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## Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights

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# HUMAN RIGHTS AND REMEDIAL EQUILIBRATION: EQUILIBRATING SOCIO- ECONOMIC RIGHTS

*Margaux J. Hall*  
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## INTRODUCTION

Those who work in the field of international human rights understand a practical reality: human rights law guarantees fundamental, universally agreed-upon rights, except when it doesn't. Whereas human rights represent normative truths, efforts to create remedies for human rights violations confront an onerous task of making legal norms a practical reality. To translate identified right to improved reality, human rights advocates must overcome the practical limitations of the world they seek to improve. Inept, inefficient, under-resourced, or iniquitous governments incapable of, or perhaps even opposed to, assisting citizens' realization of their human rights are a near-constant hurdle. Therefore, under the standard account of human rights definition and realization, articulating what constitutes a particular human right is relatively easy in comparison to the more practical and onerous task of ensuring that governments or private actors do not impair—and that they in fact advance—an individual's or group's realization of a defined right. Human rights theorists thus recognize a classic gap between rights and remedies.<sup>1</sup>

This analytical gap between rights and remedies is perhaps most commonly seen in discussions of socio-economic rights, which are second generation rights<sup>2</sup> constricted, even more than civil or political rights, by practical and budgetary realities. The adjudication of socio-economic rights violations has been characterized as a jurisprudence of deficiencies, viewed by many human rights advocates as all-too-often defined by shortcomings and missed opportunities. Recently, for example, when the Constitutional Court of South Africa refused to define or endorse a minimum core content of the right of access to sufficient water in *Mazibuko v. City of Johannesburg*<sup>3</sup>—reversing what human rights advocates

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1. See Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 LAW & INEQ. 467, 470–72 (2007); see also Sonja Starr, *Rethinking 'Effective Remedies: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 706–10 (2008); Sanja Djajic, *Victims and Promise of Remedies: International Law Fairytale Gone Bad*, 9 SAN DIEGO INT'L L.J. 329, 332–33 (2008); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 287 (2004).

2. Socioeconomic rights, including the rights articulated in the United Nations Universal Declaration of Human Rights and elaborated on in the International Covenant on Economic, Social and Cultural Rights, are deemed second generation rights, as compared with civil and political “first generation” rights. See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 16 (2003) (explaining the oftentimes amorphous distinction between first and second generation rights).

3. *Mazibuko v. City of Johannesburg* 2009 (3) SA 592 (CC) (S. Afr.).

viewed as important progress towards making a socio-economic right tangible for South Africans—many advocates lamented yet another setback in their quest to make rights a practical reality.<sup>4</sup> Some have argued that for a country with as progressive a Constitution as South Africa to refuse to articulate a baseline, minimum content to a Constitutional right (to, in turn, give that right tangible meaning) was a great disappointment.<sup>5</sup>

This Article, however, attaches a different meaning to *Mazibuko*. It argues that what was actually evident in *Mazibuko*, as in many other cases involving the adjudication of socio-economic rights, was a phenomenon that is hardly foreign: remedial deterrence.<sup>6</sup> The practice of remedial deterrence is well-established in U.S. constitutional law. When the Supreme Court ordered that segregated schools in the South be desegregated “with all deliberate speed,”<sup>7</sup> those paradoxical words came to represent the constant tension in American jurisprudence between the world of the ideal, sounding in foundational rights, and the world of the real, implicating practical remedies.<sup>8</sup> Similarly, this Article explains that in *Mazibuko*, as well as many other human rights cases (and socio-economic rights cases in particular), the very nature of the right at issue was a product of tangible, practical concerns about implementation of attendant remedies. From this perspective, the traditional understanding of encapsulable human rights—as distinct from the remedies they implicate—is incorrect.

Thus, this Article argues that the picture is at once simpler and more nuanced than the conventional account of human rights would have us

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4. See, e.g., CENTER FOR APPLIED LEGAL STUDIES, UNIVERSITY OF THE WITWATERSRAND, <http://web.wits.ac.za/Academic/CLM/LAW/CALS> (last visited Aug. 30, 2010) (describing *Mazibuko* as a “[d]isappointing judgment”); *Lindiwe Mazibuko & Others v. City of Johannesburg & Others*, ESCR-NET, [http://www.escr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=1110326](http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1110326) (last visited Feb. 25, 2011); Rachel Ordu, *Lindiwe Mazibuko and Others v. City of Johannesburg and others: Analysis of the Ruling by the Constitutional Court of South Africa* (unpublished manuscript), available at [http://www.uusc.org/files/Summary\\_Comments\\_Mazibuko\\_Judgment.pdf](http://www.uusc.org/files/Summary_Comments_Mazibuko_Judgment.pdf).

5. See, e.g., Peter Danchin, *A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case*, EUR. J. INT’L L. BLOG (Jan. 13, 2010), <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/> (“the final outcome in *Mazibuko* has no doubt disappointed rights advocates”); sources cited *supra* note 4.

6. See *infra* note 34 and accompanying text (defining remedial deterrence).

7. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

8. Remedial deterrence is, of course, not limited in U.S. jurisprudence to *Brown* and its progeny. As discussed below, the concept is powerfully evident in recent cases regarding the provision of healthcare services in California’s prison system. See *infra* notes 238–41 and accompanying text.

believe. Those who view human rights as universal, agreed-upon norms and separately inquire about practical, remedial fixes—as this Article claims most commentators in fact do—are missing a critical complexity in the interplay between rights and remedies. Recognizing this nuance enables commentators and tribunals to shed light not only on the remedies available to those whose rights have been violated, but also on the content of human rights themselves. Yet understanding rights and remedies together can also be simpler, allowing commentators to set aside some of the formalistic distinctions they have created to understand human rights, particularly socio-economic rights.

The conventional understanding of human rights parallels the decades-long prevailing view of U.S. constitutional rights. Writing about U.S. constitutional law in the 1970s, for example, Lawrence Sager,<sup>9</sup> Ronald Dworkin,<sup>10</sup> and others,<sup>11</sup> have explained the tension between separable rights and remedies, spurred by the obvious divide between desegregation rights and desegregation remedies in *Brown v. Board of Education* and its progeny.<sup>12</sup> A range of commentators have sought to make descriptive claims of a divided rights-remedy landscape, oftentimes recognizing deficiencies in U.S. courts' process of identifying purist rights, but corrupting such rights upon translating them into practical remedies.<sup>13</sup>

However, this view of separable rights and remedies has been persuasively attacked in the domestic context. Daryl Levinson, for example, critiques the U.S. constitutional legal theory of "rights essentialism," a practice that commences with judicial recognition of a purist constitutional value.<sup>14</sup> Under the rights essentialist model, the normative task of "essentializing" is reserved for the judiciary, which is uniquely equipped to intuit the true meaning of constitutional values like due process, liberty, or equality.<sup>15</sup> These values are corrupted, the essentialist account

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9. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

10. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–84, 90 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

11. For example, Paul Gewirtz, to a lesser extent, analyzed the discord between rights and remedies. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591–92 (1983).

12. *Brown*, 349 U.S. 294; see also *Cooper v. Aaron*, 358 U.S. 1 (1958); *Guy Heung Lee v. Johnson*, 404 U.S. 1215 (1971); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

13. See *infra* Section IV.C.

14. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999).

15. See Owen Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979) [hereinafter Fiss, *Forms of Justice*]. Fiss emphasizes

goes, when they must be translated into remedies. In this essentialist view, remedies inhabit a more pragmatic and functional world, in which the constraints of economic, social, political, and other pressures temper ideals.<sup>16</sup> Levinson and others have pushed back on this essentialist model. They underscore the great disconnect between rights essentialism discourse and the true character of constitutional adjudication, claiming that a more perspicuous view of U.S. constitutional law reveals a dynamic and bi-directional remedial process—wherein considerations of remedies affect rights determinations and vice versa. This argument builds on the notion of “remedial deterrence,” which holds that courts are dissuaded from recognizing a particular right because of the necessary remedy they would have to institute. Levinson further develops this concept by discussing “remedial equilibration”—in a nutshell, the notion that constitutional rights are affected by, and are indivisible from, remedies.<sup>17</sup>

Surprisingly, unlike U.S. constitutional law and areas of private law such as contracts,<sup>18</sup> in which commentators have argued for a more thoughtful understanding of the nuanced relationship between rights and remedies and then a better equilibration of the two, commentators have devoted scant academic effort to analyzing the interdependent roles of rights and remedies in human rights discourse.<sup>19</sup> In the socio-economic rights context, for example, academics have exhaustively debated whether courts have employed weak- versus strong-form review of legislative action that has led to alleged rights deprivations (as well as whether courts should recognize a minimum core of rights from which one cannot

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structural reform litigation and its propensity to establish rights as pure truths, while remedies are reserved to a subservient and secondary role. *See id.*

16. Rights essentialist scholars have observed that courts often reserve the pragmatic task of allocating remedies to elected officials—to a congress that is accustomed to tempering its ideals in light of pragmatic and policy-based constraints.

17. *See* Levinson, *supra* note 14, at 884. Levinson first defined “remedial equilibration” with respect to U.S. constitutional adjudication.

18. The incongruous relationship between rights and remedies that Levinson has argued against in U.S. constitutional law does not exist in all areas of U.S. law, such as in contract law’s premise of an efficient breach, in which the costs of compliance with a commitment outweigh the benefits of holding steadfast to that same commitment. Contract liability rules are not seen as prohibiting breach, with remedies serving to enforce this prohibition. *See id.* at 859. Instead, this Article understands contractual obligations as the dividing line between performing or breaching at a particular price—the price being the remedy of damages or, in certain instances, specific performance. *See id.*

19. Perhaps the closest discussion to that presented in this Article is the compelling argument made by Sonja Starr, who also has considered remedial deterrence in the context of human rights, but has focused exclusively on international criminal courts and their unique institutional constraints. *See* Starr, *supra* note 1.

deviate).<sup>20</sup> However, these commentators do not appear to have made any serious efforts to discredit the prevailing rights essentialism that permeates descriptive accounts of socio-economic rights.

Though acknowledging the prevailing human rights debates, this Article argues that academics and practitioners working in human rights law must more closely investigate the overly-simplistic theory of judicial rights essentialism. The related claim is that this investigation must occur before commentators can overcome the prevailing, constrictive understanding of human rights and erect a more resonant, harmonious view of the jurisprudence of rights and remedies, in which rights and remedies are inevitably interdependent and mutually defining.

In some ways, this Article's primary claim should be unsurprising. Law mediates—it accepts compromise as unavoidable given that law both idealizes and seeks pragmatism in a world filled with constraints. Therefore, applying remedial equilibration to human rights, arguably, clarifies how courts confronted with the daunting task of having to remedy human rights deprivations oftentimes engage in an artful exercise of remedial deterrence. Remedial equilibration makes clear that these courts balance a variety of interests in order to achieve a tempered remedy that is loosely calculated to optimize a range of interests.

In addition, while the Article addresses human rights broadly, its core insight is a particularly important component of a proper descriptive understanding of socio-economic rights adjudication. The focus here frequently returns to socio-economic rights for two reasons, one practical and the other theoretical. Both reasons relate to the fact that such rights are already aspirational and accepting of many forms of compromise in their progressive realization. If, for example, a concrete right to equal treatment is subject to remedial deterrence and is, therefore, not immediately enforceable, how much more so is a more amorphous socio-economic right that must be achieved “progressively”—by no clearly determined speed or pathway—subject to the same fate? Thus, the practical reason for focusing on socio-economic rights is that to the extent that theorists (or practitioners) are uncomfortable with thinking about human rights as being inherently limited by an attendant remedy, such discomfort should be lessened in the context of socio-economic rights in which compromises recognizing limited resources are already commonplace.

Second, remedial deterrence fits more squarely within the theoretical framework that adjudicatory bodies use to consider socio-economic rights. Put another way, once commentators more fully recognize re-

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20. See discussion *infra* Part III.

medial deterrence as an exacting force within the adjudication of socio-economic rights, they can direct their attention to more fruitful analytical endeavors, such as clearly articulating to a reviewing court—and having the court acknowledge and reiterate in turn—the variety of interests at stake and the attendant costs in adjudicating a right. Because this interaction is more likely to occur in the socio-economic rights context, a second goal of this Article is to begin the task of more thoughtfully understanding the rights-remedies relationship in socio-economic rights jurisprudence.

Finally, in discussing the interplay of rights and remedies with socio-economic rights, further insights may be gleaned about the applicability of remedial equilibration in all forms of human rights adjudication. For example, as the understanding of remedial equilibration and socio-economic rights becomes more robust, there may be further insights into other types of human rights, such as civil and political rights, and it is for this reason that this Article alludes to human rights more broadly in much of its discussion.

The Article proceeds as follows. Part I describes rights essentialism, remedial deterrence, and remedial equilibration, laying the groundwork for later claims that these concepts are sorely lacking in human rights—and particularly socio-economic rights—discourse. Part II demonstrates that rights essentialism pervades the conventional understanding of socio-economic rights in both “minimum core” and “reasonableness” dialogues. Despite impassioned debates regarding the “minimum core” versus “reasonableness” approaches to rights, the two competing conceptions ultimately suffer from similar deficiencies in that both seek to identify pure and idealistic rights that are separate from remedies.

Turning to remedies, Part III explores various conceptions of remedies, ranging from strong-form review to weak-form review, all of which follow a uni-directional path of causation, wherein the already identified and defined right leads to a particular remedy which is, in turn, often-times tempered by political or economic realities. This path-dependent, “define the right, apply the remedy” thinking proceeds from an essentialist view of rights that separates rights from remedial considerations. Therefore, Part IV offers an alternative way in which rights and remedies can be “equilibrated,” or harmonized, highlighting several examples of remedial deterrence—or more broadly remedial equilibration—moving from U.S. constitutional law to human rights jurisprudence. Finally, Part V explores the implications of such a new and perspicuously framed approach, with an emphasis on understanding that remedial concerns permeate efforts to define the content of socio-economic rights; reconsidering the institutional division of labor between branches of government if



courts alone do not define rights; finding the proper place for courts in this new understanding of human rights; and recognizing the importance of judicial transparency and candor as courts and international tribunals seek to create more resonance between rights and remedies. Ultimately, this Article begins the task of more thoughtfully understanding the rights-remedies relationship in human rights—and particularly socio-economic rights—jurisprudence.

#### I. RIGHTS ESSENTIALISM, REMEDIAL DETERRENCE, AND REMEDIAL EQUILIBRATION

“Rights essentialism” is one of the most basic and long-standing characterizations of constitutional adjudication.<sup>21</sup> Rights essentialism assumes a specific order of events in courts’ application of constitutional rules. Under rights essentialism, judges first identify a pure right with intrinsic value.<sup>22</sup> Judges may understand the value of the right based on the right’s connection to some privileged and respected source, such as the right’s articulation in the Constitution—the supreme law of the land.<sup>23</sup> Courts are uniquely empowered to discern such rights, perhaps because of their relative insulation from political pressures or because of their enhanced ability to discern legal principles.<sup>24</sup>

Next, under rights essentialism, the pure right is subsequently distorted and diminished when it confronts the practical certainties of the world.<sup>25</sup> Rights essentialism thus creates an attendant institutional division of labor between rights and remedies. It holds that remedies are “contingent facts,” requiring superior fact-finding as well as interest and cost-benefit balancing.<sup>26</sup> Balancing interests and costs and benefits, in turn, requires political accountability to those with relevant interests.<sup>27</sup> Therefore, the legislative and executive branches typically guide the implementation of rights.<sup>28</sup> Under rights essentialism, courts properly defer to these branches to do so.<sup>29</sup>

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21. See Levinson, *supra* note 14, at 858 (deeming a certain way of evaluating constitutional rights, “rights essentialism”).

22. *Id.* at 858.

23. *Id.* at 861.

24. *Id.*

25. *See id.*

26. *See id.*

27. Those with relevant interests may include the parties before a court adjudicating an alleged rights deprivation, as well as other persons or groups who may be affected positively or negatively by the court’s rendered decision.

28. For example, in *Mazibuko*, the legislature in South Africa adopted a significant piece of legislation three years after the country achieved democracy—the Water Services Act (the “Act” or the “Water Services Act”)—to help provide tangible meaning to

As Daryl Levinson astutely points out, the core assumptions of rights essentialism seem strange when stated expressly and contextually.<sup>30</sup> The notion of such a rigid institutional division of labor appears unconvincing given that multiple branches of government help shape policies and practices, such as those ensuring access to water, education, or healthcare. Furthermore, the conception of an austere divide between rights and remedies seems overly simplistic given that definitions of rights and remedies continue to evolve, like the dynamic world they occupy. Yet, the rights essentialism conception is a viable and prevalent one in scholarly analysis. Despite its wide disconnect from the actual practice of rights adjudication, the scholarly approach and characterization have endured as deeply ingrained in the conventional conception of human rights law.<sup>31</sup> This Article contests the assumptions underlying the rights essentialist account.

In *Marbury v. Madison*, the Supreme Court explained the bedrock legal principle that where there is a right, there is also a remedy.<sup>32</sup> Despite this legal maxim, institutional constraints and collateral costs may undermine the enforcement of rights. In some instances, overwhelming costs may make it impractical or infeasible for courts to institute a particular remedy. Courts may avoid these costs by creating procedural hurdles that prevent adjudication of the legal claim, narrowing their interpretation of the substantive basis of a legal right, or requiring a heightened showing in order to prove a substantive rights violation.<sup>33</sup> All of these responses, individually and collectively, comprise what is known as “remedial deterrence.”<sup>34</sup> In its most simplistic articulation, remedial deterrence takes place when the costs of a remedy deter a court from realizing

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people’s constitutional right to have access to a basic water supply. *See generally City of Johannesburg v. Mazibuko* 2009 SACLR LEXIS 12, at \*10–12, \*17–18 (S. Afr.).

29. *See* Levinson, *supra* note 14, at 861.

30. *See id.* at 858.

31. *See id.*

32. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162–63 (1803) (quoting Blackstone in his statement that “it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.”).

33. *See, e.g.,* Levinson, *supra* note 14, at 884–85 (providing, as an example, that if the structural reform of prisons will require too much judicial oversight, one might expect to see courts respond to this challenge by narrowing the associated substantive right by, for example, requiring a showing of “deliberate indifference” of prison officials).

34. *See id.* Levinson’s formative article evaluated the effects of remedial deterrence on the interpretation of rights, as seen through structural reform litigation under U.S. constitutional law. This Article analyzes “remedial deterrence” in the context of socioeconomic rights adjudication.

a right.<sup>35</sup> Unlike in the rights essentialist account, under remedial deterrence, rights do not exist in a distinct realm from remedies; rather, when courts fail to defend a right by providing a remedy, they necessarily alter the right itself.<sup>36</sup>

As applied to human rights adjudication, courts may engage in remedial deterrence when they avoid providing a tangible remedy to a rights deprivation because of the collateral costs—whether economic, social, political, or otherwise.<sup>37</sup> As foreign courts and international tribunals grapple with providing tangible relief to broad-sweeping socio-economic rights, such as the rights to health, education, and housing, the collateral costs can be quite high. One might, then, expect to find a heightened incidence of remedial deterrence in exactly these types of rights-vindicating operations that will require large outlays of capital and other resources on the part of government. Perhaps, as a consequence of the economic challenges of providing for socio-economic rights as well as the ingrained conception of these rights as second generation rights,<sup>38</sup> commentators and practitioners may be more accepting of remedial deterrence in the socio-economic rights context (as compared to the civil and political rights context).<sup>39</sup>

Internationally or domestically, remedial deterrence is unavoidable. Despite attempts to insulate courts from political and other pressures, courts inevitably confront pragmatic limitations preventing them from instituting overly costly remedies. Moreover, a fully effective and comprehensive remedy may be unavailable for a range of reasons. The enterprise of providing a full remedy is complex.<sup>40</sup> Courts may confront multiple remedial goals that require conflicting programs of action. For example, a court adjudicating a violation of the right to health may have the goal of vindicating the harm to the applicant before the court—a task that may require accounting for a history of deprivations of the right to health and other interrelated rights. The court may also have the goal of achieving an equitable and non-discriminatory approach to the right to health

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35. See Starr, *supra* note 1, at 695.

36. See, e.g., Levinson, *supra* note 14, at 858.

37. See Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 56–57 (2007). In considering the statement that “where there is a right there is a remedy”—or *ubi ius ibi remedium*—Sonja Starr has critiqued this “full remedy rule,” or at least the strongest version of it, noting that “strong remedial rules actually undermine effective rights enforcement in some areas.” Starr, *supra* note 1, at 708.

38. See *supra* note 2.

39. Cf. Starr, *supra* note 1, at 711–19 (rejecting remedial deterrence as related to international criminal procedure).

40. See Gewirtz, *supra* note 11, at 593–94.

on behalf of persons not currently before the court. These goals may be irreconcilable, requiring judicial balancing.<sup>41</sup>

Instrumental deficiencies may also contribute to remedial deterrence.<sup>42</sup> Real-world limitations may make it impossible to create a perfect remedy. Courts frequently confront imperfect knowledge about social institutions, complicated analyses of how to effect change in these institutions, a dependency on other branches of government and actors to help effect a remedial program, and unanticipated changes that alter the factual background against which courts must prescribe a remedy.<sup>43</sup> As a result, even if a full remedy can ultimately be achieved, a victim may already have suffered the complete extent of harm before the full remedy becomes available, and a court may adjust the right accordingly to account for this limitation.

In contrast to rights essentialism, the theory of remedial deterrence does not maintain that courts sidestep realizing a right, which remains uncorrupted despite the failure to realize it in the real world. Rather, as courts refrain from vindicating a right, under remedial deterrence they necessarily affect the very nature of the right.<sup>44</sup> Remedial deterrence thus lacks the disconnect that characterizes rights essentialism.<sup>45</sup> Rights and remedies exist, in this view, as part of a symbiotic relationship. This understanding is also a central tenet of “remedial equilibration”—in a nutshell, the notion that constitutional rights are affected by, and are indivisible from, remedies.<sup>46</sup> Daryl Levinson first defined “remedial equilibration” as encompassing various forms of interrelationships between rights and remedies, with the most obvious form being that of “remedial deterrence”—i.e. that rights can be shaped by the very nature of the remedy that will be applied if a court determines that the right has been violated.<sup>47</sup> Under this most-recognized form of interrelationship, courts shape the definition of a right when they craft a remedy.<sup>48</sup> If a *de facto* interpretation of a particular socio-economic right requires that government officials take a certain course of action, such as expanding access to a drug or granting social support services to a category of persons, then

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41. *See id.*

42. *See id.* at 596.

43. *See id.*

44. *See id.* at 598 (noting that rights are dependent on remedies for their very existence).

45. *See id.* at 862.

46. *See* Levinson, *supra* note 14, at 884. Levinson first defined “remedial equilibration” with respect to U.S. constitutional adjudication.

47. *See id.* at 884–85.

48. *See id.* at 884.

one may expect that a court will find any *de jure* governmental program that runs afoul of these guidelines to be unconstitutional.<sup>49</sup>

Further, in an exercise Levinson describes as “remedial incorporation,” a remedy may also affect a right when the right itself incorporates a remedy, as in the case of an equitable remedy like an injunction.<sup>50</sup> Preventive injunctions are oftentimes prophylactic instruments that require a certain course of governmental conduct. Consider the following hypothetical example: In adjudicating a violation of the right to health, a court may order the government to take a specific course of action in order to provide appropriate health care. In issuing this prophylactic remedy, however, the court also broadens the scope of the substantive right to include an entitlement to the same prophylactic remedy—the prescribed type of health care services. Many courts have such powers. The Constitutional Court of South Africa, for example, has emphasized in its jurisprudence that it has broad remedial authority, which allows it to issue supervisory injunctions.<sup>51</sup> In this way, rights and remedies operate in a symbiotic manner. Finally, Levinson offers “remedial substantiation.” In the most basic sense, remedial substantiation recognizes that the monetary value of a right is oftentimes simply the value of the remedy the court will offer if it finds that the right was violated.<sup>52</sup>

Examples of structural reform litigation in the United States illustrate the significance of considering the line of causation as running from remedies to rights rather than only from rights to remedies.<sup>53</sup> As seen domestically in California’s recent prison reform litigation, concerns about the practical availability of remedies will routinely impact rights, as courts redefine rights in light of anticipated remedial limitations.<sup>54</sup> Thus, in a series of rulings addressing challenges to conditions in California’s prisons, the U.S. District Court for the Northern District of California engaged in remedial incorporation when it first expanded prisoners’ rights to medical care to include a preventive injunction that ordered the California Department of Corrections and Rehabilitation (“CDCR”) to

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49. *See id.* (applying this line of analysis to domestic structural reform litigation).

50. *See id.* at 885.

51. *See Minister of Health v. Treatment Action Campaign 2002 (5) SA 721 (CC)* paras. 96–114 (S. Afr.). The court emphasized, “Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant ‘appropriate relief.’ It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also ‘make any order that is just and equitable.’” *Id.* para. 101.

52. *See Levinson, supra* note 14, at 887.

53. *See id.* at 884.

54. *See id.*

provide a minimum threshold of medical care.<sup>55</sup> Three years later, the court found that appalling conditions remained despite its preventive injunction, after balancing the range of interests, the court placed the CDCR health care delivery system in receivership,<sup>56</sup> thereby influencing the ultimate value and character of the prisoners' underlying right to medical care.

Remedial equilibration is important because it offers an alternate, more holistic view of human rights jurisprudence in which rights and remedies operate in a symbiotic relationship. When one views human rights law—and socio-economic rights in particular—through this new lens, the heretofore accepted doctrinal foundation cracks, yielding room for more analysis of the interplay between rights and remedies. This new theoretical understanding of socio-economic rights is also more conceptually analogous to areas of private law in which rights and remedies are an operative single package. For example, contract law presumes an efficient breach that occurs where the costs of upholding a commitment exceed the benefits of maintaining the commitment.<sup>57</sup> Contract liability rules do not forbid contractual breach; similarly, remedies enforce no such prohibition.<sup>58</sup> Instead, contractual obligations allow for an efficient breach. A person upholds contractual obligations at a certain price—the price being the remedy of damages or, in certain instances, specific performance.<sup>59</sup> The analogy between human rights law and private law cannot and should not be perfect, as there are important distinctions between the two. The optimum level of breach for human rights may be zero or close to zero, whereas such limitations may not surround private law entitlements. Nonetheless, private law can provide an important theoretical frame of reference from which to challenge long-standing conceptions of the rights and remedies divide in human rights jurisprudence.

Viewing human rights in this progressive way has other important implications. Once commentators and theorists understand the powerful role that remedial deterrence plays in adjudicating human rights in both national courts and international tribunals, they can focus attention on more rewarding, practical endeavors, such as those discussed in Part V. Thus, the Article turns to socio-economic rights to set the stage for remedial equilibration in human rights.

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55. Stipulation for Injunctive Relief, *Plata v. Davis*, No. C-01-1351 (TEH) (N.D. Cal. June 13, 2002).

56. *Plata v. Schwarzenegger*, No. C01-1351 (THE), 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

57. See Levinson, *supra* note 14, at 859.

58. *Id.*

59. *Id.*

## II. THEORIES OF SOCIO-ECONOMIC RIGHTS

Practitioners, commentators, judges, and theorists often laud socio-economic rights as pure, essentialist entities insulated from the trade-offs typically recognized in public policy. Indeed, socio-economic rights express important, normative values that the international community and state actors have subsequently enacted in national constitutions<sup>60</sup> and international treaties.<sup>61</sup> But, concomitantly, the jurisprudence of socio-economic rights is often characterized by imprecision and obscurities.<sup>62</sup> Despite the fact that socio-economic rights embody universal values, the rights have had a regrettably indeterminate practical content. In other words, commentators and practitioners understand and celebrate socio-economic rights as the embodiment of universally agreed-upon norms, as well as a normative good, but taking the outer lines the rights provide and coloring in the remedies has proven difficult.<sup>63</sup> In the face of such indeterminacy, multiple actors have attempted to bring analytical rigor to bear, arguing for competing conceptions of the basic socio-economic rights and freedoms to which all people are entitled.

There are two primary, competing conceptions of socio-economic rights: one embracing a resolute “minimum content” of rights and the other defining rights according to what is “reasonable.” Both are analytically deficient, however, in that they assume that rights exist in a conceptual silo and devote insufficient attention to remedies.<sup>64</sup> Despite the sig-

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60. See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.]; CONSTITUCIÓN POLÍTICA DE ECUADOR [C.P.]; CONSTITUTION OF THE REPUBLIC OF GHANA 1992; S. AFR. CONST., 1996.

61. See, e.g., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter International Convention on the Rights of the Child]; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217. Treaty bodies established under certain international treaties' charters have, in turn, sought to articulate the content of the rights included therein through general recommendations, concluding observations, and comments made to States Parties when they submit their State Party reports to the respective conventions. These treaty bodies include the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child.

62. See, e.g., Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 3, 796, 798–99 (2007); Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1 (2005).

63. See David B. Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT'L L. 331, 332 (2009).

64. See *infra* notes 199–280 and accompanying text.

nificant debates over the competing conceptions of socio-economic rights, both of the prevailing conceptions also lack any self-consciousness regarding their own propensities to “essentialize” rights, and both neglect to consider the powerful ways in which the rights are influenced by, and in turn influence, remedies.<sup>65</sup>

#### A. The “Minimum Core”

A long-running goal of commentators and tribunals examining socio-economic rights has been to define the rights’ “minimum core.” The min-

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65. Although not intending to diminish the importance of cultural rights, this Article does not extend its analysis to this category of rights. First, as a practical matter, this Article aims to debunk a rigid distinction between the two leading conceptions of socio-economic rights, and fewer debates have focused on propounding a conception of cultural rights, making the argument less valuable in that context. The wealth of human rights case law and academic discourse to date has been centered on social and economic rights, with cultural rights largely unexplored. *See, e.g.*, JESSICA ALMQVIST, HUMAN RIGHTS LAW IN PERSPECTIVE: HUMAN RIGHTS, CULTURE AND THE RULE OF LAW ch. 3 (2005) (discussing how human rights law has been inadequate in addressing issues related to culture); Asbjorn Eide, *Cultural Rights as Individual Human Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169, 289 (Asbjorn Eide, Catarina Krause & Allen Rosas eds., 2d ed. 2001) (assessing the Universal Declaration of Human Rights and the ICESCR and related commentary, and concluding that cultural rights appears as “almost a remnant category” of rights); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 119 (2008). Although this neglect calls for further treatment, critical theory may well need to separate characterizations of social and economic rights from those of cultural rights based upon the distinct political challenges that they pose. *See* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003); *see also* Andreas Huyssen, *Natural Rights, Cultural Rights, and the Politics of Memory*, HEMISPHERIC INST. OF PERFORMANCE & POLITICS, <http://hemi.nyu.edu/hemi/en/emisferica-62/huyssen> (last visited Feb. 25, 2011). This is especially true given that the challenges of social and economic rights are typically those of addressing redistribution of resources, whereas cultural rights address and recognize the rights of certain groups of individuals. *See* Young, *supra* note 65, at 119. Furthermore, from a pragmatic standpoint, social and economic rights dialogue is centered on the individual—the rights of each individual are recognized irrespective of group affiliation. However, the expression of cultural rights may require an emphasis on the minority group and may ultimately harm individual rights by creating or maintaining distributions of resources that are facially unequal. *See id.* at 119–20 (providing an example of how women operating in the private sphere may confront the consequences of this living tension); *see also* SUSAN MOLLER OKIN, *Is Multiculturalism Bad for Women? in IS MULTICULTURALISM BAD FOR WOMEN* 7, 9 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999). Analysis is limited to the ways in which rights and remedies have been incongruously defined in the context of redistributing resources on an individual basis, and, therefore, discussion of how rights and remedies are defined and realized in the context of cultural rights is reserved for a later date.



imum core articulation seeks to ascertain, or in some cases prescribe, the minimum content that comprises a particular right.<sup>66</sup> As one commentator notes, “it is a concept trimmed, honed, and shorn of deontological excess.”<sup>67</sup> Minimum core adherents theorize that by articulating a concrete minimum content to a certain right, it is possible to achieve maximum gains in realizing the right, as deviations will be more easily ascertained.<sup>68</sup> Yet, the view of socio-economic rights as containing a minimum core—like any other conception of socio-economic rights—has its limitations, leading commentators to provide a wealth of criticism.

Critics argue that those who believe they can discern a discrete content of a particular socio-economic right envision a precision that simply does not exist.<sup>69</sup> Others criticize that through the act of defining a concrete minimum threshold for a right, proponents of the minimum core forsake broader goals of socio-economic rights, which are to aim for more than a bare minimum, and inappropriately lead judges to make utilitarian trade-offs.<sup>70</sup> Critics similarly maintain that a minimum core conception of socio-economic rights focuses unfair attention on developing countries and their shortfalls while giving a free-ride to many middle- and high-income countries that have been underperforming by their own relative standards.<sup>71</sup> But despite the criticisms, the minimum core conception of so-

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66. See generally Young, *supra* note 65. Young’s article canvases the various dominant conceptions of the minimum core of social and economic rights and ultimately concludes that all of the conceptions fail to deliver a determinate core of rights.

67. See *id.* at 113.

68. See *id.*; Peter Danchin, *A Human Right to Water? The South African Constitutional Court’s Decision in the Mazibuko Case*, EUR. J. INT’L L. BLOG (Jan. 13, 2010), <http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case/>.

69. See, e.g., Young, *supra* note 65, at 113; ROBERT E. GOODWIN & PHILIP PETTIT, *CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY* 354–56 (2006) (noting that moral consensus is difficult, if not impossible, to achieve in a nonparochial and culturally neutral manner); Brigit Toebes, *The Right to Health*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 169, 176 (Asbjorn Eide, Catarina Krause & Allen Rosas eds., 2d ed. 2001).

70. See, e.g., Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT’L L. REV. 163, 190–91 (2006).

71. See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 152 (1995). Certain scholars have tried to resolve this tension by articulating a state-specific core minimum, as well as an absolute core minimum. See, e.g., Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context a Comment on Soobramooney’s Legacy and Grootboom’s Promise*, 16 S. AFR. J. HUM. RTS. 206, 250 (2000) (noting that “Canada’s core minimum will go considerably beyond the absolute core minimum while Mali’s may go no further than this absolute core”).

ocio-economic rights remains influential and, really, one of the two ways most tribunals and commentators conceptualize such rights. The following Sections outline the background of the “minimum core” conception, its theoretical progeny, and its criticisms, before proceeding to analyze minimum core discourse based upon its failure to consider *remedial* interactions and interdependencies.

### 1. The Minimum Core—Background

The concept of the “minimum core” has historical connections to constitutional principles. It inherits its structure from German basic law, which protects the essential content of a constitutional right from potential limitation.<sup>72</sup> Many constitutions include structural references to a core, pure, or essential component of a right that cannot be infringed or derogated, either as part of the articulated constitutional right itself or via a constitutional limitation clause.<sup>73</sup>

The United Nations Committee on Economic and Social Rights (“the Committee”) was the first international body to articulate the notion of a minimum core and it powerfully did so beginning in the early 1990s, analogizing the minimum core to a conception of strict liability. The Committee states in its General Comment 3:

[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant.<sup>74</sup>

The Committee’s early pronouncements, therefore, firmly established that a State Party *prima facie* derogates socio-economic rights when it

72. See Young, *supra* note 65, at 124. Young also notes that scholars such as Esin Orucu have traced the core rights formulation to the Turkish Constitution of 1961. *Id.*

73. See *id.* at 124; see also Fons Coomans, *Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context*, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 1, 9–13 (Fons Coomans ed., 2006) (providing an overview of employment of the minimum conception of socio-economic rights of countries such as India, Hungary, and Spain). But see generally *City of Johannesburg v. Mazibuko*, 2009 SACLR LEXIS 12 at \*10–12, \*17–18 (S. Afr.) (firmly rejecting the conception of a minimum core for the right to water under the South African Constitution but, nonetheless, reaching a closer conception to the minimum core than most other courts in their adjudication of rights).

74. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 3, art. 2, ¶ 1, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3].

disregards their “essential” components. Further, in promulgating its General Comment on the right to the highest attainable standard of health under Article 12 of the International Covenant on Economic, Social and Cultural Rights (“the Covenant”), the Committee states that “a State party cannot, under any circumstances whatsoever, justify its non-compliance with . . . core obligations . . . which are non-derogable . . .”<sup>75</sup> Many human rights advocates have adopted this understanding of socio-economic rights, arguing that this conception is the most immediate and enforceable way in which to achieve their realization.<sup>76</sup> Indeed, the minimum core concept does hold appeal in that it purports to establish rigor and accountability for government action that some observers may otherwise see as absent. Yet despite the superficial appeal of this essentialist view of socio-economic rights, the minimum core conception is tragically ineffectual at resolving the inherent tensions, challenges, and limitations in the implementation of social and economic rights.<sup>77</sup>

In a more optimistic view, the minimum core approach retains some redeeming value. Notably, this conception of socio-economic rights can provide a common platform from which states can embark on the “progressive realization” of these rights as outlined under international law. Under the Covenant, for example, the larger goal of providing for the right to health is one that is to be achieved “progressively,” taking into account the institutional and economic limitations of the State Party. Article 2 of the Covenant imposes a duty on a State Party to take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>78</sup> Under this more nuanced view, the minimum core may lay a foundation for a State Party’s journey in progressively meeting its legal commitment to provide for social and economic rights.

Further, the minimum core content of a particular right may also foretell the steps the progressive realization effort should follow. This influ-

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75. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, art. 12, ¶ 47, U.N. Doc. E/C.12/2004 (Aug. 11, 2000).

76. These advocates have also argued that the minimum core concept provides an important benchmark against which both citizens and interested international parties can measure a government’s performance and hold it accountable for its results. *See* Young, *supra* note 65, at 115; *see also* Theunis Roux, *Understanding Grootboom—A Response to Cass Sunstein*, 12 CONST. FORUM 41, 46–47 (2002).

77. *See* Young, *supra* note 65, at 115 (calling the minimum core conception “hopelessly incompatible in practice”).

78. ICESCR, *supra* note 61, art. 2.

ence is apparent in the principle of non-discrimination that applies immediately to a State Party's provision of social and economic rights, such as the right to health. The Committee emphasizes that "while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. . . . [Of these] is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination.'"<sup>79</sup> Hence, under Article 12 of the Covenant, a State Party need not provide for the complete right to health at the outset, but it cannot discriminate in its provision of health services. In this sense, the minimum core—although it does not intrinsically describe the path a state must follow in realizing social and economic rights—outlines principles that must apply across the journey.<sup>80</sup>

## 2. The Minimum Core—Theoretical Progeny

The minimum core conception has generated significant definitional debate, being subdivided into different articulations of what precisely constitutes this minimum core of socio-economic rights. Commentators categorize competing definitions of the minimum core of rights under the belief that by better understanding the content of socio-economic rights, the international community can then discern the optimal means to realize those rights.<sup>81</sup> These analyses have largely been limited to examining rights as aspirational truths, leaving others to grapple with the practical limitations of rights realization in resource-limited states. Importantly, as explained in this Section, despite the distinctions between the minimum core definitions, all of the leading explanations adopt a myopic approach

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79. General Comment No. 3, *supra* note 74.

80. One could argue that the minimum core, in fact, incorporates a distinct, independent right to non-discrimination, akin to the right equal protection under U.S. constitutional law. The authors think the minimum core concept is, instead, most significant for mandating a core of the right that must be exercised without discrimination because the Covenant does not allow *no* progress to be made in providing health while, in turn, requiring that if progress is made it be done in a non-discriminatory manner—a position that would be more consistent with a pure and independent equal protection right. Instead, it requires that some services be provided immediately and others be provided—or realized—progressively, and it holds that in progressively realizing this right, states are bound by a principle of non-discrimination. *See* ICESCR, *supra* note 64, art. 2. As such, it goes beyond a pure non-discrimination or equal protection right.

81. *See generally* Young, *supra* note 65; Joie Chowdhury, *Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights—A Comparative Perspective* (Cornell Law. Sch. Inter-Univ. Graduate Student Conference Papers, Working Paper No. 27, Mar. 23, 2009), *available at* [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps\\_clacp](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1055&context=lps_clacp).

of essentializing rights while disregarding the attendant and interconnected remedies.

One theoretical approach to the minimum core conception of socio-economic rights proceeds by seeking to understand the “essential minimum” of a particular right.<sup>82</sup> Proponents of this approach query the essential minimum elements of a right by virtue of their relationship to a particular foundational norm.<sup>83</sup> Notably, what begins as a purportedly rigorous methodology quickly reduces to a normative exercise, through which foundational norms like life, survival, or dignity are propounded as fundamentally important.<sup>84</sup> The minimum core is then defined as a tiered hierarchy of rights, with a nucleus that is the foundational norm; other socio-economic rights outside the nucleus become important as derivatives of this foundational norm.<sup>85</sup>

Examples of this approach are illustrative. The Human Rights Committee addresses preventive health care and nutrition policies through the lens of the foundational right to life.<sup>86</sup> In a General Comment, the Human Rights Committee notes that the “inherent right to life” cannot be considered in a restrictive manner, but rather, the protection of this right requires that State Parties take positive measures to decrease infant mortality and increase life expectancy, especially in addressing malnutrition and disease epidemics.<sup>87</sup>

Within foreign domestic courts’ socio-economic rights jurisprudence, the “essentialist” model has gained traction as well. India’s courts, for example, have defined the minimum core of socio-economic rights relative to a central norm—the minimum necessary for survival and basic needs. The Supreme Court of India has made no express reference to a minimum core, yet the Court regularly uses language referring to the es-

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82. Young, *supra* note 65, at 126–40.

83. *See id.*

84. *See id.*

85. *See id.*

86. *See, e.g.*, Int’l Covenant on Civil and Political Rights, art. 6, Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 127, U.N. Doc. HRI/GEN/1/Rev.6 (2003).

87. *See id.* “The Committee has noted that the right to life has been too narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.” *Id.* ¶ 5.

sential minimum of a right and that which is minimally required.<sup>88</sup> In *People's Union for Civil Liberties v. Union of India*, for example, the Court sternly addressed starvation deaths that had taken place in India despite the State's excess food stocks.<sup>89</sup> It ordered all State governments and the Union of India to immediately enforce food schemes to the poor in order to ensure the right to food, a derivative of and requisite for the right to life.<sup>90</sup> Indeed, the Court found that the right to food followed from the fundamental "right to life" enshrined in Article 21 of the Indian Constitution.<sup>91</sup> In another case before the Supreme Court of India, the Court similarly explained the right to emergency health care as forming an integral part of the fundamental right to life.<sup>92</sup>

More recently, the Constitutional Court of Columbia reviewed twenty-two *tutela* actions brought in response to alleged violations of the constitutional right to health.<sup>93</sup> The *tutela* is a special constitutional writ introduced in the Colombian Constitution of 1991.<sup>94</sup> Through the writ, any citizen can directly request that a judge protect a fundamental right when the state violates the right and when no other legal action can effectively prevent the violation.<sup>95</sup> The Colombia Constitutional Court reviews a small proportion of the voluminous *tutela* actions adjudicated by lower courts.<sup>96</sup> Astoundingly, more than 300,000 *tutela* actions have been adjudicated by lower courts each year, with 36% of these related to the

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88. See *People's Union for Civil Liberties v. Union of India & Ors.*, (1997) 1 S.C.C. 301 (India).

89. *Id.*; see also *People's Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 (India) (Nov. 28, 2001, interim order) (establishing a constitutional right to food).

90. See generally Young, *supra* note 65; see also *People's Union for Civil Liberties v. Union of India & Ors.*, Writ Petition (Civil) No.196 of 2001—Commentary, ESCR-NET, [http://www.eschr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=401033](http://www.eschr-net.org/caselaw/caselaw_show.htm?doc_id=401033) (last visited Feb. 25, 2011); Chowdhury, *supra* note 81, at 9–10 (discussing Indian jurisprudence in this area).

91. See *People's Union*, Writ Petition (Civil) No. 196 of 2001.

92. *Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal & Anor.*, (1996) 4 S.C.C. 37 (India).

93. See *Decision T-760 of 2008*, ESCR-NET, [http://www.eschr-net.org/caselaw/caselaw\\_show.htm?doc\\_id=985449](http://www.eschr-net.org/caselaw/caselaw_show.htm?doc_id=985449) (last visited Feb. 25, 2011) [hereinafter *Decision T-760 of 2008*]; see also Alicia Yamin & Oscar Parra-Vera, *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, 6 PLOS MEDICINE 147, 147 (2009), available at <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1000032>.

94. See Yamin & Parra-Vera, *supra* note 93.

95. See *id.*

96. See *id.*

right to health.<sup>97</sup> In a broad and remarkable ruling in 2008, the Colombia Constitutional Court, after reviewing twenty-two *tutela* cases that were representative of various recurrent violations of rights, ordered remedies in all of the individual cases and ordered the government—including the Ministry of Social Protection and the health supervision and regulation agencies—to modify regulations and to expeditiously provide resources to bolster the health system.<sup>98</sup> Significantly for the purposes of this Article, the Court identified the right to health as a fundamental right based on its nexus to the right to life.<sup>99</sup> In making this analytical move, the Court embraced an essentialist theoretical approach to socio-economic rights, in which the right to health becomes fundamental based on its link to the intrinsic, undeniable right to life.<sup>100</sup>

Other minimum core advocates within this theoretical approach argue for a more aspirational minimum core that goes beyond providing only what is required for basic needs, survival, and life. Some may more ambitiously look to the minimum core that is required for dignity or human flourishing.<sup>101</sup> Such an approach appeals to the goals of the human rights movement, which did not intend to provide persons with only the bare minimum for survival, but rather affirmed “faith in fundamental human rights, in the dignity and worth of the human person” and “determined to promote social progress and better standards of life in larger freedom.”<sup>102</sup> Indeed, such an articulation—no doubt more robust than that defined under the survival/minimum needs approach—could help advance human rights more fully. Furthermore, a broader definition of the minimum core—drawn in relation to dignity and flourishing—may also allow for a more participatory approach, wherein persons can assist in articulating what it means to them to lead a dignified life. Of course, the criticism of such an essentialist approach—whether tied to narrower foundational norms such as the right to life or bolder norms such as the right to flourish or to lead a life of dignity—is that by linking socio-economic rights

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97. *See id.* (information is based on data provided by the Colombian Ombudsman’s Office for 2005).

98. *See id.*

99. *See id.*

100. *See Young, supra* note 65, at 126–40 (explaining the nature of such essentialist inquiries).

101. *See, e.g., id. But see* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 4 (2008) (arguing that the use of dignity as a benchmark for minimum core obligations fails to provide a principled basis for judicial decision-making since there is marginal common understanding of what dignity substantively requires within or across jurisdictions).

102. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, pmb1. (Dec. 10, 1948).

within the “core” to such foundational norms, one may actually narrow rather than enlarge the range of rights that are ultimately protected.<sup>103</sup> In other words, rights that are intrinsically important, but that are not linked to the foundational norm, might exist on the periphery, outside of the protected core. And more broadly, such an approach is myopic for its failure to consider the critical way in which even normative rights are shaped by remedial considerations.<sup>104</sup>

A second theoretical approach to the minimum core is one built upon a notion of consensus.<sup>105</sup> This approach seeks to identify the consensus-based content of a minimum core—i.e. the precise boundaries of a mutually accepted minimum core. Advocates of this approach proceed to identify key elements of the core based upon a range of more or less definite considerations, such as “wider agreement,” “extensive experience [and] . . . examin[ation],” and the “synthesis of . . . jurisprudence.”<sup>106</sup> They do so by invoking legal documents that codify specific obligations accompanying socio-economic rights, such as human rights treaties and the jurisprudence that has evolved thereunder.<sup>107</sup> They look to the concluding observations and comments that treaty body committees issue to State Parties during periodic reporting sessions in order to further understand the scope of the commonly-recognized “core.”<sup>108</sup>

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103. See Young, *supra* note 65, at 127.

104. See *infra* notes 219–74 and accompanying text.

105. See Young, *supra* note 65, at 140–51.

106. See *id.* Young cites the following sources as exemplars of these approaches, respectively: Sage Russell, *Minimum State Obligations: International Dimensions*, in *EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES* 11 (Danie Brand & Sage Russell eds., 2002); General Comment No. 3, *supra* note 74, ¶ 10; Scott Leckie, *The Right to Adequate Housing*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, 512 (Scott Leckie & Anne Gallagher eds., 2006).

107. See Young, *supra* note 65, at 142 (citing Geraldine Van Bueren, *Of Floors and Ceilings: Minimum Core Obligations and Children*, in *EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES* 159, 183–84 (Danie Brand & Sage Russell eds., 2002)).

108. As an example of States Parties’ reports helping to elucidate the minimum core, Philip Alston, chairperson of the Human Rights Committee in 1991, suggested that the normative content of the rights to food, housing, health, and education could be clarified “through the examination of States Parties’ reports . . . [T]he approaches adopted by States themselves in their internal arrangements (and explained in their reports to the Committee) will shed light upon the norms, while the dialogue between the State and the Committee will contribute further to deepening the understanding . . .” Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 473, 491 (Philip Alston ed., 1992).



This approach also considers the work of ratifying states that have implemented domestic legal measures to protect social and economic rights in accordance with their international commitments.<sup>109</sup> For example, a state may ratify the International Covenant on Economic, Social and Cultural Rights, and subsequently adopt domestic legislation requiring itself to provide health care on a non-discriminatory basis, in accordance with Article 2 and General Comment 3 of the Covenant.<sup>110</sup> That the substantive content of non-discrimination is seen through a multitude of State Parties that ratified the Convention—as well as various parties' enactment of domestic non-discrimination laws in accordance with the Convention—supports the argument that the nucleus of consensus includes the principle of non-discrimination.

Consensus as to the minimum core may ultimately be impacted by notions of constitutional borrowing, as articulated by Frank Michelman, wherein one country's constitutional and legal industry might effectively “export” influence to other countries, which as a consequence adopt this approach.<sup>111</sup> Theories of borrowing and transplantation of law permeate many academic theorists' approaches to comparative constitutional law.<sup>112</sup> No doubt, these approaches—to the extent that they are brought to bear—could contribute to the formulation of an ultimate “consensus” approach, albeit with its own share of potential weaknesses.

For example, some commentators criticize the consensus approach for leading to conservative and abstract conceptions of rights, as polarized conceptions of socio-economic rights lead nations to only mutually agree upon a narrow “core.”<sup>113</sup> Constitutional borrowing may exacerbate these problems. Others refer to this as the “lowest common denominator” implication of the consensus approach, whereby the minimum core is mutually defined as the lowest level of rights protections to which states can agree.<sup>114</sup> Indeed, borrowing from another familiar setting in international law, “[a]s a long-standing criticism of the treaty system makes clear, the requirement for consensus across different legal systems will impede a norm's progress and development.”<sup>115</sup> The result of this least common

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109. *See id.*

110. General Comment No. 3, *supra* note 74.

111. *See* Frank I. Michelman, *Borrowing: Reflection*, 82 TEX. L. REV 1737, 1737 (2004).

112. *Id.* at 1758 (noting that “the discourses on borrowing and transplantation . . . have been a central preoccupation of theorists of comparative constitutional law”).

113. *See, e.g.,* Young, *supra* note 65, at 148.

114. *See id.* at 147.

115. *See id.* (citing Bruno Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485, 494 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983)).

denominator implication is a bias toward maintaining the status quo and understanding rights in uncontroversial ways. This bias stands in direct tension with the goals of “progressive realization” embodied in most articulations of socio-economic rights. Further, the notion of true consensus itself leads to the paradoxical outcome that if a marginal few refuse to consent to a particular conception, then their voices ultimately define—and narrow—the consensus articulation of the minimum core. Thus, when adhering to a consensus understanding, the quixotic, potentially transformative conceptions of socio-economic rights evaporate from the minimum core in the absence of universal consensus.

In practice, this second consensus-based approach has similarities to the first, “essential minimum” approach. Both approaches aspire to identify a “core of certainty and a penumbra of doubt.”<sup>116</sup> It is foreseeable that both approaches could yield overlapping results, as the United Nations Millennium Development Goals, the World Health Organization, and other international standards and standard-setting agencies define the essential minimum of a right with respect to a foundational principle (such as the minimum health care needed for living or flourishing) and with an eye toward consensus-based understandings of social and economic rights. Yet, in the process of delineating this common nucleus upon which “all” can agree,<sup>117</sup> questions of large import emerge: does the debate regarding the appropriate methodology of defining rights detract from the arguably more important questions regarding what the content should be? Which voices comprise the consensus-forming nucleus, and are marginalized voices included and provided a platform? Is the notion of a resolute core of rights necessarily a “shifting concept”?<sup>118</sup> And, criti-

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116. *See id.* at 141 (citing H.L.A. HART, *THE CONCEPT OF LAW* 123 (2d ed. 1994)).

117. Perfect consensus, of course, is a theoretical ideal that is inhibited by the practical realities of geopolitics. *See* M.R. HAFEZANIA, *PRINCIPLES AND CONCEPTS OF GEOPOLITICS* (2006) (describing “geopolitics to mean a branch of political geography” and “the study of reciprocal relations between geography, politics and power and also the interactions arising from combination of them with each other”); *see also* COLIN S. GRAY & GEOFFREY SLOAN, *GEOPOLITICS, GEOGRAPHY, AND STRATEGY I* (1999) (“By geopolitical, I mean an approach that pays attention to the requirements of equilibrium.”) (quoting HENRY KISSINGER, *THE WHITE HOUSE YEARS* 914 (1979)). Power, political, and geographical dynamics affect official policy agreements between nations, as certain voices—historically, those of developed and Western nations—are more resonant in the debate. The “compromise” that leads towards consensus can oftentimes be justly seen as a product of coercion, rather than mutually-negotiated agreement. *See* Young, *supra* note 65, at 149. And relatedly, without a true diversity of voices impacting the debate, the “consensus” outcome raises legitimacy concerns.

118. *See, e.g.*, EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES (2002). One might query whether, normatively, there are advantages, in fact, to having a “shifting” conception of the mini-

cal to the analysis here, what role do remedies play in shaping this common nucleus under consensus-based or essentialist approaches?

Young points to a third theoretical approach to defining the content of socio-economic rights that looks at the “minimum obligation” of states under a minimum core approach. As she astutely recognizes, this third conception, growing in popularity, relies upon and integrates the foundational justifications seen in the previous two approaches.<sup>119</sup> For better or worse, the reference to “minimum obligations” could be understood as an attempt to evade the challenging questions regarding how theorists define and justify the core content of socio-economic rights. Under this approach, states are obligated to act, rather than to merely think and question.<sup>120</sup> To this end, the Committee has articulated “core obligations” that State Parties must assume in order to fulfill their commitments under the Covenant and has thereby demarcated what will be clear violations of the Covenant.<sup>121</sup> Thus, a benefit of this third conception of core obligations is that it tackles the challenge of adjudicating socio-economic rights violations. The minimum core obligations become the minimum area of social and economic rights that are protected and enforceable through the judicial system.<sup>122</sup> Yet the third theoretical approach to defining social and economic rights also falls prey to similar challenges as in the first two outlined approaches, as explained below.

### 3. Criticisms of the Minimum Core

One of the central weaknesses of the minimum core conception is based in the entire operation of articulating a baseline “minimum”—of

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minimum core of rights. As countries develop, one might hope that economic and social progress would translate into new, revamped, and more stringent expectations of states with respect to their citizens.

119. See Young, *supra* note 65, at 151.

120. See *id.*

121. See General Comment No. 3, *supra* note 74 (“In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”); see also Audrey R. Chapman, A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUMAN RIGHTS Q. 23 (1996).

122. See Young, *supra* note 65, at 158 (“The focus on justiciability is thus more attentive, like the Committee’s General Comments, to the institutional competence of the body articulating the minimum core . . .”).

unraveling complex bundles of rights into their discrete parts in a Hohfeldian operation.<sup>123</sup> Such an operation is antithetical to the very nature of socio-economic rights, which are interrelated and suffer concomitant violations, and as explained in the later parts of this Article, are ultimately defined in correspondence with remedies.

Therefore, one must question whether the entire endeavor to define the minimum core of certain socio-economic rights narrows, rather than enlarges, the range of socio-economic rights. For example, in the essential minimum approach, by connecting rights' definitions to a grounded notion such as the right to life, does one undermine the broader human rights goal of achieving social and economic progress for all persons?<sup>124</sup> One might also question whether this endeavor to define a "minimum core" of rights is rooted in a false sense of determinacy, particularly as applied to relatively broad, subjective rights. Is there truly a determinate content to a foundational norm such as "dignity" or "flourishing" under an "essence" approach? Is it any easier to identify the resolute content of the right to health in any meaningful way through a consensus-based approach?<sup>125</sup> Does pointing to states' minimum obligations to meet such a right to health obviate the need to finally define the precise content?

In short, each of these approaches to the minimum core endeavors to create an objective definition of a complicated socio-economic right that includes largely context-dependent minimum requirements. As Amartya

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123. See Lawrence C. Becker, *The Moral Basis of Property Rights*, in PROPERTY 187, 190 (J. Roland Pennock & John W. Chapman eds., 1980) (describing Wesley Newcomb Hohfeld's conceptions of property as containing constituent rights); see also Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002) (recasting Hohfeld's conception of property in a new metaphor where property is not a disintegrated entity, but rather is a set of interests—including responsibilities, as well as rights—and with people, groups, and entities sharing in objects of those interests).

124. See Young, *supra* note 65, at 127.

125. For example, query whether the right to health would require emergency obstetric care as part of its minimum core. From a needs-based essentialist approach, emergency obstetric care is certainly connected to the right to life and broader concepts like dignity and flourishing, as deprivations of such emergency care lead to maternal mortality. See Margaux J. Hall, *Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocol in Reducing Maternal Mortality*, 28 WIS. INT'L. L.J. 74, 75 (2010) (highlighting the interconnection between women's deprivation of their right to health through emergency obstetric care and their deprivation of their right to life, and offering a potential remedy to such deprivations through the Convention on the Elimination of All Forms of Discrimination Against Women Optional Protocol). Yet, despite the linkages between the right to health and right to life, emergency obstetric care might fall short of consensus, and of becoming a minimum obligation for states, under those theoretical approaches to the minimum core.

Sen notes, line-drawing leads to inherent, inevitable arbitrariness that extends beyond natural variety found in regions or groups of persons.<sup>126</sup> Sen's concerns are not just theoretical; the Constitutional Court of South Africa has struggled with the tensions in such line drawing around rights guaranteed in the constitution,<sup>127</sup> as have many other constitutional courts adjudicating socio-economic rights.

*B. Alternatives to the "Minimum Core"—Assessing the Reasonableness of Government Action*

In practice, efforts to define the core of particular socio-economic rights have been strained and generally unsuccessful, if not outright rejected. The Constitutional Court of South Africa, for example, has been deliberate in articulating the contours of various socio-economic rights that are broadly provided in the country's bold constitution; yet the forced efforts to define the contents of particular socio-economic rights have been particularly evident in the progeny of cases the Court has adjudicated.<sup>128</sup>

As alluded to earlier, the Court's approach was recently evident in *Mazibuko and Others v. City of Johannesburg*, in which applicants asked the Court to define the minimum content of the right to water under the Constitution of South Africa.<sup>129</sup> The *Mazibuko* applicants asked the Court to define the minimum amount of water required to live a life of dignity, rather than a "mere minimum content" to the right to water.<sup>130</sup> The Court explained that the applicants made "in effect, an argument similar to a minimum core argument though it is more extensive because it goes beyond the minimum. The applicants' argument is that the proposed amount (50 litres per person per day) is what is necessary for dignified human life."<sup>131</sup> The Court pointed out that the requested "minimum" was actually more than a baseline minimum: "[the applicants] expressly reject the notion that it is the minimum core protection required by the

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126. See AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 12 (1982) (emphasizing that even the requirements for human survival are not clear-cut; they have an "inherent arbitrariness that goes well beyond . . . groups and regions").

127. See, e.g., *Mazibuko v. City of Johannesburg* 2009 (3) SA 592 (CC) (S. Afr.) (grappling with the difficulty of defining a discrete content to the right of access to water under the Constitution); *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) (determining whether restrictions in access to a drug violate the right to health care services).

128. See, e.g., sources cited *supra* note 127.

129. See *supra* notes 3–5 and accompanying text.

130. *Mazibuko*, 2009 (3) SA 592 (CC) para. 56.

131. *Id.*

right.”<sup>132</sup> The Court responded to the applicants’ “minimum-plus” request by firmly rejecting the notion of a “minimum core” in South Africa’s Constitution.<sup>133</sup>

In this recent rejection of the notion of a “minimum core,” the *Mazibuko* Court emphasized that certain rights—although guaranteed in the Constitution—will not be realized immediately and instead must be subject to “progressive realization.”<sup>134</sup> The *Mazibuko* Court found that the Constitution of South Africa “requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim sufficient water from the state immediately.”<sup>135</sup> This reasonableness analysis enabled the Court to adjudicate the fact-specific and case-specific circumstances surrounding the government’s alleged failure to fulfill rights guaranteed in the Constitution.

The Court described the history of South Africa’s enactment of its Constitution, set against the backdrop of massive deprivations in a newly post-apartheid country.<sup>136</sup> Presuming the drafters did not expect that the state would be able to “furnish citizens immediately with all the basic necessities of life,”<sup>137</sup> the Court explained, “[t]he fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately.”<sup>138</sup> In essence, the Court identified the right available in the immediate term as one tempered by the practical realities of a newly post-apartheid South Africa, a right that was ultimately subordinated to (and less than) the pure ideal of the right.

The important consideration for the Court was whether the new government was taking its responsibilities seriously—“to ensure that the state continues to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life.”<sup>139</sup> The *Mazibuko* Court, as in previous cases such as *Grootboom* and *Treatment Action Campaign*, looked to whether the government’s conduct was “reasonable.”<sup>140</sup>

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132. *Id.*

133. *Id.*

134. *Id.* para. 58.

135. *Id.* para. 57.

136. *Id.* para. 59.

137. *Id.*

138. *Id.* para. 58.

139. *Id.* para. 59.

140. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.) (adjudicating whether section 27 of the Constitution of South Africa guaranteeing the right to health provides a self-standing and independent positive right, and determin-

The Court's pronouncement was to the surprise and dismay of many human rights advocates—and minimum core advocates—who saw *Mazibuko* as a significant setback in their efforts to delineate and realize socio-economic rights. Many advocates have found that the “reasonable” analysis provides an almost impermeable shield through which government's shortfalls are recast as successes and progress in the right direction.<sup>141</sup> Yet, paradoxically, the South African approach to socio-economic rights, framed in a “reasonable” analysis, has remained one of the most successful approaches in defining a more determinate content to socio-economic rights.

Notably, tensions abound on both the “minimum core” and “reasonableness” ends of the human rights realization endeavor. The “reasonableness” approach undoubtedly provides wide latitude for government to delay and sequence implementation of policy programs with broad discretion. Yet, the *Mazibuko* applicants' desire to obtain a prescription for the “minimum core” of the right to water to enable a person to live a “dignified human life” was surely riddled with tensions as well.<sup>142</sup> It is difficult for a court to quantify what constitutes a dignified human life in a purely metric sense, measured by gallons per day.<sup>143</sup> Further, what would be the cost to a court's own legitimacy if it were to require the state to provide beyond its pragmatic means or political will? The Constitutional Court discerningly described limitations on its power to adjudicate such issues in a constitutional democracy:

[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for

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ing that it does not do so); *Government of the Republic of South Africa v. Grootboom* 2000, (1) SA 46 (CC) (S. Afr.) (adjudicating whether section 26 of the Constitution of South Africa which guarantees the right to housing entitles citizens to approach a court to claim a house from the state, and determining that it does not do so).

141. See, e.g., Pierre De Vos, *Water is Life (But Life is Cheap)*, CONSTITUTIONALLY SPEAKING (Oct. 13, 2009), available at <http://constitutionallyspeaking.co.za/water-is-life-but-life-is-cheap/>; Jackie Dugard & Sandra Liebenberg, *Muddying the Waters: The Supreme Court of Appeal's Judgment in the Mazibuko Case*, 10 ECON. & SOC. RTS. REV. 11 (2009).

142. See *Mazibuko*, 2009 (3) SA 592 (CC) para. 59.

143. There are undoubtedly core human needs that a definition of the right to water would recognize under a hypothetically ideal definition, in order for the right to have any effect. But how is a court to determine, for example, the distance a house must be located from a potable water source in order to meet the need, and how should these be considered in light of socio-economic factors and constraints that can interfere with the rights' realization?

the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.<sup>144</sup>

The Court went on to articulate that judges are ill placed to make determinations of what constitutes “sufficient water” for both institutional and democratic reasons.<sup>145</sup> It in turn emphasized its regard for the other branches of government in their policy-making decisions.<sup>146</sup>

The meaning of these statements and their implications are revisited below,<sup>147</sup> but first the role of remedies in socio-economic rights jurisprudence must be examined. The following Sections’ analysis seeks to demonstrate the strong influence of remedies on socio-economic rights in cases like *Mazibuko*. In other words, despite the fact that no remedy was awarded to the *Mazibuko* applicants, remedial considerations, including those concerning institutional capacity and democratic accountability, influenced the very nature of the right itself, perhaps in ways more important than if the content of the right was indeed conceived in a vacuum.

### III. THEORIES OF SOCIO-ECONOMIC REMEDIES

Scholars and advocates criticize courts that recognize socio-economic rights while limiting the meaning of the promises contained therein.<sup>148</sup> This Section probes the criticized rights-remedies divide to understand and question its normative basis, thus canvassing various characterizations of socio-economic rights interpretation—including the role of the judiciary in reviewing the implementation of constitutional rights in a strong- or weak-form manner. Strong-form review and weak-form review are ways of structuring judicial review of legislative action.<sup>149</sup> Under strong-form review, courts have the general authority to interpret the constitution and the rights therein.<sup>150</sup> Under weak-form review, courts can evaluate legislation to determine its constitutionality; however, the

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144. *Mazibuko*, (3) SA 592 (CC) para. 61.

145. *Id.* paras. 61, 65.

146. *Id.* paras. 62, 65.

147. See discussion *infra* Section IV.C.

148. See, e.g., Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151, 152 (2009); sources cited *supra* notes 17–18.

149. See Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 (2003) [hereinafter Tushnet, *Alternative Forms of Judicial Review*].

150. See *id.* at 2784.



legislature has room to reenact—and ultimately displace—judicial interpretations of the constitution, thereby depriving courts of having the ultimate “say” on the definition of rights.<sup>151</sup> In identifying these dual types of scrutiny of legislative action, it is clear that neither method seeks consonance between socio-economic rights and remedies. Rather, both seek to analyze and characterize the dissonance in this space, largely by defining which institutions retain more power to define rights and their limitations. Although strong-form structure of review comes closer to harmonizing or equilibrating rights and remedies, it nonetheless falls short because of practical constraints that make an idealistic right unattainable and because it proceeds down a restrictive one-way street in which rights are taken as established entities, from which remedies ultimately flow.

This Article offers an alternative conception of rights and remedies. In order to lay the groundwork to do so, this Section highlights theories surrounding the purpose of remedies. It then assesses the traditional “rights essentialist” characterization of remedies that accepts and expects discord between pure rights and tainted remedies. An alternative conception is proposed that seeks to “equilibrate”<sup>152</sup> rights and remedies by recognizing that rights are defined in accordance with desired and expected remedial outcomes. Relying on remedial equilibration in U.S. constitutional law, formative socio-economic rights opinions are considered through this new lens, noting the importance of transparency in regards to remedial deterrence. Not all areas of the law have such a disconnect between rights and remedies, and the Article briefly provides a few examples of other areas in private law where such a disconnect is not evident, focusing on distinctions between socio-economic rights jurisprudence and areas of private law like contract and property.

One of the best settings in which to explore the remedial landscape in socio-economic rights jurisprudence is, again, through the cases from the Constitutional Court of South Africa. Just as the Constitutional Court has been one of the courts to most successfully define a resolute content to socio-economic rights, it has also fostered an innovative form of enforcing these rights. Commentators widely debate the approach the Constitutional Court has taken, with some viewing it as a weak-form review of rights enforcement and others as a strong-form review of rights enforcement.

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151. *See id.* at 2785–86.

152. Daryl Levinson first introduced the transformative notion of “equilibrating” rights and remedies in his article, *Rights Essentialism and Remedial Equilibration*, which assessed the relationship of rights and remedies through examples from U.S. structural reform litigation. *See generally* Levinson, *supra* note 14.

### A. Weak-Form Review

Mark Tushnet characterizes the Constitutional Court of South Africa's socio-economic rights enforcement as a "weak form" review that allocates significant discretion to the legislature to enforce socio-economic rights based on the significant budgetary implications of such enforcement decisions.<sup>153</sup> In such weak-form judicial review, courts may defer to the actions of the executive or legislative branches, assuming that these branches' policy determinations are the most effective mechanism for enforcing rights.<sup>154</sup>

Even more pragmatically, Cass Sunstein emphasizes that the enforcement of constitutional rights is a costly endeavor, as all constitutional rights have budgetary implications.<sup>155</sup> Sunstein's argument resonates with the decision in *Khosa v. Minister of Social Development*, in which the state failed to provide reasonable budgetary or financial reasons why it could *not* extend social and economic services to residents.<sup>156</sup> In the absence of a reasonable cost-motivated explanation, the Court ruled, the government's exclusion was unreasonable.<sup>157</sup>

Sunstein implicitly accepts a rights-remedies divide, arguing that in enforcing rights, courts focus their attention on the reasonableness of governmental behavior.<sup>158</sup> Sunstein thus likens constitutional rights adjudication in South Africa to administrative law approaches, which evaluate policies of other branches of government in order to determine whether those policies are reasonable.<sup>159</sup> Insofar as all constitutional rights depend upon state expenditures for their protection, the decision to involve

153. See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2003) [hereinafter Tushnet, *Social Welfare Rights*] ("[S]ometimes, the enforcement of first- and second-generation rights has some implications for government budgets.").

154. See *id.*

155. See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 7 (2005) ("All constitutional rights have budgetary implications . . . It follows that insofar as they are costly, social and economic rights are not unique."); see also Ray, *supra* note 148, at 151 (noting that the distinction between socio-economic and civil and political rights, in this sense, is unhelpful as all rights implicate state expenditures); Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 389–90 (2004) [hereinafter Pieterse, *Coming to Terms*] (noting that financial and resource constraints also affect the enforcement of civil and political rights).

156. See generally *Khosa v. Minister of Social Development* 2004 (6) BCLR 569 (CC) (S. Afr.).

157. See *id.*

158. See CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 10 (2002).

159. See *id.*

and delegate decision-making authority to an accountable, elected legislature is a tacit acceptance of weak-form review.

Weak-form review allows for more flexible remedial rules that evaluate contextual elements, accepting less than complete remedies in light of other social goals.<sup>160</sup> Under Paul Gewirtz's dual characterization of remedial approaches, weak-form review most closely aligns with the conception of "Interest Balancing," wherein the effectiveness of a remedy for a particular victim is just one consideration in selecting a remedy (albeit a critical one, particularly in the context of civil and political rights).<sup>161</sup> Put another way, following Gewirtz's understanding, courts consider and temper their remedial programs by considering other societal interests, including those of individuals outside the immediate litigation.<sup>162</sup>

Evidence for the Constitutional Court of South Africa employing weak-form review in its analysis of legislative action (or inaction) is plentiful. In *Treatment Action Campaign*, the Court emphasized that the Constitution granted the Court broad remedial authority, including the power to grant supervisory injunctions.<sup>163</sup> While clarifying the existence of these broad remedial powers, the Court declined to exercise them, rejecting the lower Court's decision to grant a bold injunction, and noting instead that "[t]he government has always respected and executed [the] orders of this Court. There is no reason to believe that it will not do so in the present case."<sup>164</sup> Similarly, the recent *Mazibuko* decision affirms weak-form characterizations of the Constitutional Court's review given the Court's reluctance to enforce a resolute right of access to water under the Constitution beyond what the government had provided.<sup>165</sup>

The weak-form approach has not been without its detractors. Many in South Africa criticize the Constitutional Court's deferential approach, viewing the Court as adopting an overly narrow view of its role and thereby failing to provide real meaning to the rights guaranteed in the Constitution.<sup>166</sup> Some commentators attack the "reasonableness" model, arguing that the Constitutional Court's approach has allowed government

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160. See Tushnet, *Social Welfare Rights*, *supra* note 153, at 1896.

161. See Gewirtz, *supra* note 11, at 591–92.

162. See *id.*

163. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) paras. 96–114 (S. Afr.).

164. *Id.* para. 129.

165. *Mazibuko v. City of Johannesburg* 2009 (3) SA 592 (CC) para. 9 (S. Afr.).

166. See, e.g., Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or What Are Socio-Economic Rights For?*, in *RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION* 41 (Henk Botha et al. eds., 2003); Liebenberg, *supra* note 62, at 22.

intransigence and has deprived rights of any tangible meaning.<sup>167</sup> Other scholars point out that all that is left is the mere promise of “reasonable” government action, without even any priority setting.<sup>168</sup>

Indeed, the *Mazibuko* Court considered the broader interests of all persons in South Africa when it decided that the government had reasonably provided for the constitutional right of access to water for the applicants.<sup>169</sup> The Court balanced costs to parties outside the specific piece of litigation before it. In its introductory remarks it stated that “[t]he case needs to be understood in the context of the challenges facing Johannesburg as a City,” a City that it noted has 3.2 million people residing in one million households.<sup>170</sup> The Court continued, “It can be seen that there is much to be done to ‘[i]mprove the quality of life of *all citizens*,’ an important goal set by the preamble of our Constitution.”<sup>171</sup> *Mazibuko* thereby framed its legal analysis in light of broader pragmatic and policy-based considerations of the welfare of the numerous residents of the City of Johannesburg, many of whom continually suffer from resource deprivations.<sup>172</sup>

A range of other pragmatic and institutional considerations, beyond those expressly articulated in the opinion, may have affected the *Mazibuko* Court’s analysis. Commentators have engaged in a robust debate as to how strong the Court’s enforcement could have actually been without undermining its own legitimacy and competency.<sup>173</sup> Of course, it is important to note that simply characterizing the Court’s review as having a weak-form structure provides only a narrow insight into its ruling. In considering remedial alternatives, the Court ultimately defined the practical scope of the right to water as well.

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167. See, e.g., David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1 (2003); Pieterse, *Coming to Terms*, *supra* note 155, at 383.

168. See, e.g., Pieterse, *Coming to Terms*, *supra* note 155, at 383; Roux, *supra* note 76, at 51. One could also characterize the Court’s rulings as reflecting a Dworkinian, pragmatic, policy-based analysis that takes into account the welfare or goals of the political community as a whole. See RONALD DWORKIN, *LAW’S EMPIRE* 220–21 (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*].

169. See *Mazibuko*, (3) SA 592 (CC) para. 7.

170. See *id.*

171. See *id.* (emphasis added).

172. See *id.*

173. See, e.g., Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form*, 5 INT’L J. OF CON. L. 391, 393 (2007) (arguing that weak form judicial review is necessary in socio-economic rights adjudication in the beginning in order for the court to be counted as fully legitimate); Pieterse, *Coming to Terms*, *supra* note 155.

Such an “interest balancing” approach does not aim to harmonize rights and remedies. It proceeds by taking the essence of a constitutional right as a given, which is then tempered by practical considerations. In this manner, “interest balancing” provides only a shallow interpretation of the nuanced interplay between rights and remedies. This approach oversimplifies; it focuses entirely on the remedial program that follows from the existence of a particular, pure right, without considering how remedies alter that very right.

Some scholars assuage this oversimplification. Rosalind Dixon, for example, explores the territory of the rights-remedies divide and proposes a solution of “constitutional dialogue,” which “favors a weaker approach, requiring courts to adopt either weak rights *or* weak remedies, depending on the circumstances of the particular country and case.”<sup>174</sup> Dixon’s “dialogue” approach has the advantage of looking at both rights and remedies, and of seemingly rejecting the strict line of causation wherein rights are defined in order to achieve ends, and remedies then submit to practical economic, social, and political constraints. Yet, ultimately, Dixon’s approach also fails to achieve consonance in this arena because it cannot provide a detailed account of how remedies actually inform the content of rights. Indeed, little analysis to date has tried to reexamine the universe of socio-economic rights jurisprudence to focus a lens on the relationship between rights and remedies and how remedial considerations ultimately shape the nature of the right.<sup>175</sup>

### *B. Strong-Form Review*

Under a strong-form structure of review, a court’s constitutional interpretations are authoritative and binding on other governmental branches, at least in the short- and medium-term.<sup>176</sup> Courts may order that the government enact specific changes to a program or policy, or at times issue a structural injunction to ensure compliance with their constitutional interpretation.<sup>177</sup> An example of this stronger-form of review can be seen in the Constitutional Court of South Africa’s cases *Treatment Action Cam-*

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174. Dixon, *supra* note 173, at 393 (emphasis added) (promoting a theory of constitutional dialogue between courts and legislatures regarding constitutional norms).

175. See Levinson, *supra* note 14, at 884.

176. See Tushnet, *Alternative Forms of Judicial Review*, *supra* note 149, at 2784.

177. See Ray, *supra* note 148, at 154. Ray embraces the notion of a polycentric review of rights, wherein a court shares interpretive authority with the executive and legislative branches and is willing to respect those branches’ constitutional interpretations even when they differ from the court’s own. See *id.*

*paign*<sup>178</sup> and *Khosa*.<sup>179</sup> In *Treatment Action Campaign*, the Court found that the state had breached its obligations under Section 27 of the Constitution regarding the right to health care by restricting provision of the nevirapine drug when it had the resources to provide it more broadly.<sup>180</sup> The Court ordered the government to take specific action to make the drug more available.<sup>181</sup>

In *Khosa*, the Court rejected as unreasonable the government's argument that excluding permanent South African residents from the socio-economic assistance that the country provides to citizens was justified for financial reasons under Section 27(2) of the Constitution.<sup>182</sup> The government failed to supply the Court with data regarding the number of permanent residents that would qualify for social assistance should the citizenship restriction be lifted, or the attendant costs that would go along with such a change.<sup>183</sup> In the absence of such data, the Court inserted its own estimated cost analysis to determine that any increase in cost to the government for the inclusion of permanent residents in social assistance programs was negligible, at less than 2% of total expenditures.<sup>184</sup> One academic notes the following:

[W]hen there is strong evidence the government has failed—either deliberately, as in *TAC* [*Treatment Action Campaign*], or through serious incompetence, as in *Khosa*—to make policy choices through a rational and deliberate process, the Court will take a much more direct role and give much less deference to the justifications put forth by the government in support of its chosen policy.<sup>185</sup>

Many minimum core advocates are also proponents of strong-form review, through which courts take a more direct and affirmative role in enforcing socio-economic rights. Under the strongest-form of review, judges could engage in purist “rights maximizing” exercises, in which the only question the court would ask once finding a rights violation is what remedy would most effectively vindicate the victim, with effectiveness being defined as the successful elimination of the adverse conse-

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178. See generally *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

179. See generally *Khosa v. Minister of Social Development* 2004 (11) BCLR 1169 (CC) (S. Afr.).

180. See generally *Minister of Health*, 2002 (5) SA 721 (CC).

181. See generally *id.*

182. See generally *Khosa*, 2004 (11) BCLR 1169 (CC).

183. See *id.* para. 61.

184. See *id.* paras. 62, 81–82.

185. See Ray, *supra* note 148, at 166–67.

quences of the rights violation.<sup>186</sup> The remedial enterprise under such review is limited to considerations of the right at stake and the requisite steps to make the victim whole again. Stated simply, under the “rights maximizing” model, a remedial program stops when nothing more is feasible.<sup>187</sup> A court is limited by the very definition of a right; a court cannot order a remedy beyond the scope of the right to which the individual was entitled.<sup>188</sup>

A range of academic literature highlights the limits of strong-form review.<sup>189</sup> The strongest form of review can forsake other competing interests, interpretations, and values, including the needs of those persons not party to the litigation at hand but who will be affected by the outcome.<sup>190</sup> Strong-form review also risks exceeding institutional constraints, particularly in environments with limited resources. In recent years, Professor Brian Ray has embraced a tempered notion of strong-form review—what he describes as a “polycentric” review of rights.<sup>191</sup> Under Ray’s polycentric form of review, a court shares interpretive authority with the executive and legislative branches; the court considers those branches’ constitutional interpretations even when they differ from the court’s own.<sup>192</sup>

The strong-form of review comes closest to achieving consonance between rights and remedies. It is more, but not wholly, successful in this

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186. See Gewirtz, *supra* note 11, at 591–92. Gewirtz framed the “rights maximizing” approach in the context of two fundamentally distinct remedial approaches to providing an equitable remedy, where both approaches are limited by the definition of the right. See *id.*

187. See *id.* at 601 (noting that “the justification for any remedial limit is simple: Nothing more is possible”).

188. See *id.* at 592.

189. See, e.g., MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 22 (2007) [hereinafter TUSHNET, WEAK COURTS, STRONG RIGHTS]; Dixon, *supra* note 173; Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109 (2006); Tom R. Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998*, 2005 PUB. L. 306 (2005); Mark Tushnet, *Social Welfare Rights*, *supra* note 153, at 1895.

190. See Mark V. Tushnet, *Weak-Form Judicial Review and “Core” Civil Liberties*, 41 HARV. C.R.-C.L.L. REV. 1, 4–5 & n.11 (2006) (describing how the Supreme Court of Canada, under a weak-form of review considers other interests, beyond those of the party before the Court through its multi-stage test for determining when a rights violation is “demonstrably justified.”). The Supreme Court of Canada invokes “a form of proportionality test,” through which courts are required to balance the interests of society with those of individuals and groups. See *id.*; see also TUSHNET, WEAK COURTS, STRONG RIGHTS, *supra* note 189, at 31 (noting that strong-form review disallows disagreement about what fundamental rights prohibit or protect).

191. See Ray, *supra* note 148, at 154.

192. See *id.*

endeavor as compared with weak-form review. But strong-form review ultimately fails because it proceeds by first finding a violation of a right and then seeking direct enforcement of a remedy, and, as this Article argues, under such an approach rights and remedies lack harmony. Strong-form review conceptualizes a one-way street of causation, in which rights affect remedies, and not the reverse. Under such a view, remedies are connected to rights in so far as they are a product of the rights. The strong-form analysis is thus limited to making remedies align with established rights. Further, strong-form review has limited success because it confronts the practical realities of a resistant, multidimensional world that prevents the institution of a perfect remedy.<sup>193</sup> Thus, the strong-form academic analysis of socio-economic rights jurisprudence ultimately fails to astutely describe the full relationship between rights and remedies; it does not evaluate how courts redefine rights as they contemplate and institute remedies.

#### IV. RIGHTS-REMEDIES EQUILIBRATION

##### *A. Rights-Remedies Harmonization in Other Areas of Law*

Seeking to re-conceptualize the relationship between rights and remedies is a useful and not unfamiliar endeavor. Other areas of law have long considered rights and remedies as functionally inseparable.<sup>194</sup> For example, contract law anticipates notions of an efficient breach in which, despite a party's clearly established obligations under a contract, it may breach the contract because the costs of performance outweigh the costs of damages for breach.<sup>195</sup> Oliver Wendell Holmes instructs that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."<sup>196</sup> He elaborates, "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way [i.e. via a remedy] by judgment of the court;—and so of a legal right."<sup>197</sup> Another illustration is in Coase-ian theory, which academics, practitioners, and courts have applied to a wide spectrum of areas in private law including

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193. See Gewirtz, *supra* note 11, at 501–92 (noting the presence of such limitations even under a “rights maximizing” approach).

194. See Levinson, *supra* note 14, at 858.

195. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

196. *Id.*

197. *Id.* at 458.



torts, property, and environmental law.<sup>198</sup> Under this theory, the individual with the right is oftentimes not as important as how the law can best protect the right to facilitate efficient transfers.<sup>199</sup> Coase predicts that individuals may trade and sell rights in the marketplace, with the market reaching the efficient result (with the assistance of properly calibrated legal rules).<sup>200</sup> This well-established notion in private law regarding anticipated breaches of a right—or trading ownership of a right—is entirely foreign to socio-economic rights jurisprudence.

Certainly, there are important distinctions between these private law examples and those under constitutional law, which protect sacred rights such as the right to due process of law or—in the case of human rights—the rights to health, water, or more essentially, life. The optimum level of breach for some of these rights may be zero or quite close to zero.<sup>201</sup> Trading ownership of these rights to facilitate efficient transfers is likely both infeasible and offensive. Nevertheless, these private law examples provide a helpful doctrinal lens through which to view the disconnect between rights and remedies in socio-economic rights jurisprudence. But before putting into action what Levinson proposes—an “equilibration” of rights and remedies, as he describes it in the domestic context—it is important to explore the fundamental premises underlying rights and remedies.

### *B. Theories of the Function of Remedies*

In his formative examination into remedial resistance in American constitutional law and the *Brown v. Board of Education*<sup>202</sup> desegregation remedies, Gewirtz emphasizes that “[t]he function of a remedy is to ‘realize’ a legal norm, to make it a ‘living truth.’”<sup>203</sup> Gewirtz likens remedies to “the hard stuff of recalcitrant reality” that, although as important to jurisprudence as idealized rights, are relegated to a far less glamorous existence.<sup>204</sup> As Daryl Levinson artfully describes, in much of constitutional discourse “[r]ights occupy an exalted sphere of principle, while remedies are consigned to the banal sphere of policy, pragmat-

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198. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (noting that legal rules are justified by their ability to allocate rights to the most efficient right bearer).

199. See Levinson, *supra* note 14, at 859.

200. See generally Coase, *supra* note 198.

201. Levinson, *supra* note 14, at 859.

202. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

203. Gewirtz, *supra* note 11, at 587 (citing *Cooper v. Aaron*, 358 U.S. 1, 20 (1958) (“Our constitutional ideal of equal justice under law is thus made a living truth.”)).

204. *Id.* at 587.

ism, and politics.”<sup>205</sup> Under the “rights essentialist” model discussed earlier,<sup>206</sup> remedies are affected by rights. Causation runs from rights to remedies because rights are defined instrumentally to achieve their end goals.<sup>207</sup> Remedies also temper rights aspirations—and one might validly worry that rights will be corrupted by the practical realities of remedies.<sup>208</sup> Rights essentialist proponents leave room for such a consequence. In fact, they predict that pure rights will be corrupted by exactly this remedial exercise.<sup>209</sup> The interest in individual redress must at times yield to other factors.<sup>210</sup>

Ronald Dworkin is perhaps most closely associated with the essentialist view of constitutional rights, having distinguished arguments of principle that establish an individual right from arguments of policy that intend to establish a collective goal.<sup>211</sup> In Dworkin’s conception, policy arguments consider the welfare of political goals of a broader community; they can account for practical or empirical concerns.<sup>212</sup> For example, in *Brown*,<sup>213</sup> the policy argument could consider the risks of racial backlash and potential unenforceability of a remedial program.<sup>214</sup> In more recent U.S. constitutional cases regarding health care provision to prisoners, the policy argument can consider the costs of improving health care for prisoners, as well as the competing societal welfare goal of devoting limited resources to other underserved populations.<sup>215</sup>

Arguments of principle, in contrast to policy-based arguments, affirm the primacy of individual rights, and these arguments, in Dworkin’s view, “trump” pragmatic policy considerations.<sup>216</sup> In turn, under prin-

205. Levinson, *supra* note 14, at 857.

206. *See supra* Part I.

207. Levinson, *supra* note 14, at 884.

208. Fiss, *Forms of Justice*, *supra* note 15, at 44–58.

209. *See id.*

210. *See* Richard Fallon & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); *see also* Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991); Fiss, *Forms of Justice*, *supra* note 15, at 44.

211. *See* DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 10, at 82–84, 90; *see also* DWORKIN, *LAW’S EMPIRE*, *supra* note 168, at 220–21; Fiss, *Forms of Justice*, *supra* note 15, at 55 (focusing on structural reform litigation).

212. *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 168, at 220–21; Levinson, *supra* note 14, at 871.

213. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

214. *See* Gewirtz, *supra* note 11, at 678 (commenting on the utilitarian nature of policy-based arguments).

215. *See, e.g.*, *Plata v. Schwarzenegger*, 603 F.3d 1088 (9th Cir. 2010).

216. *See* Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 153–54 (Jeremy Waldron ed., 1984).

ciple-based arguments, elected officials have primary authority to effect policy decisions because they have the institutional ability to most effectively consider competing interests within the community and balance these interests.<sup>217</sup> On the other hand, judges have primary authority to effect principle-based decisions because they are best situated to theorize about moral ends and have the advantage of being somewhat insulated from political pressures.<sup>218</sup>

### C. An Alternative View—Rights Equilibration

Rights essentialism, while well-situated historically in academic analysis, is not the only way in which to approach rights-remedies analysis. Other scholars embrace a more tempered approach to rights essentialism, viewing remedial imperfection as unavoidable but rejecting the stark line of “[p]ure rights, dirty remedies.”<sup>219</sup> Gewirtz finds

a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.<sup>220</sup>

Gewirtz, therefore, focuses a lens on remedies for racial segregation in public schools in the United States: with the Court’s famous and paradoxical ordering of “all deliberate speed” to desegregate schools, the Supreme Court allowed remedial imperfection, in response to what many viewed as the risk of white racial backlash.<sup>221</sup>

Levinson, like Gewirtz, points out that under an alternative “rights equilibration” theory, rights are not first discerned as noble principles; rather, they are “inevitably shaped by, and incorporate, remedial concerns.”<sup>222</sup> Remedies cannot be sharply separated from rights, and rights interpretation is stymied, or bolstered, by the imposition of remedies.

In the context of constitutional rights, Levinson articulates three ways in which rights are influenced by and interconnected with remedies.<sup>223</sup> The following Section proceeds by explaining these three forms of rights-remedies relations and demonstrating how each is present in socio-

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217. See Levinson, *supra* note 14, at 872 (theorizing about the logical ends of Dworkin’s essentialist arguments and the appropriate division of labor).

218. See *id.*

219. Gewirtz, *supra* note 11, at 678.

220. See *id.* at 678–79.

221. See *id.* at 587 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955)).

222. Levinson, *supra* note 14, at 873.

223. See *id.* at 884–89.

economic rights jurisprudence. The Section then sets the stage for Part V, which discusses the implications of, and potential constraints surrounding, such a new and harmonious view of rights and remedies.

### 1. Remedial Deterrence

First, under the doctrine of “remedial deterrence,” rights can be affected by the nature of the remedy that would be required if the right were to be violated. In the classic example of *Brown v. Board of Education*, a *de facto* interpretation of the right to equal education would require courts to maintain race-conscious desegregation systems, potentially including busing programs and other supervisory programs, in order to ensure that schools maintained racial proportionality.<sup>224</sup> Gewirtz points to white racial groups’ resistance to a *de facto* remedy as an influencing factor in the Court’s limitation of the right to equal education. “[T]he Court made clear that this transition [to a public education system free from racial discrimination] would not have to be immediate. *Brown II* approved an imperfect remedy—delayed desegregation—and did so because of feared white resistance.”<sup>225</sup> The Court’s resulting instruction to district courts to “enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases”<sup>226</sup> was characterized by ambiguity. The words “deliberate” and “speed” reflected distinct and differing courses of action, and the use of the word “all” further intensified the ambiguity.<sup>227</sup> The confounding order of “all deliberate speed” imposed delay and resulted not only in effective remedial relief being postponed for some persons in the plaintiffs’ class; it also meant that certain members of the plaintiffs’ class would never receive effective remedial relief because the remedy would be instituted after they had endured full and direct harm by being required to attend segregated schools.<sup>228</sup>

*Brown II* was, therefore, a classic example of remedial deterrence, an exercise which has many modern-day forms as well. Courts may engage in remedial deterrence based upon considerations of institutional constraints and public perceptions. Courts frequently perceive undesirable remedial consequences and, in turn, construct the associated right in such

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224. *See id.* at 884–85.

225. Gewirtz, *supra* note 11, at 609–10 (referring to *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) as *Brown II*).

226. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

227. *See* Gewirtz, *supra* note 11, at 610.

228. *See id.* at 612.

a way as to avoid achieving those undesired consequences.<sup>229</sup> Gewirtz powerfully argues that a court may consider in its remedial deliberations a wide range of interests, *except* for those interests that are opposed to the nature of the very right.<sup>230</sup> In the context of school desegregation, courts should not, then, consider white resistance to equal education in their deliberations because this involves an objection to the very nature of the right.<sup>231</sup> This limitation remains a prudent guide-post, and as discussed below, can serve as an important constraint on remedial deliberation in the context of socio-economic rights.<sup>232</sup>

More recent domestic examples of remedial deterrence are plentiful, perhaps none more prominent and timely than challenges to the conditions of confinement in California's prison system consolidated in *Coleman v. Schwarzenegger*.<sup>233</sup> In a series of orders over a number of years, the *Coleman* court issued only incremental relief in the face of continued constitutional violations.<sup>234</sup> Only after the constitutional violations persisted for fifteen years—and after having placed the entire California prison system in federal receivership—did the court finally issue a prisoner relief order, having clearly been deterred from ordering more dramatic action due to the state's budgetary constraints and the difficulty of solving problems related to conditions in American prisons.<sup>235</sup> The court appeared to recognize the heavy-handed nature of its order. However, the court noted that it had considered ordering prison construction, expansion of medical facilities, and additional hiring, among other remedies, but that, quite simply, the litigation's history "demonstrates even more starkly the impossibility of establishing a constitutionally adequate mental health care delivery system at current levels of crowding."<sup>236</sup>

Moving from domestic examples, remedial deterrence is also prevalent in socio-economic rights jurisprudence. Constitutional cases adjudicating

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229. See Levinson, *supra* note 14, at 885. Levinson offered other examples of such remedial deterrence in structural reform litigation in the United States.

230. See Gewirtz, *supra* note 11, at 606–07.

231. See *id.*

232. See discussion *infra* Section V.C.

233. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 330960 (E.D. Cal. Feb. 9, 2009) (consolidating *Coleman v. Schwarzenegger* and *Plata v. Schwarzenegger*).

234. *Coleman*, 2009 WL 2430820, at \*45.

235. *Id.* at \*2 (subsequently noting that ordering a remedy such as a prisoner release is a "remedy of last resort"). The percentage reduction in total inmates the court ordered, according to California officials, would require release of 46,000 inmates. David G. Savage, *U.S. Supreme Court to Rule on California Inmate Release*, L.A. TIMES, June 15, 2010.

236. *Coleman*, 2009 WL 2430820, at \*70.

socio-economic rights perspicuously balance a variety of interests—at the societal, economical, political, and institutional levels. The complexities of remedial deliberation undermine arguments that a complete remedial program, making the victim whole, is theoretically and pragmatically possible.<sup>237</sup> Complete remedies may be unavailable because of multiple and competing interests that the court must necessarily weigh in deciding upon and instituting a remedy. Complete remedies may also be unavailable because of pragmatic limitations on remedies.<sup>238</sup>

Oftentimes, multiple remedial goals exist that thwart endeavors to implement an idealized remedy. Particularly when rights violations have continued over a prolonged time, there may be more than one remedial goal.<sup>239</sup> The attainment of one legally relevant remedial goal may obfuscate—or prevent—the attainment of another. For example, in providing for the right to education, one goal may be non-discrimination, as embodied under international covenants and national constitutions,<sup>240</sup> while another may be redressing harms to children resulting from a history of status-based *de facto* or *de jure* disadvantage. More broadly, in socio-economic rights jurisprudence, there are often a range of remedial goals, such as vindicating the rights of the particular petitioner and promoting society-wide equality and non-discrimination, including by assuaging historical biases.<sup>241</sup> In the case of developing countries in particular, relevant remedial goals often include economic development, building the capacity of multiple branches of government, and reinforcing institutional competence and accountability.<sup>242</sup>

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237. See Gewirtz, *supra* note 11, at 593.

238. See *id.*

239. See *id.* at 594.

240. See International Convention on the Rights of the Child, art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); CONSTITUTION OF THE REPUBLIC OF GHANA 1992, art. 17 (“A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”). Notably, many human rights instruments at the national and international levels provide space for amelioration of past harms—thereby allowing for some forms of discrimination.

241. See, e.g., Gewirtz, *supra* note 11, at 594 (providing an analogous example in the context of school desegregation efforts in the U.S.).

242. See, e.g., Elia Armstrong, Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues 4 (2005) (discussion paper), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf> (noting that “integrity, transparency and accountability” are cornerstones of the U.N. countries’ prin-

Remedial deterrence is uniquely useful in socio-economic rights jurisprudence, helping to explain the lack of a clear bifurcation between the allegedly contradictory “interest balancing” and “rights maximizing” approaches.<sup>243</sup> Courts may face barriers to instituting a particular remedy, such as practical infeasibility in light of financial constraints.<sup>244</sup> “Interest balancing” courts regularly engage in balancing, and the remedial effectiveness for victims becomes just one of the factors relevant to the balancing process.<sup>245</sup> Even “rights maximizing” courts may confront unavoidable limits on achieving a perfect remedy, and hence may have to balance a range of factors in order to achieve the closest-to-perfect remedy for the victim.<sup>246</sup>

Advocates who point to a specific, most effective remedy often base their judgments on a normative conception of “most effective.”<sup>247</sup> Multiple remedial goals often exist, and perhaps certain remedial goals are prioritized. For example, rights, such as those of equality and non-discrimination, may be seen as “second-order” rights in the sense that they grant equality and non-discrimination in relation to the dominant typology of rights.<sup>248</sup> On the other hand, as Frank Michelman astutely notes, the pendulum of rights hierarchies may well swing in the other direction in the case of certain nations.<sup>249</sup> Principles of non-discrimination are ingrained in the fabric of modern South Africa; the Constitution that justices of the Constitutional Court of South Africa are

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principles for developing public administration); Richard E. Messick, *Judicial Reform: The Why, the What, and the How* (unpublished manuscript), available at <http://www.pogar.org/publications/judiciary/messick/reform.pdf> (emphasizing the critical role the judiciary plays in advancing economic development by securing private property rights).

243. See generally Gewirtz, *supra* note 11. But see generally Starr, *supra* note 1 (arguing for a switch in international criminal courts to “interest balancing” from “rights maximizing” and viewing a clear distinction between the two frameworks in the context of safeguarding international criminal defendants’ procedural rights).

244. See Gewirtz, *supra* note 11, at 591.

245. See *id.*

246. See *id.* at 592.

247. See *id.* at 619–20 (noting that this may require a ranking of various, competing goals—an exercise that rests on normative principles in and of itself).

248. See Catharine A. MacKinnon, *Women’s Status, Men’s States*, in ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 1, 1–14 (2006) (arguing that international conventions such as CEDAW that grant women equality of rights, while achieving some advances, ultimately limit women to what men as the dominant group need, and thus are ineffectual at dealing with women-specific issues such as pregnancy).

249. See Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1396 (2004).

“charged to implement is, beyond all question, committed to deleting the stamp of apartheid from South African social, economic, and political life.”<sup>250</sup> When this hierarchy—or subordination—of rights exists, the consequence may well be that the associated remedial goals receive less weight than other goals. Nonetheless, multiple legally relevant remedial goals can exist and be in tension, and the strategies for completely remedying the associated harms may be at odds.

Further, where—as in many instances of socio-economic rights litigation—a class-based lawsuit is brought, the individual litigants themselves may have irreconcilable conflicts. Theoretically, a fully effective remedy would require that each member of the class of victims receive a complete remedy. However, ongoing problems of evolving membership of a class, and different contextual and historical experiences with respect to the right (among other considerations) may implicate and prevent a full remedy. This may also mean that some persons who suffer a rights violation may never receive a remedy at all, as the remedial program—for example, the coverage of certain illnesses as part of a country’s commitment to the right to health—is instituted after they have suffered the consequences of the rights deprivation, which in this example, may be illness or even death.<sup>251</sup>

Remedial imperfection is, of course, unavoidable.<sup>252</sup> Courts must respond to this reality by making choices about how to distribute imperfections in remedial alternatives. In practice, courts respond through a balancing process as they determine which goals require assessing the relative value and harm associated with the lot of legally relevant interests and goals to achieve compromise.<sup>253</sup>

The balancing exercise is not incongruous with the normative goals of the human rights enterprise. Just as there is no perfect remedy, there is oftentimes no obvious “human rights” approach. Courts may find some level of balancing necessary in order to account for an individual’s circumstances and for systemic rights violations requiring broader solutions. Many human rights themselves involve such a balancing process. Balancing is inherent in the principle of “progressive realization,” through which a state must “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate

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250. *See id.*

251. *See* Gewirtz, *supra* note 11, at 612 (arguing this was true with the *Brown II* remedy, through which some persons in the affected class ultimately received no remedy).

252. *See id.* at 594–95.

253. *See id.*



means . . . .”<sup>254</sup> This principle accepts that some rights—like the right to health or the right to education—may be difficult to fully achieve in the short-term, and that pragmatic, resource-based constraints may limit states’ progress.

Courts, therefore, often balance the normative goals of the right at hand with the government’s chosen program of progressively realizing a right. In the case of South Africa, the Constitutional Court ultimately determines whether the government’s chosen course of conduct is “reasonable” by balancing and weighing the requirement of “progress” in realizing rights with the various costs of such progress.<sup>255</sup> Such costs commonly include not only the economic costs of implementing certain solutions—such as improved education, health, housing, or water—but also a range of other costs that are more difficult to quantify, including opportunity costs of diverted institutional resources; impacts on legitimacy and progress and institution-building within other branches of government; public resistance and opposition impacting the legitimacy and success of the judicial process; and third party costs to parties beyond those directly in the litigation.

Importantly, this analysis does not simply proceed from right to remedy, wherein a pure ideal of a right is defined, and then a tempered remedy is ultimately offered. What *Mazibuko* and many other cases make clear is that the very nature of the right is implicated by the court’s anticipation of the associated remedy. One may read *Mazibuko* as an example of a Court accepting a less-than-perfect remedy. Yet, under more careful analysis, the Constitutional Court’s approach appears to be more nuanced and ultimately more balanced. The *Mazibuko* Court stated, “The fact that the state must take steps progressively to realise the right implicitly recognises that the right of access to sufficient water cannot be achieved immediately. That the Constitution should recognise this is not surprising.”<sup>256</sup> The Court acknowledged the pragmatic constraints on the implementation of a complete right of access to sufficient water and in so doing, narrowed the foundational right of access to sufficient water, and it did so with reference to the very Constitution that granted such a right.

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254. See ICESCR, *supra* note 61, art. 2.

255. See, e.g., Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa* 12 (Univ. of Chicago, Pub. Law Working Paper No. 12, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=269657](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657) (“By their very nature, socio-economic rights are different on this count, certainly in the light of the ‘progressive realization’ clause. No one thinks that every individual . . . has an enforceable right to full protection of the interests at stake . . . The only alternative . . . [is] a requirement of reasoned judgment, including reasonable priority-setting.”).

256. *Mazibuko v. City of Johannesburg* 2009 (3) SA 592 (CC) para. 58 (S. Afr.).

*Mazibuko* is, therefore, an example of remedial deterrence in the presence of practical impossibility. The cost of impossibility in meeting a right of access to sufficient water necessarily curbed the very definition of the right. The Court's decision to treat the right in this manner was instrumental and critical, not only because of resource constraints, but importantly, as a means of maintaining the very legitimacy of the Court by not exceeding its institutional and political ability to articulate the meaning and implementation of rights.

The remedy that a court would mandate should a right be found to have been violated inherently implicates socio-economic rights. As a consequence, the idealized nature or content of the right is inconsequential, from a practical perspective, when there are institutional factors that will limit it. Instead, the right is defined as it is operationalized.<sup>257</sup>

## 2. Rights Incorporating Remedies

The second way in which remedies influence and are interconnected with rights is that the right itself may incorporate a remedy. This is commonly seen in prophylactic remedies such as injunctions that order a specific course of conduct.<sup>258</sup> Rights may be constructed to have a built-in prophylactic remedy. Again, in the U.S. context, Gewirtz focuses on the injunction as an "extraordinary remedial weapon" that "evolved to carry out the courts' agenda, that agenda could not have emerged and been taken seriously unless an instrument of equity was at hand to help achieve it."<sup>259</sup> Although the basic goal of an injunction is to enjoin the enforcement of unconstitutional laws and to prohibit new constitutional violations—as well as to eliminate continuing effects of past violations—in practice, injunctions themselves involve a balancing process.<sup>260</sup> Indeed, a necessary predicate to a court providing an injunctive decree is

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257. The Committee on Economic, Social and Cultural Rights has increasingly embraced this approach, whereby institutional constraints shape the contours of the rights. This exercise has links to legal realist approaches propounded by Oliver Wendell Holmes, Louis Brandeis, and Roscoe Pound, among others, that accept limitations on law as a product of pragmatic imperfections. *See, e.g.*, WILLIAM FISHER, MORTON HOROWITZ, & THOMAS REED, *AMERICAN LEGAL REALISM* (1993) (providing a selection of pre-legal realist and legal realist essays).

258. *See* Levinson, *supra* note 14, at 885.

259. Gewirtz, *supra* note 11, at 587.

260. *See id.* at 589 (referencing the formulation of the injunction seen in *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.")).

the balanced determination that “the harm is sufficient to justify the remedial costs.”<sup>261</sup>

The California prison litigation cases, *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*, are more modern examples of courts defining a right in a prophylactic manner in order to include a remedy. There, the reviewing courts found that the CDCR’s medical services were inadequate and in violation of the Eighth Amendment (and other federal laws), and the plaintiffs negotiated a stipulation for injunctive relief through which the CDCR was required to provide “only the minimum level of medical care required under the Eighth Amendment.”<sup>262</sup> The court thus expanded the prisoners’ rights to medical care to include a preventive injunction that ordered the CDCR to provide a minimum threshold of medical care.<sup>263</sup> When the court conducted an evidentiary hearing three years after this judicial ruling and found that appalling conditions remained in the CDCR facilities, the court again engaged in a careful balancing act and ultimately ordered that the CDCR medical health care delivery system be placed in receivership,<sup>264</sup> a rights-remedy interplay the Supreme Court will now review.<sup>265</sup>

In the foreign context, this relationship between right and remedy was also apparent in the socio-economic rights arena in Colombia’s Constitutional Court ruling under Decision T-760 that compelled government authorities to modify regulations that caused structural problems in the country’s health care system.<sup>266</sup> There, the Court ordered that the government update, clarify, and unify health insurance coverage plans, and expedite the transfer of resources into the health care system and the evaluation and supervision of private companies involved in providing health care-related services.<sup>267</sup> In so doing, the Court altered the very definition of the right to health under the Colombian Constitution to include this prophylactic remedy that demanded institutional change.<sup>268</sup>

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261. See Owen Fiss, *The Jurisprudence of Busing*, 39 LAW & CONTEMP. PROBS. 194 (1975); see also DAN DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 2.4–2.5 (1973) (providing an overview of discussions of balancing in cases of equity).

262. See generally *Plata v. Schwarzenegger*, 560 F.3d 976, 979 (9th Cir. 2009); *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009) (a parallel case to *Plata* dealing with mental health care for prison inmates).

263. See sources cited *supra* note 262.

264. See *id.*

265. See *Schwarzenegger v. Plata*, *cert. granted*, 130 S. Ct. 3413 (June 14, 2010) (No. 09-1233).

266. See *Decision T-760 of 2008*, *supra* note 93.

267. See *id.*

268. See *id.*

The Constitutional Court of South Africa has also noted that it has broad remedial powers to which it is entitled under the Constitution, including powers to grant supervisory injunctions in instances where the government does not meet its constitutional obligations.<sup>269</sup> Interestingly, when petitioners before the Court litigate violations of socio-economic rights, potential supervisory injunctions themselves may be subject to balancing and a court determination that the harm outweighs the costs of instituting an equitable injunction.<sup>270</sup>

### 3. Remedies Impacting the Value of Rights

Lastly, rights are shaped by remedial concerns in so far as the monetary value of a right is oftentimes no more than what a court would provide should the right be violated. This third consideration is perhaps the most obvious. In domestic jurisprudence, this would mean that courts would limit their remedies for inadequate prison conditions to only fixing those problems that are constitutionally insufficient.<sup>271</sup>

The practical value of a right thus becomes its attendant remedy.<sup>272</sup> In *Treatment Action Campaign*, the practical value of the right to health under the South African Constitution was what the judiciary was willing to do once the right was violated—i.e. the value of the order to provide nevirapine without discrimination.<sup>273</sup> In cases like *Mazibuko*, on the other hand, the practical value of the right to water remains unclear because the necessary predicate—that there in fact be a rights violation—was not found by the Court.<sup>274</sup>

## V. IMPLICATIONS OF A MORE HARMONIOUS VIEW OF RIGHTS AND REMEDIES

In reexamining human rights and remedies through this new lens, a relationship of mutual dependency and symbiosis becomes evident.<sup>275</sup> From this view, rights and remedies operate together in mutually affirming ways against the backdrop of a necessarily imperfect geopolitical reality. There are several important implications of such an approach.

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269. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) paras. 96–114 (S. Afr.).

270. Gewirtz, *supra* note 11, at 589 (noting that injunctive relief itself can involve balancing).

271. See Levinson, *supra* note 14, at 887–88.

272. See *id.* at 888.

273. See *Minister of Health*, 2002 (5) SA 721 (CC) paras. 96–114.

274. *Mazibuko v. City of Johannesburg* 2009 (3) SA 592 (CC) para. 58 (S. Afr.).

275. See Levinson, *supra* note 14, at 914.

*A. Rejecting Rights Essentialism*

First, this new “equilibrated” theory of rights and remedies in the human rights context calls into question basic notions of “essentialist” theory. This Article maintains that at least some human rights are not determined by abstract judicial interpretation of legal text, legislative history, or values, but rather, include the same pragmatic policy-based considerations that have always been acknowledged in the world of remedies.<sup>276</sup> This result is not entirely surprising, as the entire endeavor of defining a “minimum content” to socio-economic rights, as discussed above,<sup>277</sup> is riddled with such pragmatic and policy-based concerns. “Minimum core” proponents from various camps have latched on to a variety of norms—including consensus and a notion of practical needs for “life,” “survival,” or “dignity”—in order to define a content to this minimum core of rights. But, in reality, sub-constitutional policy concerns infiltrate socio-economic rights definitions. Remedial equilibration suggests that remedial concerns will routinely infiltrate rights considerations and that rights are inevitably less pure and less ideal than essentialist theories acknowledge.<sup>278</sup>

As a consequence of this Article’s claims, rights cannot be under- (or over-) enforced, despite what many human rights advocates and commentators may believe. The traditional view that pure rights are corrupted and diminished when translated into remedies cannot be correct if courts define rights in a practical way with respect to remedies (as they arguably do). Rights are defined to operate in the real world, subject to a range of limitations. As such, Levinson cleverly and soundly articulates a significant insight of remedial equilibration that aptly applies to realizing socio-economic rights—that “rights do not spring into existence fully formed and self contained, like Athena from the head of Zeus.”<sup>279</sup> *Mazibuko* is just one recent example of this, but various other examples abound, inside and outside the arena of socio-economic rights.<sup>280</sup> Judges

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276. *See id.* at 920.

277. *See supra* Part II.

278. *See Levinson, supra* note 14, at 924.

279. *Id.* at 926.

280. *See, e.g., Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 CCT 24/07, 2000 (11) BCLR 1169 (CC) (S. Afr.) (requiring that the government consult persons affected by its policy decisions and then publicly report on that consultative process, rather than imposing a direct remedy pertaining to the right to housing under the Constitution); *Prosecutor v. Rwamakuba*, Case No. ICTR 98-44C-PT, Decision on Defense Motion for Stay of Proceedings, ¶ 26 (June 3, 2005) (rejecting the “right” to a speedy trial despite the defendant having been held for seven years); *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration),

define rights—be they rights under the U.S. Constitution or the International Covenant on Economic, Social and Cultural Rights—by considering the tangible world that they themselves live in and its related constraints.

*B. Rethinking Institutional Boundaries and the Role of Courts*

Second, a harmonious view of rights and remedies in human rights doctrine challenges the traditional view of institutional division of labor, which holds that defining rights is the role of courts alone—or at least that courts can and should define an irreducible minimum for rights (which legislatures can ratchet up)—while remedies are developed through multi-branch collaborative processes. Some scholars have tossed aside this theory of “court-fixation,” rejecting the overly simplistic notion that constitutional rights are for courts, and courts exclusively, to define and place into action.<sup>281</sup> Under this view, both courts and legislatures play a role in defining rights, and both do so with consideration of remedial limitations.<sup>282</sup> For example, if a court decides that the full, ideal right of the right to health is unattainable in a timely manner—based on practical, political, or other limitations—it may avoid finding a rights violation for procedural or other reasons. It may also further explicate the scope or content of a certain right as to not include exactly what the petitioners are asking for. In so doing, the court provides lucidity as to the content of the specific right. At the same time, when a legislature drafts legislation that provides *pro forma* penalties—for example, heightened penalties for health facilities that are found to have discriminated in access to health care—then the legislature is prescribing heightened damages beyond the actual damages that would otherwise have been awarded. Such a statutory regime by the legislative branch no doubt expands the scope of the right at hand; its practical value is greater based on legislative action.

Similarly, both courts and legislatures define the scope and availability of remedies. As described earlier, courts may define rights to include prophylactic remedies.<sup>283</sup> Or courts may, through remedial deterrence,

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¶¶ 51–75 (Mar. 31, 2000); see also Levinson, *supra* note 14, at 889–99 (reviewing examples in the United States).

281. See, e.g., Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1894 (2001) (explaining that “the constitution enforced by judges is not all the constitution there is, and that contention outside the courts over constitutional meanings very possibly can be a politically cogent, practically worthwhile activity”).

282. See *id.*

283. See *supra* notes 259–71 and accompanying text.

consider rights and remedies concomitantly as the nature of a right is defined with respect to remedial considerations. The legislature may help foster a domestic legal regime that makes a right practical in the real world. As it fosters and defines the boundaries of such a domestic legal regime, it affects the nature of the right that will ultimately be available to people.

While recognizing the roles of other branches of government, courts play a critical role in the “equilibration” exercise and are well-situated to do so, especially in the human rights context. Courts regularly engage in balancing. Although balancing is a normative task, there are limitations on judicial abuses of this freedom. One potential limitation is the notion that the true benefit of the right and the goal of undoing effects of the right’s violation should be given paramount weight. Concomitantly, interests in direct opposition to the nature of the right should not play a role in balancing.<sup>284</sup> By mediating between the ideal and the real, courts obstruct “perfect theories” that idealize general notions of justice or economic behavior.<sup>285</sup> However, law exists in every-day, messy reality as its primary realm.<sup>286</sup> As Justice Frankfurter once said of the Constitution, courts must read such law with the “gloss which life” puts upon it.<sup>287</sup> In so doing, courts effectively weigh the compendium of rights and a range of costs and constraints. Courts seem particularly well-suited to make these inquiries in the human rights context, which are often even more justice-focused than other judicial inquiries.

### *C. Affirming Judicial Candor and Transparency*

Lastly, having considered the scope of courts’ role in the equilibration exercise, considering rights and remedies as necessarily interrelated also leads to conclusions about the manner in which courts should undertake their role. Specifically, judicial transparency and candor are critical in such an approach. Courts have not always been candid about gaps between rights and remedies.<sup>288</sup> Judicial subterfuge is damaging and may be seen in certain contexts as a legitimizing device that fails to correct

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284. See Gewirtz, *supra* note 11, at 606–07.

285. See *id.* at 680.

286. See *id.*

287. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

288. See Gewirtz, *supra* note 11, at 674 (emphasizing that “any gap between right and remedy, between the ideal embodied in our rights and the reality of what courts can deliver in a particular case, should be candidly acknowledged rather than concealed by subterfuge”).

harmful social conditions.<sup>289</sup> Gewirtz articulates the concerns that accompany a candid detailing of the right-remedy divide: “If judges come to feel free about separating issues of remedy from issues of rights, they might articulate rights too broadly, by removing from their deliberations about the right certain practical constraints that properly play some role in defining those rights.”<sup>290</sup>

In practice, this may be the growing concern of human rights advocates who lament the gap that exists between boldly declared rights and a dearth of “rights-realizing” remedies. However, Gewirtz believes that the concerns about exacerbating the right-remedy gap may be minimized because “the pressures are all in the other direction: Judges will always be reluctant to advertise that they are delivering less than the ‘right,’ and therefore will be far more likely to trim the right to fit the remedy than to exaggerate the right.”<sup>291</sup> Gewirtz’s implicit reference to the process of rights equilibration acknowledges another benefit of this approach. By aligning rights and remedies in a symbiotic relationship, judges close the analytical expanse between rights and remedies. Particularly in the international human rights process, which often threatens the control of a state’s political branches, judicial transparency and candor remain critically important throughout, as a means of legitimizing a court’s actions, as well as building a sense of social awareness regarding the practical limitations that thwart the attainment of more pure, ideal versions of rights. Courts ultimately can assist with institution building by so doing, as they can allow citizens to help articulate and understand the content of human rights, and especially socio-economic rights, and the pace at which those rights can be appropriately realized.

#### CONCLUSION

The concept of remedial deterrence has received considerable academic attention with respect to understanding U.S. constitutional legal norms and, more recently, human rights law as applied by international criminal tribunals. The concept recognizes that judges may be less willing or less likely to recognize a violation of a right because of pragmatic constraints, and because a remedy may seem unviable.<sup>292</sup> However, scholars have not

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289. *See id.* at 673–74 (citing GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 173 (1982)).

290. *Id.* at 674.

291. *Id.*

292. For example, considerations of inapposite timing, unfamiliarity with alternatives, or a hesitance to mandate—or “legislate”—from the bench, may contribute to an ultimate finding that a right was not violated.



extended such insights to the area of human rights and socio-economic rights in particular.

Notwithstanding the lack of attention and the oftentimes reductionist arguments that have occupied legal discourse in this space, there is a clear relationship between rights and remedies in the human rights arena. This Article rejects rights essentialism and demonstrates the folly of solely focusing on defining, for example, socio-economic rights as either characterized by a firm and resolute minimum core of rights, versus a more flexible, but some would allege ineffectual, "reasonable" governmental course of action. Further, although many commentators have worked to characterize and adjudge "strong" versus "weak" forms of judicial review, the interplay between human rights and remedies is actually far more nuanced and resistant to such rigid classifications. For example, the highest courts in South Africa and Colombia have taken steps toward defining a minimum core of socio-economic rights, ordering bold remedial steps and requiring "reasonable" government action, respectively.<sup>293</sup> Judicial balancing takes place in all remedial determinations, and in many instances it enhances the realization of rights. This Article, therefore, rejects simplistic categorization of judicial approaches as either "rights maximizing," or else "interest balancing" and (as certain rights advocates would argue) necessarily rights-compromising.

Finally, the important emphasis for courts and commentators is in questioning the stark divide that exists between rights and remedies, despite the inevitable truth that considerations of one intrinsically weigh upon the determination of the other. A satisfying and effectual approach to adjudicating "human rights" and "human remedies" necessitates a unified and equilibrated analysis of the two. A more unified and "equilibrated" approach yields a view of socio-economic rights and remedies that holds enormous potential to foster creative and virtuous cycles of growth and measurable results in "progressively realizing" socio-economic rights.

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293. See, e.g., *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.); *Government of the Republic of South Africa v. Grootboom* 2000, (1) SA 46 (CC) (S. Afr.); *Decision T-760 of 2008*, *supra* note 93.