ECUADOR'S 2008 CONSTITUTION: THE POLITICAL ECONOMY OF SECURING AN ASPIRATIONAL SOCIAL CONTRACT

ERIC ALSTON[1]

ABSTRACT

Ecuador's 2008 constitution is fundamentally aspirational in terms of the environmental rights it guarantees. In Ecuador, social rights have received immediate implementation priority, even though their implementation, financed through resource extraction revenues, has required the government to trade off against stringent enforcement of environmental rights. Thus, the enforcement of the rights of nature to date is more akin to executive enforcement of environmental regulation than that of a rigid constitutional assurance to a particular right. Such a tradeoff can be characterized as a political economy of constitutional rights implementation. The analysis of rights implementation in Ecuador further suggests that environmental rights provisions can be particularly subject to rights tradeoffs, and

1. Scholar in residence, Finance Division, Leeds School of Business, University of Colorado–Boulder; research associate, Comparative Constitutions Project. For comments, independent study credit at the University of Chicago Law School, and noteworthy levels of patience, I thank Tom Ginsburg. For workshop and guest lecture opportunities, I thank Mila Versteeg and her students at the University of Virginia Law School, Bruce Johnsen and the George Mason University School of Law, and Graham Davis and the Department of Economics and Business at the Colorado School of Mines. I also thank the Public Choice Society for conference selection, the Hernando de Soto Capital Markets Program for research and conference support, and Javari McGill and the University of Colorado's Undergraduate Research Opportunity Program for research assistance and funding. Finally, I am grateful to Lee Alston, Federica Carugati, and the students of the Ostrom Workshop at Indiana University for comments.

Constitutional Studies, Volume 3

regimes with a dominant veto player can be more able to engage in rights tradeoffs than others.

KEYWORDS: *constitutional law, comparative constitutional law, constitutional implementation, global constitutionalism, environmental rights, human rights, rights tradeoffs, political economy, Ecuador, natural resources, development economics*

IN 2008, ECUADOR'S CITIZENRY approved a new constitution by a resounding majority. The 2008 constitution was noteworthy across a number of dimensions, from its antecedents in a stream of political crises, to the scope and form of the rights it provided, to the international interest its passage and implementation generated. The constitution was a signal achievement of the Correa regime in the extent to which it proposed to fundamentally change the nation's governance institutions from those experienced under the preceding unstable and corrupt regimes. This meant that despite being the dominant political players in the country, Correa and his party could not ignore the constitution when it competed with their policy priorities. Instead, the Correa regime relied on the judiciary to rationalize its economic and social development priorities with the more aspirational environmental rights found in the constitution.

A core tension in the implementation of the 2008 constitution has been the uniform enforcement of rights guarantees. Despite the specification that rights are nonhierarchical, this principle can break down in the face of larger fiscal and political economic realities that require the prioritization of certain rights over others (Gearty 2010). The more aspirational a given constitution is compared to the existing situation that led to its development, the greater the cost and time required to implement such a constitution fully. Ecuador's 2008 constitution is unquestionably aspirational, both within the context of the country itself as well as compared to other countries' constitutions, especially in terms of the social and environmental rights it guarantees. Thus, the extent of change a new constitution contemplates can have important implications for the tradeoffs it forces the implementing government to make when wholesale implementation is not possible in the short term.

As the subsequent analysis will suggest, the gap between existing sociopolitical realities and new rights created generates a fundamental tension whose resolution is a function of which rights have the most popular support and how these rights must be financed given the existing structure of government. This suggests that just as institutions are a determinant of economic outcomes, a given nation's industrial organization can influence the extent of institutional change that is possible under a given regime change. In Ecuador, social rights and economic development have

received immediate priority, even though their implementation, financed through resource extraction revenues, has required the government to trade off against prioritizing the implementation of the most aspirational environmental rights. The case of Ecuador provides a clear example of where a more general rights tradeoff treated in the literature, human rights versus economic development, is given further detail in that environmental rights have had to trade off with economic development (and financing of social rights). Such a rights tradeoff can be seen in light of more classic interpretations of politicians catering to the majority demands of the constituents they represent, and as such, can be characterized as a political economy of constitutional rights implementation.

The analysis proceeds as follows. Section I reviews the literature regarding rights tradeoffs, environmental constitutionalism, and contemporary Latin American political models. Section II describes the political and social upheaval that culminated in a new constitution. Section III highlights the most notable aspects of the 2008 constitution, especially in terms of environmental rights and indigenous recognition. Section IV chronicles the implementation of the new constitution during its first nine years in force. Section V notes how immediate needs for revenues led to a mining law whose interpretation in the constitutional court granted considerable latitude to the government in terms of sidelining the rights of nature. Section VI examines the courts' treatment of rights of nature claims to date. Given the difficulties in implementation and enforcement, Section VII identifies a number of other constitutional infirmities that have emerged, suggesting that they are related to the tradeoffs the government has made in implementing the 2008 constitution.

I. HUMAN AND ENVIRONMENTAL RIGHTS TRADEOFFS AND NEO-BOLIVARIAN POLITICAL MOVEMENTS

A. Rights Tradeoffs and Environmental Constitutionalism

The development of the institution of constitutionalism over the course of twentieth century closely tracks the increasing global adoption of human rights instruments (Goderis and Versteeg 2014). This increased growth in constitutionalism around the world has had important effects in terms of the extent to which new constitutional processes are representative of the demand for change that led to the need for a new constitution. In contexts like Latin America, where executives are relatively unconstrained and governance problems such as corruption are prevalent, new constitutional processes have often been accompanied by the expectation for major change from that which came prior. Given how human rights diffusion

has tracked the emergence of a culture of constitutionalism around the globe, these reactionary constitutional processes have frequently enshrined new rights. However, the increased adoption of human rights, either via constitution or international treaty, has not necessarily led to uniform human rights improvements in adopting countries (Chilton and Versteeg 2016). This had led scholars to question whether a rights-focused approach is the best way to achieve sustainable human development outcomes.

This critique has been associated with Eric Posner, who argues that a focus on human welfare as opposed to human rights might better enable governments to improve outcomes for their citizens (Posner 2008, 2014). Posner's concern about the optimality of rights institutions culminated in a book that critiques human rights law's dominance in policy debates as the best means of achieving increases in human welfare. Importantly, however, Posner's critique is mainly reserved for international human rights treaties (Posner 2014). The critique is quite simple: rights-based protections are necessarily rigid, and given the underlying intent to improve human welfare, is such a rigid assurance the best way to achieve this intent? The rigidity of a rights-focused approach is argued to lead to considerable controversies surrounding which rights should be considered fundamental, how to prioritize the enforcement of rights, and how government resources should be allocated to address rights violations (Posner 2008, 1760).

The notion that human rights pose a necessary tradeoff with other desirable outcomes is not an uncontroversial one (Henkin et al. 2009, 107–109), but critiques of the inevitability of rights tradeoffs tend to focus on specific examples that show improvements in human rights occurring alongside economic growth (Donnelly 1984, 2013, 229–31). While these critiques show that achieving improvements in human rights are possible alongside periods of economic growth, they tend to ignore the obvious counterfactual: would greater economic growth have been possible absent as many human rights restrictions? A related concern is the general focus of the development and rights tradeoff debate.[2] While such a tradeoff may well exist, are there certain types of rights that are more or less likely to create the need for tradeoffs for the implementing government? This article proceeds to argue that Ecuador provides a case study where the government has faced a

2. While scholars approaching the question have long noted that specific countries or regions can be more subject to rights tradeoffs than others (Hewlett 1979), these analyses tended to be limited to the broad rights being traded off to facilitate economic development, as opposed to a specific sets of rights likely to be traded off with one another.

tradeoff between social rights and environmental rights because of the need to finance improvements in human welfare required by the 2008 constitution.

Despite the broad terms of the rights tradeoff debate, the constitutional rights literature has developed considerable granularity in regards to environmental rights. Constitutional treatment of environmental outcomes has increased significantly in the decades since environmental concerns came to the forefront of public concern during the latter half of the twentieth century (Boyd 2014; May and Daly 2015; Kotze 2016). Since 1972, when no constitution in force treated rights to the environment, 147 countries have included some reference to environmental protection in their constitutions (Boyd 2014). David Boyd's comprehensive study concluded that constitutional environmental protections correlate strongly with improved rankings on environmental indices, among other measurable environmental outcomes.

What remains an important question is the extent to which such correlation suggests causation, for countries that more highly value environmental sustainability are also more likely to enact legal protections to assure this outcome. In Ecuador's case, the demand for environmental improvements was arguably present, especially in debates over constitutional substance, but the extent to which the rights that emerged have resulted in meaningful restraint on the actors most likely to degrade the environment is a separate question with which this analysis is concerned. This concern as to causal mechanisms of environmental improvements mirrors the more general concern in the human rights scholarship as to whether formal rights protections are the means by which human rights improvements actually occur (Hafner-Burton and Tsutsui 2005; Posner 2008, 2014). Scholars of global environmental constitutionalism have posed the environmental rights tradeoff question (Bosselmann 2015, 177) but have not examined outcomes in specific nations to the extent that this analysis does.

Interestingly enough, environmental rights do not appear to emerge as the result of adoption of these measures by other countries in a given region (Gellers 2012). Nonetheless, scholars of environmental constitutionalism consistently note Latin America as a region where environmental rights have gained the most purchase in constitutional texts and subsequent jurisprudence (Boyd 2014; May and Daly 2015; Kotze 2016). Setting aside the question of whether Latin America is an exception to the empirical finding that regional diffusion is not operative in the adoption of constitutional environmental rights, there are a number of other aspects to the politics of the region that help to understand the implementation of Ecuador's constitutional project under Correa.

B. Neo-Bolivarian Constitutionalism and Populist Parties as Veto Players

The rise of Correa in Ecuador is part of a regional trend that bucked decades of political adherence to U.S.-influenced integration into global trade. The modern emergence of left-leaning populist political movements is first traced to the rise of Hugo Chavez in Venezuela in the 1990s, followed by Evo Morales in Bolivia, and subsequently Correa in Ecuador. The appeal of these movements lay in their rejection of what came prior, often labeled neoliberalism, neocolonialism (Moraña et al. 2008, 12), or neo-imperialism (Knauft 2007). Because of this notion of dependency upon colonial or imperial masters, the rejection of neoliberalism in the preceding countries was named neo-Bolivarianism after the father of numerous independence movements in the region, Simon Bolivar.

These neo-Bolivarian movements led to a distinct form of constitutionalism, characterized by three main features: a high degree of aspirational content, a radical departure from existing governance institutions, and a tension between conservative and liberal constitutional protections (King 2013, 369). This characterization is based in part upon the Ecuadorian constitution and so directly reflects the content that led to the challenges in implementation that this article subsequently describes. A high degree of aspirationalism, based in a departure from existing governance institutions, with significant conflicts in practice among constitutional provisions themselves is a direct description of Ecuador's experience surrounding the implementation of the 2008 constitution.

Beyond the constitutional context, the role of neo-Bolivarianism as a rejection of neoliberal policies has resulted in significantly empowered executives who came to office through populist movements. Although this rejection of neoliberalism is reflected in constitutional provisions treating the rights of indigenous groups and environmental protections, this trend had larger political implications that can be situated in the political science literature surrounding veto players. In these neo-Bolivarian regimes, the emergence of a charismatic leader not only led to electoral success in the executive but was also linked to the dominance of the legislative branch by this executive's party. It is important to note that the independence of political parties from their leaders in these countries is much lower than in other Latin American contexts (Sanchez 2008; Flores-Macías 2010). In such a context, the charismatic executive is the most powerful veto player in the political system because they effectively control the definition and execution of new legislation (Tsebelis 1995, 2002). Another way to characterize these political systems is "delegative democracies," which "rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard

facts of existing power relations and by a constitutionally limited term of office" (O'Donell 1994, 59).

Tsebelis's thesis regarding the potential for policy change focuses on the number of individual political actors that can veto a potential change, the extent to which these players' visions of policy change are congruent, and the amount of internal cohesion within each veto player's political party or interest group (Tsebelis 1995). The subsequent analysis will show that in the case of Ecuador, the nearly singular veto player, President Correa; the congruence between his party's vision for change and that of the population; and the cohesion his party displayed before and after constitutional enactment all point to a significant potential for policy change. This policy change potential, however, very much depended on the priorities defined by the Correa regime, which chose to emphasize human development as opposed to strict adherence to the environmental rights enshrined in the 2008 constitution.

II. THE RISE OF ALIANZA PAÍS AND THE 2008 CONSTITUTION

Between 1996 and 2006, Ecuador had seven different governments, each characterizing its policies as intended to create market liberalization and diminution of the state. These governments fell under distinct circumstances, but corruption played a role in the demise of each regime (Paz y Miño Cepeda 2009, 74). During this time, while some sectors of the population amassed a large amount of wealth, inequality rose considerably and other sectors of the population experienced high levels of unemployment and subemployment.

In short, much of the population increasingly began to question the legitimacy of the government prior to the rise of Correa and his party, Alianza País. The political turnover preceding Correa's regime resulted in the unification of diverse movements that were instrumental in nationwide protests against the corruption and inequality that characterized the seven regimes preceding that of Alianza País (Kauffman 2016, 87). By one estimate, 80 percent of the Ecuadorian population was excluded from the political process,[3] and this was the base that Correa effectively tapped for his rise to power and reframing of the Ecuadorian social contract (Becker 2011, 48). Correa leveraged the emergence of the neo-Bolivarian model

3. The post-constitutional electoral results in 2009 emphasize the extent of disillusionment with the traditional parties, with only 9 of 124 seats in the National Assembly going to the parties who had enjoyed a clear hegemony prior to 2002 (Pachano 2010, 308). A further indication of the decline of the prior parties is that none fielded a presidential candidate in the post-constitutional 2009 elections (Bowen 2010, 187).

of governance in his own campaigns, characterizing Alianza País as part of the regional turn to the left (Arsel 2012).

Correa's platform with Alianza País was a clear reaction to the preceding periods of instability, inequality, and corruption, utilizing language to characterize the prior period as the "long neoliberal night" and promising a "new Latin-american left" (Paz y Miño Cepeda 2009, 74), including the convocation of a constituent assembly to create a new constitution. Indicative of popular support for a fundamental change in the social contract was the referendum as to whether a new constitution was needed, in which Alianza País' position of yes received 82 percent of the vote, leading to the need to elect a constituent assembly.

The indigenous political coalitions who achieved representation in the constituent assembly valued both the indigenous and environmental ideals of "Pachamama"[4] and "sumak kawsay,"[5] as well as the leftist neo-Bolivarian ideals of rights to health care, education, and social security. Furthermore, indigenous communities sought recognition as nations in their own right, and so one of their chief aims was the declaration of Ecuador as a plurinational state, first and foremost. The indigenous communities also sought the recognition of indigenous languages as official languages of the government alongside Spanish. Ultimately, neither aim was realized, although each objective received modest treatment in the constitution.[6] These outcomes emphasize how it can be comparatively easier to make "minor cultural concessions" than to create the wholesale change demanded by many indigenous rights movements (Becker 2011, 56).

Despite the conflicts indigenous groups had with the constitutional provisions on language and the tension between the provisions on natural resources and recognition of Pachamama and sumak kawsay, "the indigenous movements decided to take what they could get rather than losing everything with a more principled stance" (Becker 2011, 59). In other words, indigenous groups saw the limits of their bargaining power in the diverse coalition within Correa's movement and prioritized the aims of increased political recognition and definition of environmental rights over the full suite of ideal outcomes they desired. Furthermore, the political context from which these groups emerged was one in which they had not previously

---

4. This term can loosely be thought of as "Mother Earth," with an emphasis on the nurturing role nature and a clean environment play on achieving sustainable public health outcomes.

5. This is an indigenous term whose equivalent in Spanish is *buen vivir*, which loosely translates to "good living" but has been more broadly translated in a policy sense to sustainable development outcomes from the perspective of health, education, and economic well-being.

6. 2008 Const. of the Rep. of Ecuador arts. 1 and 2.

been afforded a voice on the national level. Thus, even these qualified victories were quite significant compared to previous political outcomes and may have been preferable to presenting their supporters with defeat. This is perhaps due to the difficult position many groups found themselves in with respect to the draft that ultimately went to referendum: by not supporting a draft that was imperfect from their ideal perspective, they could well be supporting an outcome most conducive to their opposition's interests (Becker 2011, 58–59).

Finally, there is considerable variance as to the extent to which any given constitutional moment can rationally be expected by its constituents to produce an increase in constitutionalism. The study of constitutions in authoritarian regimes and their institutional functions that can be unconnected to traditional notions of constitutionalism (Ginsburg and Simpser 2013) suggests that countries' citizens can vary significantly in their perception of the fundamental importance of a new constitutional process. If expectations are lower as to the extent to which a given constitutional process is likely to bring improvements, this could also imply lower stakes at the constitutional drafting table as compared to other avenues through which a given interest group might seek to achieve its policy aims.

III. THE TERMS OF THE SOCIAL CONTRACT

The referendum for Ecuador's 2008 constitution took place on September 28 and was approved by 64 percent of voters (Gudynas 2009, 38). Social rights are treated in detail and range from health care (articulated as a broad concept of health, in addition to that contemplated in reference to sumak kawsay),[7] to social security,[8] education,[9] specific care for the elderly and youth,[10,11] rights of the disabled to nondiscrimination and adequate care,[12] etc. Many of these rights are ones that huge sectors of the population felt they had been denied under previous regimes and so were central among those demanded in the Constituent Assembly.

The 2008 constitution enshrines the environment using a particular Ecuadorian term, Pachamama, whose direct reference to maternity underscores the

7. Ibid. art. 32.

8. Ibid. art. 34.

9. Ibid. art. 32.

10. Ibid. arts. 36–38.

11. Ibid. arts. 39, 44–46.

12. Ibid. arts. 47–49.

indigenous (and Ecuadorian) belief in the central role of the environment in providing well-being for all living organisms within the nation. The use of this term was a departure from more typical occidental understandings of the environment and natural resources as existing for the support and well-being of humans.[13] There is a core distinction between Ecuador's environmental protections, which are legion from a collective perspective[14] (as opposed to an individual perspective),[15] and those seen in other Latin American constitutions considered progressive on this front. This distinction between environmental rights is because the guarantee to levels of environmental well-being and rights to life of organisms in Ecuador is independent from the impact resource use has on individual property rights to organisms or environmental spaces. As importantly, the 2008 constitution grants some form of standing to "all persons, communities, and nations" to bring claims regarding the infringement of nature's right to "the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes."[16] This suite of ambitious environmental protections has become known as the rights of nature.[17]

The preceding constitutional provisions resulted not only from community and indigenous movements but also from the preceding decades of Ecuador's experiences with foreign extractive industries. This focus on the right to be free from the environmental degradation that often comes alongside natural resource extraction in developing nations is understandable given Ecuador's history with Texaco. Texaco's extraction of oil in the Oriente region of Ecuador resulted in significant environmental degradation to the point where it greatly affected the health of indigenous communities (Kimerling 2006, 2013, 242–4). The decades of pollution created by Texaco led to a lawsuit in Ecuador, as well as abroad, the outcomes of which are discussed in Section VI.

---

13. Bolivia under Evo Morales's neo-Bolivarian regime has similarly emphasized the importance of sustainable environmental stewardship (Kennemore and Weeks 2011).

14. 2008 Const. of the Rep. of Ecuador arts. 14, 15, 57, 71–74.

15. Ibid. arts. 30, 66.

16. Ibid. art. 71.

17. Ecuador's protection of the environment does not limit itself to the enumeration of rights to a clean environment; it also imposes duties on citizens to adopt measures necessary to avoid negative environmental impacts from their actions (2008 Const. of the Rep. of Ecuador art. 83). Furthermore, environmental restoration in the case of degradation by extractive industries is an obligation required by the constitution in Article 72, specified as a right granted to nature apart from the compensation required of the state or private entities in the case of affected communities or individuals. Again, the distinction between an individual right and a collective right or one granted to nature is notable.

The highly progressive rights and duties associated with protecting the environment are not entirely in line with one immediately following in the same section. Article 74 guarantees individuals, communities, and ethnic groups "the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living."[18] Not all uses of natural resources are unsustainable, but beyond the immediate benefits of such uses there is clearly an upper limit on the extraction that can result from sustainable use, the profits from which can be applied to other social aims such as the implicitly costly social and economic rights highlighted in Articles 26, 32, 34, and 37–50. In a country fundamentally dependent on revenues from natural resource industries, the right to benefit from the environment directly reflects the underlying belief on the part of Ecuadorian citizens that all should share in the revenues derived from their country's natural wealth. This right, when considered alongside the rights of nature, provides a clear example of the rights tradeoffs that implementation of the 2008 constitution required of Correa's regime.

This move away from the governments prior to Correa was fundamentally anchored in the concept of sumak kawsay (Radcliffe 2012, 240). While originating with the indigenous communities in Ecuador, the term has taken on a broader meaning to indicate a rejection of that which came prior, especially the corrupt regimes of the decades before Correa's rise. However, as a term is coopted by a broader range of political interest groups, even if they are all grassroots, or counterhegemonic, it must sacrifice some of its core meaning to better encapsulate the range of needs espoused by different community movements. Indeed, the National Planning and Development Secretariat (SENPLADES) themselves labeled the concept of sumak kawsay or *buen vivir* as a social pact (SENPLADES 2010, 6). Moreover, a wide range of other government programs designed to effectuate the rights of nature and environmental improvements display the tradeoffs listed here between stringent enforcement and the costs to economic and social objectives this enforcement would require (Pietari 2016).

Ultimately, though, any social pact necessarily involves compromises among interests with divergent policy preferences, which can also require rights tradeoffs, depending upon the scope and magnitude of rights that a given constitutional order enshrines. The conceptual tension surrounding the meaning of sumak kawsay as implemented in government programs has proven to be a major theme in the years since constitutional enactment and reflects the fundamental dependence of the

18. 2008 Const. of the Rep. of Ecuador art. 74.

nation on natural resource extraction revenues for financing government programs such as infrastructure and social welfare provenance.

IV. IMPLEMENTING A NEW SOCIAL PACT

Ecuador's first post-constitutional presidential and legislative elections provided a number of electoral changes.[19] Under this altered set of electoral institutions, the growing pains experienced by Correa and Alianza País in terms of living up to the full suite of their constitutional promises may have led the party to subsequently receive less than a majority in the legislative election of 2009 (Bowen 2010, 188). Since then, however, Alianza País has gone on to make up this loss, as the party won a majority in the legislative elections in early 2013 (*El Universo* 2013), not to mention Correa being reelected resoundingly for his final term as president (Consejo Nacional Electoral 2013). Nonetheless, this variance in electoral outcomes for Alianza País has an important corollary point: the Ecuadorian electorate is capable of restraining the majority party in the country, and did so during Correa's regime. This means that despite the dominant position of Correa and his party, they were still subject to electoral constraint and so had to respond to popular pressures regarding the implementation of the 2008 constitution.

Beyond the environmental implementation issues treated in the preceding paragraphs, the immediate post-constitutional period also marked significant economic restructuring on the part of the government, including the repudiation of a large amount of externally held debt, as well as substantial increases in government expenditure in the areas of infrastructure, health care, and education. State control of previously privatized enterprises, the global economic crisis, and a decrease in domestic investment (likely in response to the nationalization of core industries), all led to several years of economic contraction. The repudiation of the debt reduced the national debt as a percentage of GDP from 23.2 and 18.3 percent in 2007 and 2008, respectively, to a level of 14.3 percent in 2009 (Pachano 2010, 303). Notably, Becker claims the repudiation of the debt was a political statement that was not tied to the ability of the government to actually pay the debt, and instead that a lack of action on this front would have borne significant political costs for Alianza

19. First, the 2008 constitution defined a mixed electoral system in which out of 124 representatives, 15 are elected by proportional representation from the nation as a whole, 103 are elected in first-past-the-post district elections from Ecuador's 24 provinces, and 6 are elected by Ecuadorians living abroad. Second, the legislative elections used primaries to determine Alianza País's candidates, a first in Ecuador (Bowen 2010, 187).

País (Becker 2013, 47). This rejection of perceived Western financial hegemony is directly in line with the rhetoric and actions of other neo-Bolivarian governments in the region, especially Venezuela.

Given Ecuador's dependence on resource extraction revenues,[20] high worldwide petroleum prices greatly aided the government's development agenda despite the negative growth of the economy during these initial phases of implementation. However, largely being limited to petroleum income sources, coupled with traditional sources of international funding drying up in the wake of repudiation, led to Correa's regime accepting a loan from China guaranteed in future petroleum sales (Pachano 2010, 303). These initial years of adjustment provide a marked contrast to the years following, in which "social spending on roads, hospitals, and schools had resulted in a growth rate of 8 percent for 2011, up from 3.6 percent the previous year and above the government's prediction of 6.5 percent" (Becker 2013, 43). Such economic performance, which boosted employment while ensuring the fiscal viability of the provenance of a number of core social rights enumerated in the 2008 constitution,[21] likely played a part in Alianza País' electoral success in 2013. Correa has continued to receive recognition for the success of this spending, which included income support programs, educational opportunities, and extensions in housing credit in addition to the health care and infrastructure improvements noted by other scholars (Larrea and Greene 2017). The direct effects of this spending also have a deeper implication in regards to the rights prioritization of the Correa regime. The repudiation of the external debt and dependence on resource extraction revenues point to a significant revenue constraint on government revenue sources. In such an environment, the government's choice of expenditure directly reflects its underlying policy prioritization.

Despite the high levels of popular support for Alianza País, the implementation of the 2008 constitution has not been without hiccoughs. The necessary compromises the constituent assembly made regarding indigenous and environmental demands led in part to Alianza País losing in 2009 elections the absolute majority it had enjoyed in the constitutional drafting process, as well as the fragmentation of larger coalitions[22] that had supported the Alianza País' program within the

---

20. In recent years, 50 to 60 percent of export earnings have come from the oil sector alone, and this same sector provided 30 to 40 percent of government revenues over the same period (Beittel 2013).

21. Such a spending pattern is consistent with the empirical finding that constitutionalization of rights to health care and education increases the likelihood of government expenditure on the provenance of health care and education (Kaletski et al. 2016).

22. The political fragmentation is also due in part to changes in political representation law on the lo-

constituent assembly (Bowen 2010, 187–8). Particularly important for subsequent outcomes is the divide that first emerged between indigenous groups and Alianza País during the enactment of the Mining Law, which was subsequently exacerbated by disputes over a water resources law (Pachano 2010, 300). This emphasizes that in a context of limited government capacity to implement costly structural changes in society contemplated in the new constitution, the Correa government had to trade off between implementation priorities, which necessarily involved a political economic calculus that had real electoral ramifications if they got it wrong.

V. THE MINING LAW AND THE CONSTITUTIONAL COURT'S INTERPRETATION

First reported in 2009, the difficulties in ensuring all environmental rights enshrined in the 2008 constitution have continued to this day. The central development authority's plans for improvements in education[23] and health care for the populace necessarily implied an increase in government expenditure (Paz y Miño Cepeda 2009, 75), and these revenues had to come from somewhere. Correa's answer was a revitalized, "socially responsible" mining sector (Dosh and Kligerman 2009, 22), the vision of which was legislated in the Mining Law passed in January 2009, which defined mining as a public activity and mandated state control of mines and oil fields, as well as ensuring the freedom of businesses to "liberally prospect for mineral substances" on communal and indigenous land (Dosh and Kligerman 2009, 22). As noted previously, a major portion of Ecuador's export earnings and government revenues come directly from natural resource extraction, most notably petroleum. Correa's ability to even pass this unpopular law displays the level of party cohesion and policy congruence that he commanded at this time; when the only veto players, President Correa and his Alianza País representatives in the legislature, wanted to achieve a controversial policy change, they were readily able to do so.

---

cal and subnational level, which required a much lower bar for candidates' appearance on ballots. This in turn resulted in a much larger number of political parties' candidates appearing on these ballots, which thus resulted in a larger number of parties represented in subnational and national governance structures. These parties were able to capitalize on minority dissatisfaction with individual constitutional outcomes (or in tradeoffs surrounding their implementation) to achieve legislative representation to the detriment of Alianza País.

23. Indeed, Ecuador's current incentive system to address child truancy among the poorest sectors has been characterized as superior to that present in the United States. It involves a similarity to the food stamps program currently in place in the United States, and as such, carries a significant level of expenditure for the government (Fischer 2013, 276).

Revenues for the implementation of government programs are not the only benefit identified by Alianza País associated with mineral extraction projects. These projects are often in remote and undeveloped regions of Ecuador, regions that Alianza País argues would economically and socially benefit from the additional employment and investment that these projects bring. These beneficial aspects of natural resource development highlight the tension within the constitution itself, where the environment is guaranteed strong protections in the same section where citizens are guaranteed the right to benefit from these natural resources.

The Mining Law led to significant protests from indigenous and environmental groups who were concerned how the law interacted with some of the 2008 constitution's well-regarded rights, such as access to clean drinking water and a healthy environment.[24] This resistance to the Mining Law was one of the first examples whereby a subset of the national-level interests that had been instrumental in bringing Correa into office, and subsequently approving the constitution, argued against outcomes advocated for by the Alianza País platform (Dosh and Kligerman 2009, 23). Because of the Mining Law's unpopularity, it was subject to challenge in the courts by some of the same indigenous groups that had been instrumental in Correa's rise to power. This dispute provided one of the first tests of the rights of nature against the government's affirmation that a significant measure of natural resource extraction would proceed. An important distinction, stressed by the government from the point that it nationalized much of the petroleum industry, was that the newly public stewardship would engage in natural resource development in a way that benefited the people and minimized environmental impacts. Nonetheless, financing government programs across a nation in its entirety implies an ongoing scale of resource extraction that in theory could have violated the rights of nature, and most especially, those pertaining to clean water. This was the argument put forward by claimants that composed a confederation of indigenous groups as well as local government bodies associated with water management and distribution.

This argument ultimately remained theoretical, for the Constitutional Court upheld the Mining Law, given the law's requirements that future resource extraction be supported by procedures designed to reduce environmental damages. The Court went even further, however, by noting that another constitutional provision allowed "the State the authority to make exceptions to constitutional restrictions on mining in environmentally sensitive areas when the government declares this to be in the national interest" (Kauffman and Martin, 2016). This is an explicit recognition by

24. This is not to mention the more extreme rights granted to the environment and individual organisms themselves.

the nation's highest court that the national interest may require a tradeoff regarding the enforcement of environmental rights. As importantly, it cedes the authority to make this determination to the government itself. Such an exemption for the government stands in direct contrast to notions of the "environmental rule of law" that requires that environmental law be applicable to anyone, including state actors (Magraw 2015; Kotze 2016). Although the judicialization of politics has played an increasing role in Latin American nations writ large, outcomes in Ecuador provide a different lens from the general role identified by scholars in which activist courts have tended to step in to hold politicians accountable (Sieder et al. 2016). In Ecuador, the Constitutional Court appears willing to facilitate the rights tradeoff the Correa government identified as central to its constitutional implementation program, perhaps because of the very strength of Alianza País and Correa as veto players within the system.

In relation to these outcomes, Sarah A. Radcliffe notes that despite how "in one respect the state has signed up to a series of major commitments, yet for political and institutional reasons it treats certain rights as more significant than others" (Radcliffe 2012, 245). Of authors who view the recognition of the rights of nature in Ecuador as a positive development, this is one of the most explicit recognitions of the political economy of rights implementation. This tradeoff in rights implementation has led to a significant political divide within the country surrounding the appropriate way to understand sumak kawsay. Alianza País and its supporters have argued that achievement of "the good life" is necessarily a confluence of increases in material well-being as well as a reasonable measure of environmental protections. Indigenous groups, increasingly in opposition to Correa's economic development agenda, argue that the concept fundamentally represents a community's relationship with the environment. To deprioritize environmental outcomes compared to increases in living standards is a tradeoff at odds with the very heart of sumak kawsay, the environmentalists and indigenous rights groups argue. Recent empirical work supports the interpretation that both conceptions of sumak kawsay receive considerable popular support within the country (Guardiola and Garcia-Quero 2014, 177–182).

Much of the optimism about the 2008 constitution depends upon the framing that the creation of new rights, while not yet enforced, does not necessarily destroy classical rights. From this perspective, the 2008 constitution has been argued to be a necessary innovation in the development of fundamental rights worldwide (Gudynas 2009, 44), or as a political roadmap more than a justiciable legal tool (Ruiz Giraldo 2013). It is important to note that both of these perspectives implicitly recognize the necessity to trade off between the rights enforcement priorities

articulated by the 2008 constitution. Not all constitutional drafters have agreed with the government's decisions, however, for a former president of Ecuador's Constitutional Assembly, Alberto Acosta, rendered a judgment against the Ecuadorian government for violation of the rights of nature due to ongoing petroleum extraction within the country. Acosta is a judge for the Tribunal for the Rights of Nature in Paris, which is a citizens' tribunal lacking legal authority (Pietari 2016, 84). Regardless of the lack of legal force, this pronouncement from a leader of the drafting process shows the tension that continued natural resource extraction creates between the rights of nature and Alianza País' system of government.

Recent events continue to show the delicate balancing act required of Alianza País between ensuring increased standards of living while still providing some measure of environmental protections (Rühs and Jones 2016). One of Correa's most lauded environmental projects preceded the enactment of the 2008 constitution. Announced in 2007, the Yasuní-ITT project was an unprecedented attempt to underwrite the costs of environmental protection by contributions from other nations. The project arose after the discovery of massive oil reserves, totaling nearly 20 percent of the country's known reserves, within the Ishpingo-Tambococha-Tiputini (ITT) region of the Yasuní National Park, one of the most biodiverse regions in the world (Arsel 2012, 157–159). The premise for international involvement was that the rest of the world has an interest in protecting biodiversity and reducing carbon emissions and in great part drives the demand for oil that led to the controversy surrounding extraction in the park in the first place. Correa agreed to leave the Yasuní oil in the ground if Ecuador would receive half the oil's value at 2007 price levels,[25] which was $7.2 billion. Like the 2008 constitution itself, the Yasuní-ITT project generated considerable scholarly applause (Larrea and Warnars 2009; Finer et al. 2010; Rival 2010; Arsel 2012; Arsel and Angel 2012).

However, in August 2013, Correa announced that Ecuador would abandon its commitments under the project, having only raised $13 million of the $3.6 billion they requested (Koenig 2014). Despite the Yasuní-ITT project's significant popularity within Ecuador, drilling in the ITT region had begun as of late October 2016 (Vidal 2016). Given that the Amazonian Yasuní -ITT region of Ecuador is now open to resource extraction and that Ecuador is among the most biodiverse countries in the world, it is difficult to imagine the development of petroleum there

25. Given shocks to world commodity prices since 2007, the sum requested may actually represent a larger percentage of the Yasuni reserve than when the project began. In this sense, the project was also innovative in that it would have provided Ecuador insurance against commodity price shocks, the effects of which the country's economy is currently enduring.

would not be at odds with some of the rights of nature, at least in principle. But given the power of the state to declare projects in the public interest as superseding these rights protections, it remains to be seen if any claims against the resource extraction in the Yasuní-ITT region will be brought, let alone prevail. Recent events suggest a movement against resource development in the region, though, for a popular referendum significantly reduced the size of the zone in which oil could be drilled, while simultaneously increasing the area which was off limits to such extraction (*El Espectador* 2018).

Thus, the realization of the neo-Bolivarian state from the legal construct the 2008 constitution creates is necessarily constrained by political and economic realities. These political realities include Ecuador's dependence on resource extraction as a means of revenue to support its development policies, notably the costly social rights articulated in the constitution. While direct taxation has played a significant role in financing these development policies (Radcliffe 2012, 242), Ecuador's level of development prior to Correa's rise to power implied that no amount of redistributionary tax policy could make gains to the extent required by the more than 100 rights enshrined in the 2008 constitution.

VI. LEGAL ENFORCEMENT OF ENVIRONMENTAL RIGHTS?

A more granular analysis of the courts' implementation of Ecuador's environmental rights also exposes weaknesses, most notably surrounding which claimants have proven successful in bringing rights of nature claims. One of the first critiques of the constitution surrounded the enforceability of its more aspirational provisions: "Without a deeper understanding of how nature can access justice and how Ecuador should enforce standing, the new provision will not translate into an applied substantial right" (Radcliffe 2012, 242). The provision under consideration here is Article 71, which is among those rights without an explicit grant of individual standing. In addition, the constitution lacks specification over what criteria dictate who can make a claim under other environmental rights guarantees, and this ambiguity has not since been clarified by the legislature (Whittemore 2011, 666–9). This leaves potential claimants not knowing exactly what it takes to show an injury to the environment and themselves and allows for considerable variance in how judges might treat any given claim emanating from these rights (Pietari 2016).

Such a drafting choice regarding rights standing is indicative of the compromises inherent to a drafting process whose controlling party enjoyed the support of a broad yet heterogeneous swath of society. The tension between granting individual standing to bring claims under the most progressive of Ecuador's environmental

rights, and the diminution in enforceability an explicitly narrow grant of standing would imply, may have led drafters to leave the standing for the most aspirational rights ambiguous. This could be because ambiguity would imply less negotiation costs at the drafting table (from the perspective of the opposing interests that want narrow and broad standing, respectively), as well inherently prioritize those rights in the constitution for which broad standing to bring claims is explicitly granted. Thus, Ecuador's modern constitutional history also provides an example of how drafters may engage in predictive rights tradeoffs by making some rights more actionable than others.

Judicial treatment of rights of nature claims provides an interesting study in the types of groups that have successfully brought claims, as well as who these claims were enforced against. Unclear standing is unlikely to remain so, nor does this uncertainty bind on all potential litigants equally. Ambiguous standing raises expected costs to potential litigants by both reducing the certainty that a claim will prevail and increasing the time required to clarify ambiguous standing procedurally before the courts. In theory, rights of nature claims brought by individuals who either could afford to weather this legal uncertainty or had other structural advantages would be more likely to prevail.

Ecuadorian courts have considered a number of claims brought under the rights of nature in Ecuador's 2008 constitution. As of early 2016, thirteen such claims had been identified (Kauffman and Martin 2017). Of these, ten prevailed, with seven of the cases in which rights prevailed involving a claimant that was a government official or ministry. The Ministry of the Environment makes up a large portion of these victorious claims, which prevailed against three classes of defendants: private individuals, private companies, and local government authorities. Taken together, this means claims under the rights of nature that were most likely to prevail through 2015 in Ecuador were ones brought by the national government against private actors or subnational governments. Those successful claims not brought by the government came from two groups of local citizens and one couple, Nora Huddle and Fredrick Wheeler[26] (Kauffman and Martin 2017). Given the lack

26. Interestingly enough, the facts of Huddle and Wheeler's case appear strikingly similar to property claims that would prevail under most developed nations' actions for damage to private property. After a construction crew working for the Loja provincial government dumped rock and gravel into a river, causing its flow to increase, the property of Wheeler and Huddle was flooded. Although the provincial court used the rights of nature in its ruling, it is not clear that absent the actionable injury to the plaintiffs, claimants would readily appear to contest rights of nature violations that to nonusers of a particular natural property would appear to be marginal changes. *Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja*, juicio 11121-2011-0010 (30 March 2011). By one report, damages

of independence of the judiciary, the choice of the Ministry of the Environment to proceed through the courts is itself significant. Such a choice indicates that the Correa regime independently values the judicial validation of environmental rights in those instances in which the administration chose to restrain a subnational or private actor's environmental rights violations.

Furthermore, the researchers engaged in synthesizing rights of nature claims note how civil society organizations have been comparatively unsuccessful in prevailing on rights of nature claims (Kauffman and Martin 2017), which again points to an increasing role for the government in using these protections in a way akin to environmental regulation, enforcing them against private actors while themselves remaining comparatively free of their constraint, if successful claims brought to date are any indication. Such a pattern of enforcement emphasizes the strength of Correa and Alianza País as veto players, especially compared to the judiciary. This perspective of judicial adherence to the dictates of the dominant veto player has empirical support in a series of studies noting that Constitutional Court judges in Ecuador lack independence from both the executive and the legislature, a pattern that has continued under the Correa regime (Basabe-Serrano 2012; Basabe-Serrano and Polga-Hecimovich 2013).

Nonetheless, this deficiency in judicial independence does not mean Correa and the Alianza País felt unconstrained by the 2008 constitution. The new constitution was the direct result of the party and President Correa's success in fomenting popular support for a neo-Bolivarian revolution similar to several other countries in the region. Alianza País is closely linked to the 2008 constitution itself, such that acting with impunity would have delegitimized one of their crowning political achievements. This view as to the need to achieve the party's agenda within the bounds of constitutionality is consistent with the 2009 ruling in favor of the Mining Law and the right of the government to declare certain environmental impacts as within the public interest and thus outside the realm of constitutional protection. Once again, given the amount of government revenues that result from natural resource extraction, and the central importance of these rents to financing increases in health care, education, and infrastructure, it appears unlikely that claims under the rights of nature will prevail in these scenarios in the short to medium term.[27]

---

spent repairing the property were upwards of $43,000 (Greene 2011), which is nearly nine times the GNI per capita in Ecuador in current U.S. dollars (World Bank 2017).

27. Nonetheless, the rights of nature have prevailed in cases of illegal mining, logging, fishing, and disposal of municipal construction materials, to name a few cases. This indicates that although certain classes of environmental impact may be exempted from rights of nature claims, it is not as if these rights have no purchase whatsoever. Similarly, it should be noted that from a comparative perspective

Nominally successful outcomes of claims against prior resource extraction by private companies have met with other difficulties given constraints unique to Ecuador's regime turnover. The decades of environmental degradation by Texaco resulted in several high-profile awards within Ecuadorian courts themselves. In 2011, an Ecuadorian court ordered Chevron (formerly Texaco) to pay damages and remediation costs for their activities in the Lago Agrio area (Romero and Krauss 2011). In 2013, Ecuador's Supreme Court ratified this ruling and set damages at $9.5 billion (Valencia 2013). Chevron refused to pay. Given this experience, Correa supported an indigenous groups' lawsuit against Chevron in the United States because Chevron no longer has any assets within the country that the government can seize in order to pay compensation to affected individuals. However, in August 2016, a United States court upheld a lower court's decision in favor of Chevron due to fraud and other misconduct on the part of the plaintiffs' attorney.[28]

The Chevron case, coupled with the limited set of actors against whom rights of nature claims have been enforced, highlights the difficult position of the Ecuadorian government when confronted with remedying past and current environmental rights infringements. This difficult position underscores a hidden cost to removing private companies who have engaged in resource extraction with a given country: such companies become considerably more judgment-proof within the country itself. With historical damages to the environment, the government has effectively removed the ability to award damages against these companies in the country's domestic courts, and the outcomes in other nations' courts where these companies still do business are not guaranteed, although in this instance Ecuadorian plaintiffs were more successful in Canada (Telesur 2015). As to possible rights infringements posed by the ongoing resource extraction necessary to ensure increased standards of living and positive rights provenance, these would potentially stymie the very development that Alianza País' conception of sumak kawsay requires and many citizens demand.

VII. CONSTITUTIONAL INFIRMITIES?

While suggestive of an underlying constitutional political economy itself, the inconsistent implementation of the environmental rights creates the possibility for

---

across Latin America, Ecuador has experienced significantly less conflicts between mining companies and the communities they affect (Svampa 2015, 69), which provides an indication that the implementation of the rights of nature, while imperfect, may result in less conflicts when the rents from natural resource extraction are associated with significant outlays on public welfare provision.

28. *Chevron Corp. v. Donziger*, No. 14-0826 (2d Cir 2016).

a larger set of downstream consequences. If the executive and legislative branch of government can prioritize the implementation of certain rights over others, this broadcasts a public signal as to the nature of constitutionalism writ large. This is arguably a suboptimal outcome, even in regimes whose constitutional turnover comes in places characterized by institutional deficiencies (Landau 2013). Although the evidence is still mixed, scholars and journalists have identified several ways in which the constitutional order could be weakening. In particular, the legislature amended the constitution to extend presidential term limits in December 2015, and a number of different outlets have criticized the troubling stance of the Alianza País government and the freedom of press.

Throughout 2015, President Correa and Alianza País explored several avenues for extending term limits. There were reports of a referendum on the issue, which received treatment in the international press as a troubling indication of the strength of the constitutional order in the country (Alvaro 2014). Alianza País' arguments for term-limit extension surrounded the importance of their program of government and how this might suffer if a weaker candidate than Correa lost to a challenger. The ultimate outcome was notable, for while term limits were extended through an amendment passed by the legislature, the law did not come into force until after the April 2017 presidential election,[29] which effectively barred Correa from being reelected for a third sequential term under the new constitution (Stratfor 2015). In the election, Correa's former vice president, Lenin Moreno, narrowly prevailed against his opponent, a conservative banker (*BBC News* 2017). Both the narrow victory and the popular and political pressure to amend the constitution to allow Correa to run again signal the fact that political outcomes for Alianza País within the country are not guaranteed, which in turn emphasizes the need for the party to cater to popular pressures in its decisions regarding how to prioritize rights implementation.

An additional area where the government has received significant criticism surrounds its treatment of the press. A police protest over pay and working conditions in September 2010 led to the deaths of five police officers. A newspaper that ran an editorial critical of Correa's handling of the protest lost a lawsuit brought by the government under a controversial communications law passed in 2013. The penalties for the author of the editorial and three of the newspaper's executives

29. This change suggests the regime may no longer satisfy the definition of delegative democracies referenced earlier, which require constitutionally defined term limits for the otherwise greatly empowered executive (O'Donell 1994). Whether Alianza Pais could argue that the departure of Correa exempts the nation from such an anti-democratic characterization is an open question.

were quite steep: a three-year jail sentence. The newspaper also received a fine of $40 million. These sanctions resulted in an outcry, and Correa subsequently pardoned everyone involved, avoiding the imposition of jail time or the large fine (Beittel 2013, 245). Nonetheless, such an outcome is likely to have a chilling effect. Reporters in the country now must consider what level of criticism is appropriate, because if they go beyond it they risk huge penalties in the event the presidential pardon power is not exercised.

The response to the police protests does not appear to be an isolated instance, for international oversight bodies have highlighted a pattern of reprimands and warnings emanating from the authority empowered by the Organic Communication Law passed in 2013. Both the United Nations Special Rapporteur and the Inter-American Commission on Human Rights (IACHR) have condemned the state of press freedoms within the country due to actions undertaken since the passage of the law in 2013.[30] As recently as January 2017, the government moved to dissolve one of the most prominent (and leftist) environmental activist groups in the country after violence that erupted at protests against the development of a Chinese copper mine (*Guardian* 2017). As of this writing, though, the Ministry of the Environment had dismissed the order to dissolve the activist organization (Aguilar 2017).

Regardless of the exact balance of journalistic and political motivations underlying press critiques of the regime, Alianza País has responded quite strongly in terms of its limitations on the continued ability of the press to level criticisms without fear of reprisal.[31] As with the case of term limits, these limitations on press freedoms signal a potential weakness in the constitutional order that outstrip the individual tradeoff wrought by the executive between positive rights provisions and employment versus the strict enforcement of environmental protections. While it is a stretch to argue that these constitutional infirmities are the direct result of the tradeoffs the regime has faced in implementing positive

30. These criticisms appear to be part of a large dispute Correa has had with IACHR through the governance mechanisms of OAS. Ecuador, Bolivia, and Venezuela, each countries with strong executives that faced criticisms by the IACHR, sought constraints, fiscal and otherwise, on the commission up until March 2013, when the proposed reforms were tabled due to the rejection by the majority of other OAS members (Meyer 2016; OAS IACHR 2016).

31. In the defense of the regime's position regarding the press, recent scholarship has identified how every press outlet in the country is owned by individuals and organizations whose power was greatly diminished during the rise of Alianza País and the subsequent enactment of the 2008 constitution (Checa-Godoy 2012). Thus, there is an argument that the press' critiques of the regime are not exclusively motivated by the desire to present important issues for public consideration.

social rights and environmental protections, it is arguable that these patterns are related. An executive empowered to prioritize some rights over others is one more likely to be sufficiently powerful to extend term limits and silence its critics, a pattern consistent with delegative democracies as they have been defined in the literature (O'Donell 1994). A related question is the extent to which decisions made by the regime in terms of which rights to prioritize are path-dependent (Hewlett 1979, 454); will rights deprioritized today ever experience increases in provenance or enforcement?

Recent events provide a partial answer to this question in the short term. Correa's successor, Lenín Moreno, was widely seen as a safe choice to allow Correa to ride out an economic downturn for one electoral period, to then return in the following election when his approval ratings had rebounded (and his absence had satisfied the restriction on sequential reelection found in the legislative term-limit amendment). Instead, Moreno has struck a conciliatory tone in comparison to the dominant executive role that defined the Correa administration. As importantly, Moreno put a number of controversial issues to popular referendum on February 4, 2018. Among the issues treated was a repeal of the term-limit removal, as well as several issues related to mining and environmental rights. In response to the threat to Correa that the referendum posed, he created a new party in a public split from Moreno and the party that Correa had been instrumental in founding. To Correa's dismay, the public's approval of the referendum was resounding, barring Correa (and any other president with similar tenure in the future) from reelection and significantly restricting the ability to mine in natural areas generally, as well as the Yasuni forest reserve specifically (Tegel 2018). The popular referendum can be seen as a correction to the most unpopular decisions the Correa administration made in the implementation of the 2008 constitution. The outcomes also suggest that initial implementation decisions, while undeniably important, are ultimately subject to the will of a given electorate if such decisions diverge sufficiently from enough constituents' ideal vision of the nation's constitutional future.

VIII. CONCLUSION

The political and social antecedents to Ecuador's 2008 constitution put in place a drafting body whose popular mandate was resoundingly counterhegemonic. A range of previously marginalized groups for the first time had their voices heard at the constitutional drafting table. Because of the diversity of interests represented, the constitution guaranteed rights governing most, if not all, of the principal aims of the groups that brought Alianza País to power in the years prior to 2008.

Such an ambitious blend of social, environmental, and indigenous rights implied an initial implementation schedule that would be challenging even for governments characterized by institutional efficiency and good governance. Ecuador's recent history of corruption, patronage, and rent-seeking politics begat an institutional environment at the time of the rise of Alianza País that was characterized by anything but efficiency and good governance. Simply put, the wholesale short-term implementation of the full set of rights treated in the 2008 constitution would have been impossible. This required President Correa and his party to trade off between the provenance of different rights enshrined in the 2008 constitution. Nonetheless, Correa and his party were not fully unconstrained, for they experienced electoral defeat in the years following constitutional enactment, faced revenue constraints that required a need to prioritize certain government programs over others, and viewed the constitution as a signal political achievement. These factors meant that the Correa regime had to make strategic tradeoffs as to which aspects of the constitution to prioritize in implementation.

Thus, Ecuador presents an interesting case study of the political economic dynamic underlying rights implementation of aspirational constitutions. Such constitutions afford considerable discretion to all branches of the government as a whole in choosing which aspects of the constitution receive priority in implementation. This discretion, greater in political systems such as Ecuador, where a single party is the dominant veto player, is likely to result in the implementation of those rights constituents value most. Ecuador's experience under Correa supports such a theory, where social development priorities have been the main priority of the Alianza País governments. These social development policies have had associated costs and embody a vision of economic growth that could only be viably achieved through resource extraction due to the nation's fundamental dependence on this extraction as a source of economic development. In order to finance, and hence, implement the most popular constitutional rights, the government, including the judiciary, has constitutionally rationalized the imperfect implementation of other rights, especially those for which enforcement standing is unclear. This suggests that environmental rights protections, especially sweeping ones such as the rights of nature in Ecuador, may be particularly subject to rights tradeoffs.

This analysis is not intended to paint the 2008 constitution in a negative light. The drafters chose to create an aspirational constitution, which is an established model of constitutional design that, although not without critics, represents the fundamental desire for progress. Such desires are present by definition in post-conflict and counterhegemonic periods of political turmoil that give rise to new constitutions, as is the case in neo-Bolivarian regimes in Latin America. Thus, an

aspirational constitution may be the most representative model for drafters, even if it leads to a gap between the rights enshrined and sociopolitical realities. The recent referendum correcting the most controversial actions of the Correa administration also indicates that popular constitutional adjustments can play an important role in the context of aspirational constitutional implementation.

Furthermore, the implementation of the 2008 constitution should be considered in light of the argument that rights are violated to some extent almost everywhere (including the United States),[32] and therefore that all rights are in some sense aspirational because perfect enforcement is impossible. In one sense, this is the point of all rights: to articulate them and to subsequently make progress toward their better and more frequent enforcement. From this perspective, a right being violated in certain instances is distinct from the right not existing at all. Therein lies much of the logic of aspirational constitutions, for such logic undergirds the ability of future governments to prioritize rights implementation according to the demands of their constituents. A future research question is whether constitutions that are more aspirational lead to a net positive trend in rights implementation and how such a trend compares to the rights improvements less aspirational constitutions tend to provide.

REFERENCES

Aguilar, Daniela. "Court Dismisses Ecuadorian Government Bid to Shut Down Environmental NGO." *Mongabay*. January 26, 2017. https://news.mongabay.com/2017/01/court-dismisses-ecuadorian-govt-bid-to-shut-down-environmental-ngo (accessed February 5, 2018).

Alvaro, Mercedes. "Ecuador's National Assembly to Vote on Term Limits." *Wall Street Journal*. November 1, 2014. http://www.wsj.com/articles/ecuadors-national-assembly-to-vote-on-term-limits-1414791747 (accessed January 20, 2017).

Arsel, Murat. 2012. "Between 'Marx and Markets'? The State, the 'Left Turn' and Nature in Ecuador." *Journal of Economic and Social Geography* 103 (2): 150–63.

Arsel, Murat, and Natalia Avila Angel. 2012. "'Stating' Nature's Role in Ecuadorian Development Civil Society and the Yasuní-ITT Initiative." *Journal of Developing Societies* 28 (2): 203–27.

Basabe-Serrano, Santiago. 2012. "Presidential Power and the Judicialization of Politics as Determinants of Institutional Change in the Judiciary: The Supreme Court of Ecuador (1979–2009)." *Politics & Policy* 40 (2): 339–61.

32. Such a stance regarding the U.S. human rights record has become a more formal one on the part of the Ecuadorian government. In the diplomatic fallout over the possibility of Ecuador granting Edward Snowden asylum, Ecuador offered $23 million to the United States "to provide human rights training to combat torture, illegal executions and attacks on peoples' privacy" (Gill 2013).

Basabe-Serrano, Santiago, and John Polga-Hecimovich. 2013. "Legislative Coalitions and Judicial Turnover under Political Uncertainty: The Case of Ecuador." *Political Research Quarterly* 66 (1): 154–66.

Bassi, Michelle P. 2009. "La Naturaleza O Pacha Mama de Ecuador: What Doctrine Should Grant Trees Standing?" *Oregon Review of International Law* 11: 461–77.

Becker, Marc. 2011. "Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador." *Latin American Perspectives* 38 (1): 47–62.

———. 2013. "The Stormy Relations between Rafael Correa and Social Movements in Ecuador." *Latin American Perspectives* 40 (3): 43–62.

Beittel, June S. 2013. "Ecuador: Political and Economic Conditions and U.S. Relations." *Current Politics and Economics of South and Central America* 6 (2): 243–54.

Bosselmann, Klaus. 2015. "Global Environmental Constitutionalism: Mapping the Terrain." *Widener Law Review* 21: 171–85.

Bowen, James D. 2010. "Ecuador's 2009 Presidential and Legislative Elections." *Electoral Studies* 29: 186–9.

Boyd, David R. 2011. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: UBC Press.

Checa-Godoy, Antonio. 2012. "The Banking Sector and Media Ownership: The Case of Ecuador." *Latin Review of Social Communication* 67: 125–47.

Chilton, Adam S., and Mila Versteeg. 2016. "Do Constitutional Rights Make a Difference?" *American Journal of Political Science* 60 (3): 575–89.

Donnelly, Jack. 1984. "Review: Human Rights and Development: Complementary or Competing Concerns?" *World Politics* 36 (2): 255–83.

———. 2013. *Universal Human Rights in Theory and Practice*. Ithaca, NY: Cornell University Press.

Dosh, Paul, and Nicole Kligerman. 2009. "Correa vs. Social Movements: Showdown in Ecuador." *NACLA Report on the Americas* 42 (5): 21–24.

"Ecuador: entregan firmas para cambiar la ley y permitir otra reelección de Rafael Correa." *Infobae*. August 16, 2016. http://www.infobae.com/america/america-latina/2016/08/16/ecuador-entregan-firmas-para-cambiar-la-ley-y-permitir-otra-reeleccion-de-rafael-correa (accessed January 20, 2017).

"Ecuador's Current President Will Not Be Its Next." *Stratfor*. December 8, 2015. https://www.stratfor.com/analysis/ecuadors-current-president-will-not-be-its-next (accessed January 20, 2017).

"Ecuador le dice no al petróleo en el Amazonas." *El Espectador*. February 5, 2018. https://www.elespectador.com/noticias/medio-ambiente/ecuador-le-dice-no-al-petroleo-en-el-amazonas-articulo-737357 (accessed February 5, 2018).

"Ecuador Names New Vice President; Correa Begins Campaign against Referendum to Limit Re-Election." *MercoPress*. January 7, 2018. http://en.mercopress.com/2018/01/07/ecuador-names-new-vice-president-correa-begins-campaign-against-referendum-to-limit-re-election (accessed January 10, 2018).

"Ecuador Recount Confirms Lenín Moreno Won Presidential Poll." *BBC News*. April 19, 2017. http://www.bbc.com/news/world-latin-america-39640144 (accessed September 13, 2017).

"Ecuador Victims Can Seek Compensation from Chevron, Canada Supreme Court Rules." *Telesur*. September 4, 2015. http://www.telesurtv.net/english/news/Canadian-Supreme-Court-Rules-Against-Chevron-in-Ecuador-Case-20150904-0009.html (accessed January 20, 2017).

"Elecciones 2013: 7 de Febrero." *Consejo Nacional Electoral*. April 1, 2013. http://resultados.cne.gob.ec/Results.html?RaceID=1&UnitID=1&IsPS=0&LangID=0 (accessed August 21, 2013).

Finer, Matt, Remi Moncel, and Clinton N. Jenkins. 2010. "Leaving the Oil Under the Amazon: Ecuador's Yasuní-ITT Initiative." *Biotropica* 42 (1): 63–66.

Fischer, William M. 2013. "Conditional Welfare Grants to Address Truancy and Child Educational Neglect: United States' Experiments and Ecuador's Mandates." *Journal of Law & Education* 42: 275–311.

Flores-Macías, Gustavo A. 2010. "Statist vs. Pro-Market: Explaining Leftist Governments' Economic Policies in Latin America." *Comparative Politics* 42 (4): 413–33.

Gearty, Conor. 2010. "Do Human Rights Help or Hinder Environmental Protection?" *Journal of Human Rights and the Environment* 1 (1): 7–22.

Gellers, Joshua. 2012. "Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis." *Review of Policy Research* 29: 523–43.

Gill, Nathan. "Ecuador Scraps Trade Pact Over U.S. Threats in Snowden Case." *Bloomberg Businessweek*. June 27, 2013. https://www.bloomberg.com/news/articles/2013-06-27/ecuador-cancels-trade-pact-over-u-s-blackmail-in-snowden-case (accessed January 20, 2017).

Ginsburg, Tom, and Alberto Simpser, eds. 2013. *Constitutions in Authoritarian Regimes*. New York: Cambridge University Press.

Goderis, Benedikt, and Mila Versteeg. 2014. "The Diffusion of Constitutional Rights." *International Review of Law and Economics* 39: 1–19.

Greene, Natalia. "The First Successful Case of the Rights of Nature Implementation in Ecuador." http://therightsofnature.org/first-ron-case-ecuador (accessed January 20, 2017).

Guardiola, Jorge, and Fernando Garcia-Quero. 2014. "Buen Vivir (Living Well) in Ecuador: Community and Environmental Satisfaction without Household Material Prosperity?" *Ecological Economics* 107: 177–84.

Gudynas, Eduardo. 2009. "The Political Ecology of the Biocentric Turn in Ecuador's New Constitution." *Review of Social Studies* 32: 34–46.

Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. 2005. "Human Rights in a Globalizing World: The Paradox of Empty Promises." *American Journal of Sociology* 110 (5): 1373–1411.

Henkin, Louis, Sarah Cleveland, Laurence Helfer, Gerald Neuman, and Diane Orentlicher. 2009. *Human Rights*. 2nd Edition. New York: Foundation Press.

Hewlett, Sylvia Ann. 1979. "Human Rights and Economic Realities: Tradeoffs in Historical Perspective." *Political Science Quarterly* 94 (3): 453–73.

Hill, David. "Ecuador's Leading Environmental Group Fights to Stop Forced Closure." *The Guardian*. January 7, 2017. https://www.theguardian.com/environment/andes-to-the-amazon/2017/jan/07/ecuadors-leading-environmental-group-fights-forced-closure (accessed February 5, 2017).

Kaletski, Elizabeth, Lanse Minkler, Nishith Prakash, and Susan Randolph. 2016. "Does Constitutionalizing Economic and Social Rights Promote Their Fulfillment?" *Journal of Human Rights* 15 (4): 433–53.

Kauffman, Craig. 2016. *Grassroots Global Governance: Local Watershed Management Experiments and the Evolution of Sustainable Development*. Oxford, UK: Oxford University Press.

Kauffman, Craig, and Pam Martin. 2017. "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail." *World Development* 92: 130–42.

Kennemore, Amy, and Gregory Weeks. 2011. "Twenty-First Century Socialism? The Elusive Search for a Post-Neoliberal Development Model in Bolivia and Ecuador." *Bulletin of Latin American Research* 30 (3): 267–81.

Kimerling, Judith. 2006. "Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, Chevrontexaco, and Aguinda v. Texaco." *New York University Journal of International Law & Policy* 38: 449–68.

———. 2013. "Lessons from the Chevron Ecuador Litigation: The Proposed Intervenor's Perspective." *Stanford Journal of Complex Litigation* 1 (2): 241–94.

King, Phoebe. 2013. "Neo-Bolivarian Constitutional Design: Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions." In Denis J. Galligan and Mila Versteeg, eds. *Social and Political Foundations of Constitutions*. New York: Cambridge University Press: 366–97.

Knauft, Bruce M. 2007. "Provincializing America: Imperialism, Capitalism, and Counterhegemony in the Twenty-First Century." *Current Anthropology* 48 (6): 781–805.

Koenig, Kevin M. "Ecuador Breaks Its Amazon Deal." *New York Times*. June 11, 2014. https://www.nytimes.com/2014/06/12/opinion/ecuador-breaks-its-amazon-deal.html (accessed January 20, 2017).

Kotzé, Louis J. 2016. *Global Environmental Constitutionalism in the Anthropocene*. Portland, OR: Hart Publishing.

Landau, David. 2013. "Constitution-Making Gone Wrong." *Alabama Law Review* 64 (5): 923–79.

Larrea, Carlos, and Lavinia Warnars. 2009. "Ecuador's Yasuní-ITT Initiative: Avoiding Emissions by Keeping Petroleum Underground." *Energy for Sustainable Development* 13 (3): 219–23.

Larrea, Carlos A., and Natalia Greene. 2017. "Concentration of Assets and Poverty Reduction in Post-Neoliberal Ecuador." In Liisa L. North and Timothy D. Clark, eds. *Dominant Elites in Latin America: From Neo-Liberalism to the 'Pink Tide.'* Cham, Switzerland: Springer International Publishing: 93–118.

Magraw, Daniel B. 2015. "Rule of Law, Environment and Sustainable Development." *Southwestern Journal of International Law* 21: 277–81.

May, James R., and Erin Daly. 2014. *Global Environmental Constitutionalism*. New York: Cambridge University Press.

Meyer, Peter J. "Organization of American States: Background and Issues for Congress." Congressional Research Service, Library of Congress, 2012.

Moraña, Mabel, Enrique D. Dussel, and Carlos A. Jáuregui. 2008. "Colonialism and Its Replicants." In Mabel Moraña, Enrique D. Dussel, and Carlos A. Jáuregui, eds. *Coloniality at Large: Latin America and the Postcolonial Debate*. Durham, NC: Duke University Press: 1–20.

OAS IACHR. "UN and IACHR Rapporteurs Warn of Arbitrary Application of the Organic Communications Act." Organization of American States IACHR Joint Press Release R163/16. November 3, 2016. http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1045&lID=1 (accessed January 20, 2017).

O'Donell, Guillermo A. 1994. "Delegative Democracy." *Journal of Democracy* 5 (1): 55–69.

Pachano, Simón. 2010. "Ecuador: New political System into Operation." *Review of Political Science* 30 (2): 297–317.

Paz y Miño Cepeda, Juan J., . 2009. "El Gobierno de Rafael Correa: Un nuevo ciclo en la historia de Ecuador." *Metapolítica* 65: 71–76.

Pietari, Kyle. 2016. "Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned." *Willamette Environmental Law Journal* 5: 37–94.

Posner, Eric A. 2008. "Human Welfare, Not Human Rights." *Columbia Law Review*: 1758–1801.

———. 2014. *The Twilight of Human Rights Law*. New York: Oxford University Press.

Radcliffe, Sarah A. 2012. "Development for a Postneoliberal Era? Sumak Kawsay, Living Well and the Limits to Decolonisation in Ecuador." *Geoforum* 43: 240–9.

"Resultados oficiales condicionan futuro de algunas agrupaciones." *El Universo*. March 31, 2013. http://www.eluniverso.com/2013/03/31/1/1355/resultados-oficiales-condicionan-futuro-algunas-agrupaciones.html (accessed January 20, 2017).

Rival, Laura. 2010. "Ecuador's Yasuní-ITT Initiative: The Old and New Values of Petroleum." *Ecological Economics* 70 (2): 358–65.

Romero, Simon, and Clifford Krauss. "Ecuador Judge Orders Chevron to Pay $9 Billion." *New York Times*. February 14, 2011. http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html (accessed January 20, 2017).

Ruiz Giraldo, Carlos. "Does Nature Have Rights? Successes and Challenges in Implementing the Rights of Nature in Ecuador." *ConstitutionNet*. July 15, 2013. http://www.constitutionnet.org/news/does-nature-have-rights-successes-and-challenges-implementing-rights-nature-ecuador (accessed February 5, 2017).

Rühs, Nathalie, and Aled Jones. 2016. "The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature." *Sustainability* 8: 174–93.

Sanchez, Omar. 2008. "Transformation and Decay: The De-Institutionalisation of Party Systems in South America." *Third World Quarterly* 29 (2): 315–37.

Sieder, Rachel, Line Schjolden, and Alan Angell. 2016. "Introduction." In Rachel Sieder, Line Schjolden, and Alan Angell, eds. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan: 1–20.

SENPLADES. 2010. "Los nuevos retos de América Latina: socialismo y sumak kawsay." SENPLADES, Quito.

Svampa, Maristella. 2015. "Commodities Consensus: Neoextractivism and Enclosure of the Commons in Latin America." *South Atlantic Quarterly* 114 (1): 65–82.

Tegel, Simeon. "A Referendum in Ecuador Is Another Defeat for South America's Left-Wing Populists." *Washington Post*. February 5, 2018. https://www.washingtonpost.com/news/worldviews/wp/2018/02/05/a-referendum-in-ecuador-is-another-defeat-for-south-americas-left-wing-populists (accessed February 5, 2018).

Tsebelis, George. 1995. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism." *British Journal of Political Science* 25 (3): 289–325.

Tsebelis, George. 2002. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press.

Valencia, Alexandra. "Ecuador High Court Upholds Chevron Verdict, Halves Fine." *Reuters*. November 13, 2013. http://www.reuters.com/article/us-chevron-ecuador-idUSBRE9AC0YY20131113 (accessed January 20, 2017).

Vidal, John. "Oil Drilling Underway beneath Ecuador's Yasuní National Park." *The Guardian*. October 26, 2016. https://www.theguardian.com/environment/2016/oct/26/oil-drilling-underway-beneath-ecuadors-Yasuní-national-park (accessed January 20, 2017).

Whittemore, Mary Elizabeth. 2011. "The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite." *Pacific Rim Legal & Policy Journal* 20: 659–91.

The World Bank. 2017. "World Development Indicators." http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=EC (accessed February 5, 2017).