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REVIEW ESSAY

Interpreting History: Observations on Methodology in Taylor's The Social Constitution

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Abstract

This review essay articulates methodological insights gleaned from Whitney Taylor's The Social Constitution: Embedding Social Rights Through Legal Mobilization (Cambridge University Press, 2023). Through an analysis of how Taylor used interview and comparative methods, the essay addresses the opportunities and challenges of drawing on interview data to make sense of past events. It also explores the use of comparative methods, both comparing one country to another and comparing different regions in one country.

Keywords: comparative methods; comparative constitutional law; Colombia; social rights; legal mobilization

In *The Social Constitution: Embedding Social Rights Through Legal Mobilization*, a comprehensive study of how the *tutela*–a legal process that Colombians can use to petition the Constitutional Court–became part of the country's social fabric, Taylor shows how constitutional law becomes meaningful to people in their daily lives. She argues that both the volume of *tutela* claims and their meaning to both legal actors and everyday people in Colombia indicate constitutional embedding, a distinct relationship between law and society. Taylor uses historical qualitative methods to argue that the *tutela* became embedded through legal mobilization for individual claims through courts.

Building from Epp's (1998) pathbreaking work on support structures to explain constitutional rights, Taylor points out the importance of both social and political opportunities to make social rights a reality for Colombians. She focuses on the social and political antecedents to the Colombian Constitution, which came into force in 1991 and offers numerous rights (in theory). Article 86 of the new Constitution includes a right to petition the government if the government violates rights therein,

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which is known as the *tutela*. Taylor notes that this "writ of protection" was not only used for civil and political rights, as one might expect, but for social rights that are harder to ensure through courts. She argues that the *tutela* was legally embedded—for short, accepted and used by legal actors—as well as socially embedded—for short, accepted and used by Colombians.

In her early chapters, Taylor documents the ways in which the Constitutional Court interpreted *tutela* claims, opening an avenue for claims to health rights but not to housing rights. She suggests that the tutela emerged as popular not only because it served industry financial interests but also because the government supported this legal mobilization to establish its authority and legitimacy by showing that the *tutela* works for people. She illustrates how courts continued to expeditiously decide the numerous and administratively burdensome *tutela* claims even when a new administration tried to limit the *tutela*. A key element of her argument is that Colombians found early legal successes with *tutela* claims, and those claims increased over time.

In this essay, I focus on the opportunities that Taylor's data and analysis offer by way of interrogating methodology. The first part of this essay focuses on the use of interviews to make sense of past events. The second part focuses on the comparative case study research. Overall, my goal is to deepen critical inquiry into qualitative methods, understanding that the perfect should not become the enemy of the good, but considering the opportunities and limits of data collection and analysis in sociolegal research.

How to study embedding, or the strengths and limits of interview studies

Taylor grounds her analysis of the *tutela* in data collected during her fieldwork in a variety of communities within Colombia; two of her primary sources of data in Colombia are 92 interviews with legal "elites," including judges, advocates, and law professors, and a survey of 310 tutela users. In addition, she also randomly sampled *tutela* claims during the years immediately following the 1992 Constitution, analyzing what the claims demand (for example, health vs. housing) as well as how judges explained their decisions.

These data sources offer different insights. This information about *tutela* claims and the judicial decisions reveals the feedback effects of rulings and actions. Taylor shows how judicial decisions that codified the right to health facilitated more claim-making. This legal mobilization went beyond the Constitution itself; a law passed a year after the Constitution expanded healthcare access and, with it, expectations of healthcare access. In this way, she argues, individuals had additional material incentives to file *tutelas* to assert their rights to healthcare.

To help make that argument, Taylor relies on interviews with legal elites, including judges, as the basis for several of the book's central empirical claims. For example, one of the more important claims in the book is that insurance companies supported the *tutela* process; supporting *tutela* claims around rights made it easier for insurance companies to deny claims and wait for the courts to make them pay. To make that compelling argument, she cites interviews with legal elites (p. 85). Similarly, she relies on judges' interviews to argue that judges view health as a fundamental right and want to ensure it through the tutela. Taylor then argues that judicial decisions

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affirmed the right to healthcare through *tutela* claims while denying a right to housing, and, coupled with the interviews, that the data illustrate how judges accepted claims that healthcare—evidence of the connection between social and legal embedding—but not housing is a fundamental right.

Taylor also uses elite interviews to reinforce insights gleaned from interviews with individuals who filed *tutela* claims. These interviews complement her thorough process tracing techniques by showing the evolution of a legal right through judicial decisions. Taylor draws on interviews to go beyond this judicial account to explain how, contemporaneously, people's understandings of the law changed.

As these examples illustrate, interview data is central to Taylor's study. She uses them to triangulate documentary evidence, while also using them as primary evidence about what happened in the past. One concern is that interviews to make sense of the past necessarily involve *post-hoc* reasoning; Taylor was fortunate to access judges for her interviews, but interviews with judges rarely yield valid insights into judicial decision-making. Legal elites may simply be repeating what they were taught about the tutela, may reveal historical revision, or may reflect sense-making of a complex history, and not the actual history. Taylor's analysis would be enhanced by drawing on interviews to reveal another dimension of embedding in that her discovered meaning-making around the *tutela* and its embeddedness is part of the political story.

More broadly, interview data can illustrate how people understand an issue, or it can be used like other kinds of observational data, thinking of an interviewee as an eyewitness to an event to convey what happened. Gallagher (2013) reminds us that, as with any qualitative data, interviews are particularly good at capturing meaning, which is often understood as distinct from measurement. However, understanding meaning is essential for understanding how to measure, evaluate, or, more succinctly, understand a given social or political phenomenon.

Even trained researchers may not have the experience to disentangle the researcher's own foci and what the interviewee believes (Mosley, 2013). Even if the interviewer and interviewee are engaged in dialogue, interviews are different than conversation because the emphasis is on what the interviewee said rather than what the interviewer asks (Wodak & Krzyzanowski, 2008).[1] When thinking about Taylor's case, there may be a set of meaning-making repertoires that the reader does not know, but Taylor and her interviewees do. For example, perhaps interviewees could have discussed the legal features of the *tutela* to understand its embedding if Taylor expressed interest in the legal technicalities. However, responding to Taylor's interests as a political scientist, they focused on the social and institutional practices. Perhaps, as a result, Taylor draws us to the latter interpretation of events, suggesting that the technical aspects of the *tutela* are less important than these social and institutional features.

[1] Beyond the social skills needed to connect with an interviewee and elicit forthcoming responses, one basic characteristic of interview methods is that interviews are not all the same. Some interviews may stick to a set protocol that is more akin to a survey, where there is limited room for the interviewee to expound upon their opinion. Other approaches may allow the interviewee to expand on an idea, but that technique requires a focus on prompting questions, not idea exchanges. Another approach to interviews includes what is sometimes called dialogic interviewing, where the interviewer and the interviewee engage in discussion related to the topic of interest.

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This is not to say that Taylor is incorrect in her analysis. Rather, I seek to emphasize that interpretations based on interviews are interpretations that emerge from the relational dynamics between the interviewer and the interviewees. Sociolegal researchers often use their interviews in a similar way as Taylor does—mostly as observations of events rather than as interviewees' interpretations. The distinction between observations and interpretations is somewhat arbitrary and reflects a positivist approach to research methods (Babones, 2016). Some might suggest that all data is an interpretation of events, and that would be correct. But considering observation and interpretation as one and the same flattens an important distinction. Instead, researchers should actively think through what the interpretation tells us about the story we are trying to tell.

External comparison

Taylor is not simply interested in healthcare; health rights in Colombia are an example of her broader concern with social rights embedding. In her chapter about how the *tutela* evolved, Taylor suggests that housing rights might have become a justiciable right as well if there were proper support structures and legal mobilization. To expand on this point, she examined a parallel situation outside of Colombia, providing a valuable opportunity to reflect on comparative methods.

First, Taylor uses a shadow study of South Africa, where she expected to find similar embedding as in Colombia, but with a focus on housing rather than health rights in South Africa. This approach, often called a shadow case or ancillary case, can be useful to provide a counterfactual or some other insight about the mechanisms at play (Soifer 2020).

The goal of a shadow or ancillary case is to better establish external validity. Taylor uses South Africa as a counter-example of constitutional embedding—where social rights were not embedded—to strengthen her argument about the relationship between legal mobilization and constitutional embedding. The comparison between these two countries relies on the fact that South Africa and Colombia wrote new Constitutions around the same time, that they are both middle-income, and that South Africa's Constitutional Court famously asserted that housing is a right the state should guarantee.

Although Taylor argues that housing could have become a justiciable right through the *tutela* in Colombia, it's never clear how exactly that would work. Whereas insurance companies supported the justiciability of health rights, there is no comparable incentive structure for housing rights. There also isn't a law to support the claim; Taylor tells us that Colombian judges quickly dismissed housing claims as not comprising fundamental rights.

Given the sampling strategy of Colombia/health and South Africa/housing, one might conclude that embedding has less to do with mobilization and more to do with the mechanism or the right itself. In South Africa, housing rights were mandated by the Constitutional Court after organized legal challenges to inadequate housing. There was no petition mechanism comparable to the *tutela* to ensure them. As Colombia's judges considered, housing is a different kind of benefit than payment for a medical need—it's far more costly and complicated to ensure, especially in a

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country where the majority of the people were denied not just housing but the right to own land in most of the country.

More broadly, comparing Colombia and South Africa offers an opportunity to reflect on how we select cases for comparative research. Classic political science is known for the controlled case comparison, where the social scientist looks for places that are mostly similar but differ in some way (see Smelser 2013). Another way to understand this approach is to consider "antecedent conditions" that lead to "divergent outcomes" (Ragin 2014). The features are usually deemed important for the outcome, in this case, constitutional embedding. This model of comparative research resembles large-n studies where social scientists try to model the important variables and analyze how important (or significant) they are.

The easy methodological critique of this approach is that we cannot control for everything that makes a country different. Those who celebrate ethnographic or interpretive analysis note that a given phenomenon is never reducible to readily observable variables (Simmons and Rush 2019). Although it is correct, this critique can reinforce a common challenge for research design in letting the perfect become the enemy of the good. One does not want to fall into the trap of thinking every place is *sui generis*, unique, and therefore impossible to compare. At the same time, thinking about factors that could explain Constitutional embedding requires close attention to context. Colombia and South Africa are middle-income countries, but the income distribution in Colombia differs from that in South Africa. The reasons are obvious: South Africa was founded on a racialized hierarchy in which black Africans, the overwhelming majority of the country's population (80%), could not live, work, or even socialize with the white minority.

More critically, to fully understand the relationship between Constitutional embedding and legal mobilization, one has to consider the different legal histories in each site. Prior to the passage of the 1994 Constitution, the South African government legally disenfranchised the vast majority of its population. This legal history informs the different political cultures in the two places. Colombians have experienced displacement and disenfranchisement for generations, but Colombia has a distinct legal culture—or collective legal consciousness—that Lemaitre Ripoll (2007) refers to as "fetishism." Many in Colombia think that the country may have injustice and inequality, but some, particularly the legal elites, look to the law as a model of what justice could be. We can think of this as an imperfect extension of the Ewick and Silbey (1998) frame of "before the law," law being a majestic force that not all people feel entitled to use.

It is difficult to describe the legal culture in South Africa with a similar frame. In this imperfect theoretical extension of Ewick and Silbey's individual frames to societal practices, it has what one might call a "with the law" or "against the law" legal culture, but even those frames may not apply. Many ordinary South Africans (that is, not the elites) do not think of their issues as legal issues. They do not view the legal system as accessible (Tait and Taylor 2023) or even relevant to them (Mnisi Weeks 2018). And why should they, given that they were formally excluded from the legal system for generations? We should expect constitutional embedding in such a context to have a different pathway or, at a minimum, take much longer.

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Internal Comparison

In addition to her case of South Africa, Taylor provides an internal comparison, finding that the social embedding of the *tutela* was less prevalent in a community that was impacted more directly by the internal armed conflict that has rocked Colombia for decades. She notes that people in that community were more skeptical of the *tutela* than others she interviewed or surveyed, illustrating the importance of context.

While much of comparative politics is dominated by regional and area studies, or comparison between two countries, all social science can be framed with the phrase, "as compared to what?" Taylor finds constitutional embedding in Colombia, but compared to what? This is what the South African case tells us, where Taylor expected to find Constitutional embedding but did not. She suggests the reason for this is related to the support structures and legal mobilization that existed in Colombia.

But there is another explanation that emerges through Taylor's internal case comparison. This internal variation in constitutional embedding suggests that political stability and overall trust in the state shape embedding. In this internal comparison, "before the law" becomes important again. This frame, Ewick and Silbey tell us, can be empowering in the sense that people believe that they will get justice if they use the courts (it is disempowering in that they may not believe they are entitled to go to the courts). In Colombia, the self-help model of governance that the *tutela* represents is empowering in that some people are willing to make legal claims with the hope that the system will protect them. They believe that the law *should* protect them, even if it does not.

Taylor's internal comparative case of a community more affected by the internal armed conflict exhibits a different frame: against the law. That frame is empowering in that people may choose self-help, but it is disempowering in that they may not choose to use the legal system even when it might help them. This finding aligns with the lack of embedding in South Africa, for similar reasons, despite different histories. Taylor draws on this case study to illustrate that constitutional embedding is more complex than it might first appear; the regional variation is not easily explained by legal mobilization. To more fully explain embedding, future studies should go further to explore regional or other types of local variation.

The takeaway

Overall, Taylor provides a rich analysis of how law on the books turns into law in action. The explanation for constitutional embedding through legal mobilization offers an important complement to the vast literature on legal mobilization. It is a welcome addition to the growing law and society scholarship that takes ideas developed in the US context and shows their utility or lack thereof in different countries, while also making important contributions to the study of both countries and regions. The book also provides a useful opportunity for comparative researchers to think through research design and implementation, highlighting the importance of comparison both internally and externally.

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