

# CONSTITUTIONAL LAWYERS AND THE INTER-AMERICAN COURT'S VARIED AUTHORITY

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## I

### INTRODUCTION

The power of the Inter-American Court of Human Rights (IACtHR) to shape government behavior varies greatly from country to country. All states subject to the Court's jurisdiction accept its authority to adjudicate disputes, and all take at least some meaningful steps toward judgment compliance. Even the Chávez government, despite loudly campaigning against the Inter-American System (IAS) and eventually removing Venezuela from the Court's jurisdiction, occasionally paid victims pursuant to Court orders.<sup>1</sup> But in some states the Court's judgments play a far greater role: they are untethered from the particular dispute that gives rise to them and take on a life as law-like rules that guide the subsequent behavior of public actors and the outcomes of disputes that never reach the Court. In some states the Court's judgments even come to shape policymaking and public debates, constraining the range of options that are put on the table. The Colombian Constitutional Court, for example, regularly reviews national laws for compatibility with the American Convention on Human Rights as interpreted by the IACtHR.<sup>2</sup> And actors from all sides of Colombia's currently unfolding peace process—from the *uribistas* who oppose it to the guerrilla leadership that is negotiating it—refer to IACtHR rulings as they debate whether and how to prosecute war crimes.<sup>3</sup>

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1. See *infra* Part V.

2. See *infra* Part III.

3. Jorge Cubides, *Comunicado sobre el proceso de paz*, CENTRO DEMOCRÁTICO, July 15, 2013, <http://www.centrodemocratico.com/comunicado-sobre-el-proceso-de-paz/> (Uribista document citing the IACtHR); *Las Farc reclamaron el derecho de los pueblos a la paz y a la participación ciudadana en el proceso de paz*, AGENCIA PRENSA RURAL, Feb. 21, 2013, <http://prensarural.org/spip/spip.php?article10286> (*Fuerzas Armadas Revolucionarias de Colombia* statement that refers to the IACtHR).

This article demonstrates that variation of the Inter-American Court's authority across states can be explained in great part by the practice of constitutional law in each state. This is not to say that differences in constitutional *texts* explain the variation. Rather, the article suggests that for the Court's authority to expand beyond mere judgment compliance, two factors other than the black-letter law must be in place. The first factor is the presence of lawyers—be they scholars, judges, public-interest lawyers, or other practitioners—who adhere to and promote a particular vision of constitutional law as containing within it international human rights law. The Inter-American Court opened its doors in 1979, during the era of military dictatorships in Latin America. Starting in 1988, many Latin American countries enacted new constitutions. During this more democratic era, new theories that foreground judicial power, higher-law rights review, and constitutions open to international standards began to spread. There now exists in the region a transnational network of lawyers who advance a liberal vision of constitutional law that emphasizes judicial power, rights-based review, and Dworkinian-style interpretive practices, and who embrace the view that constitutional rights are grounded not only in positive domestic law but also in international human rights instruments.<sup>4</sup> Typically labeled neoconstitutionalism, such theories help provide a platform for expanding the Inter-American Court's authority.<sup>5</sup>

But the spread of neoconstitutionalist ideas throughout Latin America does not explain why the IACtHR's authority varies by country. The second factor explaining this variation is that those who advance these ideas must have political impact at the national level: they must be able to forge alliances with legislative and executive reformers who adopt the movement's vision of law and advance it as part of their own project of political reform. In seeking to understand the rise of a unified Europe, the rise of the New Deal in the United States, and other “transformations that are at the same time political and legal,” Yves Dezalay and Bryant Garth argue that it is important to broaden the analysis to include not only the legal field but also the interaction of the struggles that unfold in the legal field with those that unfold in the political field.<sup>6</sup> Their observation proves relevant in the Inter-American setting: it is where neoconstitutionalists gain political momentum and participate in the construction of a new domestic constitutional order, as in Colombia, that the Court's authority expands beyond judgment compliance and comes to shape

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4. As used here, “liberal” refers not to progressive politics but to political theories that prioritize liberty and view rights as a constraint on the exercise of government power. Richard Hudelson, *MODERN POLITICAL PHILOSOPHY* 37–38 (1999).

5. Neoconstitutionalism is a contested term. In this article, it will be used as it is defined in part I, *infra*. For alternative uses, see generally Pedro Salazar Ugarte, *Garantismo y neoconstitucionalismo frente a frente: algunas claves para su distinción*, 34 *DOXA, CUADERNOS DE FILOSOFÍA DEL DERECHO* 289 (2011).

6. Yves Dezalay & Bryant G. Garth, *Lawyers and the Transformations of the Fields of State Power: Osmosis, Hysteresis and Aggiornamento*, in *LAW AND THE FORMATION OF MODERN EUROPE: PERSPECTIVES FROM THE HISTORICAL SOCIOLOGY OF LAW* 275–307 (Mikael Rask Madsen & Chris Thornhill eds., 2014).

state behavior outside the confines of a particular dispute. But where neoconstitutionalism does not have political influence—either because there is little constitutional change (as in Chile) or because the constitutional change that does take place moves away from neoconstitutionalist premises and liberal political values (as in Venezuela)—the Court's authority does not expand in the same way. Throughout the region, then, the IACtHR's authority takes on different shapes depending in great part on national constitutional practices and constitutional politics.

In order to explore and further develop this hypothesis, this article delineates the relation of neoconstitutionalist lawyers to emerging constitutional practices in three states that show variation in the type of authority the IACtHR exerts. In Colombia, the Court has achieved the relatively rare type of authority Alter, Helfer, and Madsen call "extensive": the Court consistently shape[s] law and politics on certain issues.<sup>7</sup> In Chile, the IACtHR has "narrow authority," which refers to judgment compliance, and "intermediate authority," which arises when compliance partners, or state officials who have the power to comply with the Court's rulings, do so at least sometimes. In Venezuela, by contrast, the Court has achieved only narrow authority.<sup>8</sup> For each of these three countries, this article begins by exploring the role of neoconstitutionalist lawyers in recent constitutional change. It then links the role played by these lawyers to the particular type of authority that the IACtHR exerts in each state. Alternative explanations for the shape that the Court's authority takes in each state are also considered.

By drawing a link between lawyers and constitutional change to the authority of the IACtHR, this article offers several contributions to the study of international court (IC) authority. It highlights variation across states and reveals the role of epistemic communities and domestic legal practice in shaping IC authority. More specifically, it contributes a theory of the relationship between human rights courts, lawyers, and constitutional regimes that may be relevant to understanding other transnational human rights orders. Within the study of the IAS, those who have written about constitutional law and the Court's influence in the domestic realm have tended to focus exclusively on legal doctrine.<sup>9</sup> The article shows that consideration of the politics behind judicial change provides a deeper understanding of when and how legal doctrine contributes to judicial change.

Part II introduces the IACtHR and discusses how it first established its authority. It then explains the link between the variation in the Court's authority, neoconstitutionalism, and political reform. The three case studies follow in parts III, IV and V. Each examines the relation of neoconstitutionalist

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7. Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 10–11.

8. See *infra* Part V.

9. Alexandra Huneeus, *Human Rights between Jurisprudence and Social Science*, 28 LEIDEN J. OF INT'L LAW 255, 257–60 (2015).

lawyers to the field of domestic politics in recent moments of constitutional change and shows how that relation, in turn, explains the type of authority the IACtHR exerts. The final part traces the influence of neoconstitutionalists on the IACtHR itself and reveals the Court's role in advancing a particular vision of constitutional law that enhances its authority.

## II

### THE INTER-AMERICAN COURT AND NEOCONSTITUTIONALISM

The OAS was created at the close of World War II and includes all the states of the Western Hemisphere. In 1959, prompted by the Cuban Revolution and other Cold War dynamics, the OAS created the Inter-American Commission on Human Rights, based in Washington, D.C. The Commission soon invented itself as a proactive defender of human rights: through its handling of regional crises, such as the Dominican Republic's internal crisis of 1965, it earned the respect of many states.<sup>10</sup> During the 1960s and 1970s, several of the region's democracies fell to military dictatorships that engaged in covert but massive, human rights violations. In response, the Commission began to engage in on-site visits through which it would carefully document the systematic atrocities taking place.<sup>11</sup> Through its work during this difficult period, the Commission established a reputation as the "only real refuge" for victims of state atrocity.<sup>12</sup>

The Court opened its doors in 1979—a decade after the American Convention,<sup>13</sup> and two decades after the Commission began its work. The Court's early docket also focused on the topic of state-sanctioned acts of violence against civilian populations: through 2000, all but two cases decided by the Court dealt with illegal state violence. This subject-matter focus was not a deliberate strategy of the Court.<sup>14</sup> Rather, at this point, the Commission exercised discretion as to which cases it referred to the Court. Further, the

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10. CECILIA MEDINA QUIROGA & CLAUDIO NASH ROJAS, *SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: INTRODUCCIÓN A SUS MECANISMOS DE PROTECCIÓN* 97 (2007).

11. See generally CECILIA MEDINA, *THE BATTLE FOR HUMAN RIGHTS: GROSS SYSTEMIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* (1988) (providing a history of the Inter-American Commission's interventions in several countries); FELIPE GONZÁLEZ MORALES, *SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* (2013) (providing history of the Commission).

12. José Miguel Insulza, *Sistema Interamericano de Derechos Humanos: presente y futuro*, ANUARIO DE DERECHOS HUMANOS 119, 122 (2006) (translating "fue la CIDH el único refugio real frente a las tiranías"). By comparison, the OAS was loath to condemn state atrocities, and even the UN Human Rights Commission, whose members sit in representation of states, took a weaker stance. Felipe González Morales, *La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos*, ANUARIO DE DERECHOS HUMANOS 35, 37 (2009).

13. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 UNTS 123.

14. Since 2001, the Court's docket has diversified, and yet, in 2012, twelve of its twenty-one cases concerned state violence, and since then, roughly half of IACtHR judgments have addressed acts of state violence. See generally Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1 (2013) (arguing that these international crimes have been a main focus of the IACtHR).

nongovernmental organizations (NGOs), which play an important role in choosing what petitions to bring to the IAS, focused on questions of state atrocity and transitional justice.<sup>15</sup> But the emphasis on state atrocity helped bolster the Court's authority: it enabled the Court to borrow the Commission's mantle of standing up to dictators, even if by the time it ruled, the dictators had stepped down. Further, the Court was able to rely on the support of a strong transnational network focused on accountability for state atrocities that pushed for compliance with its judgments. Finally, the focus on atrocity meant that the Court developed a significant jurisprudence on a single issue despite its limited capacity: the IACtHR has seven part-time judges, hold sessions roughly six times a year, and runs on a yearly budget of roughly five million dollars—factors that make it the world's least expensive IC.<sup>16</sup>

By focusing its resources on developing one area of law that had the support of a transnational issue network and many successor governments, the Court was able to establish narrow expertise in this area of law and then slowly broaden its authority to other areas as its docket diversified. Today, although states might still flatly reject a judgment, this is rare.<sup>17</sup> All state litigants subject to the Court's jurisdiction have acknowledged that its judgments are legally binding. All state litigants participate in the Court's proceedings, and most have taken "meaningful steps toward compliance"<sup>18</sup> by paying monetary compensation pursuant to the Court's orders.<sup>19</sup> Overall, the Court has roughly achieved a 50 percent compliance rate with its orders for monetary compensation.<sup>20</sup> The Court also orders equitable relief. Indeed, the IACtHR

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15. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 89–94 (2011) (arguing for the important role of transnational activist networks in fomenting accountability for state atrocity). The Center for Justice and International Law (CEJIL), an NGO based in Washington, D.C., has played an important role in shaping the Court's docket.

16. Roberto Caldas, Judge, IACtHR, *El Proceso de Supervisión de Decisiones: la Perspectiva de la Corte Interamericana*, Panel: *La Importancia del Proceso de Supervisión de Cumplimiento de las Decisiones del Sistema Interamericano* at the Center for Justice and International Law Conference: *La Implementación de Los Órganos del Sistema Interamericano y la Administración de Justicia: Sinergias, Tensiones y Posibilidades* (Nov. 24, 2014).

17. On October 23, 2014, the Dominican Republic's president announced that the Dominican Republic "rejected" the IACtHR's ruling in a case having to do with Haitian descendants born in the Dominican Republic. See *El Gobierno Dominicano Rechaza la Sentencia de la Corte Interamericana de Derechos Humanos*, PRESIDENCIA REPÚBLICA DOMINICANA (Oct. 23, 2014), <http://www.presidencia.gov.do/noticias/el-gobierno-dominicano-rechaza-la-sentencia-de-la-corte-interamericana-de-derechos-humanos>. On November 2, 2014, the Constitutional Court said that, due to a technical error, the Dominican Republic was not subject to the Court's jurisdiction. See *Tribunal Constitucional*, noviembre 2, 2014, *Sentencia TC/0256/14* (Dom. Rep.), <http://www.tribunalconstitucional.gob.do/node/2762>.

18. Alter, Helfer & Madsen, *supra* note 7, at 10.

19. Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 37–38 (2010); Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 509 (2011).

20. COURTNEY HILLEBRECHT, *DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE* 51 (2014).

stands out among ICs for regularly ordering lengthy and ambitious to-do lists that include structural reform measures.<sup>21</sup> As a result, full compliance is rare, but the Court has a fairly high “partial compliance” rate.<sup>22</sup>

If the IACtHR’s only consistent achievement was judgment compliance, its authority would be limited to the resolution of about fifteen disputes per year, and its main compliance constituencies would be the region’s executive branches and the human rights NGOs that litigate internationally. But as will be argued below, the Court’s authority extends well beyond judgment compliance. In some states, domestic constitutional litigation has served as the platform on which the IACtHR’s authority has expanded to intermediate and broad authority, allowing it to cast a much longer shadow.

#### A. The Rise of Neoconstitutionalism and the Inter-American Court

In 1979, when the IACtHR first opened its doors, Latin American constitutional law would not have seemed an auspicious site from which to expand the Court’s authority. At that point, judges across Latin America were unwilling and, some argued, ill-equipped to practice judicial review. As one author wrote, despite the formal presence of judicial review in many Latin American constitutions, “it ha[d] not yet permeated the minds of the judges called to exercise it.”<sup>23</sup> Predominant legal theories in states such as Chile emphasized the idea of the superiority of legislation—judges were meant to apply, rather than to question, laws passed by Congress.<sup>24</sup> Often the Civil Code, rather than the Constitution, was considered the crown jewel of the national legal system.

Beginning in 1988, the year of the IACtHR’s first contentious judgment, a new generation of constitutions emerged. Brazil (1988), Colombia (1991), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993), Venezuela (1999), and Bolivia (2009) all introduced new constitutions, and Argentina, Mexico, and Costa Rica undertook important constitutional reforms.<sup>25</sup> Although the new

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21. Structural remedies, or guarantees of nonrepetition, are another way in which the Court overcomes its small docket. Alexandra Huneeus, *Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts*, 40 *YALE J. INT’L L.* 1 (2015).

22. Hawkins and Jacoby find that states have complied with 50 percent of the IACtHR’s compliance orders, and that there is partial compliance with 83 percent of the Court’s case rulings. Hawkins & Jacoby, *supra* note 19, at 56.

23. Rodolfo Piza Rocafort, *Influencia de la Constitución de los Estados Unidos en las Constituciones de Europa y de América Latina*, in *LA CONSTITUCIÓN NORTEAMERICANA Y SU INFLUENCIA EN LATINOAMÉRICA: 200 AÑOS 1787–1987* 53, 79 (Thomas Buergenthal, Jorge Mario García Laguardia & Rodolfo Piza Rocafort eds., 1987) (original quotation in Spanish reads “no ha calado aún en la mente de los jueces llamados a ejercer la función”).

24. See Javier Couso, *The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 141, 149–52 (Javier A. Couso, Alexandra Huneeus & Rachel Sieder eds., 2010).

25. Rodrigo Uprimny, *Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos*, in *EL DERECHO EN AMÉRICA LATINA: UN MAPA PARA EL PENSAMIENTO JURÍDICO DEL SIGLO XXI* 109, 109 (César Rodríguez Garavito ed., 2011). Chile’s constitutional reform is not included here because it was not as far-reaching or rights-oriented. See discussion in part IV.

constitutions differ in important ways,<sup>26</sup> they share important features when compared to the constitutions that preceded them. They manifest a greater commitment to the protection of rights, including socioeconomic and community rights, and “a vigorous opening to international human rights law, especially through special treatment and privileges accorded to treaties in this area.”<sup>27</sup> Further, many of the constitutions established stronger judicial review mechanisms. Rights-based litigation soon became an important feature of political life in several states under the jurisdiction of the IACtHR.<sup>28</sup>

These constitutional texts were partly shaped by new theories, originating in Europe, that view constitutions as not only delineating the competence of the branches of government, but as including substantive norms that commit the state to particular objectives and, correspondingly, a less formalistic approach to law.<sup>29</sup> The Latin American variant of neoconstitutionalism has three main elements relevant to this inquiry.<sup>30</sup> Each departs from prior constitutional theory or practice. The first element is judicial review of individual rights, meaning some or all national courts have authority to review legislation or executive action under the constitution. Latin American countries actually have a long history of judicial review: the nineteenth-century constitutions of both Colombia and Mexico formally established judicial review.<sup>31</sup> But the practice was less frequent prior to the 1990s, and it was particularly rare for an individual to successfully challenge legislation as a violation of individual rights. Neoconstitutionalist thought makes strong-form review of individual rights a centerpiece of constitutional practice.<sup>32</sup> Further, it shifts the emphasis of theory

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Note that it is not unusual for so many Latin American states to renew their constitutions. See Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 LAW & SOC'Y REV. 749 (2012).

26. For a discussion of the different kinds of constitutions that emerged in this era, see Roberto Gargarella, *LATIN AMERICAN CONSTITUTIONALISM, 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION*, 148–95 (2013); Mauricio García Villegas, *Constitucionalismo Aspiracional: Derecho, Democracia y Cambio Social en America Latina*, 75 ANÁLISIS POLÍTICO 89 (2012); Uprimny, *supra* note 25.

27. Uprimny, *supra* note 25, at 114 (original quote in Spanish reads “una apertura al derecho internacional de los derechos humanos, en especial a través del tratamiento especial y privilegiado a los tratados de derechos humanos”).

28. See generally *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder, Line Schjolden & Alan Angell eds., 2009).

29. Miguel Carbonell, *El Neoconstitucionalismo en su Laberinto*, in *TEORIA DEL NEOCONSTITUCIONALISMO: ENSAYOS ESCOGIDOS* 9–11 (Miguel Carbonell ed., 2007).

30. On the use of the term “neoconstitutionalism,” see *supra* note 5.

31. Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 538–39 (2004) (showing that Colombia's nineteenth-century constitution had judicial review); Vicente Fernández Fernández & Nitza Samaniego Behar, *El juicio de amparo: historia y futuro de la protección constitucional en México [The Trial of Amparao: its History and the Future of this Constitutional Protection in Mexico]*, 27 REVISTA DEL INSTITUTO DE CIENCIAS JURIDICAS DE PUEBLA 173, 174 (2011), [http://www.scielo.org.mx/scielo.php?pid=S1870-21472011000100009&script=sci\\_arttext](http://www.scielo.org.mx/scielo.php?pid=S1870-21472011000100009&script=sci_arttext) (showing that Mexico's 1841 Constitution included the writ of amparo).

32. Judicial review in the region has taken the form of what Mark Tushnet calls strong-form review, which, as in U.S. practice, “insists that the courts’ reasonable constitutional interpretations

and scholarship from the “organic” aspects of the constitution, which concern separation of powers and the attributes of different governing bodies, to the “dogmatic” aspects, in particular, fundamental rights.<sup>33</sup>

A second element of Latin American neoconstitutionalism is the interpretive practice of viewing constitutions as embodying fundamental principles beyond (or implicit in) their written word. By the mid-twentieth century, formalist legal thought in Latin America was already under challenge by anti-formalist theories received and adapted from Europe. So strong had been formalism’s hold, however, that even HLA Hart’s *Concept of Law* was read as an anti-formalist text pointing the way toward a more open interpretative practice.<sup>34</sup> Neoconstitutionalist thought pushes further away from formalism, emphasizing Dworkinian-style interpretation in which unwritten principles, including fundamental rights, are understood as belonging to the constitutional text. It represents support for judicial consideration of principles and values, proportionality and reasonability tests, and other constitutional doctrines that ultimately grant judges a large dose of discretion.

The third relevant element of Latin American neoconstitutionalism, which flows from the second, is the doctrine of the “constitutional block.” Under this doctrine, judges interpreting the scope and meaning of constitutional rights must consider not only the text of the document, and not only the unwritten norms and commitments that underlie the constitution, but also human rights norms. Góngoro Mera defines the constitutional block as a set of norms and principles with constitutional rank that . . . “encompasses 1) the Constitution *stricto sensu*, 2) international declarations of human rights, such as the Universal Declaration and the American Declaration, and 3) human rights treaties ratified by the States.”<sup>35</sup> Through this doctrine, human rights treaties are part of the constitution, rather than separate and external sources of law.

Where neoconstitutionalism comes to shape judicial and legal practice, the IACtHR’s judgments take on a particularly salient role beyond dispute resolution. There are several reasons for this. Neoconstitutionalism emphasizes judicial review of rights and thus foments rights-based litigation. Further, as courts seek to determine the meaning of constitutional rights, they refer to international treaties—the American Convention in particular. It follows that

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prevail over the legislatures’ reasonable ones. . . . [T]heir interpretive judgments are final and unreviewable.” MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 21 (2009).

33. See Uprimny, *supra* note 25, at 100. A fourth important feature of neoconstitutionalism in Latin America—an emphasis on economic, social, and cultural rights as well as community, or group, rights and pluralism—will play less of a role in the discussion that follows.

34. Diego López Medina, *Teoría Impura del Derecho: La Transformación de la Cultural Jurídica Latinoamericana*, 36 *REVISTA CHILENA DE DERECHO* 193, 193 (2009).

35. MANUEL EDUARDO GÓNGORA MERA, *INTER-AMERICAN JUDICIAL CONSTITUTIONALISM: ON THE CONSTITUTIONAL RANK OF HUMAN RIGHTS TREATIES IN LATIN AMERICA THROUGH NATIONAL AND INTER-AMERICAN ADJUDICATION* 162 (2011); see also *id.* at 161 (explaining the difference between the Constitutional Block doctrine in Europe, where it originated, and in Latin America).



the IACtHR's jurisprudence interpreting the Convention and other rights treaties becomes an important source for domestic judicial review. For activists in neoconstitutionalist orders, the judgments of the IACtHR are not only a tool pushing for state compliance on the international plane following a judgment; they are also a tool for challenging laws and practices before the domestic judiciary. Litigants can invoke IACtHR judgments to shape how courts interpret law domestically without ever having to file a petition before the IAS. The Court's jurisprudence becomes embedded domestically, and the Court's authority can grow despite its small docket.<sup>36</sup>

In some states, like Colombia and Argentina, neoconstitutionalist ideas have come to shape constitutional practice. In other states, they remain confined to the ivory tower. The following parts explore three case studies that seek to describe and explain these differences as a way to understand variation in the IACtHR's authority. Colombia, Chile, and Venezuela span a broad spectrum of authority types: extensive, intermediate, and narrow.<sup>37</sup> Each case study depicts the role neoconstitutionalist lawyers have played in contributing to key moments of constitutional reform (1991, 2005, and 1999, respectively), and in implementing a new constitutional practice. The discussion of each case study concludes by linking the role played by neoconstitutionalism in domestic politics to the type of authority the IACtHR has achieved.

### III

#### THE RISE OF NEOCONSTITUTIONALISM IN COLOMBIA'S APEX COURTS

Neoconstitutionalists played an important role in shaping Colombia's constitutional reform of 1991 and thereafter in broadening the IACtHR's authority. In 1988, in the midst of a political crisis, President Barco set in motion a process that would lead to a constituent assembly, and eventually, a dynamic new constitutional regime. Mauricio García Villegas writes that, unlike institutional changes undertaken in Venezuela and other states, the reform in Colombia was not motivated by revolutionary ideas but rather by a belief in the political utility of law.<sup>38</sup> A key actor in this process was Manuel José Cépeda, a young attorney who, after receiving an LL.M. at Harvard, acted as advisor on the Constituent Assembly to both Presidents Barco and Gaviria. Cépeda first served as presidential advisor on the development of the constitution after its passage (1991–1993), and, later, as a Constitutional Court judge (2001–2009). Known for having embraced a neoconstitutionalist approach to law, he played an important role in drafting the proposals for a new constitution that ultimately framed the Constituent Assembly's work.<sup>39</sup> The 1991 Constitution

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36. See generally Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008).

37. See *supra* Part I.

38. Villegas, *supra* note 26, at 101.

39. Unlike Brazil's earlier Constituent Assembly, "Colombia's Constituent Assembly began with a

indeed bears neoconstitutionalist hallmarks: it defines human rights treaties as having supralegislative status, creates several types of judicial review, includes a broad list of rights encompassing socioeconomic and group rights, and provides that the “rights and duties enshrined in this Charter shall be interpreted in accordance with international human rights treaties ratified by Colombia.”<sup>40</sup>

Perhaps the 1991 Constitution’s most important judicial innovation was the creation of a Constitutional Court (CCC), distinct from the Supreme Court, to which citizens had direct access through the writ of *tutela*.<sup>41</sup> The CCC quickly became known for its bold, progressive, rights-based jurisprudence. Of the first generation of nine judges, three were progressive law professors who had studied abroad and who had links to the Universidad de los Andes, which boasted Colombia’s most internationalized law faculty.<sup>42</sup> The judges, in turn, hired a strong group of academically inclined “auxiliary judges” (or professional clerks) trained in the United States and Europe who would contribute to the introduction and local construction of neoconstitutionalist doctrines and practices, including the constitutional block.<sup>43</sup>

These judges and auxiliaries played a leading role in shaping the CCC’s work and, through the CCC, in expanding the IACtHR’s authority in Colombia. The 1991 Constitution provides only that international treaties ratified by Congress have “priority” domestically.<sup>44</sup> During the Court’s first year, two rulings by these progressive scholar-judges would declare that human rights treaties are directly binding and superior to domestic legislation.<sup>45</sup> In 1995 the CCC first used the term “constitutional block” and began to systematize its meaning, declaring that human rights treaties had constitutional rank.<sup>46</sup> Since then, Rodrigo Uprimny writes, it has “entered into national practice with much

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well[-]organized and detailed draft prepared by a bright young team of lawyers well versed in comparative constitutional law.” Keith S. Rosenn, *A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil*, 23 U. MIAMI INTER-AM. L. REV. 659, 661 (1992). Some of these young lawyers then went on to serve on the early CCC.

40. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

41. *Id.* art. 86.

42. These three are: Ciro Angarita Barón (professor at Universidad de los Andes and Universidad Nacional), Eduardo Cifuentes Muñoz (professor at Universidad de los Andes), and Alejandro Martínez Caballero (professor at the Universidad del Rosario). See MAGISTRADOS DE LA HISTORIA, <http://www.eleccionvisible.com/index.php/magistrados-de-la-historia> (last visited Feb. 27, 2015).

43. These include Juan Jaramillo, Rodrigo Uprimny, Nestor Correa, Catalina Botero, Rodolfo Arango, Luis Fernando Restrepo, and Mauricio García Villegas. See Villegas, *supra* note 26, at 98 n. 28.

44. C.P. *supra* note 40, art. 93.

45. Corte Constitucional [C.C.] [Constitutional Court], octubre 28, 1992, Sentencia C-574/92, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); see Mónica Orango Olaya, *El Bloque de Constitucionalidad an la Jurisprudencia de la Corte Constitucional Colombiana*, PRECEDENTE 79, 81 (2004).

46. C.C., enero 19, 2000, Alejandro Martínez Caballero, Sentencia C-010/00, G.C.C. (Colom.) (“La Corte coincide con el interviniente en que en esta materia es particularmente relevante la doctrina elaborada por la Corte Interamericana de Derechos Humanos, que es el órgano judicial autorizado para interpretar autorizadamente la Convención Interamericana.”); see generally Hernán Alejandro Olano García, *El Bloque de Constitucionalidad en Colombia*, 3 ESTUDIOS CONSTITUCIONALES 231 (2006) (describing the constitutional bloc in Colombia).

force.”<sup>47</sup> Further, in 2000, in a ruling by one of the scholarly judges, the Court declared that the rulings of the IACtHR and, in some cases, the Commission, were self-executing.<sup>48</sup>

#### A. Human Rights and Judicial Power during Colombia's Civil War

The story of the early CCC and its rapid construction of a neoconstitutionalist regime open to international human rights aligns well with Dezalay and Garth's argument about groups of progressive lawyers who, in moments of opportunity, ally themselves with progressive political reformers and participate in the construction of a new legal regime.<sup>49</sup> It is worth noting, however, the features of the Colombian political context that made it a uniquely auspicious place for neoconstitutionalism to take root. On one hand, Colombia is the Latin American state with the most egregious rights violations and the only state where an active conflict is still unfolding. On the other, Colombia has one of the highest levels of ratification of international human rights treaties and is a “net exporter of institutional innovations and constitutional jurisprudence.”<sup>50</sup> This seeming paradox, writes Sandra Borda, is in part the product of a self-conscious strategy by the Colombian government to contain the damage to its reputation caused by reports of its widespread human rights abuses.<sup>51</sup> During the Uribe Administration, the “almost compulsive ratification” of human rights treaties formed part of an executive strategy to project the image of a government that takes human rights seriously despite the presence of terrorists within the territory.<sup>52</sup> It behooved the executive, and it was part of Colombia's foreign policy, to demonstrate a strong adhesion to human rights. The political context was in this sense open to international human rights, which helps explain how the CCC was able to successfully construct IAS jurisprudence as a source of constraining authority. The CCC's survival as a strong court may also be attributed to the support it gained through its early rights jurisprudence in a state where the other branches of government had low public approval and were in the midst of an ongoing internal conflict. NGOs and other actors in civil society turned to the CCC and supported it.

Despite the CCC's strong beginnings, its assertion of power and exercise of

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47. Rodrigo Uprimny, *Bloque de Constitucionalidad en Colombia*, Red de Escuelas Sindicales 1 (2005), [http://redescuelascsa.com/sitio/repo/DJS-Bloque\\_Constitucionalidad%28Uprimny%29.pdf](http://redescuelascsa.com/sitio/repo/DJS-Bloque_Constitucionalidad%28Uprimny%29.pdf).

48. C.C., noviembre 2, 2000, M.P. Fabio Moron Diaz, Sentencia C-1490/00, G.C.C. (Colom.).

49. See Garth & Dezalay, *supra* note 6, at 275.

50. CÉSAR RODRÍGUEZ GARAVITO, *LA GLOBALIZACIÓN DEL ESTADO DE DERECHO* 40 (2009) (original quotation in Spanish reads: “En un giro paradójico de la historia social y jurídica, precisamente uno de los países con violaciones más graves de los derechos humanos ha pasado a ser exportador neto de jurisprudencia constitucional y de innovaciones institucionales . . .”).

51. Sandra Borda Guzmán, *Política exterior y derechos humanos en Colombia: un manual para la contención de la presión internacional*, in *DERECHOS HUMANOS EN POLÍTICA EXTERIOR: SEIS CASOS LATINOAMERICANOS* 123, 123 (Natalia Saltalamacchia Ziccardi & Ana Covarrubias Velasco eds., 2011).

52. *Id.* at 136 (original quotation in Spanish reads: “[L]a ratificación casi compulsive de tratados internacionales sobre esta material ha sido un component permanente y ha variado poco.”).

judicial review have fluctuated over time and remain subject to political constraints. Though President Gaviria participated in naming the first generation of judges who would play such an important role, all presidents since have tried to pass legislation to curtail the CCC's power.<sup>53</sup> The CCC is not immune to these threats, and some argue that it defers strategically.<sup>54</sup> But even if the exact contours of the constitutional block and other rights doctrines fluctuate partly in response to politics, the CCC's trajectory also speaks to the difficulty (although not impossibility) of containing a rights-based legal practice once it is out of the bottle, especially in a state where power is fragmented.

## B. The Intermediate and Extensive Authority of the IACtHR in Colombia

The history described above suggests that the rise of a neoconstitutionalist order in Colombia has broadened and diversified the IACtHR's authority. Today the Court exerts narrow, intermediate, and extensive authority in Colombia.

When it deposited its instrument in 1985, Colombia became the eighth state to accept the Court's jurisdiction. Since then, it has become one of the most frequently condemned states. The majority of the judgments against Colombia address state-sponsored violence or the failure to adequately investigate massacres.<sup>55</sup> Colombia has never fully complied with an IACtHR judgment, and in particular it has failed to comply with orders to prosecute those who have committed atrocities. However, it actively participates in litigation, regularly complies with court orders to pay compensation and to provide symbolic reparations such as apologies, and has undertaken significant steps toward criminal investigation in all cases that have come before the IAS.<sup>56</sup>

Further, the IACtHR's authority in Colombia extends well beyond the resolution of particular disputes. In its abstract review of legislation, for example, the CCC consistently refers to the IACtHR's jurisprudence as part of the constitutional block.<sup>57</sup> In this way, much of the legal activity in Colombia that gives effect to the IAS never formally comes before the IAS; it is never the subject of a petition to the Commission or a case before the Court. Rather, the activity takes place in the shadow of the IAS through abstract and concrete judicial review before the CCC.<sup>58</sup> An example is the CCC's treatment of

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53. Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court 1992–2006*, in *COURTS IN LATIN AMERICA* 81, 85 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

54. *Id.*

55. *See, e.g.*, *Mapirpan Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *La Rochela Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007); *La Rochela Massacre v. Colombia*, Merits, Reparations & Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).

56. For example, once a case that is before the national criminal justice system also comes before the IAS, Colombia's Attorney General (Fiscalía General de la Nación) prioritizes it and hands it to prosecutors who specialize in such cases.

57. *See Uprimny, supra* note 47; *Hernán Alejandro Olano García, supra* note 46.

58. Note that it is likely that this domestic litigation shapes, in turn, the IAS jurisprudence. *See Jorge Contesse, Inter-American Constitutionalism: The Interaction Between Human Rights and*

indigenous rights. The IACtHR has never issued a judgment against Colombia on indigenous rights. It has in recent years, however, developed a rich jurisprudence in this area through cases against Nicaragua, Suriname, Paraguay, and Ecuador, and the CCC has frequently made reference to these cases and used them to review national legislation and treaties under the constitutional block.<sup>59</sup>

The constitutionalization of the IAS has also meant that the CCC refers to IAS jurisprudence even in matters not traditionally considered to be human rights law, such as criminal, family, and administrative law.<sup>60</sup> The Supreme Court and the Council of State, Colombia's highest administrative court, also regularly refer to the IACtHR's jurisprudence in interpreting questions of national law.<sup>61</sup>

Perhaps the most striking example of the IACtHR's extensive authority is its role in the current peace process. Like so many states negotiating peace in the midst of an internal armed conflict, Colombia must decide whether to facilitate negotiations through an amnesty or through some other formula that lifts or lightens penal responsibility for war crimes and other atrocities. But unlike any other state before it, Colombia's peace comes at a time when the IACtHR and the Commission have developed a body of jurisprudence that restricts the options available; in particular, some argue it takes amnesty off the table entirely.<sup>62</sup> The IAS's jurisprudence thus occupies a central place in the discussions. In a surprising twist, it is the *uribista* Right—usually critical of IAS—that most often invokes Inter-American jurisprudence as a way to oppose the peace process, which they argue will be too lenient on the *Fuerzas Armadas Revolucionarias de Colombia*.<sup>63</sup> Meanwhile, there is a split in the traditional human rights and public-interest law community, with some NGOs supporting a harder line against amnesties, and others seeking ways to interpret the Inter-

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*Progressive Constitutional Law in Latin America*, in LAW AND SOCIETY IN LATIN AMERICA: A NEW MAP 220 (César Rodríguez Garavito ed., 2015).

59. See, e.g., C.C. julio 6, 2012, M.P. Humberto Sierra, Sentencia T-513/12 G.C.C. (Colom.) (citing to three Inter-American Court judgments focused on indigenous rights); C.C., noviembre 2, 2000, M.P. Fabio Moron Diaz, Sentencia C-1490/00, G.C.C. (Colom.).

60. See Enrique Gil Botero, *El principio de reparación integral en Colombia a la luz del Sistema Interamericano de Derechos*, in PERSPECTIVA IBEROAMERICANA SOBRE LA JUSTICIA PENAL INTERNACIONAL 319 (Héctor Olásolo Alonso & Salvador Cuenca Curbello, eds., 2012); Rodrigo Uprimny, *Bloque De Constitucionalidad, Derechos Humanos y Nuevo Procedimiento Penal* (unpublished manuscript), <https://www.wcl.american.edu/humright/hracademy/documents/Clase1-Lectura3BloquedeConstitucionalidad.pdf>.

61. Botero, *supra* note 60.

62. See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203 (2011); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

63. Thus, for example, Alvaro Uribe himself participated in a seminar organized by the Inter-American Court, during which he emphasized that there is no peace without justice. See *¿Qué hay detrás del sorpresivo apoyo de Uribe a Santos?*, EL TIEMPO POLITICA (Apr. 27, 2015), <http://www.eltiempo.com/politica/proceso-de-paz/apoyo-de-uribe-a-santos-que-hay-detras/15637555>.

American jurisprudence to facilitate rather than constrain the peace process.<sup>64</sup> All of these debates take place in the public arena but in the shadow of the law, for the IAS has never issued an amnesty ruling against Colombia.

In sum, neoconstitutionalists in Colombia were able to seize a moment of political change to introduce and implement new ideas about judicial review, principled interpretation, and the constitutional block. Today the IACHtR's judgments are frequently cited in domestic litigation over constitutional rights, and they continue to guide and constrain state actors while shaping public debates over certain policy matters.

#### IV

#### NEOCONSTITUTIONALISTS AND THE GRADUAL REFORM OF CHILE'S AUTHORITARIAN CONSTITUTION

The Chilean Constitution was promulgated by the Pinochet dictatorship through a politically closed process in 1980. Unlike Venezuela and Colombia, then, Chile labors under a constitution that was written in an attempt to realize the political project of a prior and now illegitimate authoritarian regime. Further, the Chilean judiciary emerged from the dictatorship tainted by its deference to, and even collusion with, the Pinochet regime.<sup>65</sup> During the decade after the return to democracy, the idea that such a judiciary should play a more active political role through constitutional review was received with reticence. One well-regarded liberal scholar of the time likened advocating for judicial review in Chile to handing one's batterer a hammer.<sup>66</sup> Even as judicial review of rights became an important political phenomenon in Argentina, Colombia, Costa Rica, and other democratic states in the region, Chile remained "the rights revolution that never was."<sup>67</sup>

In 2005, Chile's center-left coalition led a reform process that sought to cleanse the 1980 constitution of its authoritarian features. Among many changes, the reform removed non-elected positions from the Senate and curbed presidential powers, including reducing the presidential term from six years to four years without direct reelection. One feature of this reform was to expand

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64. Thus, actors in support of the peace process frequently cite to a concurrence in the recent *Mozote Massacre v. Salvador* judgment of the Inter-American Court that seems to differentiate between amnesties after dictatorships and amnesties to end civil war. See, e.g., *De la Calle ve fórmula para blindar la justicia transicional*, EL TIEMPO POLITICA (Feb. 25, 2015), <http://www.eltiempo.com/politica/proceso-de-paz/proceso-de-paz-de-la-calle-ve-formula-para-blindar-la-justicia-transicional/15297602>.

65. See Report of the Chilean National Commission on Truth and Reconciliation (1991: vol. 1, CH.4, 117–26 (critiquing judiciary's failure to defend rights under the Pinochet dictatorship); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE 1, 180–83 (2007).

66. Fernando Atria, *Revisión Judicial: El Síndrome de la Víctima Insatisfecha*, 79 ESTUDIOS PUBLICOS 348, 378 (2000).

67. Javier A. Couso, *The Judicialization of Chilean Politics: The Rights Revolution That Never Was*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 105, 105 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2009).

the powers of the Constitutional Court. It moved the practice of constitutional review of legislation from the Supreme Court, which is part of the regular judiciary, to the Constitutional Court. It also changed the procedures for nominating judges to the Constitutional Court (at last ending, for example, the role the Armed Forces played in the process).<sup>68</sup> Some argued the 2005 reform was so extensive that its result was in effect a new constitution.<sup>69</sup> However, the 2005 reform left important Pinochet-era institutions in place, including electoral procedures that constrain majoritarian voting and, significantly, *a priori* abstract review of legislation. As argued in one author's account, post-dictatorship constitutional politics in Chile have been characterized by a spirit of gradual reform, presidential leadership, and strong party discipline, with little voice given to civil society.<sup>70</sup> The 2005 reform process "was conducted by a political elite accustomed to exercising power . . . who knew each other and created relatively closed spaces for dialogue. . . . The project was not much discussed by the press."<sup>71</sup>

The main legal scholars who advised the reform process were Francisco Zúñiga and Humberto Noguiera, who were close to the ruling coalition (the Concertación), along with Gastón Gómez and Arturo Fermandois, chosen for their relation to the Right as well as the Center. Whereas Noguiera is a neoconstitutionalist who has advocated for the constitutional block in Chile and writes about the IAS regularly, the others are less enthusiastic about the role of international human rights in the domestic realm. Francisco Zúñiga, who played the most influential role in the process, deems neoconstitutionalism to be a type of "constitutional fetishism" and describes the IACtHR's doctrine of conventionality review<sup>72</sup> as a "paroxysm" of judicial discretion lacking in democratic grounding.<sup>73</sup> Fermandois, a political conservative close to the Right, has argued that the IACtHR's rulings are not binding within Chile.<sup>74</sup> Significantly, the reform did not alter or further specify the status of international human rights law domestically.

The Constitutional Court's docket grew as a result of the 2005 reform, and its judges, now more likely to be drawn from the political sphere, were less deferential than the Supreme Court judges before them in exerting judicial review of legislation, and less deferential than prior Constitutional Court judges

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68. FERNANDO ATRIA, LA CONSTITUCIÓN TRAMPOSA 16–17, 33 (2013).

69. CLAUDIO FUENTES SAAVEDRA, EL PACTO: PODER, CONSTITUCIÓN Y PRÁCTICAS POLÍTICAS EN CHILE (1990–2010) 96 (2012).

70. *Id.* at 126.

71. *Id.* at 126–27.

72. Discussed further in Part V, *infra*.

73. Francisco Zúñiga Urbina, *Nueva Constitución y Constitucionalismo en Chile*, 18 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 173, 175 (2012), <http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/2012/pr/pr11.pdf>.

74. *Expertos debaten sobre validez del recurso presentado en la Corte*, EL MERCURIO (Oct. 17, 2008), <http://prensa.politicaspUBLICAS.net/index.php/politicachile/2008/10/17/expertos-debaten-sobre-validez-del-recur> (reporting that Fermandois argued that the IACtHR's rulings were politically binding, as opposed to legally binding).

in exerting abstract review. The Court began to participate in what scholars have called an “incipient activism.”<sup>75</sup> But the new Constitutional Court elided neoconstitutionalist doctrines such as the constitutional block. One reason for this is legal: there was no explicit change in the status of human rights law in Chile. And while the 1980 Constitution can be read as consonant with the doctrine of the constitutional block, this was not part of the 2005 reform debate. Further, the judges who came into the Court were not neoconstitutionalist scholars. Rather, several had participated in the reform negotiations as members of the executive branch or the Senate.<sup>76</sup> As in the negotiation process, these judges did not promote a theory about the role of international human rights in constitutional interpretation. Indeed, many of them lacked basic knowledge about international human rights law.<sup>77</sup>

Chile’s legal community, however, has not been immune to the neoconstitutionalist ferment in the region. As in other states, the role of constitutional law has begun to generate more interest, and the status of those who study constitutional law has risen.<sup>78</sup> Today there are constitutional and human rights scholars who emphasize rights review and constitutional law as well as international law in all of the main Chilean law schools. Chilean scholars study abroad, constitute part of transnational networks of constitutional law, and participate in conferences in which neoconstitutionalism is studied and discussed. Increasingly, law school clinics and several NGOs engage in strategic rights litigation before the national and international judiciary.<sup>79</sup> But neoconstitutionalism has had less impact in the Chilean political order than in Colombia, and it has received a less enthusiastic reception among the scholars who have the social and professional ties that allow them to participate in constitutional reform.

Chile may soon undergo another constitutional moment. Throughout her campaign and upon taking office in March 2014, President Bachelet announced that a new constitution, be it through Congress or a constituent assembly, would be one of the three pillars of her second term.<sup>80</sup> These reforms were put on the

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75. Indeed, during the 2013 campaign, presidential candidates regularly called for laws to curb its powers. Judith Schonsteiner & Javier A. Couso, *The Uses of International Human Rights Law in Chile's Constitutional Court: Errors and Politicization*, paper presented at Law and Society Annual Conference 1, 4 (2014) (on file with author).

76. These judges are Mario Fernández, Jose Antonio Viera Gallo, Jorge Correa Sutil, Carlos Carmona, and Gonzalo García. See Claudio Fuentes, *supra* note 69, at 256–57.

77. Schonsteiner & Couso, *supra* note 75, at 20.

78. See Couso, *supra* note 24, at 146–48.

79. The Universidad Diego Portales Law School has created the Clínica de AIP y Derechos Humanos, CENTRO DE DERECHOS HUMANOS, <http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/clinicas/clinica-aip-y-derechos-humanos> (last visited Sept. 17, 2015). The Universidad de Chile also has a public interest clinic. FACULTAD DE DERECHO: UNIVERSIDAD DE CHILE, <http://www.derecho.uchile.cl/pregrado/secretaria-de-estudios/53639/ensenanza-clinicas-juridicas-clinica-de-interes-publico> (last visited Sept. 17, 2015).

80. Bachelet: “Chile necesita una carta magna nacida en democracia,” RT (Dec. 16, 2013), <http://actualidad.rt.com/actualidad/view/114366-bachelet-presidenta-chile-reforma-constitucion> (reporting on Bachelet’s first public address during her second term, in which she reiterated her



political agenda by massive student protests portraying Chile's neoliberal economic system and the 1980 Constitution as an illegitimate "iron jacket" imposed by a dictator.<sup>81</sup> It is possible that one day, as in Colombia and Argentina, a new constitution could open the door to expansion of the IACtHR's authority beyond judgment compliance—the "narrow" level. Indeed, Bachelet's official proposals for a new constitution emphasize that it would give "maximum value" to human rights treaties.<sup>82</sup> Some of Bachelet's advisors, however, are not devotees of neoconstitutionalism; rather, they view individual-rights litigation as linked to the neoliberal project she is trying to overcome.<sup>83</sup> Thus, Bachelet's constitutional-reform agenda includes eliminating the Constitutional Court's power to exert abstract review over legislation, which in Colombia has been an important platform for expanding the IACtHR's influence, but in Chile is viewed as one of the anti-majoritarian features of the 1980 constitution that crimps democratic politics.<sup>84</sup>

#### A. The Narrow and Intermediate Authority of the IACtHR in Chile

Since accepting the IACtHR's jurisdiction in 1990, Chile has been the subject of seven judgments. In each, the state has participated actively in the litigation before the Commission and the Court. Further, with each ruling, the Chilean state has taken meaningful steps toward compliance: it has complied with at least some of the Court's orders in all its cases, and in two cases, it has reached full compliance, making it the state with the highest compliance rate.<sup>85</sup> Indeed, to comply with the first human rights judgment entered against it, Chile went so far as to amend its constitution,<sup>86</sup> which an Open Society report refers to "as the ultimate example of compliance."<sup>87</sup> Chile has even taken significant steps toward compliance in responding to the Court's orders to investigate and punish for matters of state atrocity, the types of orders that have the lowest compliance rate in the Inter-American System.<sup>88</sup> Taken together, these actions

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commitment to reforming the Constitution).

81. See, e.g., *The Dam Breaks*, THE ECONOMIST (Aug. 27, 2011), <http://www.economist.com/node/21526906>.

82. *Nueva Constitución*, BACHELET CAMPAIGN, <http://michellebachelet.cl/wp-content/uploads/2013/10/Nueva-Constituci%C3%B3n-28-35.pdf> ("[T]he fundamental charter should give the greatest value to the principles and international treaties that recognize the rights of the human person. It is the duty of the organs of the state to respect, promote, and assure, at every level of protection, the exercise of human rights.") (author's translation).

83. See FERNANDO ATRIA ET AL., *EL OTRO MODELO: DEL ORDEN NEOLIBERAL AL RÉGIMEN DE LO PÚBLICO* 186–89 (2013).

84. *Nueva Constitución*, *supra* note 82, at 34.

85. See "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Monitoring Compliance with Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001) (declaring full compliance to Last Temptation in 2003, after amending law creating prior censorship, and full compliance to Claude Reyes in 2008).

86. See *id.*

87. OPEN SOCIETY FOUNDATIONS, *FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS* 74 (2010).

88. Bárbara Ivanschitz Boudeguer, *Un Estudio Sobre el Cumplimiento y la Ejecución de las*

suggest that Chile has reached the greatest “narrow authority” in the region.

Chile also shows an emerging “intermediate authority.” Following the *Atala v. Chile* judgment<sup>89</sup> in which Chile was found to have violated the American Convention for stripping a lesbian of custody over her biological children, the Congress passed anti-discrimination legislation even though the IACtHR had not ordered it to do so.<sup>90</sup> The judgment thus arguably had effects beyond judgment compliance. Further, a study of the Constitutional Court of Chile, the seat of higher-law review, shows that its judges have begun to cite to IACtHR judgments, but concludes that it “employs the Inter-American Court of Human Right’s jurisprudence in only a timid fashion.”<sup>91</sup> The constitutional tribunal cites mostly to cases against Chile, and it seems not to acknowledge the difference in the legal authority in Chile between the European Court of Human Rights and the IACtHR. A study by Couso and Schonsteiner finds that the tribunal shows “a disregard for international standards” and undertakes only “occasional references depending on topical conveniences.”<sup>92</sup> They also find that congressional debates suggest congresspersons are poorly advised on international law, and that they “seem to be unfamiliar with rudimentary elements of the interpretation of international human rights law and public law, as the submissions to the tribunal tend to show.”<sup>93</sup>

The IACtHR’s influence in Chile does have some features of extensive authority. Some actors not directly charged with state compliance recognize the IACtHR as authoritative. For example, there are a few NGOs and law school clinics that have experience in litigation before the IAS, some international human rights legal scholars who write about the Court, and several constitutional law scholars who engage in scholarly debates about the IAS. But these actors form a relatively small group, and the Court’s jurisprudence does not “consistently shape law and politics” for any particular issue.<sup>94</sup> Neoconstitutionalists have been kept mostly on the sidelines in moments of constitutional reform. They have not succeeded in shaping the practice of the apex courts. And there is a strong division between constitutional law and

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*Sentencias de la Corte Interamericana de Derechos Humanos por el Estado de Chile*, 11 ESTUDIOS CONSTITUCIONALES 275, 303–07 (2013).

89. *Atala Riffo and Daughters v. Chile*, Merits, Relief, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 502 (Feb. 24, 2012).

90. Boudeguer, *supra* note 88, at 322–24.

91. Humberto Nogueira Alcalá, *Diálogo Interjurisdiccional, Control De Convencionalidad y Jurisprudencia del Tribunal Constitucional en Período 2006–2011*, 10 ESTUDIOS CONSTITUCIONALES 57, 128 (2012) (original quotation in Spanish reads “El Tribunal Constitucional en el periodo 2006–2011, emplea en forma tímida la jurisprudencia de la Corte Interamericana de Derechos Humanos.”).

92. Schonsteiner & Couso *supra* note 75, at 12.

93. *Id.*

94. Alter, Helfer & Madsen, *supra* note 7, at 10. It could be argued that in the area of amnesty law, the Court has extensive authority across the region, including in Chile. In any debate over amnesty laws, including the debate to repeal the 1978 amnesty law in Chile, the Court’s jurisprudence on this matter will be frequently invoked. However, this is muddled by the fact that there is a specific order against Chile to repeal the law, so it is also a judgment-compliance matter.

international human rights law, meaning that the IACtHR's judgments are little used in domestic litigation. As a result, while the IACtHR enjoys narrow authority and a high level of judgment compliance in Chile, it has not come to shape policy in any specific matter beyond the country's judgment compliance.

## V

### NEOCONSTITUTIONALISTS AND VENEZUELA'S BOLIVARIAN REVOLUTION

Neoconstitutionalism was sidelined by Hugo Chávez's Bolivarian Revolution.<sup>95</sup> Chávez rose to the presidency in 1998, marking the end of Venezuela's "pacted democracy," an arrangement in which a small elite held power, and leadership of the government alternated between the two main political parties that had dominated politics since 1958.<sup>96</sup> Backed by a large majority, President Chávez called for a constituent assembly to create a new constitution, and vowed to end the corruption, cronyism, and concentration of power that had characterized Venezuelan politics.<sup>97</sup>

Though Chávez's ascent threatened the status quo, his administration at first seemed open to international human rights and to the IAS in particular. Chávez vowed to investigate the human rights violations that had occurred prior to his presidency, some of which were under the review of the Inter-American System.<sup>98</sup> Further, the text that emerged from the Constituent Assembly contains one of the most human rights-friendly clauses in the region. Article 23 of the Venezuelan Constitution declares that international human rights treaties enter into the national system at the constitutional level, and adds that under the *pro homini* principle, the Constitution yields to the international human right if the latter is more protective.<sup>99</sup> The 1999 Constituent Assembly also relied on the American Convention to define certain rights, and the constitutional text directly refers to the Convention in a clause on regimes of emergency.<sup>100</sup>

These human rights clauses were proposed to the Human Rights Committee of the Constituent Assembly by Allan Brewer Carías, a proponent of neoconstitutionalist thought, and one of only four members of opposition parties elected to the Constituent Assembly.<sup>101</sup> He wrote the proposed text for Article 23 with the help of two of his law firm associates, Pedro Nikken, a former president of the IACtHR, and Carlos Ayala, a former president of the

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95. Bolivarian in this context refers to Simón Bolívar, one of the leaders of the struggle for independence from Spain, and not the country Bolivia (which is itself named after Simón Bolívar).

96. Jennifer McCoy, *Chavez and the End of "Partyarchy" in Venezuela*, 10 J. OF DEMOCRACY 64, 64 (1999).

97. *Id.* at 73.

98. Manuel A. Gomez, *Political Activism and the Practice of Law in Venezuela*, in CULTURES OF LEGALITY 182, *supra* note 24, at 192–93.

99. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [C.V.] art. 23.

100. *Id.* art. 339.

101. See generally ALLAN BREWER CARÍAS, ASAMBLEA CONSTITUYENTE Y PROCESO CONSTITUYENTE 1999 ch. VII (2013) (exploring constituent assembly and process).

Inter-American Commission.<sup>102</sup> Although Brewer Carías was a member of the opposition, the Committee accepted these proposals practically without change.<sup>103</sup>

Although these neoconstitutionalists were able to influence certain clauses of the 1998 constitutional text, they did not participate in putting the new constitutional regime into effect. Chávez rose to power specifically as an outsider and proceeded to exclude the traditional ruling elites from his administration. As he began to interfere with the independence of the judiciary,<sup>104</sup> many of the lawyers and scholars who would have usually ended up as presidential advisors instead joined the opposition. Further, they were excluded from the Supreme Court and did not participate in the construction of the Bolivarian constitution. As two observers note, Bolivarian constitutionalism is “a phenomenon that emerged outside the academy, produced more by the demands of social movements than by constitutional law professors.”<sup>105</sup>

Neoconstitutionalism instead became the foil against which theorists of the Venezuelan constitution would understand their own practice. Two Spanish law professors who acted as consultants to the constituent assemblies of Venezuela, Ecuador, and Bolivia argue that these three constitutions taken together reflect a “new Latin American constitutionalism,” which they define in opposition to neoconstitutionalism.<sup>106</sup> Like neoconstitutionalism, this new constitutionalism is less formalist in jurisprudential orientation and is committed to social and economic rights. However, the two strands diverge on important points. Whereas neoconstitutionalism emphasizes judicial power and fundamental rights as checks on state power, the new constitutionalism emphasizes the national constituent assembly and the sovereign will of the people as sources of the constitution’s legitimacy.<sup>107</sup> As in some U.S. interpretive schools, the constitution must be understood primarily through the lens of the founding moment as an expression of national sovereignty.<sup>108</sup>

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102. *Id.*

103. *See generally id.*

104. Chávez put in place a provisional system that destabilized judicial tenure, making the judiciary dependent on the executive. *See Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 182 ¶ 253 (Aug. 5, 2008).

105. Roberto Viciano Pastor & Ruben Martinez Dalmau, *¿Se puede hablar del nuevo constitucionalismo latinoamericano como una corriente doctrinal sistematizada?* 3–4 (2010) (unpublished manuscript), <http://www.juridicas.unam.mx/wccl/ponencias/13/245.pdf> (original quotation in Spanish reads “un fenómeno surgido en el extrarradio de la Academia, product más de las reivindicaciones de los movimientos sociales que de los profesores de Derecho Constitucional.”).

106. Pedro Salazar Ugarte, *El Nuevo Constitucionalismo Latinoamericano (Una Perspectiva Crítica)*, in *EL CONSTITUCIONALISMO CONTEMPORANEO* 345, 351 (Luis Raul Gonzalez Perez & Diego Valades eds., 2013), <http://biblio.juridicas.unam.mx/libros/7/3271/22.pdf>; *see also* BOAVENTURA DE SOUSA SANTOS, *REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR* (2010).

107. Eduardo Meier García, *Nacionalismo Constitucional y Derecho Internacional de los Derechos Humanos*, 9 *ESTUDIOS CONSTITUCIONALES* 329, 330 (2011).

108. Salazar, *supra* note 106, at 352–53; Javier Couso, *Radical Democracy and the New Latin*

Accordingly, the practice of the Venezuelan judiciary has moved from formalism to a more purposive view of judicial interpretation.<sup>109</sup> The rulings of the Venezuelan Supreme Court openly portray judges as participants in the Bolivarian Revolution and as having its social and political program as an explicit end.<sup>110</sup> Indeed, judges who have ruled against the Chávez Administration or that of his successor, Maduro, risk losing their jobs,<sup>111</sup> while the President of the Supreme Court feels comfortable airing in public his pro-Chávez political views.<sup>112</sup> The Supreme Court thus has little use for neoconstitutionalist theories about fundamental rights or for the judgments of the IACtHR, a foreign, nondemocratic body that, like the American Convention, prioritizes civil and political rights over development of social and economic rights.

But, as will be shown below, neoconstitutionalism still had a role to play: it became the preferred legal theory of at least some anti-Chavista activists.

#### A. The Shrinking Authority of the IACtHR under Hugo Chávez

Venezuela was an early participant in the IACtHR. In 1981 it became the second state to accept jurisdiction and has since been a respondent in seventeen cases. Prior to Chávez's ascent in 1998, however, the Inter-American Court had issued only one contentious judgment against Venezuela. Thus, the IACtHR was not known beyond a small group of human rights lawyers and the executive actors charged with international litigation.

Starting in 1999, as Chávez increasingly gained control over government institutions, his opponents saw in the IAS a forum for opposing him, especially on matters of freedom of expression and judicial independence. Manuel Gómez writes that a group of elite corporate lawyers metamorphosed into cause lawyers, taking on cases of well-heeled Chávez opponents who were being prosecuted and, they argued, persecuted.<sup>113</sup> When they found doors closed domestically by a judiciary that had adopted Bolivarian values, they often turned to the IAS, to which some had close ties. One of the most emblematic

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American Constitutionalism 9–11 (unpublished manuscript), [http://www.law.yale.edu/documents/pdf/sela/SELA13\\_Couso\\_CV\\_Eng\\_20130516.pdf](http://www.law.yale.edu/documents/pdf/sela/SELA13_Couso_CV_Eng_20130516.pdf).

109. See Raúl Sánchez Uribarri, *Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court*, 63 LAW & SOC. INQUIRY 856, 873–78 (2011); Rogelio Pérez Perdomo, *Judicialization and Regime Transformation: The Venezuelan Supreme Court*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 131, *supra* note 67, at 141.

110. Alexandra Huneus, *Rejecting the Inter-American Court in CULTURES OF LEGALITY*, *supra* note 24, at 128 (quoting the Supreme Court as holding that “law is a normative theory at the service of the politics underlying the axiological project of the Constitution”).

111. See Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008) (finding three administrative law judges were dismissed for political reasons).

112. Omar Mora Díaz, *presidente del Tribunal Supremo de Justicia “Sí, yo sí soy revolucionario,” EL NACIONAL* (Feb. 5, 2005), <http://www.sumate.org/democracia-retroceso/T1ST02P8V1%20Y%20V2.HTM>.

113. Manuel A. Gomez, in CULTURES OF LEGALITY, *supra* note 24, at 183.

cases in this sense involves the neoconstitutionalist scholar Allan Brewer Carías. Following a 2002 attempted coup against Chávez, the government opened a criminal case against Carías for his alleged participation in the conspiracy to topple the government. Claiming innocence and fearing unfair judicial treatment, Carías fled the country and filed a petition with the IAS. The Commission accepted the case and eventually referred it to the Court even though, Venezuela argued, Carías had not exhausted domestic remedies.<sup>114</sup> A similar case was that of Leopoldo López, a political opponent of the Chávez government, charged with corruption and disqualified from serving in political office in 2004. López petitioned the Inter-American System, claiming irregular process and violation of political rights; the Inter-American Court ruled in his favor in 2011.<sup>115</sup> He immediately launched a presidential bid.<sup>116</sup>

The Court, then, had as interlocutor a small, elite compliance constituency that filed cases with the IAS, a feature of emerging intermediate authority. In the end, however, their litigation strategy did not broaden the Court's authority; it did just the opposite. The Venezuelan judiciary increasingly rejected the recommendations and rulings of the Inter-American Commission and Court. Starting in 2000, the new Supreme Court issued a series of rulings that challenged the authority of the Commission, arguing that its precautionary measures were not binding, and ignoring or rejecting IAS jurisprudence on freedom of expression.<sup>117</sup> The Supreme Court also resisted IAS efforts to protect judicial independence in Venezuela. In *Apitz v. Venezuela*, the IACtHR found that the government had violated the American Convention by interfering with judicial independence and ordered Venezuela to reinstate three judges who had been dismissed after rulings against the government.<sup>118</sup> The Venezuelan Supreme Court responded by ruling that the *Apitz* judgment was inconsistent with the Venezuelan Constitution and could not be implemented.<sup>119</sup> It also stated that the IACtHR had overstepped its mandate, and called on the Venezuelan government to denounce the American Convention—four years

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114. The acceptance of Brewer Carías' and Leopoldo López's case features prominently in Venezuela's letter of denunciation as revealing an anti-Venezuela bias. Before the Chávez Administration, the Court allowed only litigants in non-democratic governments to forego the exhaustion of domestic remedies requirement. See Denunciation letter from the Minister of Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, to the Gen. Secretariat of the Org. of Am. States (Sept. 6, 2012), [http://www.oas.org/DIL/Nota\\_Rep%C3%BABlica\\_Bolivariana\\_Venezuela\\_to\\_SG.English.pdf](http://www.oas.org/DIL/Nota_Rep%C3%BABlica_Bolivariana_Venezuela_to_SG.English.pdf).

115. *López Mendoza v. Venezuela*, Merits, Relief, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 233 (Sept. 24, 2011).

116. Leopoldo Lopez Launches Venezuela Presidential Bid, BBC NEWS, Sept. 25, 2011, <http://www.bbc.com/news/world-latin-america-15050728>.

117. Meier, *supra* note 107, at 332–60.

118. See *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 182 (Aug. 5, 2008).

119. Tribunal Supremo de Justicia [T.S.J.] [Supreme Court], *Caso Gustavo Alvarez Arias y otros*, December 18, 2008, M.P. Magistrado Ponente: Arcadio Delgado Rosales, Sentencia 1939/2008 (Venez.) (<http://www.tsj.gov.ve/decisiones/scon/diciembre/1939-181208-2008-08-1572.html>).

before the government actually did so.<sup>120</sup> The Supreme Court similarly ruled that the Inter-American Court's judgment in *Leopoldo López v. Venezuela* could not be executed.<sup>121</sup>

Even as the Supreme Court challenged the IAS domestically through its rulings, the executive increasingly challenged the IAS on the international stage, depicting it as controlled by U.S. interests and calling for reform at the OAS.<sup>122</sup> Further, although the foreign ministry continued to defend Venezuela before the Court, its participation became ever more reluctant: it stopped reporting to the Court on the implementation of judgments, making it impossible for the Court to properly monitor compliance, and it even failed to pay compensatory damages in an emblematic case.<sup>123</sup> Chávez finally denounced the American Convention in 2012 with a long, carefully argued letter accusing the IAS of overstepping its mandate, of bias against Venezuela, and of catering to U.S. interests.<sup>124</sup> The denunciation took effect in September 2013. According to the IACtHR, Venezuela will still be bound to participate in proceedings and be bound by the judgments in cases filed before that date.<sup>125</sup> Venezuela continues to appear before the Court, and even succeeded in getting the Court to dismiss the *Brewer Carías* case in 2014 on the ground that the applicant had not exhausted local resources.<sup>126</sup> But a 2015 judgment against Venezuela was repudiated by the Venezuelan Supreme Court, which held that the Inter-American Court had violated the American Convention, and urged the Venezuelan government to denounce the Inter-American Court before the OAS General Assembly.<sup>127</sup> It is arguable that the Court's authority has withered from "narrow" to none.

The Bolivarian Revolution, then, was a political project that stood in tension with constitutional theories that emphasized judicial review as well as fundamental and transnational rights. Neoconstitutionalism became the foil against which Bolivarian constitutionalism would be defined. Further, Chávez's opponents—some of them neoconstitutionalist scholars and practitioners—

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120. *Id.* at "Decisión," no. 2.

121. Tribunal Supremo de Justicia [T.S.J.] [Supreme Court], Oct. 17, 2011, M.P. Magistrado Ponente: Arcadio Delgado Rosales, Sentencia 1547/2011 (Venez.) (<http://www.tsj.gov.ve/decisiones/scon/octubre/1547-171011-2011-11-1130.html>).

122. Human Rights Watch, *Concentración y Abuso de Poder en la Venezuela de Chávez*, 46–51 (2012) (<http://www.hrw.org/sites/default/files/reports/venezuela0812sp.pdf>).

123. *Blanco Romero et al v. Venezuela*, Inter-Am.Ct.H.R., Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 22, 2011 at para. 32–35.

124. Letter from Nicolás Maduro, Venezuelan Foreign Minister, to José Miguel Insulza, OAS Secretary General (Sept. 6, 2012), <http://www.scribd.com/doc/105813775/Carta-de-denuncia-a-la-Convencion-Americana-sobre-Derechos-Humanos-por-parte-de-Venezuela-ante-la-OEA>.

125. *Ivcher Bronstein v. Peru*, Reparations and Costs, Judgment, Inter-Am.Ct.H.R. (ser. C) No. 74 (Feb. 6, 2001) at para. 49.

126. Case of *Brewer Carías v. Venezuela*. Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 278 (May 26, 2014) at 46.

127. Tribunal Supremo de Justicia [T.S.J.] [Supreme Court], Sept. 10, 2015, Caso Reynaldo Munoz Pedroza y otros, Sentencia 1175/2015 (Venez.).

turned to the IAS to defend themselves and to challenge the government's policies, pitting Chávez against the IAS. In the end, however, this contest diminished the IACtHR's authority in Venezuela.

## VI

### NEOCONSTITUTIONALISM AS A TRANSNATIONAL NETWORK: COLONIZING THE INTER-AMERICAN COURT

Thus far the discussion of neoconstitutionalism has focused on national legal practices and political processes. But part of the power of epistemic communities is that their members can work across national borders and play a role in shaping international as well as domestic institutions.<sup>128</sup> Such changes in the international sphere can then boomerang back to influence the domestic sphere.<sup>129</sup> This part shows that neoconstitutionalists have increasingly taken leadership roles on the IACtHR as judges and clerks, and that neoconstitutionalist ideas and practices have permeated the Court. The jurisprudence of the Court now reflects a neoconstitutionalist understanding of domestic constitutional law, and may, in turn, further push domestic legal systems in this direction.

An example of this transnational dynamic can be found by focusing on an important node in the Latin American neoconstitutionalist network, *Universidad Nacional de México* (UNAM), which is home to two research centers, the *Instituto Iberoamericano de Derecho Constitucional* (IIDC), part of a transnational effort to promote liberal constitutionalism, and the *Instituto de Investigaciones Jurídicas* (IIJ), a well-regarded center for the study of law. Although IIDC and IIJ scholars adhere to more than one view of constitutionalism, neoconstitutionalism has been prominent.<sup>130</sup> The IIDC has also been important to the IAS.<sup>131</sup> The director of the IIDC from 1972 through 2002 was Hector Fix-Zamudio. During his tenure as director, Fix-Zamudio also served two terms as a judge on the IACtHR, from 1986 through 1997, and was twice its president (1993, 1994–1997). The year after he stepped down, another investigator from the Institute, Sergio García Ramírez, became a two-term judge and served as President of the IACtHR (1998–2009, and President from

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128. The concept of epistemic communities refers to “professional networks with authoritative and policy-relevant experience.” Mai’a K. Davis Cross, *Rethinking Epistemic Communities Twenty Years Later*, 39 REV. INT’L STUD. 137, 137 (2012).

129. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 12 (1998) (explaining the boomerang effect, whereby domestic actors use international institutions and allies to create domestic change).

130. Armin von Bogdandy, *Ius constitutionale commune latinoamericanum. Una aclaración conceptual*, in IUS CONSTITUTIONALE COMMUNE EN AMERICA LATINA: RASGOS, POTENCIALIDADES Y DESAFIOS 3, 4 n.3 (Armin von Bogdandy, Hector Fix-Fierro & Mariela Morales Antoniazzi eds., 2014).

131. Hector Fix-Fierro, *Los juristas academicos del Instituto de Investigaciones Juridicas de la UNAM y la construccion juridical de las nuevas instituciones democraticas*, in LOS ABOGADOS Y LA FORMACION DEL ESTADO MEXICANO 451, 456–57 (Oscar Cruz Barney, Hector Fix-Fierro & Elisa Speckman Guerra eds., 2013).



2004–2007).<sup>132</sup> In 2012, Eduardo Ferrer-Macgregor, yet another investigator of the UNAM institute who has written extensively on the doctrine of conventionality review, started his first six-year term.<sup>133</sup> Further, the IJ has an ongoing project with the Max Planck Institute of Germany to foment a *ius commune constitucional Americano*—a transnational doctrine of fundamental rights shared across the Latin American states that has been constructed in great part by judicial dialogue that involves and, in some versions, prioritizes the IACtHR. Among participants in the UNAM–Max Planck *ius constitutionale* network are several former judges, former presidents, the Secretary of the IACtHR, and members of the Inter-American Commission.<sup>134</sup>

Through these and other links, the influence of neoconstitutionalist thought on the IACtHR has been decisive. During his tenure as Court President, IIDC investigator Sergio García Ramírez penned what is arguably the most significant ruling in the Court's neoconstitutionalist turn. In *Almonacid v. Chile* the Court announced its interpretation of the American Convention as demanding that all judges in states under its jurisdiction have the duty to review legislation under the American Convention and “must refrain from enforcing any laws contrary to such Convention”:

[W]hen a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. . . . In other words, the Judiciary must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.<sup>135</sup>

This judge-made doctrine is a bold amalgam of *Marbury v. Madison* and *Van Gend en Loos*.<sup>136</sup> It seems to say that *all* the judges in states that have ratified the American Convention must exert conventionality review—even those judges in places, such as Colombia, where constitutional review is not diffuse, and Chile, where it is contested whether or not the Convention has direct effect. Since this judgment, the Court has softened and added nuance to

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132. For a list of prior presidents of the Inter-American Court, see *I/A Court Composition*, CORTE INTERAMERICANA DE DERECHOS HUMANOS, <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (last visited July 17, 2015).

133. Miguel Carbonell, an IIDC investigator who wrote one of the founding works on neoconstitutionalism, has served as an ad hoc judge, and José de Jesús Orozco and Carlos Ayala, two other IIDC members, have served as presidents of the Commission. Participation in IIDC is by nomination. For IIDC governance, see *Estatuto*, INSTITUTO IBEROAMERICANO DE DERECHO CONSTITUCIONAL, <http://www.juridicas.unam.mx/iidc/estatuto.htm> (last visited July 17, 2015); for membership, see INSTITUTO IBEROAMERICANO DE DERECHO CONSTITUCIONAL, <http://www.juridicas.unam.mx/iidc/> (last visited July 17, 2015).

134. IUS CONSTITUTIONALE COMMUNE EN AMERICA LATINA: RASGOS, POTENCIALIDADES Y DESAFIOS (Armin von Bogdandy, Hector Fix-Fierro & Mariela Morales Antoniazzi eds., 2014) at Table of Contents (revealing participation of many IAS insiders).

135. *Almonacid Arellano and others v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

136. See *Marbury v. Madison*, 5 U.S. 137 (1803); *Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

its statements on conventionality review. In later opinions, it acknowledges that not all judges have the power to review legislation, and thus conventionality review will take different forms in different states.<sup>137</sup> However, it reads the Convention as requiring all constitutions to bring in Convention law so that state officials can directly apply it, and so that it carries supra-legislative status.<sup>138</sup>

The doctrine of conventionality review contains all the main elements of Latin American neoconstitutionalism. It emphasizes judicial power and defines judges as having final say over the content of rights (strong-form review). And it views international human rights law as having direct effect, so that domestic law is always already infused with international human rights law. Further, the doctrine of conventionality review is an example of purposive, principled judicial reasoning. It is not directly mentioned in the American Convention, and it was not the explicit intent of its authors or of the signing states in 1969. Finally, the Court adds that conventionality review must refer to the Court's own jurisprudence as the authoritative interpretation of the Convention, placing itself as the ultimate arbiter of human rights. The Court has thus read the American Convention through a neoconstitutionalist lens.

#### A. The Neoconstitutionalist Boomerang Effect

The doctrine of conventionality review, first announced in a judgment against Chile but authored by a Mexican judge, later “boomeranged” back to Mexico and contributed to an important shift in Mexican constitutional law and practice.<sup>139</sup> Mexico accepted the Court's jurisdiction only in 1998.<sup>140</sup> The Court has since issued nine contentious judgments against Mexico, several of them concerning extrajudicial execution or lack of investigation by military courts that claim jurisdiction over crimes committed by soldiers against civilians, or both.<sup>141</sup> In *Radilla Pacheco v. Mexico*, the Court called on Mexican courts to exert conventionality review.<sup>142</sup>

In 2011, in the midst of a crisis over growing violence by both drug cartels and the Mexican government, Mexico passed a human rights reform to its constitution. The reform adapted the constitutional text to clearly state that international treaties come in at the constitutional level and, as in Venezuela,

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137. Jorge Contesse, *¿La Última palabra? Control de convencionalidad y posibilidades de diálogo con la Corte Interamericana de Derechos Humanos* 6–8 (2013) (unpublished manuscript), [http://www.law.yale.edu/documents/pdf/sela/SELA13\\_Contesse\\_CV\\_Sp\\_20130401.pdf](http://www.law.yale.edu/documents/pdf/sela/SELA13_Contesse_CV_Sp_20130401.pdf).

138. *Caso Cabrera García y Montiel Flores v. Mexico*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C). No. 220 (Nov. 26 2010) at paras. 225–33.

139. MARGARET E. KECK & KATHRYN SIKKINK, *supra* note 129.

140. Fix-Zamudio helped write the proposal for submitting this acceptance such that it won President Zedilla's support. See Fix-Fierro, *supra* note 130, at n.181.

141. See, e.g., *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, (Nov. 23, 2009).

142. *Id.* ¶ 339.

trump the constitution if the treaty right is more protective.<sup>143</sup> A year later, the Supreme Court of Mexico responded to the reform and to the IACtHR's demand for conventionality review in *Radilla Pacheco v. Mexico* by ruling that the IACtHR's rulings are self-executing, and that all Mexican judges—federal and state—have the power and the duty to review laws under either the American Convention or IACtHR jurisprudence, which the Supreme Court views as authoritative interpretations of the Convention.<sup>144</sup> Federal judges have the power to strike down laws that contradict the Convention, and state judges, who did not have higher-law review powers prior to the Court's decision, now must refrain from applying unconventional laws in the cases they hear. Within a short period, a dramatic judicial and constitutional change unfolded, triggered in part by the IACtHR's rulings, leaving Mexican judges scrambling to learn Inter-American human rights law.

The IACtHR, then, influenced by neoconstitutionalist lawyers and judges, has committed itself to pushing national judiciaries toward conventionality review. Further, through *Almonacid* and subsequent rulings, it has provided a rich resource for neoconstitutionalists to help advance their own vision of constitutional law in the domestic setting.<sup>145</sup> The question remains, however, whether and under what conditions conventionality review will expand the Court's authority.

## VII

### CONCLUSION: THE IACtHR'S VARIED AUTHORITY IN LATIN AMERICA

The three case studies in this article suggest that the uneven spread of neoconstitutionalist ideas and practices across Latin America helps explain the various types of authority the IACtHR exerts. In Colombia, where neoconstitutionalist lawyers were able to successfully ally themselves with reformers and participate in the construction of a new constitution and court starting in 1991, the Court now enjoys narrow, intermediate, and extensive authority. In Chile, where constitutional reform was muted, and neoconstitutionalist doctrines have not found strong adherents in the judiciary, the IACtHR has achieved narrow authority and, at times, intermediate authority. In Venezuela, neoconstitutionalism was sidelined as the new Bolivarian constitutional order was forged. After Chávez centralized power and interfered with judicial independence, the Supreme Court adopted purposive theories of interpretation that advanced Chávez's political agenda and directly rejected an IACtHR judgment on judicial independence in Venezuela. The

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143. For a description of the reform, see la Suprema Corte de Justicia de la Nación, *Reformas Constitucionales en materia de Amparo y Derechos Humanos publicadas en junio de 2011*, <http://www2.scjn.gob.mx/red/constitucion/10Junio.html>.

144. Suprema Corte de Justicia de México, MP: Olga Sánchez Cordero, August 20, 2012, Sentencia 133/2012 (Mexico) at 97, [http://fueromilitar.scjn.gob.mx/Resoluciones/Amparo\\_revision\\_133\\_2012.pdf](http://fueromilitar.scjn.gob.mx/Resoluciones/Amparo_revision_133_2012.pdf).

145. See *Almonacid Arellano and others v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

Court has thus achieved only narrow authority in Venezuela. Finally, the Mexican example suggests that the neoconstitutionalist movement can also work transnationally. Neoconstitutionalist lawyers managed to assume leadership roles on the IACtHR itself, using it as a vehicle to spread neoconstitutionalist ideas and practices.

The fact that the Court's authority varies by state, depending on local legal practices and constitutional politics, has implications for the future of the IACtHR. If the Court's authority depends on the domestic constellation of lawyers and political reformers, the anti-Court stance of Venezuela and some of its allies is, perhaps, less of a threat than it might seem at first blush. Venezuela's denunciation and the Dominican Republic's recent rejection of the Court's authority may cause worry that the IAS will soon come crashing down. But the expansion of the Court's authority beyond judgment compliance in other states means that there are also deep wells of growing support.<sup>146</sup> Further, these wells of support lie beyond the executive branch and outside the government. Where the Court establishes authority beyond judgment compliance, and its compliance constituencies include actors beyond the parties to the case, its presence likely becomes more stable.<sup>147</sup> It is hard to imagine that Colombia, where the American Convention and the jurisprudence of the IACtHR play so salient a role in domestic politics, could withdraw from the American Convention and thus the Court's jurisdiction, without domestic repercussions.

These conclusions suggest several subjects for further study. For lack of space, this article has not examined the motives and struggles within the political field. In particular, the narratives do not examine the bottom-up role of civil society, emphasizing instead the role of legal elites. But social movements clearly played an important role in forming the political moments of change that created opportunities for neoconstitutionalism in Colombia, and in shaping the Venezuelan constitutional moment as well. More work is needed to explore the political field, to examine the role of social movements, and to reveal the exact ties that link neoconstitutionalists to particular political projects.

Finally, it is important to note that the discussion thus far, pursuant to the typology posed by Alter, Helfer, and Madsen, focuses on type rather than on depth of authority. Thus, it does not analyze how *much* authority, or power, the IACtHR wields overall in a state; it tells us only how that authority is exerted, and through which audiences. Indeed, it is possible that in states where authority is extensive, an IC's actual power is weak because the state's capacity is weak. For example, the Colombian government has a strong presence in major cities, but a thin presence in certain rural areas, and it is entirely absent in areas that have been taken over by the *Fuerzas Armadas Revolucionarias de*

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146. This point was suggested by Karen Alter.

147. KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW 348–49 (2014) (describing the role of compliance constituencies).

*Colombia* and the *Ejército de Liberación Nacional*, two guerrilla groups.<sup>148</sup> Similarly, Mexico's turn to the IAS and human rights occurred just as the federal government's loss of control over certain areas dominated by drug cartels became evident. In these states, civil society and the government are turning to the judiciary and opening doors to the international human rights systems because of national governments' weaknesses. As a result, more audiences within the government acknowledge the IACtHR's judgments as binding and take action toward implementation, and more civil society actors refer to the Court's judgments as they push their governments to fulfill its human rights obligations. This means that the Court is beginning to exert its authority in different ways, and also beginning to reach a broader audience. But there is a paradox in that the Court gains authority in a state where the government is weaker and less able to stop atrocities from taking place.<sup>149</sup> In other words, an important source of variation of the Court's de facto power both within and among states may be government presence and capacity. And this is regardless of whether the Court enjoys narrow, intermediate, or extensive authority, or some combination of the three.

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148. MAURICIO GARCIA VILLEGAS & JOSE RAFAEL ESPINOSA, *EL DERECHO AL ESTADO: LOS EFECTOS DEL APARTHEID INSTITUCIONAL EN COLOMBIA* 91–93 (2013).

149. Arguably, in “brown areas” where the state is absent, the Inter-American Court, too, is absent. See Guillermo O’Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 41 (2004) (discussing brown areas).