THE SOCIAL CONSTITUTION

In *The Social Constitution*, Whitney Taylor examines the conditions under which new constitutional rights become meaningful and institutionalized. Taylor introduces the concept of "embedding" constitutional law to clarify how particular visions of law come to take root both socially and legally. Constitutional embedding can occur through legal mobilization, as citizens understand the law in their own way and make legal claims – or choose not to – on the basis of that understanding, and as judges decide whether and how to respond to legal claims. These interactions ultimately construct the content and strength of the constitutional order. Taylor draws on more than a year of fieldwork across Colombia and multiple sources of data, including semi-structured interviews, original surveys, legal documents, and participation observation. This title is part of the Flip it Open Programme and may also be available Open Access. Check our website Cambridge Core for details.

WHITNEY K. TAYLOR is Assistant Professor of Political Science at San Francisco State University. Her research focuses on the intersection of rights, law, and contentious politics.

CAMBRIDGE STUDIES IN LAW AND SOCIETY

Founded in 1997, Cambridge Studies in Law and Society is a hub for leading scholarship in socio-legal studies. Located at the intersection of law, the humanities, and the social sciences, it publishes empirically innovative and theoretically sophisticated work on law's manifestations in everyday life: from discourses to practices, and from institutions to cultures. The series editors have longstanding expertise in the interdisciplinary study of law, and welcome contributions that place legal phenomena in national, comparative, or international perspective. Series authors come from a range of disciplines, including anthropology, history, law, literature, political science, and sociology.

Series Editors

Mark Fathi Massoud, University of California, Santa Cruz Jens Meierhenrich, London School of Economics and Political Science Rachel E. Stern, University of California, Berkeley

A list of books in the series can be found at the back of this book.



THE SOCIAL CONSTITUTION Embedding Social Rights Through Legal Mobilization

Whitney K. Taylor San Francisco State University



www.cambridge.org



Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781009367769

DOI: 10.1017/9781009367738

© Whitney K. Taylor 2023

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2023

A catalogue record for this publication is available from the British Library

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-009-36776-9 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

CONTENTS

List of Figures List of Tables Acknowledgments		page vi vii
		viii
1	Introduction: The Social Constitution	1
2	Constitutional Embedding through Legal Mobilization	24
3	Expectations and Transformations of Colombian Constitutional Law	46
4	Social Embedding	71
5	Legal Embedding	96
6	Challenges to Embedding: Legal Legibility	121
7	Challenges to Embedding: Power Struggles	144
8	Challenges to Embedding: Workload	164
9	Partial Constitutional Embedding: The Case of South Africa	182
10	Conclusion: Social Constitutionalism and the Politics of Rights	212
Appendix: Interviewees References Index		227 233 250

v

FIGURES

1.1	Constitutions and social rights over time	page 2
1.2	Tutela claims filed, 1992–2019	4
1.3	Differentiating types of constitutions and	
	constitutionalism	6
2.1	Plotting constitutional embedding	29
2.2	The process of constitutional embedding	36
3.1	The most commonly invoked rights in tutela	
	claims, 2003–2019	64
3.2	People waiting in line to file tutela claims in	
	Medellín, Colombia	67
3.3	Interns cataloguing tutela claims at the	
	Constitutional Court	68
3.4	Catalogued tutela claims at the Constitutional Court	68
4.1	Andrés Gómez explaining how to play Tutela y Juega	77
4.2	Andrés Gómez after a workshop on Tutela y Juega	77
5.1	Social rights tutela claims	109
6.1	Comunas in Cali, Colombia	123
6.2	The interruption of constitutional embedding	
	by legal illegibility	125
7.1	Powerful actors' efforts to thwart constitutional	
	embedding	145
8.1	Judicial workload and constitutional embedding	165
8.2	Tutela claims per 1,000 people (monthly average)	168
8.3	Tutela claims per ordinary court (monthly average)	169
8.4	Proportion of procesos and tutelas cleared	
	(monthly average)	170
9.1	Written submissions to the South African	
	Constitutional Assembly	200
9.2	Reported response to difficulties in accessing social	
	welfare goods	206
10.1	Percentage of tutelas for covered goods and services by	
	healthcare regime	217

vi

TABLES

1.1	Argument: constitutional embedding through	
	legal mobilization	page 10
1.2	Observable implications of constitutional embedding	11
3.1	Rights, guarantees, and duties in the 1991	
	Colombian Constitution	62
9.1	Likelihood of turning to the law to deal	
	with a social rights difficulty	207

ACKNOWLEDGMENTS

The book you are now reading was once my PhD dissertation. It has been substantially revised and substantially improved, thanks to the comments, critiques, and advice of many, many individuals.

First and foremost, a heartfelt thank you to the wonderful people I worked with and asked questions of in both Colombia and South Africa, including Pastora and Leo, who welcomed me into their home; Zeller Álvarez and his team of student-enumerators, who made survey work fly by; "Daniela," who encouraged me to think more critically about the dualities and contradictions present in Colombian life and law; and the members of Abahlali baseMjondolo, who invited me to their neighborhoods, meetings, and funerals, and reminded me of the awesome power of people who follow their convictions. Thank you to all of the people who L formally interviewed and surveyed, as well as to all of those who chatted with me over tintos, in taxis, and while waiting in line.

I am immensely grateful for the support and encouragement of so many mentors, colleagues, and friends throughout my time in graduate school and as I began my career as an assistant professor. Thank you to my dissertation committee – Ken Roberts, Matt Evangelista, Sid Tarrow, Lisa Hilbink, and Aziz Rana – who have been, without exception, generous with their time and unwavering in their support. Ken's ability to take your loose series of thoughts and pull out something that is not only intelligible but exactly what you meant is unrivalled and has benefitted just about every comparativist at Cornell. I am grateful also for Ken's guidance in connecting my work to broader debates in comparative politics. Matt reads more carefully than anyone I have ever met – as far as I can tell, he has never missed a typo. His engagement with my work has always been thoughtful and thought-provoking. Sid's high standards pushed me to continually strive to be more precise in my claims and more rigorous in my methods. He models what it looks like to generously support colleagues and to cultivate networks across disciplines and continents. Thank you also to Lisa, who has always

ACKNOWLEDGMENTS

believed in me and who has never shied away from telling me when I could do better. Her expertise and encouragement have been invaluable. Aziz's excitement, curiosity, and ability to see the hidden linkages between events, texts, and ideas have inspired me, and discussions with him dramatically enhanced the project.

Thank you to Jamila Michener. She provided sharp, thoughtful feedback throughout the development of the project and has always been quick with a smile and supportive words. Her commitment to amplifying the voices of those who are often overlooked in political science and to unearthing the real-life consequences of what may seem like technical policy choices make her a scholar-citizen whom I hope to emulate. Thank you also to Joe Margulies, who read early drafts of chapters and has offered a clear example of what it means to be an engaged teacher, researcher, and community member.

I cannot thank my graduate school friends and colleagues enough. I was blessed with a wonderful cohort, made up of people who are both intellectually curious and genuinely nice. In particular, I am grateful to have taken classes and developed projects with David De Micheli and Michael Allen. David and Michael have been not only great friends, but also amazing teachers. Liz Acorn was the first person I met in Ithaca. Her thoughtfulness and generosity are qualities I deeply admire. She also provided a much-needed example of how to take work seriously but not get lost in the process. Janice Gallagher's enthusiasm for life and commitment to telling the stories of the people who comprise political struggles (and, more importantly, her commitment to those people and those struggles) has inspired me throughout graduate school. Our conversations across Ithaca, New Orleans, Mexico City, Medellín, and New York City have both enriched and grounded my research. I was lucky that my fieldwork in Colombia partially overlapped with Bridget Marchesi's. Her critical eye and pragmatic approach greatly improved my project. Thank you also to Martha Wilfahrt and Natalie Letsa, who offered advice and friendship, and shared tips and materials for navigating the job market and the first few years on the tenure track. Janet Smith has been a consummate cheerleader and friend, reminding me to take breaks and enjoy the best of Ithaca all year round (and later the Bay Area, though the case for enjoying the Bay all year round is a much easier one to make, of course). Emilio Lehoucg made sure that I not only worked during my fieldwork in Bogotá, but also had fun. He has read almost everything I've ever written and has provided timely, thoughtful feedback and encouragement, no matter how busy he was.

ix

ACKNOWLEDGMENTS

I lucked out once again with the wonderful colleagues I have at San Francisco State University. Each one reached out to me to help ease the transition from graduate school to being an assistant professor, and they all went above and beyond in their efforts to support me as a teacher, a researcher, and a person. On hikes with Wendy Salkin (and our dogs, Jackson and Birdie), I honed the arguments in this book. Her curiosity and drive to suss out the roots and the implications of each and every claim, as well as her reminders to be precise with language, certainly made this book stronger. Runs with Nicole Watts, walks with Rebecca Eissler, and beers with Chris Longenecker and Kurt Nutting helped me to stay grounded while pushing this project forward.

In 2020, I was given the opportunity to participate in the Cambridge Studies in Law and Society Early Career Book Workshop, alongside Toby Goldbach. The workshop, organized by Rachel Stern, Mark Massoud, and Jens Meierhenrich, came at just the right time and provided both the push and direction I needed to transform my dissertation into a viable book project. Along with Rachel, Mark, and Jens, Dan Brinks and Jamie Rowen offered careful guidance and excellent feedback on the project.

The project also benefitted from comments offered at conferences and workshops. I am grateful to have been able to present parts of this book at various American Political Science Association annual meetings, Law and Society Association annual meetings, Latin American Studies Association annual meetings, and the Socio-Legal Studies Association conference, as well as the Global Law and Politics Workshop (organized by Rachel Cichowksi, Dan Brinks, Jeff Staton, and Kyle Shen) and the Cultivating Networks and Innovative Scholarship in Law and Courts conference (organized by Monica Lineberger, Alyx Mark, and Abby Matthews). Comments from Karen Alter, Celeste Arrington, Dan Brinks, Jenn Earl, Chuck Epp, Diana Fu, Janice Gallagher, Mary Gallagher, Esteban Hoyos, Alex Huneeus, Filiz Kahraman, Gabi Kruks-Wisner, Ke Li, Michael McCann, Angela Páez, Wendy Salkin, Nick Smith, Kira Tait, Sid Tarrow, Lisa Vanhala, Andrea Vilán, Susan Whiting, and many others helped me develop this book into its strongest form. Lisa Vanhala, in particular, has been a tireless supporter of this project and all my research.

Luis Robayo captured a moment that perfectly encapsulates the argument you will find this book, and I am so grateful for his support in using that photograph as the cover image.

Thank you also to my family: Mom, Dad, Leah, Jackson, Filbert, and Hazelnut. Your love and support mean the world to me.

Х

ACKNOWLEDGMENTS

Acknowledgments sections often include a line or two suggesting that the book is for family, friends, or interlocutors. I couldn't have done it without the gracious help of everyone listed above, but this book was my dream; it's for me.

Finally, this book relies on some of the same interview and survey data that appears in previously published articles, including my 2018 *Law & Society Review* article, "Ambivalent Legal Mobilization: Perceptions of Justice and the Use of the Tutela in Colombia," my 2020 *Comparative Political Studies* article, "On the Social Construction of Legal Grievances: Evidence from Colombia and South Africa," my 2020 *Comparative Politics* article, "Constitutional Rights and Social Welfare: Exploring Claims-Making Practices in Post-Apartheid South Africa," and my forthcoming *Human Rights Quarterly* article, "Judicial Agency and the Adjudication of Social Rights." Each of these articles, however, advances a distinct argument from the core argument of the book.



Map of Colombia with Departments Source: Wikimedia commons, Camilo Sanchez