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The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights

QA Daniel Brinks and Varun Gauri

While many find cause for optimism about the use of law and rights for progressive ends, the academic literature has long been skeptical that courts favor the poor. We show that, with the move toward a robust "new constitutionalism" of social and economic rights, the assumptions underlying the skepticism do not always hold. Our theories must account for variation in the elite bias of law and litigation. In particular, we need to pay closer attention to the broad, collective effects of legal mobilization, rather than focusing narrowly on the litigants and the direct benefits they receive. We support the claim by showing that litigation pursued in legal contexts that create the expectation of collective effects is more likely to avoid the potential anti-poor bias of courts. On the other hand, policy areas dominated by individual litigation and individualized effects are more likely to experience regressive outcomes. Using data on social and economic rights cases in four countries, we estimate the potential pro-poor impact of litigation by examining whether the poor are over- or under-represented among the beneficiaries of litigation. We find that the impact of courts is positive and very much pro-poor in India and South Africa, and slightly negative in Indonesia and Brazil. Overall, we challenge the tendency in the literature to focus on the direct effects of litigation, find that the results of litigation are more positive for the poor than the conventional wisdom would lead us to expect, and offer an explanation that accounts for part of the variation while raising a number of questions for future research.

As constitutions increasingly set out to protect social and economic rights, it may be time to revisit Anatole France's famous critique of the law: "Another source of pride, to be a citizen! For the poor it consists in . . . laboring under the majestic equality of the laws, which prohibit the rich and the poor alike from sleeping under bridges, begging in the streets and stealing bread."[1] At the end of the nineteenth century it might have been easy to conclude that formal equality before the law was just another way to protect and entrench privilege while denying substantive justice. As Judge Richard Posner famously said in reference to the United States Constitution, citizenship rights then were largely "a charter of negative rather than positive liberties."[2] As recently as the 1970s, Morton Horwitz could say that the rule of law "creates formal equality . . . but it *promotes* substantive inequality . . . . By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their advantage."[3] As a result of the law's proceduralism, its lack of substantive notions of social justice and equality, and its perceived bias in favor of the already powerful, Horwitz could legitimately question how it was possible that "a Man of the Left" could see the rule of law as an unqualified human good. In this view, the quest for substantive social justice will rarely run through constitutions or the law.

At the beginning of the twenty-first century, however, there have been changes in global constitutionalism that seem explicitly designed to benefit the disadvantaged. These changes have led to an explosion of litigation and the judicialization of the politics of social provision that

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appear, on their face, to seek to expand the supply of goods that are important to the poor, such as health care, education, and social provision more generally. At this point, then, it seems important to examine whether and to what extent this change in the apparent nature of constitutionalism can actually deliver on its promise; and whether and to what extent the increasing involvement of courts in social policies actually improves matters for the poor. For simplicity, we call litigation that disproportionately benefits the poor "progressive," while if the poor are underrepresented among beneficiaries, we call the litigation "regressive." We use here the results of a multi-country survey of social and economic rights (SER) litigation to explore the extent to which the poor benefit from this activity. Our analysis suggests that the literature so far has been far too focused on the direct, individual effects of litigation to adequately gauge its impact on the overall distribution of the gains. If we better theorize the impact of judicial interventions on SER, expanding our vision beyond the immediate direct effects of those interventions, we may well find that the SER judicialization that has become a feature of twenty-first century constitutionalism is less biased toward the middle class than many have suggested.

We outline a conceptual, methodological and theoretical approach designed to better understand the politics of the new social rights constitutionalism. We first describe the contours of the new constitutionalism and the legal mobilization it has triggered and outline the theoretical reasons to be skeptical or optimistic about the distributive effects of legal mobilization, as well as the gaps in the empirical research on these effects. In the main theoretical section that follows we lay out in some detail the distinction between individual and collective effects that animates much of our empirical discussion, and explain why the expectation of collective effects changes the litigant calculus in a way that should lead to more pro-poor outcomes. The subsequent empirical section relies primarily on a tabulation of the beneficiaries of SE rights mobilization in Brazil, India, Indonesia, and South Africa, a summary discussion of Nigeria, and on narrative descriptions of the motivations and goals of the main actors involved in that mobilization.[4] We then summarize the findings and implications, before turning to a conclusion that raises questions for further research and develops the theoretical, normative, and practical implications of social rights constitutionalism, as practiced today. Our main goal here is to lay bare some of the assumptions on which most distributive critiques of SE rights litigation are based, suggest when they might or might not hold, and outline the beginnings of a research agenda on the progressive potential of litigation and enforceable social and economic rights.

The New Social Rights Constitutionalism

It may be true, as Posner argued, that "the men who wrote the [US] Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them," but the vast majority of new constitutions are moving from a purely negative conception of rights to a more positive one. Social and economic rights have been creeping into constitutions for decades. David Law and Mila Versteeg present data showing a dramatic increase in the number of civil and political rights, as well as social and economic rights expressly protected in constitutional texts, since the 1960s.[5] The trend begins with a set of post-colonial constitutions, but the sharpest increase—especially in the protection of social and economic rights—comes after the collapse of the Soviet Union in 1990. The new constitutionalism is sufficiently preoccupied with rights, over and against questions of structure and procedure, that it can be described as rights constitutionalism and, for much of the developing world in particular, social rights constitutionalism.[6]

David Bilchitz, for example, contrasts the Western "tradition of focusing on civil and political rights, and the ideal of 'liberty,'" with the new constitutions of the Global South. For the latter, he writes, "matters of economic distributive justice . . . are central."[7] The new constitutions are, in effect, seeking to push beyond a model of law and constitutions that protects mainly the freedom to be secure in one's person and property—should one happen to own any. They typically include a more robust set of obligations on the government to create the conditions for substantive equality, a dignified existence, and the effective exercise of democratic citizenship. In places as disparate as the post-Soviet countries, South Africa, Brazil, and Colombia, constitutions at least purport to set up entitlements for the poor that go far beyond the mere freedom to pursue one's interests unhindered. Under these new constitutions, citizenship now means that "the rich and the poor alike" can claim guarantees of adequate food, health care, education, a minimum standard of living, and a decent place to live, turning France's mordant, iconic statement on its head.

Nor have these rights remained mere parchment promises. Progressive activists around the world have seized on the judicial enforcement of social and economic rights as a powerful new tool in the politics of social provision, a change that is reflected in the explosion of academic interest in the "judicialization of politics."[8] Samuel Moyn has argued, not necessarily with approval, that human rights have become "The Last Utopia"—one of the few remaining political ideals that promise a more just society.[9] When the Thatcher and Reagan revolutions and the Washington consensus brought

welfare states under attack in much of the world, when the utopian aspirations of the Second World ended with the fall of the Berlin Wall, when neoliberal orthodoxy governed the ideological landscape, the language of rights enshrined in constitutions and treaties seemed to offer some leverage for protecting and extending social provision to the poor, especially through litigation.[10] Social rights constitutionalism, and its judicialization, expanded the political opportunity structure for the left, which otherwise found itself frozen out of the debate about the proper role of the state in moderating the effects of the market and providing material goods.

Twenty or thirty years into this process, judicial interventions on behalf of SE rights cannot be dismissed as tangential to the politics of welfare. In one Brazilian state alone, Rio Grande do Sul, right to health cases grew from 1,126 in 2002 to 17,025 in 2009; that same year the highest non-constitutional court in Brazil heard nearly six thousand such cases,[11] resulting in large percentages of state medication budgets being allocated by courts.[12] The Indonesian Constitutional Court issued a series of opinions from 2004–2006 that doubled budget allocations to the education sector—redirecting about five percent of the entire national budget.[13] In 2004 the South African Constitutional Court required a recalcitrant Mbeki government to launch a major program to prevent the transmission of HIV from mothers to infants, likely averting tens of thousands of HIV infections.[14] In India, the courts have issued numerous consequential rulings on the constitutional rights to health care, education, housing, the environment, nutrition, and labor.[15] Even in Russia people turn to the courts by the hundreds of thousands in efforts to secure pensions.[16] The phenomenon is widespread, deeply affecting health care, education, and even that most fundamental of classical liberal rights, the right to property, in many countries around the world.[17]

Of course, we should not be surprised to find that courts have not managed anywhere to create a new utopia for the poor. Even what is probably the most celebrated court in the world in this respect, the South African Constitutional Court, has come under fire recently for failing "to take seriously and to operationalize within its judgments the issue of structural poverty."[18] South African courts have also been less than successful in dealing with problems of land redistribution or sexual violence. Even in dealing with SER, courts have sometimes turned them from positive entitlements into purely negative rights. Perhaps the most striking example of this is *Victoria (City) v. Adams*,[19] in which the courts of British Columbia determined, under the right to housing, that the city government could not prevent homeless people from putting up temporary shelters on public property, given the absence of adequate public shelter elsewhere. But the very fact that courts can be criticized for failing to address structural poverty adequately or improve the lack of housing for the homeless demonstrates how vast the expectations now are.

Given the importance of rights constitutionalism to the distribution of state resources, welfare state politics, and the aspirations of the left in many countries, it is all the more urgent to return to a slightly modified version of the question Horwitz posed forty years ago: Is the constitutionalization and judicialization of SE rights an unalloyed human good? Or does it remain the case that the law "enables the shrewd, the calculating and the wealthy to manipulate its forms to their own advantage," thus promoting substantive inequality in the end?[20] It is true, of course, that constitutional aspirations may be pursued through many means that have nothing to do with courts and law, and there is perhaps less controversy about the value of these approaches, although it is possible that the language of rights constrains the politics of provision in different ways that are worth exploring empirically.[21] Here, however, we limit our view to the effects of judicial interventions, which play a large role in many strategies to make SER effective.

The literature has presented many reasons to be skeptical of the law as an instrument for the weak against the powerful. Economic, social, and procedural barriers prevent the great majority of poor people from making claims in courts;[22] accumulated experience gives the rich and the powerful advantages in the courtroom;[23] patterns of judicial recruitment and retention, which reflect prevailing configurations of political power, incline the attitudes and calculations of judges toward the status quo;[24] and without the active support of elected officials, opponents can easily limit and undermine the implementation of any rulings that might challenge that status quo.[25] As Ran Hirschl has argued, the constitutionalization of rights may even be an attempt by outgoing elites to protect their interests by limiting the ability of majorities to enact more redistributive legislation.[26] For all these reasons, and in spite of *Brown v. Board of Education* and other famous cases that appear to suggest the contrary, it has long seemed unreasonable to expect that the courts will consistently produce outcomes that significantly favor the underprivileged.[27]

Perhaps the dominant account that places rights at the center of improving the material conditions of the less advantaged is T.H. Marshall's classic story of the evolution of civil, political, and ultimately social citizenship.[28] Similarly, the western liberal left has often made civil liberties a central plank in its platform, at least in part to ensure equal access to politics, the ability to associate, and to demand outcomes more favorable to previously excluded groups. In this account, however, classic liberal rights merely create the conditions for an extra-legal, extra-constitutional politics of social citizenship. In the liberal model, judges are neutral umpires, protecting the playing field on which the politics are worked out, and

rights are (in theory) relatively neutral as well, agnostic about the ultimate distributional outcomes the political struggle might produce. The realization of social and economic rights is then a consequence of liberal rights plus mass social-democratic politics. In social rights constitutionalism the politics of social and economic demands are prior to and embedded in the constitutional structure. This almost inevitably, although with the important intermediation of legal mobilization, shifts some of the responsibility for working out the substantive details of social provision, and some of the work of monitoring compliance, to judges.

Research on the real-world effects of judicially enforced social rights constitutionalism is remarkably thin. The literature often includes cautionary notes about its possibly negative effects, but little empirical evidence. Researchers are beginning to focus on questions of compliance,[29] but compliance and impact, though related, are not the same. César Rodríguez Garavito's interesting work addresses impact,[30] but he focuses primarily on *whether* there has been impact, as does Gerald Rosenberg's classic work,[31] not on *who benefits* from impact. Recent research exploring this question has focused on health rights litigation, mostly claims for particular medications or treatment, and mostly in Brazil,[32] questioning whether health rights litigation skews policy in favor of the better-off.[33] Even in Colombia, David Landau argues, the dominant models of SE rights enforcement "have a very pronounced tilt towards higher income groups; they are unlikely to do much for poorer citizens."[34]

Thus far, the research on who wins and who loses has taken the most direct approach, identifying the actual remedies directly required by the courts, or conducting a survey of people receiving benefits by court order in an effort to ascertain the socio-economic profile of the class of people who litigate successfully and capture the direct effects of litigation in the individual case.[35] Clearly, this is where it is easiest to measure the effects of litigation, just as it is easiest to observe the socio-economic characteristics of actual litigants. But, as we will see, it seems likely that the area under the proverbial street lamp is precisely where effects are likely to be both *most regressive and least important* in the overall public policy context—least important simply because the number of people and resources affected by collective effects dwarfs that of individual effects, and most regressive because opportunity costs will ensure that, when cases benefit both litigants and non-litigants, the litigants are likely to be among the most privileged of all potential beneficiaries. As always, but especially here, the choice of research design is highly likely to determine the findings.

Understanding the Individual and Collective Effects of Judicialization

In what follows, we argue that focusing narrowly on the direct, individual effects of cases biases the findings in favor of a more regressive conclusion. Indeed, it is in large part the *expected* reach of the effect of the cases that dominate a particular litigation environment that determines whether the aggregate effects ultimately favor the poor or the better off. When potential litigants expect that cases seeking social and economic rights can and will have effects beyond the litigants themselves, it is more likely that litigation will be funded by third parties, and undertaken as a mechanism to extend greater benefits to the poor, even benefits that are very low cost, such as vaccines, or very diffuse, such as clean air. When litigation is expected to have purely individual effects, then it will target higher-end goods, be carried out by better-off litigants, and have greater potential to further skew the distribution of state goods toward the better off.

Widening the lens is also crucial because many critiques of litigation, while they have a nicely contextual and political vision of how courts work, often rest on a thin notion of what *law* is and how it works. Horwitz's concern about the proceduralism and formal equality of the rule of law rests on a nineteenth-century vision of the content of the law. While it may fit the US Constitution,[36] it is at odds with the more robust ideas of substantive justice embodied in twenty-first century constitutionalism—at least the constitutionalism emerging in middle-income countries.[37] And the structural critiques of public interest litigation—elite biases in access, courtroom advantage, judicial preferences and compliance—depend partly on a vision of the law as a command and control mechanism, triggered by well-resourced litigants and operated by judges. In this view, the effects of litigation are mostly reduced to whether judicially ordered relief reached the litigants in question—whether the cases had direct (individual) effects.

Since at least the 1970s, however, scholars have argued that law is more than a set of "operative controls" that people either follow or fail to follow.[38] Law and litigation as social practices and political resources, scholars have argued, have wide ranging, systemic effects that extend far beyond the cases and litigants themselves.[39] Indeed, scholars like Michael McCann would argue, the "indirect effects and uses of litigation may be the most important of all for political struggles by most social movements."[40] More recently, Mariana Mota Prado has argued that, when considering the effects of SER litigation, we need to be much more sensitive to collective effects than we have been so far.[41] These insights suggest that SER cases can be arrayed on a continuum based on the *expected* reach of their effects—from those with effects limited to one or two individual litigants to those with virtually universal effects.

Many taxonomies of effects have been offered, and different classifications are often useful for different research goals. We adopt here a very simple framework, classifying cases as either individual or collective depending on whether they are expected to produce purely individual or more collective effects. At one end of the spectrum are cases with expected effects that are essentially limited to

individual litigants. These cases, which we refer to as individual cases, seek to capture individual goods, whether private or from a common pool, for the litigants and no one else—a particular plaintiff sues for access to a particular course of medication or for payment for a particular personal service, and for no other reason. On the opposite end of the spectrum are cases that are expected to produce collective effects—that is, effects for a group that may not even be represented in the courtroom.

Cases produce collective effects through two channels. First, cases can have collective effects directly, when litigants sue for, and court orders directly require, the provision of inherently collective goods: the creation of common pool or club goods, as when a lawsuit seeks the creation a new AIDS program; and occasionally the safeguarding of public goods, as when a lawsuit seeks the protection of clean air or water, in order to protect health. We refer to these as direct collective effects. Second, cases might produce collective effects when judicial interventions in a policy area modify the incentive structure and bargaining power of key actors in that field, even if they do not directly order the creation of collective goods. This is what we refer to as systemic collective effects. Examples of systemic collective effects are the transformations in labor rights negotiations produced by changes in the law, as in McCann's work; decisions taken in anticipation of litigation, such as using safer playground equipment or training police to avoid violence, in Epp's work; and the decision by Brazilian public health bureaucrats to extend court-ordered remedies to all similarly-situated persons in order to avoid the costs of litigation or simply to equalize provision, in our own work.

It is likely true that virtually all cases brought for an individual, private purpose have some collective effects. Our argument, however, hinges on the intent of the parties, and so we classify cases that do not explicitly seek collective goods as collective only when they are undertaken specifically for their expected systemic effects, as in the classic model of landmark public interest litigation. The South African health cases fall in this category, as would *Brown v. Board of Education*, *Victoria (City) v. Adams*, and many other cases that are brought in order to set an important precedent, even though by their terms they are only brought on behalf of particular plaintiffs. In other words, nominally individual cases are brought as collective cases when they are pursued in order to, and expected to, generate systemic effects.

We should note here that SER are often characterized as positive rights, and SER litigation is typically imagined to aim at securing collective or individual goods at government expense. In fact, SER cases can often be much more akin to traditional negative-rights cases (and civil and political cases much more like positive-rights cases) than this model would suggest, and for that reason we avoid relying on the positive/negative distinction. We have mentioned already the striking negative-rights approach to housing rights taken in *Victoria (City) v. Adams*. In that case, the courts of British Columbia essentially sanctioned the right to sleep in a cardboard box (if you have one) in a public park (if there is one); but they created no affirmative duties upon the state to ensure that anyone has anything like adequate shelter. In an equally striking example of systemic collective effects, however, public authorities responded to this narrow decision in part by creating more public shelters for the homeless, even though the courts did not order them to do so, simply to keep their parks free of squatters. What is interesting about that case for our purposes is not whether it can be categorized as positive or negative, but whether it was expected to produce wide effects, either through an order for a collective good or systemically, and who it ultimately benefited, whether the poor or the better off.

Because they depend on extant characteristics of the legal and political context, collective effects may be more or less predictable by groups seeking to produce social change. Sometimes SER litigants will request, and judges will directly order, the provision of collective goods—e.g., the production of an "orphan" vaccine by the government, as in the *Viceconte* case in Argentina.[42] Whether litigants can bring these cases depends on whether the legal system in question allows for them, and whether the judges are willing to issue orders that are often perceived as treading on legislative territory. Civil law systems often contemplate the possibility of abstract constitutional challenges in which the decisions by their very terms have universal application—each case either strikes or upholds the law in question, affecting rights for all persons regulated by the statute. The Indian Public Interest Litigation is a sort of public interest class action that was created by judicial fiat;[43] the *Ação Civil Pública*, a similar device contemplated in Brazil's 1988 constitution, empowers either the public prosecutors or certain public interest organizations to file actions asserting collective or diffuse interests. In all these cases the directly affected individuals never have to appear before a court.

At other times features of the legal system in question automatically assign systemic effects. Systems with a strong norm of following judicial precedent (what is known as *stare decisis*), for instance, implicitly make every case a collective one, creating a rule that is legally binding on all similarly situated people. Thus many social movements have as their primary goal not a victory in the individual case but the creation of precedent to produce broad systemic change. The conventional wisdom is that common law systems have the edge in this regard, although the extent to which a given system actually responds to precedent is really an empirical question, and largely driven by a politics of enforcement and compliance, as the vast literature on law and social change has emphasized. Because some civil law countries have a *de facto* system of precedent, the extent to

which activists feel they can rely on precedent to change the law will vary; the CELS in Argentina, for example, focuses on strategic litigation precisely because they expect important cases to set precedents and change the law. In Brazil, in contrast, activists expect very little rule change from the courts.

In these environments, systemic effects arise from individual cases much more unpredictably. There is still the potential for systemic collective effects in Brazil, where public health officials will sometimes extend the same treatment to non-litigants that they were compelled to extend to litigants, even though everyone agrees judicial decisions are binding only on the immediate parties to the case. Thus, even in Brazil, AIDS activists brought cases with the goal, ultimately, of changing treatment for all HIV positive people. But the road to generalizing the effect was not as clear as it would have been in places with norms of *stare decisis*, like the United States or South Africa. As a result, the evidence suggests that later generations of health-rights plaintiffs in Brazil are primarily motivated by the individual effects they can capture for themselves.[44] Collective systemic effects in Brazil, however real, are less predictable in advance of the litigation and are typically not a part of the litigant calculus leading to a lawsuit.

The progressive potential of SE rights litigation hinges on the strategic calculus of potential litigants, who must decide whether it is worth litigating for a particular policy good. The argument draws on the notion of opportunity structure frameworks for analyzing when and where social movements concentrate their efforts, a notion that has been explicitly applied to litigation by Siri Gloppen, Bruce Wilson, and others, as well as in our own work.[45] When benefits are limited to litigants, individuals must generally raise the resources to litigate, and the individual benefit being demanded must generally exceed the full cost of litigation, so litigation will tend to focus on higher-end goods and services, and benefits are more likely to skew toward the better off. Moreover, if systemic effects are unlikely or unpredictable, social movements will not focus their efforts on litigation, and thus groups seeking to improve the lot of the underprivileged are unlikely to seize on courts as the venue. On the other hand, if benefits are expected to generalize beyond actual litigants, then those who cannot afford to (and do not) litigate can still benefit, and the aggregate benefit of even very low-cost interventions can justify relatively expensive (in practice, often third party-funded) litigation. For example, Treatment Action Campaign, a South African NGO, mounted an expensive and complicated litigation and activism campaign to require the government to offer pregnant women a $5.00 dose of Nevirapine, to prevent mother-to-child transmission of HIV. For any single individual, or even for a charitable enterprise, it would be irrational to engage with the machinery of courts to secure something of such low cost. But, as in this case, public interest NGOs and other social movements may very well litigate for individually small benefits on behalf of the poor, if they can engage in "impact litigation" rather than litigating on behalf of each needy person, one at a time.

Schematically, in the absence of (expected) collective effects, citizen *i* will litigate only if the expected individual benefits exceed the expected individual costs of litigation, or $E(b_i) - E(c_i) > 0$. This means that, first, because of the high opportunity costs of litigation for the poor, the rich will be more likely to litigate unless $E(c_i) \approx 0$. But more importantly, if $E(c_i) >> 0$, the expected benefits to the litigant must be very high. That rules out not only litigation for low cost inputs and interventions, but also litigation for public goods or against "public bads" (e.g., dirty water, bad air) whose harms are often only demonstrable at the population level, and in a probabilistic sense. Adding collective benefits from positive-rights litigation for collective goods radically changes the equation, justifying even relatively costly litigation for relatively low cost individual benefits that can be multiplied by the entire population of similarly situated claimants.

This suggests that an emphasis on litigation with collective effects is likely to have a larger impact on the share of poor beneficiaries than lowering barriers to courts: even when c is very low, it is still high enough (in the form of opportunity costs) that, although poor people will litigate, they will do so for relatively expensive goods and services. We agree with the claim that lowering barriers to access will make it somewhat easier for the poor to litigate; and one can find instances in which the poor litigate en masse.[46] But even in those instances, they are litigating for relatively high-value benefits. In contrast, the beneficiaries of collective SE rights litigation can be poor even when access is costly; and the benefits sought can be individually inexpensive, so long as decisions have broad collective effects. The expectation of broad collective effects should change the *composition* of SE rights litigation so that it is more likely to involve less-expensive goods and services that can be provided to many more people, as well as more public, non-excludable goods.

This analysis of collective effects should have a bearing, then, on who benefits from litigation. But this may be contingent on the politics of legal mobilization in a given jurisdiction. If only the privileged litigate, and if they litigate primarily for the sorts of things only the privileged care about—for club goods, in other words, in clubs that exclude the poor, like better public university education in poor and unequal countries, or hospitals colonized by the upper classes because of their geographic location—then the effects, though collective, are likely also to be regressive. The question, therefore, is whether the ripples caused by the collective effects simply magnify the initial bias or whether the collective effects of litigation can ameliorate that initial bias. The answer to this is not obvious, and we do not purport to offer a full answer here, but our findings at

minimum caution against a facile equation of unequal access to justice with unequal benefits from formal rights.

Furthermore, we do not mean to suggest by this argument that we could magically create a politics of progressive, twenty-first century social rights constitutionalism simply by formally assigning to judicial decisions collective effects. The literature has amply established that any successful project seeking to realize the promises embedded in social and economic rights depends upon a robust set of political, organizational and financial resources. That is the basic conclusion of our prior research, and nothing here contradicts that conclusion.[47] Social mobilization capacity determines the success of what we have previously identified as the four stages of the legalization of policy—from the initial mobilization and filing of cases, to gaining the support of the courts, to matters of compliance and, ultimately, the close engagement with the implementation process that distinguishes transformative projects from ones that turn out to be a mirage. Both the magnitude and the distribution of the actual benefits from any such strategy will, of course, depend on the conformation of the political structures that undergird the entire enterprise. The possibility of collective effects interacts with the politics of legal mobilization by creating stronger incentives both to litigate precedent-setting and collective-goods cases and to use court orders in political mobilization and implementation monitoring.

If our claim is true, it has a clear and somewhat counterintuitive policy implication. In the more cautionary, juriskeptical academic literature, judges are often urged to be wary of interventions on behalf of positive rights, and especially of ordering broad public policy-like effects. The fear is that they will lose legitimacy by violating the separation of powers,[48] and simply make matters worse by exceeding the bounds of their competence and capabilities.[49] But if they heed this advice, they may well be encouraging a more regressive form of judicialization. An analysis of the collective effects of their rulings may complicate the analysis considerably. If we find that systemic effects are positive—say because the added judicial scrutiny of executive decision-making encourages the government to address felt needs that have somehow escaped the political process—or that collective judgments can create the conditions for better policy-making around a particular issue,[50] we might encourage justices to think in a more policy-conscious way, rather than narrowing their vision to the litigants standing before them in the courtroom. To the extent their legitimacy is tied to a consequentalist analysis of the effects of litigation rather than to traditional notions of separation of powers, a more conscious attention to collective effects might enhance rather than detract from their legitimacy.

The broader point, which we will not develop in any detail but which becomes self-evident in light of our discussion, is that we believe the literatures in comparative politics and comparative legal analyses must become more open to each other. While this is rapidly changing, it is still true that beyond the relatively few people who focus on judicial behavior, the comparative politics literature takes too little account of legal processes, and has a relatively unsophisticated understanding of how those processes actually operate. This literature could benefit from the insights of scholars of law and politics, both in the United States and elsewhere. By the same token, much of the literature on law, even that which is grounded in the socio-legal literature, is too innocent of the vast comparative politics literature, which provides a more nuanced understanding of the political and institutional context in which legal institutions operate, and could benefit from a more sophisticated reading of that literature.

The Distribution of the Benefits of Rights Litigation in Five Countries

The immediate problem confronting comparative research on the differential effects of policy-oriented legal mobilization is the absolute lack of comparable, cross-country data on the benefits of legal strategies, let alone on the distribution of those benefits. In order to address this and other questions related to SE rights litigation, we carried out detailed studies of the judicial enforcement of SE rights in Brazil, India, Indonesia, Nigeria, and South Africa.[51] We used local teams from each of these countries, under our supervision, to carry out a systematic cross-national survey of SE rights litigation, including descriptions of the cases filed in each country, the effect of those cases on public policies, and estimates of the numbers of people benefiting from constitutional health and education rights cases. For this article, we took that data as the starting point and carried out additional studies of the beneficiaries, using secondary sources and interviews. The results of this second-stage investigation (including Nigeria, only summarily discussed here) are detailed in an on-line appendix that lays out the data, our calculations, and our assumptions.[52]

We were occasionally forced by the lack of data to rely on rather strong assumptions about the effects of the litigation. But where our data are weaker—as in the effects of the Indian or Indonesian cases on education—we made dramatically conservative assumptions, using a small fraction of the potentially affected schoolchildren. In the Indonesian case in particular, we assumed that the effects of more spending on education, and thus the benefits of either higher quality or lower cost public education, were distributed across all existing users of public education, rather than focused on the poor by bringing new children into the system. Ultimately, we are in every case very confident of the policy domains in which the benefits can be found, and in selective cases somewhat less confident of the socio-economic composition of the beneficiaries in each policy domain. In the latter we

have made conservative assumptions, to ensure we do not overstate the potential benefit to the poor. In any event, the analysis highlights the policy areas affected, and the reader ultimately can judge whether the nature of these policy areas justifies concluding that litigation is an elite-centric enterprise.

The country teams followed comparable but not identical strategies. In Indonesia they identified all cases relating to the rights to health care and education. In the absence of systematic compilations of decisions, they used archival research in the various courts, and interviewed the principal legal NGOs. In India and South Africa the teams used electronic searches to identify all reported cases from appellate courts on up. In Brazil, where the number of cases was vastly higher, they searched electronic databases for appellate and higher courts in a cross-section of subnational units including states at both ends of the socio-economic spectrum and extrapolated from this sample to produce nationally-comparable numbers. Sampling differences are not likely to affect the conclusions we reach here. In the first place, our conclusions do not depend on having identified every last beneficiary in each country. We do not aggregate and average across countries, so our conclusions are not affected so long as we have identified representative beneficiaries in each country. We do aggregate across policy areas within countries, but here we applied the same sampling techniques, and we adjusted for population size where necessary to arrive at comparable figures.

These countries will not necessarily give us a representative sample of SE rights litigation across the world—there are no post-Soviet cases, no advanced industrial democracies, no cases at the bottom of the global income spectrum. But they can fairly be called representative of the middle-income cases (Brazil and South Africa are upper middle-income and Indonesia and India are lower middle-income economies) where social rights constitutionalism has been most important and thus where we focus our attention. More importantly, these countries, for different reasons, offer both cross-national and within-country variation in the extent to which litigants should expect their cases to have collective effects. In India, a common law country, and in South Africa, which blends common and civil law traditions, cases have broad precedential effects, simply by virtue of that tradition. Meanwhile, in the civil law countries (Brazil and Indonesia), individual cases are expected to have individual effects, but there is the possibility of filing cases with primarily and self-consciously collective effects. The *Ação Civil Pública*, in Brazil, and the abstract constitutional challenge, in Indonesia, for instance, both figure among the cases in our sample.

We estimate the regressive or progressive impact of litigation by examining whether the poor, defined in nearly all cases as those in the bottom two income quintiles, are over- or under-represented among the beneficiaries of litigation relative to their share of the population—in other words, whether more or less than 40 percent of the beneficiaries fall below the fortieth income percentile. Finally, in calculating the distribution of benefits, we discount cases with partial or no implementation, and we account for the likelihood that the poor will not receive even the collective benefits of litigation by including only the population that has access to the mechanisms that dispense the goods in question—schools, hospitals, blood banks, etc.

For each subset of cases, we examine whether the decisions' effects are expected to be narrow and tied to the initial litigants, or whether the impact is the product of broader, more collective decisions. In general, South Africa and India are the two countries that experienced the most collective litigation. In both of these countries high court decisions strongly guide both lower courts and public officials. Indian courts, moreover, rely heavily on Public Interest Litigation, a legal device that encourages individuals and NGOs to speak on behalf of otherwise unrepresented interests, encourage fundamental rights litigation, and are not shy about addressing regulatory issues, which are collective by definition. These countries should have the most pro-poor outcomes, with litigation targeting lower-cost goods and policy areas that serve more people. At the opposite end of the spectrum, cases in Brazil are largely pursued for their individualized benefits, and are expected by litigants to have purely individual effects in the short term, and thus should focus on more expensive goods and be less pro-poor. To look at within-country variation we also examine Brazilian education cases, which rely more on the *Ação Civil Pública*, a legal device used to challenge broad public policies, and which should, therefore, have a higher share of disadvantaged beneficiaries.

We have two additional cases on which to draw, Nigeria and Indonesia, but in neither of these cases has litigation had a very significant impact across policy areas. The reasons for their limited impact are fully discussed in our other work.[53] Here we focus more narrowly on the distribution of whatever impact there is, so Nigeria is discussed only in the tables and the online Appendix, while the discussion of Indonesia focuses on the one set of cases that had a discernible impact.

Brazil

By far the most common form of litigation in Brazil consists of individual actions in which litigants sue for medical services and medications. Our survey identified about eight thousand cases in four states (Rio de Janeiro, Rio Grande do Sul, Bahia, and Goias); of these, over 94 percent were individual actions for health-related goods and services. Some 66 percent of these were demands for state-funded medications. Essentially all the cases are individual demands to capture individual goods from a common pool. All the research on Brazil makes it clear that these cases are undertaken for their individual effects,

and that judges disfavor health rights cases that are meant to have collective effects. While even this individual litigation has systemic effects, the evidence suggests that these effects are mostly unexpected and unintended by the litigants. Still, our and other research shows that after a number of cases for a particular remedy, the states stop opposing the claims and begin supplying the medication through the public health system.[54] This was true, for instance, for HIV/AIDS treatments.

Thus, in Brazil, the litigation landscape is dominated by individual litigation. The largely litigant-unintended collective effects, when they occur, produce club goods—goods that, while not universally enjoyed, are shared by the entire benefitted class and (typically) are not meaningfully depleted by any individual user. The key question in gauging the progressive effects of this litigation is who belongs to the club. If the litigation targets club goods that are enjoyed predominantly by the better off, then its collective effects essentially re-focus the state on "rich people's problems"—and the greater these effects, the more regressive the impact of litigation on the distribution of health care in Brazil. To estimate the socio-economic composition of the members of the club, we assumed that the beneficiaries roughly reflected the distribution of these diseases *as diagnosed*. By identifying who is treated for the diseases that are the subject of litigation, we can evaluate the extent to which health rights litigation is in fact simply drawing the state's attention to "rich people's illnesses." Table 1 summarizes the results of our investigation for Brazil's health cases.[55]

Note that our analysis allows us to set the outside bounds of the outcome of interest when litigation is pursued as an individual enterprise: if all the effects are direct individual effects, benefits are limited to the litigant population, which others have identified through litigant surveys, and placed at about 40 percent underprivileged;[56] if collective effects fully generalize to those similarly situated, then the beneficiaries include all Brazilians who share an illness with the litigants and are treated through the public health system, about 36 percent of whom are underprivileged. Either way, this type of litigation, driven by individual incentives, produces more regressive outcomes than the collective litigation we see in other countries. Prado has recently argued that certain systemic effects of the Brazilian litigation may make this pattern less regressive than we think;[57] more detailed analysis would be needed to reach a final conclusion on this question, but for now we may accept our findings as something like an upper-bound estimate of its regressive effects.

Overall, the distribution of beneficiaries in Brazil skews upward slightly, relative to the population. This confirms our expectation that litigation undertaken for individual benefits is regressive, though perhaps not by a great margin—and it suggests that whether judges and litigants intend it or not, litigation is likely to have systemic effects. Health-rights litigation in Brazil is hardly a phenomenon limited to or dominated by "elites," however you may define them, but the distribution of benefits of litigation is less pro-poor than the distribution through the general public health system (which serves a population that is about 43 percent poor)[58] by about seven percentage points. If the individual litigation model continues to dominate and to grow, distributing ever more resources through litigation, the distribution of goods through the public health system may shift more and more toward the better off. Moreover, others have found, again as expected, that this litigation tends to focus on high-cost medications, so that even in the categories in which the poor are significantly over-represented, such as osteoporosis, litigation targets very expensive treatments.[59]

The picture was quite different in the less voluminous right-to-education litigation. In education, our earlier survey finds that all of the impact is due to cases that affect the regulatory structure around education. These cases are intended as collective cases, and the benefits by definition extend to all those who use the service in question. They are not, by and large, positive-rights cases in the sense that they do not require the state to provide more services, although some of the cases do fit this category. In this policy area, then, we identified the effects of cases

Table 1
Distributive impact of health litigation, Brazil

	Percent underprivileged	N underprivileged	Total N
HIV/AIDS	32	209,057	660,000
Hepatitis	30	45,000	150,000
Diabetes	14	96,180	687,000
Cancer	26	19,000	72,200
Hypertension	19	138,624	729,600
Osteoporosis	50	1,213,150	2,426,300
OTC goods	43	1,174	2,731
Terms of private insurance	32	12,765	40,522
Grand total	**36**	**1,734,950**	**4,768,353**

relating to private schools (for example, allowing legislative limits on tuition increases) and public schools (mostly, easing procedural restrictions on hiring new teachers), estimated the number of beneficiaries in each, and applied the known demographics of public and private school students to these findings. According to the Brazilian statistical service[60] about 80 percent of public school students, and 27 percent of private school students were "underprivileged."[61] Our survey found about 40,000 beneficiaries in public schools and only 400 in private ones. Applying the demographics of education to this ratio, at least 78 percent of the beneficiaries of education litigation came from the lower two income quintiles, so that the poor were overrepresented in Brazil's more collective right-to-education litigation by about 2 to 1.

South Africa

South Africa's post-apartheid constitution of 1996 explicitly includes rights to housing, health care, food and water, education, and social security. Our review of cases at the level of the High Court and above found twenty-four cases dealing with health and education rights. In contrast to Brazil, and as expected in a common law jurisdiction, South Africa showed not only a markedly smaller number of cases, but also a set of cases primarily targeting collective effects on public policy, rather than individual impact on litigants. This means that, even more than for Brazil, the demographics of the actual SE rights litigants in South Africa are of trivial importance, compared to the demographics of the relevant policy area beneficiaries—we are less interested in the few named plaintiffs in the *Treatment Action Campaign* case, for example, than in the demographics of the thousands of women and children who benefited from the resulting distribution of medications to prevent mother-to-child transmission of HIV.

The overall results for South Africa, in keeping with our expectations, were more pro-poor than those in Brazil: more than eighty percent of all those benefited by these decisions fit even a fairly narrow definition of "underprivileged," compared to the slightly negative effect of litigation in Brazil. If we assume that the South African "underprivileged" come from the bottom-fortieth income percentiles (in fact, they were probably even less "privileged" than that), then South African SE litigation was twice as pro-poor as the Brazilian model. We summarize our calculations in table 2.

Note that the findings for South Africa are significantly driven by the fact that HIV/AIDS, the object of most of the significant cases, has a much higher prevalence among poor South Africans. Still, the results support our basic claim—in collective litigation-friendly South Africa, it makes sense to litigate even the relatively low-cost single dose needed to prevent mother-to-child transmission of HIV.

India

Starting in the early 1980s, India's Supreme Court began to enforce economic and social rights. But perhaps as important was a significant opening to collective cases that occurred in the same era: the Indian courts established Public Interest Litigation, in which applicants need not demonstrate that they themselves have suffered harm in order to address a public policy issue; the courts lowered the standard for a petition, so that even letters to the court could qualify; and the Supreme Court began to examine

Table 2
Distribution of benefits in South Africa

Name of case	Description of case	N beneficiaries	Percent under-privileged	N under-priv'd	"Underprivileged" defined as
Health					
Van Biljon	Treatment for HIV+ prisoners	57,600	100	57,600	Prisoner
TAC	PMTCT for HIV+ pregnant women	55,000	69	37,950	<$132/mo **household** income
Interim procurement	Expedited procurement of ARVs	42,500	69	29,325	<$132/mo **household** income
Hazel Tau	Access to ART generics	119,000	69	82,110	<$132/mo **household** income
Total Health		274,100	76	206,985	
Education					
Premier Mpumalanga	Subsidies for poor children	22,500	100	22,500	Subsidies designed for "indigent" children
Watchenuka	School age asylum seekers	50,625	100	50,625	Asylum seeker pending decision
Total Education		73,125	100	73,125	
Total		**347,225**	**80.67**	**280,110**	

social concerns on its own initiative. Ninety-nine percent of all the beneficiaries we identified in India were the result of cases like these, with broad collective goals.

Our review found 209 cases involving the right to health and 173 involving the right to education. The Indian courts heard cases involving low-cost goods and services, such as the regulation of, and policies toward, primary education and basic health care. Many of these are not classic cases of positive rights provision, but look more like negative rights cases—and even these sometimes suffer from a lack of enforcement.[62] Examples of poorly-implemented negative-rights decisions include a ban on child labor, a ban on corporal punishment in schools, a ban on smoking in public places,[63] injunctions to close polluting factories and set up green zones, and a case permitting criminal prosecution of medically-negligent health care providers. Similarly, more positive-rights cases sometimes suffer from low implementation, including rulings on hospital quality, extending the right to pre-primary education, and setting up schools for blind children.[64]

We did, however, find substantial impact from several streams of litigation in India. In some cases, the benefits of broad collective decisions trend away from the poor, due to weaknesses in the distribution of India's state benefits. In contrast to South Africa, 77 percent of the beneficiaries of AIDS litigation were not from disadvantaged classes (table 3) because most of the benefits went to the few who already accessed (very unevenly distributed) hospital care. Similarly, although we estimated a large number of beneficiaries from increasing patients' right to sue doctors for malpractice, these benefits went to those who were utilizing formal sector private medicine, only 13 percent of whom came from the lowest two income quintiles. Unequal access to basic services can skew even the most progressive patterns of litigation.

The remaining two litigation streams that affect large numbers of people were strongly pro-poor. The first focused on air quality in Delhi and other urban centers; the other on the provision of midday meals to students in public schools. The former does not depend on the state for distribution, and the other is distributed through the schools, where there is a broad base of participation.

The Delhi clean air cases culminated in a 2001 order in which the Indian Supreme Court required commercial vehicles in Delhi to use cleaner fuels. This resulted in sharply lower rates of respirable suspended-particulate matter (RSPM) in the air around Delhi. Our calculations show that the change saved an estimated 14,323 lives in Delhi from 2002–2006 and significantly reduced morbidity among about 523,000 people. To estimate disadvantaged beneficiaries, we assumed that the distribution of illness episodes followed the distribution of asthma in the general population. About 47 percent of diagnosed asthma sufferers in India come from the lowest two income quintiles,[65] so that the number of disadvantaged beneficiaries was 259,196 people. This is likely an underestimate: rates of diagnosis, as in Brazil, are likely lower for the lower-income groups, and in this case the decision's benefits improve conditions for all asthma sufferers—the undiagnosed perhaps even more than the diagnosed ones.

We estimated the impact of the right-to-food litigation to be the sum of impacts on school attendance and on nutritional status. The free midday meals increased the incentive for parents to send children to school, particularly girls; and studies indeed found that the program increased first grade school enrollment, for girls alone, by 10 percent per year. As a result, the program resulted in 412,500 new girls in school each year from 2001–2006. All of these were likely disadvantaged, as the lowest-income girls are the ones who are prevented from attending school

Table 3
India distributive impact of litigation streams

Litigation Stream	N of people affected up to the year 2006	Share of disadvantaged people among people affected	N disadvantaged people affected
Expand access to tertiary education	20,000	0.11	2,200
Extending Consumer Protection Act to health care providers	1,648,240	0.13	219,216
Blood banks	62,000	0.23	14,260
Free anti-retrovirals for AIDS patients	10,000	0.34	3,400
Extend teacher qualification	84,000	0.37	31,080
Vehicular pollution	551,481	0.47	259,196
New hospital for Union Carbide victims	370,000	0.4	148,000
Midday meals in schools	9,841,667	1.00	9,841,667
Total	**12,587,388**	**0.84**	**10,519,019**

due to a lack of food. We estimated that nearly ten million students benefited from the program's nutritional effects. Similar calculations for other cases are in table 3.

Overall, the share of disadvantaged beneficiaries in India was about 84 percent, consistent with the expectations when the legal system permits abstract policy review and cases focus on broad policy issues, such as regulation. Note, however, that the lion's share of the pro-poor benefits in India stemmed from just one or two major cases (confirming our intuition that the most progressive cases are also those that have the greatest potential for broad impact), and that shortcomings in India's state capacity otherwise constrained the potential pro-poor impact of collective litigation.

Indonesia

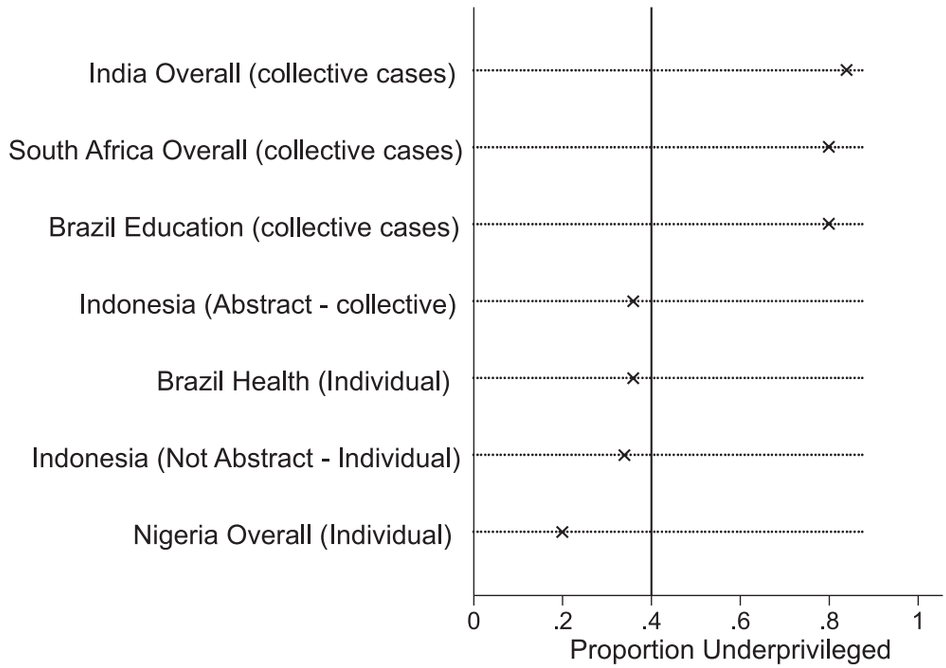
Our survey identified only one right-to-health or right-to-education case with wide impact in Indonesia since the beginning of the transition to democratic rule in 1999. By far the most consequential SER litigation stream in Indonesia, accounting for 95 percent of the identified beneficiaries, was a series of three cases involving judicial review of government funding for K–12 education. In the *Judicial Review of the 2005 State Budget Law* and two subsequent challenges, the Constitutional Court ordered compliance with a constitutional requirement that the budget allocate 20 percent of its expenditures to education. These rulings contributed to an increase in education's share of the budget from 7 percent to nearly 12 percent in the next few years (and eventually 20 percent, but only once the definition of the numerator changed). Our study estimated, very conservatively, that at least 750,000 students received significantly better schooling as a result of more financing (out of some 50 million students enrolled in primary and secondary education at the time).

In Indonesia, the poorest are underrepresented in public education—middle class families commonly use public schools while many of the poorest families are not enrolled at all. These middle class families are not, of course, rich by global standards: approximately *half* of Indonesians consumed less than US$2/day in 2007.[66] Still, we estimated that 36 percent of the public school students who benefited were from the lowest two income quintiles. This may be an underestimate because adding money to the public school budget might have lowered costs (Indonesian public school students pay considerable fees and other costs) as well as raising quality, so that the litigation might have had the effect of drawing more lower-income families into the system.

Interpreting the Distributive Results

Figure 1 summarizes our findings, showing the percentage of underprivileged persons benefiting in each class of litigation. With some exceptions, such as prisoners or refugees, the underprivileged category in each line represents the bottom 40 percent of the population in terms of

Figure 1
Percent underprivileged in each category



income. Any finding that more than 40 percent of the beneficiaries are underprivileged, therefore, is a finding that the poor are overrepresented among beneficiaries compared to the general population. With the exception of the Indonesia education cases, in all cases in which the litigation is pursued for its collective effects, the underprivileged are overrepresented—and in most cases by a margin of at least two to one. When the landscape is dominated by uncoordinated individual litigation, on the other hand, the poor are less likely to be among the beneficiaries.

Several findings deserve highlighting. First, of course, the share of underprivileged beneficiaries in each class of cases is generally higher when expected collective effects dominate individual effects. India and South Africa, where collective litigation dominates, are at the high end, Nigeria at the low end, and Brazil and Indonesia in between. Overall, in cases with expected collective effects the poor are overrepresented among the beneficiaries of SE litigation by a factor of around 4 to 1. In Indonesia, our estimate of how the poor benefit is highly conservative, so the numbers might actually be better than we show here. Both there and in India, the pro-poor impact of many collective cases is muted by the limited reach of the welfare state to the poorest sectors of the population, not by any structural elite bias in the law. In these cases, the use of existing state mechanisms to distribute benefits—whether of litigation or any other form of mobilization—will continue to privilege those who are already in some relationship to the state. Only a more structural approach aimed at developing state capacity, which we have not observed in existing SER litigation and which may well exceed the capacity of courts, would avoid this outcome. Even absent litigation explicitly designed to expand state infrastructure, however, legal mobilization could have a positive effect. Especially if we accept the argument that improving education funding or food distribution should extend its reach to lower socioeconomic sectors, it appears that, when courts adopt a more programmatic approach, a legal strategy can somewhat correct for the prior maldistribution of state services, rather than merely reflecting or intensifying inequalities.

Second, even in the cases we did not expect to be pro-poor, the impact of litigation was not as elite-biased as we might have predicted. In the Brazil health cases the poor were, in fact, almost proportionately represented—whether that is a terrible outcome or a not so bad one depends on one's prior expectations. Cross-country and cross-policy area differences in the number of cases counsel against too much aggregation, but on average the underprivileged are only underrepresented among the beneficiaries of individual litigation by about twelve percent (35 percent, relative to the distributionally neutral benchmark of 40 percent), while they are overrepresented by over 200 percent in the areas where we expected a more pro-poor effect (82 percent compared to 40 percent). This is in part due to what we suggested earlier—systems that restrict benefits to the litigants tend to favor a wealthier population, but they also have effects that are not as widespread. The exception to the "individual litigation equals low impact" equation is Brazil, where a combination of low barriers to litigation and a favorable legal environment has produced a veritable industry of individual litigation. Low barriers to access, when litigation is limited to individual cases, might lower the mean income of litigants and increase the impact of litigation, but will continue to exclude the truly marginalized.

Third, as shown here and in the Appendix, even our own fairly narrow examination shows that nearly all cases have some systemic effects, and estimates of the progressive or regressive effect of SER litigation need to take this into account. Among cases that direct the state to provide more resources, the difference between Brazil, on the one hand, and India, Indonesia, and South Africa, on the other, is that the systemic collective effects in the former were the product of individual cases that were *intended* by the litigants to have purely individual direct effects, so that the claims generally targeted higher-end goods for which demand was spread across all income strata. Only where litigation was expressly undertaken for its collective effects do we see a focus on low-end goods for which we might expect demand to concentrate among low-income populations, and which are inexpensive enough for the state to provide on a massive scale.

In summary, for all the seemingly commonsensical reasons to expect litigation to be an elite game, the evidence does not support a finding that only the better-off benefit—in fact, in many of the categories, the primary beneficiaries of the cases in our sample were the underprivileged. It is true then that litigation does not, with important exceptions, target primary health care, where individual interventions tend to be relatively low cost; but it is not true that it does not target primary education. It is true that many of the cases are brought by middle class people or people who fit some definition of privilege (such as the white Afrikaans-speaking population of South Africa); but it is not true that these cases dominate, either in number of cases or number of beneficiaries. This is strong evidence that human rights litigation on behalf of social and economic rights is not inherently anti-poor, and can actually address the needs of marginalized groups.

Conclusion: Future Research on Social Rights Mobilization

There are a number of reasons why our analysis here should be treated as a preliminary finding and an invitation to further research. The first is that, as is evident from the preceding discussion, our data are rough and our conclusions could be tested or extended with more in-depth comparative case studies. The more important one, however, is that, as anticipated in the introduction, we need to think beyond the "command and control" model of law's operation.

There are very few studies of the effect of social rights constitutionalism on the politics of social policy, beyond the study of litigation, which strikes us as a very partial view. What effect does the constitutionalization of rights to basic goods like health care, education and so on have on politics more broadly? We ourselves would expect this to be positive. Surely the debate in the United States on a federal health care program is deeply colored, to the detriment of public health provision, by the lack of express substantive commitments to aggregate welfare in the United States Constitution. Most countries writing constitutions today opt for a more robust vision of the central government's role in providing for the wellbeing of the population than simply making space for private enterprise or subnational units to act. The point of social rights constitutionalism is not that putting the right to health, or the right to a decent standard of living, in the constitution will make it so. Rather the hope is that under some conditions a constitution writing process that includes these commitments may promote a robust politics of rights provision, or that, under certain circumstances, the inclusion of these provisions in constitutions affects national identities and serves as a focal point for mobilization. Surely drafters expect these constitutions to lead to societies that take better care of the least well off, for reasons that far exceed the possibility of litigating particular issues of social provision.

But it is entirely possible that the presence of far-reaching promises in a constitutional text, in the presence of enduring inequalities and deprivation, might have negative consequences for this and other outcomes. The presence of formal, unfulfilled social and economic rights might detract from the legitimacy of the constitution, or shift the politics from the legislative arena to a possibly less effective judicial arena. Couching these entitlements in the language of rights might have an atomizing, individualizing effect, to the detriment of possibly more-effective collective, class-based mobilization. Focusing on rights to basic goods, instead of on the economic or political conditions that make the provision of such goods possible, might result in the misallocation of government resources and energies. Adding a long list of rights that may never be fully realized might cheapen rights overall, leading to a lack of regard for basic civil and political rights. We simply do not have good comparative studies of the overall, systemic effects of what has become a hugely important political phenomenon. Scholars of courts and scholars of comparative politics need to engage in a broader conversation, informed by the insights of both scholarly communities, about the comparative politics, the causes, and the effects of social rights constitutionalism.

The middle-income countries experimenting most deeply with social rights constitutionalism live in a world shaped both by the ideological dominance of constitutional democracy and by global markets that place constraining pressures on the welfare state. In that context, many have settled on social rights constitutionalism as a way to ensure that the distribution of basic entitlements is not purely determined by the market. This impulse dovetails with a long tradition suggesting that basic levels of material wellbeing are necessary for a successful, more participatory democracy. It is also congruent with more recent calls for a new model of developmental state, one that emphasizes the creation of human capital.[67] In this view, the social investment called for by social rights constitutionalism is an investment in democracy and an investment in development. The extent to which this is or could be true depends greatly on the answer to the question we posed here. Does social rights constitutionalism simply deepen the existing maldistribution of resources and access to state-provided benefits, thus deepening the challenges of unequal and underdeveloped democracies, or does it palliate that inequality somehow?

This study is one of the first systematic and comparative efforts to assess the distributive impact of judicializing social and economic rights. In our view, it should not be the last. Untangling the impact of judicial involvement in these basic issues of social provision and public policy is a more complex matter than the current state of research—perhaps including this piece—has acknowledged. SE rights litigation has been used to scrutinize the scientific claims made to justify the denial of antiretrovirals for treating HIV and AIDS in South Africa, and to require more rigorous reason-giving by policymakers in a variety of contexts. It has been used to call attention to private health care administrators who deny benefits that are actually mandated by law in Colombia. It has been used to publicize and generate debate about national legislators' decisions on the level of education funding in Indonesia. Litigation has required policy makers to at least consider the claims of populations with little or no political influence, such as migrants and refugees in South Africa and Indonesia, or populations displaced by environmental disasters or conflict in Indonesia and Colombia. The mere possibility of litigation around these issues could change the quality of decision making around them, once decision makers understand that their decisions will be subject to review. Our own conclusions are tentative, our vision partial, and more research on this question is needed.

Beyond the implications for academics and constitution-makers, a better understanding of the distributive and systemic effects of judicial intervention has important practical implications for courts and litigants, and they too are deeply interested in the answer. One of the authors was approached by a justice from a provincial supreme court in Argentina. The justice remarked that his court was flooded with cases relying on the right to health, and he wanted to know whether he and his colleagues should treat these cases like every other case, simply applying the law to the facts to resolve the individual case, or whether they should take into account the

obvious policy implications, with an eye to the distributive and systemic impact of their decisions. If it is true that litigation leads to more inequality, the equity-enhancing response would be either to deny the cases altogether—as many have advocated—or to craft the decisions as narrowly as possible, so as to minimally distort public policy. But if our conclusions are correct, the pragmatic answer is exactly the opposite—in social and economic rights cases, judges ought to craft broadly applicable, more public policy-like decisions, to the extent they can legally and practically do so.

This raises obvious questions regarding the proper role of judges in a democracy, and calls for a new take on the so-called "countermajoritarian difficulty" in light of the actual, empirical contours of twenty-first-century social rights constitutionalism. Is it enough to say, as the South African Constitutional Court has done, that any intrusion into the legislative arena on behalf of social and economic rights is one that the constitution itself invites, when it makes these substantive rights justiciable? Many of the contributions to this debate have centered on the South African Court's decisions, and too many have been carried out without rigorous, comparative, empirical contributions by social scientists. More comparative studies of the origins and consequences of social rights constitutionalism are needed to inform this debate. Our hope is that by demonstrating the complex politics of social and economic rights litigation we can help to promote a more consistent engagement between legal scholars and scholars of comparative politics.

Notes

1 France 1922: 117-118; authors' r translation.
2 *Jackson v. Joliet*, 715 F.2d 1200 (7th Cir. 1983). While Posner's view is somewhat controversial, few would deny that this is the dominant view of the constitution reflected in the Supreme Court's decisions.
3 Horwitz 1976-77.
4 The empirics are backed up by an Appendix that is posted online, at DOI/XXXXXX.
5 Law and Versteeg 2011.
6 The term is meant to describe constitutions that attend centrally to what Robert Gargarella in his description of Latin American constitutions calls "the social question" by incorporating a series of rights to basic social and economic goods, such as health care, education, housing, basic social provision, and even a decent standard of living, sometimes at the expense of addressing imbalances in the distribution of power; Gargarella 2013.
7 Bilchitz 2013, 47.
8 Couso, Huneeus, and Sieder 2010; Hirschl 2008; Sieder, Schjolden, and Angell 2005; Moustafa 2003; Shapiro and Stone Sweet 2002; Guarnieri 2000; Stone Sweet 1999; Tate and Vallinder 1995; Edelman 1994.
9 Moyn 2010.
10 Brinks and Forbath 2014.
11 Biehl et al. 2012.
12 Prado 2013.
13 Susanti 2008.
14 Heywood 2009; Nattrass 2004.
15 Shankar and Mehta 2008; Khosla 2010; Gauri 2011.
16 Trochev 2012; Popova 2012; Hendley 2012.
17 Yamin and Gloppen 2011; Gauri and Brinks 2008a; Langford 2009; Bonilla Maldonado 2013.
18 Dugard 2013, 321.
19 The appellate and trial court opinions can be found at 2009 BCCA 563 and 2008 BCSC 1363. [AUS: What are these? Probably should be in your References. These are the official citations to the cases discussed in the text. I added some text to make that clearer. I don't really think they need to be in the references.]
20 Horwitz 1976-77: 566.
21 Indeed, this is part of Moyn 2010's argument—the language of human rights, in his view, can have a constraining and depoliticizing effect, regardless of the means deployed to pursue their realization.
22 Cappelletti and Garth 1978-79.
23 Galanter 1974.
24 Dahl 1957.
25 Rosenberg 1991.
26 Hirschl 2004.
27 Although some have argued that courts with low barriers to access can and do work on behalf of some underprivileged groups. See Wilson 2009, 2007.
28 Marshall 1950.
29 See, e.g., Kapiszewski and Taylor 2012; Staton 2004; Gauri, Staton, and Vargas Cullel 2013.
30 Rodríguez Garavito 2011.
31 Rosenberg 1991.
32 Ferraz 2011; Da Silva and Terrazas 2011; Biehl et al. 2012.
33 Norheim and Gloppen 2011.
34 Landau 2012.
35 Biehl et al. 2012; Vieira and Zucchi 2007; Da Silva and Terrazas 2011.
36 But see, for example, Forbath 2007, on the US Constitution's potential for a more robust notion of social and economic rights.
37 See especially the discussion in Brinks and Forbath forthcoming 2014 and Bilchitz 2013.
38 Galanter 1974, 127.
39 Scheingold 1974; Rosenberg 1991; McCann 1994; Rodríguez Garavito 2009.
40 McCann 1994, 10.
41 Prado 2013.
42 Viceconte, Mariela c. Estado Nacional (Ministerio de Salud y Ministerio de Economía de la Nación) s/ Acción de Amparo, Federal Administrative Court of Appeals, Argentina, 1998-06-02.

43 The PIL, as it is known, allows public-spirited people, organizations, or institutions, often at the invitation of the court, to file an action addressing important public policy issues.
44 See also Prado 2013 for a discussion of this issue.
45 Gloppen 2009; Wilson 2009; Gauri and Brinks 2008b.
46 The massive waves of pension litigation in places as disparate as Russia and Argentina, involving hundreds of thousands of cases, clearly involve litigants who, by any measure, are poor. But the remedy they seek is an important one relative to the cost of litigating—an adequate pension payment sufficient to meet their needs over their remaining lifetime.
47 See not only our own book on this (Gauri and Brinks 2008a), but also many other contributions, from the US (Epp 1998, 2009), South Africa (Forbath 2011), to Latin America (Yamin and Gloppen 2011). [AUS: These are not in your References. Sorry, first a typo and then a misremembered cite]
48 On this point, see especially Tushnet 2009.
49 The classic references here are Horowitz 1977, and Rosenberg 1991.
50 In fact, there is research suggesting that judicial interventions, while not panaceas, can significantly improve the material conditions of many people who are otherwise passed over by the representative branches. See Rodríguez Garavito 2009, 2011, or our own work in Gauri and Brinks 2008.
51 See Gauri and Brinks 2008a. Here we limit discussion of Nigeria to some examples and aggregate data, essentially because there are only two cases worth discussing, and they had limited effects.
52 See [to be added]. [I think James Moskowitz is supposed to put the appendix online, and then let us know what the permanent link is, so we can cite it.]
53 Gauri and Brinks 2008a.
54 Hoffman and Bentes 2008; Prado 2013.
55 Less than one percent of the beneficiaries sued for over-the-counter goods that could be used by anyone. For these goods we simply assumed that a random distribution of SUS beneficiaries benefited, leading to an estimate that 46.6 percent of them come from the bottom two quintiles (and thus have per capita family incomes below about $60 USD/mon); Ribeiro et al. 2006.
56 We use the 40 percent number because the most critical studies of the beneficiaries of medications litigation in Brazil find that the litigant population approximately reflects the overall income distribution; Da Silva and Terrazas 2011. Other studies question these results, finding a much greater participation by the poor than either they or we do; Biehl, et al. 2012.
57 Prado 2013.
58 Ribeiro et al. 2006.
59 Norheim and Gloppen 2011. Indeed, if our calculation were done in dollars, rather than in numbers of people benefited, we might have a more regressive result. Vieira and Zucchi 2007, for instance, find that 75 percent of the dollars allocated through court actions are attributable to cancer drugs. If we used this figure, and assume a blended rate of 41 percent for the other 25 percent of dollars allocated, as explained in the Appendix, we would find that somewhere around 30 percent of the benefits, in dollar terms, accrue to the bottom two income quintiles.
60 Instituto Brasileiro de Geografia e Estatística (http://www.ibge.gov.br).
61 The cutoff here is actually a more conservative, for our argument, $50 per month in per capita family income, rather than the $60 that marks the bottom 40 percent.
62 In this article, we use the terms "negative rights" and "positive rights" loosely. Most negative-rights demands entail negative and positive duties; and positive-rights demands entail negative and positive-duties. See Gauri and Brinks 2012.
63 Smoking was made a punishable offense in a Supreme Court case in 2001, but rules implementing the ban were not put in place until 2008, and enforcement is still spotty.
64 These cases raise one important question that undoubtedly deserves additional research—to what extent do the socio-economic characteristics of the target population influence compliance rates? We do not attempt to answer it here, but limit ourselves to noting that there are public good-type cases in both the compliance and the non-compliance camp (e.g., clean water and non-smoking); and club good cases that seem to favor the poor in both camps (child labor, which should exclusively affect the poor, and right to food, which predominantly affects the poor). This question is certainly worth exploring further, as our initial investigation shows that litigant resources are crucial to compliance in large-scale collective cases (Brinks & Gauri 2008).
65 http://www.who.int/healthinfo/survey/whs_hspa_book.pdf.
66 http://go.worldbank.org/BEQZ2K3MR0.
67 Trubek 2009; Trubek, Coutinho, and Schapiro 2013.

Supplementary Materials

Data Appendix
http://dx.doi.org

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