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The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America

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THE TWO DISCOURSES IN COLOMBIAN CONSTITUTIONAL JURISPRUDENCE: A NEW APPROACH TO MODELING JUDICIAL BEHAVIOR IN LATIN AMERICA

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I. INTRODUCTION

Understanding, explaining, and modeling judicial behavior is important for the legal academic and the political scientist alike. Because legal academics tend to be far more preoccupied with normative questions (Is this a good legal rule? How can it be improved?), the task of formally defining judicial behavior has fallen largely to the political scientists. A vision of the world that privileges economic rationality has influenced political science, even more than law, across a wide range of subfields including U.S. politics, comparative politics, and foreign relations. Political science's rational choice theory—the economic theory of politics—is not so different from, but probably even more influential than, law and economics in legal scholarship. In a manner of double colonization (economics taking over politics, and then politics taking over law), fundamentally economic theories of human behavior have dominated formal, modeled explanations of judicial behavior. However, rational choice theory, although often a useful heuristic for understanding certain aspects of judicial behavior, leaves out too many of the factors that drive judges for it to hold such a prominent place among theories of judicial behavior.[1] That

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1. I am not alone in this view, even among economists. The great institutional economist, rational choice historian, and Nobel Prize winner Douglass North, for example, has written that "[e]fforts to explain the independent judiciary in an interest group perspective are simply unconvincing"; thus, one must resort to "ideology" rather than traditional rational choice theory in order to get a proper understanding. DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 56–57 (1981) (citations omitted). To North, there is obviously something special about judges, as in his world, most social actors are more easily explained via rational choice theory. I tend to agree with North that there is something special about the judicial role, but I also think that rational choice may be less powerful—even to an understanding of politics—than is sometimes assumed.

rational choice nonetheless has been so influential is largely a result of its impressive structure and clarity. It can generate clear predictions based on a few simple premises and can test those predictions relatively easily, often with large, quantifiable datasets (usually results of cases). My primary purposes here are twofold: (1) by exploring the judicial behavior of constitutional judges in Colombia, to build a richer, more realistic theory of judicial behavior; and (2) to show that one can build such a theory without losing all of the structure and clarity that makes rational choice modeling a seductive tool.

More specifically, I hope to contribute to two separate bodies of literature. First, there is the literature that Western legal scholars created on discourse in Latin American legal systems. This literature is both sparse and rent with considerable ideological preconceptions about U.S. and European legal systems; these preconceptions limit, for the most part, the usefulness of the descriptions.[2] Second, there is a large volume of literature created by U.S. political scientists, which is generally focused on U.S. courts and aims to understand judicial behavior. The two most prominent schools of thought in this sub-field, attitudinalism and strategic theory, share the same rational choice underpinning. The challengers to attitudinal and strategic scholars are a loosely defined group of academics identified as legalists; they believe that judicial behavior is best seen not as an attempt to maximize some political policy goal to which the judge is attached, but as a response, at some level, to the judge's notion of what the law is. Unfortunately, the legalist model is extraordinarily underdeveloped, suffering both

2. Jorge Esquirol has recently written two excellent articles surveying and criticizing the American and European literature on legal discourse in Latin America. The largest set of American legal scholarship on Latin American law is associated with the law and development movement of the 1960s and 1970s; this scholarship, as Esquirol has shown, was biased towards emphasizing the large gap between Latin American law and Latin America society and thus focused on a call for socially instrumental views of law. *See* Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 42–43 (2003) [hereinafter Esquirol, Law and Development]. Classical comparative law scholars (René David and John Henry Merryman, for example) constitute another way of thinking about Latin American legal discourse—they emphasize, celebrate, and thus exaggerate the legal culture's closeness to European law. *See* Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 431–32. An important and fascinating recent work on Latin American legal discourse is Diego Lopez-Medina, Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America (2001) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard Law School Library), which lays out the ways Colombian academics, judges, and lawyers have used and intentionally misread jurisprudential theories from other countries (for example, European countries and the United States) to construct their own theories of law in both the abstract (academic writing) and in application (judging and lawyering).

from a lack of interest from political scientists and from an almost exclusive attention to the U.S. federal courts: Legalist models have thus not gotten very far beyond focusing on mechanical adherence to precedent.

I seek to bridge the gap between the two literatures noted above and to use comparative work to lend some clue as to what a richer conception of the legalist model might look like. I use discourse (what judges say when they decide cases) as a clue to judicial worldviews. Using Colombian constitutional courts in the 1980s and 1990s, I argue that there are presently at least two completely different judicial worldviews about constitutional law in Latin America: (1) a traditionalist Latin American view that minimizes the role of constitutions by focusing on concrete rules, which form a relatively small part of constitutional discourse; and (2) a newer view that focuses on the principles and values behind constitutions, and thus tends to read them broadly. These worldviews are extremely rich, integrating ideas about what law is, interpretative methods, theories of the judicial role in a political system, and substantive values into a fairly coherent whole. Further, each of these worldviews can be identified with a particular type of social actor as its likely carrier: As I will suggest, the traditional worldview is most closely associated with career judges, whereas the alternative view is most likely to be espoused by public or constitutional law scholars. This matching of actors and worldviews, although somewhat crude, helps us to discipline, clarify, and structure the legalist model considerably.

The rest of this work is organized as follows: Part I surveys the descriptive (mostly political-science driven) literature on judicial behavior and shows the common rational choice assumptions of attitudinalism and strategic theory, as well as the theoretical shortcomings of legalism. Part II draws mostly off Weberian social thought to construct a new model of judicial action that focuses on two distinct, rich judicial worldviews that different sets of social actors predictably carry. Part III uses this model to explore the language of judicial opinions in Colombian constitutional courts in the 1980s and 1990s, thus acting both as a preliminary test for the plausibility of the hypotheses and as a chance to flesh out and explore the remarkable richness and internal coherence of the two worldviews that I have identified. Finally, Part IV attempts to link these worldviews—which have been constructed by using the language of judicial opinions—to "real" social phenomena: I suggest that these worldviews affect judicial case outcomes, and at any rate

the language of opinions has an independent impact on public opinion and thus on a court's legitimacy.

II. The Descriptive Literature on Judicial Behavior: The Failure to Formalize the Legal Model

Scholars have spent almost no effort building and testing models of judicial behavior within a comparative setting.[3] Almost all work has thus been done within a U.S. context, virtually always using federal courts, and generally the U.S. Supreme Court. These commentators have grouped theories of judicial behavior into three main types: attitudinal, strategic, and legalist.[4] Attitudinalists believe that judges follow their raw, political preferences when making judicial decisions.[5] Believers in strategic theory think that judges are led rationally to defect from their raw preferences by the presence of other relevant actors within the systems (like a legislature or higher court judges).[6] Finally, adherents to legal theory think that judicial decision-making is best explained as a response

3. *See, e.g.*, Matthew Caleb Stephenson, Formal Models of Judicial Power 1, 4 (2003) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard Law School Library) ("Most early formal and empirical analyses of judicial politics focused primarily, although not exclusively, on the American court system, particularly the U.S. Supreme Court . . . . [T]he field is still dominated by analyses of the American judiciary, [although] attention to comparative judicial politics has been steadily increasing."). There have been a few recent exceptions to the U.S.-centric nature of the literature. *See, e.g.*, Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 Law & Soc. Inquiry 91 (2000) (analyzing the recent constitutional reforms of Israel, Canada, New Zealand and South Africa to argue that judicial empowerment is often the result of a deliberate choice by sociopolitical elites to preserve their strength); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Perspective*, 23 J. Legal Stud. 721 (1994) (claiming after a comparative study of American and Japanese courts that judicial independence may emerge as a risk-reducing device used where there is relatively fierce political competition); C. Neal Tate & Stacia L. Haynie, *Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961–1987*, 27 Law & Soc'y Rev. 707 (1993) (analyzing the Philippine Supreme Court and concluding that authoritarianism may hurt certain judicial functions, leave others basically unchanged, and even strengthen others). For a discussion of the recent Latin American literature, see *infra* notes 53–56 and accompanying text.

4. *See, e.g.*, Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 44 (2002) [hereinafter Segal & Spaeth, Attitudinal Model Revisited]; Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 Cal. L. Rev. 1457, 1460 (2003) (calling the attitudinal model the "political" model and adding a fourth model, the "litigant-driven" theory). There is a fourth grouping, consisting of psychological attempts to explain judicial behavior. This literature is discussed briefly below. *See infra* note 71 and accompanying text.

5. Segal & Spaeth, Attitudinal Model Revisited, *supra* note 4, at 86; Cross, *supra* note 4, at 1471.

6. Segal & Spaeth, Attitudinal Model Revisited, *supra* note 4, at 97; Cross, *supra* note 4, at 1483.

to specifically legal variables, like adherence to precedent.[7] Although legalism is by far the broadest and richest of these three theories, it should be briefly emphasized that all three combined form only a narrow slice of potential ways in which one could explain judicial behavior.[8] This narrowness seems to be largely a function of the social-scientists' emphasis on quantifiability.

Rather than attempting to give an exhaustive summary of the literature in all three camps—a task that others have adequately carried out[9]— my goal here is to demonstrate two narrower points: (1) in section I(A), that the attitudinalist and the strategic models are really both aspects of one, single theoretical approach—the rational choice approach—which differ not in their theoretical assumptions about human nature but in their factual assumptions about the judicial policy-making environment; and (2) in section I(B), I will attempt to show just how poorly theorized and formalized, if implicitly influential, the legalist model is.

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7. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 48; Cross, *supra* note 4, at 1462.

8. One could imagine (and scholars have theorized) a myriad of ways to approach judicial behavior that have nothing to do with either the judge's individual self-interest as construed by rational choice or with the judge's desire to follow "law." For example, one can imagine a theory in which law, and judicial actions, are about power. *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 1979) (1977) (locating judges within a web of power relations, while at the same time suggesting that judges have intentionally relinquished most of the real power in the criminal law context to the structures of nonlegal norms administered by prison officials); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (exploring the relationship between the activity of communities peacefully creating competing norms and interpretations of law and the courts violently determining which of those interpretations will be backed by the force and power of the state). Further, scholars have constructed theories that have emphasized the influence of the collective "social" on judicial behavior and the subsequent development of law. *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., 1984) (1933) (arguing that law and judicial-decisionmaking will generally be a reflection of the type of solidarity holding a society together). Perhaps the social idealists in legal academia, like Fuller and Llewellyn, should be put loosely in this camp: They seem to think that law only works when judges refuse to deviate from broad social norms and values. *See, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

9. *See, e.g., supra* note 4 and accompanying text.

A. *The Common Core Assumptions of the Attitudinal and Strategic Models*

1. The Attitudinal Model

The attitudinal model seems to be the dominant formalized model of judicial behavior today.[10] Put briefly, the model holds that judges come to the bench with certain "ideological attitudes and values" that are essentially political in nature, and they systematically vote in favor of these preexisting political preferences when making judicial decisions.[11] "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."[12] The "laws" that judges use in their opinions are simple post hoc justifications and not true causes of judicial behavior.[13] Of course, many theories of political behavior argue that politicians vote in accord with their revealed ideological preferences;[14] the attitudinal theory is thus a transference of a theory from the political to the legal realm. Just as politicians vote in accord with ideological, policy-based considerations, so too do judges.[15] The results of empirical testing of the

10. *See, e.g.*, Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 812 (1995) ("A predominant, if not *the* predominant, view of U.S. Supreme Court decision making is the attitudinal model.") (emphasis in original).

11. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 86; *see also* Cross, *supra* note 4, at 1471 (noting that in this theory "judges are dedicated to advancing their own personal ideological preferences").

12. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 86.

13. *Id.* at 26–27. These scholars, who generally are not legal academics, commonly list the legal realists as the prophets of their own views within the legal world; this is true, I think, only to a limited extent.

14. *See, e.g.*, KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 115–32, 312–44 (outlining the spatial model of legislative politics, which models interactions between policy-seeking legislators).

15. And it is in fact perhaps a rather odd migration. It is possible within the rational choice model to conclude that actors have ideological, policy-based preferences without delving into why these policy-based preferences exist. Many rational choice scholars, however, have not been satisfied with such an explanation. There seems generally to be a push within rational choice towards ultimately leaning on "solider" types of preferences that seem more or less materialistic in nature and therefore universalizable (pursuit of pure economic self-interest is classic, but pursuit of votes or reelection also seems to qualify as at least quasi-materialistic). *Cf.* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 23–30 (1994) (noting rational choice theory's preference for universalism, with some exceptions). Rational choice scholars have tried to explain political ideology as a public good: It helps all the members of a party to have a strong party ideology, but it may often be desirable for a single legislator who is a member of a party to defect from the ideology in order to gain reelection and other political goals more easily. Individual politicians thus *want* quasi-materialistic goals like reelection and power within a legislative chamber, but in order to achieve these goals, they may have to tow the party line to the extent that the party has the ability to influence the politicians' chances of receiving them. *See generally* GARY W. COX &

attitudinal model have been somewhat mixed, but most studies have found considerable support for the model.[16]

2. The Strategic Model

Strategic theorists believe that judges have preferences of one sort or another, but that when they actually give their decisions, the preferences embodied therein are unlikely to match the judges'

MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (1993); John M. Carey & Matthew Soberg Shugart, *Incentives to Cultivate a Personal Vote: A Rank Ordering of Electoral Formulas*, 14 ELECTORAL STUD. 417 (1995). Thus, for example, individual politicians may follow party platforms to the extent that parties control the nomination process or campaign financing. Alternatively, legislators may pursue policy goals outside of a party framework not because of some personal preference for policy, but because they need to pursue certain policy interests in order to gain resources needed for reelection. *See* SHEPSLE & BONCHEK, *supra* note 14, at 313 ("Because campaigns are expensive propositions, most politicians are eager to please those who can supply resources for the next campaign.").

There is no similar theorization as to why judges should care about ideological policy preferences—they certainly do not face the same constraints as politicians. In fact, the theory seems to be precisely the opposite: It is because judges (at least Supreme Court justices) are so completely unconstrained that they can freely implement political policy preferences. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 92–96. But this seems odd; as scholars have pointed out, it seems at least as probable for judges to care about other things, like the integrity of the law or their own reputations. *See, e.g.*, Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 97 (1988) (noting that judges may decide in part out of a concern to mitigate internal tensions in legal doctrines); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000) (arguing the judges are influenced by a variety of non-ideological concerns, particularly reputation); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13–15 (1993) (listing, in addition to reputation—popularity, prestige, public interest, and avoidance of reversal as examples of nonideological considerations made by judges).

16. *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287–315 (1999) [hereinafter ADHERENCE TO PRECEDENT] (finding, after a large-scale empirical study, that Supreme Court justices care far more about ideological preferences than precedent, thus supporting the attitudinal model); SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4 (reaching the same empirical results); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURT OF APPEALS 81–85 (2002) (concluding after an empirical study of the U.S. courts of appeals that ideological preference "is strong enough to have a substantial effect on [judicial] behavior," although strategic considerations were also present); Cross, *supra* note 4, at 1504–09 (finding that the attitudinal model does explain a considerable fraction of judicial behavior, although legalist considerations are also explanatory to a statistically significant degree); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992) (concluding that an ideological model of the Supreme Court performed well, although not as well as a model that integrated both legal and ideological factors); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999) (finding strong support for the attitudinal model after using a massive collection of data). *But see* Segal et al., *supra* note 10, at 822 (receiving only "mixed" support for the attitudinal model in a study of the Supreme Court: It performed very well for post-Warren court appointees but not nearly as well for early justices).

actual preferences because of the influence of various constraints.[17] By constraints, these theorists do not mean senses of rightness or duty that lie within the judges' heads; rather, they mean something external—either other people or institutions. For example, the presence of a legislature that can overturn judicial decisions may influence judicial behavior. To the extent that the judge can foresee this possibility, she may try to hand down a decision that is as close to her personal policy preference as possible *without* galvanizing a congressional override.[18] For lower court judges, one constraint might be the possibility of a higher court judge's reversal of their decisions.[19] Finally, internal rules or the

17. *See, e.g.*, Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING 43, 46 (Cornell W. Clayton & Howard Gillman eds., 1999) ("Justices, in short, are strategic actors who take into consideration the constraints they encounter as they attempt to introduce their policy preferences into the law.").

18. *See, e.g.*, John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990). This model of court-legislative interactions has been called the "Marksist" model after its initial formulation by Brian Marks in 1988, and is surely the best known and most tested type of strategic model. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 103. Some recent works have attempted to complexify the Marksist model by adding an element of imperfect information. *See, e.g.*, James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84 (2001) (developing a model in which both the legislature and the judiciary care only about policy, but an informational element is introduced because the legislature may actually want its statutes overturned as they fail to perform well, even from the legislature's preferred policy position, once implemented in the real world); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346 (2001) (articulating a comparative model of imperfect information in the interactions between judiciaries, legislatures, and the public, and testing it successfully on constitutional politics in Germany). Beyond Congress, of course, there are other institutions to which courts might strategically defer. Cross and Nelson tested deference to a wide range of institutions and found that courts are strategically deferential to federal institutions but not state institutions. *See* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1485–91 (2001). On a more bizarre note, Professor Clinton has purported to explain *Marbury v. Madison* as a result of strategic interactions between Chief Justice Marshall and President Jefferson. Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of* Marbury v. Madison, 38 AM. J. POL. SCI. 285, 286 (1994).

Some scholars have tested the Marksist model empirically and found it unsupported. *See, e.g.*, SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 349 ("If the overwhelming majority of statistical models find no support for the [Marksist] model, if the few statistical models supporting the . . . model are seriously flawed, and if the model's foremost advocate concludes that the Warren, Burger, and Rehnquist courts all ignored legislative precedents, there is little need to say more."); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 35 (1997) ("The evidence is far from convincing. More systematic proof clearly is needed.").

19. *See, e.g.*, Tracy E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO. ST. L.J. 1635, 1692–94 (finding that federal appeals courts act strategi-

presence of other actors within the court itself might influence judges; thus, U.S. Supreme Court justices might refuse to grant certiorari even for a case they thought was wrongly decided because they anticipated that if certiorari was granted, they would lose on the issue once and for all.[20] Again, the model here is obviously derived from rational choice models of political behavior—which in turn are derived from economic models of behavior.[21] As an example, Ferejohn and Shipan have produced a model of bureaucratic deference in the face of possible congressional action[22] that is theoretically identical to Ferejohn and Weingast's theory of judicial deference in the face of possible congressional action.[23] Empirical support for the strategic model has been somewhat weaker than that for the attitudinal model.[24]

3. The Attitudinal and Strategic Models Share the Same Basic Assumptions

Theoretically, attitudinalists could argue that judges rule in accordance with their own ideological preferences honestly, rather than strategically, because for some reason judges simply are not capable of, or prefer not to, act strategically. In practice, however, this is not what they say. Attitudinalists instead say that the factual environment renders strategic action *unnecessary*, at least for U.S. Supreme Court justices, because, for example, federal judges have life tenure, U.S. Supreme Court justices have no real ambition for higher office, and congressional overrides are rarely a realistic danger.[25] "The Supreme Court's rules and structures, along with those of the American political system in general, give life-tenured jus-

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cally when they fear Supreme Court reversal). *But see* KLEIN, *supra* note 16, at 126 (finding that at least where the Supreme Court has not yet clearly ruled on an issue, lower court judges do not attempt to anticipate how the Supreme Court would have ruled); Cross, *supra* note 4, at 1509–12 (finding very little empirical evidence that circuit court judges pay any attention to the preferences of Supreme Court justices).

20. *See, e.g.*, Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999) (constructing a similar model of the Court's "gate-keeping" function and finding empirical support for it). There are other sorts of intracourt considerations that might lead to strategic activity. For example, chief justices may strategically use their powers to assign majority opinions. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 125–35 (1998).

21. *See, e.g.*, SHEPSLE & BONCHEK, *supra* note 14, at 15 (noting although qualifying the rational choice model's debt to economic theory).

22. *See generally* John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1, 1–5 (1990).

23. *See* Ferejohn & Weingast, *supra* note 18.

24. *See supra* notes 18–20 and accompanying text.

25. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 92–97. The authors also criticize the Marksist separation-of-powers model. *Id.* at 103–10.

tices enormous latitude to reach decisions based on their personal policy preferences."[26] In other words, both strategic and attitudinal models, in practice, assume that judges are willing and able to act strategically. Where the two theories differ is in their factual assumptions: Strategic models support the belief that judges face various types of constraints that force them to support decisions that differ from their preferred policy points, while attitudinalists believe that the institutional environment leaves at least those judges that they study—generally U.S. Supreme Court justices—free to make decisions that are exactly in accord with their preferred policies.

Similarly, followers of strategic theory could theoretically believe that judges act strategically to maximize achievement of some set of goals other than their ideological policy preferences. For example, perhaps judges could prefer "legalistic" goals like adherence to precedent, but would have to defect strategically from absolute adherence to those goals given the presence of other institutions with some clout, like the U.S. Congress. In practice, however, this is not what happens. Instead, strategic theorists virtually always model judges as strategically furthering sets of ideological policy goals, which are the exact same goals modeled by the attitudinal theorists.[27]

What we have, then, are two theories that in practice tend to collapse into one. In both theories, actors are assumed: (1) to have preferences; and (2) to act strategically for the maximization of those preferences.[28] In addition, attitudinalists and strategic theorists both believe in a particular kind of rational choice theory: Specifically, the actors' preferences are assumed to be solely ideological, policy-based goals derived from the political realm. It is important to emphasize that both theories also believe that the

26. *Id.* at 92. Note also Segal and Spaeth's concession that their attitudinal model works particularly well only for federal Supreme Court decisions on the merits; vis-à-vis other types of judicial decisions, like certiorari decisions and opinion assignments, they would expect strategic factors to play a bigger role. *Id.* at 96. As they argue, "few areas in political life can be well represented by unconstrained choice," but one such area happens to be federal Supreme Court decisions on the merits. *Id.*

27. *See, e.g.*, KLEIN, *supra* note 16; Caldeira et al., *supra* note 20; Rogers, *supra* note 18 (employing strategic models that take ideological, political policy-based goals as their starting point). *But see* Ferejohn & Weingast, *supra* note 18, at 268 (noting that although "[i]n the past, [strategic] models of legislative interaction have assumed that courts are unconstrained policy advocates without much discussion or justification," their own strategic model attempted to encompass both the unconstrained policy position and the "legalist" position).

28. This is, of course, the classical statement of rational choice theory. *See, e.g.*, SHEPSLE & BONCHEK, *supra* note 14, at 15–35.

proper way to test judicial behavior is to look at what judges actually do, not at what they say: Thus, what matters is the outcome, not the reasoning of the case.[29]

The most important difference between the two models is how outside pressure is placed on judges: In the attitudinal model, judicial decisions can only be molded by external actors through the appointment process—the initial selection of a liberal or a conservative judge. This model is thus, from one perspective, a cousin of the economists' adverse selection game, where the only relevant fact is the *a priori* type of the appointed actor (competent vs. incompetent, liberal vs. conservative).[30] The strategic model, without denying the impact of the appointment process, suggests that external actors can also influence judicial behavior after this point through the use of incentives such as denials of promotions, reputational losses, impeachment, and reversals. Thus this model resembles the economists' game known as moral hazard, where the emphasis is not on the actors' types but rather on the sorts of incentives they face.[31]

B. *The Unfulfilled Promise of the Legal Model*

The very narrowness of the strategic and attitudinal models should give the legal model plenty of breadth in which to work. But this very breadth has been, in many ways, the problem with legalistic theories of judicial behavior. There is nothing like a common answer among believers that "law" drives judicial decisions on two key issues: (1) what are the factors that a legalistic judge pays attention to?; and (2) why do legalistic judges care about law? I will take up these two questions in turn, below. Aside from breadth, another problem with the legalistic model has been that most of its proponents are not political scientists seeking to create relatively formalized models about how judging works; instead, the model's most strident proponent has been mainstream legal academia.[32] These legal academics have made assertions about the nature of

29. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 432–33.

30. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 481–82 (3d ed. 2004) (illustrating adverse selection by using the classic used car market where consumers cannot distinguish good cars from lemons).

31. *See id.* at 480–81 (discussing the concept of moral hazard and defining it as "the tendency of a person who is imperfectly monitored to engage in dishonest or otherwise undesirable behavior").

32. *See, e.g.*, SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 48–53 (explaining legalistic approaches primarily by using broad jurisprudential thinkers like Dworkin and Ackerman); Cross, *supra* note 4, at 1462–64 (explaining the legalistic model with reference to jurisprudential theorists like Dworkin, Kronman, and Weschler).

law in a non-formalized manner and in a way that shows little concern for the intermingling of positive and normative argument. This obvious intermingling with normative argument has made legalistic theory an easy target for the *seemingly* less biased, more purely descriptive attitudinalist and strategic models,[33] while the failure to make any attempts at formalizing legalist theory has left it in a muddled state, easy prey as a foil for the other two theories, and unsupported by much of the formalized empirical evidence that is generally considered acceptable in political science.[34]

1. Legalism means adherence to what?

What does it mean for a judge to be legalistic? Much of the defining, unfortunately, has occurred at the hands of the theory's

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In jurisprudential thought, those who believe that law "matters" and has some autonomy span an incredible range. There are the (now-largely-defunct) formalists, like Langdell, who think that legal rules alone can give determinate outcomes to legal questions. *See, e.g.*, C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS viii (2d ed. 1879). As noted below, political scientists have often equated legalism wholly with the claims of the formalists, which is a questionable assertion considering the essentially superseded status of this group's claims (which were at their height over a century ago). *See infra* note 39 and accompanying text. Far more sophisticated are the claims of the modern liberal idealists, most notably Dworkin, who think that legal issues can still receive determinate answers only through a review of systems of legal rules *and* the policies and principles that stand behind them. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). Finally, there are those modern critical scholars who believe that legal questions lack determinate answers but who nonetheless believe that legal discourse has some autonomy and is not solely a reflection of the traditional notions of broader social reality. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1720–21 (1976) (explaining that the opposed legal concepts of "individualism" and "altruism" explain the irreducible conflict in private law far better than "the 'social function of maintaining the market' or the interests of dominant groups[, which] are, as tools, simply too crude to explain the detailed content of, say, the law of contracts").

This incredible diversity in the jurisprudential thought of those legal scholars who the political scientists lump into the general "legalist" category suggests: (1) the potential breadth of thought in this area; (2) the relative lack of interest of most political scientists in claims of legal autonomy, because only such disinterest could explain the lack of differentiation within such an internally incoherent grouping; and (3) the importance of legal scholars contributing more forcefully to the political-science dominated debate on judicial behavior.

33. For example, Segal and Spaeth seem to consider the legalistic model part of the "mythology of judging." SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 26–27; *see also id.* at 53 ("[W]e argue that the legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process.").

34. *See, e.g.*, Cross & Nelson, *supra* note 18, at 1443 (noting that "[t]he . . . legal model has not generally been tested empirically" and that "[t]he lack of empirical support is the greatest shortcoming for those who believe in the legal model, because the primary alternative of the naïve political model has been empirically tested and has stood up well to the tests.").

opponents. Segal and Spaeth, the most prominent attitudinal scholars, define the legal model as follows: "the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent."[35] Of these elements, it is obvious that the key element to Segal and Spaeth is precedent. Specifically, Segal and Spaeth have attempted to test the legal model by observing whether U.S. Supreme Court justices who dissented from one decision changed their minds and adhered to the now precedentially-supported view in later decisions on the same issue.[36]

One can make several obvious criticisms of a legalistic model focusing almost exclusively on precedent. First, it seems thin: It would be fairly strange to think that a legalistic judge would simply determine what relevant precedent was on point and then would apply that precedent.[37] A better model of legalistic behavior would have to be richer, and comparative work would help to draw out that richness. A second problem with Segal and Spaeth's model is that it envisions legalism as operating as an external constraint on preference-directed behavior, rather than as a state of mind internalized by the judge in question.[38] The second conceptualization seems more realistic. Finally, the Segal and Spaeth model strikes one as a bit of a straw man because it reflects a legal model that is far too mechanistic in nature: As has been noted by critics, formalism has not been in vogue for nearly a century and today's mainstream idealist jurisprudence is far from mechanistic or formalistic in nature.[39] The post-realist critics of Segal and Spaeth, however, have failed to identify many clear, testable competing conceptions:

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35. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 48.

36. *See* ADHERENCE TO PRECEDENT, *supra* note 16; Jeffrey A. Segal & Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996) [hereinafter *Influence of* Stare Decisis]. The authors found no real evidence that precedent affected the votes of Supreme Court justices. *See id.* at 987. This formula for testing precedent has been criticized as being strongly biased against a finding of legalistic effect; for example, persistence in dissent could easily be seen as very legalistic behavior given certain assumptions. *See, e.g.*, Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 483 (2001) (reviewing HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE AND MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999)).

37. Of course, in a civil law country a precedent-centered model would seem innately implausible given the civil law's traditional rejection of precedent as a primary source of law. *See* JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985).

38. *See* Gillman, *supra* note 36, at 485–90.

39. *See id.* at 474–76 (rehearsing the arguments of various critics against the Segal and Spaeth position).

Moving from the lofty domain of idealist jurisprudence to the more grounded realm of the rigorous, empirically-testable model has proven exceedingly difficult. Without such a model, post-realists leave themselves unprotected against Segal and Spaeth's critique that the legal model seems consistent with *any* judicial behavior, and that such a model is not falsifiable.[40]

Given the evident problems with Segal and Spaeth's precedent-centered model, it is not too surprising that some other scholars have tried to produce models that they perceived as more realistic.[41] The most interesting and important of these combined theoretical and empirical efforts is by Richards and Kritzer, who try to identify and test the influence of what they call "jurisprudential regimes."[42] By jurisprudential regime, Richards and Kritzer refer to "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area . . . jurisprudential regimes function as intervening variables between factors influencing justices' decisions and the decisions themselves."[43] Thus, although Richards and Kritzer, like Segal and Spaeth, do look at precedent, they consider it in very different ways. In the Richards and Kritzer model, precedent is not some constraint to mechanically apply to similar future cases; rather, sets of precedents and the ideas embodied in them form part of the internal consciousness of the justices, filtering between the raw data of the cases and the decision that is eventually reached.[44] Thus, in their model, the division of a free-speech incident into

40. *See* SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 86 ("If various aspects of the legal model can support either side of any given dispute that comes before the Court, and the quality of these positions cannot be reliably and validly measured *a priori*, then the legal model hardly satisfies as an explanation of Supreme Court decisions. By being able to 'explain' everything, in the end it explains nothing.").

41. *See* Lee Epstein et al., *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001) (using empirical data to demonstrate that there seemed to be a norm of consensus on the Supreme Court in the late nineteenth and early twentieth centuries, but that such a norm no longer exists).

There is also a line of literature arguing that circuit courts often do follow precedents established by the U.S. Supreme Court. *See, e.g.*, Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 966 (1992) (finding that circuit court doctrine seems to shift with major shifts in Supreme Court doctrine). One problem with this literature is that it could equally well support the strategic theory, or a general, exogenous ideological shift effecting both higher and lower courts simultaneously. *See* Cross, *supra* note 4, at 1469.

42. Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

43. *Id.* at 308.

44. *Id.*

content neutral vs. content-based tracks served as a jurisprudential regime,[45] and they found that the presence of this regime had an empirically verifiable effect on the Court's decision-making: Cases decided after the formulation of this regime were decided differently to a statistically significant degree than those decided before it was determined.[46] The Richards and Kritzer approach to understanding legalism is promising because it gets at the idea that the judge sees legalism as a sort of richly-defined worldview within which she acts. Richards and Kritzers's "jurisprudential regimes" are fairly narrow; they self-consciously avoid constructing a macro-worldview of judicial behavior in favor of smaller-scale, issue-specific notions.[47] Without faulting this approach, this Article's aim is to articulate just this sort of macro-worldview—or, rather, two competing macro-worldviews—in Latin America. One advantage of comparative work is that it tends to allow the most basic, constitutive notions of an institutional order to become clear.

2. Why Does the Legalist Judge Act in a Legalist Way? Preference vs. Role

Along with the issue of what factors the legalist judge pays attention to, the even more basic, if much less studied, question of how the legalist judge's human nature should be conceptualized stands as equally muddled. Treating legalism as a preference of the individual judge would achieve the easiest reconciliation with attitudinal and strategic theory.[48] Thus, instead of desiring decisions in accord with their personal ideological views, judges would desire decisions that they saw as being legally sound. Such an approach to legalism might occasionally be useful to allow ease of testing an integrated attitudinal-strategic-legalist approach, but it has the drawback of seeming rather unrealistic. It does not seem quite right to say that judges *prefer* legalist over nonlegalist outcomes in the same way they prefer apples over oranges. Instead, a more complex phenomenon is occurring. The judge is trained and socialized

45. *See id.* at 310–11.

46. *See id.* at 312–15.

47. *See id.* at 308 ("In defining the concept of jurisprudential regime, we step down one level from the broad notion of constitutional and political regimes used by Ackerman and by Clayton and May. Whereas constitutional and political regimes define expansive patterns of decision making and institutional interrelationships, jurisprudential regimes focus on more specific areas of Supreme Court activity.").

48. *See, e.g.*, Ferejohn & Weingast, *supra* note 18, at 268 (modeling two kinds of legalist behavior—"naïve textualist" and sophisticated honest interpreter of legislative intent ("politically sophisticated honest agent")—as possible preferences alongside a third type of preference, the "unconstrained policy advocate").

to act a certain way, so she may not perceive herself as having much choice and may feel duty-bound to determine cases in accordance with legal principles.

Some legalists have tried to adopt more realistic, if less tractable, notions of human behavior, based on some idea of "role" or duty—the judge's conception of what it means to be a judge or what she ought to be doing as a judge.[49] One theory, for example, suggests that the institution of a court itself has a sort of normative structure, and the actors within the institution somehow adopt this structure as their own normative framework.[50] Thus, U.S. Supreme Court justices gain their role conceptions from the norms swirling around the Court.[51] This institutionalist theory doubtlessly has some force, and it may explain a bit of the narrative I will tell about Colombian constitutional jurisprudence. One could also argue, however, as does this Article, that the source of much of one's "role" conception lies not in the court on which one is *currently* sitting, but somewhat further back in time. Thus, one might consider the source of one's professional training, or the course of one's career prior to appointment on a top-ranking court.[52]

C. *The (Sparse) Descriptive Literature on Judicial Behavior in Latin America*

The existing descriptive literature on Latin American judicial behavior falls into either the attitudinal or the strategic camps, with legalist work being essentially absent.[53] For example, Larkins has

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49. *See, e.g.*, James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978) (creating a model where roles serve as the mediator between ideological attitudes and judicial decisions).

50. *See* Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING 65 (1999).

51. *See id.* at 77; *see also* Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359 (1972) (suggesting a mechanism, judicial socialization immediately upon attaining the bench, that may explain some of the efficacy of this institutionalist model of human behavior).

52. One should not confuse the way that I use role in this article with the way that a sociologist like Goffman uses the concept. Goffman suggests that individuals are composed of a huge set of social roles that, like masks, constantly shift so that the proper role is being deployed in the proper social situation. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE xi (1959).

53. Note that I omit from this discussion the technical reform literature on judicial action that has been popular over the course of the past decade. *See, e.g.*, EDGARDO BUSCAGLIA ET AL., JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT (1995); INTER-AMERICAN DEVELOPMENT BANK, JUSTICE AND DEVELOPMENT IN LATIN AMERICA AND THE CARIBBEAN (1993) [hereinafter JUSTICE AND DEVELOPMENT]. For an overview of the politics of judicial reform in Peru, see LINA A. HAMMERGREN, THE POLITICS OF

argued that Argentina's recent president Carlos Menem appointed members to the country's Supreme Court that were dedicated Peronists and close associates of the president and thus extremely compliant towards his program.[54] The Argentine Supreme Court, therefore, served Menem's shift towards an executive-led, delegative democracy.[55] Obviously, this is essentially an attitudinal argument. Recent work by Helmke fits more comfortably into the strategic paradigm. She argues (and empirically demonstrates) that Argentine justices, although generally possessing ideological preferences that are very close to those of the nation's incumbent presidents (who generally appointed them), sometimes strategically defect from the president who appointed them.[56] The reason why they defect, Helmke posits, is basically because they want to keep their jobs, and various means, both formal and (mostly) informal, exist for new presidential administrations to purge the old Supreme Court and put in place their own appointees. Thus, for the sake of extending their judicial tenure, judges have strong incentives to defect from the incumbent president's policy at the end of his term in an attempt to please the future president. An external actor's—in this case, a future president's—exertion of pressure, therefore, alters the preferred policy position of judges.

Both the attitudinal and strategic models, particularly the former, have received fairly good empirical support within the United States; these models would probably perform at least as well in Latin America. In particular, given the lack of effective institutional protections for judicial tenure in Latin America, strategic theory would seem to be a fruitful avenue for future research. This Article is therefore not meant to imply that the types of political pressures identified in the attitudinal and strategic models never occur in Latin America. Instead, this Article will demonstrate that the lack of legalist work in Latin America is a major lacuna, and it would be a significant mistake for scholars seeking to understand Latin American judicial behavior to fail to take account of judicial role conceptions.

JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE (1998).

54. *See* Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423 (1998).

55. *See id.*

56. *See* Gretchen Helmke, *Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s*, 35 COMP. POL. 213 (2003); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002).

D. *A Short Summary of the Literature Review*

We have seen, first, that the strategic model and the attitudinal model are really the same theory, with both importing rational choice assumptions derived from political science and ultimately from economics. The only real difference between the models is in the point at which control can be exerted on the judicial process by outside actors: In the attitudinal model, like in the adverse selection game, outside actors can only exert control during the appointment process through selection of the desired "type"; while in the strategic model, as with moral hazard, outside actors can exert control after appointment through manipulation of incentives. These two models dominate formalized descriptions of judicial behavior, and are the only game in town in Latin American research. Legalism stands against these two models as a rather jumbled mess. Yet the most promising way of conceiving the legalist model would seem to focus on judicial role conceptions—rather than preferences—and would attempt to construct a relatively rich judicial worldview.

III. A New Theory of Judicial Behavior in Latin America

At the outset, this Article's goal for the present, unlike those of the attitudinal and strategic scholars, is not to explain case *outcomes*. Instead, this Article seeks to explain the judicial self-conception as expressed in the *language* of judicial opinions.[57] This parallels a move made by some other legalist scholars.[58] Part IV will attempt to provide some link between the judicial self-perceptions

57. Even the link between formal judicial opinion and judicial self-perception can sometimes be strained or broken. Lasser, for example, found by perusing informal judicial documents that French judges have a very different conception of the judicial role from the one that is suggested in their formal judicial opinions. *See* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L.J. 1325, 1326–27 (1995)

58. *See, e.g.*, Jack Knight & Lee Epstein, *The Norm of* Stare Decisis, 40 Am. J. Pol. Sci. 1018 (1996) (casting doubt on a theory that precedent plays no role in judicial decision-making by producing evidence that attorneys cite precedent in their briefs and that Supreme Court justices appeal to precedent both in conference discussions and in opinions themselves).

My whole approach in this essay is indebted to Winch's conception of internal rationality. *See generally* Peter Winch, The Idea of a Social Science and Its Relation to Philosophy (1958). According to Winch, the proper way to do social science is not to examine social phenomena in the same way as one would examine atoms or other data in the natural sciences. Rather, social phenomena can only properly be studied by understanding the meaning that is imparted to them by the social communities in which they have been created. In other words, the proper way to study society is to understand it as those people whom you are studying understand it. Winch's theory suggests that we might learn more

that this Article has constructed and case outcomes, and will also attempt to show that the language used in opinions is independently worth studying for its impact on public opinion.

A. *Weber and Legal vs. Economic/Political Rationality*

The theory that this Article will construct here has its roots loosely planted in Weberian social thought. Weber gives us, first, a suggestion that the strategic and attitudinal models would seem insufficient to explain legal behavior.[59] The rational choice model embodied in these two models is a worldview. It is a worldview that matches pretty well with our society's understanding of modern economic rationality. The rational economic actor conceives of himself as being called upon to act strategically—or purpose rationally, to use Weber's term—for the end of maximizing profit.[60] Modern economic rationality, in Weber's view, does not seem too different from modern political rationality. The heart of the professional politician's role is also to act in a very strategic manner, for the purpose of maximizing power.[61] Behind this game

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from an approach that focused on judicial discourse (and thus judicial self-understanding) than from one that focused on the more hidden motives posited by rational choice theory.

59. For purposes of contextualization and to orient the reader, I should emphasize that the argument of Weber that I stress here—the separate worldviews in different realms of social thought, each internally coherent and constituting "rational behavior" within that realm but often difficult or impossible to square with what is considered "rational behavior" in other social realms—is closely linked to Weber's core concern with fragmentation, disenchantment, and ultimate loss of meaning in the modern world. The separate definitions of "rational behavior" in each of the key social realms makes it impossible to identify one overriding "purpose" to human existence. This is particularly glaring when an individual feels himself torn to pieces by conflicting demands from the different spheres—for example, where the state demands a person's sacrifice in war, while religion demands just as adamantly that he not kill another human being. *See* MAX WEBER, *Religious Rejections of the World and Their Directions*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 323, 333–40 (H.H. Gerth & C. Wright Mills eds. & trans., 1958). In the past, in contrast, the social world was held together by one sphere—religion—which acted as umbrella and meta-principle over all others and thus imbued the entire world with a clear meaning. Today, however, religion has fallen off its pedestal and is just one competing sphere, coequal to all the others like politics, economics, eroticism, and so forth. And one cannot easily return to the past and regain meaning. *See, e.g.*, MAX WEBER, *Science as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra*, at 154–56.

60. *See, e.g.*, MAX WEBER, 1 ECONOMY AND SOCIETY 63–74 (Guenther Roth & Claus Wittich eds., 1978) [hereinafter ECONOMY AND SOCIETY].

61. *See* WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 59, at 78 ("'[P]olitics' for us means striving to share power or striving to influence the distribution of power . . . . He who is active in politics strives for power either as a means in serving other aims . . . or as 'power for power's sake,' that is, in order to enjoy the prestige feeling that power gives."). Weber contrasts an ethic of responsibility, which is essentially strategic behavior that weighs the consequences of various actions against each other, with an ethic of ultimate ends, which requires unflinching obedience to a given norm regard-

for power, hopefully, lies some cause, some ideological policy, that the politician wants to favor.[62] Because Weberian economic rationality is roughly a variant of rational choice theory, and because Weberian political rationality is so similar to Weberian economic rationality, rational choice theories do a good job of predicting many aspects of political behavior. In both the political and economic spheres, however, rational behavior is a construction, not something deeply imbedded in human nature: Entrepreneurs and politicians act the way they do because of their understanding of what it means to have the role they hold within society.[63]

Things change significantly when one comes to judges, because rationality for a judge is constructed quite differently than either political or economic rationality. Weber seems to consider modern judicial rationality to be somewhat similar to modern bureaucratic rationality.[64] The key difference between political rationality and judicial-bureaucratic rationality is that an actor subject to the latter feels himself ultimately not to be free to choose his own end or cause; instead, a web of norms chooses his end or cause and constrains his behavior.[65] The attitudinal claim that judges bring their personal policy preferences to bear on cases clashes sharply with

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less of consequences. *See id.* at 118–28. He argues that almost all action in politics should fall into the ethic of responsibility type, although there are rare occasions where the ethic of ultimate ends is appropriate, and, in fact, it is these rare occasions that makes politics truly a calling. *See id.*

62. *See id.* at 116–17 ("The sin against the lofty spirit of [the politician's] vocation . . . begins where . . . striving for power . . . becomes purely personal self-intoxication, instead of exclusively entering the service of 'the cause' . . . . [T]he serving of a cause must not be absent if action is to have inner strength . . . . Otherwise, it is absolutely true that the curse of the creature's worthlessness overshadows even the externally strongest political successes.").

63. *See, e.g.*, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans. 1958) (showing how modern economic rationality was constructed, partly from religious roots).

64. *See, e.g.*, 2 ECONOMY AND SOCIETY, *supra* note 60, at 976–78 (including a section on judging within his chapter on bureaucracy); *id.* at 801 (noting the tight link between bureaucratization and rationalization of law); *id.* at 975 ("[O]nly bureaucracy has established the foundation for the administration of a rational law conceptually systematized on the basis of 'statutes' . . . . [T]he reception of [Roman] law coincided with the bureaucratization of legal administration: The advance of the rationally trained expert displaced the old trial procedure which was bound to tradition or to irrational presuppositions."); *id.* at 886 (noting that modern judges see themselves as being largely "confined to the interpretation of statutes and contracts, like a slot machine into which one just drops the facts (plus a fee) in order to have it spew out the decision (plus opinion)").

65. *See, e.g., id.* at 979 (noting that administration must not be "a realm of free, arbitrary action and discretion, of personally motivated favor and valuation, such as we shall find to be the case among pre-bureaucratic forms. The role and the rational pursuit of 'objective' purposes, as well as devotion to these, would always constitute the norm of conduct.").

the self-perception of the judicial actor. Furthermore, because bureaucratic rationality par excellence is defined as the obeying of commands, there would seem to be considerably less scope for strategic conduct.[66] Weber is not naïve; he recognizes that bureaucrats and judges can and often do act strategically in their personal self-interest.[67] This is not their core role conception, however; and the content of this core role conception, one would presume, would significantly affect their behavior.

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66. Means-ends or strategic rationality (on behalf of an end, however, that the actor did not select) is clearly a part of bureaucratic work. *See id.* ("[I]n principle a system of rationally debatable "reasons" stands behind every act of bureaucratic administration, namely, either subsumption under norms, *or a weighing of ends and means.*") (emphasis added). But judicial activity does not seem to allow the same scope for strategic action as normal bureaucratic work.

The striking difference between political and bureaucratic rationality is the major reason why bureaucrats perform poorly in political roles. As Weber notes:

> The "directing mind," the "moving spirit"—that of the entrepreneur here and of the politician there—differs in substance from the civil-service mentality of the official . . . . If a man in a leading position is an "official" in the spirit of his performance . . . then he is useless at the helm of private enterprise as of a government.
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> The difference is rooted only in part in the kind of performance expected. Independent decision-making and imaginative organizational capabilities in matters of detail are usually also expected of the bureaucrat . . . . The difference lies, rather, in the kind of *responsibility* . . . . An official who receives a directive which he considers wrong can and is supposed to object to it. If his superior insists on its execution, it is his duty and even his honor to carry it out as if it corresponded to his innermost conviction, and to demonstrate in this fashion that his sense of duty stands above his personal preference. A political leader acting in this way would deserve contempt. He will often be compelled to make compromises, that means, to sacrifice the less important to the more important . . . . "To be above parties"—in truth, to remain outside the realm of the struggle for power—is the official's role, while the struggle for personal power, and the resulting personal responsibility, is the lifeblood of the politician . . . .

Max Weber, *Parliament and Government in a Reconstructed Germany*, *in* 3 ECONOMY AND SOCIETY, *supra* note 60, at 1381, 1403–04.

67. *See, e.g.*, 2 ECONOMY AND SOCIETY, *supra* note 60, at 979 (noting that "the sure instincts of the bureaucracy for the conditions of maintaining its *own* power in the home state . . . are inseparably fused" with the bureaucratic ethos); *id.* at 787–88 (explaining England's refusal to adopt civil law as follows: "Wherever legal education has been in the hands of practitioners, especially attorneys, who have made admission to practice a guild monopoly, an economic factor, namely, their pecuniary interest, brings to bear a strong influence upon the process not only of stabilizing the official law . . . but also of preventing its rationalization through legislation or legal science. The lawyers' material interests are threatened by every interference with the traditional forms of procedure, and every interference menaces that situation in which the adaptation of the scheme of contracts and actions to both the formal norms and the needs of the interested parties is left exclusively to the legal practitioners.").

B. *A New Model — The Two Worldviews in Latin American Constitutional Law*

If, according to Weber, we should hesitate to apply theories developed to explain political behavior to the legal realm, then what sort of theory might we use as a replacement? Again Weber gets us started. This Article will not use Weber's specific categorization of legal systems,[68] but the broader point Weber—along with many others—makes is very important: He sees the way that law, in the modern world, is a sort of autonomous system that hangs together and makes sense in the eyes of its actors (lawyers and judges).[69] Legal actors possess a distinctively legal orientation to the world, and this orientation seems unified and systematized to them. To act rationally from a legal perspective is to act meaningfully within that worldview. Thus, the first step—although surely

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68. The four categories that Weber uses are substantively irrational, formally irrational, substantively rational, and formally rational. *See id.* at 654–58. There is an immense amount of literature regarding these categories. *See, e.g.*, ANTHONY T. KRONMAN, MAX WEBER 72–95 (1983) (linking the categories to Weber's more general theory about autonomy and meaning); Max Rheinstein, *Introduction*, *in* MAX WEBER ON LAW IN ECONOMY AND SOCIETY xxv (1954); Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 LAW & SOC'Y REV. 487 (1987) (considering the relationship between Weber's categories and the achievement of an advanced capitalist economy and concluding, contrary to some other accounts, that formally rational justice was not necessary to achieve capitalism); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972) (giving a lucid account of Weber's four categories and the problems they raise).

The categories have been criticized as leaving out certain types of modern Western legal thought. *See, e.g.*, Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004) (arguing that Weber's theory has no room for an important modern U.S. mode of legal action, policy analysis). The categories have also been criticized for failing to perceive the ultimate rationality of non-Western legal systems. *See* Frank E. Vogel, Islamic Law and Legal System: Studies on Saudi Arabia 773–86 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with the Harvard Law School Library) (criticizing Weber's placement of Islamic law in the realms of substantively irrational law and charismatic authority by showing how that placement demonstrates a Western bias and avoids explaining the peculiar internal logic and rationality of the Islamic legal system). The thrust of these critiques is correct in that Weber's typology is too constricting (as well as insufficiently detailed). For example, the two types of Latin American constitutional worldviews explored infra match up to some slight extent with Weber's concepts of formal and substantive rationality, but this match is loose and otherwise problematic.

69. *See, e.g.*, KRONMAN, *supra* note 68, at 36 ("Weber's aim is to make manifest the common thread of meaning that links certain centrally important features of the modern legal order . . . . One of Weber's principal objectives is to show how these techniques, doctrines and institutions fit together into a meaningful whole, forming a world with a characteristic and historically unique meaning of its own."). A similar idea is found in the work of the anthropologist Geertz. *See, e.g.*, CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1993).

not the last—to understanding the behavior of judges is to reconstruct their worldviews.

Of what is such a legal worldview composed? Weber suggests, and one might safely assume, that it consists primarily of two components: (1) a notion of what law is (a sort of jurisprudence); and (2) a notion of what the judge is supposed to do with that law (a sort of political theory of the judge's role). Note that this definition of a worldview is somewhat different than Richards and Kritzer's "jurisprudential regime."[70] They define jurisprudential regimes as encompassing only understandings of what to do within a single area of law. The worldviews expressed here are intended to be far more comprehensive, encompassing the constitutional judge's entire professional self-conception.[71]

There are at least two quite different worldviews that Latin American constitutional judges possess at the present time. The first, which I will call—using a closely related concept from Lopez-Medina[72]— traditionalism-positivism represents the classic way of seeing law in Latin America. When translated into the constitutional realm, it means that courts will interpret constitutions just like ordinary statutes; thus constitutions will not be seen as having much impact on the legal order. The second worldview, which I will call new constitutionalism, defines itself quite differently. It sees constitutional interpretation as being a different enterprise from ordinary statutory interpretation, and thus views constitutions as documents that should be read broadly and with the document's hierarchy of ideals in mind. This Article will flesh out the conceptions much more broadly in the case study below.

For now, though, it is more important to theorize why a given constitutional judge might adhere to one of the above worldviews versus the other. Most of the answer appears to lie in intellectual cleavages within the legal profession. Traditionalism-positivism is still the dominant outlook within Latin American societies; carriers of new constitutionalism perceive it as being something quite new

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70. *See supra* notes 42–47 and accompanying text.

71. It is also important here to distinguish the theory expressed in this Article from certain psychological work that has been done on judicial behavior. This work, while generally starting with cognitive constructs within the judge's mind, suggests that the influence of these constructs is generally unconscious, that the constructs themselves are generally "non-legal," and that the judge is unable to combine these constructs into any sort of comprehensive system. LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 135–43 (1997); *see also* LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? (1999). The theory expressed in this Article, however, assumes that judges consciously work within systematic worldviews that they see as being distinctively "legal" in nature.

72. Lopez-Medina, *supra* note 2.

and different within Latin America, part of a transnational network of high-level academic/judicial discourse moving towards expansive constitutionalism. The focus here will be on the judges' legal experiences before becoming constitutional judges. Pre-constitutional-court professional experience is likely to make a big difference: Career judges spend their lives immersed in the ordinary legal system,where traditionalism-positivism is still unrivalled; furthermore, these judges, due to their long exposure with the ordinary system, would seem unlikely to be sympathetic to claims that constitutional interpretation has special rules. At the opposite end of the spectrum, constitutional or public law professors would expect to have the most exposure to new constitutionalist ideas during their careers, and would likely see themselves as harbingers or entry points for a discourse that they see as being new, transnational, and very scholarly.[73]

With these ideas in mind, and at significant risk of seriously understating the amount of complexity involved, we can proceed to make a *very* crude table matching worldviews with their likely carriers:[74]

TABLE 1: THE TWO WORLDVIEWS AND THEIR CARRIERS

Worldview	Probable Carriers
Traditionalism-Positivism	Career judges (and most lawyers?)
New Constitutionalism	Legal scholars (and some lawyers?)

73. *Cf.* Lopez-Medina, *supra* note 2, at 83–84 (noting that in the story he tells of the history of Colombian legal worldviews, "[w]e will discover . . . a continuous effort on the part of sophisticated lawyer-jurisprudes to undo the much more traditionalist positions of the professional lawyer, little concerned with the theoretical foundations of the law. When that happens, all sorts of jurisprudential positions . . . are situated to the left (to the critical side) of the standard legal theory. [Traditionalism-positivism], on the other hand, will make every possible attempt, through a mechanism that I call 'pop reception' to tame and de-radicalize the unsettling influences that jurisprudence generates on the system."). Where someone went to law school would seem to make a great difference in their worldviews: Those attending top law schools would expect to have substantial exposure to new constitutional ideas, while those attending mid-range or lower-level law schools probably would have much less exposure. This is confirmed informally through anecdotal evidence gleaned from various interviews with Harvard Law School LL.M. students who worked and attended law school in Latin America.

74. The picture is considerably complicated by the fact that many people involved in Latin American law have held multiple roles. For example, professors in Latin America rarely hold full-time positions. *See, e.g.*, KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 66 (1975) ("The full-time law professor is still a rarity in Latin America. Most law professors are busy practioners [sic] who dash into the law school to give a lecture and disappear immediately thereafter.").

These classifications, as crude as they are, can help us predict which worldview a court's decisions will exhibit. A career judge-dominated court should demonstrate a faithfulness to traditionalism-positivism, while a constitutional law scholar-dominated court should adhere more closely to new constitutionalism. This Article will examine this hypothesis below, using Colombia as an example. In fact, the model constructed here, like attitudinal theory, can be usefully conceptualized through using the adverse selection game. There are two different types of actors—constitutional scholars and career judges—each carrying a very different attitude towards constitutional law. The existence of these two types opens up possibilities that could be exploited by the relevant political authorities during the appointment process (ie. politicians could select carriers of worldviews that gain these politicians political advantages).

Finally, a caveat: This categorization of courts into carriers and worldviews is a contingent one, holding true only in Latin America and only at the present time. It is not meant, of course, to be a universal typology of judicial behavior.

IV. The Two Worldviews and Their Carriers: The Colombian Case

Having formulated a model, it is time for at least a preliminary investigation of its plausibility. This Article will examine the model using Colombian high courts hearing constitutional claims—the generalized Supreme Judicial Court in the 1980s, and the specialized Constitutional Court from 1991 to the present. The data on the composition and prior experience of the judiciary comes entirely from newspaper articles, and is collected in detailed form in the tables in the Appendix, while the source for judicial discourse comes mostly from formal written judicial decisions, although for the post-1991 period, this Article relies on some of the constitutional judges' writings in academic journals.[75] The methodology is admittedly somewhat eclectic: For the pre-1991 period, I read—or at least skimmed—hundreds of cases, including virtually all of the constitutional jurisprudence from 1985 to 1990. In the 1990s, where far more constitutional opinions have been written and where the length of the average opinion has increased considerably, I had no choice but to be more selective: I focused on reading cases that dealt either with jurisprudential problems or with major social issues.

75. All translations of both types of sources are my own.

What I aim to show is that career judges dominated the 1980s Supreme Judicial Court and therefore demonstrated the Traditionalist-Positivist worldview, while constitutional law scholars dominated the post-1991 Constitutional Court and this court has thus gravitated sharply toward new constitutionalism. In the process, this Article will flesh out these two worldviews and give the reader some sense of just how rich they are: jurisprudence, political theory, interpretative craft, and substantive values are all combined in an essentially seamless whole.

A. *Background*

Prior to 1991, the Supreme Court of Justice (CSJ), a body of twenty-four members, held the power to hear constitutional claims.[76] The CSJ functioned as a court of cassation as well as a constitutional court, and thus heard a wide variety of ordinary statutory claims.[77] The body was arranged into four smaller chambers: the criminal, civil, labor law, and constitutional chambers.[78] The full body of twenty-four heard all constitutional claims following a study by the constitutional chamber.[79] In 1991, Colombia drafted a new constitution, which, among other things, changed the machinery for hearing constitutional claims. A new, specialized Constitutional Court, hearing constitutional issues exclusively and composed of nine members (initially seven, changed to nine after 1993), became the highest constitutional authority.[80] This new institutional structure has persisted up to the present day.

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76. *See* COLOM. CONST. art. 214 (1987), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Gisbert H. Flanz trans., 1988). Actually, the Supreme Court of Justice (CSJ) had power to hear only congressionally-passed laws and, in some cases, presidential decrees. *Id.* Other decree laws went to the administrative Council of State when their constitutionality was challenged. *See id.* arts. 214, 216.

77. JAVIER HENAO HIDRÓN, CONSTITUCIÓN POLITICA DE COLOMBIA: COMENTADA 121 (8th ed. 1990) ("The Supreme Court is, essentially, a court of cassation . . . . The ultimate end of extraordinary recourse of cassation is unification of the national jurisprudence."); *see also* DIEGO RENATO SALAZAR, CONSTITUCIÓN POLITICA DE COLOMBIA: CONCORDA-COMENTADA CON JURISPRUDENCIA 238 (2d ed. 1986) (noting that the CSJ's two fundamental functions are to "unify the national jurisprudence by acting as a court of cessation" and to "protect the integrity of the national constitution").

78. *See* Hidron, *supra* note 77, at 121; Salazar, *supra* note 77, at 238.

79. COLOM. CONST. art. 214 (1987), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 76 ("The Supreme Court shall comply with these [constitutional] functions in plenary session following their study by the Constitutional Chamber . . . .").

80. *See* COLOM. CONST. arts. 239–45 (1991), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Peter B. Heller & Marcia W. Coward trans., 1995).

B. *The CSJ in the 1980s: Career Judges and Traditionalism-Positivism*

1. Composition of the Court

It is difficult to find evidence of the composition of the CSJ in the 1980s, but the evidence that I have found strongly indicates that this was a career judge-dominated court. On November 6, 1985, terrorists affiliated with guerillas fighting the Colombian government invaded the CSJ offices.[81] They killed about one-third of the court.[82] Thus, in this abnormal situation, the government replaced much of the court at the same time, making it relatively easy to track the appointments in the press.

Of the twelve initial nominees to fill these vacancies, six appear to have been career judges.[83] The newspapers described only four, including one of the career judges, as having substantial legal academic experience.[84] These raw numbers would seem to substantially overstate the representation of legal academics and understate the representation of career judges: As the attack wiped out the court's entire four-person constitutional chamber, the members of this particular chamber seemed to have been very heavily oriented towards legal academia. Three of the four initial replacements in this chamber were academics, and the other was a member of the top national administrative court. When all four of these initial nominees declined because of fear or other reasons, the four new nominees were all legal academics.[85]

The academia-heavy, career judge-light composition of the Constitutional Chamber makes sense if one keeps in mind that pre-

81. *See Hoy se Conocera la Nueva Corte*, EL TIEMPO (Bogotá), Nov. 26, 1985, at 7A.

82. *Id.*

83. For a more detailed look at the data used and the sources (newspaper articles) used to get this data, see *infra* Appendix Table 1. The table is based on the twelve nominees initially chosen to fill each vacancy, but a good portion of these nominees turned down the post (memories of the recent violent deaths of half the court, and threats made to the prospective new members, strongly influenced the high rejection rate). These twelve nominees, rather than the twelve who eventually joined the court, were used simply because the data is much better for the former group than for the latter; the press appears to have lost interest at some point, and ceased paying much attention to the names of new justices.

84. Two of the remaining three judges were politicians, while the third's prior career is basically unknown, except for his service as an auxiliary judge on the CSJ before becoming a full member. *See infra* Appendix Table 1.

85. *Corte Eligio Ayer a 5 Nuevos Magistrados*, EL TIEMPO (Bogotá), Dec. 5, 1985, at 3A. The replacement magistrates in the constitutional chamber were Hernando Gomez Otalora, Jairo Duque Perez, Jaime Pinzon Lopez, and Fabio Moron Diaz. *Id.* Three of these magistrates seem to have devoted most of their energies to academics; one, Jaime Pinzon Lopez, was primarily a politician who served as Minister of Work and an ambassador. *Id.*

1991 Colombia used a centralized system of judicial review; almost all constitutional claims under the old constitution could only be heard by the CSJ.[86] If other courts could not hear constitutional claims, then it would be tough to recruit judges from other courts to serve in the constitutional chamber, as that chamber's chief function was to study and recommend results for constitutional cases. Members of the other chambers dealt mostly with ordinary, non-constitutional cases in their respective areas, but recall that the full body composed of all twenty-four members actually decided constitutional claims.

If one roughly extrapolates the data for the eight replacements for the other three chambers (civil, labor, and criminal) and treats the constitutional chamber as a wholly separate entity with no predictive power for the composition of the rest of the court, then one might expect a full CSJ of twenty-four members to be composed of maybe thirteen or fourteen career judges and only five or six magistrates with substantial academic experience.[87]

Note further that this was a court where justices served for life and were replaced by vote of the remaining members of the court itself,[88] which would seem to be peak conditions for the maintenance of a court dominated by a technocratic, civil-service-like career judiciary.

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86. *See supra* note 80 (explaining the centralized system under the pre-1991 system and the decentralized system, centered around an action called the tutela, which is in effect today).

87. This extrapolation is very crudely calculated. I merely take the constitutional chamber of four members as is, with its three academics and one career judge. Then I note that the other eight replacements from the civil, labor, and criminal chambers were composed of five certain career judges and only one member with substantial academic experience (who also happened to be a career judge). I then extrapolate the data from these eight members out to the other twelve, unreplaced members of the court, all of whom were members of these three chambers (since the constitutional chamber was entirely destroyed in the guerrilla attack).

5/8=x/20, x=12.5=estimated number of career judges in the civil, criminal, and labor chambers. Add 1, the career judge nominated from the constitutional chamber, and you get 13 or 14 career judges on the full court of 24.

1/8=x/20, x=2.5=estimated number of academics in the civil, criminal, and labor chambers. Add 3, the 3 academics nominated to be on the constitutional chamber, and you get 5 or 6 legal academics on the full court of 24.

Using the same extrapolation, the CSJ would contain maybe five career politicians.

88. *See* COLOM. CONST. art. 148 (1987) ("Any vacancies that occur shall be filled by the respective bodies."). Post-1991, constitutional court justices serve not for life, but merely for eight-year terms (without possibility of reelection), and they are chosen by the Senate (from recommendations made by the President, CSJ, and Council of State), not by themselves. *See* COLOM. CONST. art. 239 (1995).

2. The Worldview of the Court

i. Interpretive Method and Judicial Role

Judicial worldviews are easily analogized to spheres: they have no obvious starting point for purposes of analysis. Nonetheless, in this case one can most easily begin to understand the judicial worldview by considering the general issue of constitutional interpretation. The CSJ addressed this issue in sentence number 51 of 1988, where it confronted the issue of whether a statute could properly penalize the mere act of running away after being ordered to jail, given the general interest in liberty enshrined in the preamble of the national constitution.[89] The precise issue at hand—which would not give any court much difficulty—and the broader decision not to make the preamble directly enforceable is not incredibly important. What is important is some of the court's more general language about constitutions.

The court began by noting that norms can be either should-be's (current arrangements) or want-to-be's (aspirations), and preambles fall primarily in the aspirational category. Legal rules ("normas juridicas"), on the other hand, fall into the should-be category. The court stated that it knows this because of the simple grammatical logic "brilliantly expressed" by Hans Kelsen in his *Pure Theory of Law*. Enforceable legal rules, unlike constitutional preambles, "impute a determined consequence to a certain antecedent."[90] There is a division, then, between legal rules—things that state in their own text when they are triggered and describe the sanction for triggering them—and other norms like general principles and values. The status of these necessarily vaguer norms within the system is reduced to mere aspiration. Furthermore, the court noted that constitutionalism inevitably involved the comparison of lesser legal rules with constitutional legal rules, which are of a higher order. It acknowledged, however, that only

> poorly can we try to determine the constitutionality of a legal precept compared with a principle or value of diverse kinds . . . . [F]or determining if something conforms with another thing or not, we should compare homogenous entities, not heterogeneous ones, as would be, in the present case, if we compared a rule with a principle or value.[91]

Thus, in addition to being aspirational, constitutional values and principles seem ill-suited on practical grounds to application in

89. No. 51, 2434 G.J. 466 (1988).
90. 2434 G.J. at 470.
91. *Id.* at 470–71.

real constitutional cases—they are too different in nature from ordinary statutory law. When put together, these two critiques render problematic the idea of a broad constitution with considerable penetration into the rest of the legal order; most of the language in all constitutions would not meet the Kelsenian definition of a legal rule, but instead looks like a vaguer principle or value.[92]

Finally, the court sought to link its jurisprudential points to some conception of the proper judicial role within a separation of powers system. In a traditional civil law system, the notion is especially strong that judges must only apply law; they must not make it.[93] The court applied this traditional theory as follows:

> The confrontation of many rules articulated in the Constitution and the law with [principles and values], would give rise to grave contradictions, according to the focus of the political doctrine with which you looked at them. If this occurred . . . the constitutional judge would become a legislator, and, what's more, a constituent, starting down the road towards legal uncertainty and . . . arbitrariness.[94]

In summary, the majority envisions a jurisprudence where only legal rules have legal efficacy, while principles and norms are purely aspirational in character, and where principles and norms are too different from legal rules to really fit into the legal structure. Further, the majority backs this up with a narrow theory of judicial role.[95]

The seven dissenters imagined a very different, and far more expansive, task for constitutional values and principles. There was little historical or other evidence that values and principles (including those in the preamble) were intended to be merely aspirational.[96] Furthermore, the Kelsenian definition of the efficacious legal rule is far too simple: Oftentimes legal rules did not come

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92. Note, though, that the court tried to head this criticism off by arguing that "the great majority of the principles and values . . . are confirmed as true legal rules in articles of the constitution." *Id.* at 472.

93. *See* MERRYMAN, *supra* note 37, at 34–38 (explaining that in a civil law system, "the net image is of the judge as an operator of a machine designed and built by legislators").

94. 2434 G.J. at 471 (quoting a decision of Oct. 2, 1980) (internal quotation marks omitted); *see also id.* ("That comparison" between rules and principles or values "can only determine if the rule is good or bad, in function of the prevalent values of the community. This is not the lawsuit for unconstitutionality, nor the function of the judge that is realized in exercise of the elevated function that is given him . . . by the Constitution.").

95. The majority did leave open the possibility that the values enshrined in the preamble could be used as a interpretative tool to help interpret constitutional rules so long as these values were not applied directly, see *id.* at 471, but it is hard to see how this squares with the majority's general picture of constitutional jurisprudence and judicial role.

96. *See id.* at 471 (Greiffenstein, J., dissenting).

with any kind of consequence or sanction attached in and of themselves; the sanction was found elsewhere in the legal order. Thus, the dissenters saw the legal order "systematically and comprehensively," as a united whole and with its guiding principles in mind.[97] The dissenters also made the important point that constitutions are inevitably political and must be applied with their given broad political philosophies in mind if they are to be enforced sufficiently.[98] This, however, emphatically did not mean that courts could not apply them objectively.[99] What the dissenters wanted, in sum, was a constitutional order that went beyond mere logical interpretation and entered the realm of teleology.[100] Principles and values existed to guide the application of constitutional rules and to broaden their scope beyond what would be allowed by classical positivism.[101]

It is interesting that the court saw statutory interpretation in the same way as constitutional interpretation: It is a logical enterprise, not a teleological one.[102] One key point, then, is the way that these pre-1991 judges minimized the differences between statutory interpretation and constitutional interpretation: They basically saw the two as the same enterprise. Again, the vision is that of law, whether statute or constitution being about low-to-the-ground rules. The ordering is vertical in the sense that a higher ranking rule in the constitution outweighs a lower ranking one in a statute, but horizontal or flat within each rank—a constitution, like a statute, is composed of a series of rules that are autonomous and not con-

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97. *Id.*

98. *See id.* at 473–74; 2434 G.J. at 476–77 (Marin Naranjo, J., dissenting).

99. *See* 2434 G.J. at 474 (Greiffenstein, J., dissenting) ("[It is] possible to develop in objective and valid arguments the significance of values and fundamental principles . . . . [T]he judge in general . . . has to penetrate . . . norms equally broad and indeterminate that legislation must use to structure its orderings, like Christian morality, good customs, social order, public order, and others . . . ."). The implicit undertone of this statement seems to be that traditionalist judges are already, in a hidden way, applying broad principles and values when found in legislation. Their hostility is thus less to broad principles and values *as such* than to understandings of constitutional values that will upset the more traditional values found within Codes.

100. *See* 2434 G.J. at 477 (Marin Naranjo, J., dissenting).

101. *Id.* ("The ambit of law is not reducible to the rules that positivism considers. Rules are law, but they are not all of the law. This has much broader confines.").

102. *See* No. 113, 2434 G.J. 371, 373 (1988); *id.* at 377 (Otalora, J., dissenting); *see also* No. 56, 2426 G.J. 42 (1986) (explaining that when a rule is clear, you do not neglect its literal meaning on the pretext of consulting its spirit). "Logical" interpretation includes both the plain or grammatical meaning of the text, and also reading the text in conjunction with other pieces of the same statute—a sort of horizontal ordering. *See* 2434 G.J. at 373. Teleological interpretation seems to refer more to vertical ordering: You gain a sense of the meaning of a rule by considering general principles and purposes.

trolled by higher-order norms. As I have already said, the inevitable result is to downplay much of the significance of the constitution, because the constitution is a very different type of document from a statute—it is far vaguer in form. Thus many types of claims simply were not computable under the constitution.[103] What survived within the constitutional order? Primarily, it would seem, those provisions that were framed as rather specific, particular rules, like the prohibition against ex post facto laws and the right to a defense.[104]

The basic story so far—of flat constitutions—needs to be qualified in just one respect. If most of the provisions in the constitution were enforced individually, without regard to some unifying, guiding principle that might stand behind them, the structural provisions were treated differently. Here, separation of powers acted as a spirit: It was, in the court's words, a "principle" that formed "one of the pillars of Constitutionalism as a national philosophy of division

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103. In one example, a man tried to sue to strike down mandatory retirement ages for civil service workers on the ground that these violated rights to dignity, honor, and equality. *See* No. 151, 2430 G.J. 397 (1987). The court did not explore the complex, value-laden argument that the plaintiff was making, instead simply interpreting a literal rule in the constitution as allowing all acts of forced retirement and repeating its oft-cited doctrine that the court was "incompetent to effect judgment on the convenience or adequacy of the [legal rule]." *Id.* at 403. It coupled with this a bare statement that the law did not create "any offense to the dignity of man, but simply signaled an age limit for giving service to the sector." *Id.*

104. For example, in several cases involving the presidential power to declare and legislate during states of siege, the court has articulated a certain core of constitutional values that cannot be broken even during such periods. Strikingly, chief among these is the rule against ex post facto applications of laws. *See, e.g.*, No. 58, 2418 G.J. 558, 563 (1984); No. 66, 2418 G.J. 624, 628 (1984). Also included is the right against uncompensated takings. *See, e.g., id.* at 629.

The court took a more nuanced, but ultimately similar, approach in a case where it was argued that a statute allowing the judge to nullify a criminal conviction where there was a "validated existence of substantial irregularities that affected the process" gave the judge too much arbitrary discretion. *See* No. 55, 2434 G.J. 518, 521–22 (1988). The court showed that the provisions on due process leading to nullification in the constitution were very particular in form, including: (1) that crimes and punishments must be written as law; (2) that jurisdiction be legally exercised and formal procedures followed; (3) the right to a defense; and (4) the right to be treated favorably (in terms of burden of proof). *Id.* New cases for nullification could be created by judges within these four cases, but not outside of them. *See id.* at 522. Thus, the statute was not too broad—it allowed for individualization of circumstances, avoiding complete formality, but within a constrained set of rules within the constitution. What this shows is: (1) that the court was willing to work with constitutional provisions slightly higher up on the hierarchy of norms (provisions that were basically rule-like but not completely developed to specific cases); and (2) that the court was using specific provisions in a constitution to narrow broad statutory provisions, rather than using a general principle in a constitution to inform a statute.

and management of powers in service of liberty."[105] The court thus derived several specific doctrines from this principle, including, for example, the idea that "all actions of a branch of government in activity that properly belongs to another branch require an express mandate in the constitution, since the contrary would . . . contravene the philosophy of the Constitution."[106] Thus, if Congress wanted to adjudicate or perform administrative functions, it would need to find explicit authorization for the particular act of adjudication or administration from the constitution.[107] Related to this principle, the court developed a family of important doctrines limiting the president's extraordinary powers under states of emergency and states of siege.[108] This last set of cases in particular had a significant impact on many of the executive's important policies,[109] leaving the general impression that most of the court's constitutional cases in the 1980s, and particularly most of its important cases, were argued and decided on these sorts of structural grounds.

Why was the court so willing to imbue the constitution with a spirit when it came to structure, but nowhere else? Some of this might be rooted in the division, particularly strongly seen with civil

105. No. 43, 2418 G.J. 383, 387 (1984). The court similarly noted that separation of powers is more than a mere technicality, it is "a philosophical and normative doctrine in service of liberty," avoiding the creation of a new, technocratic and bureaucratic-administrative "absolutism." *Id.* at 389. Interestingly, a dissenter noted that the court had "returned ideologically to the seventeenth century." *Id.* at 418 (Segura, J., dissenting). The specific issue in the case was whether a decree creating special procedures and special judges for terrorism-related cases could stand. 2418 G.J. at 384. The court struck much of the decree down, holding that statutes could not take many of these functions away from the ordinary judiciary. *Id.* at 389–400.

106. No. 75, 2426 G.J. 239, 243 (1986).

107. *See id.* at 244–46. The disposition denied Congress power to appoint senators and representatives to the commission that was in charge of national television, saying that this would give Congress an administrative power not found in the constitution. *Id.* at 246–47.

108. The court's jurisprudence on state of siege powers, for example, tended to try and interpret presidential powers somewhat restrictively. *See, e.g.*, No. 126, 2430 G.J. 141, 146–47 (1987) (noting a recent shift in the court's holdings away from allowing some broad notion of implicit or natural executive authority towards holding that presidential authority for a state of siege must be found either expressly in the constitution, in a previous law passed by the Congress, or in the "rights of people" (which was not to be interpreted as a broad catchall but was merely meant to encompass international human rights law)); No. 45, 2413 G.J. 32, 40 (1983) (reciting the requirement of a connection—emergency decrees must have a "direct and specific relationship with the situation that determined the implantation of the emergency regime").

109. *See, e.g.*, 2413 G.J. 1–275 (striking down a huge emergency economic decree, mostly on structural grounds of executive inability to pass tax laws and the like).

law countries, between public and private law.[110] Codes regulate private law, constitutions public law, and organization of the state seems like the most appropriate subject for public law. Another piece of the puzzle would seem to deal with the concept of judicial role touched on earlier.[111] The traditionalist-positivist theory of judicial role is marked by a great fear of acting politically, as the legislator; separation of powers is a political theory, but it *seems* to be less political than substantive values like dignity or equality. Making sure that the proper branches are performing political acts might seem very different than striking down one branch's substantive political act with an opposing substantive political conception.

ii. Substantive values

The jurisprudential theory of a "flat" constitution (and its related conception of judicial role) was linked, in the Colombian context, to certain substantive values. In the absence of a strong overlay of constitutional values to fill the legal order, "code values" played this role instead—those essentially politically conservative values reflected in the old nineteenth century codes, particularly the Civil Code.[112]

A wonderful example is found in a 1981 case where the court explored whether a law giving illegitimate children less of a father's estate than legitimate children was unconstitutional.[113] The plaintiff, citing a number of constitutional provisions, made an argument based on principles of equality and dignity.[114] The court complained about the "lack of rigor in the formulation of the charges, and concretely in the enunciation of precepts supposedly infringed," and stated that the plaintiff was "opposing her own, personal idea of justice to the conception of justice formulated by the legislator in her norm . . . [thus supposing] that her idea of justice is that of the constitution."[115] The court also noted, dismis-

110. *See, e.g.*, MERRYMAN, *supra* note 37, at 91–93 ("The main division in the civil law tradition is into public law and private law. This distinction seems to most civil lawyers to be fundamental, necessary, and, on the whole, evident.").

111. *See supra* notes 93–95 and accompanying text.

112. Merryman has noted how basic the notion of the Code (which became something of an ideology) is to civil law countries, and that this notion spread from Europe (particularly France) to the newly independent nations of Latin America in the nineteenth century. *See* MERRYMAN, *supra* note 37, at 32–33. The Civil Code is, in many ways, the main organizing principle of the traditional civil law.

113. No. 37, 2405 G.J. 246 (1981). The law specifically provided that illegitimate children received half the hereditary quota that legitimate children received. *Id.* at 246.

114. *See id.* at 247.

115. *Id.* at 250.

sively, that the plaintiff's view reflected a "pure idea of immanent justice."[116]

The court placed the Civil Code against the notion of the broad, value-laden constitution. After rehearsing at some length the history of the (unequal) treatment of illegitimate children under the evolving Code, the court noted that the provisions served "valuable goals": "the preservation of sexual stability, the defense of the family, the identification of the father . . . ; [these] are values of social order and collective security that it would be senseless to try and ignore."[117] The court added that "the unequal treatment . . . of children born outside wedlock compared to those born inside is a predominant legislative phenomenon in history" and that this was "easily" shown as being the result of "the constant and profound interest of the community . . . in maintaining the regularity, solidity, and consistency of that original and basic focus of society that is the family."[118] Furthermore, such a deeply-rooted legislative enactment was entitled to far more respect than the plaintiff's pure constitutionally-grounded theory of justice, because the enacted Code's values represented "a harmonization of the interests in conflict . . . . [that] supposes not only an axiological criterion, but [also] a painstaking sociological study of the interests in the era in which the legislation is transmitted."[119] "Law," then, is the "positivist-historical product of what the community thinks and feels," and not something "abstract, ideal, and transcendent."[120]

Thus, the values of the statutory legal order, expressed most powerfully in the Codes, become the source of values across the entire system. Tested by the history of society, they are entitled to far more respect than some speculative values derived by judges from the constitution. Obviously, the conception of separation of powers and judicial role looms large again. A dissenter accused the majority of being "merely positivistic" and of lacking "ideology"—the court, the dissenter argued, should have tested the legal rule against some normative conception of justice.[121] This critique misperceives that the majority's notion of positivism is itself ideological—it is grounded in the historical values of enacted legislation. It is, thus, an ideology, and a rather conservative one.

116. *Id.*
117. *Id.*
118. *Id.* at 249.
119. *Id.* at 251.
120. *Id.*
121. *Id.* at 253.

This reverence for conservative code values extended beyond traditional regulation of family law and into the economic realm. A 1988 case considered the clash between an 1887 Civil Code provision providing that "ownership . . . is the real right to a corporeal thing for enjoying and disposing of it arbitrarily, so long as it is not contrary to the law or the right of another" and constitutional provisions noting that property is a "social function entailing obligations."[122] The majority held that there was no conflict: "The adjective 'arbitrarily' [in the Civil Code] is tempered in the same rule by prohibiting uses that violate the law or the rights of another, all of which implies that it is not an absolute faculty . . . ."[123] Despite dating from a different era, the court fully adapted the Civil Code provision to the social enmeshment of property contained in the New Deal era[124] constitutional clauses.

A close read of the decision, however, reveals that it was not simply the Civil Code provision that the court was reinterpreting; if the court was understanding the Code provision in a strangely communitarian light, it was also moving the constitutional provisions on property further towards individualism. The court, citing a variety of old cases,[125] argued that the definition . . . of ownership . . . of the Civil Code, with its content as a subjective and individual right, has been considered as an essential element of its social function, thus that its constitutional protection obeys fundamentally the particular interest in ownership and also those of the community for the satisfaction and advancement of its social ends . . . .[126]

The individualistic conception of property enshrined in the Civil Code seems to have heavily influenced this scope of constitutional protection. As a dissenter noted, the court adopted this "individualistic and egoistic" conception of property, which the constitutional provisions of the 1930s tried to neutralize, into the new constitutional order: "[I]n Colombia they reform the texts but not the attitudes."[127] This complaint expresses an interesting issue: As wedded

122. No. 86, 2434 G.J. 117–18, 124 (1988).

123. *Id.* at 126. The majority also noted that "the meaning in which we should understand the adverb 'arbitrarily' is . . . [according to a dictionary] 'the faculty that a person has to adopt one resolution in preference to another' and not one of 'abuse.'" *Id.*

124. *Id.* at 132 (Velasquez, J., dissenting).

125. *See* 2434 G.J. at 125–26. Interestingly, the court uses authorities from before, during, and after its short-lived legal realist experiment around the time of the New Deal. The quotes themselves seem to show the huge differences in perception of property rights in the middle (New Deal) period as compared to the earlier and later periods.

126. *Id.* at 126.

127. *Id.* at 132, 134 (Velasquez, J., dissenting); *see also id.* at 134–35 ("The spirit of the law does not arrive in direct form across the express and manifest texts but continues

as the traditionalists-positivists were to a positivist vision of the law, they had, through time, developed a very strong, intensely normative vision of the Code. The court could use this sort of spirit to strike down a claim to a distinctively normative spirit within the constitution, as it did in the family law case above, or instead the court could infuse the constitution itself with this spirit, rather than opposing the constitution and the Code, as here with private property. The Code, then, becomes the light behind the constitution, illuminating one of its aspects (private property) and giving it some real normative life. The court sometimes read the constitution through the Code.

One should not get the impression that the property area has been an extraordinarily active one, or that the court has developed a nineteenth-century conception of property in its jurisprudence. The court has recognized that property is a social institution and that legislators have fairly broad discretion to regulate it and related economic rights.[128] Still, the court has been willing to imbue this section of the constitution with a spirit and to enforce it with some activeness. Most of its work here, unsurprisingly, has been in the expropriation area, where the court has noted that although property rights entail social obligations, they still exist in strong form and the state cannot take them without either full compensation or through the extinction of property rights through prescription.[129] Via the compensation route, the court has insisted rigorously that the compensation be equal to the market value of the property taken.[130] The prescription route is much more interesting, because here the court has stated that this constitutional method "of developing the social function of property"[131]

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reigning in deformed legal compositions and awkward interpretations that . . . slow, at least, the advance of legislation and the change of political-social course that our institutions need.").

128. *See, e.g.*, No. 32, 2340 G.J. 335 (1987) (articulating the same principle in a case upholding the regulation of businesses and workers and requiring certain investments in social-security-like funds); No. 29, 2340 G.J. 305 (1987) ("Our constitutional system recognizes the freedom of enterprise and private initiative within the limits of the common good, although the general direction of the economy is a charge of the state."); No. 80, 2418 G.J. 682 (1984) (upholding presidential regulation of banks as this industry is imbued with the "public interest"); No. 23, 2418 G.J. 201 (1984) (upholding legislative power to order forced investment in certain funds).

129. *See* No. 24, 2422 G.J. 251, 255–56 (1985).

130. *See, e.g., id.*; No. 12, 2418 G.J. 100 (1984).

131. No. 71, 2434 G.J. 704, 708 (1988); *see also* No. 23, 2418 G.J. 201, 207 (1984).

is an "ancient"[132] concept regulated by principles found in the Civil Code.[133] Thus, the court gives the constitutional mandate of the social function of property much of its life through a general principle it derives from the Code.

3. Summary of the 1980s CSJ

We have seen that the CSJ in the 1980s was a court dominated by career judges, and we have also seen that it displayed a traditionalist-positivist worldview. It read constitutions as being flat—composed of a series of fairly specific, lesser-order rules rather than as rules subordinated to and understood in light of higher constitutional principles and values. The result is that the court has generally downplayed the significance of the constitution. We have seen that this jurisprudential theory is linked to the traditional Latin American civil law conception of separation of powers and judicial role. The one exception to this general interpretative theory is in the structural area of defining which branches of government should perform which roles; here a more value-oriented jurisprudence has developed. Finally, the court's jurisprudential theory has led to a situation where traditional values from the codes have filled the gap in overarching legal ideals left vacant through this method of constitutional interpretation. Thus, this jurisprudence had a predictably, if loosely, conservative bent.

C. *The Constitutional Court in the 1990s and Today: Law Professors and New Constitutionalism*

1. Composition of the Court

The composition of the Constitutional Court in the 1990s was radically different from the composition of the CSJ in the 1980s. The CSJ, as we have seen, was a court controlled by career judges. In contrast, the first Constitutional Court selected in 1991, composed of seven members, had only three magistrates with substantial prior judicial experience, yet five of the seven were legal

132. 2418 G.J. at 207 ("Prescription is as ancient as the judicial institutions of which it forms a part."). The case allowed prescription to extinguish the rights of certain persons in their investments.

133. *See* 2434 G.J. at 705 (defining prescription within the constitutional context by looking at the Civil Code, deriving from it the following prerequisites: "a) A credit or an obligation susceptible of being extinguished through prescription, b) the lack of exercise or inertia of title, c) the passage of a period of time determined in the law, that varies according to the cases."). The case permitted governmental wages not claimed within two years to be taken by the government.

academics.[134] Colombia selected a new, nine-member court in 1993; this court was composed of six academics and only two career judges.[135] Thus, by 1993 the percentage of academics on the Court compared to the old CSJ had risen from roughly twenty-three percent to sixty-six percent, while the percentage of career judges had fallen from about fifty-five percent to twenty-two percent.[136] As further evidence of legal academics' domination of the new Constitutional Court, one notes an explosion of public-law scholarship from the nine members of this new court, particularly in the early 1990s.[137]

Though important, explaining the reasons for this shift is difficult and well beyond the scope of the present Article. Partly, prominent politicians, including then-president Cesar Gaviria Trujillo, understood that legal academics, with their tendency to question certain aspects of traditional Latin American jurisprudence, would be more in accord with a progressive, new-constitutional political agenda. The shift was also partly a result of the pragmatic need to find people who understood constitutional law: since, as has been noted, the pre-1991 system utilized a centralized system of judicial review, the career judiciary—below the CSJ itself, which monopolized judicial review under the old system—was a bad place to find judges that were competent in constitutional law.

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134. For detailed data and sources, see *infra* Appendix, Table 2. Two of the academics were also seemingly career judges. *Id.* One member of the court was neither a career judge nor an academic; he seems to have been a prominent politician. *Id.*

135. For data and sources, see *infra* Appendix, Table 3. Both of the career judges were also professors. *Id.* Political ideology, as well as carrier type, played a large part in the selection process for the 1993 court. *See* Edgar Torres, *Una Corte en Equilibrio*, EL TIEMPO (Bogotá), Dec. 3, 1992, at 3A (noting the political ideologies of the various appointees and their sponsors in the legislature).

136. Percentages for the 1985 CSJ are based on my rough extrapolation calculated above. *See supra* note 87. Using only the raw data for the 1985 CSJ, without making the above adjustments, the percentage of academics under the CSJ would be 33% and the percentage of career judges on the CSJ would be 50%. Therefore, by any measure, there was a drastic change in composition with the advent of the new Constitutional Court.

137. *See, e.g.*, Alejandro Martinez Caballero, *Tipos de Sentencias en el Control Constitucional de las Leyes: La Experiencia Colombiana*, REVISTA ESTUDIOS SOCIO-JURIDICOS, Mar. 2000, at 9; Eduardo Cifuentes Munoz, *La Igualdad en la Jurisprudencia de la Corte Constitucional*, REVISTA DE DERECHO PUBLICO, Feb. 1997, at 8; Rodolfo Arango Rivadeneira, *El Valor de los Principios Fundamentales en la Interpretacion Constitucional*, REVISTA DE DERECHO PUBLICO, Nov. 1994, at 51 [hereinafter Rivadeneira, *Fundamental Principles*] (Rivadeneira was an auxiliary magistrate); Rodolfo Arango Rivadeneira, *Jurisdiccion e Interpretacion Constitucional*, REVISTA DE DERECHO PUBLICO, Nov. 1993, at 31 [hereinafter Rivadeneira, *Jurisdiction*]. It is also notable that Ciro Angarita Baron, a key member of the court in the 1990s, served as chief editor of the REVISTA DE DERECHO PUBLICO [Journal of Public Law], one of the nation's most important constitutional law journals.

2. Jurisprudence of the Court

i. Interpretive Method and Judicial Role

A crucial starting point for the new court has been that constitutional interpretation is somewhat different from ordinary statutory interpretation in degree if not in kind.[138] Constitutional doctrine starts from the notion that mere legal rules are insufficient to cover all individual cases. Rules would leave gaps in the legal order without some additional, creative judicial work:

> The text of the law is not . . . susceptible to being applied mechanically in all cases, and that justifies the necessity of having the judge interpret and apply it, integrating it and giving it coherence, thus that equality can be realized in the most complete constitutional sense.[139]

This is far truer of the constitution than of ordinary statutes, given the vague character of constitutions. Some method is needed to bring clarity to the constitution and to make it effective: This method essentially starts from fundamental principles and values. According to Justice Rivadeneira, the constitution is largely comprised of these principles, which, even though they have an "open character," must not be "subordinated to the other, more concrete constitutional precepts . . . . Far from an opposition between the abstract and indefinite and the concrete and specific . . . interpretation should try to integrate [them] in a harmonious whole."[140] Similarly, according to the court in an important 1995 case, general principles are an important way of making sense of the otherwise gap-filled constitution without giving way to judicial arbitrariness.[141]

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138. *See, e.g.*, Rivadeneira, *Jurisdiction*, *supra* note 137, at 35 ("The methods of judicial interpretation are applicable to the constitutional orbit. However, the significance and the peculiarities of a constitution require the modification and adaptation of the general principles of interpretation to the exigencies of this branch of law . . . . In comparison to other legal norms, constitutional norms have a higher grade of indeterminacy and of conceptual openness . . . .").

139. *See, e.g.*, C-836, 2001 J. & D. 2524, 2530; *see also* C-083, 1995(3) G.C.C. 55, 64–66 ("[T]he judge constitutes an essential moment in the law, since the task inherent to legal rules is application. It would be much easier to have a legal order without legislators than without judges, because without the possibility of projecting the rule onto the concrete case, the law would cease to be what it is . . . .").

140. Rivadeneira, *Fundamental Principles*, *supra* note 137, at 59–60.

141. C-083 at 70–73 (noting in regard to working with general principles that this "aims to arrive at only one proposition: explaining what is implicit in the system and has served as the basis of the decision. The complexity of the work does not cover up . . . the positive base of the decision."). The other two ideas that the court saw as being important for gap-filling were precedent and analogy. *Id.* at 67. The idea of general principles, though, has had a dominant impact within the new legal order, perhaps because prece-

If broad principles are thus suddenly relevant to constitutional interpretation, how exactly should the court use them? Based on a reading of Dworkin, the court seems to want to break down these general concepts into two groups: values and principles.[142] Values identify the ends of the state and are chiefly aimed at the future—they are things like "coexistence, work, justice, equality, knowledge, liberty, and peace captured in the preamble to the constitution. Also they include [things enumerated in one of the initial articles like] service to the community, general prosperity, . . . participation, etc."[143] These ends are so broad that they exist "to resolve a problem of interpretation in which the sense of the law is in play, not to be applied directly . . . ."[144] Principles are quite different. These are narrower concepts that "express norms for the present" and "consecrate general legal prescriptions that imagine a recognized political or axiological delimitation, and, in consequence, restrict the space of interpretation."[145] These include things like the social state of law, participatory and pluralist democracy, prevalence of the general interest, and respect for human dignity.[146] Because of their greater specificity, principles, in addition to being an "inescapable guide to interpretation," can also sometimes be applied directly to solve constitutional questions.[147] In sum, rules, principles, and values all lie on a continuum in which, "as they gain generality they increase their space of influence but lose concreteness and capacity to apply directly to the concrete case."[148] The court must interpret rules in light of principles and values to achieve coherence and harmony throughout the constitution as a whole, and must place these principles and values in a hierarchy to avoid high-level conflicts between general concepts.[149]

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dent is not a device for making tough decisions as a matter of first instance, but only for ensuring that those tough decisions will not have to be made more than once, while analogy would seem to depend, in most cases, on general principles anyway.

142. *See, e.g.*, T-406, 1992(2) G.C.C. 190, 198–99; Rivadeneira, *Fundamental Principles*, *supra* note 137, at 53.

143. T-406, 1992(2) G.C.C. at 198.

144. *Id.*

145. *Id.* at 198–99.

146. *Id.* at 199.

147. *Id.*; *see also* Munoz, *supra* note 137 (interpreting various specific constitutional provisions in light of the general concept of equality, but also using that concept to derive various new specific rules; thus developing a richly textured, ready-to-be-applied norm of equality).

148. *Id.*

149. *See* Rivadeneira, *Fundamental Principles*, *supra* note 137, at 58 ("The Constitution has a hierarchy in its interior, or one might say, there exist some constitutional norms with greater weight than others . . . . [I]t is the case that human dignity prevails over the princi-

The post-1991 Constitutional Court thus abandoned the notion of the flat constitution where only specific legal rules had enforceable content for a complex, hierarchical constitutional structure that general principles and values dominated. They believed that they were doing something that was both quite new[150] and fairly international[151] in outlook. They even selected a new hero: In place of the old worship of Kelsen, the new court cited Dworkin's theories.[152] This new approach should not be confused with a judicial emphasis on policy; policy arguments have never had much play in Latin American law.[153] The argumentation from broad principles that Colombian constitutional jurisprudence has emphasized since 1991 is very different from the kind of pragmatic policy arguments that are familiar to us in modern, post-realist American law.

Lopez-Medina, in his study of Colombian "pop" jurisprudence, has emphasized the new court's role in changing the notion of precedent.[154] This change in precedent, however, was only a part of the new court's general change in approach to the constitution, despite its obviously important consequences (if the Constitutional

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ple of the general interest . . . ."). My general sense is that a few general concepts have prevailed over all others in the Colombian constitution: human dignity, equality, and the social state of law. *See, e.g.*, T-414, 1992(2) G.C.C. 299, 309 (referring to human dignity as the "supreme value of the 1991 Constitution").

150. See, for example, T-406, 1992(2) G.C.C. 190, 201, which states:

> We will go to construct a new interpretation of the constitution of law adequate to our own reality of sub-development (new constitutionalism for Latin America) . . . . There exists a new strategy for the effectiveness of fundamental rights . . . . This new relationship between fundamental rights and judges signifies a fundamental change in relation to the old constitution.

(emphasis omitted).

151. *See, e.g.*, Rivadeneira, *Fundamental Principles*, *supra* note 137, at 55 (linking Colombia's new constitutionalism with "the constitutionalism of the post-war" period elsewhere in the world).

152. *See, e.g., id.* at 58–59 (rejecting "Kelsen's" view that "traditionally has negated that principles—as opposed to legal rules—formed part of the law" and accepting "Dworkin's thesis" that "underlines the possibility of overcoming moral, political, and legal divisions through a constructivist interpretation of the law."); C-083, 1995(3) G.C.C. 55, 71 (citing Dworkin's views of general legal concepts); T-406, 1992(2) G.C.C. 190, 198–201 (citing Dworkin, as well as Bickel and Hart). Kelsen was such a central figure in Colombian law that he did not totally disappear for the New Constitutionalists—rather, he was reinterpreted to support the new theory and thus continues to be cited by current constitutional court judges. Lopez-Medina has demonstrated convincingly that both the old traditional-positive and the new readings are really partial reads and intentional misreads of Kelsen's true argument. *See* Lopez-Medina, *supra* note 2, at 275–325, 403–18.

153. *See, e.g.*, Esquirol, Law and Development, *supra* note 2, at 68 ("[T]here is admittedly a perceived absence of social argument within Latin American legal reasoning. It is deeply eclipsed, and when it is raised, it is quickly challenged as illegitimate.").

154. *See* Lopez-Medina, *supra* note 2, at 344–91.

Court could succeed in forcing other courts to follow its holdings). Also, these precedential changes were, in fact, subsidiary to the new interpretive methodology explained above. When the legal order is seen as being composed of specific legal rules interpreted through the use of logic, precedent would seem to the actors involved as unnecessary—it should be simple enough, the traditional view goes, for judges to come to the right decision independently. Once the constitutional order becomes seen as gap-filled and is consequently complexified through the use of teleological methods of interpretation and vague general concepts like values and principles, then the need for precedent appears pressing to avoid blatant inconsistency in application of constitutional concepts. Indeed, the court used the dangers of inequality to justify a ratcheting up of the value of its own precedents in the 1990s.[155] The court's steps towards altering the types of decisions it reached[156]—allowing: (1) holdings where a statute would only be considered constitutional if applied a certain way (conditional decisions);[157] and (2) sentences adding something to a statute and thus correcting its omission (integrated decisions)[158]—should also be seen as subsidiary to its more general change in attitude towards

155. Precedent was always cited and used by the Colombian high courts (unlike in some other Latin American countries), even before 1991; but the post-1991 constitutional court initially showed some skepticism towards giving it a formal status as a source of law. *See* Lopez-Medina, *supra* note 2, at 350–61. It later hitched itself to the constitutional notion of equality in increasing the force of its precedents. *See, e.g.*, C-083 at 66, 68–70 (upholding a law allowing reference to the court's constitutional doctrine in cases where the texts themselves were not clear, as a necessary function given the gaps in the law and the need to avoid judicial arbitrariness); T-321, 1998(6) G.C.C. 306, 312–15 (continuing a long line of cases in holding that equality requires respect for the constitutional court's doctrine in tutela decisions, and holding that other courts may only deviate from this precedent if they clearly explain the reasons for the deviation in their decisions). Recently, the court has refined its doctrine by stating that only the holding, and not the dicta, must be respected as precedent. *See* SU-047, 1999(1) G.C.C. 1063; *see also* Diego Eduardo Lopez-Medina & Roberto Gordillo, *Consideraciones Ulteriores Sobre el Analisis Estatico de Jurisprudencia*, REVISTA DE DERECHO PUBLICO, Dec. 2002, at 3 (giving an overview of recent developments in this area as well as other areas dealing with precedent).

156. An overview of these changes can be found in a recent article by a constitutional judge. *See* Caballero, *supra* note 137.

157. *See, e.g.*, C-700, 1999(9) G.C.C. 209 (upholding an economic law on condition that it be interpreted a certain way); C-239, 1997(5) G.C.C. 144 (upholding a penal statute on condition it not be construed to reach mercy killers without a guilty state of mind); C-496, 1994(11) G.C.C. 115 (upholding a habeas corpus law on condition that it be interpreted to allow certain challenges to judicial orders to free a prisoner).

158. *See, e.g.*, C-690, 1996(12) G.C.C. 111 (adding a provision to a tax law for constitutional reasons); C-109, 1995(3) G.C.C. 179 (adding provisions to a paternity law creating an irrebutable presumption that a child born out of wedlock is legitimate to allow challenges in certain enumerated circumstances).

constitutional law. These maneuvers were not exactly new,[159] but they were applied far more confidently and far more often in the post-1991 period than before. They spring from the court's increasing sense that the constitution—and not something else, like the Codes—constituted the main well-spring of normative ideals within the legal order, and thus that the rest of the legal order must be infused with and, when necessary, reshaped by constitutional ideals.

A changing theory of judicial role has accompanied this new theory of a complex, value-laden constitution. The old notion of separation of powers emphasized the legislator as law-maker and the judge as law-applier, and inspired an extraordinary fear of judges making law. The new theory instead marks out a "creative"[160] role for the judge in the "creation of law."[161] Jurisprudential arguments about the changing nature of law back this new theory. Society and law have both become more complex.[162] On the one hand, as we have already seen, vague values and principles instead of specific rules have dominated the legal, or at least constitutional, order, and it requires considerable judicial work to integrate legal rules with higher principles of the legal order.[163] On the other hand, the post-1991 judges have tended to note a gap between judicial rules on the books, which are relatively abstract, and complex, fact-specific, modern social reality; only creative judicial action can bridge this gap.[164] Thus, in addition to upward-looking work aimed at

159. *See* Caballero, *supra* note 137, at 21–23 (discussing examples of pre-1991 cases involving integrated and conditional decisions).

160. C-836, 2001 J. & D. 2524, 2530.

161. T-406, 1992(2) G.C.C. 190, 201 ("[L]egislation and judicial decision are both processes of the creation of law.").

162. *See id.* at 200.

163. *See* C-836 at 2530–31, which states:

> [The creative role of the judge] has an additional justification from normative and teleological aspects of the social state of law . . . . This function [is] . . . realized through the construction and weighing of legal principles, which make sense of judicial institutions in their labor of interpreting and integrating the positive order. This supposes a degree of abstraction or of concreteness with respect to particular norms, which for giving integrity to the whole of the positive order and attributing to the legal text a concrete, coherent, and useful meaning, allows channeling this order for the achievement of constitutional ends.

164. *See* C-083, 1995(3) G.C.C. 55, 64 ("[T]he judge constitutes an essential moment in the law, since the task inherent to legal rules is application. It would be much easier to have a legal order without legislators than without judges, because without the possibility of projecting the rule onto the concrete case, the law would cease to be what it is."); T-406 at 200 ("The increase in the factual and judicial complexity of the contemporary state has brought as consequence the exhaustion of the regulatory capacity of general and abstract postulates. In these circumstances the law loses its traditional predominant position and the principles and judicial decisions . . . acquire exceptional importance . . . . [The law

coherent integration of legal principles and rules, the judge is also engaged in a downward-looking task, required to mesh complex social facts with legal rules. As the court noted on one occasion, "the work of the judge cannot be reduced to a simple, mechanical application of [legal rules] to concrete cases, because that ignores the complexity and singularity of social reality . . . ."[165] Judges on the post-1991 court have a somewhat increased penchant for delving into the material, rather than merely formal, situation faced by those groups hurt by a given law, and for using empirical, social scientific information to get a picture of social reality.[166]

Beyond these jurisprudential arguments for judicial role changes, there has also been some effort on an institutional level to alter the traditional theory of separation of powers. The political reality in modern, interventionist Latin American states has, according to some judges on the court, been one of "overwhelming growth" in the power of the executive branch and a "loss of political leadership" from the legislative branch.[167] The legislature, traditionally the most legitimate part of a democratic state, has lost legitimacy as it has declined in leadership and fallen prey to special interest groups.[168] This void in legitimacy must be filled by the court, which must take an active role to defend "the institutional order" and to reestablish a "true equilibrium and collaboration between the three powers."[169] Otherwise, the "president will predominate."[170] The judiciary cannot fill this void, however, simply by applying traditional-positivist conceptions of law. These traditional conceptions of law, like traditional conceptions of the legislature, are no longer seen as legitimate.[171] Modern social

now needs] purposeful criteria (principles) and instruments of concrete solution (judges) to obtain a better communication with society.").

165. C-836 at 2531. Justice Baron even seems to argue that understanding the nuances of modern social reality is a task imposed on the judge by the normative hierarchy of the new constitutional order. T-406 at 200 ("[T]he new role of the judge in the social state of law is the direct consequence of the energetic aspiration [of the new constitution] to give validity and effectiveness to the material contents of the constitution."). There is a very complex relationship between this notion of social fact, a new interpretative methodology which reads a rich set of values into the constitution, and the substantive values applied by the judge.

166. *See infra* notes 185, 193–96 and accompanying text.

167. T-406 at 200.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* ("The dispersion of interests in actual capitalist society has reduced the importance of the concept of the general interest, reducing the legitimacy of the legislative organ and of the law."). The "law" referred to in the preceding quotation means traditional legal rules.

actors, rather than looking for law applied hierarchically top-down, instead want consensus-based solutions that are particularized to specific social situations.[172] The creative judge, who works at the level of individual dispute resolution, is best placed to integrate broad legal values, specific legal rules, and the specific factual situations of the actors to arrive at suitable solutions.[173] In the modern order, the judge has become "the carrier of the institutional vision of the general interest."[174]

ii. Substantive values

Just as the flat constitutional theory of the pre-1991 CSJ was connected, albeit loosely, with certain substantive norms, the complex, hierarchical constitutional theory of the post-1991 Constitutional Court also seems to have some connection with a broad set of substantive values. The values imbedded in the old codes are no longer the chief source of normative spirit for the legal order; now the broad principles and values found in the constitution itself can play this role. These values tend to be relatively progressive in character. The court demonstrated this point quite early on; in a 1992 decision, Justice Ciro Angarita Baron noted that the judiciary could no longer ignore the constitution's "generous" list of social, cultural, and economic rights as judges has done under the old system: The court had to give them judicial effect.[175] In a decision later that same year, Justice Baron held that human dignity was the "supreme" principle of the 1991 constitution.[176] This, of course,

172. *Id.*

173. *Id.*

> [The] deficiency in traditional legitimacy has been compensated with the strengthening of the state's capacity to create consensus and to find solutions that are the product not only of the traditional legal order ['el imperio de la ley'] but also through negotiation and adaptation to the specific circumstances of the conflict. In these circumstances, the idea of judicial control appears as the functional key for . . . achieving an adaptation of law to social reality. As depository of its own advantages of a distant and detached social knowledge that considers the objectiveness of values, and also as gifted with the advantages . . . of routinely taking into account 'the lived reality of the litigants,' the judge has full capacity, unlike any other political organ, of carrying out this role.

Id.

174. *Id.* at 201.

175. *Id.* at 208–10. The case enforced a right to public health by forcing the state to stop an interminable construction project that was subjecting residents of one impoverished neighborhood to severe water problems and nauseous odors. *Id.* at 193, 214.

176. T-414, 1992(2) G.C.C. 299, 309 ("[T]his constitution shares a new philosophical orientation that places man in the privileged position and is the most effective instrument in service of the dignifying of the human person. This is shown by a good part of its text, but especially the preamble and articles 1 to 95, which permeate all of the national order."); *cf.* RAMON EDUARDO MADRINAN RIVERA, EL ESTADO SOCIAL DE DERECHO 42, 97–108

put the Colombian charter within an international family of modern, liberal, dignity-centered constitutions.[177] Other members of the court have not seriously challenged the dignity-focused nature of the constitution.

A summary of some important cases since 1991 demonstrates the generally liberal bent of recent jurisprudence, as well as its connection to new constitutionalist interpretative methods. In 1994, the court held that possession and consumption of drugs for personal use could no longer be criminalized in Colombia.[178] The court focused on broad constitutional principles of liberty, autonomy, and particularly "free development of personality," deducing the holding from these ideals.[179] As the court noted:

> When the state resolves to recognize the autonomy of the person . . . . this is defined as everything that corresponds to the zone of ethics: it leaves it up to the individual to decide . . . on the good and the bad, on the sense of her existence. If the person resolves, for example, to dedicate her life to hedonistic gratification, it does not interfere with that decision while that form of life, in the concrete, and not in the abstract, does not harm anyone else . . . . If the right to free development of personality has any force inside our system . . . the rules that make consumption of drugs a crime are clearly unconstitutional.[180]

Hence, the court was interpreting the constitution as having an underlying philosophy that was liberal, and almost libertarian, in its content.[181]

(1997) (arguing that the social state of law is the basic principle behind the new constitution and that the dignity of man is its "fundamental presupposition").

177. Other examples of "modern, liberal, dignity-centered constitutions" include those of Germany, South Africa, and India. Justice Baron was clearly one of the more liberal judges on the court, but his basic point was indisputable: If you looked thoroughly at the values and principles lying behind the new constitution, most of them were relatively liberal in character, at least compared to the conservative state of current Colombian society. *See* Lopez-Medina, *supra* note 2, at 355–57, 361.

178. C-221, 1994(5) G.C.C. 45.

179. *See id.* at 56–63. The court rejected an alternative "hermeneutic possibility" for the constitution that would have seen the state as "owner and father of the life and destiny of each person subject to its jurisdiction"; it considered this theory to be contrary to the "philosophy that informs the constitution." *Id.* at 58–59.

180. *Id.* at 63.

181. The court also included a decent amount of empirical, social-scientific information. For example, it included detailed statistical information (including charts) about the impact of alcohol on crime, the incidence of alcoholism and drug addiction in society, and the types of crimes committed by people with these and other "psychiatric" problems. *See id.* at 57–58, 68. This data was aimed at rebutting the inference that the legislature prohibited drugs to avoid the incidence of other, dangerous crimes. *See id.* at 57.

In recent years, the post-1991 court has turned away from its early emphasis on liberty and formal aspects of equality[182] towards an emphasis on social, cultural, and economic rights and a conception of material equality. For example, the court has used the constitutional right to dignified housing to strike down several laws dealing with home loans. In 1998, the court struck down a law forbidding prepayment of loans where interest was charged.[183] In 1999, the court invalidated a law tying movement in a formula used to index the interest rates on home loans for inflationary changes to general changes in the national interest rate.[184] The court's general approach in these cases was to start with the general, exceptionally broad concept of the "social state of law," beneath which existed other broad ideas like human dignity, "service to the community," and "the creation of a just order."[185] The court then linked social, cultural, and economic rights, and particularly the right to dignified housing, as integral parts of these broader ideals.[186] The right to dignified housing and its subparts (such as the state's obligation to provide adequate long-term housing), even though they were intended to be progressive measures and not to be fully applied immediately,[187] seemed to have enough content once filtered through the broader concepts to be applied directly to the factual situation. For example, the state had an obligation, under the new and non-individualist order, to "establish[ ] specific plans for the less wealthy classes of the population."[188] The general technique, again, is quite comfortable starting from the broad values at the top of the constitution and working its way down to narrower, but still quite un-Kelsen-like, notions of law. The narrower rights are applied in light of the broader ideals, and once again, the general philosophy of the constitution seems liberal in content.

The court's recent decision to invalidate the application of a value-added tax (VAT) to basic goods and services used almost an

182. *See, e.g.*, RIVERA, *supra* note 176, at 109–58.

183. C-252, 1998(5) G.C.C. 448. The problem with such an arrangement from the debtor's perspective is that it prevented the debtor from paying off high-interest loans ahead of time and obtaining better deals in the market. *Id.* at 450.

184. C-383, 1999(5) G.C.C. 399.

185. *Id.* at 416.

186. *Id.*

187. *Id.* ("[I]t cannot because of its own nature be achieved immediately, but only progressively. Thus, the constitution ordered the state to fix the 'conditions necessary to make effective this right,' to promote 'plans of living in the social interest,' and to create 'adequate systems of long-term financing.'").

188. *Id.*

identical methodology.[189] The court began by citing the social state of law as the basic principle of interpretation for the other norms involved.[190] It then held that the VAT violated a right to a minimum of support for living,[191] a right that seemed to come from a combination of constitutional clauses.[192] The VAT case also strongly defended the use of socio-economic context to resolve cases[193] and conducted such an exploration, including detailed empirical social-scientific data.[194]

We should be wary of thinking that the political-substantive values favored by adherents of the post-1991 interpretative method have been particularly uniform. A 1994 decision, for example, *required* the criminalization of abortion while using classic new constitutionalist interpretative methods: The right to life was seen as trumping any countervailing rights of the mother, given that it was the "ontological substratum for the existence of the other rights" and thus must be higher than other rights in the hierarchy of principles and values.[195] Still, there is certainly a loose, understandable relationship between interpretative method, conception of judicial role, and substantive values. Some decisions of the new court, like the decision to decriminalize personal drug use and the decision to

189. C-776, 2003 J. & D. 2162.

190. *Id.* at 2186.

191. *See id.* at 2229–30 ("[T]he rule ignores the limits derived from the protection of the right to a minimum support for living in a social state of rights . . . . The Court concludes that [the law] has a particular significance for broad sectors of the population whose income level goes practically in its entirety to the necessary satisfaction of basic needs, as the law makes it more costly, or in extreme cases, impossible for them to reach the minimum required for a dignified life.").

192. *See id.* at 2235 (citing several constitutional provisions as support).

193. *See id.* at 2220–22 ("In the first place, the Court has said that the constitution, through its origin, its elaboration, and its institutional function, has been interpreted in a living manner to respond to the changing national situation and to the particularities of the country's reality . . . . In the second place, the constitution contains measures of progressive development that are incapable of being applied without taking into account limitations in economic resources or insufficiencies in the capacity of public administration . . . . In the third place, the relevance or implications of a norm . . . can be better appreciated in a context . . . .").

194. *See id.* at 2222–29. The contextual factors that the court considered included the high level of tax evasion and corruption in the country, the burden of different taxes on different social groups, and the problem of poverty. In all of these categories, the court used social-scientific studies and/or statistical data. The most interesting use of statistics was the court's analysis of exactly what percentage of a lower-class household's budget in Colombia goes to essential items like food, shelter, and transportation, as compared to higher-class households. *See id.* at 2228.

195. C-133, 1994(3) G.C.C. 275, 284; *see also id.* at 285 (referring to the right to life as "the essential protected value of the superior order"). The court went on to consider the question of when life begins, but its ordering of life relative to other values had already made inevitable the answer that life begins at conception. *See id.*

strike down the VAT, would have been simply unthinkable under the old style of jurisprudence, whereas some decisions of the old court, like the decision to deny equality in inheritance to illegitimate children, are equally unthinkable under the new style.

3. Summary of the post-1991 Constitutional Court

As we have seen, this was a court composed largely of constitutional law scholars, and it strongly espoused new constitutionalist jurisprudence. This court no longer viewed the constitution as flat and enforceable only through relatively specific rules; rather, the court saw the constitution as a complex amalgam of rules, principles, and values, ordered in a vertical hierarchy for purposes of interpretation. The court also recognized social reality as being quite complex. It linked this new jurisprudential theory both with a new conception of the judicial role—the creative judge, restoring an imbalance in the balance of powers—and loosely with a set of progressive values that seem imbedded in the constitutional text.

V. Why Does This Matter? Linking Judicial Worldviews to "Real" Social Phenomena

A. *Worldviews and Outcomes*

The attitudinalists believe that there is no causal link between what a judge says in his opinion and the outcome that that judge reaches—the outcome is caused by the judge's substantive, political policy views, whereas the opinion is simply ex post legitimation. As Segal and Spaeth have noted,

> We . . . considered the legal model, which holds in one form or another that justices make decisions influenced by the facts of the case in light of plain meaning, the intent of the framers, and precedent. While the Court uses these factors to justify its decisions, they do not explain their outcome.[196]

The case study of Colombian judges demonstrates that it is implausible to assert that there is no causal link between judicial wordviews, as manifested in opinions, and judicial outcomes, for reasons rooted in the interdependency of ideas.[197] That is, the very

196. Segal & Spaeth, Attitudinal Model Revisited, *supra* note 4, at 110.

197. Consider Weber, who noted that causality was complex and often ran in more than one direction. In the Protestant Ethic and the Spirit of Capitalism, for example, Weber noted that his project, which was to trace a causal link between religious ideas and an economic ethos, captured only part of social reality and that the links of causation could just as easily run in the reverse direction. *See, e.g.*, Max Weber, *supra* note 63, at 27–28.

> In this case we are dealing with the connection of the spirit of modern economic life with the rational ethics of ascetic Protestantism. Thus we treat here only one

richness and complexity of the relationships between substantive policy values and two other types of ideas explored above—theories of judicial interpretation and ideas about what facts are relevant in a given type of case—make the notion of unilateral causality seem hard to sustain. Political policy preferences are part of judicial behavior in Colombia, but they are also intertwined with other ideological constructs in a dense web of reciprocal causation.

First, discussed in Part III above, substantive values in Colombia have some relationship with interpretative methodologies. I have generally drawn the causal arrows as running from interpretative theory to policy values, but I recognize that they probably run in the reverse direction as well. This relationship should not be seen as a particularly tight one: As shown above, a wide range of values can fit within each worldview. For example, the post-1991 court has been much more disruptive of the prevailing governmental political economy in recent years, when it has turned towards material equality and social, cultural, and economic rights, than it was in its early years when it focused on formal equality and liberty. But there is some loose relationship nonetheless. An attitudinalist thus might still be able to use clusters of policy values—roughly, liberal vs. conservative—to predict judicial behavior, but he would be missing the underlying causes of those values themselves—conceptions about the nature of legal interpretation and judicial role.

Furthermore, a judge's ability to maximize political policy preferences depends on the types of facts he sees as relevant in a given case, and these facts themselves are a product of judicial worldview.[198] As we have seen, traditionalists-positivists tend to want to decide cases on structural grounds—the facts that they would seem to focus on are thus facts dealing with the procedural legitimacy of the rule-making process.[199] New constitutionalists tend to see nitty-gritty social scientific facts—they try to see the material,

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> side of the causal chain . . . . [L]ater studies . . . attempt, in the form of a survey of the relations of the most important religions to economic life and to the social stratification of their environment, to follow out both causal relationships . . . . [T]o avoid misunderstandings we must here lay special emphasis on the limitation of our purpose.

Id.

198. This argument is largely derived from the critical legal studies literature, which asserts that legal views are not only composed of theories of what the world ought to be like, but also include more descriptive visions of what the world actually looks like. *See, e.g.*, Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981) (referring to the Ely-Choper process-oriented theory of constitutional law as a combination of prescriptive and descriptive tenets).

199. *See supra* notes 105–11 and accompanying text.

rather than formal, situations of those affected by laws.[200] Obviously, the facts seen in a case will affect the way that a court decides that case. Attitudinalists could claim that a judge's preexisting political policy preferences predetermine the judge's vision of which facts are relevant in a given case, but this does not seem likely.

If roles predictably affect outcomes, then one interesting insight of my theory is that, like attitudinal theory and unlike strategic theory, it focuses attention back on the selection processes for judges. The key to determining judicial behavior is to see what type of social actor—career judge vs. public law scholar—was appointed, rather than to look at incentives judges face once they are already on the bench—like threats of reversal, censure, and removal. Still, if certain judicial worldviews, which are predictably carried by certain social actors, increase the probability of a given set of linked substantive case outcomes, and if politicians know this, might politicians try to select social actors that are likely to carry worldviews which are favorable to those politicians' preferred substantive policy outcomes? Thus, the old conventional wisdom of the liberal politician appointing a liberal judge and the conservative politician appointing the conservative judge would be complicated a bit; politicians would instead appoint actors with legal worldviews that, after a working through of interpretative methodologies and the like, were likely to produce favorable substantive outcomes for those politicians. In future work, I hope to be able to explore whether these sorts of appointment practices have occurred in Latin America.

B. *Worldviews and the Legitimacy of the Court*

Segal and Spaeth seem to argue that the language of an opinion itself is not an important social phenomenon: What really matters is what drives judicial outcomes, not the language judges use to get there.[201] This ignores the impact that judicial opinions, indepen-

200. *See supra* notes 164–68, 185, 193–96 and accompanying text.

201. This is suggested in a passage where Segal and Spaeth are criticizing post-positivist legalist theories which focus on a judge *believing* that her decision is constrained by law, rather than actually being constrained by law. SEGAL & SPAETH, ATTITUDINAL MODEL REVISITED, *supra* note 4, at 430–33. Segal and Spaeth argue that this belief is simply irrelevant, because the theory of motivated reasoning suggests that "the ability to convince oneself of the propriety of what one prefers to believe psychologically approximates the human reflex." *Id.* at 433. Thus, even if a judge convinces herself that, "Congress cannot block slavery in the territories" (*Dred Scott*, 60 U.S. (19 How.) 393 (1856), and *Bush v. Gore*, 531 U.S. 98 (2000), are predictably favorite examples of the attitudinal scholars), "[t]he fact remains that the ideology of the justices drives their decisions" beneath the surface. *Id.*

dent of outcomes, can have on public opinion. Jonathan Miller has recently taken a stab at this issue in the Latin American context, arguing roughly that the decline in the legitimacy of the Argentine Supreme Court can be explained as a shift away from the traditionalist-positivist jurisprudence of the old court towards a new, socially responsive jurisprudence in which the court must rely on—using Weber's categories of legitimacy—charisma rather than law as the ultimate source of its authority.[202] When forced to battle for charisma with other, more naturally charismatic bodies like the president and the legislature, the court has not fared well.[203]

The biggest problem with this theory is its use of charisma as a catchall black box for all modern legal action outside of the traditional-positivist sphere.[204] Post-1991 Colombian constitutional judges see their decisions as grounded in factors that are just as objective and legal as the underpinnings of traditionalism-positivism; they do not see themselves as doing something that is arbitrary or grounded only in their personal or institutional magnetism. However, Miller's explanation for the stylized fact that Latin American courts have lost legitimacy in recent years is onto something. What he may be trying to get at is a social difference as to what counts as "legal action." The attitudes of the Colombian career judges identified in this Article regarding what law is may be closer to the attitudes of most ordinary people in Latin American society. The attitudes of the constitutional scholars, which are self-consciously elitist and transnational in orientation, may be further from these normal social attitudes. If this is so, it suggests that shifts from traditional-positive views to new constitutionalist views may threaten the power of courts as institutions. This is ironic, given that proponents of these views envision giving courts a more central role within the separation of powers system than was true traditionally,[205] that traditional Latin American law has long been perceived as being out of touch with social reality,[206] and that one

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Even if Segal & Spaeth are right and *all* judicial adherence to legal worldviews is either in bad faith or a product of motivated reasoning (which may be implausible), judicial opinions would still be relevant because public opinion (and its subsets, for example, elite lawyerly opinion) would still respond to them.

202. *See* Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77 (1997).

203. *See id.* at 95–97.

204. *See* VOGEL, *supra* note 68, at 773–86 (arguing that Weber made charisma something of a black box in the context of Islamic law).

205. *See supra* notes 167–74 and accompanying text.

206. This was a prominent theme of the (mostly U.S.-written) law and development literature of the 1970s. *See, e.g.*, KARST & ROSEN, *supra* note 74, at 57–66 (pointing to Latin

goal of the new constitutionalists has been to help bring law closer to that social reality.[207] A related theory might be that any change from one type of legal worldview to another, at least if insufficiently gradual, destabilizes judicial legitimacy.

VI. Conclusion

Colombian constitutional judges have worked under two quite different, yet equally rich, legal worldviews. Each of these worldviews combined interpretative theories, ideas about judicial role, and substantive policy goals. Equally important, each was predictably linked to a certain type of legal actor who functioned as its carrier—career judges in one case, legal scholars in the other. Rational choice is not the only perspective that is capable of producing structured, testable theories of judicial behavior. Legal scholars potentially have much to contribute to the literature on judicial behavior.

A complete theory of judicial behavior requires more than a general theory of human nature; it requires a specific understanding of how and what lawyers, judges, and others think about law. Those of us who are comparative scholars should say even more: We must study not just the understandings of the legal community in general—although this of course will always have relevance to the extent that lawyers in one country see themselves as sharing worldviews with lawyers elsewhere—but those understandings in the exact area that we are studying. Ultimately, this is because law is largely an autonomous sphere of society that courts and legislatures have constructed quite differently from other spheres of our social life. Law and economics, rational choice, and related theories of economic rationality are problematic partly because they miss this point: They posit universal accounts of motives and values that simply do not exist, and they tend to ignore the things that people (judges, for example) actually say.[208]

American law's idealism, paternalism, legalism, formalism, and lack of penetration as five major causes of a "gap between the law on the books and the law in practice" that is "notoriously large"). At least to some extent, this critique seems to have penetrated into Latin American legal consciousness. *See* Esquirol, Law and Development, *supra* note 2, at 92–106 (noting the ways in which the law and development critique was absorbed by Latin American legal culture and noting that it led to a successful counterattack by pro-formalist forces in Latin American society, who threatened chaos and tyranny if formalism was replaced by a socially-responsive vision of law).

207. *See supra* notes 164–69 and accompanying text.

208. Richard Posner, Economic Analysis of Law (5th ed. 1998) is a classic example of a law-and-economics piece that pays little attention to what judges actually say. The book attempts to explain how the common law is efficient. The underlying premise is that, in

The ending point need not be the discourses that legally-oriented individuals use in their own interactions: judges can lie to others and they can delude themselves. Still, these discourses must at least be our starting point.

most cases, individual judges choose the most efficient outcomes. The fact that judges other than Posner rarely use the economic language of efficiency, instead using legalistic discourse, does not appear to concern Posner very much.

APPENDIX: DETAILED EMPIRICAL DATA ON COLOMBIAN JUDGES, LISTING THEIR PRIOR CAREER EXPERIENCE

TABLE 1: THE 12 INITIAL REPLACEMENTS FOR THE ASSASSINATED SUPREME COURT (CSJ) JUDGES OF 1985

Name	Chamber	Judicial	Academic	Political/ admin	Other
Hector Jimenez-Rodriguez	Penal	Career Judge, Medellin			
Jaime Bernal Cuellar	Penal	Career Judge, Bogota; Auxiliary, CSJ[209]		Involved in criminal law reforms of 1979	
Lizandro Martinez Zuniga	Penal	Career Judge, Bogota			
Julio Rozo Rozo	Penal	Former Judge, Bogota. Conjuez, CSJ	Prof., Director, Crime & Punishment Ctr., Nat'l Univ.		
Jose M. Arias Carrizosa	Penal			Rep. of congress	
Alvaro D. Goenaga	Labor	Auxiliary Judge, CSJ			
Humberto de la Calle Lombana	Labor			National register of the civil state[210]	
Hector Marin Naranjo	Civil	Career Judge, Manizales			
Jaime V. Perdomo	Constitutional		Prof.		
Enrique Low Murtra	Constitutional	Judge, Council of State (admin court)			
A. Tafur Galvis	Constitutional		Rector, Univ. Rosario		
Gabriel Melo Guevara	Constitutional		Prof., public law		Journalist, "El Siglo"

Sources: *Amenazas Inmovilan a la Corte*, EL TIEMPO (Bogotá), Jan. 18, 1986, at 1A; *Varios de los Elegidos no Aceptarian el Cargo*, EL TIEMPO (Bogotá), Nov. 29, 1985, at 7A; *Integrada la Corte Suprema de Justicia*, El Tiempo (Bogotá), Nov. 27. 1985, at 1A; *Hoy se Conocera la Nueva Corte*, EL TIEMPO (Bogotá), Nov. 26, 1985, at 7A.

209. A conjuez breaks ties and votes when the court lacks a quorum on any given day, for example, because of a recusal or sickness. I consistently do not consider this judicial post, which seem to be quite undemanding and not a full time job, as giving someone "career judge" status. An auxiliary judge seems to be something like an elbow clerk, or an assistant judge; he collects information, cases, and the like for the primary judge under which he serves. I, after much hesitation and considerable doubt, do not think that an auxiliary judge can fairly be considered as a member of the career judiciary either. My treatment of the auxiliaries does not greatly change my results at any rate.

210. The "registrador nacional del Estado Civil" is elected for a single term by the National Council on Elections, and the holder works as the state's leading supervisor of elections and electoral problems, convoking the full Council when necessary. It seems to

TABLE 2: CONSTITUTIONAL COURT OF 1991

Name	Judicial	Academic	Political/admin	Other
Eduardo Cifuentes Munoz		Prof., Director of post-grad studies, Univ. of Andes	Legal vice-president, Bank of Colombia; Chief, law office, Superintendent of Banks	
Jaime Sanin Greiffestein	Judge, constitutional chamber, CSJ	Prof., con law, Medellin Univ., author of con law work		
Fabio Moron Diaz	President, CSJ	Prof., law and political science, Cartagena Univ	Rep. of congress, 1 term	
Simon Rodriguez Rodriguez	President, CSJ		Governmental advisor	
Ciro Angarita Baron		Prof., Univ. of Andes; Director, Journal of Public Law		
Alejandro Martinez Caballero			Rep. of congress, member of 1991 const. convention, Sec'y Gen. of Inst. of Reg'l Credit	
Jose Gregorio Hernandez	Auxiliary Judge, const. chamber, CSJ	Prof., con law, Javeriana Univ.	Advisor, Ministry of Econ. Dev.	

Sources: *Quien es Quien en la Corte del Siglo XXI*, EL TIEMPO (Bogotá), Mar. 2, 1993, at 3A; Jorge Gonzalez, *Con Tarjeton Eligen Magistrados*, EL TIEMPO (Bogotá), Dec. 1, 1992, at 6A; *Lista la Corte Constitucional*, EL TIEMPO (Bogotá), Dec. 5, 1991, at 8A; *La "vieja" Corte Fallara a la Luz de la Nueva Constitucion*, EL TIEMPO (Bogotá), July 10, 1991, at 1A; *Eduardo Cifuentes, Primer Magistrado*, EL TIEMPO (Bogotá), July 9, 1991, at 1A.

be a quasi-political, quasi-judicial position; for example, the holder needs to have the same qualifications as a member of the CSJ, but I have considered it a political position for my purposes.

TABLE 3: CONSTITUTIONAL COURT OF 1993

Name	Judicial	Academic	Political/admin	Other	Studied law abroad?
Eduardo Cifuentes Munoz		Prof., Director of post-grad studies, Univ. of Andes	Legal vice-president, Bank of Colombia; Chief, law office, Superintendent of Banks		
Fabio Moron Diaz	President, CSJ	Prof., law and political science, Cartagena Univ.	Rep. of congress, 1 term		
Alejandro Martinez Caballero			Rep. of congress; member of 1991 Const. Convention; Sec'y Gen., Inst. of Reg'l Credit		
Jose Gregorio Hernandez	Auxiliary Judge, const. chamber, CSJ	Prof., con law, Javeriana Univ.	Advisor, Ministry of Econ. Dev.		
Antonio Barrera	Conjuez, Council of State		Advisor, Inst. of Agric. Reform	Long-time private lawyer	
Jorge Arango Mejia			Mayor, Ambassador, Legal director, Nat. Fed. of Coffee Industry		
Carlos Gaviria		Prof., dean, vice-rector, Antioquia Univ.			Yes. L.L.M. con. law and jurisprudence, Harvard
Hernando Herrera	Conjuez, CSJ; Member of Superior Council of the Judiciary[211]	Prof., admin. and labor law, Univ. National, Gran Colombia and others	Vice-minister & Sec'y Gen., Ministry of Justice; Member of 1991 Const. Convention		
Vladimiro Naranjo		Prof., con law and political science			Yes. L.L.M. comparative jurisprudence, NYU; Ph.D. con law and political science, Paris

Table 3: *Con Tarjeton eligen magistrados*, EL TIEMPO (Bogotá), Dec. 1, 1992, at 6A; *Quien es Quien en la Corte del Siglo XXI*, EL TIEMPO (Bogotá), Mar. 2, 1993, at 3A.

211. This organization is charged with the administrative organization and the discipline of the country's judges and lawyers. These functionaries seem deeply embedded with the nation's career judiciary and thus I classified Hernando Herrera as a career judge for my purposes.