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Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court and the Right to Health

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ABSTRACT

Why do some constitutional transitions trigger the emergence of progressive judicial activism? This article addresses this question through an analysis of the creation of the Colombian Constitutional Court and its subsequent activism toward rights in general and the right to health in particular. This research suggests that ideational variables are crucial to explain this outcome. On the one hand, the Constitutional Court's behavior reflects the dominance of the *institutional* conception that it is the judiciary's role to help fulfill the promises of the constitutional text. On the other, programmatic beliefs about the relationship between the rule of law and market-driven economic growth led powerholders to create the court and appoint judges with this orientation. The emergence of progressive judicial activism in Colombia, this analysis suggests, was the unexpected outcome of purposeful political choices made by proponents of neoliberal economics.

Most recent constitutions grant judges the authority to enforce bills of rights laden with positive entitlements, but judicial responses to social rights claims have varied across cases. In some countries, courts have refused to enforce positive rights; but in others, judges have pushed for greater social protection and more inclusive welfare programs (see Gargarella et al. 2006; Gauri and Brinks 2008). Colombia belongs to the second category. In 1991 an all-inclusive constitutional convention drafted a document that defined Colombia as an *Estado Social de Derecho*, enumerated a long list of negative and positive rights, broadened access to the judiciary, and created a Constitutional Court with vast powers of review. Since then, groups and individuals have successfully relied on legal strategies to demand the provision of welfare benefits. The right to health, in particular, has been invoked in hundreds of thousands of legal cases over the years, the outcomes of which have pushed the boundaries of health policy beyond those envisioned by Colombian legislators. In all these instances, the jurisprudence of the Constitutional Court has guided the lower echelons of the judiciary.

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This article aims to explain the emergence of progressive judicial activism in Colombia, defined as judicial behavior that demands the prompt provision and expansion of welfare benefits. The research suggests that this outcome was the unexpected result of political choices made during the country's recent constitutional transition regarding the shape and composition of the Constitutional Court. César Gaviria, the president at the time of the Constituent Assembly, subscribed to the belief that an efficient system of negative rights protection is a precondition for the success of market-driven economic growth. This belief, this study argues, encouraged him to defend the institutionalization of open access to the judiciary, to propose the creation of a Constitutional Court, and to appoint justices who shared the view that the judiciary's institutional mission is to protect rights. Yet there were also progressive elements in the Constituent Assembly that imbued the document with social provisions antithetical to the government's goals. Judges are not impervious to broader sociopolitical discourses, and when politicians empower prorights individuals to enforce constitutions with a strong social component, they open the door for the emergence of progressive judicial activism.

The finding that ideas about the role of the judiciary are crucial determinants of political decisions to create courts and of judicial responses to rights claims suggests interesting alternatives to existing theories of judicial empowerment and behavior. First, the Colombian case implies that strong courts are not antithetical to the preferences of officeholders, and that incumbents who have substantive governmental objectives may support a strong judiciary if they believe that such an institution can help them accomplish their programmatic goals. Second, the behavior of the Colombian Constitutional Court suggests that different conceptions of the judicial role are necessary for different types of judicial activism to emerge. The behavioral impact of ideational variables was initially ignored by much of the political science literature on Latin American courts, but scholars are now calling for its inclusion in analyses of judicial politics in the region (Kapiszewski and Taylor 2008, 755). This study aims to help fill this gap in the literature by assessing the relative explanatory power of ideas and beliefs in comparison with other factors.

The article will proceed to describe alternative explanations for the emergence of progressive judicial activism in newly constitutionalized countries, and to develop the argument that such activism is unlikely to emerge if judges do not hold certain programmatic beliefs about the judicial role. It discusses the political conditions under which such ideas might become entrenched in the judiciary. An empirical analysis of the ideational origins and consequences of judicial power in Colombia traces the political processes leading up to the empowerment of the

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Constitutional Court, the entrenchment of rights in the constitution, and the appointment of its first judges. Evidence is provided that judges appointed by the promarket executive were the primary defenders of greater judicial protection for negative and social rights, and that their actions were motivated by an institutional conception of the judicial role that clashed with traditional views of that role held by members of Colombia's legal class.

Determinants of Progressive Judicial Activism

Why do some newly empowered courts accept and promote claims for redistributive justice while others refuse to do so? The comparative literature on judicial politics has developed a number of answers to this question. According to formal legal arguments, the constitutional text itself can either encourage or stymie judicial protection for social rights. If constitutions list such rights as mere "directive principles" for elected officials, for example, we should not expect judges to enforce them against legislative will (see Tushnet 2008, 237–47). Legal mobilization theories, in contrast, have suggested that rights activism is contingent on the presence of a resource-rich support structure for litigation (Epp 1998). This conclusion is based on the argument that judges are reactive individuals who engage in specific "rights battles" only after a critical mass of cases is filed within the broader legal system by organized interests.

The exception to this rule is found in settings where access to the judiciary is easy and cheap enough to allow even resource-poor groups and individuals to bring their grievances to the courts. As legal opportunity structure arguments claim, in such contexts we should expect a "rights revolution" regardless of the presence of organized civil society (Wilson and Cordero 2006). Moreover, strategic theories argue that judicial activism is more likely to emerge when there is a low probability of political retaliation against the judiciary (Vanberg 2001; Rios-Figueroa 2007; Chávez 2004). This view is based on the assumption that new courts are mainly concerned with expanding their authority, and for that reason will defend social rights instrumentally to build popular support only when the political system is sufficiently fragmented.

The research for this study shows that these arguments provide important insights into the institutional and structural conditions that have allowed the emergence of progressive judicial activism in Colombia since 1991, but that they are insufficient to fully explain the behavior observed. Constitutional language has influenced the justices' decisions, and arguably if the document had not identified Colombia as an *Estado Social de Derecho*, or Social State under the Rule of Law, we might not have observed the type of behavior that emerged. Nevertheless, the court's output contradicts the expectations of formal legal argu-

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ments, for the constitution excludes social rights from the list of judicially enforceable norms.

Similarly, the openness of the Colombian judiciary has provided the court with the influx of cases without which judges are unlikely to engage in progressive activism. Yet this study provides evidence that the court's progressive jurisprudence evolved in tandem with litigation and not after a critical mass of cases reached the lower court system. Furthermore, the fragmentation of the Colombian political system since 1991 has weakened the credibility of political threats to the court's authority and has allowed the court to engage in behavior that falls outside the preference intervals of officeholders. Yet the structural context in which the court dwells does not explain the substantive content of its jurisprudence.

The insufficiency of these explanations indicates that whether or not newly empowered judges engage in progressive judicial activism is also contingent on their particular attitudes toward rights, including social rights. It suggests, in other words, that judges are neither purely reactive individuals nor powermongers constantly assessing threats to their authority, but have preferences and attitudes that are not externally determined. Such attitudes help guide their reactions to the formal aspects of constitutional texts, determine how they respond to rights litigation, and define their strategies for dealing with structural and institutional constraints. If judges on the bench are not internally predisposed to enforce the rights provisions of the constitution, it is unlikely that the variables enumerated here will translate into progressive judicial activism.

The literature on the sources of judicial attitudes can be roughly divided into two camps. Some scholars argue that judges' decisions stem from their policy preferences, while others contend that legal interpretations stem from judges' ideas and beliefs about their institutional mission (see Whittington 2000).[1] As Thomas Keck puts it, "so long as the justices think that the purpose of an independent judiciary is to defend certain fundamental principles against majoritarian interference, that normative commitment is likely to shape at least some of their decisions" (2007, 337).

The research for this study indicates that in Colombia, the initial push for greater judicial involvement in rights issues originated with a group of judges who subscribed to the view that constitutions and bills of rights entail responsibilities for governments and that judges should employ their powers to facilitate the accomplishment of constitutional goals. This may be called the new constitutionalist position (see Stone-Sweet 2000, 37). This conception contrasts with the set of beliefs held by judges who belonged to Colombia's traditional legal circles and who subscribed to the positivist legal ideology that dominated Latin America

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for most of the twentieth century. According to their view, constitutions do not entail a set of moral responsibilities, and courts should focus their efforts on making sure that legal norms and governmental actions satisfy the procedural requirements set forth by the constitution (see Landau 2005). It was the entrenchment of new constitutionalist ideas on the court, combined with the text of the constitution, rules governing access to the judiciary, and the fragmentation of the political system, that allowed progressive activism to emerge in Colombia after 1991.

The entrenchment of judicial attitudes is the result of political choices. The current paradigm in the literature on judicial politics argues that potential electoral losers create accessible courts and staff them with activist judges to constrain likely electoral winners, and not to satisfy some moral obligation toward the protection of citizens' rights (Ginsburg 2003; Hirschl 2004; Finkel 2005). In general, these interest-based arguments anchor their claims on the assumption that politicians want to govern with as few constraints as possible, and will refuse to support judicial authority and activism while they anticipate remaining in office. Clearly, it is not unrealistic to expect politicians in an uncertain electoral position to support institutions that create a check on majoritarian institutions (Przeworski 1991, 87–88). But it is unrealistic to assume that courts, even independent ones, cannot benefit officeholders who expect to remain in power as well. On the one hand, and given courts' relative insulation from democratic politics, officeholders may see them as potential allies in the pursuit of their substantive objectives, particularly if those objectives clash with the status quo (Whittington 2005). On the other hand, officeholders may see strong courts as inherent components of their programmatic goals, goals that are not easily described in the language of political interests but that require an assessment of the ideas and beliefs held by institutional designers (Hilbink 2009; Woods and Hilbink 2009).

In Colombia, the belief that market-based economies are the most effective in boosting prosperity encouraged a powerful and popular president to defend the creation of an accessible judicial system and to populate it with rights-defending judges. Promarket economists have disseminated the causal belief that the rule of law, judicial predictability, and an efficient system of rights protection facilitate market-driven economic development, and a number of international organizations have promoted this argument during the most recent wave of market reforms (see Wilson et al. 2004). President Gaviria (1990–94) was an economist influenced by neoliberal ideals, and his government was engaged in the pursuit of a series of paradigmatic economic and institutional reforms designed to insert Colombia into the international market and to create the institutional conditions for more efficient and rational policymaking. Gaviria's programmatic beliefs arguably deter-

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mined his preferences for a particular set of judicial institutions and for a particular kind of judge. The Colombian Constituent Assembly, fragmented as it was, created the conditions for judicial empowerment, but we cannot explain the actual shape of the judiciary that emerged from the proceedings without taking into consideration the preferences and motivations of the executive.

Gaviria wanted to create a strong system of negative rights protection, but he was not completely unconstrained during the transition, and he could not prevent leftist members of the assembly from including a set of social aspirations in the new constitution. For that reason, he worked to exclude social rights from the list of judicially enforceable norms. The Constitutional Court, nevertheless, ignored these constraints. This outcome resulted from the interaction between the judicial role conceptions entrenched in the court, the substantive character of the constitution, and the legal inputs received from litigants. Gaviria's appointees conceptualized the 1991 Constitution as entailing a set of responsibilities for the state, and could not ignore the more substantive aspects of the document or their own role in turning those aspects into reality.

The emergence of progressive judicial activism in Colombia, in other words, was the unexpected outcome of purposeful political decisions made by a neoliberal dominant actor. Such an outcome does not weaken the general theory of judicial empowerment proposed here, however. As Hall (2005, 134) succinctly puts it, "every political action entails a risk-laden judgment about what will follow from it, which can be difficult to form with accuracy. Unintended consequences are endemic to the political world."

Ideational Origins of a Rights-Protecting Judiciary in Colombia

One of the central arguments of this article is that ideas and programmatic beliefs, rather than a narrowly defined set of political or power interests, induced the Colombian executive to defend the creation of a Constitutional Court in 1991 and to staff it with new constitutionalist judges. To assess the validity of this argument, this section presents a contextual analysis of the 1991 Constitutional Convention that identifies the goals, preferences, and actions of relevant actors at the time of the transition.

Empowering a Constitutional Court: Presidential Influence

Accessible courts and rights-protecting judges provide groups and individuals with the institutional means and legal support to make demands on the state, but these conditions were absent in Colombia before 1991.

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For one thing, the judiciary was out of reach for most of the population. Colombia for much of the twentieth century was under a state of emergency, which entailed the restriction of constitutional guarantees and the emergence of a legal system that favored resource-rich litigants at the expense of resource-poor ones (García Villegas 2006, 453–56). Moreover, a positivist legal ideology, antithetical to the notion that judges should consider unwritten principles of morality for guidance or that courts should seek to transform constitutional aspirations into reality, dominated Colombian legal education and permeated the Colombian judiciary (López Medina 2004).

The Constituent Assembly of 1991 represents a critical juncture for Colombia's legal system, for two reasons. First, it empowered a nine-member Constitutional Court to replace the Supreme Court of Justice (SCJ) as Colombia's highest tribunal. Second, it granted the new institution both abstract and concrete powers of review. The former allow the court to review the constitutionality of states of emergency and legislative outputs, and the latter are exercised through the *acción de tutela*, the Colombian version of the *recurso de amparo* common to many Latin American and European constitutions. This mechanism allows any person, without legal assistance, to file legal complaints whenever he or she believes his or her fundamental rights are being threatened by the actions or inactions of private or public authorities. Judges from all levels of the judiciary can decide on tutelas, and their decisions are of immediate application, but decisions might be appealed to higher courts in the judicial structure. The Constitutional Court, in turn, selects some for review in order to develop and unify the jurisprudence.

These changes are not necessarily surprising, for the 1991 assembly was highly fragmented and included formerly excluded social, political, and ethnic groups. As predicted by interest-based accounts, such contexts are conducive to the creation of institutions that create a check on governmental authority. Yet it was President Gaviria who defended the creation of a Constitutional Court. Other drafters were satisfied with merely expanding the Supreme Court's authority, and did not see the need for a new judicial institution. Opposition to Gaviria's proposal is observed in the published version of the convention's internal debates, and it appears that partisanship had no direct influence on individual drafters' preference for a new system or the old (Garcés Lloreda and Velasco Guerrero 1991).[2] The SCJ, in particular, vehemently opposed Gaviria's plan, for it would subject that court to the Constitutional Court's decisions.

The president had to persuade a majority of drafters that a new court was preferable to the status quo, and on one occasion went to the assembly to defend the argument that this institution was necessary to avoid the release of contradictory judicial decisions regarding the reach

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of the new constitution (Gaviria 1991). His minister of government, Humberto de la Calle, also emphasized this point in meetings with the Constituent Commission charged with designing the judicial system.

> [W]hen the new constitution is approved there will be a deep institutional reformulation at odds with the previous constitutional regime, which will generate a series of questions that will certainly be debated by citizens. From this emerges the need for coherence in questions of institutional interpretation and control; and if we lack this degree of coherence, of congruence in the interpretation of the new constitution, we run the risk of juridical anarchy (Presidencia de la República 1991, 18).

The assembly finally approved the creation of the court with 44 out of 70 votes (Cepeda 1993, xl). It was one of a few secret votes during the whole proceeding, which attests to the proposal's controversial nature. It is unclear whether drafters decided to transform the country's judicial system because they found Gaviria's idea to be "a persuasive way of organizing the world" (Weingast 2005, 163) or because they received concessions in return for their support. The answer is probably both. The relevant factor, however, is that these reforms were implemented due to the actions of a president at the beginning of his term, who enjoyed high levels of popular support, and whose party held a plurality in the Constituent Assembly (see Dugas 1993). According to interest-based explanations, incumbents in such strong political positions are unlikely to support reforms that strengthen the judicial branch.

From a purely interest-based perspective, this seemingly paradoxical institutional choice has to be conceptualized as a way to eliminate the authority of an institution, the Supreme Court, which, in the years preceding the Constituent Assembly, had imposed a number of barriers to the reformist projects of Colombian presidents. This is a plausible explanation, for between the late 1970s and 1991, what had historically been a deferential institution began to exert its authority in ways detrimental to the interests of Colombian governments. In 1978, for example, the Supreme Court declared its capacity to assess the constitutionality of constitutional amendments, and a few years later began vetoing decrees released during states of emergency. One of the most controversial declarations of unconstitutionality occurred in 1983, when the court declared an emergency fiscal reform unconstitutional. In doing so, the Supreme Court relied on the argument that it held the responsibility to uphold the formal procedures laid out in the constitution and to protect them from imbalances in the system of separation of powers (Cepeda 1985).

Yet an interest-based perspective does not explain why the government proposed to grant so many powers to a brand-new court, rather than merely to weaken the existing one. To fully understand Gaviria's

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choices, we must analyze how they fit into his broader program of government. Ultimately, the decision to create a new judicial institution to exercise judicial review had less to do with the Supreme Court's constraining capacity than with its incompatibility with Gaviria's programmatic goals and with the kind of state that his government sought to build.

Programmatic Basis for a Constitutional Court

The 1991 Constitution replaced a document that had been in place since 1886 and was the culmination of a lengthy process of reform driven by Colombia's national political elites. Leaders from both the Liberal and Conservative parties, who had dominated Colombian politics since the nineteenth century, had attempted to adapt the country's policies to the demands of a growing urban population at least since the late 1960s, only to have their efforts thwarted by a congress whose electoral basis lay in the countryside (Archer and Shugart 1997; Nielson and Shugart 1999).

In 1988, Liberal president Virgilio Barco and the leadership of the Conservative Party called for an overhaul of the 1886 Constitution in order to alter the institutional incentives of congressional members. Congress opposed these changes, but the emergence of a student movement in support of constitutional reforms gave Barco enough political capital to hold a plebiscite in tandem with the presidential elections of May 1990. At the end of the electoral process, voters supported the election of a constituent assembly while electing Gaviria, of the Liberal Party, to the presidency (see Segura and Bejarano 2004; Archer and Shugart 1997).

Attempts to reform the 1886 Constitution coincided with a growing consensus in technocratic circles on the need to internationalize the Colombian economy. As Barco's finance minister has written, by the second half of 1988, the government's economic team had agreed that the conditions were ripe for a slow liberalization of trade (Alarcón 1994, 447). Influencing this decision were pressures from the World Bank and the International Monetary Fund, demands from various exporters, the less-than-stellar growth rate of the economy in the 1980s, and a general shift in the ideological orientation of Colombian technocrats (Urrutia 1994, 289–94, 302). Although modest in comparison to his successor's reforms, Barco's measures nevertheless helped diminish economic and political resistance to the restructuring of the economy that took place during the first years of Gaviria's presidency.

César Gaviria was 43 years old when he ascended to the presidency. He had previously served as vice minister of development, congressman, and Barco's minister of finance (1986–87) and minister of government (1987–90). In all these positions, Gaviria defended the liberalization of Colombia's economy against the position of interest

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groups that defended the economic status quo rooted in protectionist practices. With a degree in economics from the University of the Andes, Bogotá's premier private university, he always criticized Latin America's reliance on the development strategy of import substitution industrialization. According to Edwards and Steiner (2008, 203), Gaviria firmly believed that the private sector should take a more proactive role in the country's development and that poverty alleviation would occur only after Colombia had joined the international market. To pursue these ends, he surrounded himself with a team of mostly young economists with degrees from the United States and few, if any, ties to political organizations and traditional economic interests (Edwards and Steiner 2008, 206–15; Cepeda Ulloa 1994, chapter 3).[3]

Gaviria had a specific programmatic goal, defined by his belief in the superiority of the market as a force of socioeconomic transformation; but to accomplish this goal he also had to adapt the country's institutions. To that end, his constitutional proposals included a series of measures designed to modernize the state. His project created an independent central bank, eliminated the state's monopoly on public services, and promoted the role of regional units in the provision of services through decentralization, among other changes. The constitution also had a series of transitional provisions that allowed his government to unilaterally enact efficiency-enhancing bureaucratic reforms (Hartzell 1993; Ladrón de Guevara 2002, 154–56).

Reforms to the judicial system were also part of this process of institutional adaptation to the requirements of neoliberal economics. Proponents of the market economy, at least since Adam Smith, have diffused the causal belief that the rule of law is a precondition for economic development and growth (see Wilson et al. 2004). To put it simply, an efficient market economy requires predictability in the application of norms and the protection of individual rights in general, and of property rights in particular. Perhaps paradoxically, given their emphasis on predictability, recent neoliberal proponents of judicial reforms state that it also requires a legal system willing to adapt existing rules to changing socioeconomic circumstances (Shihata 1995, 221–22). Gaviria shared these beliefs, which he expressed in public pronouncements and private conversations. According to him, a key obstacle to economic development in Colombia was the arbitrary application of legal norms (De la Calle 2009).

The Colombian legal system did not fit into Gaviria's governmental project. On the one hand, and as already stated, the Colombian judiciary was of difficult access. On the other, the dominance in it of a positivist legal culture rooted in the civil law tradition imposed two threats to the goal of transforming the Colombian judiciary into a system that would promote stability and predictability. First, civil law doctrines

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rejected the binding power of precedent, in the belief that only the legal text itself can guide judicial decisions. Codes and statutes are always open for interpretation, however, and without binding precedents, different judges might reach different decisions when dealing with similar issues. Second, positivism's reliance on the formal aspect of constitutional texts was believed to prevent judges from taking broader contextual factors into consideration when making decisions. Colombian presidents felt the impact of these legal-ideological characteristics in the 1970s and 1980s, when the Supreme Court made decisions that contradicted its own jurisprudence and vetoed various economic measures based on formalistic readings of the constitution.

Ideas and beliefs about the proper role of courts determined Gaviria's institutional choices regarding the Colombian judiciary, but to be convincing, ideational explanations of political choice require the identification of the "carriers" that bring new ideas into the political system and convince decisionmakers of their superiority (Berman 1998, 25–26). Gaviria's team of constitutional reformers included three different positions regarding the creation of a Constitutional Court (Cepeda 2007; De la Calle 2009). One group, which included his minister of justice and other individuals with ties to the Supreme Court, was opposed to its creation. Another, formed mostly by a small group of young lawyers and Humberto de la Calle, actively defended it. Among this group were Manuel José Cepeda and Fernando Carrillo Flórez, both of whom had been exposed to alternative conceptions of law and the judiciary's role while studying at Harvard Law School. De la Calle, on the other hand, had previously served on the Supreme Court, where he had become personally dissatisfied with the way the formalism and positivism of Colombia's legal institutions responded to claims for rights protection. These people supported new constitutionalist approaches to constitutional adjudication and lobbied Gaviria for a restructuring of the Colombian judiciary along these lines. Third, and surprisingly, given the economic impact of this institution in later years, Gaviria's macroeconomic team was indifferent to the court proposal. For them, this was a question for lawyers, not economists.

Ultimately, the decision whether or not to propose the creation of a Constitutional Court belonged to the president. To reach his conclusion, Gaviria assessed which institutional arrangement would better serve his programmatic goals. In Colombia in 1991, new constitutionalist ideals about the role of courts and rights in democratic systems of government converged with officeholders' programmatic beliefs regarding the strategy best suited to promoting growth and development (see Rodríguez Garavito 2009). This convergence helped to trigger a set of judicial reforms that, in the conventional interest-based perspective, do not make a whole lot of sense. Gaviria wanted a Constitutional Court

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not to constrain his opponents, but to facilitate the accomplishment of a programmatic goal. According to one of his allies, the government was conscious of the potential for judicial activism from a Constitutional Court, but it believed that such an institution would be able to adapt its decisions to the "requirements of the moment" in ways that the Supreme Court would not be able to do (Perry 2007). As Gaviria himself would later explain, the creation of the Constitutional Court was designed to develop the rule of law in accordance with the demands of globalization (see Gaviria's prologue in De la Calle 2004, 48).

Debates Concerning Rights and Their Enforceability

Gaviria's accomplishments are a testament to his political skills, for his party held only a plurality of the assembly. In fact, leftist parties held a third of the seats in the Constitutional Convention. The largest of these was the former guerrilla group M-19, whose leader co-chaired the proceedings with the leaders of the Liberal and Conservative parties. Leftist parties generally supported the government's broader constitutional proposals, but their presence in the assembly nonetheless influenced the debate concerning rights and their enforceability.

The 1886 Constitution was a conservative document, born out of elite distrust of the popular will, which conceptualized rights as concessions from the state rather than as inalienable possessions of all citizens (Gargarella 2005, 8–14). In reaction to this historical tradition, and because of the programmatic goals described, Gaviria's government defended the drafting of a normative bill of rights. The official position, however, was that whereas negative rights should be automatically enforceable, socioeconomic rights were progressive and should be developed by the legislature as conditions permitted. As Gaviria stated in a speech to the assembly,

> this distinction between rights has been accepted, for example, in Spain and Germany. . . . Taking advantage of this decadeslong experience, the government has issued for your consideration an attempt to classify rights in such a way that social, economic, and cultural rights, as well as collective rights, will not be immediately applicable. (Gaviria 1991, 6)

The president also used this argument to ease the concerns of the Colombian Association of Financial Institutions (ANIF 1991, 29).

Many in the assembly disagreed with this position. As a member of the commission charged with drafting the bill of rights wrote, "by analyzing the different projects presented . . . we have ascertained the wish of many drafters to contribute to a formulation of rights that reflects the most recent tendencies concerning their mechanisms of enforcement"

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(Uribe Vargas 1991, 10). Among these new trends was the conception of civil and social rights as complementary to one another. According to the commission, "Individual and social rights complement each other insofar as the latter amplify the scope of people's protection by guaranteeing them the material conditions for the full and effective enjoyment of individual rights" (Abella et al. 1991, 19). Similarly, one of the M-19's constitutional proposals classified the rights to education, health, and social security, among others, as fundamental and as having the same legal standing as negative rights (Navarro et al. 1991, 7–13).

Ultimately, the assembly drafted a document in which all rights were granted the same legal status and defined Colombia as an *Estado Social de Derecho*. The composition of the Constituent Assembly led to a conception of the reach of rights and the state's responsibility in providing for its citizens that overstepped the preferences of the executive. The primary consequence of these debates was the emergence of a constitutional text that, on the one hand, sought to create the institutional conditions necessary for the successful transition to a market economy, but on the other, entailed a series of substantive goals for elected governments. As some local observers have argued, the 1991 Constitution "is founded on a philosophy and an ideology consistent with interventionist social democracy, but brings in elements from the opposite side, a liberal or neoliberal approach, such as giving autonomy to a central bank" (Murillo-Castaño and Gómez-Segura 2005, 4). This dual identity would have a determinant impact on the Constitutional Court's behavior.

The Politics and Objectives of Judicial Selection

Gaviria enlisted young economists from outside Colombia's traditional circles in order to prevent old views from influencing his economic reforms, and chose judges according to the same logic. New institutions have no immediate impact if their members subscribe to the ideational perspectives that governed previous institutional arrangements. The learning process might eventually substitute new ideas for older ones, but this process is likely to be a lengthy one. In Colombia, the influence of new constitutionalist ideals on the nation's legal institutions was particularly unlikely. The heavy formalism of the Colombian judiciary is explained by a 1957 reform that institutionalized life tenure for Supreme Court justices and granted them the power to select their own replacements and to control appointments and promotions in the lower courts. Until that year, a short, five-year term for justices meant that the Supreme Court was a direct extension of the party in office at any given time (Dix 1967, 175).

By the 1980s, however, almost none of the sitting Supreme Court justices had political backgrounds. As Uprimny (2006a) writes, political

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insulation helped create a more independent and professional judiciary, but it also led to the evolution of a "judicial elite with aristocratic tendencies" that molded the broader legal system in accordance with its ideological preferences and was immune to the influence of alternative legal doctrines. (See Hilbink 2007 for a similar account of the Chilean judiciary during the transition to democracy.)

To break these behavior patterns, Gaviria's government proposed a cooperative mechanism of appointment to the Constitutional Court in which the senate would select justices from lists sent by the president, the Supreme Court of Justice, and the High Administrative Tribunal, or *Consejo de Estado*.[4] In the government's reasoning, such a mechanism would avoid the creation of a partisan court of the kind that existed before 1957 and of a legal "ivory tower" detached from the political reality of the moment (Presidencia de la República 1991, 17). The exception was the selection of the first court, a seven-member panel appointed for a one-year transitional term. The SCJ and the Consejo each appointed one judge to this bench, whereas Gaviria appointed five: two directly, one through his attorney general, and two through lists sent to the Constitutional Court for selection.

The Supreme Court and the Consejo followed their corporatist tradition and appointed members of their own institutions, but Gaviria appointed justices in accordance with political and substantive concerns. On the one hand, he appointed two justices from the Supreme Court to make amends with that institution and to reward the individuals who had supported the legality of the Constituent Assembly.[5] On the other, he appointed three judges with backgrounds in academia who had not served on Colombia's high courts. One of them, Alejandro Martínez, had advised the M-19 during the Constituent Assembly and was selected partly to reward M-19 for having supported many of the government's proposals (Martínez 2007). The remaining two were Ciro Angarita, a law professor from the University of the Andes; and Eduardo Cifuentes, a lawyer from Manuel José Cepeda's circle who had studied under Angarita. The justices of the first Constitutional Court and their backgrounds are summarized in table 1.

The principal characteristic of Gaviria's academic appointees was their commitment to human rights and to a proactive judicial role in protecting them, a commitment that was heavily influenced by their legal education. Angarita, for example, earned a degree from Yale Law School in 1969 (Herrán 1998, 65). At the time, that institution actively promoted "teaching and research directly relevant to improving the world" (Smith 2004, 151); on its faculty was legal philosopher Ronald Dworkin, an active defender of the position that judges should base their decisions on values. Arguably, these experiences also influenced Cifuentes, given his status as one of Angarita's former students at the University of the

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Table 1. The First Constitutional Court, 1992–1993

Judge	Nominated By	Background
Alejandro Martínez	President Gaviria	Academia and M-19
Ciro Angarita	President Gaviria	Academia
Eduardo Cifuentes	President Gaviria	Academia
Simón Rodríguez	Consejo de Estado	Consejo de Estado
Jaime Sanín	Supreme Court	Supreme Court
José Gregorio Hernández	President Gaviria	Supreme Court
Fabio Morón	President Gaviria	Supreme Court

Andes. The legal philosophy of Justice Martínez, on the other hand, was shaped by his tenure as a student at the Latin American Institute of Social and Economic Planning associated with CEPAL in Chile. According to him, during his stint at this United Nations institution, he "met for the first time the great universe of human rights, which was neither part of Colombia's legal education, nor applied by the courts, for the Supreme Court of Justice did not consider them part of domestic law" (Martínez 2001).

The appointment of judges committed to the protection of rights supports the claim that Gaviria's goal was to change the institutional mission of the judiciary rather than to constrain other political actors. Still, Gaviria was well aware of the political risks of delegating so much power to a Constitutional Court, and therefore also entrenched a series of institutional mechanisms commonly believed to restrict judges' decisional autonomy. Specifically, his constitutional project instituted congressional control over the institutional structure of the judiciary and a short, eight-year tenure for constitutional justices. According to strategic accounts of judicial behavior, congressional control encourages judicial moderation among judges seeking to protect the judiciary from political backlashes (Ferejohn and Kramer 2002, 976–94). Short tenure, in turn, allows politicians to reshape the composition of the court periodically.

The Gaviria government also sought to impose stricter limits on the judicial enforcement of social rights. Specifically, the codification commission appointed by the president to revise the constitutional text for final approval split the bill of rights into three different chapters, titled "Fundamental Rights," "Social, Economic, and Cultural Rights," and "Collective Rights." According to the commission's text, only those under the first heading, such as the rights to life, free speech, and religious expression, would be judicially enforceable through tutelas. The only social right of immediate application was children's right to health.

Thus, from an interest-based perspective, the creation of the Colombian Constitutional Court presents a paradox. Why would officeholders who do not expect to lose power in the short term support the creation

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of an institution that could limit their actions? Specific programmatic beliefs about which institutional structure would facilitate Colombia's transition to a growth-promoting market economy drove the institutional choices of President Gaviria and his government. These same ideas influenced the president's judicial selections, although political constraints forced him to compromise on some individuals. He could not prevent the entrenchment of social rights in the constitution, however, but he institutionalized mechanisms believed to prevent the judicial enforcement of those rights. These mechanisms, however, did not constrain the court as anticipated.

JUDICIAL ACTIVISM POST-1991: THE IMPACT OF INSTITUTIONAL CONCEPTIONS AND BELIEFS

The argument of this study is that the ideational characteristics of individual judges on the Constitutional Court, through interactions with the constitutional text and legal inputs, determined their responses to rights claims. Specifically, Gaviria's appointees to the Constitutional Court held the belief that judges should be actively involved in the protection of rights, and they framed their decisions accordingly. In contrast, their fellow judges, whose legal careers had been shaped by the traditional legal system, sought to limit judicial involvement in rights issues. Unexpectedly for Gaviria, however, his appointees also built a progressive jurisprudence, especially toward health, that has created a series of fiscal issues for the Colombian state.

The Emergence of Prorights Activism

Judicial reforms in Colombia were designed partly to facilitate the protection of citizens' rights, and popular reliance on the tutela has grown dramatically since the introduction of this institutional innovation in 1992 (figure 1). Two reasons explain this growth. First, the tutela is a cheap and quick mechanism of rights protection. Second, the success rate of tutelas is very high. In 2003, for example, lower courts granted 63 percent of all claims (Cepeda 2007, 98).

The success rate of tutelas was not always so high, however, and despite the influx of cases, the judicial system was initially unwilling to enforce the bill of rights (data from Vicepresidencia de la República 1995; Corte Constitutional 1999; Defensoría del Pueblo 2004, 2007). In 1992 and 1993, for example, lower courts granted less than 24 percent of requests for the judicial protection of a fundamental right. Data from the Supreme Court and the Consejo de Estado are even more striking. In the same period, the SCJ rejected 91 percent of the tutelas it received. When it acted as a court of appeals, it overturned a tutela previously

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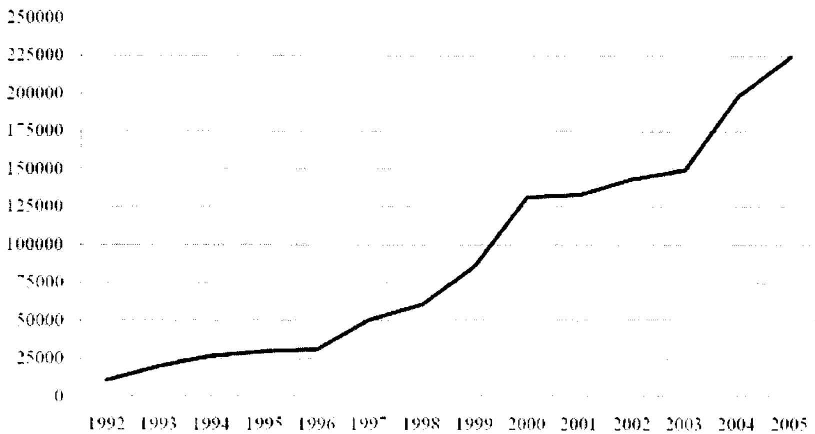
Figure 1. Tutelas Filed in Colombia, 1992–2005



Sources: Corte Constitucional 1999; Defensoría del Pueblo 2004, 2007

granted by a lower court 73 percent of the time. The Consejo de Estado behaved in a similar manner: it rejected 92 percent of tutelas received, and 74 percent of its decisions on appeal denied a claim previously granted. Note that half of the rejections in this initial period were justified on procedural grounds—on the argument that there were alternative legal venues to pursue the claim—suggesting that formalism and positivism shaped judicial decisions (Cepeda 2007, 97).

As these numbers indicate, the influx of rights cases did not initially exert strong influence over the Colombian judiciary. Yet these figures contrast starkly with those emanating from the Constitutional Court. In 1992 and 1993, Colombia's new judicial institution granted 47 and 53 percent of the tutelas it reviewed, respectively; and in 89 percent of the cases in which it revoked a lower court decision, it did so to grant a claim previously denied. In doing so, the court not only acknowledged the supremacy of rights, but also developed arguments in favor of judges' responsibility in facilitating the protection of those rights. Thus, whereas the Supreme Court of Justice and the Consejo de Estado attempted to limit the reach and impact of the tutela, the Constitutional Court sought to expand it. Clearly, the substantive character of the new constitution influenced the court's output; and arguably, the influx of rights cases had an impact on the court's jurisprudence as well. However, if constitutional language and legal inputs were the whole story, we would not have observed such differences of behavior between the various levels of the Colombian judiciary. The lower court system, after all, is more exposed to rights litigation than the Constitutional Court.

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Table 2. Success Rate of Tutelas by Sala, 1992–1993

Sala #	Granted	Denied	Justices	Dissenting Opinions
2	74.3% (N=26)	25.7% (N=9)	*Cifuentes	0
			*Martínez	0
			Hernández	5
1	72.7% (N=24)	27.3% (N=9)	*Angarita	2
			*Cifuentes	0
			Hernández	5
7	46.2% (N=12)	53.8% (N=14)	Sanín	4
			*Angarita	0
			*Cifuentes	0
6	45.8% (N=11)	54.2% (N=13)	Rodríguez	0
			Sanín	0
			*Angarita	5
3	38.2% (N=13)	61.8% (N=21)	Hernández	0
			Morón	0
			*Martínez	1
4	32.3% (N=11)	67.7% (N=23)	*Martínez	1
			Morón	0
			Rodríguez	0
5	11.1% (N=3)	88.9% (N=24)	Morón	0
			Rodríguez	0
			Sanín	0

*Justices from outside the legal establishment. The presiding justice of each sala is listed first.
Sources: Vicepresidencia de la República 1995; Official Database of the Colombian Constitutional Court.

The Constitutional Court's jurisprudence and rights activism arguably reflects the institutional conception of President Gaviria's appointees, and the fact that the first court did not act as a unified entity provides evidence of this. According to the court's rules, three-member panels, or *salas*, select tutelas for review, and their final decisions require the support of two judges. Each justice belongs to three salas and presides over one of those. Table 2 displays the different salas and their composition during the first court's tenure, as well as the ratio of tutelas that each of them granted or denied. As the table shows, the panels whose members included two of Gaviria's nontraditional appointments granted a higher proportion of claims. Panels on which Gaviria's appointees were a minority, in turn, failed to grant a high percentage of tutelas. We also observe that, with two exceptions involving justice Angarita, justices in

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the ideational minority of a panel released all dissenting opinions. The only panel that had no dissenters during the court's first year was the "homogeneous panel" composed of three traditional justices.

According to Justice José Gregorio Hernández, these minority opinions resulted from clear philosophical differences between members of the court regarding whether or not the judiciary should be the primary enforcer of rights and whether or not the tutela should be the primary vehicle for rights-related claims (Hernández 2009). Gaviria's nontraditional appointees sought to facilitate the employment of the tutela and to encourage lower courts to accept claims, whereas those who had belonged to the Supreme Court or the Consejo de Estado felt committed to a more formalistic reading of judicial procedures and a more circumscribed judicial role. This tendency continued during the second court's term (1993–2000), in which many of the first court's judges remained. Between 1993 and 1998, salas dominated by judges appointed by either the Supreme Court or the Consejo de Estado were less likely either to review or to grant tutelas than salas dominated by Gaviria appointees.[6]

The data presented in table 2 indicate that nontraditional judges were more likely to accept rights claims than those with a background in the Colombian judicial system, but these data cannot identify the ideational basis for their behavior. To accomplish that, we must rely on the pronouncements of the justices themselves. As Alejandro Martínez stated on the occasion of his retirement, Colombian jurists "came from a tradition of symbolic law, with a marked difference between what the law establishes and the conduct of judicial and social actors in general, a breach between norm and practice that threatened the affectivity of the 1991 Social Pact" (Martínez 2001). And in a personal interview, "In the first court, Cifuentes, Angarita, and I realized that we would clash with a court of prestige that had existed for many decades. But we also believed that we had to justify the creation of a new court, that we had to change the prevailing culture" (Martínez 2007).

In a similar vein, Justice Cifuentes has said that "prior to 1991 Colombia was an extremely legalist country where the normative value of the constitution had limited efficacy. . . . But the court and other state agencies have no intrinsic value if they do not become vessels through which the principles and rights of the constitution are made effective" (quoted in Restrepo Saldarriaga 2003). And furthermore, "we wanted to develop a fresh jurisprudence, unencumbered by the Supreme Court's decisions from the past. At the outset the court had no 'mortgage,' and we felt the responsibility of developing the new constitution in a fresh way. We wanted to make rights count for something" (Cifuentes 2007).

Justice Angarita has provided perhaps the clearest expression of the institutional mission defended by Gaviria's first appointees to the bench.[7] In an often-cited tutela, he wrote,

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> There is a new strategy for protecting fundamental rights. The Constitutional Court guarantees the coherence and wisdom of rights interpretation and enforcement. This new relation between fundamental rights and judges is a sharp departure from the previous constitution; a change that can be defined as a new strategy for rights enforcement that consists in granting to judges, and not to the administration or to legislators, the responsibility of promoting the development of fundamental rights. In the previous system rights only had symbolic force. Today, with the new constitution, rights are what judges say they are through tutela decisions. (T-406/1992)[8]

Just as certain lawyers acted as carriers of new ideas during the constitutionmaking process, these judges acted as carriers of new conceptions of the judicial role. At the outset there were struggles with traditional judges, but Gaviria's early appointees eventually succeeded in building a jurisprudential regime that has guided the actions of the broader legal system ever since. It is perhaps easy to see how Colombian judges have become receptive to the institutional conception promoted by the new constitutionalist judges instead of the one expressed by the formalistic judges; after all, and as strategic arguments posit, judges also want to expand their authority, and therefore should welcome arguments in favor of a more proactive judicial role.

Nevertheless, the discussion indicates that how judges on high courts act is still highly contingent on their internal beliefs about the judicial role and about the ends of judicial authority. Consequently, if political actors had not entrenched the beliefs just described in the court, the activism that we have observed might not have emerged, at least not in the short term.

These findings help confirm two propositions set forth in this article: first, that ideas about role conceptions and a sense of mission are important determinants of judicial behavior, and second, that such conceptions are purposefully entrenched in judicial institutions by political actors who want courts to help them accomplish an idea-driven programmatic goal. These conceptions and beliefs shaped the court's activism toward social rights in general and the right to health in particular.

Unexpected Outcomes: The Judicial Enforcement of Social Rights

As we have seen, the final constitutional text discriminated between fundamental and social rights, only the first of which were deemed judicially enforceable. Yet in the years since the constitutional convention, groups and individuals consistently have relied on the tutela for the provision of welfare benefits. The right to health in particular has been invoked in hundreds of thousands of legal cases over the years.

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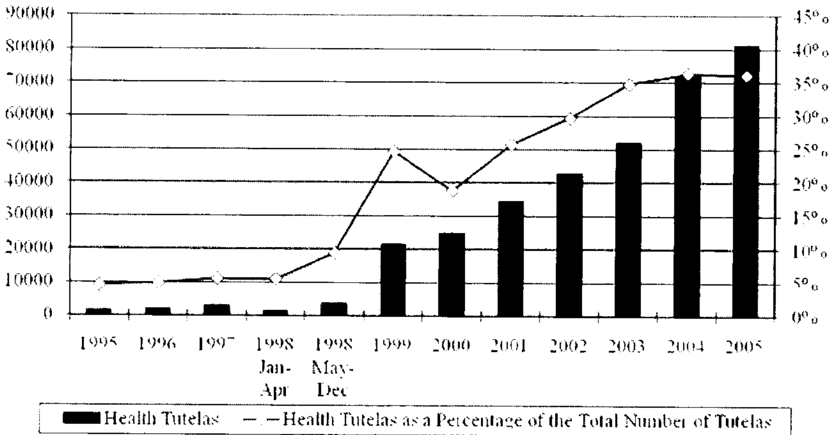
Figure 2. Tutelas Invoking the Right to Health, 1995–2005



Source: Compiled by the author from data available in Corte Constitucional y Consejo Superior de la Judicatura 1999; Defensoría del Pueblo 2004, 2007.

The evolution of health tutelas in Colombia cannot be understood without considering the country's health legislation. The General Law of Social Security, Law 100 of 1993, was a compromise between supporters of social-democratic and neoliberal concepts of social security. It subscribes to the idea of managed competition in health care (Jaramillo Pérez 1999, 33–39; Uribe 2004). Accordingly, it guarantees all citizens a minimum amount of health coverage, to be provided by competing private and public healthcare promotion companies (*empresas promotoras de salud*, EPS). Within this framework, two mandatory subsystems coexist: a contributory one for wage earners and independent workers who dedicate a portion of their earnings to the overall system, and a subsidized health program that protects low-income groups. Each scheme has a mandatory health plan (*programa obligatorio de salud*, POS) that specifies the treatments and drugs to which affiliated members are entitled.

Law 100 took effect in 1995, after which the number of tutelas invoking the right to health grew steadily (figure 2). From 1995 to 2005, this right also grew as a percentage of the total number of tutelas filed each year, an upward trend that began in early 1998. In May of that year, the executive released a decree to regulate membership in the health system and the provision of health benefits that made it easier for EPS to deny requests for treatments or medications (Decree 806/98). As the rate of rejected claims increased, so did the number of legal complaints. The fastest-growing demand, however, accounting for 46 percent of health claims in 2005, was for noncovered drugs or treatments. This was

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particularly the case regarding claims for medication: between 1999 and 2005, 85 percent of such tutelas demanded drugs not included in the POS (Defensoría del Pueblo 2004, 2007).

Again, the success rate of health tutelas partly explains popular reliance on this mechanism of rights protection. In 1999, Colombian judges granted 72 percent of such claims, a figure that grew steadily over the years and reached 83.5 percent in 2005 (Defensoría del Pueblo 2004, 30; 2007, 33). Just as with other tutelas, however, early on, the Colombian judiciary proved relatively resistant to such demands. Between 1992 and 1996, lower courts granted only 19 percent of tutelas that invoked a positive right (García Villegas 1996, 12). In comparison, during those early years, the Constitutional Court granted 63 and 57 percent of tutelas that invoked the rights to social security and health, respectively (García Villegas 1996, 19).

Gaviria's appointees also drove forward the court's jurisprudence on social rights. In the second tutela reviewed by the court, Justice Martínez criticized the government's meddling with the constitutional text in the following statement: "different from the constitutions of countries like Spain and Germany, the Colombian drafter did not specify which rights were fundamental." Thus, "the fact that fundamental rights are only those under this title should not be considered the determinant criterion for judges, but rather an auxiliary one, for this distinction contradicts the assembly's intention regarding the reach of the constitutionally created mechanisms for rights protection and enforcement" (T-002/1992).

Months later, Justice Cifuentes drafted a decision that associated social security with the fundamental right to a *mínimo vital*; that is, the guarantee of the basic material conditions necessary for survival. Not specified in the constitution, this right stems from a positive understanding of the purposes of the state. According to Cifuentes, the concept of an *Estado Social de Derecho* is not an empty one, but requires public authorities to employ their resources toward the "construction of the minimum conditions indispensable to guarantee all citizens a dignified life in accordance with the economic possibilities within their reach" (T-426/1992). Justice Angarita, in turn, declared that positive rights are judicially enforceable if the presiding judge believes that not doing so could endanger the petitioner's fundamental right to life, human dignity, and physical integrity, among others (T-406/1992). According to these members of the court, Colombian judges could and should ignore formal aspects of the law when making decisions on tutela cases and should focus instead on the specific situation of the claimant.

This activism also has to be understood in relation to the institutional conception entrenched in the court in 1991. Just as with negative rights, the traditional Colombian judiciary was not inherently opposed

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to the notion that social rights were an important aspect of the new constitution. After resisting doing so at first, for example, the Consejo de Estado also defended the position that social rights, through their connection to other rights, are fundamental (Cepeda 1992, 2–3). Similarly, the traditional judges on the first court accepted the argument that fundamental rights are not solely those listed in the first chapter of the bill of rights (T-008/1992). Nevertheless, these individual justices tended to resist broadening the conditions under which judges could rely on their authority to enforce rights or to accept rights claims, and often rejected tutelas on the basis that other legal means were available for litigants (see, e.g., T-014/1992).

As a prominent Colombian legal scholar has written, the most important contribution of the Constitutional Court's jurisprudence on social rights has been a procedural one, for it grants judges the power to rely on a criterion of equity in making their decisions, rather than on a purely formal criterion (Lemaitre 2006). This contribution is readily observed, for the connectivity principle and the right to a *mínimo vital* have guided judicial responses to health claims in the years since 1991 (Arango and Lemaitre 2002, 36–38). The second Constitutional Court, for example, relied on this jurisprudence to allow judges to mandate the provision of health benefits to individuals who had not yet amassed the required number of weeks of affiliation, whose ailment predated entering the health system, or who fell behind on their monthly dues (T-283/1998; T-497/1997; SU-562/1999; SU-039/1998).[9] It was also the basis for the argument that drugs or treatments not included in the POS should be provided whenever, among other reasons, the lack of the drug or treatment threatens fundamental rights to life or personal integrity (T-645/1996; T-236/1998; T-283/1998; T-268/1998; T-328/1998).

The court's initial jurisprudence on social rights raised red flags among those who had opposed the constitutionalization of such entitlements, but at the outset it did not trigger responses or heavy criticism from public officials and the bureaucracy. In the early years of the new constitutional order, the number of social rights cases was not large enough to justify a political reaction (García Villegas and Uprimny 2006, 510; Uprimny 2006). In 1997, however, a government commission charged with evaluating Colombia's fiscal accounts released a report claiming that social security was the greatest source of fiscal imbalance in the country and that the cost of judicial decisions during the period 1994–96, driven by judges' "erroneous belief that it is [their] job to defend the welfare of citizens," accounted for 50 percent of the health system's budget (Comisión de Racionalización del Gasto y de las Finanzas Públicas 1997, 66–67).

In this context, in 1997 the court moderated its jurisprudence. In a widely analyzed decision, the court, sitting *en banc*, refused to grant an

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elderly woman the right to receive arthritis treatment from an EPS to which she was no longer affiliated (SU-111/1997). The court argued that there was no immediate threat to her well-being or capacity to live a dignified existence that could justify circumventing existing rules of benefit provision. If, up to that point, the court had emphasized the powers of the judge in tutela cases to substitute for the will of the legislator, this decision emphasized the argument that judges must respect the legislator's supremacy in the allocation of limited resources (Arango and Lemaitre 2002, 54).

This decision points to the influence of political constraints on the court's outputs. Nevertheless, and despite this rhetorical shift, many of the court's paradigmatic decisions regarding the right to health emerged in subsequent years (Arango and Lemaitre 2002). The main difference from the previous period is that after 1997 the court developed specific rules about the conditions under which judges should accept claims for social rights protection. Regarding health, the court created rules that allowed tutelas in favor of the provision of health benefits to persons with HIV (SU-480/1997), cancer (T-283/1998), cerebral palsy (T-286/1998), and other serious conditions. The right to health was also used to justify the development of public sanitation (SU-442/1997) and to mandate the vaccination of children in poor areas of Bogotá (SU-225/1998). The court further admitted the possibility of state funding for medical treatments abroad (SU-819/1999).

The third court (2000–2008) embraced this general jurisprudence (see, e.g., T-406/2001; T-421-2001; T-572-2001), going as far as to demand the inclusion in the health system of refugees from areas affected by paramilitary groups (T-098/2002). More recently, the third court released a controversial decision declaring that the Colombian health system should be reformed in order to integrate the benefit packages of contributors and noncontributors to the heath care system (Yamin and Parra-Vera 2009).

It may be argued that the court's continuing enforcement of the right to health despite criticism from the Colombian government is due to the explosion in health litigation that occurred after the implementation of new regulations in 1998. As opportunity structure theorists have posited, courts and judges are not immune to the demands and opinions they receive from individuals and groups in society, and judicial enforcement of rights is positively correlated to the number of cases reaching judicial dockets. However, as we have seen, the court's initial progressive jurisprudence emerged before the explosion of litigation, and was primarily influenced by the institutional conception described earlier. If the first court had rejected initial social rights claims or limited the potential for judicial involvement with them, such levels of health litigation probably would not have arisen. Input from society has

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induced the expansion of the court's jurisprudence nonetheless, especially given the 1997 decision mentioned above.

Also, it is difficult to imagine the maintenance of this jurisprudence if the Colombian political system had not been as fragmented as it was during most of the 1990s. There were many political calls for the weakening of the tutela during this period (Comisión Colombiana de Juristas 2003), but they never materialized, for two reasons. First, political fragmentation meant that proponents of such reforms could not amass the necessary political capital; and it is not far-fetched to assume that in Colombia's ultrapresidentialist system, legislators have incentives to protect an institution that can check the executive. Second, the court's jurisprudence encouraged various social sectors to support the institution and protect it from attacks. As one observer has put it, the progressive jurisprudence of the Constitutional Court led to the emergence of a "tactical alliance" between the court and certain social sectors that has monitored the enforcement of its decisions and allowed it to flourish (Uprimny 2006, 131).

Specifically, the inability or unwillingness of the elected branches to address policy issues of importance for Colombians has led groups and individuals to rely on the court for their policy demands. As strategic arguments posit, it is not unrealistic to assume that the court has embraced popular support and actively sought it; yet we cannot explain this behavior without considering the institutional mission pursued by members of the court. As we have seen, different judges reacted differently to rights litigation based on their conceptions of the judicial role. If judges were merely concerned with acquiring more power and authority, such disparity in behavior would not have been manifest.

Final Remarks

What lessons can we draw from the Colombian case? Theoretically, Colombia's experience with the Constitutional Court suggests that scholars need to consider ideational variables to explain institutional choices and judicial behavior. This is not a minor suggestion; in recent years, much of the comparative literature on judicial politics has grounded its conclusions in narrowly defined assumptions of interests that, as seen here, may lead to erroneous, or at least incomplete, conclusions regarding the determinants of institutional and behavioral outcomes. First, the Colombian case indicates that officeholders are not necessarily opposed to a strong judiciary, and that judicial empowerment should not be conceptualized as an elite ploy to protect elite interests from the reformist tendencies of new majorities. Second, it suggests that judges who see rights protection as an inherent part of their institutional role will act to achieve this substantive end and thus advance the judicialization of

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social policy, particularly in settings where constitutions embody a progressive component. Law, institutions, and broader political contexts matter for judicial behavior, but how they matter often depends on the ideational perspective of judges in a position of authority.

NOTES

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1. The term *institutional mission* here means "an identifiable purpose or shared normative goal that, at a particular historical moment in a particular context, becomes routinized within an identifiable corporate form" (Gillman 1999, 79).

2. The *Gaceta Constitucional*, the official newsletter of the 1991 Constitutional Assembly, is available at the Luis Angel Arango Library in Bogotá. Recently, it has been made available at http://www.elabedul.net/Documentos/Temas/Asamblea_Constituyente/Gacetas/Gacetas_1-50/index.php.

3. The president's economic advisers were so young that the media nicknamed them Gaviria's *Kinder*.

4. Arguably, Gaviria's proposal had to incorporate judicial elites as central participants in the appointment process in order to eliminate opposition to the weakening of the SCJ.

5. The Supreme Court had previously voided attempts to reform the 1886 Constitution that circumvented Congress. In 1991, however, popular pressure induced the SCJ to validate the plebiscite that allowed for the election of the 1991 Constituent Assembly.

6. Data from a database of tutelas compiled by the author, which includes more than 2,300 tutelas reviewed by the court in the period in question, an average of about 390 tutelas reviewed per year. The analysis ends in 1998 because in that year the composition of the court suffered a slight change due to the retirement of justice Arango. The one exception to the trend was Justice Carlos Gaviria, appointed by the Consejo de Estado. He sided with the prorights camp, and if paired with the other Gaviria appointees, he increased the likelihood that a tutela would be granted.

7. Justice Angarita died in 1997 and could not be interviewed.

8. Tutelas are cited as follows: T – (number of decision)/(year of decision). Available from http://www.corteconstitucional.gov.co/relatoria/radicador/buscar.php.

9. SU refers to *sentencia de unificación*. These are tutelas decided by the entire court in order to clarify its jurisprudence on issues in which contrasting decisions have been released.

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