
CAN RIGHTS COMBAT ECONOMIC INEQUALITY?

NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD. By Samuel Moyn. Cambridge, Mass.: Harvard University Press. 2018. Pp. xii, 277. \$29.95.

*Reviewed by Mila Versteeg**

INTRODUCTION

Few recent academic-press books have spurred as much public and scholarly debate as Professor Samuel Moyn's *Not Enough: Human Rights in an Unequal World*.¹ This is unsurprising given its topical and important subject: the growing gap between rich and poor in many countries around the world.² Rising inequality, which Moyn and others attribute largely to neoliberal policies of free trade and free markets, is often blamed for the rise of populist movements and the resulting threats to liberal democracy (pp. 216–18). Moyn explores this phenomenon from the perspective of human rights: What, if anything, have human rights done to address the economic inequality at the heart of these disturbing trends?

“Not enough,” answers Moyn. The book is therefore a critique of the modern human rights movement, which, Moyn believes, has barely attempted to address economic inequality. As Moyn puts it, human rights have been “unambitious in theory and ineffectual in practice in

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¹ The book has spurred many reviews and debates. See, e.g., Gráinne de Búrca, *Samuel Moyn. Not Enough: Human Rights in an Unequal World*, 16 INT'L J. CONST. L. 1347 (2018) (book review); Ioannis Kampourakis, *Samuel Moyn, Not Enough: Human Rights in an Unequal World*, 83 MODERN L. REV. 229 (2020) (book review); Jennifer Pitts, *Not Enough: Human Rights in an Unequal World, by Samuel Moyn*, 47 POL. THEORY 267 (2019) (book review); Mitchell Cohen, *Did the Crusade for Human Rights Lead to More Inequality?*, N.Y. TIMES (May 18, 2018), <https://nyti.ms/2k4HuqO> [<https://perma.cc/ZLS2-3G2N>] (book review); Katharine Young, *Inequality and Human Rights*, INFERENCE (Dec. 12, 2019), <https://inference-review.com/article/inequality-and-human-rights> [<https://perma.cc/T9JD-Z4VF>] (book review). The blog *Law and Political Economy* featured some seven response pieces. See *Category Archives: Not Enough Symposium*, LAW & POL. ECON., <https://lpeblog.org/category/not-enough-symposium> [<https://perma.cc/2GAS-N8F6>].

² See Richard Partington, *Inequality: Is It Rising, and Can We Reverse It?*, THE GUARDIAN (Sept. 9, 2019, 1:00 AM), <https://www.theguardian.com/news/2019/sep/09/inequality-is-it-rising-and-can-we-reverse-it> [<https://perma.cc/ENY4-KWEF>].

the face of market fundamentalism's success" (p. 216). While human rights "have occupied the global imagination," they have "contributed little of note, merely nipping at the heels of the neoliberal giant" (p. 216). Even worse, the human rights movement has been tainted by association with unconstrained capitalism because the movement gained prominence while laissez-faire policies were gaining favor globally (p. 217). Moyn believes that "[t]he coexistence of the human rights phenomenon with the death of socialism . . . is a historical fact that needs to be named" (p. 217) because past decades show that "even perfectly realized human rights . . . are compatible with . . . radical inequality" (p. 213).

Moyn acknowledges that some advocacy efforts have addressed social rights, such as the rights to healthcare, to social security, and to education (pp. xi, 68–69, 143). But these efforts are not enough either, as they have focused only on *sufficiency*: a minimum of resources for the poorest of the poor, rather than comparable resources for all (p. 3). For Moyn, there exists a crucial distinction between the former, that is, "sufficiency," and the latter, what he calls "material equality" (p. 3) (also "distributive equality" (p. 3), "economic justice" (p. 3), or just "equality" (p. 218)). Sufficiency captures "how far an individual is from having nothing and how well she is doing in relation to some minimum of provision of the good things in life" (p. 3).³ In contrast, material equality "concerns how far individuals are from one another in the portion of those good things they get" (p. 3).⁴ A commitment to material equality therefore effectively requires limiting inequality in any given country and a "commitment to a universal middle class" (p. 4). Moyn believes that promoting sufficiency is not enough to achieve equality: even if we realize higher levels of sufficiency for more people, the rich can still become richer (pp. 4–5).⁵

Not Enough is a strong indictment of the human rights movement. Yet in the end, Moyn concludes that human rights law is actually the wrong vehicle for promoting material equality.⁶ One reason is that human rights law — with its individualistic premise of constraining the state from committing human rights abuses against discrete persons — is simply a bad fit for the task of effecting material equality (p. 218). "[W]henever inequality has been limited," he says, "it was never on the sort of individualistic and often antistatist basis that human rights share with their market fundamentalist *Doppelgänger*" (p. 218). Another, related reason is that human rights law's toolkit — litigation and "naming

³ Emphasis has been omitted.

⁴ Emphasis has been omitted.

⁵ Moyn conjectures that promotion of sufficiency alone could lead to a world in which "the poor will come closer to sufficient provision as the rich reap ever greater gains for themselves" (p. 5).

⁶ There is some ambiguity here, as Moyn also claims that the human rights movement could do more: "If human rights movements today focused even more than they do on social rights, for example, especially in the promotion of labor rights that functioned as mechanisms of collective empowerment, it might make a significant difference to material outcomes" (p. 217).

and shaming” violators — is ill-equipped to promote economic justice (pp. 10, 218). According to Moyn, “When it comes to mobilizing support for economic fairness, the chief tool[] of the human rights movement — playing informational politics to stigmatize the repressions of states . . . — [is] simply not fit for use” (p. 218). In addition, the movement’s hopes for litigation have never materialized: Moyn concludes that litigation opportunities at the international level are ineffectual or nonexistent, while at the domestic level, courts have been unwilling and unable to do much of note (pp. 199–201). In fact, Moyn even questions whether human rights have any role to play in combating inequality: “[A] critical reason that human rights have been a powerless companion of market fundamentalism is that they simply have nothing to say about material inequality” (p. 216).

What, then, is Moyn’s solution? Moyn’s primary objective is to force redistribution and cap inequality (p. 218). To accomplish that, he argues, we need not only to provide a basic minimum of subsistence but also to set an income ceiling, lift up the middle classes, prevent the dismantling of existing social welfare states, and build new ones (pp. 214, 218–21). His own plan therefore entails a more radical shift than a mere change in human rights advocacy strategies. He appears to envision economic transformation realized through global economic interventionism, massive tax reforms, and new antitrust rules (p. 214). The end goal is a strong social welfare state, preferably extended to the global level. “The truth is that local and global economic justice requires redesigning markets or at least redistributing from the rich to the rest, something that naming and shaming are never likely to achieve . . .” (p. 218).

Moyn’s critique and proposal leave the reader wondering: If human rights law by its nature is not the right vehicle for achieving his redistributive vision, why indict the movement for not addressing it adequately? Political economists and policymakers have been increasingly concerned with rising economic inequality.⁷ Moyn masterfully forces his readers to grapple with the connection between human rights and this growing inequality. He places their relationship in historical perspective, taking us back to times when political leaders imagined a world with relative economic equality. *Not Enough* introduces us to the thinkers of the French Revolution, the architects of the mid-twentieth-century European social welfare states, and the drafters of the Universal Declaration of Human Rights, all of whom sought to close the gap between rich and poor. These leaders built societies genuinely concerned with material equality, with the post–World War II European social welfare state as Moyn’s primary example. They were also the first to put

⁷ See, e.g., Christopher Ingraham, *U.N. Warns that Runaway Inequality Is Destabilizing the World’s Democracies*, WASH. POST (Feb. 11, 2020, 8:03 AM), <https://www.washingtonpost.com/business/2020/02/11/income-inequality-un-destabilizing> [https://perma.cc/3Y8T-LVLE].

social rights into writing, although they viewed these rights as “regulatory guidelines” rather than as human rights in the modern sense (p. 55). By the end of the book, though, it remains unclear why the human rights movement is the object of Moyn’s scorn.

This Book Review addresses the question that *Not Enough* prompts but does not ultimately answer: Can human rights *law*, including litigation and other forms of legal mobilization, be used to promote material equality? To do so, this Review takes an angle mostly absent from *Not Enough*: the phenomenon of courts around the world interpreting their domestic constitutions to promote economic equality. Courts in Colombia, Mexico, Argentina, Peru, Hungary, Portugal, Russia, Romania, Lithuania, and Latvia have all, on occasion, rendered decisions that tackled economic inequality.⁸ Some of these courts have provided access to social rights–related goods and services to the poor and the middle classes alike. Others have protected middle-class entitlements in the face of harsh austerity measures or have prevented tax cuts for the rich or new tax burdens on the poor. In essence, these courts have used constitutional rights to do exactly what Moyn says human rights law has failed to do: attempt to advance economic equality.

One takeaway from these foreign examples is that rights *do* have a potential role to play in promoting economic equality. Many courts have deployed their constitutions to promote economic justice and, in doing so, have illuminated numerous possible connections between rights and material equality.⁹ Even though these decisions may fall short of Moyn’s transformative vision, they do ensure equality gains if faithfully implemented.

Another takeaway is that the political economy of these judicial interventions is very different from Moyn’s description of the international human rights movement. Notably, many of these interventions were not primarily concerned with sufficiency for the poor, but with protecting the middle classes.¹⁰ Indeed, some of the courts that have addressed economic equality beyond a minimum subsistence for the poor have been heavily criticized for pursuing a majoritarian agenda and engaging in “judicial populism,” that is, catering justice to the middle class.¹¹ Commentators have argued that, in doing so, courts have strayed from the core objective of justiciable social rights: protecting society’s most vulnerable.¹²

This Review argues that if rights are to play a role in promoting material equality, some judicial populism is probably helpful. When large segments of the population benefit from judicial interventions,

⁸ See *infra* Part II, pp. 2029–52.

⁹ See *infra* Part II, pp. 2029–52.

¹⁰ See *infra* pp. 2033–37, 2044, 2048–49.

¹¹ See *infra* pp. 2053–54.

¹² See *infra* p. 2054.

equality gains are likely larger than when interventions focus on the poor alone. Such interventions are not necessarily inconsistent with the judicial role: protecting the rights of the groups that lack political power, even if those groups comprise numerical majorities, is arguably a proper function of constitutional courts. What is more, such interventions can be particularly impactful. A large body of empirical social science literature on rights effectiveness has shown that, although rights enforcement is often difficult, rights are most impactful when mobilized groups of citizens push for their enforcement.¹³ Such mobilization is more likely to occur for rights that benefit majorities than for rights that protect vulnerable minorities alone.¹⁴ It follows that a human rights agenda focused on economic justice that also benefits the middle classes can be particularly powerful.

Ultimately, however, whether rights can promote economic equality is an empirical question, and neither Moyn nor I have done the work required to answer it with certainty. But I imagine that the readers of this Review will feel more optimistic about such an endeavor than those who only read *Not Enough*. At a minimum, my analysis suggests that it may be premature to abandon human rights law as a tool for fighting economic inequality.

My conclusions differ from Moyn's chiefly because I introduce three perspectives that are mostly absent from *Not Enough*. First, my account draws heavily on the comparative constitutional law literature. *Not Enough* is an intellectual history focused on political thought in Western Europe and Northern America. Yet the comparative literature has shown that most of the action on social rights has occurred in the Global South, and particularly in Latin America.¹⁵ Second, my account takes

¹³ See *infra* notes 265–272 and accompanying text.

¹⁴ See *infra* notes 265–272 and accompanying text.

¹⁵ David Bilchitz, *Constitutionalism, the Global South, and Economic Justice*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 41, 47 (Daniel Bonilla Maldonado ed., 2013) (noting that for many constitutions in the Global South, “matters of economic distributive justice . . . are central”). Latin American courts are especially known for their social rights activism. See, e.g., César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1672–73 (2011). They were the first to enforce social rights and have been most aggressive in deploying them toward material equality. See Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1, 5–10 (2014). What is more, Latin American countries were the first to constitutionalize many social rights. See *id.* The right to public education was first constitutionalized in Haiti in 1801. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1688 (2014); see CONSTITUTION DE 1801, art. 68 (Haiti). The right to asylum was first constitutionalized in Colombia in 1811. Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219, 1261 (2017); see ACTA DE FEDERACIÓN DE LAS PROVINCIAS UNIDAS DE LA NUEVA GRANADA [CONSTITUTION] (1811) art. 39 (Colom.). Children’s rights were first constitutionalized in Haiti in 1816. See Revised 1806 CONSTITUTION D’HAÏTI (June 2, 1816) art. 35; *id.* art. 53. Rights for the disabled were also first

seriously the many different doctrinal connections between rights and material equality. *Not Enough* uses the term “human rights” broadly, to encompass both the political project of building a social welfare state and the legal project of the modern human rights movement. This approach may explain why *Not Enough* largely abstracts from doctrine. Taking doctrine seriously, however, reveals that judicial decisions that promote equality are rooted not only in social rights but also in property and equality rights. Thus, focusing on social rights alone does not reveal the full potential of human rights law to address economic inequality. Third, this Review engages the social science literature on human rights effectiveness. Sorting out the causal effect of human rights law is notoriously difficult.¹⁶ Nonetheless, *Not Enough* makes a strong causal claim: human rights have been ineffective in reigning in the soaring income inequality around the globe (p. 201). In developing its claim, *Not Enough* does not engage the voluminous empirical social science literature that has attempted to sort out the causal impact of human rights law.¹⁷ Granted, this literature has addressed social rights in only a limited way, and, to date, few studies have directly explored the impact of rights on material equality.¹⁸ What is more, this literature has shown that rights protections are no panacea: it is only under a limited set of circumstances that they make a difference in practice.¹⁹ Nonetheless, some of the literature’s findings do offer cause for optimism on the impact of social rights.

The remainder of this Review is organized as follows. Part I explores the relationship between rights and material equality by introducing the

constitutionalized in Haiti in 1816. *Id.* art. 35. The right to work was first constitutionalized in Mexico in 1857. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA MEXICANA (1857) art. 4. And the right to food was first enshrined in the constitution of Argentina in 1949. *See* CONSTITUCIÓN DE LA NACIÓN ARGENTINA (1949) art. 37, § I.6. Notably, *Not Enough* does not cover the stories of the Latin American drafters who first imagined and constitutionalized these rights; its focus is on the 1791 French Constitution (which mentioned poor relief and public education) and other European constitutions (pp. 20–25). Indeed, Moyn mentions only the Mexican Constitution of 1917 and then moves on to the drafters of the 1919 Weimar Constitution and the 1921 Yugoslav Constitution, leaving untold the stories of the Latin American drafters who constitutionalized these rights (p. 35).

¹⁶ ADAM S. CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (forthcoming 2020) (manuscript at 100–03) (on file with the Harvard Law School Library); *see* Adam S. Chilton, Essay, *Experimentally Testing the Effectiveness of Human Rights Treaties*, 18 CHI. J. INT’L L. 164, 166–68 (2017); *see also* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171, 171–78 (2003); Eric A. Posner, *Some Skeptical Comments on Beth Simmons’s Mobilizing for Human Rights*, 44 N.Y.U. J. INT’L L. & POL. 819, 823–30 (2012).

¹⁷ For Moyn’s view on the debate, *see* Samuel Moyn, *Beyond the Human Rights Measurement Controversy*, 81 LAW & CONTEMP. PROBS., no. 4, 2018, at 121, 121–22. He argues that the controversy in the empirical literature over whether human rights treaties matter “[s]ettles [n]othing,” *id.* at 122, because “both sides have put similar or even identical intellectual and political options on the table” and that the debate “ought to end,” *id.* at 121.

¹⁸ *See infra* notes 265–266 and accompanying text.

¹⁹ *See infra* notes 285–287 and accompanying text.

well-known concepts of the Lorenz curve and the Gini coefficient and providing some stylized examples of how rights can improve equality *in theory*. This Part reveals that there are a number of different ways that law can promote economic equality other than by capping the wealth of the rich, including successful efforts to promote sufficiency and the protection of middle-class entitlements. Part II gives examples of how courts around the world have used rights to promote economic equality. It focuses especially on judicial interventions in austerity measures and regressive tax reform, as these most directly seek to mitigate the neoliberal agenda. It observes that not all these cases were decided based on social rights provisions, and that some courts used the rights to property and equality to promote economic equality. Part III concludes by exploring the lessons we can draw from these foreign examples.

I. RIGHTS AND MATERIAL EQUALITY

Before discussing how constitutional courts have sought to promote economic justice in specific cases, it is helpful to consider how judicial interventions can affect material equality in theory. Moyn's definition of equality — "how far individuals are from one another in the portion of [the] good things they get" (p. 3)²⁰ — is imprecise, and it raises a host of questions. For example, does equality increase if social rights advocacy efforts successfully lift up the poor? Moyn claims that helping the poor alone is not enough to improve equality (pp. 4–5), but surely, if the poor are made better off while everyone else stays the same, equality improves. Likewise, what happens to equality if the middle classes are made better off, while everyone else stays the same? *Not Enough* does not concern itself with such details. In many parts of the book, it appears that what Moyn really means by material equality is reducing the wealth of the rich, such as by establishing an income ceiling (pp. 112–13). Moyn wants us to escape from "Croesus's world," that is, a world in which the benevolent ruler Croesus generously provides for the poor, but grows ever richer himself (p. 212). Needless to say, capping the wealth of the rich can bring large equality gains. But if we want to consider the various ways in which law can promote equality, including those that are more modest, it is helpful to gain some precision.

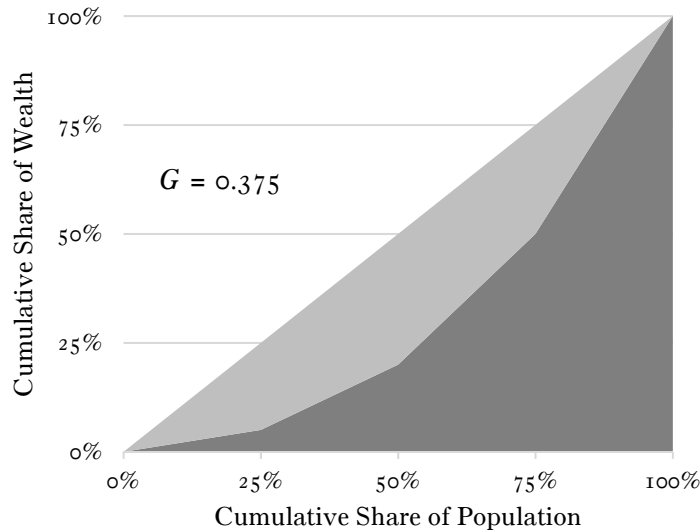
One useful way of thinking about the distribution of wealth in society is the Lorenz curve, along with the Gini coefficient.²¹ The Lorenz curve depicts the percentage of total wealth in a society (on the y-axis) that some poorest segment of society cumulatively holds (expressed as a

²⁰ Emphasis has been omitted.

²¹ See generally Anthony B. Atkinson, *On the Measurement of Inequality*, 2 J. ECON. THEORY 244, 244, 246–48 (1970); Lawrence Zelenak, *Of Head Taxes, Income Taxes, and Distributive Justice in American Health Care*, LAW & CONTEMP. PROBS., Autumn 2006, at 103, 105–06.

percentage of society, on the x -axis).²² Thus, a point on the Lorenz curve might represent an observation like: “The bottom twenty-five percent of the population holds five percent of the total wealth.” The more equal the society, the closer the Lorenz curve is to a forty-five-degree angle.²³ Indeed, when $x = y$, the Lorenz curve represents perfect equality of wealth (a “line of perfect equality”).²⁴ Notably, the Lorenz curve does not distinguish between rich and poor societies, given a fixed distribution: a society where no one owns anything is depicted identically to one where everyone is equally rich — as perfectly equal. Figure 1 depicts a hypothetical Lorenz curve for a stylized economy comprising one hundred wealth units, where the bottom quartile of the population has five units, the second quartile fifteen units, the third quartile thirty units, and the top quartile fifty units.²⁵

Figure 1: Lorenz Curve for a Hypothetical Economy



From the Lorenz curve, we can calculate a Gini coefficient, a widely used measure of economic inequality.²⁶ The Gini coefficient is the ratio of the area that lies between the line of perfect equality and the actual Lorenz curve to the total area below the line of equality.²⁷ The resulting

²² Atkinson, *supra* note 21, at 246.

²³ See Zelenak, *supra* note 21, at 106.

²⁴ See *id.*

²⁵ These stylized examples, and the figures and calculations based on them, assume that income is uniformly distributed within each quartile.

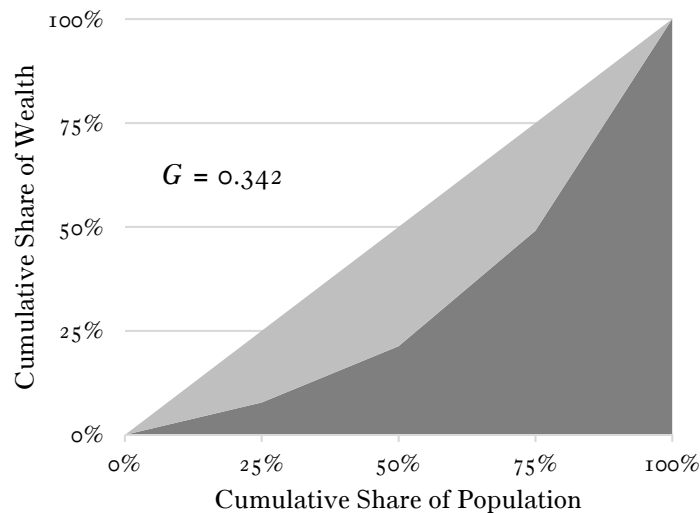
²⁶ See generally Atkinson, *supra* note 21, at 244, 255–56; Zelenak, *supra* note 21, at 105–06.

²⁷ See Zelenak, *supra* note 21, at 106.

Gini coefficient ranges from zero (perfect equality; everyone has equal wealth) to one (perfect inequality; the top percentile holds all wealth).²⁸ For the aforementioned stylized economy, the Gini coefficient is 0.375 (by comparison, in 2013, the Gini coefficient was 0.26 for Norway, 0.41 for the United States, and 0.53 for Colombia²⁹).

Using the Lorenz curve and Gini coefficient, we can depict the expected potential impact of different kinds of judicial interventions.³⁰ First, let us consider the scenario where courts order the provision of social rights–related goods and services to the poor alone (that is, they focus on “sufficiency” alone). Imagine that after a series of judicial interventions enforcing social rights in the stylized country in Figure 1, the bottom quartile gets an additional three wealth units. Assume that this represents extra money flowing into the economy, not resources taken from the higher-income groups. In this scenario, depicted in Figure 2, equality increases, as the Gini coefficient decreases from 0.375 to 0.342.³¹ Notably, if these additional resources came in whole or in part from higher-income groups, equality would also increase.

Figure 2: Lorenz Curve for Hypothetical Economy
After Wealth Increase for Poor



²⁸ See *id.*

²⁹ *World Development Indicators*, WORLD BANK (Dec. 20, 2019), <http://data.worldbank.org/data-catalog/world-development-indicators> [https://perma.cc/7CEF-CTX8].

³⁰ These stylized examples were originally calculated and plotted with an online Gini coefficient calculator. See Buck Shlegeris, GINI COEFFICIENT CALCULATOR, <http://shlegeris.com/gini> [https://perma.cc/H3ZD-YQ98].

³¹ See *id.*

This simple exercise reveals an important insight: successful efforts to promote sufficiency alone *do* improve material equality in most instances. In fact, in many cases, equality can increase *even* if the rich also gain for other reasons. First, consider a scenario in which the bottom quartile gains three wealth units due to social rights, while the top quartile gains the same for other reasons. In this scenario, the Gini coefficient decreases from 0.375 to 0.354.³² Thus, equality increases, chiefly because the three units represent a relatively larger increase for the bottom quartile than for the top quartile. It is only when the rich gain more than the poor that inequality increases. But even then, the poor are still made better off by these interventions — meaning that equality increases relative to a world in which the rich would have grown richer anyway and the poor would not have been lifted up by the courts. Ultimately, interventions intended to lift up the poor only decrease equality if the top quartile gains more than the poor *because of* those interventions, which seems unlikely. Moyn no doubt concludes that all of this falls short of his transformative vision and, therefore, is not enough. Yet, for the sake of analytical clarity, it is important to note that material equality *does* improve when efforts to promote sufficiency are successful.

Second, assume a scenario in which judicial interventions seek to lift up the poor and the middle classes alike. In the same stylized economy, if the same judicial interventions were directed at the bottom two income quartiles and each gained three additional income units, the Gini coefficient would decrease from 0.375 to 0.325.³³ Notably, equality would increase even further if these same interventions also reached the upper middle classes (or the third quartile): when the bottom three quartiles each gain three additional income units, the Gini coefficient decreases from 0.375 to 0.323.³⁴

Third, assume a scenario in which only the middle classes gain from judicial interventions, and the poor do not. In this scenario — which is relevant to some of the courts that have been criticized for focusing on the middle classes — equality increases as well. If both the lower and middle classes gain from judicial interventions (in our stylized economy, this means that the second and third income quartiles each gain three units), the Gini coefficient decreases from 0.375 to 0.354.³⁵ (By contrast, if only the second income quartile gained three units, the Gini coefficient

³² See *id.*

³³ See *id.*

³⁴ See *id.* The examples assume that judicial interventions that reach more people increase the number of wealth units flowing into the economy. If the number of wealth units flowing into the economy were fixed, then giving money to the poor as well as the middle classes would increase equality relative to the situation where no interventions were made but decrease equality relative to a situation where all these additional wealth units were given to the poor alone.

³⁵ See *id.*

would decrease from 0.375 to 0.357, and if only the third quartile gained three units, the Gini coefficient would decrease from 0.375 to 0.371.³⁶) This simple exercise suggests that, contrary to suggestions in the literature,³⁷ when rights are deployed exclusively toward protecting the middle classes, overall equality improves in many cases, thus benefiting the poor as well as the middle classes. Equality would decrease if these additional resources directed toward the middle classes were taken directly from the poor, but this scenario is unlikely.³⁸

Finally, it is worth noting that many of the judicial interventions discussed in the next section do not seek to provide goods and services to those without, but rather seek to prevent the cutting of existing social services.³⁹ That is, they have the character of negative injunctions: they invalidate measures that would have cut existing welfare programs.⁴⁰ Such interventions do not strictly speaking cause equality to increase, but, by blocking regressive policies, they do prevent *inequality* from increasing.⁴¹ Thus, even if the main contribution of human rights law has been to prevent the dismantling of some existing welfare programs, it may have impacted equality positively.

At this point, a caveat is in order. The stylized examples above assume that we know who benefits from judicial decisions. In practice, however, it can be difficult to disentangle the distributive effect of social rights cases. Indeed, this question has spurred substantial debate in the literature. Some studies have argued that when courts focus on the provision of social rights–related goods and services to individual litigants, the distributive impact of judicial involvement might be limited, since society’s poorest are less likely to litigate than middle-class citizens.⁴²

³⁶ See *id.*

³⁷ See *infra* notes 243–251 and accompanying text.

³⁸ In theory, equality can also decrease if the benefits to the middle class are so extensive as to raise their incomes above that of the existing upper class.

³⁹ See *infra* pp. 2036–37, 2039–41.

⁴⁰ See David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 199–201 (2012).

⁴¹ Cf. *id.* at 233 (explaining that benefits “can be attractive targets for governments that urgently need to cut budget deficits”).

⁴² See Daniel M. Brinks & Varun Gauri, *The Law’s Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights*, 12 PERSP. ON POL. 375, 382, 386–87 (2014) (finding that when courts focus mainly on the provision of social rights–related goods and services in individual cases as opposed to collective cases, the poor are more likely to be underrepresented relative to the general population); Virgílio Afonso Da Silva & Fernanda Vargas Terrazas, *Claiming the Right to Health in Brazilian Courts: The Exclusion of the Already Excluded?*, 36 LAW & SOC. INQUIRY 825, 840–42 (2011) (finding that healthcare litigation in Brazil mostly benefits the middle and upper classes); Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1660–62 (2011) (same); Landau, *supra* note 40, at 202–03 (finding that, despite its commitment to aiding economically marginalized groups, the Colombian Constitutional Court has nevertheless primarily aided middle- and upper-class litigants).

Others have contested these claims.⁴³ But importantly, as the foregoing analysis reveals, even when *only* middle-class litigants benefit, judicial involvement can still bring equality gains. Most of the judicial decisions reviewed in Part II have the character of negative injunctions: they invalidate austerity measures that would have cut wages and pensions of public servants.⁴⁴ While such decisions are not squarely focused on the poor, they nonetheless represent equality gains when they successfully protect public servants, many of whom receive lower pensions and wages than private sector workers.⁴⁵ While there is no doubt that the

⁴³ Some point to the limits in data and methods. See Tatiana S. Andia & Everaldo Lamprea, *Is the Judicialization of Health Care Bad for Equity? A Scoping Review*, 18 INT'L J. FOR EQUITY HEALTH, article no. 61, at 1, 6, 8–10 (2019) (reviewing empirical studies on equity outcomes from judicial action in Brazil, Colombia, Costa Rica, and Argentina, and concluding that they suffer from methodological limitations and rely on problematic evidence). Others have suggested that individualized enforcement for middle-class litigants can have important spillover effects on the poor. Daniel M. Brinks & William Forbath, Commentary, *Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for Pro-poor Interventions*, 89 TEX. L. REV. 1943, 1952 (2011); Danielle da Costa Leite Borges, *Individual Health Care Litigation in Brazil Through a Different Lens: Strengthening Health Technology Assessment and New Models of Health Care Governance*, HEALTH & HUM. RTS. J., June 2018, at 147, 149 (finding that the individual cases in Brazil may produce a fairer and more efficient healthcare system overall); David Landau & Rosalind Dixon, *Constitutional Non-transformation? Socioeconomic Rights Beyond the Poor*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 110, 112 (Katharine G. Young ed., 2019); Mariana Mota Prado, *The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help?*, 41 J.L. MED. & ETHICS 124, 125 (2013) (suggesting that there might be important systemic effects of individual litigation in Brazil that are underappreciated by the literature); Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 192–96 (2013) (showing the broader systemic effect of Colombian healthcare litigation, including legislative reform). There likewise exists debate over the distributive impact of judicial decisions that order the state to provide collective goods. Compare Brinks & Gauri, *supra* note 42, at 378–79, 386–87 (studying the distributive impact of judicial decisions in Indonesia, Brazil, South Africa, Colombia, India, and Nigeria and finding that equality gains are largest when decisions have collective effects, which arise either because the rulings directly order the provision of collective goods or because individual decisions create incentives for powerful actors to produce collective goods), with Martín Sigal et al., *Argentina: Implementation of Collective Cases*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE 140, 172 (Malcolm Langford et al. eds., 2017) (concluding that cases aimed at structural change are unlikely to achieve their goals in the short or medium term, but may help generate “the necessary institutional preconditions” for change).

⁴⁴ See *infra* sections II.A–II.C, pp. 2031–52.

⁴⁵ Especially since public sector wages and pensions are more equally distributed than those in the private sector, such rulings are likely to improve material equality. See, e.g., Dale Belman & John S. Heywood, *Public-Sector Wage Comparability: The Role of Earnings Dispersion*, 32 PUB. FIN. REV. 567, 568 (2004) (“It is well known that public-sector earnings show less dispersion than private-sector earnings do.”); see also Claudio Lucifora & Dominique Meurs, *The Public Sector Pay Gap in France, Great Britain and Italy*, 52 REV. INCOME & WEALTH 43, 43–44 (2006) (“[P]ay dispersion is usually found to be lower in the public sector with respect to the private sector.”); Evangelia Papapetrou, *The Public-Private Sector Pay Differential in Greece*, 34 PUB. FIN. REV. 450, 460 tbl.2 (2006) (showing less dispersion among public sector wages than among private-sector wages). On the distributive effect of pensions, see, for example, 2 SOC. PROT. COMM. & EUROPEAN COMM., PENSION ADEQUACY REPORT 2018, at 136–37 (2018),

distributive politics of judicial decisions can be messy, there are many scenarios in which equality gains are made, including those cases in which courts lift up the middle classes alone.

II. NOT NOTHING: CONSTITUTIONAL COURTS AND ECONOMIC EQUALITY

This Part explores the different ways in which national courts have used their constitutions to promote material equality. This angle is mostly absent from *Not Enough*, which spends only four pages on domestic litigation, with much of the discussion devoted to the South African Constitutional Court's well-known 2000 decision on the right to housing, *Republic of South Africa v. Grootboom*⁴⁶ (pp. 198–201). Based on his four-page survey, Moyn concludes that efforts to judicially enforce social rights have been rather limited and that the impact of such litigation has been disappointing (p. 201). This characterization, however, does not square with insights from a voluminous literature in comparative constitutional law. First, this literature has shown that the judicial enforcement of social rights is far more widespread than Moyn suggests. Over eighty percent of all constitutions today include social rights,⁴⁷ and many courts enforce these rights directly.⁴⁸ This approach has been taken by a range of courts in Latin America,⁴⁹ continental Europe,⁵⁰ and Israel,⁵¹ along with a growing number of courts in Asia

<https://op.europa.eu/en/publication-detail/-/publication/62f83ed2-7821-11e8-ac6a-01aa75ed71a1/language-en> [https://perma.cc/2EKH-5BLP].

⁴⁶ 2000 (11) BCLR 1169 (CC) (S. Afr.). In this case, the South African Constitutional Court opted for a deferential approach, comprised of reasonableness review, to the South African Constitution's right to housing. *See id.* at 1188 para. 33. The court merely required the government to put a "reasonable" housing policy in place, without reviewing the content of that policy. *Id.*; *see* David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710, 726 (2014).

⁴⁷ *See* Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1053–54 & tbl.2 (2014).

⁴⁸ *See* Salma Yusuf, *The Rise of Judicially Enforced Economic, Social, and Cultural Rights — Refocusing Perspectives*, 10 SEATTLE J. FOR SOC. JUST. 753, 754–55 (2012); *see also* INT'L COMM'N OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 107–16 (2008), <https://www.refworld.org/pdfid/4a7840562.pdf> [https://perma.cc/3W5V-GKTC] (listing social rights cases from twenty-three countries); Colleen M. Flood et al., *Introduction: Legislating and Litigating Health Care Rights Around the World*, 33 J.L. MED. & ETHICS 636, 636 (2005) (mentioning cases from Canada, Israel, the United Kingdom, the Netherlands, and Norway, among others); Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in SOCIAL RIGHTS JURISPRUDENCE 3, 11–29 (Malcolm Langford ed., 2008) (analyzing a number of social rights cases from around twenty-nine national and international jurisdictions).

⁴⁹ INT'L COMM'N OF JURISTS, *supra* note 48, at 51.

⁵⁰ *See, e.g., id.* at 109–16.

⁵¹ *See* Daphne Barak-Erez & Aeyal M. Gross, *Social Citizenship: The Neglected Aspect of Israeli Constitutional Law*, in EXPLORING SOCIAL RIGHTS 243, 248–50 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

(for example, in India,⁵² Indonesia,⁵³ Nepal,⁵⁴ Bangladesh,⁵⁵ Sri Lanka,⁵⁶ and Pakistan⁵⁷) and Africa (for instance, in Kenya,⁵⁸ Nigeria,⁵⁹ and South Africa⁶⁰). Second, some of these courts have been quite activist in enforcing these rights. Indeed, the South African Constitutional Court's rather deferential approach to social rights enforcement, which appears to be the basis for Moyn's claim, is not representative of the global trend.⁶¹ Third, judicial interventions to promote economic equality in the context of austerity measures and tax reform have been based not only on social rights but also on the rights to property and equality.⁶²

This Part seeks to provide a more comprehensive overview of how rights can be deployed to promote equality and to show that such an endeavor is not beyond the realm of possibility. Needless to say, the overview provided here is not complete. It features only those countries

⁵² See Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST. L. 739, 742–43 (2010).

⁵³ See, e.g., Mahkamah Konstitusi Republik Indonesia [Constitutional Court of Indonesia] Case No. 026/PUU-III/2005 (Mar. 22, 2006), https://mkri.id/public/content/persidangan/putusan/putusan_sidang_026_PUU-III_2005.pdf [https://perma.cc/F52P-YWQR] (declaring 2006 Indonesian budget law unconstitutional). See generally Bivitri Susanti, *The Implementation of the Rights to Health Care and Education in Indonesia*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 224, 236–42 (Varun Gauri & Daniel M. Brinks eds., 2008).

⁵⁴ See Ananda M. Bhattarai, *Access of the Poor to Justice: The Trials and Tribulations of ESC Rights Adjudication in South Asia*, N.J.A.L.J., Special Issue, 2012, at 1, 7, 10–11, 13, 16.

⁵⁵ See *id.* at 4–5, 7, 18–19, 21, 28.

⁵⁶ See *id.* at 4, 28.

⁵⁷ See *id.* at 7, 10–11, 18–19, 28–29.

⁵⁸ E. AFRICAN CTR. FOR HUMAN RIGHTS, A COMPENDIUM ON ECONOMIC AND SOCIAL RIGHTS CASES UNDER THE CONSTITUTION OF KENYA, 2010, at 45 (2015), http://eachrights.or.ke/wp-content/uploads/2017/12/A_Compendium_On_Economic_And_Social_Rights_Cases_Under_The_Constitution_Of_Kenya_2010.pdf [https://perma.cc/J8RY-U5EG].

⁵⁹ See Chidi Anselm Odinkalu, *The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD, *supra* note 53, at 183, 219 (reviewing social rights cases, and concluding that Nigerian economic and social rights jurisprudence is “episodic, sparse, and incoherent”).

⁶⁰ The South African Constitutional Court's enforcement of social rights has been widely celebrated. See, e.g., Cass R. Sunstein, *Social and Economic Rights?: Lessons from South Africa*, 11 CONST. F. 123, 123 (2001). Yet the court has also been criticized for its deferential approach. See, e.g., David Bilchitz, *Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 484 (2002). For an account of how the constitutional court's jurisprudence has evolved, see generally BRIAN RAY, *ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE* (2016).

⁶¹ Landau, *supra* note 40, at 199.

⁶² See Claire Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, in CONSTITUTIONAL CHANGE THROUGH EURO-CRISIS LAW 279, 294–95 (Thomas Beukers et al. eds., 2017) (observing that different courts have used different rights as bases for reviewing austerity measures).

where there has been legal action, not those where nothing has happened.⁶³ It does not trace whether these decisions were actually implemented or the extent to which they made an impact. And, finally, it does not survey all the possible ways in which courts have promoted material equality, but highlights instead judicial interventions that target austerity measures and regressive tax reform, since these are widely seen as the hallmark of a neoliberal agenda.⁶⁴ Some of these interventions are based on social rights (section II.A), others are based on the right to property (section II.B), and yet others are based on the right to equality (section II.C).

A. Social Rights: Minimum Core and Proportionality Review

There are at least two broad approaches through which courts have used social rights to tackle material equality: (1) the minimum core doctrine and (2) proportionality review based on social rights.

1. *A Maximalist Approach to the Minimum Core.* — *Not Enough* is not particularly concerned with human rights doctrine. It merely observes that whatever minimal effort has been made toward promoting economic equality has focused on social rights, but that these rights have been deployed toward sufficiency, or lifting up the poor (pp. 112-13). Presumably, the basis for this claim is the “minimum core doctrine,” developed by the Committee on Economic, Social and Cultural Rights, which interprets the International Covenant on Economic, Social and Cultural Rights⁶⁵ (ICESCR). While the guiding principle of the ICESCR is that social rights can be realized gradually, as states “take steps . . . to the maximum of [their] available resources”⁶⁶ (the principle of “progressive realization”), the minimum core obligation to “ensure the satisfaction of . . . minimum essential levels of each of the rights” is immediate.⁶⁷ Although the exact content of the minimum core varies

⁶³ Not all countries that have social rights in their constitution have activist courts willing to enforce them. For a typology of judicial postures toward social rights, see Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 INT’L J. CONST. L. 385, 388-409 (2010). See also Malcolm Langford, *Judicial Politics and Social Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 43, at 66, 69-70 (describing archetypes of court postures toward activist social rights adjudication).

⁶⁴ See, e.g., Trevor George Gardner, *Right at Home: Modeling Sub-federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 565 (2019).

⁶⁵ Adopted Dec. 16, 1966, 993 U.N.T.S. 3.

⁶⁶ *Id.* art. 2, ¶ 1; see also Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, ¶ 9, U.N. Doc. E/1991/23 (1990) [hereinafter *General Comment No. 3*], reprinted in 1 INTERNATIONAL HUMAN RIGHTS INSTRUMENTS: COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES 7, 9, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008), https://www.ohchr.org/Documents/HRBodies/TB/HRI-GEN-1-REV-9-VOL-I_en.doc [https://perma.cc/F34A-9MSY].

⁶⁷ See *General Comment No. 3*, *supra* note 66, ¶ 10.

from country to country, emergency healthcare, protection from starvation, and the opportunity to obtain basic literacy are often mentioned as examples of the minimum core of social rights.⁶⁸ What is more, the Committee has clarified that, even in times of economic crisis, the minimum core must be respected.⁶⁹

Many national courts have likewise found that the social rights in their constitutions include a minimum floor below which people cannot fall. And some of these courts have interpreted that floor quite generously. Colombian courts' approach to healthcare offers a well-known example.⁷⁰

The main mechanism for enforcing the right to healthcare, provided for in Colombia's constitution, is *acción de tutela*: an action that can be filed before any judge when an individual's fundamental rights are violated or threatened.⁷¹ The judge hearing the case is legally required to give priority consideration to a *tutela* by reaching a decision within ten days.⁷² Notably, this decision applies to the plaintiff only and does not have *erga omnes* effect.⁷³ The easy availability of judicial recourse created by the *tutela*, along with the many structural problems in the Colombian healthcare systems, caused hundreds of thousands of Colombians to bring healthcare claims before the courts.⁷⁴ The typical *tutela* claim concerned plaintiffs seeking access to treatments denied or delayed by their insurance company.⁷⁵ Some claims concerned treatments that were included in plaintiffs' public benefit plans but that were wrongfully denied; others involved treatments not covered by the

⁶⁸ *Id.*; see also Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 128 (2008).

⁶⁹ Letter from Ariranga G. Pillay, Chairperson, Comm. on Econ., Soc. & Cultural Rights, to All States Parties to ICESCR, Ref. No. CESCR/48th/SP/MAB/SW, at 2 (May 16, 2012), <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf> [<https://perma.cc/46DG-FUMC>].

⁷⁰ See, e.g., David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 267, 267–68 (Aoife Nolan ed., 2014); Landau, *supra* note 40, at 213–15; Alicia Ely Yamin & Oscar Parra-Vera, *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, 6 PLOS MED. 147, 147–50 (2009); Young & Lemaitre, *supra* note 43, at 192–93.

⁷¹ Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 552–53 (2004).

⁷² *Id.* at 553.

⁷³ See MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 377 (2017) (“The prototypical order in a *tutela* case runs only *inter partes* — that is, it affects only the parties to the decision.”).

⁷⁴ For an account, see Landau, *supra* note 40, at 202–29. See also CHILTON & VERSTEEG, *supra* note 16 (manuscript at 192–206).

⁷⁵ See Oscar Bernal et al., *The Judicialization of Health in Colombia*, 1 GLOBAL VIRTUAL CONF. 310, 311 (2013).

Colombian public healthcare system.⁷⁶ Judges hearing these claims typically employed the minimum core doctrine to evaluate them: they would ask whether the treatment was necessary to enjoy a fundamental minimum, or *mínimo vital*, of the rights to life and human dignity (and therefore affected the right to healthcare).⁷⁷ If so, they would order the state to provide the treatment to the plaintiff.⁷⁸ The Human Rights Ombuds Office calculated that, between 1999 and 2005, about 328,191 healthcare *tutelas* were filed; the plaintiff was successful in around eighty percent of these.⁷⁹

It has been observed that, throughout the early 2000s, Colombian courts became increasingly generous in applying the minimum core doctrine in the health context.⁸⁰ One reason is that, as the number of healthcare *tutelas* multiplied, especially during Colombia's economic crisis of the late 1990s, courts started to simply grant claims, without serious application of the minimum core doctrine to the plaintiff's case.⁸¹ As a result, they would issue orders that went well beyond basic survival alone.⁸² Among other things, courts ordered the state to pay for state-of-the-art treatments abroad and expensive pharmaceuticals not covered in the healthcare plans.⁸³ What is more, these treatments were made available to all those who litigated, which included many middle-class litigants.⁸⁴

Colombian courts' approach to the right to healthcare has generated much criticism and has spurred much debate over whether the widespread use of the *tutela* by middle-class litigants was appropriate, and whether this might even hurt the poor.⁸⁵ Yet, as shown in Part I, as

⁷⁶ *Id.* at 312.

⁷⁷ See Landau, *supra* note 40, at 207–08. When the constitution was first adopted, it was unclear whether the *tutela* was available for social rights: the constitution made it available for “fundamental rights,” and most social rights were not listed in the constitution's fundamental rights section. *Id.* at 207. The court addressed this problem in case T-426 of 1992, in which it held that even though social rights are not listed as fundamental rights, they become fundamental when their minimum core is affected. See Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-426/92, §§ 5, 9 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/1992/T-426-92.htm> [<https://perma.cc/3FZS-WP79>]. See generally ESPINOSA & LANDAU, *supra* note 73, at 150–52.

⁷⁸ See CHILTON & VERSTEEG, *supra* note 16 (manuscript at 199–200).

⁷⁹ Yamin & Parra-Vera, *supra* note 70, at 147.

⁸⁰ Landau, *supra* note 40, at 213–14; Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431, 440 (2010).

⁸¹ See Landau, *supra* note 70, at 277; see also Pablo Rueda, *Legal Language and Social Change During Colombia's Economic Crisis*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 25, 43–45 (Javier A. Couso et al. eds., 2010).

⁸² See Landau, *supra* note 70, at 277–78; Yamin & Parra-Vera, *supra* note 80, at 440.

⁸³ See, e.g., Yamin & Parra-Vera, *supra* note 80, at 440.

⁸⁴ Landau, *supra* note 40, at 213–14.

⁸⁵ See, e.g., Govind Persad, *The Medical Cost Pandemic: Why Limiting Access to Cost-Effective Treatments Hurts the Global Poor*, 15 CHI. J. INT'L L. 559, 582–83 (2015).

long as the provision of healthcare to the middle classes does not come directly at the expense of healthcare for the poor, equality likely improves.⁸⁶ But, more importantly, my own best reading of the official statistics is that both the poor and the middle classes benefited from the *tutela*. One study that analyzes a representative sample of 1301 healthcare *tutelas* finds that 49% of these *tutelas* were filed by those without formal-sector employment, mostly the urban poor, while 47.4% were filed by litigants with formal-sector jobs (middle- and upper-class litigants).⁸⁷ The same study further found that the plurality of *tutelas* (some 31%) were filed by those making an average of COP 572,772,⁸⁸ or some USD 298 per month⁸⁹ (just under the minimum wage at the time the study was conducted⁹⁰), revealing that the lower middle class made significant use of the *tutela* mechanism.⁹¹ Perhaps more importantly, the widespread use of the *tutela* ultimately caused more structural interventions by the constitutional court, which ordered a major overhaul of the healthcare system as a whole and, among other things, demanded the equalization of healthcare benefits for those with and without formal-sector employment.⁹² While a full account of these events is beyond the scope of this Review, observers have noted that, over time, the many judicial healthcare interventions brought about substantial equality gains in the Colombian healthcare system, especially for those without formal-sector employment.⁹³

⁸⁶ See *supra* pp. 2023–27.

⁸⁷ Bernal et al., *supra* note 75, at 310–11.

⁸⁸ See *id.* at 311 & tbl.1.

⁸⁹ This calculation is based on the 2013 exchange rate. U.S. DEP'T OF THE TREASURY, TREASURY REPORTING RATES OF EXCHANGE AS OF DECEMBER 31, 2013, at 1 (2014), <https://www.fiscal.treasury.gov/files/reports-statements/treasury-reporting-rates-exchange/intn-12-31-2013.pdf> [<https://perma.cc/V6ZP-EKHN>].

⁹⁰ Maren Soendergaard, *Colombia Sets Minimum Wage Increase for 2014 at 4.5%*, COLOM. REP. (Dec. 27, 2013), <https://colombiareports.com/colombias-minimum-wage-set-4-5-increase-2014> [<https://perma.cc/J2JN-LWCP>].

⁹¹ See Bernal et al., *supra* note 75, at 311. One study further found that waiting times to see a specialist are actually higher for higher-income groups, and suggests that this explains their frequent use of the *tutela*. See OECD, OECD REVIEWS OF HEALTH SYSTEMS: COLOMBIA 2016, at 76 (2016), <https://www.oecd-ilibrary.org/docserver/9789264248908-en.pdf> [<https://perma.cc/ARP7-DZ9E>].

⁹² See generally Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760/08 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm> [<https://perma.cc/B4AR-K5ZY>]. For a discussion, see Alicia Ely Yamin, *Decision T-760 (2008) (Colom)*, OXFORD CONST. L. (Nov. 2017), <http://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e742> [<https://perma.cc/J6Y8-9C8B>].

⁹³ See CHILTON & VERSTEEG, *supra* note 16 (manuscript at 203–06).

This use of the minimum core doctrine is not unique to Colombia; other courts, including those in Mexico,⁹⁴ Venezuela,⁹⁵ Uruguay,⁹⁶ Costa Rica,⁹⁷ Argentina,⁹⁸ Israel,⁹⁹ and Italy,¹⁰⁰ have likewise found that the social rights in their constitutions include a minimum floor below which people cannot fall. What is more, some of these courts have interpreted the minimum core quite generously, going well beyond basic subsistence alone.¹⁰¹ Of course, we should not be naive about this type of judicial

⁹⁴ See Adolfo S. Azcuna, *The Writ of Amparo: A Remedy to Enforce Fundamental Rights*, 37 ATENEO L.J., no. 2, 1993, at 13, 13–15; see also *infra* note 120 and accompanying text.

⁹⁵ See Enrique Gonzalez, *Venezuela: A Distinct Path Towards Social Justice*, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 48, at 192, 199–207.

⁹⁶ See Lucía Berro Pizarossa et al., *How the Uruguayan Judiciary Shapes Access to High-Priced Medicines: A Critique Through the Right to Health Lens*, HEALTH & HUM. RTS. J., June 2018, at 93, 94–95.

⁹⁷ See Olman Rodríguez Loaiza et al., *Revisiting Health Rights Litigation and Access to Medications in Costa Rica: Preliminary Evidence from the Cochrane Collaboration Reform*, HEALTH & HUM. RTS. J., June 2018, at 79, 81–83; Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 47, 59 (Rachel Sieder et al. eds., 2005); Bruce M. Wilson & Olman A. Rodríguez, *Costa Rica: Understanding Variations in Compliance*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE, *supra* note 43, at 111, 111, 118–19.

⁹⁸ See Christian Courtis, *Argentina: Some Promising Signs*, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 48, at 163, 167–80; see also Gustavo Maurino & Ezequiel Nino, *Economic and Social Rights and the Supreme Court of Argentina in the Decade Following the 2001–2003 Crisis*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS, *supra* note 70, at 299, 310–20.

⁹⁹ Barak-Erez & Gross, *supra* note 51, at 248–51 (discussing CA 4905/98 *Gamzu v. Yeshaiah* 55(3) PD 360 (2001) (Isr.) and HCJ 366/03 *Commitment to Peace & Social Justice Ass'n v. Minister of Finance* 60(3) PD 464 (2005) (Isr.), in which the Israeli Supreme Court found there was a “minimum of human existence” in the Basic Law’s human dignity provision, Barak-Erez & Gross, *supra* note 51, at 248 (quoting *Gamzu*, 55(3) PD at 375)). Since then, the Israeli Supreme Court has only further increased the protection of social rights. See HCJ 10662/04 *Hassan v. Nat'l Ins. Inst.* 65(1) PD 782 (2012) (Isr.), translated in *Hassan v. National Insurance Institute*, VERSA, <https://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute> [<https://perma.cc/9AGW-DDV8>].

¹⁰⁰ See Diletta Tega, *Welfare Rights and Economic Crisis Before the Italian Constitutional Court*, 4 EUR. SOC. J. 63, 70 (2014) (listing several cases in which “[t]he [Italian Constitutional] Court ruled against legislative measures . . . when the ‘essential core’ of a constitutional entitlement had been infringed”).

¹⁰¹ Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD, *supra* note 53, at 100, 115–27 (analyzing the characteristics and outcomes of some 7,400 healthcare *amparos* — procedural tools similar to *tutelas* — filed between 1994 and 2004 in five Brazilian states, and telling a story similar to Colombia’s). The Brazilian case, however, has generated a lot of debate on how these interventions have impacted equality. Compare Ferraz, *supra* note 42, at 1660–62, with João Biehl et al., *The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil*, HEALTH & HUM. RTS. J., June 2016, at 209, 212. Other courts, however, have not used the minimum core principle to intervene in policies that affect larger swaths of the population, and have interpreted the principle in a more minimalist fashion. See, e.g., Barak-Erez & Gross, *supra* note 51, at 250–52 (observing how the Israeli Supreme Court’s focus on a basic minimum alone meant it did not intervene in austerity measures).

activism, especially when it is focused on the provision of social rights–related goods and services to individual litigants: such decisions may remain unimplemented and have various unintended consequences. This Review is not the place to discuss all the potential shortcomings of such activism, although I have done so elsewhere.¹⁰² But, at minimum, we can appreciate its impact on equality *in theory*: when courts successfully order social rights–related goods and services for the poor and the middle classes, gains in equality might be substantial.

The minimum core doctrine has been used not only to provide access to social rights–related goods and services but also to protect existing entitlements, especially in the face of austerity measures that squeeze the middle class. The Colombian Constitutional Court is again illustrative. In the wake of Colombia’s financial crisis of the late 1990s, the court undertook a number of structural interventions intended to “aid the struggling middle class.”¹⁰³ One notable decision concerned the salaries of public sector workers. Faced with major budgetary constraints, the government proposed a budget that made adjustments for inflation to the salaries of only those public sector workers who made less than twice the minimum wage, with no increases for those who made more than that.¹⁰⁴ Relying on the minimum core doctrine, the court held that all public sector workers were entitled to salary raises to account for inflation and struck down the budget.¹⁰⁵ In doing so, it used the minimum core doctrine to protect the middle classes, since the salaries of the lowest-income workers would have been adjusted regardless. The court has been severely criticized for this decision, as well as some of its other interventions, in part because of its use of social rights to protect the middle class.¹⁰⁶ Observers have noted that the court has become more cautious since the end of the economic crisis, and has redirected its minimum core jurisprudence toward the poor.¹⁰⁷ Yet it has continued to scrutinize austerity measures for their compatibility with the minimum core.¹⁰⁸ And importantly, as noted, even interventions that benefit the middle class alone can represent equality gains.

¹⁰² See CHILTON & VERSTEEG, *supra* note 16 (manuscript at 192–206); see also Malcolm Langford et al., *Introduction: From Jurisprudence to Compliance*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE, *supra* note 43, at 3–4.

¹⁰³ Landau, *supra* note 70, at 278.

¹⁰⁴ *Id.* at 279.

¹⁰⁵ See Corte Constitucional [C.C.] [Constitutional Court], octubre 23, 2000, Sentencia C-1433/00, §§ VI.2.6–2.7, .2.11 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2000/c-1433-00.htm> [<https://perma.cc/MAQ4-9P3G>]; Landau, *supra* note 40, at 219–21.

¹⁰⁶ Landau, *supra* note 70, at 279.

¹⁰⁷ See *id.* at 281.

¹⁰⁸ See *id.* at 273–74.

Another example comes from Russia. In 1997, the newly reopened Russian Constitutional Court¹⁰⁹ held unconstitutional a law that scaled back unemployment benefits so that most workers could not receive more than thirty days of unemployment benefits a year.¹¹⁰ The court held that the law violated the right to social security enshrined in the Russian Constitution,¹¹¹ and used some version of the minimum core doctrine to do so.¹¹² It held that the right to social security and the right to unemployment benefits required the state to provide citizens with a basic minimum of subsistence through monetary payments.¹¹³ After analyzing the social security schemes enshrined in federal law, the court concluded that “[n]o minimal material provision is guaranteed to a sufficient degree to unemployed citizens within the framework of . . . social security [laws].”¹¹⁴ More concretely, by not providing another source for basic subsistence, the law violated the right to social security.¹¹⁵ Considering that the official unemployment rate at the time was close to twelve percent,¹¹⁶ the decision could potentially have allocated resources to millions of Russians without work.¹¹⁷

The minimum core doctrine has also been used by courts to scrutinize tax policies. Colombia and Mexico offer examples. Courts in both countries have mainly scrutinized the distributive implications of tax policy based on the right to equality, yet they have also held that tax policies cannot infringe upon the minimum core required for a dignified

¹⁰⁹ See Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1953–54 (2004).

¹¹⁰ Po delu o proverke konstitutsionnosti polozheniya abzatsa shestovo punkta 1 stat’i 28 zakona Rossiyskoy federatsii ot 19 aprelya 1991 goda «O zanyatosti naseleniya v Rossiyskoy federatsii» v redaktsii ot 20 aprelya 1996 goda. [Decree No. 20-P of the Constitutional Court of the Russian Federation of Dec. 16, 1997], SOBRANIE ZAKONODATEL’STVA ROSSIYSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1997, No. 51, Item 5878, translated in *In the Case Concerning Verification of the Constitutionality of the Provisions of the Sixth Paragraph of Point 1 of Article 28 of the Law of the Russian Federation of 19 April 1991 “On Employment of the Population in the Russian Federation” as Amended Through 20 April 1996*, 36 STATUTES & DECISIONS 11, 17 (Sarah J. Reynolds trans., 2000) [hereinafter Case 20-P]. For context, see generally Scheppele, *supra* note 109, at 1949–59.

¹¹¹ See KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 39 (Russ.).

¹¹² See Scheppele, *supra* note 109, at 1954–55.

¹¹³ Case 20-P, *supra* note 110, at 14 (observing that “[s]ocial security is achieved by means of monetary payments” and that the basic content of the right to social security “consists specifically of material provision, [that is] the provision to a person of the means of subsistence” (alteration in original)).

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.* at 17.

¹¹⁶ See *Russia Unemployment Rate 1991–2020*, MACROTRENDS, <https://www.macrotrends.net/countries/RUS/russia/unemployment-rate> [<https://perma.cc/7SCV-L9UG>].

¹¹⁷ The decision, however, was mostly ignored by the government. See Scheppele, *supra* note 109, at 1955.

existence.¹¹⁸ In one notable decision, the Colombian Constitutional Court struck down a two percent value-added tax on nutritional products and medications that were previously exempted from taxation on the ground that the tax infringed upon the minimum core (as well as the right to equality).¹¹⁹ The Mexican Supreme Court has likewise held that the minimum core principle trumps economic considerations in taxation.¹²⁰ Section II.C discusses these cases in more detail, as the main basis for these courts' tax jurisprudence is the right to equality.

2. *Proportionality Review.* — The minimum core doctrine is not the only means by which social rights have been used to promote economic equality beyond a basic minimum for the poor alone. Some courts have used proportionality review when reviewing social rights, which negates the need to define social rights' basic minimum. Proportionality review is arguably the most widely used method for interpreting rights globally.¹²¹ It can be conceived of as two steps: (1) determining whether a right has been violated, where the right is typically broadly construed, and (2) evaluating whether the violation is nonetheless justifiable because its objective is legitimate and the violation is proportional to the importance of its objective.¹²² Importantly, because a right is broadly construed when determining the violation, it is often unnecessary for the

¹¹⁸ See, e.g., Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, § VIII.4.5.3.3.2 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm> [<https://perma.cc/3DB7-68YQ>] ("The fundamental right to a vital minimum . . . constitutes a limit to the tax power of the State and a mandate that guides State intervention in the economy."); Subsidio para el empleo argumenta violación a las garantías contenidas en los artículos 31, fracción IV; y 72 Constitucionales, Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 2237/2009, Página 87 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=114032> [<https://perma.cc/64EH-TD7M>]; see also Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2015, Sentencia C-492/15, § VI.44 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2015/c-492-15.htm> [<https://perma.cc/9CHT-4HQW>]; Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2014, Sentencia C-100/14, §§ VI.23, .25 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2014/c-100-14.htm> [<https://perma.cc/V62A-3SJY>].

¹¹⁹ See C.C., septiembre 9, 2003, Sentencia C-776/03, § VIII.4.5.7.

¹²⁰ See SCJN, Amparo en Revisión 2237/2009, Página 87; Retención sobre salarios, Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 554/2007, Páginas 52–53 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=93419> [<https://perma.cc/3PFN-NG86>].

¹²¹ See KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 99 (2012); Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660, 661 (2012). See generally Aharon Barak, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 175–210 (Doron Kalir trans., 2012) (discussing the adoption and use of proportionality review around the world).

¹²² See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 423–24 (2008). The nature of proportionality analysis varies across jurisdictions. See, e.g., Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 387–95 (2007).

court to define the minimum core.¹²³ Yet, while the reasoning is different from a minimum core analysis, the result can be the same: through proportionality review, courts can protect existing social programs. Indeed, some commentators have argued that, especially in the context of austerity measures, proportionality review is more appropriate than the minimum core approach.¹²⁴ The reason is that the invalidation of austerity measures does not entail a lifting up of the poor, but the protection of existing social welfare programs that usually also benefit the middle classes.¹²⁵ (Others, by contrast, have argued that the courts should intervene in austerity measures only when the minimum core is at stake.¹²⁶)

A number of courts have resorted to proportionality analysis in adjudicating social rights claims, including those in Latvia,¹²⁷ Lithuania,¹²⁸ Romania,¹²⁹ Germany,¹³⁰ Hungary,¹³¹ Canada,¹³² Argentina,¹³³ and the Czech Republic.¹³⁴ The Latvian Constitutional Court's response to a series of austerity measures passed by the legislature in the wake of the 2008 financial crisis exemplifies this approach.¹³⁵ The court handed down some twenty-five decisions in which it dealt with constitutional challenges to spending cuts — including pension cuts, salary reductions, and the reduction of parental benefits.¹³⁶ It struck down roughly forty percent of the challenged provisions, mostly because they represented disproportional infringements upon the constitutional right to social security.¹³⁷ The court did not define the content of the right to social security; instead, it simply held that the right was infringed, but then went on to

¹²³ See Contiades & Fotiadou, *supra* note 121, at 673. Of course, these two doctrinal approaches are not mutually exclusive; some courts use proportionality analysis, while also protecting the minimum core. See *id.* at 665.

¹²⁴ Xenophon Contiades & Alkmene Fotiadou, *Socio-economic Rights, Economic Crisis, and Legal Doctrine: A Reply to David Bilchitz*, 12 INT'L J. CONST. L. 740, 745–46 (2014).

¹²⁵ *Id.* at 743.

¹²⁶ See Bilchitz, *supra* note 46, at 714–15; Landau, *supra* note 70, at 294–95.

¹²⁷ Contiades & Fotiadou, *supra* note 121, at 676.

¹²⁸ Irmantas Jarukaitis & Gintaras Švedas, *The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges*, in NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE 997, 1015 (Anneli Albi & Samo Bardutzky eds., 2019).

¹²⁹ Bogdan Iancu, *Romania — The Vagaries of International Grafts on Unsettled Constitutions*, in NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE, *supra* note 128, at 1047, 1077.

¹³⁰ See Contiades & Fotiadou, *supra* note 121, at 681–82.

¹³¹ *Id.* at 677.

¹³² *Id.* at 680.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 676–77; Kilpatrick, *supra* note 62, at 299.

¹³⁶ Kristīne Krūma & Sandijs Statkus, *The Constitution of Latvia — A Bridge Between Traditions and Modernity*, in NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE, *supra* note 128, at 951, 971–72.

¹³⁷ *Id.* at 951, 972–73.

assess whether the infringement was proportional.¹³⁸ Many of the challenged provisions did not survive the test on the ground that the legislature had not considered alternatives.¹³⁹ In one case, the court struck down provisions that required state pensions to be cut by ten percent (but produced a seventy percent cut in the pensions of those still working) as a violation of the right to social security, since the legislature had not considered less severe alternatives.¹⁴⁰ In two other cases, the court also used proportionality review to strike down major cuts to long-service pensions of Ministry of the Interior employees¹⁴¹ and military service members.¹⁴²

The Constitutional Court of Lithuania similarly used proportionality analysis to invalidate austerity measures passed in the wake of the 2008 financial crisis. In one case, the constitutional court held that a reduction in state pensions for working persons was a disproportionate infringement on the rights to work and to receive social security.¹⁴³ In another case, the court found that reductions in state contributions to pension funds were a disproportionate infringement on the right to social security.¹⁴⁴ And in yet

¹³⁸ See, e.g., Latvijas Republikas Satversmes Tiesa [Constitutional Court of the Republic of Latvia] Lieta Nr. 2009-88-01, §§ 10–13, 16 (Apr. 15, 2010), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-88-01_Spriedums.pdf [https://perma.cc/P4JF-TZZG], translated in *Judgment on Behalf of the Republic of Latvia: Riga, 15 April 2010 in Case No. 2009-88-01*, CONST. CT. REPUBLIC LAT. §§ 10–13, 16 (Apr. 15, 2010), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/09/2009-88-01_Spriedums_ENG.pdf [https://perma.cc/5VP7-XCAF].

¹³⁹ See Contiades & Fotiadou, *supra* note 121, at 676–77.

¹⁴⁰ See Latvijas Republikas Satversmes Tiesa [Constitutional Court of the Republic of Latvia] Lieta Nr. 2009-43-01, §§ 30–30.2.2 (Dec. 21, 2009), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-43-01_Spriedums.pdf [https://perma.cc/37ZA-ARXS], translated in *Judgment on Behalf of the Republic of Latvia: In Riga, on 21 December 2009 in Case No. 2009-43-01*, CONST. CT. REPUBLIC LAT. §§ 30–30.2.2 (Dec. 21, 2009), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/07/2009-43-01_Spriedums_ENG.pdf [https://perma.cc/X7FK-NC4Y]; Krūma & Statkus, *supra* note 136, at 973, 978.

¹⁴¹ See Latvijas Republikas Satversmes Tiesa [Constitutional Court of the Republic of Latvia] Lieta Nr. 2009-76-01, §§ 1, 6–7 (Mar. 31, 2010), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-76-01_Spriedums.pdf [https://perma.cc/9RHE-4NUR], translated in *Judgment on Behalf of the Republic of Latvia: Riga, 31 March 2010 in the Case No. 2009-76-01*, CONST. CT. REPUBLIC LAT. §§ 1, 6–7 (Mar. 31, 2012), http://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/08/2009-76-01_Spriedums_ENG.pdf [https://perma.cc/KRE6-XSAC].

¹⁴² See Lieta Nr. 2009-88-01, §§ 1, 14, 20.

¹⁴³ See Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania] Dėl Lietuvos Respublikos teisės aktų nuostatų, kuriomis reguliuojamas pensijų perskaičiavimas ir mokėjimas valstybėje susidarius itin sunkiai ekonominei, fi nansinei padėčiai, atitikties Lietuvos Respublikos Konstitucija, 25 KONSTITUCINĖ JURISPRUDENCIJA 5, §§ III.6.1, III.6.3, IV.8 (Feb. 6, 2012), https://www.lrkt.lt/data/public/uploads/2015/01/ktb_2012-125.pdf [https://perma.cc/5K6W-TFLZ], translated in *On the Recalculation and Payment of Pensions upon Occurrence of an Especially Difficult Economic and Financial Situation in the State*, CONST. CT. REPUBLIC LITH. §§ III.6.1, III.6.3, IV.8 (Feb. 6, 2012), <https://www.lrkt.lt/en/court-acts/search/170/ta1073/content> [https://perma.cc/6MD4-YJZC].

¹⁴⁴ See Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania] Dėl Lietuvos Respublikos pensijų sistemos reformos įstatymo, jo pakeitimo ir papildymo

another case, the court used similar reasoning to invalidate proposed cuts in maternity allowances.¹⁴⁵

B. Property Rights and Reliance Interests

Not Enough is focused solely on social rights; yet social rights are not the only tool that courts have used to address economic equality. Another right that has been deployed to this end is the right to property. This might seem surprising in light of this right's perceived connection to neoliberalism.¹⁴⁶ Yet, by concluding that people have property interests in certain social welfare programs, courts have been able to use property rights to protect these programs. In terms of the well-known framework developed by Professor Frank Michelman, these courts have engaged with the idea that there might be a "distributive" dimension to the right to property in that everyone is entitled to some minimum level of property, in addition to the "possessive" aspect of property that protects property already acquired.¹⁴⁷

One well-known example comes from Hungary. When the many economic and political changes of the 1980s and early 1990s put the country on the brink of insolvency, Hungary was forced to accept a loan from the International Monetary Fund that was subject to harsh austerity conditions.¹⁴⁸ In order to fulfill these conditions, the Parliament passed an austerity package in 1995 — the Economic Stabilization Act —

įstatymų nuostatų atitikties Lietuvos Respublikos Konstitucijai, 26 KONSTITUCINĖ JURISPRUDENCIJA 100, §§ III.4, .6 (June 29, 2012), https://www.lrkt.lt/data/public/uploads/2015/01/ktb_2012-226.pdf [<https://perma.cc/X5NS-PVZV>], translated in *On the Reduction of the Amounts of Cumulative Contributions Accumulated in Pension Funds*, CONST. CT. REPUBLIC LITH. §§ III.4, .6 (June 29, 2012), <https://www.lrkt.lt/en/court-acts/search/170/ta1058/content> [<https://perma.cc/AGW6-Q35E>].

¹⁴⁵ See Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania] *Dėl Lietuvos Respublikos socialinių išmokų perskaičiavimo ir mokėjimo laikinojo įstatymo nuostatų, kuriomis reguliuojamu paskirtų motinystės (tėvystės) socialinio draudimo pašalpų ir statutiniam valstybės tarnautojams — vidaus tarnybos sistemos pareigūnams paskirtų motinystės (tėvystės) išmokų perskaičiavimu sudarytos prielaidos šias pašalpas ir išmokas sumažinti, taip pat kitų su šiuo teisiniu reguliavimu susijusių teisės aktų nuostatų atitikties Lietuvos Respublikos Konstitucijai*, 29 KONSTITUCINĖ JURISPRUDENCIJA 190, § IV.22 (Mar. 5, 2013), https://www.lrkt.lt/data/public/uploads/2016/01/ktb_2013-1-29_.pdf [<https://perma.cc/3B7F-SAS5>], translated in *On the Reduction of Awarded Maternity (Paternity) Benefits and Payments*, CONST. CT. REPUBLIC LITH. § IV.22 (Mar. 5, 2013), <https://www.lrkt.lt/en/court-acts/search/170/ta887/content> [<https://perma.cc/X6TF-3Q2J>].

¹⁴⁶ Property rights are widely seen as a condition for economic growth. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 63–66, 166 (2000); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803 (1989). For a literature review, see Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 206–09 (2008).

¹⁴⁷ Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987); see *id.* at 1319–20.

¹⁴⁸ See Scheppele, *supra* note 109, at 1943–45.

that cut many social programs, including child support, sick pay, and maternity leave.¹⁴⁹ In a series of fifteen decisions, the Hungarian Constitutional Court invalidated many of these measures, relying chiefly on the right to property (as well as the principle of legal certainty, discussed below).¹⁵⁰ In doing so, the court distinguished between two types of programs: (1) “insurance program[s],” such as pensions, social security, and health insurance, to which individuals had made mandatory contributions; and (2) “solidarity programs,” such as child support and maternity benefits, which did not require a direct contribution from individuals, but were based on solidarity and paid for from general funds.¹⁵¹ In an important decision, the court reasoned that cuts to insurance-based programs “should be evaluated according to the criteria of the protection of property.”¹⁵² The court noted that property rights are “the traditional means of securing an economic basis for the autonomy of individuals” and that “constitutional protection must track the changing social role of property,” and therefore concluded that the right to property “extends to . . . public law entitlements.”¹⁵³ Harsh cuts to those programs to which people had made mandatory contributions would therefore violate the right to property.¹⁵⁴ As one commentator observes, the court used the right to property to turn some social welfare schemes into “[p]urchased rights.”¹⁵⁵ Although the court acknowledged that the right to property is not unlimited and that proportional infringements that pursue legitimate ends might be permitted, the state could not simply eliminate insurance-based entitlements without offering some other form of protection and allowing ample time to prepare for such changes.¹⁵⁶

Commentators have observed that the Hungarian Constitutional Court’s jurisprudence was influenced by the writings of Professor Charles Reich, whose “‘new property’ theory” argued for extending some property-like protections to social welfare programs.¹⁵⁷ Reich’s influential argument caused the U.S. Supreme Court to do so; in the

¹⁴⁹ See *id.* at 1944–45.

¹⁵⁰ See *id.* at 1945–46.

¹⁵¹ *Id.* at 1945 (citing Alkotmánybíróság (AB) [Constitutional Court] June 30, 1995, MK 56/1995. No. 43/1995 (Hung.), translated in LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 322, 329 (2000) [hereinafter MK 56/1995]).

¹⁵² MK 56/1995, *supra* note 151, at 329.

¹⁵³ *Id.* (quoting Alkotmánybíróság (AB) [Constitutional Court] Dec. 22, 1993, MK 184/1993. No. 64/1993 (Hung.), as translated in SÓLYOM & BRUNNER, *supra* note 151, at 329).

¹⁵⁴ See *id.* at 328.

¹⁵⁵ Andras Sajó, *How the Rule of Law Killed Hungarian Welfare Reform*, E. EUR. CONST. REV., Winter 1996, at 31, 36.

¹⁵⁶ See MK 56/1995, *supra* note 151, at 330.

¹⁵⁷ Sajó, *supra* note 155, at 37; see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785–87 (1964).

U.S. context, this meant extending due process protections to social welfare recipients, so that benefits could not be cut without the government complying with procedural safeguards.¹⁵⁸ In the Hungarian context, by contrast, the scope of property rights became far more expansive, requiring “a flat prohibition on takings” of social welfare programs.¹⁵⁹

The Hungarian Constitutional Court, however, is not the only court that has used the right to property to evaluate cuts to social programs. Notably, the Inter-American Court of Human Rights has also held that pensions are protected by the right to property.¹⁶⁰ Specifically, in a case that concerned five Peruvian pensioners who saw their pensions cut by some eighty percent, the court reasoned that pensions were “acquired rights” protected by the property clauses of the Peruvian Constitution and the Inter-American Convention on Human Rights, and therefore could not simply be cut.¹⁶¹ Other courts, including the Greek Council of State,¹⁶² the Romanian Constitutional Court,¹⁶³ and the Israeli Supreme Court,¹⁶⁴ have likewise held or suggested that social programs can be protected by constitutional property rights.

A different example comes from Argentina, where property rights played an important role in protecting the savings accounts of the middle classes in the wake of the country’s 2001 financial crisis. In 2001, the country’s hard peg of the peso to the U.S. dollar, extensive foreign

¹⁵⁸ See *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970); Sajo, *supra* note 155, at 37.

¹⁵⁹ Sajo, *supra* note 155, at 37.

¹⁶⁰ See “Five Pensioners” v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 102 (Feb. 28, 2003).

¹⁶¹ *Id.*; see *id.* ¶¶ 93–102, 109.

¹⁶² Legal challenges to pension cuts in Greece in the wake of the country’s debt crisis were also primarily evaluated on the basis of the right to property. See Evangelia Psychogiopoulou, *Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges*, 2014 EUR. J. SOC. L. 12, 16–18. In these cases, however, the challenges were unsuccessful. See *id.* Performing a proportionality analysis, the Greek Council of State held that while the pension cuts violated the right to property, they were nonetheless justified and proportional in light of the state’s goal to stabilize its budget. See, e.g., *Symboulion Epikrateias [S.E.]* [Supreme Administrative Court] 668/2012 (Greece). For a discussion, see Psychogiopoulou, *supra*, at 16–17.

¹⁶³ The Constitutional Court of Romania has similarly used property-like arguments to protect pensions. See Iancu, *supra* note 129, at 1075–76. Invalidating a fifteen percent pension cut passed in the wake of the 2008 financial crisis, and citing the Hungarian Constitutional Court, the Romanian court emphasized that people had made mandatory contributions to pensions, and, therefore, that these could not simply be cut. See *id.* Yet, while the reasoning was similar to the Hungarian Constitutional Court’s, the Constitutional Court of Romania ultimately used the right to social security to invalidate the cut. See *Curtea Constituțională a României* [Constitutional Court of Romania] No. 872/2010, 25 iunie 2010, MONITORUL OFICIAL NR. 433, 28.06.2010, <http://legislatie.just.ro/Public/DetaliuDocumentAfis/119896> [<https://perma.cc/KLB2-8V9B>]; see also *Curtea Constituțională a României* [Constitutional Court of Romania] No. 874/2010, 25 iunie 2010, MONITORUL OFICIAL NR. 433, 28.06.2010, <http://legislatie.just.ro/Public/DetaliuDocumentAfis/119889> [<https://perma.cc/Q2M6-57WB>].

¹⁶⁴ See Barak-Erez & Gross, *supra* note 51, at 250 (observing that Chief Justice Barak was “willing to accept the argument that eligibility for social security payments is a property right that must not be infringed” in H CJ 5587/02 *Manor v. Treasury Minister* 59(1) PD 729 (2004) (Isr.)).

borrowing, and procyclical fiscal policy resulted in a severe economic crisis.¹⁶⁵ To keep the crisis in check and to prevent a bank run, Argentina's Minister of Economy announced the establishment of restrictions on cash withdrawals from private and company bank accounts (a policy known as the "*corralito*").¹⁶⁶ The government further converted dollar-based savings accounts into peso-based accounts at an unfavorable exchange rate, causing people to lose money.¹⁶⁷ Shortly after these measures were announced, a "wave" of cases, using the *amparo* procedure, were brought against the reforms.¹⁶⁸ According to one estimate, by April 2002, some 210,188 *amparos* had been brought against the *corralito*.¹⁶⁹ The basis for these claims was the constitutional right to property; the claimants argued that the government could not limit access to people's own savings or reduce them by applying unfavorable exchange rates.¹⁷⁰ These claims were mostly successful. According to one study, courts in 2002 granted some 143,836 injunctions, and each injunction led to the return of an average of USD 23 thousand.¹⁷¹ Statistics show that these interventions mainly benefited middle-class litigants: claims regarding deposits between ARS 50 thousand and ARS 1 million received back a larger percentage of the frozen deposits than did those regarding deposits below ARS 50 thousand or over ARS 1 million (since the peso's peg to the U.S. dollar was one-to-one, ARS 50 thousand was equivalent to USD 50 thousand and ARS 1 million to USD 1 million).¹⁷² Property rights also featured in some structural rulings, even though, in general, the Argentine Supreme Court was far more deferential to the political branches throughout the crisis than were the lower courts.¹⁷³ Yet in 2002, the court declared a thirteen percent cut to public servant salaries carried out in 2001 to be an unconstitutional infringement of the right to property.¹⁷⁴

¹⁶⁵ See Maurino & Nino, *supra* note 98, at 301–04; Catalina Smulovitz, *Judicialization of Protest in Argentina: The Case of Corralito*, in ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 55, 56–59 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006).

¹⁶⁶ Smulovitz, *supra* note 165, at 57; *see id.* at 56–57.

¹⁶⁷ *Id.* at 57–58; *see also* Maurino & Nino, *supra* note 98, at 325.

¹⁶⁸ Smulovitz, *supra* note 165, at 60. The *amparo* is similar to the *tutela* in Colombia. *See generally* ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (2009).

¹⁶⁹ Smulovitz, *supra* note 165, at 60. A similar number of cases were brought at the provincial level. *Id.*

¹⁷⁰ *Id.* at 62.

¹⁷¹ *Id.* at 61.

¹⁷² *Id.*

¹⁷³ *See* Maurino & Nino, *supra* note 98, at 322–25, 325 n.110.

¹⁷⁴ *Id.* at 325 n.110 (citing Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/8/2002, "Leónidas Tobar c. Ministerio de Defensa — Contaduría General del Ejército," Fallos (2002-325-2059) (Arg.)).

The right to property is a useful tool to evaluate cuts to programs to which people directly contributed, and in which they thereby acquired a property right. For some social programs, however, property rights are harder to establish.¹⁷⁵ In such cases, some courts have resorted to a related argument: that of reliance interests in social programs.¹⁷⁶ The key idea here is that because people expected to receive certain benefits, and relied on those expectations in making important life choices, these benefits cannot simply be cut. Thus, while these benefits do not amount to personal property, the principles of rule of law and legal certainty demand that these programs receive special protection.¹⁷⁷ Hungary again offers an example. The Hungarian Constitutional Court has held that, when cuts concern social programs based on solidarity rather than direct and mandatory payments by beneficiaries, beneficiaries do not have a property interest in those programs.¹⁷⁸ While this means that such programs can be modified more easily, people nonetheless have reliance interests in these programs, which limits lawmakers' ability to cut them without sufficient notice.¹⁷⁹

Observers have noted that the Polish Constitutional Court, in the early 1990s, used similar reasoning — the principles of rule of law and legal certainty — to protect pensions and other social services.¹⁸⁰ This reasoning also bears some similarity to the principle of “non-retrogression” that has been developed by the Committee on Economic, Social and Cultural Rights, which implies that a government cannot simply cut back on existing social rights–related entitlements without special justification.¹⁸¹ While the Committee has not rooted its reasoning in the

¹⁷⁵ Cf. Scheppele, *supra* note 109, at 1945 (describing the Hungarian Constitutional Court's distinction between insurance programs and solidarity programs).

¹⁷⁶ See, e.g., MK 56/1995, *supra* note 151, at 328–30; see also Scheppele, *supra* note 109, at 1946–47 (describing the Hungarian Constitutional Court's approach to this type of reliance interest).

¹⁷⁷ See Sajó, *supra* note 155, at 36.

¹⁷⁸ See MK 56/1995, *supra* note 151, at 326–27, 330; see also Scheppele, *supra* note 109, at 1946–47 (“Because recipients of these benefits had not paid into the system, they did not have acquired rights in the payments that the state had previously provided.” *Id.* at 1946.).

¹⁷⁹ See MK 56/1995, *supra* note 151, at 326–30. The principle of legal certainty flows from the rule of law as enshrined in the Hungarian Constitution. Sajó, *supra* note 155, at 36; see also Jean-Jacques Dethier & Tamar Shapiro, *Constitutional Rights and the Reform of Social Entitlements*, in PUBLIC FINANCE REFORM DURING THE TRANSITION: THE EXPERIENCE OF HUNGARY 447, 458–60 (Lajos Bokros & Jean-Jacques Dethier eds., 1998). In addition, benefits could be cut only to the extent that they did not fall below the minimum guaranteed by the right to social security provided in the Constitution. See MK 56/1995, *supra* note 151, at 326 (“[S]ocial rights have a role insofar that . . . the extent of welfare benefits as a whole may not be reduced below a minimum level which may be required according to Article 70/E [enumerating the right to social security].”).

¹⁸⁰ András Sajó, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 83, 88 n.17, 89–90 (Roberto Gargarella et al. eds., 2006).

¹⁸¹ *General Comment No. 3*, *supra* note 66, ¶ 9; Malcolm Langford & Jeff A. King, *Committee on Economic, Social and Cultural Rights: Past, Present and Future*, in SOCIAL RIGHTS JURISPRUDENCE, *supra* note 48, at 477, 501–02.

requirements of rule of law and legal certainty, it likewise seems to operate on the idea that existing social programs, to some extent, amount to acquired rights that deserve special protection and cannot easily be reduced or eliminated.

C. Equality Rights

Courts have also used the right to equality to strike down austerity measures and regressive tax reform. Some courts — including those in Portugal,¹⁸² Greece,¹⁸³ Lithuania,¹⁸⁴ Italy,¹⁸⁵ Canada,¹⁸⁶ and various U.S. states¹⁸⁷ — have demanded *formal* equality, or equality in treatment, and have invalidated measures that affected the economic well-being of only some citizens. Other courts — including those in Colombia,¹⁸⁸ Mexico,¹⁸⁹ Argentina,¹⁹⁰ Peru,¹⁹¹ and Germany¹⁹² — have also demanded *material* equality (that is, equality of outcomes, including among the poor and the rich) — especially in the context of taxation.¹⁹³ While the latter might seem more radical, and more in line with Moyn's vision, it is worth noting that, as of 2016, some fifty-two national constitutions¹⁹⁴ explicitly gave all citizens the right to equality regardless of property or economic status.¹⁹⁵ The idea that equality rights can be used to demand material equality, then, is something that many constitution-makers imagined to be possible.

One high-profile example of equality rights being used to invalidate measures that are formally unequal because they fall on some groups alone comes from Portugal. In the wake of the Eurozone financial crisis,

¹⁸² See *infra* notes 196–205 and accompanying text.

¹⁸³ See *infra* note 206 and accompanying text.

¹⁸⁴ See *infra* note 207 and accompanying text.

¹⁸⁵ See *infra* notes 208–210 and accompanying text.

¹⁸⁶ Aeyal M. Gross, *The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives*, in EXPLORING SOCIAL RIGHTS, *supra* note 51, at 289, 309 (observing that healthcare claims can be made under the Canadian Charter's equality provision).

¹⁸⁷ See William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 KY. L.J. 789, 790–91 (2010).

¹⁸⁸ See *infra* notes 211–221 and accompanying text.

¹⁸⁹ See *infra* notes 222–233 and accompanying text.

¹⁹⁰ See *infra* notes 234–237 and accompanying text.

¹⁹¹ See *infra* notes 238–239 and accompanying text.

¹⁹² Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369, 383–84 (2018) (discussing higher-education cases in Germany that used the right to equality to ensure access for those from nonwealthy backgrounds).

¹⁹³ For a conceptualization of equality rights and taxation, see Sandra Fredman, *Taxation as a Human Rights Issue: Gender and Substantive Equality*, in TAX, INEQUALITY, AND HUMAN RIGHTS 81, 83–84 (Philip Alston & Nikki Reisch eds., 2019).

¹⁹⁴ Data on file with the Harvard Law School Library.

¹⁹⁵ The same is true for the ICESCR, which prohibits discrimination on the basis of property. See International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 2, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

Portugal concluded a bail-out agreement with the European Commission, the European Central Bank, and the International Monetary Fund, whereby the Portuguese government promised to cut spending and to reform public policy in exchange for a €78 billion loan at below-market rates.¹⁹⁶ These austerity measures were challenged in some twelve cases; in seven of them, the Portuguese Constitutional Court held the measures unconstitutional.¹⁹⁷ In doing so, the court primarily relied on the principle of equality, finding that the burdens of the austerity measures were unequally distributed among the population.¹⁹⁸ To illustrate, in 2012, the court invalidated provisions in that year's State Budget Law that suspended Christmas and holiday-month payments for public employees with salaries above €600 a month and for retirees on public pensions.¹⁹⁹ The court observed that these holiday payments were part of workers' yearly wages, so their suspension would effectively amount to a salary cut.²⁰⁰ Although the objective pursued by these cuts — a swift balancing of the budget — was legitimate, the burden fell exclusively on public employees and therefore violated the right to equality.²⁰¹ The next year, the court invalidated similar provisions in the State Budget Law for 2013 that sought to suspend holiday-month pay (although not Christmas pay) for public workers as a violation of the principle of equality.²⁰² And the year after, the court used the right to equality to invalidate provisions in the State Budget Law for 2014 that would have imposed pay cuts on public workers making more than €675 a month.²⁰³

¹⁹⁶ See Mariana Canotilho et al., *Austerity Measures Under Judicial Scrutiny: The Portuguese Constitutional Case Law — Portuguese Constitutional Court*, 11 EUR. CONST. L. REV. 155, 156–57 (2015); Ana Maria Guerra Martins, *Constitutional Judge, Social Rights and Public Debt Crisis: The Portuguese Constitutional Case Law*, 22 MAASTRICHT J. EUR. & COMP. L. 678, 679 (2015); Catherine Moury & André Freire, *Austerity Policies and Politics: The Case of Portugal*, 39 PÔLE SUD 35, 36 (2013).

¹⁹⁷ Canotilho et al., *supra* note 196, at 158–82. These numbers include only cases of abstract review that involved a violation of individual rights, not the numerous cases of concrete review. *See id.* at 158–60.

¹⁹⁸ Kilpatrick, *supra* note 62, at 293–96.

¹⁹⁹ Tribunal Constitucional [T.C.] [Constitutional Court] Acórdão N.º 353/2012 (July 5, 2012) (Port.), <http://www.tribunalconstitucional.pt/tc/acordaos/20120353.html> [https://perma.cc/7SND-R3VB], summarized in English in *Ruling No. 353/12*, TRIBUNAL CONSTITUCIONAL PORT. (July 5, 2012), <http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html> [https://perma.cc/FEST-ZXQN].

²⁰⁰ See Canotilho et al., *supra* note 196, at 162.

²⁰¹ *See id.* at 163.

²⁰² Tribunal Constitucional [T.C.] [Constitutional Court] Acórdão N.º 187/2013 (Apr. 5, 2013) (Port.), <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html> [https://perma.cc/X8DY-MBPD], summarized in English in *Ruling No. 187/13*, TRIBUNAL CONSTITUCIONAL PORT. (Apr. 5, 2013), <http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html> [https://perma.cc/23RK-7A5Y]; see also Canotilho et al., *supra* note 196, at 164–65.

²⁰³ Tribunal Constitucional [T.C.] [Constitutional Court] Acórdão N.º 413/2014 (May 30, 2014) (Port.), <http://www.tribunalconstitucional.pt/tc/acordaos/20140413.html> [https://perma.cc/7Y4Y-]

Notably, the Portuguese Constitutional Court's use of equality rights mainly benefited middle-class workers: the lowest-income earners would have their salaries protected regardless. Significantly, in 2011, the court had allowed pay cuts for public workers making more than €1500 a month, holding that even though these cuts fell on public workers alone, it was a proportional restriction on the right to equality.²⁰⁴ In a country where the average income was around €1000 a month,²⁰⁵ the court protected those in the middle (making between €600 and €1500).

We find similar reasoning in cases concerning salary and pension cuts in Greece, Lithuania, and Italy. In Greece, the Court of Auditors (which can deliver only nonbinding decisions) held that a 2012 draft law that would have implemented pension cuts for public pensioners was unconstitutional because the burdens — including those of many prior measures that had already been passed — fell disproportionately on public employees and therefore violated the principle of equality.²⁰⁶ The Lithuanian Constitutional Court used similar reasoning to invalidate proposed salary cuts for public officials.²⁰⁷ In Italy, the constitutional court used the right to equality to invalidate pay cuts for magistrates: it held that these pay cuts effectively amounted to a tax and that tax increases cannot be applied only to certain groups of citizens (in this case, judges).²⁰⁸

584Z], summarized in English in Ruling No. 413/14, TRIBUNAL CONSTITUCIONAL PORT. (May 30, 2014), <http://www.tribunalconstitucional.pt/tc/en/acordaos/20140413s.html> [https://perma.cc/7MZZ-TT5D]; see also Canotilho et al., *supra* note 196, at 166–67.

²⁰⁴ Tribunal Constitucional [T.C.] [Constitutional Court] Acórdão N.º 396/2011 (Sept. 21, 2011) (Port.), <http://www.tribunalconstitucional.pt/tc/acordaos/20110396.html> [https://perma.cc/7N6N-QBE7]; see also Canotilho et al., *supra* note 196, at 160–62.

²⁰⁵ See *Average Monthly Wage of Employees: Basic Remuneration and Earnings*, PORDATA (Dec. 16, 2019), <https://www.pordata.pt/en/Portugal/Average+monthly+wage+of+employees+basic+remuneration+and+earnings-857-6932> [https://perma.cc/5F8Q-6VR8].

²⁰⁶ Psychogiopoulou, *supra* note 162, at 18 (describing conclusions reached by the Court of Auditors in its third and fourth special sessions of October 2012). Specifically, the proposed law violated article 4, paragraph 5 of the Greek Constitution. *Id.*; see also 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 4, ¶ 5 (Greece) (“Greek citizens contribute without distinction to public charges in proportion to their means.”).

²⁰⁷ See Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania] Dėl Lietuvos Respublikos įstatymų nuostatų, kuriomis nustatyti sumažinti valstybės tarnautojų ir teisėjų atlyginimai valstybėje susidarius itin sunkiai ekonominei, finansinei padėčiai, atitikties Lietuvos Respublikos Konstitucijai, 31 KONSTITUCINĖ JURISPRUDENCIJA 5, §§ IX.4–6 (July 1, 2013), https://www.lrkt.lt/data/public/uploads/2016/01/ktb_2013-3-31_.pdf [https://perma.cc/PUB3-DDBH], translated in *On the Reduction of the Remuneration of State Servants and Judges*, CONST. CT. REPUBLIC LITH. §§ IX.4–6 (July 1, 2013), <https://www.lrkt.lt/en/court-acts/search/170/tag35/content> [https://perma.cc/ZYB7-7WSJ].

²⁰⁸ Corte Cost., 8 ottobre 2012, Racc. uff. corte cost. 2012, IV, 669, §§ 13.2.1–13.4 (It.), <https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2012&numero=223&tipoView=P&tipoVisualizzazione=O> [https://perma.cc/4AX9-VXA6], translated in *Judgment No. 223 Year 2012*, CORTE COSTITUZIONALE §§ 13.2.1–13.4, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2012223_Quaranta_Tesoro_en.pdf [https://perma.cc/8QXC-7ABG]. For a discussion, see Diletta Tega, *Welfare Rights in Italy*, in *SOCIAL RIGHTS IN TIMES OF CRISIS IN THE*

In another case, the court used similar reasoning to invalidate a solidarity levy on high-earning public pensioners: it argued that this measure effectively was a tax, and taxes should be applied equally to all those in the same income bracket.²⁰⁹ Since those with the same income in the private sector were not subject to the same tax, the measure was unconstitutional.²¹⁰ Notably, in this last case, the court's insistence on formal equality actually led it to invalidate a progressive measure, one that taxed higher-earning public pensioners only (although not those in the private sector).

Other courts have used the right to equality to demand some degree of material equality in taxation. Colombia is again instructive here: Colombia's constitutional court has invalidated regressive tax reform on a number of occasions (my research revealed some seventy-five cases, not including *tutelas*, in which the court scrutinized tax laws).²¹¹ Notably, the Colombian Constitution includes a strong equality clause: "All persons are born free and equal before the law . . . [and] shall receive equal protection and treatment from the authorities," and "[t]he [s]tate shall promote the conditions so that equality may be real and effective[,] . . . shall adopt measures in favor of the discriminated or [of] marginalized groups,"²¹² and "shall especially protect those persons who . . . are in a situation of manifest weakness."²¹³ As the Colombian Constitutional Court has noted, this provision demands not only formal equality but also "material equality, which orders the State to promote the conditions for equality to be real and effective, adopting measures in favor of discriminated or marginalized groups."²¹⁴ The constitution further includes a requirement that the tax system be "based on the principles of equity, efficiency, and progressivity,"²¹⁵ which, according to the constitutional

EUROZONE: THE ROLE OF FUNDAMENTAL RIGHTS' CHALLENGES 50, 56 (European Univ. Inst. Working Paper LAW 2014/05, 2014), <https://ssrn.com/abstract=2428855> [<https://perma.cc/BX2H-757A>].

²⁰⁹ Corte Cost., 3 giugno 2013, Racc. uff. corte cost. 2013, III, 127, §§ 7-7.3 (It.), <https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2013&numero=116&tipoView=P&tipoVisualizzazione=O> [<https://perma.cc/QRD4-ESQ7>], translated in *Judgment No. 116 Year 2013*, CORTE COSTITUZIONALE §§ 7-7.3, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/116-2013.pdf [<https://perma.cc/WYE5-F8UC>].

²¹⁰ *Id.*

²¹¹ Data on file with the Harvard Law School Library.

²¹² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [POLITICAL CONSTITUTION OF COLOMBIA] art. 13, translated in *WORLD CONSTITUTIONS ILLUSTRATED: COLOMBIA 6* (Jefri Jay Ruchti ed., Anna I. Vellvé Torras et al. trans., 2020) (final alteration in original).

²¹³ *Id.*

²¹⁴ Corte Constitucional [C.C.] [Constitutional Court], octubre 28, 2015, Sentencia C-668/15, § VI.14.5 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2015/c-668-15.htm> [<https://perma.cc/J95X-74WY>] (quoting Corte Constitucional [C.C.] [Constitutional Court], noviembre 20, 2013, Sentencia C-833/13, § VI.14 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/2013/C-833-13.htm> [<https://perma.cc/4NWA-9FFW>]).

²¹⁵ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] [POLITICAL CONSTITUTION OF COLOMBIA] art. 363, translated in *WORLD CONSTITUTIONS ILLUSTRATED: COLOMBIA*, *supra* note 212, at 108; see also *id.* art. 95, ¶ 9.

court, is a specification of the general equality principle in the context of taxation.²¹⁶

In various decisions, the Colombian Constitutional Court has held that equality in taxation has both horizontal and vertical components.²¹⁷ *Horizontal equality* means that people with similar economic capacity must be treated the same; *vertical equality* demands the tax system to be progressive so that “those who have greater economic capacity must bear a larger share of the tax.”²¹⁸ Taxes that fall disproportionately on vulnerable groups violate the equality principle. To illustrate, the court invalidated a new two percent value-added tax on various basic goods and services, including nutritional products and medications, on the grounds that it would place a larger burden on the poor than the rich, and thus stand in the way of achieving material equality (the tax also violated the minimum core, as mentioned above).²¹⁹ Tax breaks for the wealthy likewise violate the principle of vertical equality. In one case, the court struck down tax benefits (so-called “representation expenses”) for high-ranking public officials, since they only benefited top-level officials and not ordinary government workers with lower wages.²²⁰ In another decision, the court invalidated a provision that made tax exemptions for the self-employed the same as for those with a formal employer, as the provision had effectively imposed a larger burden on the self-employed.²²¹

²¹⁶ See, e.g., C.C., octubre 28, 2015, Sentencia C-668/15, § VI.14.1; Corte Constitucional [C.C.] [Constitutional Court], agosto 26, 2015, Sentencia C-551/15, § II.3.8.2.1 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2015/c-551-15.htm> [<https://perma.cc/WL64-8K9M>].

²¹⁷ See, e.g., C.C., octubre 28, 2015, Sentencia C-668/15, § VI.14.5 (quoting C.C., noviembre 20, 2013, Sentencia C-833/13, § VI.16); C.C., agosto 26, 2015, Sentencia C-551/15, § II.3.8.2.1; Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2015, Sentencia C-492/15, § VI.42 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2015/c-492-15.htm> [<https://perma.cc/9CHT-4HQW>]; Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2014, Sentencia C-100/14, § VI.17 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2014/c-100-14.htm> [<https://perma.cc/V62A-3SJJ>]. Note that, technically, in the context of taxation, the court uses the concept of equity (“equidad”) instead of equality (“igualdad”), but for the sake of clarity, I will use the term equality to refer to both. See C.C., octubre 28, 2015, Sentencia C-668/15, § VI.14.5 (“The principle of equity . . . has been understood as a specific development of the principle of equality in tax matters.” (quoting C.C., noviembre 20, 2013, Sentencia C-833/13, § VI.16)).

²¹⁸ C.C., agosto 26, 2015, Sentencia C-551/15, § II.3.8.2.1.

²¹⁹ Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, § VIII.4.5.0 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2003/c-776-03.htm> [<https://perma.cc/3DB7-68YQ>]; see also *supra* p. 2038. The court deemed it relevant that many of these goods and services had historically been exempted from taxation. C.C., septiembre 9, 2003, Sentencia C-776/03, §§ VIII.4.5.2, .4.5.3.4, .4.5.6.1. Taxing these goods without compensation to vulnerable populations for these additional burdens violated the principle of material equality (“real and effective equality”). *Id.* § VIII.4.5.6.1. Indeed, the court has directly linked vertical equality to the minimum core principle. See, e.g., C.C., agosto 5, 2015, Sentencia C-492/15, § VI.44.

²²⁰ Corte Constitucional [C.C.] [Constitutional Court], octubre 8, 2001, Sentencia C-1060A/01, § VI.5 (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2001/c-1060a-01.htm> [<https://perma.cc/N5LC-CGHT>].

²²¹ See C.C., octubre 28, 2015, Sentencia C-668/15, § VI.49.

Courts in Mexico have used similar principles to scrutinize tax policy. Like the Colombian Constitution, the Mexican Constitution not only contains a general equality clause²²² but also demands equality in taxation, stating that citizens are to “contribute in the proportional and equitable manner provided by law toward the public expenses.”²²³ The Mexican Supreme Court has regularly used this principle to demand “proportionality” and “equality” in taxation: my research revealed some forty-seven cases²²⁴ in which these principles were used to invalidate tax laws.²²⁵ Proportionality means that those who earn higher incomes must be taxed at a higher rate than lower-income earners.²²⁶ Equality means that people in identical situations need to be treated in the same way, while those in unequal situations have to be treated differently.²²⁷ The equality principle demands progressivity: the court has reasoned that the “decreasing marginal utility of money” and “proportional sacrifice” mean that those who are better off should sacrifice a larger portion of their incomes.²²⁸ In one case, the supreme court used these principles to scrutinize the tax brackets for different income groups.²²⁹ It held that to decide whether the tax system was equitable and proportional, looking at brackets alone was not enough; it also had to examine possible tax breaks for anyone who fell in those brackets as well as how the tax income was spent.²³⁰ In another case, the court used these same principles to scrutinize tax exemptions.²³¹ It held that the tax scheme under consideration did not meet constitutional muster, and, when government action taken for the purpose of realizing social or economic rights results in inequality, the inequality must have a reasonable justification and be

²²² Constitución Política de los Estados Unidos Mexicanos, CP, art. 1, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 20-12-2016 (Mex.).

²²³ *Id.* art. 31, frac. IV.

²²⁴ Data on file with the Harvard Law School Library.

²²⁵ Like the Colombian Constitutional Court, the Mexican Supreme Court uses the concept of “equity” in the context of taxation, which it derives from the principle of equality. *See* Exención del pago del impuesto sobre la renta por la enajenación de acciones emitidas por sociedades Mexicanas cuando se realice a través de bolsas de valores concesionadas en los términos de la ley del mercado de valores o de acciones emitidas por sociedades extranjeras cotizadas en dichas bolsas de valores. Argumenta violación a las garantías contenidas en los artículos 14, 16 y 31 fracción IV constitucionales, Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 811/2008, Página 54 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=102354> [<https://perma.cc/LHL3-5YEE>] [hereinafter Amparo en Revisión 811/2008] (“[T]he principle of tax equity is nothing more than the manifestation in tax matters of the superior value of equality enshrined in Article 1 of the Federal Constitution.”).

²²⁶ *See* Retención sobre salarios, Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 554/2007, Página 34 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=93419> [<https://perma.cc/3PFN-NG86>].

²²⁷ *See id.* at 36.

²²⁸ *Id.* at 55.

²²⁹ *See id.* at 39.

²³⁰ *Id.*

²³¹ Amparo en Revisión 811/2008, *supra* note 225, at vii.

proportional to the desired end.²³² And in yet another case, the court held that the legislature could not pass a measure that would tax non-deductible items in the year they were acquired rather than the year they were sold, as doing so would effectively create a higher tax rate for businesses that made these purchases despite their equal status to businesses that did not make the purchases.²³³

The Argentine Supreme Court has likewise used the right to equality to scrutinize tax reform. In a 2019 case, it invalidated statutory provisions that would have taxed earnings from retirement pensions.²³⁴ Like the Colombian and Mexican courts, it concluded that tax equality demands that those in similar positions be treated in the same way, while those in unequal situations be taxed differently.²³⁵ Reading this principle in conjunction with the constitution's social rights provisions, the court further held that a mere consideration of the "contributory capacity" of citizens was insufficient; the legislature should also consider the particularly vulnerable position of certain groups, such as the elderly and disabled.²³⁶ In this case, failure to consider the vulnerable position of pensioners amounted to a constitutional violation.²³⁷ We find similar reasoning in a 2005 decision by the Peruvian Constitutional Court that struck down a law that increased all public sector workers' pension contributions to twenty-seven percent of their salaries.²³⁸ Specifically, the court reasoned that applying the same rate to all workers meant that the burden disproportionately fell on those with lower salaries, and therefore was not progressive.²³⁹

III. SHOULD COURTS PROMOTE ECONOMIC EQUALITY?

The foregoing analysis reveals that courts in many countries have readily used their respective constitutions to attempt to promote economic equality. Moyn would no doubt respond that these interventions are "not enough" to bring about the structural reform he envisions. Yet Moyn also

²³² See *id.* at 50.

²³³ See *Costo de lo vendido*, Suprema Corte de Justicia de la Nación [SCJN], Amparo en Revisión 1502/2005, Páginas 237–39, 256, 259 (Mex.), <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=77063> [<https://perma.cc/E835-AX8A>].

²³⁴ Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/3/2019, "García, María Isabel c/ AFIP s/ Acción meramente declarativa de inconstitucionalidad," Fallos (2019-342-411), at 429, 439 (Arg.).

²³⁵ *Id.* at 430–31.

²³⁶ *Id.* at 434–36.

²³⁷ *Id.* at 439.

²³⁸ Tribunal Constitucional del Perú [Constitutional Court of Peru] Sentencia sobre el expediente 0030-2004-AI/TC, §§ VI.5, VI.9 (Dec. 2, 2005), <http://www.tc.gob.pe/jurisprudencia/2006/00030-2004-AI.pdf> [<https://perma.cc/QZ96-MMB9>].

²³⁹ *Id.* The court further reasoned that the measure was a disproportionate infringement on the right to have a pension. *Id.* § VI.12.

appears to have concluded that human rights law generally is ill-suited to this task.²⁴⁰ This Review's inquiry is more modest: Even if it cannot foster such radical change, to what extent can human rights law, especially as contained in national constitutions, improve material equality?

One takeaway from the aforementioned cases is that human rights *do* have a potential role to play. They reveal how it is possible for courts to deploy constitutional rights in an effort to achieve greater economic justice. Granted, we cannot say how widespread this type of judicial activism is or whether these cases have been faithfully implemented and produced measurable equality gains. But at a minimum, these cases allow us to imagine the possible connections between rights and economic equality. They also offer a starting point for further exploration into the topic.

Another takeaway is that the distributive politics of these cases can be complicated, especially when it comes to the question of who benefits materially from these interventions. Many of the judicial interventions described above did not seek to provide minimum subsistence for the poor, but instead protected entitlements for the middle classes.²⁴¹ Who exactly benefits from such interventions can be difficult to trace: the term "middle class" has no universal definition, and in many instances, it appears that courts protected blue-collar workers and those in the bottom half of the income distribution.²⁴² The very poorest may have also benefited from these interventions. At the same time, it is also clear that, in many instances, the chief beneficiaries of this litigation were not society's poorest and most vulnerable, but large demographic cross-sections.

Indeed, critics have attacked many of these judicial actions for just that reason. Take the example of Hungary. The constitutional court's invalidation of the proposed austerity measures was popular: close to ninety percent of the Hungarian population approved of the court's decisions.²⁴³ Yet intellectuals and politicians accused the court of overstepping its powers and dealing to the middle class.²⁴⁴ For example, Judge András Sajó criticized the court for perpetuating socialist policy²⁴⁵ and espousing "majoritarian values" by protecting welfare programs for the middle class instead of for vulnerable minorities.²⁴⁶ The

²⁴⁰ See *supra* p. 2018.

²⁴¹ See *supra* pp. 2033–37, 2043–44, 2048–49.

²⁴² See, e.g., *supra* pp. 2041–43 (discussing the Hungarian Constitutional Court's protection of state plans into which individuals had contributed, such as pension plans and healthcare); *supra* p. 2036 (discussing the Colombian Constitutional Court's jurisprudence protecting middle-income public sector workers).

²⁴³ Scheppele, *supra* note 109, at 1947.

²⁴⁴ *Id.* at 1947–48.

²⁴⁵ Sajó, *supra* note 155, at 40–41.

²⁴⁶ Sajó, *supra* note 180, at 85; see also Malcolm Langford, *Hungary: Social Rights or Market Redivivus?*, in *SOCIAL RIGHTS JURISPRUDENCE*, *supra* note 48, at 250, 259.

Portuguese Constitutional Court received similar criticisms. For example, Professor Gonalo de Almeida Ribeiro, who was later appointed to the court, argued that the democratic process is well suited to take account of majority interests, and, therefore, the court's decisions protecting wide swaths from austerity measures were inappropriate.²⁴⁷ The Colombian Constitutional Court's aggressive use of the minimum core principle has likewise been criticized as "[l]arge-[s]cale [j]udicial [p]opulism."²⁴⁸ While there is no doubt that this approach has boosted the court's popularity, some have criticized it for undermining what they see as the main objective of social rights: protecting the poor.²⁴⁹ Indeed, many suggest that social rights should be deployed only or primarily to guarantee a basic minimum standard of living.²⁵⁰ Moreover, it is commonly thought that protecting vulnerable minorities from tyrannical majorities is the essence of judicial review.²⁵¹ Judicial interventions that protect popular majorities are difficult to square with this concept of the judicial role.

²⁴⁷ See Gonalo de Almeida Ribeiro, *Judicial Activism Against Austerity in Portugal*, INT'L J. CONST. L.: I-CONNECT (Dec. 3, 2013), <http://www.iconnectblog.com/2013/12/judicial-activism-against-austerity-in-portugal> [<https://perma.cc/PVD3-DMHC>]; see also Jeff King, *Social Rights, Constitutionalism, and the German Social State Principle*, E-PÚBLICA, Dec. 2014, at 19, 23–24 (criticizing the court's decisions for interfering with legislation on behalf of groups that were not marginalized).

²⁴⁸ Landau, *supra* note 40, at 216; see *id.* at 203 (observing that Colombian judges have "often displayed populist tendencies, deliberately targeting some of their interventions towards middle class groups").

²⁴⁹ *Id.* at 199–200; see also Landau & Dixon, *supra* note 43, at 110–11 (discussing theories that social rights have been captured by the middle class at the expense of the poor).

²⁵⁰ See JEFF KING, JUDGING SOCIAL RIGHTS 1–2, 8–10 (2012) (proposing a theory of social rights adjudication based on incrementalism); Landau, *supra* note 70, at 294–97; Landau, *supra* note 40, at 240–41.

²⁵¹ See, e.g., Aharon Barak, *The Supreme Court, 2001 Term — Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 21, 49–50 (2002) ("The protection of human rights — the rights of every individual and every minority group — cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion." *Id.* at 21.). A related debate in the context of judicial review is whether courts should employ "weak" remedies that seek to induce dialogue with the political branches. Some have argued that "weak forms" of judicial review are most appropriate for social rights enforcement. See, e.g., CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221–37 (2001); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 242–44 (2009). But see Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 393 (2007) (arguing that the appropriateness of weak and strong forms of judicial review depends on context); Roberto Gargarella, *Why Do We Care About Dialogue? "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 43, at 212, 212–13 (critiquing the "dialogic practice," *id.* at 213, in which courts engage public participation and deliberation, as insufficient to enforce social rights).

Yet some degree of “judicial populism” may be essential to promoting economic justice.²⁵² Other things equal, the larger the middle class of any given society, the more equal that society is.²⁵³ Judicial interventions that protect the wealth of the middle, then, can meaningfully improve equality.²⁵⁴ Indeed, this type of intervention exactly seeks to mitigate the neoliberal agenda to which Moyn claims human rights law has failed to respond.

It is also not clear that such interventions are in fact inconsistent with the judicial role.²⁵⁵ Even when beneficiaries have a majority numerically, this does not mean they are politically powerful.²⁵⁶ In many democracies, democratic politics fail to deliver the social rights–related services that would benefit democratic majorities (for example, free education, free healthcare, a minimum wage, and guaranteed pensions).²⁵⁷ When large corporations, wealthy elites, and other powerful interests hold disproportionate influence over resource allocation, judicial interventions that counter these groups’ influence restore democratic process.²⁵⁸ According to an influential strand of constitutional theory,

²⁵² For a similar argument, see Landau & Dixon, *supra* note 43, at 120–24 (arguing that judicial enforcement that focuses on the middle classes is less problematic than often suggested). See also Rosalind Dixon, *On Law and Economic Inequality: A Response to Philip Alston*, 24 AUSTRALIAN J. HUM. RTS. 276, 276–77 (2018) (arguing that “[t]o address economic inequality, however, social rights guarantees cannot simply be interpreted in a way that promotes the needs of the poor without any attention to the needs of the middle class”).

²⁵³ See Richard Reeves, *The Middle Class: Does Size Really Matter?*, THE GUARDIAN (Apr. 13, 2019, 6:00 AM), <https://www.theguardian.com/inequality/2019/apr/13/middle-class-shrinking-oecd-report-income-inequality> [<https://perma.cc/PJF5-SDFP>] (“The size of the middle class, on a median-pegged definition, is then simply a proxy for income inequality.”).

²⁵⁴ See *supra* Part I, p. 2023–29.

²⁵⁵ Recent studies have emphasized the frequently majoritarian character of judicial decisionmaking. See, e.g., GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 170–71 (2005) (discussing the German Constitutional Court); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 283–84 (2010) (discussing the U.S. Supreme Court); cf. Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC’Y REV. 117, 149–54 (2001) (arguing that Russia’s second constitutional court was more successful than the first constitutional court in part because it avoided conflicts with other branches and focused on cases in areas where “it [could] build up a reservoir of public support,” *id.* at 154).

²⁵⁶ Cf. Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1535 (2015) (finding that women and the poor have less political power than men and the nonpoor relative to their population size); Nicholas Carnes, *Working-Class People Are Underrepresented in Politics. The Problem Isn’t Voters.*, VOX (Oct. 24, 2018, 8:00 AM), <https://www.vox.com/policy-and-politics/2018/10/24/18009856/working-class-income-inequality-randy-bryce-alexandria-ocasio-cortez> [<https://perma.cc/E9NH-G3HE>] (noting that while “working-class jobs . . . make up a little more than half of our economy[,] . . . workers make up less than 3 percent of the average state legislature”).

²⁵⁷ Dixon & Suk, *supra* note 192, at 375–76.

²⁵⁸ *Id.* (discussing economic inequality caused by powerful economic interests as a constitutional problem).

judicial review is actually most appropriate when it seeks to unblock the democratic process.²⁵⁹

A judicial focus on economic justice for the middle class may also allow courts to bolster their reputations and legitimacy.²⁶⁰ Courts are widely considered to be the weakest branch of government,²⁶¹ and around the world, they often encounter political backlash against unpopular decisions or find that their decisions are not implemented.²⁶² Protecting social welfare programs offers an opportunity for courts to boost their popularity with the public at large.²⁶³ Such popularity can help courts: courts that are broadly popular are less likely to encounter backlash and have more institutional capital to resist the political branches when needed.²⁶⁴

²⁵⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).

²⁶⁰ Maintaining legitimacy, often through a strong reputation with the public, is considered central to the operation of the judiciary. See, e.g., NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 19–22 (2015) (arguing that “[a] better reputation will be correlated with an increased likelihood of compliance [with judicial decisions], whether the mechanism of compliance involved relies on legitimacy, enforcement, or coordination,” *id.* at 20); cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1833 (2005) (“Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could cause their doctrinal handiwork to collapse. Possibly as a result of the Court’s concern for its own sociological legitimacy, it has seldom remained dramatically at odds with aroused public opinion for extended periods.” (footnote omitted)); James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 484 (1995) (arguing that “diffuse support is important because it contributes to mass acceptance of unpopular judicial decisions”). But see James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998) (suggesting that “the level of commitment to an institution may color the views one holds of its performance” rather than the reverse).

²⁶¹ See, e.g., THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“The judiciary . . . has no influence over either the sword or the purse . . . [and] is beyond comparison the weakest of the three departments of power . . .”).

²⁶² Adam S. Chilton & Mila Versteeg, *Courts’ Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 319–21 (2018); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT’L L. 285, 287–88 (2015).

²⁶³ See Landau & Dixon, *supra* note 43, at 120; see also Michael D. Gilbert & Mauricio A. Guim, *The Active Virtues* 20 (Va. Pub. Law & Legal Theory Research Paper No. 2019-21, 2019), <https://ssrn.com/abstract=3366512> [<https://perma.cc/WNG2-WFP6>] (noting that courts can increase their legitimacy by making “decisions popular with different groups,” including “ordinary citizens”). But see John Ferejohn, *Financial Emergencies*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS 18, 23 (Tom Ginsburg et al. eds., 2019); Tom Ginsburg et al., *Introduction: Liberal Constitutions During Financial Crises*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS, *supra*, at 1, 7 (questioning whether courts will step up in times of economic crisis); Georg Vanberg & Mitu Gulati, *Financial Crises and Constitutional Compromise*, in CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS, *supra*, at 117, 141–42 (arguing that courts will defer to the executive when facing an economic crisis).

²⁶⁴ Cf. VANBERG, *supra* note 255, at 170–72; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–94 (1957).

Perhaps most persuasively, there is reason to believe that judicial interventions that enrich large demographic cross-sections can be particularly impactful. This insight flows from the large set of empirical studies on rights effectiveness.²⁶⁵ This literature (which is not discussed in *Not Enough*) has not directly explored the impact of rights on economic equality, yet some of its findings nonetheless provide insight into their possible relationship. One of the core insights of this body of work is that governments can often ignore rights,²⁶⁶ even in the face of robust judicial review.²⁶⁷ But this research also finds that rights are most powerful when backed by organized groups of citizens willing to litigate and mobilize political pressure against rights encroachment.²⁶⁸ While successful rights mobilization is a challenge itself, it is easier to mobilize for rights that protect majorities than for rights that protect vulnerable minorities alone. Vulnerable minorities — including the poor — may not present their grievances as rights violations, and therefore lack the rights

²⁶⁵ For a review, see generally Kevin L. Cope & Cosette D. Creamer, Response, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT'L L. 459, 462–74 (2016); Kevin L. Cope et al., *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155, 158–72 (2019); Emilie M. Hafner-Burton, *A Social Science of Human Rights*, 51 J. PEACE RES. 273, 276–82 (2014); Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 288–92 (2010).

²⁶⁶ A host of empirical studies have found that if we look at the impact of many constitutional rights in the aggregate, they are not necessarily associated with better rights practices. See, e.g., Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575, 575 (2016); Adam S. Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. LEGAL STUD. 417, 420 (2015); Mila Versteeg, *The Politics of Takings Clauses*, 109 NW. U. L. REV. 695, 723–29 (2015). Scholars have found similar results for human rights treaties. See generally Cope & Creamer, *supra* note 265 (reviewing these studies).

²⁶⁷ Existing quantitative studies have not found consistent evidence that constitutional rights are more effective when enforced by independent courts. See Chilton & Versteeg, *supra* note 262, at 297; Charles Crabtree & Michael J. Nelson, *New Evidence for a Positive Relationship Between De Facto Judicial Independence and State Respect for Empowerment Rights*, 61 INT'L STUD. Q. 210, 221 & tbl.7 (2017). Some qualitative studies confirm these findings. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–43 (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND SOCIAL CHANGE* 131–32 (Univ. of Mich. Press 2004) (1974).

²⁶⁸ See CHILTON & VERSTEEG, *supra* note 16 (manuscript at 18–19) (finding that some kinds of constitutional rights come with natural constituencies that can push for compliance, and that, as a result, these rights do actually translate into better rights practices); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 371–73 (2009) (finding that human rights treaties matter in transitional democracies where there are civil society groups that can push for their implementation by applying political pressure or litigation); see also CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 4–6 (1998); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 926 (2005); Jana von Stein, *Making Promises, Keeping Promises: Democracy, Ratification and Compliance in International Human Rights Law*, 46 BRIT. J. POL. SCI. 655, 657–59 (2015). See generally JOE FOWERAKER & TODD LANDMAN, *CITIZENSHIP RIGHTS AND SOCIAL MOVEMENTS: A COMPARATIVE AND STATISTICAL ANALYSIS* (2000).

consciousness necessary for rights mobilization.²⁶⁹ They also often lack the resources to litigate.²⁷⁰ The middle classes, by contrast, do often present their grievances as rights violations and have the resources to litigate.²⁷¹ With tangible benefits at stake, they also have every incentive to do so.²⁷² For this reason, a judicial agenda focused on economic justice can be particularly impactful. Put simply, when rights are deployed to protect the material benefits of popular majorities, law and politics align.

The story of school finance litigation in the United States backs these insights. In the United States, school funding relies in part on local property taxes, which generates great disparities across school districts.²⁷³ The U.S. Supreme Court acknowledged such disparities in *San Antonio Independent School District v. Rodriguez*²⁷⁴ but declined to provide a remedy.²⁷⁵ Since then, parents seeking equitable school funding have turned to U.S. state courts. Some sought equal funding per student under state constitutional equal protection clauses (equity cases); others sought adequate funding for students under state constitutional education provisions (adequacy cases).²⁷⁶ One study finds that the resulting court-mandated school finance reform “reduce[d] within-state inequality in [educational] spending by [nineteen] to [thirty-four] percent,” mostly because of increased spending in poorer districts.²⁷⁷ Subsequent studies have linked the equalization of spending to higher SAT scores

²⁶⁹ See Michael McCann, *Litigation and Legal Mobilization*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 522, 529–30 (Keith E. Whittington et al. eds., 2008); see also Landau, *supra* note 40, at 232.

²⁷⁰ See, e.g., Landau, *supra* note 40, at 231–32.

²⁷¹ See, e.g., *id.*

²⁷² See generally, e.g., ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS* (2003) (showing that the Social Security Act transformed senior citizens into one of the most politically active groups in American politics because their welfare is tied to a government program); SUZANNE METTLER, *SOLDIERS TO CITIZENS* (2005) (showing how the Servicemen’s Readjustment Act of 1944, known as the “G.I. Bill,” increased the political participation of the veterans who benefited from the bill).

²⁷³ See Brian Highsmith, Essay, *The Implications of Inequality for Fiscal Federalism (or Why the Federal Government Should Pay for Local Public Schools)*, 67 BUFF. L. REV. 407, 410–11 (2019).

²⁷⁴ 411 U.S. 1 (1973).

²⁷⁵ *Id.* at 50–55.

²⁷⁶ See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008).

²⁷⁷ Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 790 (1998). Other studies have also shown the effect of the courts on school finance reform. See, e.g., Raquel Fernández & Richard Rogerson, *Public Education and Income Distribution: A Dynamic Quantitative Evaluation of Education-Finance Reform*, 88 AM. ECON. REV. 813, 831 (1998); Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, AM. ECON. J.: APPLIED ECON., Apr. 2018, at 1, 23–24 (2018); David P. Sims, *Lifting All Boats? Finance Litigation, Education Resources, and Student Needs in the Post-Rose Era*, 6 EDUC. FIN. & POL’Y 455, 478–83 (2011).

among students from lower socioeconomic backgrounds.²⁷⁸ Moreover, the literature finds that both adequacy and equity suits can produce these benefits.²⁷⁹ Of course, these studies concern school funding only in the United States, but they reveal that in some settings, rights-based litigation can meaningfully promote equality.

Evidence from other countries is scarcer. Yet the literature has documented some notable success stories. Case studies on healthcare litigation in Colombia and Brazil have found that, while the many individual healthcare cases may have mostly benefited the middle class,²⁸⁰ they also produced more systemic effects and ultimately, albeit indirectly, improved the fairness of the healthcare system as a whole.²⁸¹ A study on Indonesia has shown that three landmark rulings on education spending by the Indonesian Constitutional Court redirected some five percent of the national budget to education, thereby doubling the education budget and benefiting roughly 750,000 students, some thirty-six percent of whom were estimated to be from the lowest two income quintiles.²⁸² A study on education litigation in Brazil finds that some seventy-eight percent of the beneficiaries of education cases — which mostly dealt with procedural restrictions on tuition increases and the hiring of public school teachers — came from the lowest two income quartiles.²⁸³ And a study on the right-to-food litigation in India estimates that the supreme court's requirement that midday meals be served at schools resulted in some 412,500 girls, most of whom likely were from underprivileged backgrounds, enrolling in first grade each year from 2001 to 2006.²⁸⁴

Of course, such gains in material equality do not materialize everywhere. For one thing, studies have found that merely enshrining social rights in a constitution has little impact on governments' spending priorities.²⁸⁵ What is more, the mere presence of an independent judiciary

²⁷⁸ David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of Student Test Scores*, 83 J. PUB. ECON. 49, 79–80 (2002).

²⁷⁹ Matthew G. Springer et al., *The Impact of School Finance Litigation on Resource Distribution: A Comparison of Court-Mandated Equity and Adequacy Reforms*, 17 EDUC. ECON. 421, 421, 440–41 (2009).

²⁸⁰ On Colombia, see, for example, Landau, *supra* note 40, at 231–32. On Brazil, see, for example, Brinks & Gauri, *supra* note 42, at 383 & tbl.1; and Ferraz, *supra* note 42, at 1660–62.

²⁸¹ On Colombia, see, for example, CHILTON & VERSTEEG, *supra* note 16 (manuscript at 202–06); and Young & Lemaitre, *supra* note 43, at 191–97. On Brazil, see, for example, Borges, *supra* note 43, at 149–51; and Brinks & Gauri, *supra* note 42, at 383.

²⁸² Brinks & Gauri, *supra* note 42, at 377, 386; see also Susanti, *supra* note 53, at 258–62 (examining the three rulings).

²⁸³ Brinks & Gauri, *supra* note 42, at 384.

²⁸⁴ *Id.* at 385; see also Poorvi Chitalkar & Varun Gauri, *India: Compliance with Orders on the Right to Food*, in SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE, *supra* note 43, at 288, 311.

²⁸⁵ Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J.L. & ECON. 713, 742 (2017); see also Avi Ben-Bassat &

might also not be enough.²⁸⁶ Instead, the evidence from existing studies suggests that at least three conditions likely need to be fulfilled: (1) there has to be progressive constitutional law (for example, in the form of social rights), (2) courts need to be willing to take up an economic justice agenda, and (3) there needs to be some social mobilization in the form of dedicated groups of citizens that litigate and push for implementation.²⁸⁷ These conditions may interact with each other in complex ways. As mentioned, social mobilization may be easier to accomplish when courts are willing to protect broad swaths of the population than when they focus on the poor alone.

Ultimately, whether and how constitutional rights can be deployed to promote equality is an empirical question. *Not Enough* makes strong claims: not only have the efforts of the human rights movement been “not enough,” but the minimal efforts made to promote sufficiency have also been ineffective (p. 201). Yet the existing empirical literature suggests that this conclusion may be premature. If anything, our knowledge is “not enough” to make strong claims one way or the other. While some country case studies provide cause for optimism, we do not know to what extent these findings generalize. To date, there are no global studies that explore the effect of social rights on material equality, or the pathways through which social rights make a difference. But my own reading of the existing literature provides more cause for optimism than Moyn’s account. At the minimum, the question whether rights can combat economic equality is sufficiently promising to merit future exploration.

Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. COMP. ECON. 103, 115–18 (2008) (finding that the right to social security correlates with higher transfer payments in a cross-section of 64 countries, while the right to education is negatively correlated with education spending); Christian Bjørnskov & Jacob Mchangama, *Do Social Rights Affect Social Outcomes?*, 63 AM. J. POL. SCI. 452, 464 (2019) (finding no relationship between social rights and social spending).

²⁸⁶ See Chilton & Versteeg, *supra* note 262, at 308–25 (arguing that the existence of independent courts does not increase the probability that governments will respect constitutional rights).

²⁸⁷ See Brinks & Gauri, *supra* note 42, at 381 (suggesting that “[s]ocial mobilization capacity” ultimately determines the impact of social rights — “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”). Note, however, that this hypothesis has not yet been tested with cross-national data.

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