present in the realm of health was not inevitable. The official data on tutela claims nationwide does not include disaggregated information on claims to the right to housing. Instead, housing appears in the "other socioeconomic rights" category. That the *Defensoría del Pueblo* does not tabulate housing rights claims is evidence of their relative infrequency. In order to examine housing rights claims more closely, I turn to my random sample of tutela claims scraped from the Constitutional Court's website. This sample indicates that between 1992 and 2016, only 3.4% of all reviewed tutelas claimed the right to housing, of which the Court accepted 60.5% (compared to 25.1% pertaining to the right to health, of which the Court accepted 72.8%).[318] The first of these housing rights tutelas, T-423/92, dealt with "*invasores*," or squatters, who remained on rented property even after their lease had ended. Despite acknowledging the country's significant housing deficit, the three-judge panel rejected the claim, arguing that the right to housing, like all constitutional rights, had to be sought though legal means, that the right to housing was not a fundamental right (and therefore fell outside the competence of the tutela), and that, at any rate, "the termination of a lease cannot be considered as a violation of the right to housing."[319] The Court also rejected

[318] The 60.5% statistic is somewhat misleading, as most of these tutelas were accepted on the basis of a right other than housing.
[319] There was also a similarly decided c-case: C-157/97.

the only other housing rights tutela it reviewed in 1992 (T-598/92), again pointing to the non-fundamental status of the right to housing.

The most well-known legal claims related to the right to housing is a set of cases involving the system of home financing (*Unidad de Poder Adquisitivo Constante* or UPAC). Interviewees, including those currently working at the Constitutional Court, consistently referred to the UPAC cases when asked about the right to housing and often failed to identify any other housing rights cases. Initially, citizens organized, marched, and brought tutela claims in the wake the UPAC crisis (Uprimny 2007). Nevertheless, as Pablo Rueda (2010: 46) notes, these tutelas were not decided in favor of the claimants, with the CCC finding "that an eventual breach of the right to housing was not enough to award protection through [the] mínimo vital" standard.[320] In 1999, the Court decided an abstract review case related to UPAC (C-747/99). The Court declared the UPAC system unconstitutional and held that the central bank, not the market, should determine interest rates. Interestingly, however, two justices noted a hesitance to issue such a decision, stating:

> The reluctance or incompetence of the relevant organs of state – which should not be tolerated by the people, who can appeal at all times to the instruments of democratic participation – cannot be offered as an excuse for the Court to intervene in the determination or elimination of a public policy, outside of its original function of the review of constitutionality.[321]

While the other justices did not share this disinclination, their decisions in tutela claims suggest that they, too, saw the tutela as an inappropriate tool to raise claims related to UPAC specifically and housing more generally. Some commentators have

[320] Following this decision, business groups and government officials criticized the Court for infringing on the functioning of the market.
[321] Justices Eduardo Cifuentes and Vladimiro Naranjo make this argument in their dissent (para. 14).

suggested that these cases had a demobilizing impact on further claims-making related to housing rights.[322] Further, not only did judges indicate that they would not respond favorably to tutela claims related to UPAC, but financial organizations did not promote the filing of these claims (in contrast to pharmaceutical and insurance companies in the realm of health).

Still, it is not immediately clear why other kinds of housing claims did not follow a path similar to that of health claims. According to UN-Habitat (2013: 148-49), in 1990, 31.2% of urban-dwelling Colombians lived in "slum areas," a percentage that dropped to 14.3% by 2009 (compared to a change from 46.2% to 23.0% in South Africa). The key here is not that the percentages have declined, but that there is evidence of a population that *could have made claims* on the basis of housing inadequacy and could have connected those claims about housing to dignity (which incidentally mirrors the types of arguments put forward in South Africa about the right to adequate housing).[323] Whether or not judges would accept these arguments is another story, but it is striking that these kinds of claims have been largely absent in the Colombian context.[324]

Judicial decision-making related to social rights tutelas has changed over time, with judges first rejecting these claims outright, before accepting claims on the basis of the *conexidad* doctrine (where a violation of one right signifies a violation to

[322] Interview 161104_0052
[323] Policy regarding evictions likely plays some role here. As Holland (2017) shows, many local politicians in Bogotá prefer forbearance to enforcement of laws against squatting. Interestingly, Holland's account further demonstrates how housing has not been judicialized in the way health has been in Colombia. While the bureaucrats Holland interviewed expressed concern about the precarious lives of those living in informal housing, they did not speak of the "right to housing" as such.
[324] There is evidence, however, that citizens occasionally filed tutela claims to this effect (c.f. Holland, 2017).

another, fundamental right, because the two rights are connected in the concrete case) or the *mínimo vital* doctrine (where a violation of one right indicates that the absolute minimum conditions necessary for a dignified life are not met), and finally declaring the right to health to be fundamental in itself (and therefore directly claimable with the tutela). The expansion of justiciability did not occur as quickly or as fully with other social rights as it did with health rights, though these early decisions did not explicitly privilege health. While lines of argumentation and interpretation changed, this process appears to be primarily one driven by CCC justices. It is certainly true that societal actors pushed for protections to the right to health, but judges appeared to rely instead on general lines of argument about the status of non-fundamental rights, rather than on specific arguments related to health developed by civil society and disseminated to judges through workshops, amicus briefs, and legal commentary. These changing standards that judges looked to in adjudicating social rights claims reflect socio-legal values, specifically interpretations of the meaning of justice, dignity, and a dignified life in the Colombian context.

Eduardo Cifuentes, a justice in the Constitutional Court from its inception to 2000, notes that one of the two major challenges facing "the Court was for rights to mean more power for the weak … and for that reason, the extension of borders of economic, social and cultural and fundamental rights was guided by the Court directly."[325] Further, as Rodolfo Arango, an auxiliary justice during the first years of the Court, recalls, it was the Court itself that played a pedagogical role, disseminating information to potential claimants:

[325] Interview 160726_0006.

> From the beginning of the Court, we had a very, very aggressive strategy of delivering the decisions and explaining them very pedagogically, directly to the media … every week on the front page of the newspaper [you read] a surprising decision, one that protected someone's rights. We did that intentionally. Journalists were always visiting the Court, visiting our offices, asking what decisions would come out that week that they could write about in the newspaper.[326]

The idea here was to promote a closer connection between everyday citizens and the courts, not necessarily to encourage specific rights claims. Thus, it is not immediately clear, if these general arguments about the importance of social rights motivated Constitutional Court judges and if judges reached out to the public generally rather than by inviting specific kinds of cases, why there are such stark differences in legal mobilization around the rights to health and housing.

The exposure mechanism helps to explain the differential expansion of rights protections. One auxiliary justice put it this way, "It's a bit like the citizens were knocking on the door to see what the judges were saying. We were very receptive and we opened the door completely … They knocked on the door with many cases of many issues and we as judges opened it [to health claims]." When pressed as to why the Court would have "opened the door" to health claims more readily than other social rights claims, she referred to the state of crisis of the healthcare system, to the "painfulness" of the situation, and the fact that "we suffer physical pain equally, we suffer the pain of seeing a sick relative equally, and we are also equally victims of the health system."[327] Another auxiliary justice summarized that the "tutela for social rights [emerged] out of pure necessity of the people, and [they] found that the

[326] Interview 160825_0016.
[327] Interview 160826_0017.

Constitutional Court was receptive to the needs of the people."[328] As judges continued to be exposed to health claims, they became more comfortable with them and even identified with claimants, and they became more aware of the extent of the problems with the healthcare system, and more convinced that these types of claims could or should be resolved by the Court.

Judges became convinced that these types of claims could or should be resolved by the Court not simply because of the continued filing of health claims (though my sample of tutelas reviewed by the CCC shows that between 1992 and 2016, nearly 25% involved health claims), but also because the issue of access to healthcare comported with judges' understanding of contemporary Colombia socio-legal values. In other words, judges viewed access to healthcare as central to a dignified life (as evidenced by their willingness to accept health rights tutela claims with the *mínimo vital* and *conexidad* standards). While my interviewees referred to objective factors, such as having sick relatives, the process of recognizing problems and identifying with claimants is contingent and subjective; these judges just as easily could have referenced not health-related issues, but housing-related issues as what tied Colombians together, for example, holding instead that "at a minimum, we all need a roof over our heads." However, they not did share this interpretation of housing and relatively few housing rights claims came before the Court (only 3.4% of reviewed tutelas involved housing rights claims). Thus, judges were less receptive to housing claims than they were to health claims.

2. Litigating the Rights to Housing and Health in South Africa

[328] Interview 160804_0008.

Turning now to South Africa, the dominant form of legal mobilization features collective claimants who advance centralized, formalized, and heavily mediated claims. This form of legal mobilization results from the institutional rules governing how one can advance a claim in the South African legal system (i.e., by conforming to technical standards of legal argumentation), and this form renders proactive legal mobilization in the absence of a support structure highly unlikely. The basic support structure for social rights claims in South Africa can be divided in two: on the one hand, an organization or movement specific to the issue at hand (e.g., Treatment Action Campaign for HIV-related issues or Abahlali baseMjondolo for evictions and shack-dwellers' rights), and on the other, the emergent post-apartheid human rights legal elite and the NGOs they created. A problem may begin with an individual, but by the time that individual engages the legal system, several other applicants (including organizations) will have been joined to the complaint, and two sets of legal professionals (attorneys and advocates) will have become involved in the expression of the legal claim. This is true regardless of the issue area, though legal mobilization related to the right to housing has far surpassed mobilization related to the right to health.

Of the 15 health rights cases I identified across the High, Supreme, and Constitutional Court levels since 1996, seven focused on claims related to HIV/AIDS, three of which related to access to anti-retroviral medication while in prison. The other cases are difficult to group and dealt with issues ranging from access to dialysis to the legal regime governing surrogacy to the constitutionality of the National Health Act. The two earliest health cases emerged in 1997. One, *Van Biljon and others v Minister*

of Correctional Services and others (1997), ended at the Cape High Court with a court order protecting the constitutional right of prisoners living with HIV to receive "adequate medical treatment," including prescribed ARVs at state expense.

The other, *Soobramoney v Minister of Health (KwaZulu-Natal)* (1997), became the first social rights case heard by the Constitutional Court. The applicant, Mr. Soobramoney, sought to claim an individual right to access healthcare services in light of his renal failure he and his inability to obtain dialysis from private medical facilities due to the cost. Of course, rights claims are not made unopposed. In this case, the state pointed to its limited resources in the health sphere as a reason why the Court should not second-guess its health policy and why it should reject Mr. Soobramoney's claim. Ultimately, the Court accepted the state's argument and clarified that individual claims to the right to health would not supersede broader health policy. In concrete terms, this meant that the Court refused to direct a state-run medical facility to provide Mr. Soobramoney with dialysis treatments, considering the resource limitations faced by the state and the nature of Mr. Soobramoney's illness. The decision was both highly public and highly contentious. In fact, one former clerk who worked at the Court at the time of the decision recalled, "You know, it was emotionally charged. Clerks got phone calls to say 'you killed Soobramoney' … One of my good friends got sort of repeated phone calls from somebody. And, you know that they read the judgment and I think he died two hours later."[329] This decision indicated that one cannot claim the right to health in cases like these, and when combined with the already difficult

[329] Interview 170801_0121. Mr. Soobramoney actually died two days later, but the idea stands.

process of bringing claims before the Court, it made claims-making related to the individual right to health even less likely.

The next health rights case, *Treatment Action Campaign* (2002), to come before the SACC found much more success. Much has been written about this case, but, in short, the Court found that the state had acted unreasonably in limiting the distribution of a drug shown to inhibit mother-to-child transmission of HIV. The decision required that the state roll out a full program to distribute the drug, rather than simply pilot the program at a few medical facilities.

Although the courts in South Africa were willing, at least at times, to accept claims to the right to health, health did not become judicialized in the way it did in Colombia. Notably, relatively few health claims have been advanced, especially outside the realm of HIV/AIDs, despite a flagging public healthcare system, which has been characterized as being "in a state of crisis, with much of the public health care infrastructure run down and dysfunctional as a result of underfunding, mismanagement, and neglect" (Mayosi and Benatar 2014: 1346). One might think that the taboo status of HIV/AIDS might have inhibited claims-making in South Africa, at least early on in the 1990s. However, even if HIV/AIDS contestation was initially less likely because the issue is associated with taboo subjects (Gauri and Lieberman 2006), that does not explain the dearth of overall health claims. What we see, in fact, is that HIV/AIDS claims surpass other kinds of health claims, such as those related to access to medications or procedures, which have been quite common in the Colombian context. Further, we might have expected, given the South African government's reticence to develop policy to confront the AIDS epidemic, to see even greater levels

of legal claims-making. While there are seven health rights cases pertaining to HIV/AIDS (and only eight other health rights cases), neither HIV/AIDS specifically nor health more generally became judicialized in the way that housing did.

The Constitutional Court has been receptive to housing rights claims, particularly those claims related to evictions, beginning with the first housing rights case to come before it, *Grootboom* (2000). In *Grootboom*, the Court found the state's housing policy to be unreasonable, and therefore unconstitutional, as it neglected to provide for those "in desperate need." The Court handed down this decision over the objections of the state that it had limited funds to address the housing crisis and that the Court should not second-guess its housing policy decisions – the same objections that the Court had been receptive to in the *Soobramoney* case, which it had heard just a few years earlier. The *Grootboom* decision set off a chain of cases related to the right to housing in the context of evictions. One former clerk described the development of the right to housing as follows:

> Under apartheid, it was illegal to be a squatter, and you could be kicked out and you could be thrown in jail … [Now] you [can] evict someone, but only with a court order, and only if it's equitable … Built into the right is if eviction is going to lead to homelessness, the state must provide you with temporary alternative accommodation. And over the past 20 years, that has been expanded. It's not just if you're flood victim the state must provide this accommodation, it's also if the state evicts you. Then the next step is when the state evicts you from private land. Then the next step, if a private owner evicts you, also you have this right. And now we're getting to the content of what that alternative accommodation looks like … So we're seeing – and what's so lovely and unexpected – is the Court has started writing case law on this, kind of like a handbook for litigators … The jurisprudence has developed to such a level that the courts are now writing, "Judges, when they decide this issue, have to do X, Y, Z."[330]

[330] Interview 170828_0142.

Thus, there has been a steady expansion of the understanding of the scope of the right to housing, built step-by-step, from emergency or crisis protections to everyday protections. One lawyer explained, "in housing, the area where there's been the greatest success is that evictions have been made very much more difficult through the Constitution and through very skilled and energetic lawyers who had pushed the boundaries of the Constitution beyond what anyone imagined at the time it was written."[331] Social movements organized by shack-dwellers, such as Abahlali baseMjondolo, have adopted rights-based language in contesting evictions, and even have posters that detail the steps necessary for evictions to proceed lawfully posted in their offices. As such, the issue of housing – or at least evictions – appears to have been thoroughly judicialized in the South African context, with housing understood through the lens of law (unlike in Colombia). In fact, most respondents seemed to take it almost as natural that there would be so many housing rights cases, stating, for instance, "I think that the starting point, that people need a home, need a roof over their heads, is a really significant one."[332] That one needs a home is true everywhere, but legal mobilization for the right to housing does not occur everywhere there are housing gaps.

But why were judges so receptive to these legal claims about evictions, in contrast to other social rights claims, even though the legacy of apartheid-era social exclusion transcended the issue of housing? James Fowkes (2016: 2), a former clerk at the Constitutional Court, notes, "Somehow, the Court is seen as being on both sides of

[331] Interview 2018.03.27_15.08_01.
[332] Interview 170725_0120.

[a] dichotomy, with the very same judges apparently contextual, progressive guardians of social justice at one moment and closed-minded, heartless formalists the next." He attributes these oppositional assessments to the early Constitutional Court's preference for a "constitution-building" approach, which views the executive as a partner in rights-protection rather than as an adversary, and which encourages deference to the other branches of government where possible. Interviews with former Constitutional Court judges and other former clerks affirm this understanding of the Court.[333] The Court was not necessarily inclined in general to take interventionist decisions, or to demand that the state handle the housing question in any specific way, though one lawyer concluded that "one of the reasons the *Grootboom* case had the outcome [it did] was that some of the judges were so relieved to see a socio-economic rights case which they could support … [When we were arguing the case,] we kept on saying, 'Of course this is not *Soobramoney*. Oh no, it's not *Soobramoney*.'"[334] Again, though, the question of why judges would have understood the *Grootboom* case as "supportable" in contrast to the *Soobramoney* case remains. Both cases entailed positive obligations on the state – whether providing access to dialysis machines or temporary alternative accommodation.

As was the case with health rights in Colombia, non-state actors pushed for protections, and they were more intimately involved in these litigation efforts than were their Colombian counterparts, but we do not necessarily see South African judges taking up the arguments preferred by civil society activists. In the *Grootboom*

[333] Interviews 170801_0121, 170811_0128, 170814_0130, 171003_0170.
[334] Interview 2018.03.27_15.08_01.

case, one lawyer remembers, "The judges got really agitated about [the] 'who first' [question] and said, 'Well, how can we just reward people because they've got clever lawyers?'"[335] While the Court did end up deciding in favor of Ms. Grootboom, it continued to show skepticism regarding the expansive social rights protections called for by lawyers and NGOs. This skepticism comes through most clearly in the repeated rejection of the minimum core approach to social rights.[336] Lawyers repeatedly advanced arguments in favor of a minimum core in oral arguments and in amicus briefs, but the Constitutional Court judges remained steadfastly opposed to applying such an approach.[337]

As James Fowkes (2016: 132) holds, "New legal protections can become settled and entrenched, and their judicial enforcement can become easier and more routine, but this is not inevitable." The Court's willingness to decide in favor of Ms. Grootboom did not imply that it would necessarily continue to expand housing rights protections. The Court hypothetically could have decided in subsequent cases that the right to housing would only imply justiciable positive obligations in the context of emergencies or could have limited the applicability of housing in some other way. After the fact, judicial decisions may seem as if they were inevitable, but this perception is not an accurate one.

One way in which legal protections become entrenched is through the continued exposure of judges to particular kinds of legal claims and the problems they

[335] Interview 2018.03.27_15.08_01.
[336] "Minimum core" refers to the idea in international law that there is minimum level of provision of socio-economic rights that governments must provide, regardless of available resources.
[337] Interviews 170814_0130, 170829_0144, 170904_0152, 170908_0156, 171005_0172.

implicate, especially when judges interpret these claims as consonant with contemporary socio-legal values. Again, the exposure mechanism refers to the process by which continued experience with claims related to a specific grievance cumulatively inform judges about an issue, causing them to become comfortable with the issue and/or to identify with claimants. The process results in an increased receptivity of judges to claims pertaining to that issue area. We see this clearly in the realm of housing in South Africa, where judges clearly connected the specific issue of access to housing with the general value of human dignity. One former clerk noted:

> Housing cases are numerous at this point in the jurisprudence, in the High Court and the [Constitutional] Court, and I think that maybe it's just getting judges and courts comfortable in that terrain so that the more of a particular kind of case they see, the more comfortable they become with the numbers and statistics and so on … Especially in the [Johannesburg] courts they've seen it again and again and again so they're becoming more comfortable. I don't know … [but] that's something that I suspect.[338]

This view is consistent with hands-on interventions undertaken by the Court in housing cases such as *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009), which specified "the exact time and manner and conditions" of the eviction, including precise directives about the alternative accommodation to be provided to those subject to eviction.[339] The existence of a robust support structure around housing issues and the fact that eviction orders must be granted by judges meant that judges would continue to be exposed to housing rights cases. Another former clerk pointed to this support structure and the history of land

[338] Interview 2018.03.01_10.24_01.
[339] Interview 2018.02.23_12.39_01.

and housing issues in South Africa as being particularly influential on judicial receptivity of these kinds of claims:

> There's a long history of land and housing litigation as kind of an anti-apartheid move … A lot of the liberal and progressive judges who went on to High Courts and the Supreme Court of Appeal and the Constitutional Court identified with these cases as sort of, as sites of progressive fighting. I think [that] is one reason. There's been incredibly organized and coordinated litigation and planning around housing rights specifically … There's this kind of feedback happening between an issue that is obviously quite dire on the ground … [and] good organization among clients, lawyers, and receptiveness on the part of judges.[340]

Yet another former clerk noted that the problem of inadequate housing was visible in such a way that judges were exposed to it, that "even judges can see them for themselves."[341] The notion that judges can see and identify with the problem of housing echoes the idea that in Colombia judges could imagine themselves as claimants in a health rights case. Importantly, both are subjective interpretations described as if they were instead objective facts.

Still, exposure is not enough on its own to precipitate judicial receptivity. Judges must also have the sense that the kind of rights violation in question is incompatible with contemporary socio-legal values – in this case, the value of human dignity appears crucial. In early health rights cases, including *Soobramoney* and *Treatment Action Campaign*, South African judges suggested that while human dignity remained central to the post-apartheid South African legal order, the link between a difficulty with access to healthcare might not be an infringement on dignity

[340] Interview 170803_0122.
[341] Interview 170817_0135.

(in *Soobramoney*) or simply did not consider dignity as a fundamental part of the legal analysis (in *Treatment Action Campaign*).

In contrast, in early housing rights decisions, human dignity featured prominently. For example, in *Grootboom*, Justice Zak Yacoob wrote, "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream." Here, dignity and access to adequate housing are understood as necessarily connected, and this understanding combined with exposure spurred judicial receptivity to housing claims. This receptivity involved not only hearing housing rights cases, but also issuing interventionist decisions, rather than leaving the issue to be resolved by the executive or legislature (even if those same judges otherwise embrace a philosophy of judicial deference). These decisions, particularly as they detailed what one lawyer quoted above described as "a handbook for litigators," served as cues for potential claimants and incentivized further legal claims-making related to the right to housing, forming a positive feedback loop. This constellation of factors – judicial receptivity, societal support, and the judicialized understanding of housing – has not yet emerged with respect to other social rights issues.

Interestingly, the ways Colombian lawyers talk about the right to health and the ways South African lawyers talk about the right to housing are remarkably similar. As one lawyer and former clerk in Colombia put it, "among the socioeconomic rights, the only one that is actually enforceable in a way that you can actually identify the right with a treatment, a drug, something tangible, is the right to health. The only

one."[342] Now consider a South African lawyer and former clerk's view: "I think housing just created a particularly unique gap because it's such a negative effect. It's leave that person alone, [that] was the starting point, not give them healthcare, not give them special healthcare, not feed them, not educate them, just simply leave them where they are. You know, that's the difference."[343] Both of these assessments make complete sense in their national contexts, but what seems inevitable, commonsense, or natural in one country loses that quality when placed in comparative perspective. The social right that is understood to be most enforceable, or most appropriate for judges to enforce, in South Africa is housing, while in Colombia, it is health. These understandings held by legal professionals coincide with the understandings of the general population about which of their rights are most claimable.

Conclusion

I have examined differential legal mobilization for social rights in Colombia and South Africa, advancing two arguments about how societal actors influence legal mobilization in ways unacknowledged or underspecified in existing accounts. First, I argue that societal actors not only support claimants in their efforts to seek redress by providing financial and technical resources, but they also actively participate in the social construction of grievances. Societal actors help to construct broad understandings of existing problems as both objectionable and claimable in the legal sphere. In other words, they encourage citizens to view specific realities through the lens of the law. Second, I identify a new mechanism through which societal actors

[342] Interview 160818_0012.
[343] Interview 170814_0130.

influence judicial receptivity to particular claims: public exposure to problems, which refers to how the persistence or increase of particular kinds of claims inform judges about an issue, encouraging them to become (more) comfortable with the scope of the problem and/or to identify with claimants. Over time, this continued exposure to claims triggers a consideration or reconsideration of the correct legal response to the underlying issue, particularly when judges view the issue as comporting with contemporary socio-legal values – in the cases analyzed here, when they interpret the issue as central to a dignified life. Together, these processes result in a positive feedback loop, with sustained legal claims-making prompting judicial receptivity, and judicial receptivity (and subsequent pedagogical interventions by judges) inspiring additional claims-making.

The cross-national, cross-sector comparisons explored here help to establish how different kinds of societal actors may play similar roles in influencing legal mobilization across contexts. In Colombia, health came to be understood through a legal lens as incentives of potential claimants combined with incentives of actors involved in the provision of healthcare services encourage the use of the tutela. Judges – influenced by exposure to these health rights claims – became more receptive to those claims, further incentivizing the continued use of the tutela in the realm of health. Housing rights claims did not follow a similar path. In contrast, housing rights claims have been most common in South Africa. Societal actors helped to construct a widespread understanding that housing was a legal issue, instead of simply a personal or social one. Further, the exposure of judges to the problem of housing, through both continued legal claims and personal experience, encouraged judges to be more

receptive to claims to the right to housing relative to other social rights claims. The argument here is not that judges in South Africa are unaware of deep problems in the healthcare sector, or that judges in Colombia are unaware of housing issues, but that this awareness sits at an academic level and is less influential for decision-making, while housing in South Africa takes on a more visceral quality and is understood as inexorably connected to human dignity. The same applies to health in Colombia, because of the way judges have been exposed to these issues.

Again, the material existence of a problem does not imply that it will necessarily be recognized as a grievance. Further, the recognition of a grievance does not indicate by itself how or where or by whom that grievance will be expressed. There is no one-to-one-to-one translation of problems into grievances into claims. Hypothetically, health rights claims could have become most common in South Africa and housing rights claims in Colombia, or both types of claims could have emerged as equally common in both countries. Patterns of legal claims-making express not only underlying material conditions, but also the social construction of legal grievances. The beliefs that actors have about the problems in their lives, specifically about which problems are *legally* grievable or claimable, have social roots. Likewise, judicial decision-making emerges not from wholly abstract reasoning, but is influenced by social context, including through public exposure to problems and a re-interpretation of what constitutes the real world.

A holistic examination of legal mobilization reveals the recursive, interconnected nature of grievances, legal opportunity, and judicial behavior. Attention to this interplay is key for understanding the contestation about and

expansion of access to social goods throughout much of the world. The consequences of this kind of expansion of access to social welfare goods are largely unknown. Ultimately, constitutional rights offer equal access to all citizens on paper, yet real access is determined by the ability of citizens to make claims to these goods, either as individuals or as part of a group. In other words, legal recognitions offer an indirect route to social incorporation and to social policy change, one that might reify rather than offer redress for preexisting disadvantage. Chapter 9 follows with a discussion of the implications of this study of legal mobilization for social rights.

CHAPTER 9

CONCLUSION

The title of this dissertation comes from a poem by Stephen Crane (1899) that evocatively captures one of the challenges of rights-based activism. The poem reads:

> A man said to the universe:
> "Sir, I exist!"
> "However," replied the universe,
> "The fact has not created in me
> A sense of obligation."

Making a claim – as difficult as that can often be – is nowhere near enough. As Jeremy Bentham (1843) cautioned in his critique of natural rights, hunger is not bread. Existing does not necessarily impel recognition. Yet, this seemingly impossible situation has been met time and again with obstinate contestation, with people who refuse to accept this lack of recognition, with people who imagine better futures and work toward those futures tirelessly.

In this study, I explored efforts to ensure that rights are not simply parchment promises, in other words, efforts to create a sense of obligation regarding the social needs of citizens in the Colombia and South Africa. Chapters 3 and 4 described the historical processes that led to the adoption of social constitutionalist commitments in the early- to mid-1990s. Chapters 5 and 6 then turned to mobilization "from below," or decisions made by citizens about when and how to advance legal claims, and Chapters 7 and 8 followed with a discussion of mobilization "from above," or decisions made by judges about how to interpret their role and respond to these claims.

Together, these empirical chapters comprise my constructivist account of legal mobilization. This chapter concludes the dissertation by offering a discussion of the consequences of legal mobilization for social rights and the broader lessons that can be taken from this study of the experiments with social constitutionalism and legal mobilization in Colombia and South Africa.

Evaluating Legal Mobilization for Social Rights

Although this project focused on the emergence and character of legal mobilization for social rights in Colombia and South Africa rather than its consequences, the subsequent sections attempt to draw some initial conclusions about the various impacts of the turn to law in these two countries. César Rodríguez-Garavito (2011: 1679) advocates for the assessment of the effects of judicial decisions along two axes: direct/indirect and material/symbolic. I take his typology as a starting point, but expand it to consider not only judicial decisions but the broader process of legal mobilization, which includes both legal claims-making and judicial decision-making. Material consequences of legal mobilization for social rights include whether or not individual claimants have personal access to social goods, as well as whether or not social policy changes directly as a consequence of a legal order or indirectly as the court shapes legislative debate and public opinion. Symbolic consequences of legal mobilization for social rights include shifts in understandings of what kinds of grievances are legal in nature, of the judicial role, and the extent to which law

constrains powerful actors.[344] I begin with a discussion of material and symbolic impacts on claimants I then turn to the effects of legal mobilization on the state, specifically considering both the relationship between legal mobilization and public policy and the challenges and opportunities that legal mobilization presents for state actors.

1. The Consequences of Legal Mobilization for Individual Claimants

Scholars have long-noted how law can enable and constrain those who wish to contest existing power relations at the same time. As E.P. Thompson (1975: 264) explains in his study of the Black Act:

> On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced, the law became a superb instrument by which these rulers were able to impose new definitions of property to their even greater advantage, as in the extinction by law of indefinite agrarian use-rights and in the furtherance of enclosure. On the other hand, the law mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers.

Thus, while elite control of the drafting of legal rights and regulations and over the operation of legal institutions may result in the perversion of the supposedly even-handed law, this codification, this formalization, and this claim to fairness and justice at times can empower non-elites and constrain those in power. On the other hand, "rights talk" may offer new opportunities to claimants or to movements in their myriad quests to improve the conditions of their lives, but, at the same time, the very invocation of rights may legitimate an illegitimate state or further embed a hegemonic

[344] See also Rosenberg (1991, 1996), McCann (1994, 1996), Hall (2010), Grossman and Swedlow (2015), and Keck and Strother (2016) on various ways to evaluate the impacts of judicial decisions or the turn to law more broadly.

discourse, reifying existing power relations (e.g., Glendon 1991; Nonet and Selznick 2001; Silbey 2005).

These questions about elite machinations and counter-hegemonic possibilities can overshadow fundamental questions about lived experience. All too often discussions of law and social change (or politics writ large) are divorced from the ways in which people experience opportunities, constraints, advances, and setbacks. Yet, as Robert Cover (1986: 1601) rightly proclaimed, "legal interpretation takes place in a field of pain and death." Far from simply being parchment promises, social rights recognitions bring into relief Cover's notion – legal interpretation regarding the scope, meaning, and content of social rights has had life and death consequences for Colombian and South African citizens.

For example, the *Treatment Action Campaign* decision gave thousands upon thousands of South African babies the opportunity to begin their lives without having contracted HIV during birth. In the words Gilbert Marcus, one of the lawyers involved in the case, "Now, let me tell you that was an agonizing decision, because every day that went by, babies were dying. It's as blunt and as ugly as that."[345] Prior to the judgment, President Mbeki and members of his administration had publically indicated suspicion regarding the connection between HIV and AIDS and had proven hesitant to roll out measures to combat the spread of HIV/AIDS. Yet, following the *Treatment Action Campaign* decision (and continued mobilization by the Campaign), cases of mother-to-child transmission dropped from 70,000 per year to less than 8,000

[345] Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council (2015: 108).

per year by 2013 (Motsoaledi 2014: 10). On the other hand, while the decision in the *Soobramoney* case did not cause Mr. Soobramoney's death, neither did the decision mandate access to the medical services Mr. Soobramoney direly needed. Here, I am not contesting the soundness of the legal reasoning underlying these decisions; instead, I mean to highlight the serious consequences of legal mobilization, something that is easily overlooked in the study of the politics of law and courts.[346]

In addition to impacting who lives and who dies, legal mobilization also influences how citizens are able to live. For example, despite what Varun Gauri and Jeffrey Staton (2013) describe as "alarming low" rates of compliance with tutela orders, thousands upon thousands of Colombians have been able to access medicines following the filing of tutela claims that they otherwise would not have. As another example, shack dwellers in KwaZulu-Natal were able to retain their homes as the Constitutional Court struck down the "Slums Act,"[347] the implementation of which would have rendered them homeless, and, in all likelihood would have also resulted in the wholesale destruction of their possessions. Although these consequences may be far from the ideal, they do indicate concrete impacts on lived experience.

The impacts of legal mobilization for social rights on how citizens live also take on a symbolic character. Symbolic changes include an impact on how individual claimants, potential claimants, and the broader public understand an issue, specifically whether or not it is a legal or a rights issue. As the empirical chapters of this

[346] The critique here is also not that the justices involved in these cases did not attend to these life and death considerations – no one could read either decision and walk away with that conclusion.
[347] *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* (2009).

dissertation have demonstrated, recurring legal mobilization for particular social rights can result in the development of the understanding that certain issues are legally grievable, especially when judges decide these cases positively. In other words, over time, legal mobilization can encourage the translation of everyday difficulties into legal grievances and state obligations. This translation of issues into explicitly legal problems can occur among actors not affiliated with the legal system as well. For instance, Rodríguez-Garavito (2011: 1681) conducted an analysis of news coverage in Colombia, and found that before a major Constitutional Court decision regarding the right to health, about 60% of articles framed the problems in the healthcare sphere as related to "institutional crisis," whereas after the court case, 72% of articles instead referred these problems as "in terms of the right to health." These changing frames reflect underlying changes in how actors understand rights, the law, and the state.

Additionally, legal mobilization for social rights can influence how judges view claimants, as well as how the parties in a dispute interact with one another. In an interview, a South African lawyer with years of experience litigating housing rights cases described a shift in the way that judges engaged with her clients over the course of her career:

> When we started, the way in which courts inferably referred to our clients was "building hijackers," "criminals," "the lowest of the low." Through putting the personal circumstances of occupiers before the courts, time after time after time, that narrative has changed. Courts, now when you get up and you talk about unlawful occupiers in the city of Johannesburg, don't see "building hijackers," "criminals," you know. [Instead] they see poor people who have nowhere else to live, and if they do not live [in the occupied buildings] they will not be able to work. So that narrative has changed, and I think that's probably one of our biggest victories.[348]

[348] Interview 170828_0142.

As Chapter 7 shows, these rhetorical changes may also reflect changes in the way that judges analyze and decide cases, which may then have concrete material effects on litigants as well. Another example from South Africa demonstrates the symbolic impact that legal mobilization for social rights can have on the two parties to a dispute. As detailed in Chapter 7, the idea behind meaningful engagement was to give

> … voice, direct voice, to the poor. The poor are not just an anonymous mass out there to be protected by the judiciary. The poor become participants in deciding on their own fate … They become people with names, with the history, with biographies, with particular interests … At the same time, it compels the authorities to humanize the processes… to take account of the impact of the measures on the poor. And it's the process, I think, [that] has been very educative for many bureaucrats, and it humanizes what otherwise could be a very cold abstract form of judicial intervention.[349]

In other words, by requiring that the two parties interact with each other outside of the courtroom before a case proceeds, the goal was to encourage the recognition of the mutual humanity underlying these legal disputes. Relatedly, in describing Abahlali baseMjondolo's legal victory against the Slums Act, one member of Abahlali said, "For us it was a great victory for us and we were very happy and we [still] are – because we were clear that it is the place that we know that we can be respected and we can be recognized." He continued, saying that the legal victory made it clear that, at least at the Constitutional Court, no one was above the law.[350] Thus, the symbolic effects of legal mobilization for social rights complement the material consequences.

Additionally, it is important to remember that oftentimes those who live through a rights violation have different expectations about legal mobilization than scholars and litigators. One South African lawyer at a prominent NGO described

[349] Interview 171003_0170.
[350] Interview 2017.11.29.10.02_01.

several particularly illuminating instances in which her expectations and understandings of social rights cases diverged from that of her clients:[351]

> Sometimes we lose cases or sometimes we don't win the way we wanted to and it's still successful. We've recently represented a community in the Western Cape who were working 21 hours a day for 400 Rand a week … Then what happened is they joined a union, and everybody who joined the union got dismissed, of course. So we represented them, and what we wanted was two years' salary, which was the maximum the legislation allowed for … Everything went wrong everywhere. Eventually, we get to court, and the employer that dismissed people was in the witness box. Third question, he asked for a postponement, and we were approached with a settlement offer. The settlement offer was a year's salary.
>
> The clients said … "half of the money now is worth much more than all of it later." So we settled. And I can tell you, the whole legal team, we'd been carrying this case in our hearts. You know? What a loss! Like, of course, I must do what the client says. There's no – this only works, this only has value if we do what they say but it didn't sit well in my heart.

Later on, the community called up this lawyer and asked to meet again.

> They said, "Can you come and help us? There are these cases we want to do also." … And the community said to me [the original case] was incredibly successful because they did this and they did that. They're mentioning all of the things they did with the money. They said the biggest thing is the idea that the employer has to go stand on the witness box and explain why he's dismissed people … The fact that we got this order against this employer spread like wildfire. Union membership went up exponentially. Litigation against employers sky rocketed. People who were before willing to accept certain types of treatment, there's been an increase in the amount of eviction cases being opposed [since then], because the tenure rights is often linked to the job rights. So aside from the money, there was a new sense that people can be held to account in the litigation setting.

What this legal team viewed as a loss, the community viewed as a win, and there were rippling effects of the legal process that impacted broader social and economic relations within the community. The lawyer described another case to me, this time one with a favorable outcome:

[351] Interview 170828_0142.

> There's this other community … They live in an area where, again, [there has been] no upgrading [to the informal settlement]. Nothing's happened. They've been told since '94 they will be upgraded. They've never been upgraded. And we go to court and we argue for the upgrading of the informal settlement. It's never been done. You've never been able to go to court – I mean, you've been here, you know how many people live in informal settlements – to be able to tell government through the court, "You must give people water, electricity, and roads." Unheard of! I mean, when the people came to us, they told us – you know, everybody had told them, "You can't argue this case." And we won the case. Look, to say we were happy! We were celebrating!
>
> So the community invited us to come and tell them about [how] the case [had gone]. But we were number three of five things they discussed that day in the community. We weren't even number one. They were like, "We have managed to get a social, a mobile clinic that comes in once a week. We've spoken to the mayor about this. We've also won this case. We created the following educational spaces, and we've created a program to keep kids off the street through basketball."

Here, we see that while legal decisions have serious consequences, much of the time, court cases are not the only important thing going on in peoples' lives. Often, people mobilize in more than one way at a time, and they use forums and languages deliberately (Lovell 2012). Further, as demonstrated in Chapters 5 and 6 of this dissertation, the turn to law does not necessarily reflect buy-in about the legitimacy or utility of law.

Now, I want to return to the individuals whose stories I shared in the introduction to this dissertation. In the case of Doña Beatriz, although the judge found that her right to health had been violated, his decision offered her access to creams and other products, not the night nurse she had requested. She concluded that she had to learn how to improvise to deal with her health problem. Even so, she told me that if presented with another problem in the future, she would file another tutela claim.[352]

[352] Aguablanca interview 6.

Sifiso and Patrick similarly indicated ambivalence about the turn to law.[353] As Patrick put it, "I was still young in 1994, but … our parents and our grandparents, they fought for us. They fought for us for freedom, but … still we got no work. You are forced to live in the shack. When you start to speak out, you are a threat. You must be killed." While legal claims-making may result in important victories, it does not necessarily resolve all the problems that Abahlali members face, and, in fact, it may create new problems, such as the risk of violent retribution from actors opposed to the movement. Sifiso noted that Abahlali has always considered legal claims-making as a form of mobilization that should come only after other avenues have been exhausted, because "by just waking up in the morning taking the issue to court, you take away the power of the people. You're taking away the ideas and the thinking of the people. Let them get involved first in whatever way." The case of Irene Grootboom sheds additional light on the tensions that are part of legal-claims-making. Although she won her legal case, and although that case set an important precedent, and although that case is talked about in human rights law courses the world over, she died eight years after the ruling, still living in a shack. Thus, there are myriad symbolic and material consequences for claimants who make the choice to engage in legal mobilization.

2. The Consequences of Legal Mobilization for the State

The impact of legal mobilization on the state takes on multiple forms. For one, legal mobilization for social rights has had significant impact on public policy – or public policy-making – in both of the countries examined in this project. These impacts on policy can be understood in terms of direct or indirect materials

[353] Interview 2017.11.29.10.02_01.

consequences in Rodríguez-Garavito's terms. Additionally, however, legal mobilization impacts the state through the workload it creates for judges and its effect on the way judges understand their role as state officials. These impacts are both material and symbolic in nature. Finally, the act of legal mobilization for social rights signals a shift in state-society relations. This shift is yet another consequence of legal mobilization for the state.

Looking first to Colombia, in a study of the impact of the judicial protection of the right to health, Rodrigo Uprimny and Juanita Durán (2014: 39) find that tutela claims regarding the right to health is "inefficient and inequitable, because it distracts public resources that could satisfy other priorities." Further, they show that those who have benefitted most from health rights litigation have been members of middle and upper classes. Uprimny and Durán refer to a study by Emmanuel Nieto and Alejandro Arango (2011) of healthcare litigation in Medellín, which found that for every $100 in services denied by the healthcare provider, "the Medellín judicial system spent around $48 on [the] legal process." More than half the time, the cost of the legal process exceeded the that of the healthcare service in question. While these numbers are staggering – and while they do undoubtedly reflect an inefficient and inequitable system – we should be careful when assessing what would have happened absent the tutela procedure. Money currently being spent on tutela claims would not necessarily otherwise go toward addressing public health issues or toward those in the most need. Still, the filing of legal claims has become a routine part of access to healthcare services in Colombia; in effect, some of the time, the recurrent filing of tutela claims replaces healthcare policy.

At other times, however, the judicialization of health has resulted in direct efforts by the Constitutional Court to influence healthcare policy. The clearest example of this is the structural decision T-760/08. The Constitutional Court decided 22 separate tutelas together and in the process mandated significant changes to the overarching healthcare policy structure. The decision called for a restructuring of the benefits plan that outlined which medicines and services had to be covered by the *entidades promotoras de salud* (which are akin to insurance companies), regulated transfers of administrative costs to patients, and solidified the freedom to choose among healthcare providers. In addition, the decision called for the adoption of deliberate measures to realize universal coverage. The Constitutional Court has required concrete changes to the healthcare system in other cases as well.[354] Because legal mobilization has congregated around the right to health, its impact is most clear in the realm of healthcare policy, but judicial decisions have also effected the implementation of education, social security, and – to a lesser extent – housing policy.

In South Africa, legal mobilization has similarly impacted social policy. As Carol Steinberg, who specializes in constitutional law, concludes:

> there can be no debate about whether the Courts must engage with Government policymaking or not. I think the Constitution obliges the Courts to do so. If Government comes up with a policy scheme that's challenged, the Courts are obliged to evaluate that scheme against the Constitution. So I don't think that it's open to anybody to say that policy falls outside of the domain of the courts. That's for me the starting point. The question really is how the Courts engage with policy issues.[355]

[354] For an assessment of these cases, see Yamin and Parra-Vera (2009).
[355] Quoted in Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council (2015: 61).

The *Grootboom* case in particular set into motion significant changes to housing policy and the standard used in *Grootboom* – reasonableness – would come to define South African social rights jurisprudence. The case specifically "led to [the development of a] new program, the 2003 Housing Assistance in Emergency Situations, [which was] incorporated into Chapter 12 of the National Housing Code in 2004" (Williams 2014: 823). This program represented a new emergency housing policy and a new policy for the upgrading of informal settlements. Subsequent housing rights cases expanded on the standard set in Grootboom, as detailed in Chapters 7 and 8. These expansions in the meaning of the right to housing included the requirement of meaningful engagement and the provision of alternative accommodation in evictions.

Although relatively few health rights cases have come before the South African courts (at least compared to housing rights cases), these cases have still impacted healthcare policy. As noted above, the *Treatment Action Campaign* case yielded direct changes to public policy – namely, the nationwide roll out of nevirapine rather than a limited one. Lisa Forman (2005: 719) notes that "the decision not only directly ensured the implementation of a national MTCT [mother-to-child transmission] plan but also added critical mass to public pressure on government to initiate a national ARV treatment plan, which it announced over a year later." Here, we see both direct and indirect material effects of legal mobilization for the right to health in the realm of public policy. Legal mobilization has also influenced policy regarding education (e.g., through the development of norms and standards for school

infrastructure)[356] and social welfare (e.g., through changes to the administration of social grants).[357]

Legal mobilization for social rights has also impacted the state through its effects on judges and the practice of judging. Although judges are meant to be neutral arbiters in disputes, they are formally state officials, and therefore impacts on judges are also impacts on the state. As shown in Chapters 7 and 8, the ways in which judges understood issued related to access to social welfare goods changed over time, with judges in Colombia coming to view the right to health as justiciable in itself (and as integral to human dignity) and judges in South Africa coming to view the right to housing as particularly important (and connected to both human dignity and the legacy of apartheid). In other words, judicial receptivity changed over time and thus so did judicial behavior.

Beyond these changes in how judges understood what they were doing (and what they ought to be doing), legal mobilization for social rights has impacted the workload of judges. This is most evident in Colombia, where all judges must hear tutela claims, and they must prioritize tutela claims over their other workload, though certainly in South Africa, too, legal mobilization for social rights has required judges to consider new kinds of legal questions that simply did not come before the courts prior to the introduction of social constitutionalism into the country. I turn now to my interviews with lower courts judges in Medellín and Cali for additional perspective on how judges outside the Colombia Constitutional Court – ones who are tasked with the

[356] See various legal cases put forward by Equal Education and/or the Legal Resources Centre.
[357] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (2004).

initial tutela decision-making – see the effects of the tutela. Importantly, these views do not necessarily reflect the modal understanding of the tutela procedure among lower courts judges, but they do offer insight into some of the challenges posed by the tutela procedure for judges.

One judge commented that one of the most difficult parts of the job was "the drama of the tutela and *incidentes de desacato* [contempt orders], which do not stop being dramatic – that a person needs a health service and they are denied it."[358] He was alluding to the fact that oftentimes, one tutela order is not enough to ensure compliance, even though the medicine or procedure sought might be time-sensitive. Instead, the claimant must seek a contempt order in the hopes that the second order or a more severe penalty will prompt compliance. Not only does this affect the claimant, but it also increases the workload of the judges involved. Another lower court judge noted that this workload can become quite burdensome, especially considering the need to keep up with changing jurisprudence across rights issues and the quick turnaround time required for tutela decisions (10 days in the first instance, and 20 in the second): "If I am a day late, I am punished. I can be suspended from office for a month, two months, a year, depending on how serious was the error" in terms of the judgment or in terms the delay.[359] This burden in turn can have negative effects for claimants. As one judge put it:

> Not all judges are experts in constitutional law … Through the tutela action we can get involved in all the processes that involve fundamental rights. A criminal law judge like me, who knows and has specialized in criminal law,

[358] Interview 170315_0064.
[359] Interview 170310_0063.

> who works every day in criminal law, may be forced to resolve a matter of labor law, civil law, social security, administrative law.[360]

Similarly, another judge noted that this lack of expertise

> … is something that costs people, and the cost is sometimes very serious. I am not necessarily an expert in health, right? So I think that there should be specialized judges in tutelage but since there are not, and we cannot deny justice, we have to learn [on the job] … There are areas in which you are more comfortable, in my case, for example, criminal law. I prefer to go to those hearings all day than to decide tutela claims, because there I feel like a fish in the water. When deciding tutelas, not so much, but because I have to do it, because it is part of my job, I do it.[361]

Yet another judge concluded that in order to be a good judge of the tutela, you must be something of an autodidact "because the tutela actions are so unpredictable, and they require your immediate attention. You do not know what will happen to you, and you do not know what [kinds of requests] people are going to present to you."[362]

Overall, then, the tutela presented new challenges to judges as they sought to carry out their duties. The timing of tutela decisions as well as the subject matter pushed judges to do not only more work than they had previously but also to engage in different legal topics, topics that some of the time might be outside their expertise. To sum up his views on the effects of the tutela procedure, one judge referenced the phrase made famous by the poet Guillermo Valencia during Rafael Uribe Uribe's funeral, "blessed be democracy, even though it may kill us," suggesting "blessed be the tutela, even though it may kill us."[363] Typically, interviewees – both those working at the Constitutional Court and those working elsewhere in the legal system –

[360] Interview 170418_093.
[361] Interview 170315_0064.
[362] Interview 170406_0071.
[363] Interview 170322_0068.

evaluated the tutela positively, pointing to the immense advances in access to justice brought about by the mechanism, though many also recommended revisions to way that tutelas are processed in the hopes of reducing congestion in the legal system.[364] And, as one judge put it, "today I think that no Colombian imagines life without the tutela. It's that simple. It would be hard to imagine what Colombian society would be like without this mechanism."[365]

Finally, legal mobilization for social rights influences state-society relations, as citizens engage new forums for claims-making. Rather than relying only on electoral pressures or local brokers to expand social incorporation, Colombians and South Africans can make claims to social welfare goods through the courts. In making those claims, they are enacting social citizenship through the law, asserting the right to have access to social welfare goods not because of particularistic ties, but because of shared belongingness to both a national community and the human community. Contestation around social welfare goods in these contexts signal not only an inequitable allocation of resources, but, importantly, the failure of the government to live up to its legal obligations. The following section engages more deeply with the question of the impact of legal mobilization for social rights on social change and social incorporation.

3. Law, Social Change, and Social Incorporation

As Sandra Liebenberg (2001: 233) holds, "the ultimate test of giving constitutional recognition to these [social] rights is whether they result in real

[364] One common suggestion involved the creation of a specialized set of judges whose only job would be to review and decide tutela cases.
[365] Interview 170310_0063.

improvements in the quality of life of all." In other words, if we are to judge whether or not social constitutionalism has "worked," we must look to the cumulative effects of the turn to law for social change and social incorporation. A challenge inherent to this analysis is the ability to isolate the impact of particular cases on broader social outcomes. In the discussions of the impacts of legal mobilization for social rights above, I have drawn links between both favorable and unfavorable judicial decisions and material and symbolic effects on claimants and the state. Importantly, though, favorable judicial decisions can have very different effects. As described above, favorable decisions can result in material or symbolic improvements to daily life, and, over time, these improvements – if they expand through changes to public policy or as more and more citizens advance legal claims – can have transformative effects. However, favorable decisions may falter if implementation does not follow or if these decisions are artificially narrow in scope.

As has long been noted, courts lack the power to implement or enforce their own decisions. Examples from both Colombia and South Africa indicate that compliance remains a difficult problem. In Colombia, one judge estimated that "almost 80 or 90%" of health tutelas are decided in favor of the claimant, but that does not mean that the insurance companies will comply those favorable tutela orders or even the contempt orders that follow. Instead, "the judge accumulates 20, 30, 50, 100 contempt orders."[366] This assessment was borne out in the experience of residents of the marginal community of Aguablanca.[367] One explained,

[366] Interview 170425_0105.
[367] The experiences of residents of Aguablanca featured heavily in Chapter 5.

> I have a relative who is very sick. I had to file tutela actions that said the health clinic would not do the [necessary] surgery or give the [necessary] medication. Sometimes they comply, and they attend to the patient. Many times, no … [In these situations,] you have to get an order of contempt or file another tutela or go to the media. The tutela is not enough.[368]

Another woman from Aguablanca noted that a further problem beyond compliance with tutela orders related to the right to health is that, depending on where you are, the pharmacies near you may not have – and may not be willing or able to obtain – the medications you need.[369]

Likewise, compliance with and implementation of judicial decisions does not always occur in South Africa. Take, for example, the case *Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others* (2009). Residents of an informal settlement called Harry Gwala brought a complaint against the municipality, seeking access to basic services, including sanitation services, toilet, potable water, and trash removal. The Constitutional Court issued a decision that required the municipality to implement the existing National Housing Code. In effect, the Court urged the municipality to determine whether to relocate residents of Harry Gwala or to provide for *in situ* upgrading of the settlement. By 2015, the municipality still had not issued a decision, and the community remained without access to basic services.[370]

Yet another possibility is that favorable decisions have circumscribed effects. This may occur if there is limited access to the courts or if decisions are narrow in scope and do not address the root causes of the problem in question. Where few

[368] Aguablanca interview 18.
[369] Aguablanca interview 6.
[370] See discussions in Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council (2015) and Bohler-Muller, Kanyane, Pophiwa, and Dipholo (2018) for more information on this case.

people can access the courts or when only certain kinds of people can access the courts, it becomes more likely that the cases that judges hear reflect not the problems that most people face. Instead, these cases will be more likely to feature a certain kind of claimant – one that likely to be perceived sympathetically or one that has access to more resources, whether knowledge-based or financial. Jackie Dugard (2015) demonstrates that the South African Constitutional Court's hesitance to accept direct access petitions has had precisely this effect. Remedies, logically, will be oriented toward the needs of the claimants who come before the courts, so if the claimants who come before the courts are not those in the most need (or representative of those most in need), then even rights-expansive decisions will have a limited overall impact.

Unlike in South Africa, there are relatively few formal barriers to legal claims-making in Colombia, thanks to the design of the tutela procedure. In order to file a tutela claim, you must know what the tutela is and you must be able to wait in line, but you do not need the services of a lawyer. Further the claim will be decided in a matter of days, not years. The expansion of claims-making possibilities in Colombia, then, may appear to be an important move toward greater democratic participation – and considering the state of Colombian politics throughout the 20th century (and before), that conclusion seems quite defensible[371] – but the fact that claims-making now follows a market logic also provides reason for concern. As Alejandro Gaviria (2010) has argued, "paradoxically, the Colombian *estado social de derecho* created the conditions for the development of the worst type of opportunistic capitalism" and has

[371] In other words, citizens who have not historically been represented by any political party can through the tutela express demands for social welfare goods.

led to what he views as "the excessive judicialization of private life." Thus, the focus is not necessarily on those in the most need, but those best situated to take advantage of the new configuration of institutions and opportunities, and as Chapter 8 described, at least some of the time pharmaceutical and insurance companies have been able to manipulate this new configuration for their own gain. By comparing the Colombian approach of open access to the court with the more restricted South African approach, we see that neither one necessarily is better suited to ensuring that the rights of those most in need are protected.

The impact of favorable decisions may also be limited due to the scope of the decision itself. This difficulty is evident in the *Nokotyana* case described earlier. Similarly, Abahlali baseMjondolo's challenge to the Slums Act resulted in a favorable decision in that the Court struck down the Act. Yet, the decision indicated that those living in shacks in KwaZulu-Natal could continue to live in those shacks – or, more precisely, that the government could not evict shack dwellers without a coherent plan for the provision of alternative accommodation. This decision, although technically favorable, did not spur material changes to the daily lives of those affected. One member of Abahlali reflected on this situation:

> … the Constitutional Court declared the Slums Act invalid and unconstitutional … Justice was done. But also … the lesson out of that is that you can win in court but still fail in reality. Now, the question is what's the point of winning in court [if] in reality there is no difference?[372]

As noted above, the same could be asked with respect to Irene Grootboom's turn to the legal claims-making. The decisions in these case did not necessarily have tangible

[372] Quoted in Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Council (2015: 157).

effects on the lives of the claimants involved; there was no advance in social incorporation, at least not for these claimants. On the other hand, these decisions perhaps stymied the further marginalization of Grootboom and the shack-dwellers of the greater Durban area. Thinking back to Doña Beatriz's experience with her tutela claim, there is also the possibility of that the remedy offered by the judge will be disconnected from the needs of the claimant.

So what does all of this mean for social incorporation? As noted in the introduction to this dissertation, access to social welfare goods in developing countries has typically been determined by patron-client ties, membership in organized sectors of the formal economy, or one's ability to buy these goods on the market. More recently, factors such as electoral competition, shifting preferences of employers, and the strength of the political Left have prompted social welfare expansion in different contexts. The existence of justiciable social rights provides another avenue for access to social welfare goods and the extension of social incorporation, at least in theory.

This study of legal mobilization for social rights in Colombia and South Africa has shown that not only did the idea of socially responsive law come to the fore in the early- to mid-1990s, but it was also embedded institutionally in the decade(s) that followed. Newly empowered actors took steps to ensure that social constitutionalism – and their role in social constitutionalism – would endure. In both countries, legal claims-making has prompted changes to social policy and social welfare. Citizens have engaged the state through the courts, advancing legal claims that have resulted in tangible changes to social policy – in effect enacting what Smulovitz and Peruzzotti (2000) call "societal accountability." Concretely, these policy changes include the

creation of emergency housing policy in South Africa, which has protected thousands of people facing dire housing situations, and substantial revisions to healthcare policy in Colombia, including a revamp of the dual health system – specifically an equalization of the contributive and subsidized systems. Yet, these changes have done little by way of addressing the underlying causes of poverty and inequality.

While more systematic study is needed, what the Colombian and South African experiences have shown is that legal mobilization for social rights might be best described as having a limited and partial, though important, impact on social incorporation. The goal of ensuring that each and every Colombian and South African is able to live a life of dignity remains unmet, but the legal recognition of social rights in both countries has empowered citizens to claim access to the goods and services necessary for a good life, including health, housing, education, and social security. As a result of these claims – in other words, as a result of these efforts to create a new sense of obligation – social incorporation has expanded on a case-by-case and issue-by-issue manner, allowing some people improved access to certain social goods or protections, advances that should not be overlooked.

REFERENCES

Abdulai, Abdul-Gafaru, and Sam Hickey. 2016. "The Politics of Development under Competitive Clientelism: Insights from Ghana's Education Sector." *African Affairs* 115 (458): 44–72.

Abel, Richard. 1995. *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*. Routledge.

Acemoglu, Daron, and James Robinson. 2006. *Economic Origins of Dictatorship and Democracy.* Cambridge University Press.

Adésínà, Jìmí O. 2009. "Social Policy in Sub-Saharan Africa: A Glance in the Rear-View Mirror." *International Journal of Social Welfare* 18(1): 37–51.

Albarracín, Juan, Laura Gamboa, and Scott Mainwaring. 2018. "Dinstitutionalization without Collapse: Colombia's Party System." In *Party Systems in Latin America: Institutionalization, Decay, and Collapse*, edited by Scott Mainwaring, 227–54. Cambridge University Press.

Alexander, Peter. 2010. "Rebellion of the Poor: South Africa's Service Delivery Protests – A Preliminary Analysis." *Review of African Political Economy* 37 (123): 25–40.

Amat, Yamid. 2003. "Londoño Quiere un Estado Monárquico y Sin Controles." *El Tiempo*, August 3, 2003. http://www.eltiempo.com/archivo/documento/MAM-1038668.

Andersen, Ellen Ann. 2005. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. University of Michigan Press.

Angel-Cabo, Natalia, and Domingo Lovera. 2014. "Latin American Social Constitutionalism: Courts and Popular Participation." In *Social and Economic Rights in Theory and Practice: Critical Inquiries*, edited by Helena García, Karl E. Klare, and Lucy A. Williams. Routledge.

Andrews, Penelope. 2006. "The South African Judicial Appointments Process." *Osgoode Hall Law Journal* 44 (3): 565–72.

Arrington, Celeste L. 2018. "Hiding in Plain Sight: Pseudonymity and Participation in Legal Mobilization." *Comparative Political Studies* 1-24.

Auyero, Javier. 2001. *Poor People's Politics: Peronist Survival Networks and the Legacy of Evita*. Duke University Press.

Baird, Vanessa A. 2007. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*. University of Virginia Press.

Banco de la República. n.d. "Miembros de La Asamblea Nacional Constituyente de 1991 - Enciclopedia | Banrepcultural." Accessed February 14, 2019. http://enciclopedia.banrepcultural.org/index.php?title=Miembros_de_la_Asamblea_Nacional_Constituyente_de_1991.

Bar-Tal, Daniel. 1990. *Group Beliefs: A Conception for Analyzing Group Structure, Processes, and Behavior*. Springer Science & Business Media.

———. 2013. *Intractable Conflicts: Socio-Psychological Foundations and Dynamics*. Cambridge University Press.

Barnard-Naudé, A. J., Drucilla Cornell, and François Du Bois, eds. 2009. *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann*. Juta.
Barreto, Antonio. 2011. *La generación del estado de sitio*. Universidad de los Andes.
Baum, Lawrence. 1994. "What Judges Want: Judges' Goals and Judicial Behavior." *Political Research Quarterly* 47 (3): 749–68.
———. 2008. *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton Univ. Press.
Baxi, Uprenda. 1985. "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India." *Third World Legal Studies* 4 (6): 107-32.
Beetham, David. 1995. "What Future for Economic and Social Rights?" *Political Studies* 43 (1): 41–60.
Benesh, Sara C. 2006. "Understanding Public Confidence in American Courts." *Journal of Politics* 68 (3): 697-707.
Benesh, Sara C., and Susan E. Howell. 2001. "Confidence in the Courts: A Comparison of Users and Non-Users." *Behavioral Sciences & the Law* 19 (2): 199–214.
Bentham, Jeremy. 1843. "Critique of the Doctrine of Inalienable, Natural Rights." In *Anarchical Fallacies*, 9.
Berman, Sheri. 2009. *The Social Democratic Moment: Ideas and Politics in the Making of Interwar Europe*. Harvard University Press.
Bernhard, Michael. 2015. "Chronic Instability and the Limits of Path Dependence." *Perspectives on Politics* 13 (4): 976–91.
Bickel, Alexander M. 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Yale University Press.
Black Sash. 2004. "'Breaking the Poverty Trap': Financing a Basic Income Grant in South Africa." Black Sash.
Blyth, Mark. 2002. *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*. Cambridge University Press.
Bohler-Muller, Narnia, Modimowabarwa Kanyane, Nedson Pophiwa, and Mojalefa Dipholo. 2018. "Life after Judgment: The Nokotyana Case Re-Examined." *Journal of Contemporary African Studies* 36 (1): 143–59.
Boittin, Margaret. 2013. "New Perspectives from the Oldest Profession: Abuse and the Legal Consciousness of Sex Workers in China." *Law & Society Review* 47 (2): 245-78.
Bonilla, Daniel. 2013. *Constitucionalismo del Sur Global*. Siglo del Hombre Editores.
Booth, John A, and Mitchell A. Seligson. 2009. *The Legitimacy Puzzle in Latin America: Political Support and Democracy in Eight Nations*. Cambridge University Press.
Booysen, Susan. 2007. "With the Ballot and the Brick: The Politics of Attaining Service Delivery." *Progress in Development Studies* 7 (1): 21–32.
Botero, Sandra. 2015. "Courts That Matter: Judges, Litigants and the Politics of Rights Enforcement in Latin America." PhD Dissertation, University of Notre Dame.
Bourdieu, Pierre. 1977. *Outline of a Theory of Practice*. Cambridge University Press.

———. 1986. “The Force of Law: Toward a Sociology of the Juridical Field.” *Hastings LJ* 38: 805.
Bratton, Michael, and Nicholas van de Walle. 1997. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. Cambridge University Press.
Brewer-Carías, Allan R. 2009. *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings*. Cambridge University Press.
Brinks, Daniel M. 2012. “The Transformation of the Latin American State-As-Law: State Capacity and the Rule of Law.” *Revista de Ciencia Política (Santiago)* 32 (3): 561–83.
Brinks, Daniel M, and Abby Blass. 2017. “Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice.” *International Journal of Constitutional Law* 15 (2): 296–331.
Brinks, Daniel M., and William Forbath. 2014. “The Role of Courts and Constitutions in the New Politics of Welfare in Latin America.” In Randall Peerenboom and Tom Ginsburg, eds., *Law and Development of Middle Income Countries.* Cambridge University Press.
Brinks, Daniel M., and Varun Gauri. 2014. “Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights.” *Perspectives on Politics* 12: 375-93.
Brinks, Daniel M., Varun Gauri, and Kyle Shen. 2015. “Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular.” *Annual Review of Law and Social Science* 11: 289-308.
Bumiller, Kristin. 1988. *The Civil Rights Society*. Johns Hopkins University Press.
Burstein, Paul. 1991. “Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity.” *American Journal of Sociology* 96 (5): 1201–25.
Cahn, Edgar S., and Jean C. Cahn. 1964. “The War on Poverty: A Civilian Perspective.” *The Yale Law Journal* 73 (8): 1317–52.
Cajas Sarria, Mario. 2015. *La Historia de la Corte Suprema de Justicia de Colombia 1886-1991*. Universidad de los Andes.
Cameron, Edwin. 2014. “Dignity and Disgrace – Moral Citizenship and Constitutional Protection.” In *The Quest for Constitutionalism: South Africa since 1994*, edited by Hugh Corder, Veronica Federico, and Romano Orrù, 95–109. Ashgate.
Cammett, Melani Claire, Lauren M. MacLean, and Ian Gough, eds. 2014. *The Politics of Non-State Social Welfare*. Cornell University Press.
Capoccia, Giovanni. 2015. “Critical Junctures and Historical Change.” In *Advances in Comparative-Historical Analysis*, edited by James Mahoney and Kathleen Thelen, 180–210. Cambridge University Press.
Capoccia, Giovanni, and R. Daniel Kelemen. 2007. “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism.” *World Politics* 59 (03): 341–69.
Carreras, Miguel. 2013. “The Impact of Criminal Violence on Regime Legitimacy in Latin America.” *Latin American Research Review* 48 (3): 85–107.

Casey, Gregory. 1974. “The Supreme Court and Myth: An Empirical Investigation.” *Law & Society Review* 8 (3): 385.
Casper, Gerhard, and Richard Posner. 1974. “A Study of the Supreme Court’s Caseload.” *The Journal of Legal Studies* 3(2):339–75.
Cepeda, Manuel José. 2004. “Judicial Activism in a Violent Context: Origin, Role, and Impact of the Colombian Constitutional Court.” *Washington University Global Studies Law Review* 3: 529-700.
Chandra, Kanchan. 2004. *Why Ethnic Parties Succeed: Patronage and Ethnic Head Counts in India*. Cambridge University Press.
Chanley, Virginia A., Thomas J. Rudolph, and Wendy M. Rahn. 2000. “The Origins and Consequences of Public Trust in Government: A Time Series Analysis.” *The Public Opinion Quarterly* 64 (3): 239–56.
Chaskalson, Arthur. 2011. “Dignity as a Constitutional Value: A South African Perspective.” *American University International Law Review* 26: 1377–1407.
Clark, Nancy L., and William H. Worger. 2011. *South Africa: The Rise and Fall of Apartheid*. Routledge.
Clausen, Bianca, Aart Kraay, and Zsolt Nyiri. 2011. “Corruption and Confidence in Public Institutions: Evidence from a Global Survey.” *The World Bank Economic Review* 25 (2): 212–49.
Collier, Ruth Berins, and David Collier. 1979. “Inducements versus Constraints: Disaggregating ‘Corporatism.’” *American Political Science Review* 73 (04): 967–86.
Collier, David, and Gerardo Munck. 2017. “Symposium on Critical Junctures and Historical Legacies.” *Qualitative & Multi-Method Research* 15 (1): 2–9.
“Constitute Project.” 2018. https://www.constituteproject.org/?lang=en.
Corder, Hugh. 1992. *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate*. Department of Public Law, University of Cape Town.
———. 2012. Constitutional Court Oral History Project. Interview by Roxsana Patel. http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-C16-001-jpeg.pdf.
Cornell, Drucilla. 2014. *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation*. Fordham University Press.
Cosoy, Natalio. 2015. “A 30 años de las "28 horas de terror": así fue la toma del Palacio de Justicia en Colombia.” Accessible at: http://www.bbc.com/mundo/noticias/2015/11/151030_colombia_30_aniversario_toma_palacio_de_justicia_nc
Couso, Javier, and Lisa Hilbink. 2011. “From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile.” In *Courts in Latin America*, edited by Gretchen Helmke and Julio Ríos-Figueroa. Cambridge University Press.
Cover, Robert M. 1986. “Violence and the Word.” *The Yale Law Journal* 95 (8): 1601.
Crane, Stephen. 1899. *A Man Said to the Universe by Stephen Crane*. https://www.poetryfoundation.org/poems/44049/a-man-said-to-the-universe.
Crawford, Neta C. 2002. *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention*. Cambridge University Press.

Cross, John Christopher. 1998. *Informal Politics: Street Vendors and the State in Mexico City*. Stanford University Press.
Davies, James C. 1962. "Toward a Theory of Revolution." *American Sociological Review* 27 (1): 5–19.
Davis, Dennis M. 1992. "The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles." *South African Journal on Human Rights* 8 (4): 475–90.
Davis, Dennis M., and Karl Klare. 2010. "Transformative Constitutionalism and the Common and Customary Law." *South African Journal on Human Rights* 26 (3): 403–509.
De Villiers, Bertus. 1992. "Directive Principles of State Policy and Fundamental Rights: The Indian Experience." *South African Journal on Human Rights*, 22.
Defensoría del Pueblo. n.d. "Tutela Reports," various years. On file with the author.
Della Porta, Donatella. 2000. "Social Capital, Beliefs in Government, and Political Corruption." In *Disaffected Democracies: What's Troubling the Trilateral Countries?* Princeton University Press.
Democracy, Governance and Service Delivery Research Programme of the Human Sciences Research Counciluncil. 2015. "Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society: Final Report." On file with author.
Department of Human Settlements. 2017. "Annual Performance Plan."
Dugard, Jackie. 2006. "Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court." *South African Journal on Human Rights* 22 (2): 261–82.
———. 2015. "Closing The Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access." *South African Journal on Human Rights* 31 (1): 112–35.
Dugard, Jackie, Michael Clark, Kate Tissington, and Stuart Wilson. 2018. "The Right to Housing in South Africa." Foundation for Human Rights.
Dugard, John. 1990a. "A Bill of Rights for South Africa." *Cornell International Law Journal* 23 (3): 27.
———. 1990b. "Toward Racial Justice in South Africa." In *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, edited by Louis Henkin and Albert Rosenthal, 349–80. Columbia University Press.
———. 2015. *Human Rights and the South African Legal Order*. Princeton University Press.
Dugas, John. 2001. "The Origin, Impact and Demise of the 1989-1990 Colombian Student Movement: Insights from Social Movement Theory." *Journal of Latin American Studies* 33(4): 807-37.
Einwohner, Rachel L. 2006. "Identity Work and Collective Action in a Repressive Context: Jewish Resistance on the 'Aryan Side' of the Warsaw Ghetto." *Social Problems* 53 (1): 38–56.
El Espectador. 2012a. "Las mejores y peores EPS." July 30. https://www.elespectador.com/search/noticias%20temadeldia%20mejores%20y%20peores%20eps%20articulo%20363940.

———. 2012b. “Fiscalía capturó a cinco directivos de EPS por fraude a la salud.” December 17. https://www.elespectador.com/noticias/judicial/fiscalia-capturo-cinco-directivos-de-eps-fraude-salud-articulo-392896.
El Tiempo. n.d. http://www.eltiempo.com/archivo/documento/MAM-78510.
———.. 2012. “Aseguradas siete personas por el caso del desfalco al Fosyga.” May 4. http://www.eltiempo.com/archivo/documento/CMS-11719964.
Engel, David. 1984. “The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community.” *Law & Society Review* 18: 551-82.
———. 2010. “Lumping as Default in Tort Cases: The Cultural Interpretation of Injury.” *Loyola of Los Angeles Law Review* 44: 33–68.
Engel, David, and Jaruwan Engel. 2010. *Tort, Custom, and Karma: Globalization and Legal Consciousness in Thailand*. Stanford University Press.
Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. 1 edition. Chicago: University of Chicago Press.
———. 2009. *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State*. University of Chicago Press.
Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. CQ Press.
Esping-Andersen, Gøsta. 1990. *The Three Worlds of Welfare Capitalism*. Princeton, N.J: Princeton University Press.
Evans Case, Rhonda, and Terri E. Givens. 2010. “Re-Engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive.” *JCMS: Journal of Common Market Studies* 48 (2): 221–41.
Ewick, Patricia, and Susan S. Silbey. 1998. *The Common Place of Law: Stories from Everyday Life*. University of Chicago Press.
Feeley, Malcolm. 1979. *The Process is the Punishment: Handling Cases in a Lower Criminal Court*. Russell Sage Foundation.
Feeley, Malcolm M., and Edward L. Rubin. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons*. Cambridge University Press.
Felstiner, William. 1974. “Influences of Social Organization on Dispute Processing.” *Law & Society Review* 9 (1): 63.
Felstiner, William, Richard Abel, and Austin Sarat. 1980/81. “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…” *Law & Society Review* 15 (3/4): 631-54.
Ferejohn, John A., and Barry R. Weingast. 1992. “A Positive Theory of Statutory Interpretation.” *International Review of Law and Economics* 12 (2): 263–79.
Ferguson, James. 2015. *Give a Man a Fish: Reflections on the New Politics of Distribution*. Duke University Press.
Fernandez, Kenneth E., and Michele Kuenzi. 2010. “Crime and Support for Democracy in Africa and Latin America.” *Political Studies* 58 (3): 450–71.
Festinger, Leon. 1957. *A Theory of Cognitive Dissonance*. Stanford University Press.
Fish Hodgson, Tim, and Silomo Khumalo. 2016. “Too Many Children Left Behind: Exclusion in the South African Inclusive Education System with a Focus on the Umkhanyakude District, KwaZulu-Natal.” Section 27.

Fiszbein, Ariel, Norbert Rüdiger Schady, and Francisco H. G. Ferreira. 2009. *Conditional Cash Transfers: Reducing Present and Future Poverty*. A World Bank Policy Research Report. Washington D.C: World Bank.
Fligstein, Neil, and Doug McAdam. 2012. *A Theory of Fields*. Oxford University Press.
Forman, Lisa. 2005. "Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy." *The Journal of Law, Medicine & Ethics* 33 (4): 711–24.
Fowkes, James. 2016. *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*. Cambridge: Cambridge University Press.
Galanter, Marc. 1974. "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1): 95.
Gallagher, Janice. 2017. "The Last Mile Problem: Activists, Advocates, and the Struggle for Justice in Domestic Courts." *Comparative Political Studies* 50 (12): 1666–98.
Gallagher, Mary E. 2006. "Mobilizing the Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness." *Law & Society Review* 40 (4): 783–816.
———. 2017. *Authoritarian Legality in China: Law, Workers, and the State*. Cambridge University Press.
Gallagher, Mary, and Yujeong Yang. 2017. "Getting Schooled: Legal Mobilization as an Educative Process." *Law & Social Inquiry* 42 (1): 163–94.
Garay, Candelaria. 2016. *Social Policy Expansion in Latin America*. New York, NY: Cambridge University Press.
García Villegas, Mauricio. 2001. "Constitucionalismo perverso. Normalidad y anormalidad constitucional en Colombia: 1957-1997," in Santos, Boaventura de Sousa y García Villegas, Mauricio (eds.). *El caleidoscopio de las justicias en Colombia. Análisis socio-jurídico*. Siglo del Hombre: 317-370.
Gargarella, Roberto, Pilar Domingo, and Theunis Roux. 2006. *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Routledge.
Garoupa, Nuno, and Tom Ginsburg. 2015. *Judicial Reputation: A Comparative Theory*. University of Chicago Press.
Gauri, Varun, and Evan S. Lieberman. 2006. "Boundary Institutions and HIV/AIDS Policy in Brazil and South Africa." *Studies in Comparative International Development* 41(3):47–73.
Gauri, Varun, and Daniel M. Brinks. 2008. *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge; New York: Cambridge University Press.
Gauri, Varun, and Jeffrey K. Staton. 2013. "Compliance with Tutela Orders in Colombia: Research Design." On file with author.
Gaviria, Alejandro. 2010. "El país de la tutela." elespectador.com. November 6, 2010. https://www.elespectador.com/opinion/el-pais-de-la-tutela-columna-233493.

Gely, Rafael, and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the 'State Farm' and 'Grove City Cases.'" *Journal of Law, Economics, & Organization* 6 (2): 263–300.

———. 1992. "The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan." *International Review of Law and Economics* 12 (1): 45–67.

Genn, Hazel. 1999. *Paths to Justice: What People Do and Think about Going to Law*. Hart Publishing.

Gibson, James L. 2007. "The Legitimacy of the US Supreme Court in a Polarized Polity." *Journal of Empirical Legal Studies* 4 (3): 507–538.

Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92 (2): 343–58.

Gill, Stephen, and A. Claire Cutler, eds. 2014. *New Constitutionalism and World Order*. Cambridge, United Kingdom; New York: Cambridge University Press.

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge University Press.

———. 2010. "The Global Spread of Constitutional Review." In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, 81–98. Oxford University Press.

Glendon, Mary Ann. 1991. *Rights Talk: The Impoverishment of Political Discourse*. Free Press.

Goldstein, Judith, and Robert O. Keohane, eds. 1993. *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*. Cornell Studies in Political Economy. Cornell University Press.

Goldstone, Richard. 2010. "Foreword." In *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, edited by Varun Gauri and Daniel M Brinks. Cambridge; New York: Cambridge University Press.

González-Ocantos, Ezequiel A. 2016. *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America*. Cambridge University Press.

Gough, Ian, Geof Wood, Armando Barrientos, Philippa Bevan, Peter Davis, and Graham Room. 2008. *Insecurity and Welfare Regimes in Asia, Africa and Latin America: Social Policy in Development Contexts*. Cambridge: Cambridge University Press.

Graaff, David. 2012. "¿Se volverá conservadora la Corte Constitucional?" *La Silla Vacía*, August 18, 2012. https://lasillavacia.com/historia/se-volvera-conservadora-la-corte-constitucional-35546.

Grossmann, Matt, and Brendon Swedlow. 2015. "Judicial Contributions to US National Policy Change since 1945." *Journal of Law and Courts* 3 (1): 1–35.

GroundUp. 2018. "No Justice for Assassinated Abahlali Activists." *Daily Maverick*. https://www.dailymaverick.co.za/article/2018-09-12-no-justice-for-assassinated-abahlali-activists/.

Gurney, Joan Neff, and Kathleen J. Tierney. 1982. "Relative Deprivation and Social Movements: A Critical Look at Twenty Years of Theory and Research." *The Sociological Quarterly* 23 (1): 33–47.
Gurr, Ted Robert. 1970. *Why Men Rebel*. Paradigm Publishers.
Haas, Peter. 1992. "Introduction: Epistemic Communities and International Policy Coordination." *International Organization* 46 (1): 1–35.
Hacker, Jacob. 2005. "Policy Drift: The Hidden Politics of US Welfare State Retrenchment." In *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by Kathleen Thelen and Wolfgang Streeck, 40–82. Oxford University Press.
Haggard, Stephan, and Robert R. Kaufman. 2008. *Development, Democracy, and Welfare States: Latin America, East Asia, and Eastern Europe*. Princeton: Princeton University Press.
Hall, Peter A. 1993. "Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain." *Comparative Politics* 25 (3): 275.
Hall, Peter A., and David Soskice. 2001. *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford University Press.
Hall, Ruth. 2004. "Land Restitution in South Africa: Rights, Development, and the Restrained State." *Canadian Journal of African Studies* 38 (3): 654–71.
Hall, Matthew E. K. 2010. *The Nature of Supreme Court Power*. Cambridge University Press.
Haysom, Nicholas. 1992. "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights." *South African Journal on Human Rights* 8 (4): 451–63.
Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge University Press.
Henao, Juan Carlos. 2013. "El ideario de la Constitución de 1863 no ha muerto." Accessible at: http://www.eltiempo.com/archivo/documento/CMS-12785475
Hendley, Kathryn. 1999. "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law." *E. Eur. Const. Rev.* 8: 89.
———. 2012. "The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts." *Cornell Int'l LJ* 45: 517.
Hilbink, Lisa. 2007. *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press.
———. 2008. "Assessing the New Constitutionalism" *Comparative Politics* 40 (2): 227-45.
———. 2012. "The Origins of Positive Judicial Independence." *World Politics* 64 (4): 587–621.
———. 2014. "Location, Location, Location: On Judicial Attitudes and Transitional Justice in Spain and Chile." https://papers.ssrn.com/abstract=2712003.
Hilbink, Lisa, and Matthew C. Ingram. Forthcoming. "Courts and Rule of Law in Developing Countries." *Oxford Research Encyclopedia of Politics*.
Hilson, Chris. 2002. "New Social Movements: The Role of Legal Opportunity." *Journal of European Public Policy* 9 (2): 238–55.

Hirschl, Ran. 2000. “The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions.” *Law & Social Inquiry* 25 (1): 91–149.
———. 2004. “The Political Origins of the New Constitutionalism.” *Indiana Journal of Global Legal Studies* 11 (1): 71–108.
Hoffman, Elizabeth. 2003. “Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies.” *Law & Society Inquiry* 28: 691-716.
Hollis-Brusky, Amanda. 2015. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. Studies in Postwar American Political Development. Oxford University Press.
Holland, Alisha C. 2017. *Forbearance as Redistribution: The Politics of Informal Welfare in Latin America*. Cambridge University Press.
Holland, Alisha C., and Ben Ross Schneider. 2017. “Easy and Hard Redistribution: The Political Economy of Welfare States in Latin America.” *Perspectives on Politics* 15 (04): 988–1006.
Howard, J. Woodford. 1977. “Role Perceptions and Behavior in Three U.S. Courts of Appeals.” *The Journal of Politics* 39 (4): 916–38.
Huber, Evelyne, and John D. Stephens. 2012. *Democracy and the Left: Social Policy and Inequality in Latin America*. University of Chicago Press.
Hull, Kathleen. 2003. “The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage.” *Law & Social Inquiry* 28: 629-57.
———. 2016. “Legal Consciousness in Marginalized Groups: The Case of LGBT People.” *Law & Social Inquiry* 41 (3): 551-72.
Human Sciences Research Council. 2014. “Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society: Final Report.”
Huq, Aziz, Ben Bradford, Jonathan Jackson, and Tom Tyler. 2013. “Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence.” *Psychology, Public Policy, and Law*, 479.
Hussmann, Karen, and Juan Carlos Rivillas. 2014. “Financial ‘Blood-Letting’ in the Colombian Health System.” In *Corruption, Grabbing and Development*, edited by Tina Søreide and Aled Williams, 115–28. Edward Elgar Publishing.
Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. “Judicial Independence in Unstable Environments, Argentina 1935-1998.” *American Journal of Political Science*, 699–716.
Ingram, Matthew C. 2012. “Crafting Courts in New Democracies: Ideology and Judicial Council Reforms in Three Mexican States.” *Comparative Politics* 44 (4): 439–58.
Iversen, Torben. 2005. *Capitalism, Democracy, and Welfare*. Cambridge University Press.
Jacobs, Alan M. 2009. “How Do Ideas Matter?: Mental Models and Attention in German Pension Politics.” *Comparative Political Studies* 42 (2): 252–79.

Jasper, James M. 2004. "A Strategic Approach to Collective Action: Looking for Agency in Social-Movement Choices." *Mobilization: An International Quarterly* 9 (1): 1–16.
Kapiszewski, Diana. 2012. *High Courts and Economic Governance in Argentina and Brazil*. Cambridge University Press.
Keck, Thomas M. 2009. "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights." *Law & Society Review* 43 (1): 151–86.
Keck, Thomas M., and Logan Strother. 2016. "Judicial Impact." *Oxford Research Encyclopedia of Politics*. https://doi.org/10.1093/acrefore/9780190228637.013.103.
Kelman, Mark. 1990. *A Guide to Critical Legal Studies*. Harvard University Press.
Kelleher, Christine A., and Jennifer Wolak. 2007. "Explaining Public Confidence in the Branches of State Government." *Political Research Quarterly* 60 (4): 707–21.
Khunou, Kelebogile. 2018. "Turning Off the Tap: Discontinuing Universal Access to Free Basic Water in the City of Johannesburg." Socio-Economic Rights Institute.
Kitschelt, Herbert, and Steven Wilkinson, eds. 2007. *Patrons, Clients, and Policies: Patterns of Democratic Accountability and Political Competition*. Cambridge University Press.
Klare, Karl E. 1998. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14 (1): 146–188.
Klotz, Audie. 1995. *Norms in International Relations: The Struggle against Apartheid*. Cornell University Press.
Klug, Heinz. 2000. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge University Press.
———. 2016. "Challenging Constitutionalism in Post-Apartheid South Africa." *Constitutional Studies* 2: 41–58.
Kmiec, Keenan D. 2004. "The Origin and Current Meanings of 'Judicial Activism.'" *California Law Review* 92 (5): 1441.
Kruks-Wisner, Gabrielle. 2018. "The Pursuit of Social Welfare." *World Politics* 70 (1): 122–63.
Kulkarni, Pavan. 2018. "Housing the Homeless While Enduring Brutal Oppression: The Story of Shack-Dwellers Movement in S. Africa." *Peoples Dispatch*. https://peoplesdispatch.org/2018/12/18/enduring-assassinations-police-brutality-and-criminalization-in-the-struggle-to-house-the-homeless-the-story-of-shack-dwellers-movement-in-s-africa/.
Kurtz, Marcus J. 2004. "The Dilemmas of Democracy in the Open Economy: Lessons from Latin America." *World Politics* 56 (2): 262–302.
La Rota, Miguel, Sesbatián Lalinde, and Rodrigo Uprimny. 2014. "Encuesta Nacional de Necesidades Jurídicas: Análisis General y Comparativo Para Tres Poblaciones. Dejusticia.
Lake, Milli, Ilot Muthaka, and Gabriella Walker. 2016. "Gendering Justice in Humanitarian Spaces." *Law & Society Review* 50(3):539–74.
Lamprea, Everaldo. 2015. *Derechos en la práctica: Jueces, litigantes y operadores de políticas de salud en Colombia*. Universidad de los Andes.

Lamprea, Everaldo, and Johnattan García. 2016. "Closing the Gap Between Formal and Material Health Care Coverage in Colombia." *Health and Human Rights Journal*.
Landau, David. 2010a. "A Dynamic Theory of Judicial Role." *Boston College Law Review* 55 (5): 1501-62.
———. 2010b. "Political Institutions and Judicial Role in Comparative Constitutional Law." *Harvard International Law Journal* 51 (2): 319-77.
———. 2012. "The Reality of Social Rights Enforcement." *Harvard International Law Journal* 53: 60.
———. 2014. "Beyond Judicial Independence: The Construction of Judicial Power in Colombia." Ph.D. diss. Department of Government, Harvard University, on file with the author.
Lane, Robert. 1973. *Handbook of Political Psychology.* Jossey-Bass.
Langford, Malcolm. 2009a. *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law.* Cambridge: Cambridge University Press.
———. 2009b. "Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review." *Sur. Revista Internacional de Direitos Humanos* 6 (11): 98–133.
———. 2013. "Housing Rights Litigation: Grootboom and Beyond." In *Socio-Economic Rights in South Africa: Symbols or Substance?*, edited by Malcolm Langford, Ben Cousins, Jackie Dugard, and Tshepo Madlingozi. Cambridge University Press.
Latinobarometer. n.d. http://www.latinobarometro.org/latOnline.jsp.
Lehoucq, Emilio, and Whitney K. Taylor. 2018. "Conceptualizing Legal Mobilization: Legal Strategies and Social Movement Mobilization." Paper presented at the Law & Society Annual Meeting, Toronto, Canada.
Lemaitre, Julieta. 2009. *El derecho como conjuro: Fetichismo legal, violencia y movimientos sociales*. Bogotá: Grupo IDEAS (Investigación, Derecho y Acción Social) Facultad de Derecho Universidad de los Andes.
Lempert, Richard O. 1976. "Mobilizing Private Law: An Introductory Essay." *Law & Society Review* 11 (2): 173.
Levi, Margaret. 1997. *Consent, Dissent, and Patriotism*. Cambridge University Press.
Levi, Margaret, Audrey Sacks, and Tom Tyler. 2009. "Conceptualizing Legitimacy, Measuring Legitimating Beliefs." *American Behavioral Scientist* 53 (3): 354–75.
Levine, Felice J., and Elizabeth Preston. 1970. "Community Resource Orientation among Low Income Groups." *Wisconsin Law Review*, 80.
Levine, Kay, and Virginia Mellema. 2001. "Strategizing the Street: How Law Matters in the Lives of Women in the Street-Level Drug Economy." *Law & Social Inquiry* 26: 169-207.
Levitsky, Steven, and María Victoria Murillo. 2013. "Lessons from Latin America: Building Institutions on Weak Foundations." *Journal of Democracy* 24 (2): 93-101.
Liebenberg, Sandra. 2001. "The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa." *South African Journal on Human Rights* 17: 232–57.

———. 2005. “The Value of Human Dignity in Interpreting Socio-Economic Rights.” *South African Journal on Human Rights* 21 (1): 1–31.
———. 2010. *Socio-Economic Rights: Adjudication Under a Transformative Constitution*. Claremont South Africa: Juta Academic.
Lieberman, Evan S. 2003. *Race and Regionalism in the Politics of Taxation in Brazil and South Africa*. Cambridge Studies in Comparative Politics. Cambridge; New York: Cambridge University Press.
———. 2009. *Boundaries of Contagion: How Ethnic Politics Have Shaped Government Responses to AIDS*. Princeton, N.J: Princeton University Press.
Locke, Richard M., and Kathleen Thelen. 1995. “Apples and Oranges Revisited: Contextualized Comparisons and the Study of Comparative Labor Politics.” *Politics & Society* 23 (3): 337–67.
Lovell, George I. 2012. *This Is Not Civil Rights: Discovering Rights Talk in 1939 America*. University of Chicago Press.
Lynch, Julia. 2006. *Age in the Welfare State: The Origins of Social Spending on Pensioners, Workers, and Children*. Cambridge University Press.
Maher, Thomas V. 2010. “Threat, Resistance, and Collective Action: The Cases of Sobibór, Treblinka, and Auschwitz.” *American Sociological Review* 75 (2): 252–72.
Mahoney, James, and Kathleen Thelen, eds. 2010. *Explaining Institutional Change: Ambiguity, Agency, and Power*. Cambridge University Press.
Mainwaring, Scott. 2006. “The Crisis of Representation in the Andes.” *Journal of Democracy* 17 (3): 13–27.
Malagón Pinzón, Miguel. 2012. *Los modelos de control administrativo en colombia (1811-2011)*. Universidad de los Andes.
Maltzman, Forrest, James Spriggs II, and Paul Wahlbeck. 1999. “Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making.” In *Supreme Court Decision-Making: New Institutionalist Approaches*, edited by Cornell W. Clayton and Howard Gillman, University of Chicago Press.
Mandela, Nelson. 1995. *Long Walk to Freedom: The Autobiography of Nelson Mandela*. Back Bay Books.
March, James, and Johan Olsen. 1998. “The Institutional Dynamics of International Political Orders.” *International Organization* 52 (4): 734-49.
Mares, Isabela. 2003. *The Politics of Social Risk: Business and Welfare State Development*. Cambridge, UK; New York: Cambridge University Press.
Mares, Isabela, and Matthew E. Carnes. 2009. “Social Policy in Developing Countries.” *Annual Review of Political Science* 12 (1): 93–113.
Marshall, Anna-Maria. 1998. “Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases.” *Law & Social Inquiry* 23 (4): 761–93.
Marshall, T.H. 1950. *Citizenship and Social Class*. Cambridge University Press.
Martínez Franzoni, Juliana. 2008. “Welfare Regimes in Latin America: Capturing Constellations of Markets, Families, and Policies.” *Latin American Politics and Society* 50 (2): 67–100.
Martz, John. 1997. *The Politics of Clientelism: Democracy and the State in Colombia*. Transaction Publishers.

Marx, Anthony W. 1998. *Making Race and Nation: A Comparison of South Africa, the United States, and Brazil*. Cambridge University Press.
Massoud, Mark Fathi. 2013. *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge University Press.
Mayosi, Bongani M., and Solomon R. Benatar. 2014. "Health and Health Care in South Africa—20 Years after Mandela." *New England Journal of Medicine* 371 (14): 1344–53.
Mbeki, G. 1996. *Sunset at Midday*. Pan Macmillan.
McAdam, Doug. 1982. *Political Process and the Development of Black Insurgency, 1930-1970*. University of Chicago Press.
McAdam, Doug, John D. McCarthy, and Mayer N. Zald. 1996. *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings*. Cambridge University Press.
McAdam, Doug, John D. McCarthy, Mayer N. Zald, and Neil J Smelser. 1988. "Social Movements." In *Handbook of Sociology*. Sage Publications.
McAdam, Doug, Sidney G. Tarrow, and Charles Tilly. 2001. *Dynamics of Contention*. Cambridge University Press.
McAdam, Doug, and Sidney Tarrow. 2018 (in press). "The Political Context of Social Movements." *The Wiley Blackwell Companion to Social Movements.*
McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. University of Chicago Press.
———. 1996. "Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)." *Law & Social Inquiry* 21 (2): 457–82.
McCarthy, John D., and Mayer N. Zald. 1977. "Resource Mobilization and Social Movements: A Partial Theory." *American Journal of Sociology* 82 (6): 1212–41.
McClendon, Gwyneth H. 2018. *Envy in Politics*. Princeton University Press.
McMillan, L. Jane. 2011. "Colonial Traditions, Co-optations, and *Mi'kmaq* Legal Consciousness." *Law & Social Inquiry* 36 (10): 171-200.
McNamara, Kathleen R. 1999. *The Currency of Ideas: Monetary Politics in the European Union*. Cornell University Press.
Meierhenrich, Jens. 2008. *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000*. Cambridge University Press.
Merry, Sally Engle. 1990. *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*. University of Chicago Press.
Michelman, Frank I. 2008. "Socioeconomic Rights in Constitutional Law: Explaining America Away." *International Journal of Constitutional Law* 6 (3-4): 663–86.
Michel, Verónica, and Kathryn Sikkink. 2013. "Human Rights Prosecutions and the Participation Rights of Victims in Latin America." *Law & Society Review* 47 (4): 873–907.
Ministry in the Office of the President. 1994. "White Paper on Reconstruction and Development." *Government Gazette* 353 (16085).
Mnookin, Robert H., and Lewis Kornhauser. 1979. "Bargaining in the Shadow of the Law: The Case of Divorce." *The Yale Law Journal* 88 (5): 950.
Morgan, Jana. 2013. *Bankrupt Representation and Party System Collapse*. Penn State University Press.

Motsoaledi, Aaron. 2014. “Foreword - National Department of Health Annual Report 2013/14.” 170/2014.
Motta Ferraz, Octavio Luiz. 2011. “Harming the Poor Through Social Rights Litigation: Lessons from Brazil.” *Texas Law Review* 89: 1643-68.
Mureinik, Etienne. 1992. “Beyond a Charter of Luxuries: Economic Rights in the Constitution.” *South African Journal on Human Rights* 8: 464–74.
Murphy, Walter F., Joseph Tanenhaus, and Daniel L. Kastner. 1973. *Public Evaluations of Constitutional Courts, Alternative Explanations*. Sage Publications.
Nattrass, Nicoli, and Jeremy Seekings. 2011. “The Economy and Poverty in the Twentieth Century.” In *The Cambridge History of South Africa*, edited by Robert Ross, Anne Kelk Mager, and Bill Nasson, 518–72. Cambridge University Press.
Neier, Aryeh. 2006. “Social and Economic Rights: A Critique.” *Human Rights Brief* 13 (2).
Neumann, Iver. 2002. “Returning Practice to the Linguistic Turn: The Case of Diplomacy.” *Millennium* 31 (3): 627–51.
Nielsen, Laura Beth 2000. “Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment.” *Law & Society Review* 34: 1055-90.
Nieto, Emmanuel, and Alejandro Arango. 2011. “Costos de Los Servicios de Salud Tutelados y Del Proceso Legal de Las Tutelas En Medellín, 2009.” *La Revista Facultad Nacional de Salud Pública* 29 (3): 223–31.
Nonet, Philippe, Philip Selznick, and Robert A. Kagan. 2001. *Law and Society in Transition: Toward Responsive Law*. Routledge.
North, Douglass, and Barry Weingast. 1989. “Constituents and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England” *The Journal of Economic History* 49 (4) :802-32.
Nunes, Rodrigo M. 2010a. “Ideal Justice in Latin America: Interests, Ideas, and the Political Origins of Judicial Activism in Brazil and Colombia.” PhD Dissertation, University of Texas at Austin.
———. 2010b. “Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health.” *Latin American Politics and Society* 52 (3): 67–97.
O’Malley, Padraig. n.d. “Third Force Proposals.” The O’Malley Archives at the Nelson Mandela Centre of Memory. Accessed February 13, 2019. https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01993/06lv01999.htm.
O’Meara, Dan. 1997. *Forty Lost Years: The Apartheid State and the Politics of the National Party, 1948-1994*. Ravan Press.
Olano García, Hernán. 2013. *El Choque de Trenes: Guerra Entre Cortes? Acercamiento Al Conflicto Entre Organos Constitucionales En Colombia*. Ediciones Doctrina y Ley.
Ortiz, Jaime. 1991. “Proyecto de Acto Reformatorio de la Constitución Política de Colombia No. 10.” *Gaceta Constitucional* 9: 21.

Palacios, Marco. 2006. *Between Legitimacy and Violence: A History of Colombia, 1875–2002*. Translated by Richard Stoller. Duke University Press Books.
Paris, Michael. 2009. *Framing Equal Opportunity: Law and the Politics of School Finance Reform*. Stanford Law Books.
Pedriana, Nicholas. 2006. "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s." *American Journal of Sociology* 111 (6): 1718–61.
Peña Aranza, Santiago. 2011. "Alberto Zalamea, el periodista y la academia." *Semana*, September 10, 2011. https://www.semana.com/gente/articulo/alberto-zalamea-periodista-academia/246164-3.
Petrova, Dimitrina. 2018. "Strategic Human Rights Litigation in Tough Times." *OpenGlobalRights*. https://www.openglobalrights.org/strategic-human-rights-litigation-in-tough-times/.
Pharr, Susan J. 2000. *Disaffected Democracies: What's Troubling the Trilateral Countries?* Princeton University Press.
Phillips, Laura. 2017. "History of South Africa's Bantustans." *Oxford Research Encyclopedia of African History*, July. https://doi.org/10.1093/acrefore/9780190277734.013.80.
Pierson, Paul. 2000. "Increasing Returns, Path Dependence, and the Study of Politics." *American Political Science Review* 94 (02): 251–67.
Pieterse, Marius. 2014. *Can Rights Cure?: The Impact of Human Rights Litigation on South Africa's Health System*.
Posel, Deborah. 2001. "Race as Common Sense: Racial Classification in Twentieth-Century South Africa." *African Studies Review* 44 (2): 87–113.
Pouliot, Vincent. 2008. "The Logic of Practicality: A Theory of Practice of Security Communities." *International Organization* 62: 257-88.
Powell, Martin. 2002. "The Hidden History of Social Citizenship" *Citizenship Studies* 6 (3): 229-244.
Powell, Martin, and Armando Barrientos. 2004. "Welfare Regimes and the Welfare Mix." *European Journal of Political Research* 43 (1): 83–105.
Pribble, Jennifer. 2011. "Worlds Apart: Social Policy Regimes in Latin America." *Studies in Comparative International Development* 46 (2): 191–216.
Quinche Ramírez, Manuel Fernando. 2007. *Vías de hecho: acción de tutela contra providencias*. Universidad del Rosario.
Radio Caracol. 2014. "Fraude de Saludcoop al Fosyga alcanzó los 27.000 millones de pesos." August 19. http://caracol.com.co/radio/2014/08/19/judicial/1408443780_374024.html.
Ramseyer, J. Mark, and Eric B. Rasmusen. 2001. "Why Are Japanese Judges So Conservative in Politically Charged Cases?" *American Political Science Review* 95 (2): 331–44.
Restrepo Piedrahita, Carlos. 1993. *Primeras constituciones de Colombia y Venezuela, 1811-1830*. Universidad Externado de Colombia.
Richards, Mark J., and Herbert M. Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review* 96 (2): 305–20.

Riedl, Rachel Beatty, and Kenneth M. Roberts. 2019. "Critical Junctures, Contingency, and Institutional Legacies: Insights from Party System Development in Africa and Latin America." Unpublished manuscript.
Ríos-Figueroa, Julio. 2016. *Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America*. Cambridge University Press.
Risse-Kappen, Thomas. 1994. "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War." *International Organization* 48 (2): 185–214.
Roberts, Kenneth M. 1998. *Deepening Democracy? The Modern Left and Social Movements in Chile and Peru*. Stanford University Press.
———. 2002. "Social Inequalities without Class Cleavages in Latin America's Neoliberal Era." *Studies in Comparative International Development* 36 (4): 3–33.
———. 2014. *Changing Course in Latin America: Party Systems in the Neoliberal Era*. Cambridge University Press.
———. 2019. "Temporal Distance, Reactive Sequences, and Institutional Legacies: Reflections on Latin America's Neoliberal Critical Junctures." Unpublished manuscript.
Rodríguez-Garavito, César. 2011. "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America." *Texas Law Review* 89: 1669–98.
Rodríguez-Raga, Juan Carlos. 2011. "Strategic Deference in the Colombian Constitutional Court, 1992–2006." In *Courts in Latin America*, edited by Gretchen Helmke and Julio Ríos-Figueroa, 81–98.
Rohde, David W., and Harold J. Spaeth. 1975. *Supreme Court Decision Making*. W H Freeman & Co.
Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press.
———. 1996. "Review: Positivism, Interpretivism, and the Study of Law." *Law & Social Inquiry* 21 (2): 435–55.
Rueda, Pablo. 2010. "Legal Language and Social Change during Colombia's Economic Crisis." In *Cultures of Legality*, edited by Javier Couso, Alexandra Huneeus, and Rachel Sieder, 25–50. Cambridge University Press.
Rudra, Nita. 2008. *Globalization and the Race to the Bottom in Developing Countries: Who Really Gets Hurt?* 1 edition. Cambridge, UK; New York: Cambridge University Press.
Rodriguez-Garavito, César, and Boaventura de Sousa Santos. 2005. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge University Press.
Roux, Theunis. 2013. *The Politics of Principle: The First South African Constitutional Court, 1995–2005*. Cambridge University Press.
———. 2015. "American Ideas Abroad: Comparative Implications of US Supreme Court Decision-Making Models." *International Journal of Constitutional Law* 13 (1): 90–118.

Sachs, Albie. 1991. “Towards a Bill of Rights for a Democratic South Africa.” *Journal of African Law* 35 (1/2,): 21–43.
———. 2016. *We, the People: Insights of an Activist Judge*. Wits University Press.
Salzman, Ryan, and Adam Ramsey. 2013. “Judging the Judiciary: Understanding Public Confidence in Latin American Courts.” *Latin American Politics and Society* 55 (1): 73–95.
Sarat, Austin. 1990. “‘…The Law Is All Over’: Power, Resistance, and the Legal Consciousness of the Welfare Poor.” *Yale Journal of Law and the Humanities* 2: 343-79.
Sarat, Austin, and William Felstiner. 1989. “Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office.” *Yale Law Journal* 98: 1663-88.
Sarat, Austin, and Thomas Kearns. 1995. *Law in Everyday Life*. University of Michigan Press.
Schattschneider, E.E. 1935. *Politics, Pressures and the Tariff*. Prentice-Hall.
Scheingold, Stuart A. 2004. *The Politics of Rights: Lawyers, Public Policy, and Political Change*. University of Michigan Press.
Schmidt, Sebastian. 2014. “Foreign Military Presence and the Changing Practice of Sovereignty: A Pragmatist Explanation of Norm Change.” *American Political Science Review* 108 (4): 817-29.
Schmitter, Philippe C. 1974. “Still the Century of Corporatism?” *The Review of Politics* 36 (1): 85–131.
Schoenfeld, Heather. 2018. *Building the Prison State: Race and the Politics of Mass Incarceration*. University of Chicago Press.
Schickler, Eric. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton University Press.
Seawright, Jason, and David Collier. 2014. “Rival Strategies of Validation: Tools for Evaluating Measures of Democracy.” *Comparative Political Studies* 47 (1): 111–38.
Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge University Press.
———. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press.
Seidman, Gay W. 1994. *Manufacturing Militance: Workers’ Movements in Brazil and South Africa, 1970-1985*. University of California Press.
Seligson, Mitchell A. 2002. “The Impact of Corruption on Regime Legitimacy: A Comparative Study of Four Latin American Countries.” *Journal of Politics* 64 (2): 408–33.
Shapiro, Martin. 1981. *Courts: A Comparative and Political Analysis*. University of Chicago Press.
Silbey, Susan S. 2005. “After Legal Consciousness.” *Annual Review of Law and Social Science* 1 (1): 323–68.
Simmons, Erica S. 2014. “Grievances Do Matter in Mobilization.” *Theory and Society* 43 (5): 513–46.
———. 2016. *Meaningful Resistance: Market Reforms and the Roots of Social Protest in Latin America*. Cambridge University Press.

Simmons, Erica S., and Nicholas Rush Smith. 2017. "Comparison with an Ethnographic Sensibility." *PS: Political Science & Politics* 50 (01): 126–30.
Singh, Prerna. 2017. *How Solidarity Works for Welfare: Subnationalism and Social Development in India*. Cambridge University Press.
Skinner, Rob. 2010. *The Foundations of Anti-Apartheid: Liberal Humanitarians and Transnational Activists in Britain and the United States, c.1919-64*. Palgrave Macmillan.
Slater, Dan, and Erica Simmons. 2010. "Informative Regress: Critical Antecedents in Comparative Politics." *Comparative Political Studies* 43 (7): 886–917.
Smelser, Neil J. 1963. *Theory of Collective Behavior*. Quid Pro, LLC.
Smulovitz, Catalina, and Enrique Peruzzotti. 2000. "Societal Accountability in Latin America." *Journal of Democracy* 11 (4): 147–58.
Smulovitz, Catalina. 2010. "Judicialization in Argentina: Legal Culture or Opportunities and Support Structures?" In *Cultures of Legality: Judicialization and Political Activism in Latin America*, edited by Javier Couso, Alexandra Huneeus, and Rachel Sieder. Cambridge University Press.
Snow, David A., E. Burke Rochford Jr, Steven K. Worden, and Robert D. Benford. 1986. "Frame Alignment Processes, Micromobilization, and Movement Participation." *American Sociological Review*, 464–81.
Snow, David A., and Sarah A. Soule. 2009. *A Primer on Social Movements*. W. Norton & Company.
South African Market Insights. n.d. "Unemployment Rate per Province." http://www.SouthAfricanMI.com/blog-7aug2017.html.
Spaeth, Harold J., and Jeffrey A. Segal. 2001. *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*. Cambridge University Press.
Sparks, Allister. 1996. *Tomorrow Is Another Country: The Inside Story of South Africa's Road to Change*. University of Chicago Press.
Stokes, Susan Carol. 2013. *Brokers, Voters, and Clientelism: The Puzzle of Distributive Politics*. Cambridge Studies in Comparative Politics. Cambridge University Press.
Statistics South Africa. 2015. *Census 2011: Income Dynamics and Poverty Status of Households in South Africa*.
———. 2017. "Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2015." *Report No. 03-10-06*.
Streeck, Wolfgang, and Kathleen Thelen, eds. 2005. *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford University Press.
Sunstein, Cass R. 2005. "Why Does the American Constitution Lack Social and Economic Guarantees." *Syracuse Law Review* 56: 1–26.
Swenson, Peter A. 2002. *Capitalists against Markets: The Making of Labor Markets and Welfare States in the United States and Sweden*. Oxford University Press.
Tam, Waikeung. 2013. *Legal Mobilization Under Authoritarianism: The Case of Post-Colonial Hong Kong*. Cambridge University Press.
Tarrow, Sidney G. 1994 [2011]. *Power in Movement: Social Movements and Contentious Politics*. Cambridge University Press.

———. 2010. “The Strategy of Paired Comparison: Toward a Theory of Practice.” *Comparative Political Studies* 43 (2): 230–59.
Tate, Winifred. 2007. *Counting the Dead: The Culture and Politics of Human Rights Activism in Colombia*. University of California Press.
Taylor, Paul. 1993. “Apartheid Foe Hani Slain in S. Africa.” *Washington Post*, April 11, 1993. http://www.washingtonpost.com/wp-srv/inatl/longterm/s_africa/stories/hani041193.htm.
Taylor, Whitney K. 2018. “Ambivalent Legal Mobilization: Perceptions of Justice and the Use of the Tutela in Colombia: Ambivalent Legal Mobilization.” *Law & Society Review* 52 (2): 337–67.
Teles, Steven. 2010. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton University Press.
Thelen, Kathleen. 2004. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*. Cambridge University Press.
Thompson, E. P. 1975. *Whigs and Hunters*. London: Breviary Stuff Publications.
Tilly, Charles. 1990. *Coercion, Capital, and European States, AD 990-1990*. Wiley.
Tissington, Kate, and Naadira Munshi. 2012. “‘Jumping the Queue’, Waiting Lists and Other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa.” On file with author.
Truth and Reconciliation Commission of South Africa Report.” 1999. Volume 6. http://choicereviews.org/review/10.5860/CHOICE.37-1803.
Tushnet, Mark V. 2008. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press.
Tyler, Tom R. 1990. *Why People Obey the Law*. Yale University Press.
Tyler, Tom R., and Jeffrey Fagan. 2008. “Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities Symposium - Legitimacy and Criminal Justice.” *Ohio State Journal of Criminal Law* 6:231–76.
Tyler, Tom R., and Yuen J. Huo. 2002. *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. Russell Sage Foundation.
Tyler, Tom R., and Jonathan P. Jackson. 2014. “Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement.” *Psychology, Public Policy and Law* 20 (1): 78–95.
Tyler, Tom R., and Justin Sevier. 2013. “How Do the Courts Create Popular Legitimacy-The Role of Establishing the Truth, Punishing Justly, and/or Acting through Just Procedures.” *Albany Law Review* 77: 1095.
UN-Habitat. 2013. *Prosperity of Cities*. The State of the World’s Cities. Routledge.
Uprimny Yepes, Rodrigo. 2007 “La Judicializacion de la Política en Colombia: Casos, Potencialidades y Riesgos.” *Sur. Revista Internacional de Direitos Humanos* 4 (6): 18.
Uprimny, Rodrigo, and Juanita Durán. 2014. “Equidad y protección judicial del derecho a la salud en Colombia,” 197 *CEPAL – Serie Políticas Sociales*.
Uprimny, Rodrigo, and Mauricio García Villegas. 2007. “The Constitutional Court and Social Emancipation in Colombia.” In *Democratizing Democracy: Beyond the Liberal Democratic Canon*, edited by Boaventura De Sousa Santos, Maria Jose Arthur, Leonardo Avritzer, Sakhela Buhlungu, and Patrick Heller. Verso.

Urueña, Rene. 2013. “Global Water Governance and the Rise of the Constitutional Regulatory State in Colombia.” In *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies*, edited by Navroz Dubash and Bronwen Morgan. Oxford University Press.

Valencia Lomelí, Enrique. 2008. “Conditional Cash Transfers as Social Policy in Latin America: An Assessment of Their Contributions and Limitations.” *Annual Review of Sociology* 34 (1): 475–99.

Valencia Villa, Hernando. 1987. Cartas de batalla: una crítica del constitucionalismo colombiano. Universidad Nacional de Colombia.

Van Cott, Donna. 2000. *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*. University of Pittsburgh Press.

Vanhala, Lisa. 2011. “Legal Mobilization.” http://www.oxfordbibliographies.com/display/id/obo-9780199756223-0031.

———. 2012. “Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK.” *Law & Society Review* 46 (3): 523–56.

———. 2016. “Legal Mobilization under Neo-Corporatist Governance: Environmental NGOs before the Conseil d’Etat in France, 1975–2010.” *Journal of Law and Courts* 4(1):103–30.

———. 2018a. “Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Procedural Rights Back Home: Shaping the Structure of Legal Opportunities.” *Law & Policy* 40(1):110–27.

———. 2018b. “Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy.” *Comparative Political Studies* 51(3):380–412.

Waldmeir, Patti. 1997. *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa*. W.W. Norton & Co. Inc.

Wedeen, Lisa. 2002. “Conceptualizing Culture: Possibilities for Political Science.” *American Political Science Review* 96 (4): 713–28.

Wendt, Alexander. 1999. *Social Theory of International Politics*. Cambridge University Press.

Wenzel, James P., Shaun Bowler, and David J. Lanoue. 2003. “The Sources of Public Confidence In State Courts: Experience and Institutions.” *American Politics Research* 31 (2): 191–211.

Weyland, Kurt. 1996. *Democracy Without Equity: Failures of Reform in Brazil*. University of Pittsburgh Press.

Wilfahrt, Martha. 2018. “Precolonial Legacies and Institutional Congruence in Public Goods Delivery.” *World Politics* 70 (2): 239–74.

Williams, Lucy A. 2014. “The Right to Housing in South Africa: An Evolving Jurisprudence.” *Columbia Human Rights Law Review* 45 (3): 817–45.

Wilson, Bruce M. 2009. “Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia.” *Journal of Politics in Latin America* 1 (2): 59–85.

Wilson, Bruce M., and Juan Carlos Rodríguez Cordero. 2006. "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics." *Comparative Political Studies* 39 (3): 325–51.
Wilson, Joshua. 2011. "Sustaining the State: Legal Consciousness and the Construction of Legality in Competing Abortion Activists' Narratives." *Law & Social Inquiry* 36 (20): 455-83.
Wood, Elisabeth Jean. 2003. *Insurgent Collective Action and Civil War in El Salvador*. Cambridge University Press.
Wood, Geof, and Ian Gough. 2006. "A Comparative Welfare Regime Approach to Global Social Policy." *World Development* 34 (10): 1696–1712.
Woods, Patricia J. 2008. *Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel*. SUNY Press.
Woods, Patricia J., and Lisa Hilbink. 2009. "Comparative Sources of Judicial Empowerment: Ideas and Interests." *Political Research Quarterly* 62(4): 745–52.
World Atlas. n.d. "The Richest and Poorest Provinces Of South Africa." https://www.worldatlas.com/articles/the-richest-and-poorest-provinces-of-south-africa.html.
World Bank. 2017. "GINI Index." https://data.worldbank.org/indicator/SI.POV.GINI.
Yamin, Alicia Ely, and Siri Gloppen, eds. 2011. *Litigating Health Rights: Can Courts Bring More Justice to Health?* Human Rights Program, Harvard Law School.
Yamin, Alicia Ely, and Oscar Parra-Vera. 2009. "How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court." *PLoS Medicine* 6 (2).
Yashar, Deborah J. 1999. "Democracy, Indigenous Movements, and Postliberal Challenge in Latin America." *World Politics* 52 (1): 76–104.
———. 2005. *Contesting Citizenship in Latin America: The Rise of Indigenous Movements and the Postliberal Challenge*. Cambridge University Press.
Yngvesson, Barbara. 1988. "Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town." *Law & Society Review* 22: 409-48.
Yom, Sean. 2015. "From Methodology to Practice: Inductive Iteration in Comparative Research." *Comparative Political Studies* 48 (5): 616–44.
Young, Katharine G. 2012. *Constituting Economic and Social Rights*. Oxford University Press.
Zackin, Emily. 2013. *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*. Princeton University Press.
Zemans, Frances Kahn. 1982. "Framework for Analysis of Legal Mobilization: A Decision-Making Model." *American Bar Foundation Research Journal* 7 (4): 989–1071.
———. 1983. "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77 (3): 690–703.
Zuern, Elke. 2011. *The Politics of Necessity: Community Organizing and Democracy in South Africa*. University of Wisconsin Press.

Legal Cases – Colombia

T-002/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-002-92.htm.
T-406/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-406-92.htm.
T-423/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-423-92.htm.
T-426/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-426-92.htm.
T-451/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-451-92.htm.
T-506/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-506-92.htm.
T-598/92. 1992. http://www.corteconstitucional.gov.co/relatoria/1992/t-598-92.htm.
T-005/95. 1995. http://www.corteconstitucional.gov.co/relatoria/1995/t-005-95.htm.
T-760/08. 2008. http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm.

C-157/97. 1997. http://www.corteconstitucional.gov.co/relatoria/1997/c-157-97.htm.
C-747/99. 1999. http://www.corteconstitucional.gov.co/relatoria/1999/c-747-99.htm.
C-950/07. 2007. http://www.corteconstitucional.gov.co/relatoria/2007/c-950-07.htm.

Legal Cases – South Africa

S v Makwanyane and Another. 1995. http://www.saflii.org/za/cases/ZACC/1995/3.html.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others. 1996. http://www.saflii.org/za/cases/ZACC/1996/27.html.

Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995. 1996. http://www.saflii.org/za/cases/ZACC/1996/4.html.

President of the Republic of South Africa and Another v Hugo. 1997. http://www.saflii.org/za/cases/ZACC/1997/4.html.

Prinsloo v Van der Linde and Another; *Harksen v Lane NO and Others*. 1997. http://www.saflii.org/za/cases/ZACC/1997/12.html.

S*oobramoney v Minister of Health (Kwazulu-Natal)*. 1997. http://www.saflii.org/za/cases/ZACC/1997/17.html.

Van Biljon and others v Minister of Correctional Services and others. 1997. https://dullahomarinstitute.org.za/socio-economic-rights/Cases/South%20African%20Cases/high-court-cases/van-biljon-and-others-v-minister-of-correctional-services-and-others-1997-4-sa-441-c-1997-6-bclr-789-c.

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others. 1998. http://www.saflii.org/za/cases/ZACC/1998/15.html.

Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal. 1998. http://www.saflii.org/za/cases/ZACC/1998/20.html.

Christian Education South Africa v Minister of Education. 2000. http://www.saflii.org/za/cases/ZACC/2000/11.html.

Government of the Republic of South Africa and Others v Grootboom and Others. 2000. http://www.saflii.org/za/cases/ZACC/2000/19.html.

Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College. 2000. http://www.saflii.org/za/cases/ZACC/2000/23.html.

Minister of Education v Harris. 2001. http://www.saflii.org/za/cases/ZACC/2001/25.html.
Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others. 2001. http://www.saflii.org/za/cases/ZACC/2001/19.html.
Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another. 2002. http://www.saflii.org/za/cases/ZACC/2002/2.html.
Minister of Health and Others v Treatment Action Campaign and Others. 2002. http://www.saflii.org/za/cases/ZACC/2002/15.html.
Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development. 2004. http://www.saflii.org/za/cases/ZACC/2004/11.html.
Port Elizabeth Municipality v Various Occupiers. 2004. http://www.saflii.org/za/cases/ZACC/2004/7.html.
Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others. 2008. http://www.saflii.org/za/cases/ZACC/2008/1.html.
Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others. 2009. http://www.saflii.org/za/cases/ZACC/2009/16.html.
Abahlali baseMjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others. 2009. http://www.saflii.org/za/cases/ZACC/2009/31.html.
Nokotyana & Others v Ekurhuleni Metropolitan Municipality & Others. 2009. http://www.saflii.org/za/cases/ZACC/2009/33.html.
Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others. 2011. http://www.saflii.org.za/za/cases/ZACC/2011/13.html.
Rand Leases Properties v Occupiers of Vogelstruisfontein and Others. 2011, 2013, 2014. http://www.seri-sa.org/index.php/litigation-9/cases/12-litigation/cases/77-rand-leases-properties-v-occupiers-of-vogelstruisfontein-and-others-rand-leases.
Federation for Sustainable Environment and Others v Minister of Water Affairs and Others. 2012. http://www.saflii.org/za/cases/ZAGPPHC/2012/128.html.
Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another. 2012. http://www.saflii.org/za/cases/ZACC/2012/26.html.
Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another. 2013. http://www.saflii.org/za/cases/ZACC/2013/25.html.
Ngomane and Others v Govan Mbeki Municipality. 2016. http://www.saflii.org/za/cases/ZACC/2016/31.html.
Daniels v Scribante and Another. 2017. http://www.saflii.org/za/cases/ZACC/2017/13.html.