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Dynamic Regulatory Constitutionalism: Taking Legislation Seriously in the Judicial Enforcement of Economic and Social Rights

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DYNAMIC REGULATORY CONSTITUTIONALISM: TAKING LEGISLATION SERIOUSLY IN THE JUDICIAL ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS

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INTRODUCTION

The international human rights revolution in the decades after the Second World War recognized economic and social rights alongside civil and political rights. The Universal Declaration of Human Rights in 1949, the International Covenant on Economic, Social, and Cultural Rights in 1966, regional treaties, and subject-specific treaties variously describe rights to food, shelter, health, and education, and set out state obligations for the treatment of children. When they first appeared, these international, economic, and social rights instruments raised questions about whether economic and social rights are justiciable in domestic legal contexts and whether they can be meaningfully enforced by courts in the same way as civil and political rights.[1] Today, however, constitutions all over the world place economic and social rights alongside civil and political rights in their bills of rights.[2] The 'first wave'

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1. For the debate about the justiciability of economic and social rights, mostly during the period of constitutional reconstruction in the aftermath of the Cold War and South Africa's emergence from apartheid, *see, e.g.*, Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 S. AFR. J. ON HUM. RTS. 451 (1992); Cass Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., Kluwer Law International 1996); STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (W.W. Norton 1999); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992).

2. *See, e.g.*, TORONTO INITIATIVE FOR ECONOMIC AND SOCIAL RIGHTS (2010), http://www.tiesr.org/data.html (measuring the presence or absence of seventeen distinct economic and social rights in 136 national constitutions around the world; the dataset also codes the status of these rights as justiciable or aspirational).

In the United States, while the federal U.S. Constitution recognizes no economic and social rights, all fifty state constitutions guarantee some degree of protection for economic and social rights. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) [hereinafter Hershkoff, *Positive Rights and State Constitutions*]; Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523–26 (2010); Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 927–30 (2011) [hereinafter Hershkoff & Loffredo, *State Courts and Constitutional Socio-Economic Rights*]. The new Constitution of the Arab Republic of Egypt, 2014, sets out

debate about justiciability has been replaced by pragmatic considerations of how economic and social rights can or should be enforced, and what role courts, legislatures, and the executive and administrative branches should play in achieving them.[3]

My objective here is to point out that much of this second wave of economic and social rights jurisprudence suffers from a lack of attention to the normative content of the 'social legislation' enacted to give effect to economic and social rights. I argue that scholars and courts have in the first place ignored how social legislation encodes the commitments a legal community makes to social justice in constitutionalized economic and social rights. In the second place, scholars and courts have paid insufficient attention to the role that social legislation plays in communicating constitutional norms of social justice to the government officials responsible for the administration of the state.

This lack of attention runs through all four of the dominant models that have emerged for the judicial enforcement of economic and social rights: structural injunctions and 'strong remedies;'[4] the minimum core doctrine;[5] the 'administrative law' model;[6] and the 'catalytic court' approach.[7] Comparative analysis of high court judgments around the world that have relied on one or other of these models of adjudication both confirms the inattention to constitutional norms and emphasizes the limits of adjudication that is inattentive to these norms.[8] This inattention to normativity carries the risks, first, that official efforts to realize rights will come to be characterized by a regulatory formalism focused on compliance with the letter of the legislation without con-

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rights to a number of socio-economic resources like housing, sufficient food and clean water, health care, social security, and education. The Tunisian Constitution, 2014, includes a similar catalogue of rights to socio-economic resources, and while previous drafts of the Tunisian Constitution differed on issues like the structure of government and the composition of the legislature, the commitment to economic and social rights has remained constant throughout.

3. David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 193–96 (2012) [hereinafter Landau, *The Reality of Social Rights Enforcement*].

4. *Id.*

5. DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS (Oxford Univ. Press 2007); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. ON HUM. RTS. 1 (2003) [hereinafter Bilchitz, *Towards a Reasonable Approach to the Minimum Core*]; David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484 (2002) [hereinafter Bilchitz, *Giving Socio-Economic Rights Teeth*].

6. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (Oxford Univ. Press 2001) [hereinafter SUNSTEIN, DESIGNING DEMOCRACY].

7. KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (Oxford Univ. Press 2012).

8. I rely on methods of comparative constitutional law described and employed, for example, in Armin von Bogdandy, *Comparative Constitutional Law: A Contested Domain*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & András Sajó eds., Oxford Univ. Press 2012); Mark Tushnet, *The Rise of Weak-Form Review*, *in* COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar 2011); Dennis M. Davis, *Socio-economic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled?*, *in* COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar 2011).

cern for the deeper constitutional objectives that drive it, and second, that officials unconcerned with constitutional commitments will require constant and persistent supervision by courts in the pursuit of economic and social rights.

I propose a theory of judicial engagement with economic and social rights that pays closer attention to the place of legislation and fills this gap in the existing approaches. At the cornerstone of this new perspective is the idea of 'normative congruence,' an adaptation of Lon Fuller's rule-of-law principle of congruence.[9] The heart of the idea is that government and official conduct must remain congruent not only with the formal rules and limits of legislation, but also with the constitutional commitments that provide the normative foundations of these statutory and regulatory rules. I do not suggest that this idea replaces any of the four existing models of judicial enforcement of economic and social rights; I am not offering an alternative model of economic and social rights adjudication.

Rather, I suggest that courts' enforcement of economic and social rights, through whichever of the existing models is most appropriate in the circumstances, should be aimed at achieving normative congruence. By engaging with recalcitrant administrators and officials in an ongoing dialogue aimed at leading government officials, administrators, and regulators to a clear understanding of how constitutional commitments inflect the specific rules that direct and constrain their behavior, courts can return the focus of regulatory and administrative action to fundamental constitutional norms. I call this 'dynamic regulatory constitutionalism.' It is dynamic because it calls on courts and officials to develop an understanding of what the law requires of the state, through an iterative and active engagement with each other. And it is a regulatory form of constitutionalism because it seeks to infuse constitutional values into the usually mundane, mechanical, and formalized functions of the administrative state.

Dynamic regulatory constitutionalism aims to return the focus to the constitutionally entrenched, normative content of social legislation in two ways. First, courts must emphasize the constitutional foundations of social legislation, articulating clearly how constitutional norms infuse the regulatory obligations that administrators bear. Focusing on the connections between constitutional values and the terms of positive law illustrates how compliance with the substantive content of positive law advances the constitutional commitment to social justice. The cases I discuss in this paper show this principle in action–in right-to-water litigation in South Africa, the substantive rule intended to realize the right to have access to sufficient water was the City of Johannesburg's policy of providing 6000 liters of water per household per month free of charge;[10] in Colombia the content of several economic and social rights in the context of internally displaced people (IDPs) came from

9. Lon L. Fuller, The Morality of Law (revised ed., Yale Univ. Press 1969).

10. *Mazibuko v. City of Johannesburg* 2009 (4) SA 1 (CC) (S. Afr.) [hereinafter *Mazibuko*].

Colombia's international law commitments to IDPs;[11] and in New York the common-law standard of 'habitability' gave content to state welfare rights.[12]

Second, judicial engagement with officials must be aimed at determining whether the latter do indeed understand the connections between constitutional commitments and positive social legislation. The cases I consider here suggest that where courts pay no attention to whether officials have a clear understanding of how the statutory rules they are charged with implementing advance or fulfill commitments to economic and social rights, the administrative recalcitrance giving rise to litigation in the first place may continue despite judicial intervention.

The perspective that dynamic regulatory constitutionalism brings recognizes that courts do not hold a monopoly over the project of rights fulfillment, but are partners with all the institutions of state in that project. When the legislature takes steps to translate constitutional rights into a regulatory program, the courts' role must be to ensure that the officials charged with implementing that program are committed to, or at least appreciate, the constitutional imperatives behind the regulatory system.

In Part I of this paper, I review the four dominant models for the judicial enforcement of economic and social rights, arguing that each of them ignores the constitutional normativity of positive legislation. In Part II, I introduce the idea of normative congruence as a device that brings theoretical perspective to the blind spot in these existing approaches. Relying on a conception of social legislation as a tool for intra-governmental communication, I explore how the idea of normative congruence lays a foundation for dynamic regulatory constitutionalism and guides courts, legislatures, and administrative officials in enforcing social legislation. I describe a number of important decisions from Argentina, Colombia, South Africa, and the United States in this part of the paper, using them as examples of where dynamic regulatory constitutionalism has made a significant contribution to the advancement of economic and social rights, and where the failure to engage in dynamic regulatory constitutionalism has led to the problems and failures I advert to in Part I of the paper.

I. The Gap in Existing Models of Economic and Social Rights Adjudication

It is necessary at the outset to define the scope of this paper. My argument is that in the cases where social legislation has already been enacted to give life to economic and social rights, courts should adopt a perspective that pays due regard to this legislation. I leave aside the problem of legislative inaction, where an executive or legislature makes no statutory or regulatory moves in the direction of protecting and

11. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, M. Espinosa, Expediente T-653010 (Colom.) http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm.

12. McCain v. Koch, 484 N.Y.S.2d 985, 987 (N.Y. Sup. Ct. 1984).

advancing economic and social rights. Bearing in mind that the International Covenant on Economic, Social and Cultural Rights as well as various domestic constitutions frame rights in a way that places an obligation on the government to take steps toward the progressive realization of economic and social rights, including in particular the enactment of legislation, the full realization of these rights will likely involve legislation.[13] Were a state to take no steps and pass no legislation to this end, it would likely be in violation of its obligations in terms of any economic and social rights recognized in its legal order. The South African Constitutional Court has held that in these circumstances the courts may order a government to take steps, including the passage of legislation, to fulfill these obligations.[14] Similarly, it cannot be the case that economic and social rights remain inchoate and unenforceable until legislation for their advancement is passed.[15]

But whatever the constitutional implications of legislative inaction, this paper concerns only the situations in which legislation does establish a framework for the pursuit of social and economic rights and argues that insufficient attention to the link between legislation and fundamental constitutional norms threatens to undermine the efforts of a committed legislature to realize economic and social rights.

I begin by describing how each of the four dominant models of economic and social rights adjudication suffer from precisely this lack of attention to legislation. An explanation for this myopia, at least in the first three approaches, is that they developed during the first wave of economic and social rights jurisprudence when the primary concern was to demonstrate the justiciability and enforceability of economic and social rights. In advocating justiciability, each of these models considers whether rights should be conceived as either strong or weak, and in

13. *See, e.g.*, Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 78–79 (Basic Books 1983) (arguing that welfare rights gain substance only when a legal community adopts some program of provision).

14. *Mazibuko, supra* note 10, at para. 67. The question of what courts can do in the face of legislative torpor with respect to the advancement of access to socio-economic resources is different to the question of whether a government's or legislature's actions infringe existing access to or enjoyment of socio-economic resources. Aside from the positive obligation they impose on the state, economic and social rights carry a negative obligation to ensure that legislation or other state conduct does not reduce existing access to socio-economic resources like health care, education, housing, food and water, or social security. Any such action would infringe these rights and could for that reason be struck down by courts. The negative protection of economic and social rights does not require positive legislation. *See Jaftha v. Schoeman* 2004 (2) SA 140 (CC) (S. Afr.).

15. For reliance on this argument with respect to the right to sufficient water in South Africa, for example, *see Manqele v. Durban Transitional Metropolitan Council* 2002 (6) SA 423 (D) (S. Afr.) (holding the right to water unenforceable in the absence of regulations defining the right of access to a basic water supply); and for criticism see Malcolm Langford & Richard Stacey, *Water*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 35–37 (Stuart Woolman & Michael Bishop eds., Juta 2d ed. 2011) [hereinafter Langford & Stacey, *Water*]. Amartya Sen, in this vein, recognizes a distinction between human rights and the legislation intended to advance human rights, but questions whether human rights are 'entirely parasitic' on legislation. *See* Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2915 (2006).

advocating enforceability, each describes either strong or weak remedies.[16]

Courts preferring strong rights and strong remedies responded favorably to 'institutional reform litigation' and have tended to impose structural injunctions on organs of state. A second 'strong rights' view is the minimum core doctrine which argues that economic and social rights should be understood to include a floor of socio-economic resources, the provision of which is the state's duty. The third approach adopts a weaker view of rights; the 'administrative law model' allows that officials need take only the steps that are reasonable, in the circumstances, to fulfill rights. The fourth approach suggests that a 'catalytic' court should choose from among a range of approaches in enforcing economic and social rights, conditioned on the modality of the government's failure to uphold rights.[17] This approach encompasses what has been described as the 'new Commonwealth model'[18] of rights adjudication, involving 'conversation' or 'dialogue' between courts and other branches of government about the meaning of rights, alongside 'experimental'[19] models of holding officials to their obligations. I turn now to a more detailed account of this gap in each of the four dominant models of economic and social rights adjudication.

A. *Institutional Reform Litigation and 'Strong' Remedies*

One method of enforcing economic and social rights is the judicial imposition of strong remedies against the state. Interdicts or structural injunctions give clear and specific instructions to officials, sometimes in the form of consent decrees confirming an agreement between the parties as to how rights-violating conduct will be brought to an end.[20] In policing these orders, courts may maintain jurisdiction and require parties to report back to the court on their progress in meeting orders. Structural injunctions are often the result of institutional reform litigation (or 'IRL') aimed at judicially mandated reforms to the structures of the public authorities whose conduct or inactivity infringes rights. IRL emerged prominently in the USA in response to administrative lethargy in school desegregation following the order in *Brown v. Board*

16. The typology of judicial approaches to economic and social rights enforcement is usefully summarized by Katharine Young, in her recent book, *see* YOUNG, *supra* note 7. The foundations of this typology are laid in MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (Princeton Univ. Press 2008).

17. YOUNG, *supra* note 7.

18. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

19. For experimental approaches, *see* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011) [hereinafter Sabel & Simon, *Minimalism and Experimentalism in the Administrative State*]; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004) [hereinafter Sabel & Simon, *Destabilization Rights*].

20. ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (Yale Univ. Press 2003).

of Education,[21] and in attempts to remedy dysfunction in the public management of prisons.[22] It is a response to the recognition that the judicial vindication of a right does not necessarily lead to changes in the social and administrative institutions responsible for rights violations.[23] A remedy to the ongoing injustice of segregated schooling, as opposed to a single case of racial discrimination, requires dismantling the system of segregated schooling in its entirety.

Where the underlying structural problems that give rise to economic and social rights claims are not addressed, courts are likely to face numerous individual applications for remedies. The roll of a sympathetic court can quickly become clogged with individual claims stemming from the same structural defect. The Colombian *tutela*, a rule of standing introduced in the Political Constitution of Colombia of 1991, allows individual claims against the state for the violation of constitutional rights. It was used just 10,732 times in 1992 in protection of the right to health, but over 130,000 times in 2001.[24] By 2003 over half of

21. Brown v. Board of Education, 347 U.S. 483 (1954).

22. *See, e.g.*, Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975) (in regard to school desegregation); *see also* Holt v. Hutto, 363 F. Supp. 194 (E.D. Ark. 1976); Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (in regard to prison reform). On institutional reform litigation more generally, *see* Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915 (2005) [hereinafter Sandler & Schoenbrod, *The Supreme Court*]; Ross Sandler & David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 REV. LITIG. 115 (2007) [hereinafter Sandler & Schoenbrod, *From Status to Contract and Back Again*]; SANDLER & SCHOENBROD, *supra* note 20; Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y.L. SCH. L. REV. 509 (2009); Darren Hutchinson, *Social Movements and Judging: An Essay on Institutional Reform Litigation and Desegregation in Dallas, Texas*, 62 S.M.U. L. REV. 1635 (2009); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS (Cambridge Univ. Press 1998).

23. *See* Mark Tushnet's work in Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. REV. 23 (1993); and his more recent book bringing many of these ideas to bear on social welfare specifically, TUSHNET, *supra* note 16. *See also* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (Univ. of Michigan Press 2d ed. 2004); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (Harvard Univ. Press 1997). Gerald Rosenberg's study of the social and political impact of the US Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) is an example of this kind of criticism. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (Univ. of Chicago Press 2d ed. 2008).

24. The Political Constitution of Colombia of 1991 confers a catalogue of economic and social rights in Chapter 2. This catalogue includes rights to social assistance (art. 48), health services and sanitation (art. 49), decent housing (art. 51), and education (art. 67). Although these rights are not 'fundamental' in the schema of the Constitution, the Constitutional Court has used the doctrine of connection to hold that when economic and social rights are closely enough connected to fundamental rights, they should be enforced as such. Corte Constitucional [CC] [Constitutional Court], octubre 26, 1992, Sentencia T-571/92, M. Grieffenstein, Expediente T-2635 (Colomb.), http://www.corteconstitucional.gov.co/relatoria/1992/t-571-92.htm. By 2008, however, the Court had abandoned this artificial distinction between rights, preferring to consider which aspects of fundamental rights, to health for example, are immediately enforceable and which are subject to progressive realization. Corte Constitucional [CC] [Constitutional Court], julio 31, 2008, Sentencia T-760/08, M. Espinosa (Colom.) http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm.

the Colombian Constitutional Court's docket was consumed by *tutelas* alleging violations of rights to health care and social assistance.[25] As one Colombian judge remarked, "[w]e were the bureaucracy."[26] The courts had become a substitute for regulation.[27]

In South Africa, individual claims based on the right to social assistance have been overwhelming. Judges have become frustrated both with the 'depressing tales of misery and privation' that clog the court rolls and with the unsatisfactory performance of government departments and agencies in administering social assistance programs.[28] Argentina's experience with right-to-health litigation has been similar. Constitutional reforms in 1994 strengthened the right to health by giving international human rights instruments domestic constitutional status, and imposed obligations on the legislature to pass legislation consistent with a social justice agenda and to provide health benefits on an equal basis.[29] Like Colombia's *tutela*, Argentina's *amparo* enables individual and collective claims for the injunctive protection of rights. Some of this litigation has focused on access to HIV/AIDS treatment, in the context of a national law adopted specifically to combat the disease.[30] In the landmark *Benghalensis* judgment in 1996, the Argentine courts issued an injunction requiring officials to follow specific steps in complying with the law.[31] Problems of non-compliance persisted until 2010, with courts adjudicating complaints on an individual basis instead of considering underlying or systemic faults generating official noncompliance.[32]

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25. Landau, *The Reality of Social Rights Enforcement*, *supra* note 3, at 210-11; Alicia Ely Yamin & Oscar Parra-Vera, *Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates*, 33 HASTINGS INT'L & COMP. L. REV. 431, 436 (2010).

26. Manuel José Cepeda, *quoted in* Landau, *The Reality of Social Rights Enforcement*, *supra* note 3, at 224.

27. *Id.* at 215.

28. *Vumazonke v. MEC for Social Development and Welfare for Eastern Cape Province* 2004 ZAECHC 40, ECJ 050/2004 at para. 2 (S. Afr.). Some of the judgments referred to here are *Mbanga v. MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 359 (SE) (S. Afr.); *Ndevu v. MEC for Welfare, Eastern Cape and Another*, unreported, SECLD case no. 597/02 (S. Afr.); and *Somyani v. MEC for Welfare, Eastern Cape and Another*, unreported, SECLD case no. 1144/01 (S. Afr.).

29. Art. 4, CONSTITUCION NACIONAL §§ 75(22), 75(19) (Arg.). The right to health is independently protected by §§ 41 and 42, providing for rights to a healthful and balanced environment and, '[a]s regards consumption' of goods and services, the right to the protection of health, safety and economic interests.

30. Law No. 23798, Sept. 14, 1990, [26972] B.O. 2 (Arg.).

31. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 1/7/2000, "Asociación Benghalensis y Otros v. Ministerio de Salud y Acción Social –Estado Nacional s/Amparo Ley 16.986," Fallos (2000-321-1684) (Arg.) [hereinafter Asociación Benghalensis y Otros]. For analysis see Paola Bergallo, *Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina*, 89 TEX. L. REV. 1611, 1626–28 (2010*); see also* Victor Abramovich & Laura Pautassi, *Judicial Activism in the Argentine Health System: Recent Trends*, 10 HEALTH & HUM. RTS. 53 (2008).

32. Bergallo, *supra* note 31, at 1637–38. With respect to a similar problem in right-to-health litigation in Brazil, see Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. 33 (2009).

1. The Structural Causes of Rights Violations

IRL aims to get at the systemic causes of these regulatory failures and seeks structural injunctions from courts to compel large-scale regulatory change rather than the vindication of rights in particular cases. Characteristic features of these injunctions are their detail, complexity, and the comprehensive manner in which they seek to control administrative behavior. They have roots in U.S. civil rights litigation in the 1970s,[33] while more recently and further afield, structural injunctions have been deployed in the enforcement of economic and social rights. In a High Court case in South Africa in 2011, the Eastern Cape Provincial Department of Education admitted its non-fulfillment of the right to education in providing only mud-walled schoolhouses for school pupils. An agreement laying out a very detailed plan for the resolution of the problem was reached, laying out precisely how and when funds are to be spent and describing in detail the specifications of temporary measures to be taken.[34] The agreement requires the provincial and national governments to file reports with the applicants' attorneys every four months, detailing the steps taken in fulfillment of the agreement and steps yet to be taken.[35]

Both the Colombian and South African Constitutional Courts have in recent years issued orders that set out in great detail the steps the government and its agents must take in providing housing for indigent or displaced persons[36] and in providing health care services.[37] In

33. In the early 1970s, a federal district court in Alabama made an order setting out detailed guidelines for housing inmates of state mental institutions: patients were to be bathed every twelve hours, one toilet was to be provided for every eight patients, room temperatures were to be kept between sixty-eight and eighty-three degrees Fahrenheit, hot tap water was to be 100 degrees, dining-room floor space was to be provided on the basis of ten square feet per patient, day-room space on the basis of forty square feet per patient, and single rooms were required to be a minimum of 100 square feet. Wyatt v. Stickney, 344 F. Supp. 373, 380–82 (M.D. Ala. 1972). The court appointed a human rights committee to monitor compliance with these instructions, and when the state institutions failed to meet all of the items to the letter, they were placed in receivership, with a court-appointed manager taking over the running of the institutions. *See* TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (Univ. of Alabama Press 1981).

Similarly, in the late 1970s in *Jose P. v. Ambach*, a federal district court in New York held that New York City's public education system was in persistent violation of the educational rights of pupils with special needs. *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982). While the City acknowledged that its public school system left a great deal to de desired with respect to special education, the court held that the 'polycentric' nature of the problem and the process needed to resolve it was not suited to the 'courtroom-bound adjudicative process,' and appointed a special master to mediate negotiations between the parties. The 515-page consent decree eventually agreed on by the parties made an order of court regulate just about every aspect of special education and included specific directives with respect to most of these aspects. *See also* SANDLER & SCHOENBROD, *supra* note 20, at 63.

34. *Centre for Child Law v. Government of the Eastern Cape Province,* unreported, ECHCB case no. 504/10 (S. Afr.).

35. *Id.* at para. 10.

36. In South Africa, see *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.) (setting out both the building specifications for temporary housing to accommodate people displaced from informal housing and the timetable

Colombia, the Constitutional Court's structural injunctions are often based on a finding that a 'state of unconstitutional affairs' exists, in which the ongoing violation of rights is a direct result of the normal operation of the regulatory system rather than aberrant departures from it.[38] Structural injunctions are meant to alleviate the state of unconstitutional affairs.

2. The Danger of Regulatory Formalism

Opinion on the value of structural injunctions is divided, with judicial and academic support both for and against.[39] Examples of both successful and unsuccessful institutional reform litigation are readily available.[40] Ultimately, a claim that judicial intervention or non-intervention has produced the best results in a particular case is non-falsifiable, since the circumstances of each case are different and there is no

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according to which displaced persons must be relocated to permanent housing). In Colombia, see Sentencia T-025/04, *supra* note 11 (mandating the adoption of public policy on displaced persons where none had existed before and supervised the allocation of budgetary resources to the fulfillment of the policy).

37. In Colombia, see Sentencia T-760/08, *supra* note 24 (seeking changes to the national health care system by ordering the expansion of benefits under a subsidized health care scheme to meet the level of benefits under a contributory scheme, altering the system of reimbursements to health care providers for treatments not covered by the health providers located outside the scheme, and expanding access to the system).

38. David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 358 (2010).

39. For judicial criticism of institutional reform litigation and structural injunctions, see the U.S. Supreme Court judgments in *Frew v. Hawkins*, 540 U.S. 431 (2004) and *Horne v. Flores*, 557 U.S. 433 (2009). For judicial approval, on the other hand, see *Brown v. Plata*, 563 U.S. 493 (2011).

For academic criticisms, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Sandler & Schoenbrod, *The Supreme Court*, *supra* note 22; Sandler & Schoenbrod, *From Status to Contract and Back Again*, *supra* note 22; SANDLER & SCHOENBROD, *supra* note 20; Koerner, *supra* note 22; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); ROSENBERG, *supra* note 23.

For academic celebration of structural injunctions, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term – Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); and FEELEY & RUBIN, *supra* note 22.

40. Robert Kagan points out that assessing the impact of social litigation is always difficult (ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 4 (Harvard Univ. Press 2001)):

> There is no way to count up and compare all the social costs and social benefits that a gigantic, multifaceted legal system sends rippling through economic, political, and communal life. And even if one could make such a calculation, the question would remain, "[c]ompared to what?" That is, would alternative ways of implementing public policy and resolving disputes yield higher aggregate benefits and lower social costs, or vice versa?

A notable example of an unsuccessful structural injunction is the Indian Supreme Court's immersion in Bombay's water shortages in 2009. The Court ordered the division of water from the Krishna River and its tributaries among the states of Maharashtra, Andhra Pradesh and Karnataka according to a specific ratio, but compliance with the order left 17 million Bombay residents without water for up to two days every week. Chris Lo, *Maintaining Maharashtra: The High-Tech Response to Water Crisis*, WATER-TECHNOLOGY (Jan. 31, 2011), http://www.water-technology.net/features/feature108551.

counterfactual to which the results in those circumstances can be compared.[41]

My objective is not to argue that structural injunctions do not work, or that they should never be issued by courts. My concern is rather that structural injunctions hold officials to increasingly specific standards and rules, with little emphasis on the need for official conduct to consider the substantive objectives and commitments expressed as economic and social rights. Formal compliance with highly specific court orders may shift officials' focus away from the constitutional norms that underlie social legislation, and which social legislation is, ideally, intended to promote. Official discretion and regulatory flexibility allow officials to respond to changing socio-economic needs and social or environmental circumstances in order to ensure that their conduct remains congruent with these constitutional norms. But as courts and rights-claiming individuals heap multiplying demands on officials and the constraints under which the officials must operate grow, this discretion and flexibility are stripped away.[42] The resultant increase in regulatory formalism, as courts hold officials to increasingly strict structural orders, may draw officials' attention away from the constitutional imperatives of social legislation. Regulatory formalism thus severs the connection between constitutional norms and statutory rules for official conduct, leaving official conduct untethered from the constitutional norms to which the entire regulatory framework is tied.

A second reason to be wary of IRL is the extent to which it makes courts indispensable to the regulatory process. Courts fulfill an increasingly bureaucratic rather than a purely adjudicative function as they maintain jurisdiction and supervise compliance with more, and more detailed, structural injunctions.[43] The drain on judicial resources is large, and since courts are far smaller institutions than the administrative agencies and bureaucracies established specifically to administer programs of social provision, it is unreasonable to expect courts to effectively police more than a few structural injunctions at a time.[44] The strong enforcement of rights encourages judicial enforcement, as opposed to administrative supervision, of regulatory rules and policy.[45] The outcome is not merely that courts may be called on to vindicate and protect rights where patterns of official conduct threaten them, as

41. FEELEY & RUBIN, *supra* note 22, at 26; SANDLER & SCHOENBROD, *supra* note 20, at 6, 93–94.

42. R. Shep Melnick, *Risky Business*, *in* TAKING STOCK: AMERICAN GOVERNMENT IN THE TWENTIETH CENTURY 158 (Morton Keller & R. Shep Melnick eds., Cambridge Univ. Press 1999); *see also* chapters 2 and 3 above, for more on how practices of adaptive management and integrated water resource management fit with the ideas of normative congruence and regulatory harmony.

43. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 16 (Harvard Univ. Press 2001) (arguing that it is only "a slight oversimplification" to say that "lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states").

44. Landau, *The Reality of Social Rights Enforcement*, *supra* note 3, at 225.

45. Edward Rubin, *The Conceptual Explanation for Legislative Failure*, 30 LAW & SOC. INQUIRY 583, 595 (2005).

we would expect from courts in any constitutional democracy, but that litigation and court decisions become indispensable to the process of regulation as courts become 'enmeshed' in regulation.[46]

Concerns about regulatory formalism and bureaucratic enmeshment can be met by closer attention to the connections between the statutory rules for official behavior and the constitutional commitments that underlie those regulatory frameworks. As long as officials' actions and decisions are motivated by and directed toward the achievement of the vision of socio-economic provision expressed in legislation, specific injunctions can avoid the pitfalls of regulatory formalism. The specter of regulatory formalism does not require rejecting structural injunctions altogether, but rather requires courts to determine, first of all, whether the conduct of officials responsible for implementing social legislation is oriented toward and congruent with the constitutional norms the legislation is meant to achieve. Second, whatever structural injunctions order officials to do, they should make clear that the ultimate objective of the structural reform is congruence with the constitutional commitments that prompted social legislation and regulatory intervention in the first place.

David Landau's support for structural injunctions as a promising mechanism of economic and social rights enforcement is qualified in a similar way. He concludes from a comparison of two prominent Colombian Constitutional Court cases (the *Displaced Persons* case and the *Health Care* case)[47] that structural injunctions will be effective only under certain political conditions.[48] Landau does not go into any more detail in describing these conditions than to say that the Court's choices yielded positive results where the Court, civil society, and the bureaucracy shared "an essentially similar vision" of how to go about remedying structural problems.[49] Ultimately, if structural injunctions are superimposed on situations in which officials fail to recognize how the regulatory rules governing their conduct are connected to deeper constitutional commitments, attempts to uphold rules against officials are unlikely to result in the fulfillment of those constitutional commitments. But if courts can emphasize how these constitutional values provide the normative foundations for social legislation and regulatory rules, and ensure that officials share that constitutional vision and understand how it shapes their conduct in terms of statutory rules, the imposition of even highly detailed structural injunctions can guide official conduct toward the realization of core commitments to economic and social rights rather than promote merely formal compliance with numerous individual injunctions. Even better, where officials themselves remain focused on these core commitments, the need for courts to remain enmeshed in processes of regulation or institutional reform will be reduced.

46. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).
47. *See supra* text accompanying notes 36–37.
48. Landau, *The Reality of Social Rights Enforcement*, *supra* note 3, at 225.
49. *Id.* at 227.

B. *The Minimum Core Approach*

The minimum core approach holds that economic and social rights impose obligations on the state to ensure access to a determinate minimum bundle of socio-economic resources. The approach has its roots in the International Covenant on Economic, Social and Cultural Rights, which provides that state parties have an obligation to take steps–– subject to the availability of resources––to achieve the progressive realization of each right in the Covenant. The UN Committee on Economic, Social and Cultural Rights explained in its General Comment no. 3 in 1990 that state parties to the Covenant have an obligation to provide the minimum core content of each right, despite the progressive nature of the obligations and the subordination of the obligation to the availability of resources.[50]

Defining the minimum core content of each economic and social right requires states to think about how to allocate scarce resources so as to ensure that the minimum core of each right is met. The state must continue to progressively realize each right even after this minimum is assured but may only rely on scarce resources to escape obligations once the floor is met. The minimum core also provides an objective and determinate standard against which the state's conduct can be evaluated. Failure to provide the minimum core is an unambiguous violation of the right, and we might expect a court finding such a violation to order the state to provide access to the minimum level of socio-economic resources. A court might conceivably choose to issue a structural injunction in addition, specifying the action to be taken by the state in order to meet the minimum obligation. The minimum core approach takes a strong view of rights, and while it takes no particular view on remedies, it is easily capable of being followed with a strong remedy.

1. Judicial Rejection of the Minimum Core Approach

Without a statutory definition of the minimum core of economic and social rights, courts have been reluctant to employ the approach. This reluctance is consistent with my own desire to pay attention to the role of legislation in rights protection. Proponents of the minimum core approach, consequently, tend to ignore the relevance of the legislature's role in defining the minimum core of economic and social rights, arguing instead that courts should take on both the primary role in defining the minimum core and the secondary role in holding the administrative branches to it.

The South African Constitution provides something of a best-case test for the minimum core approach because the economic and social rights in the South African Constitution are framed in very similar terms to those in the Covenant.[51] The South African Constitutional

50. The Nature of States Parties' Obligations, Comm. on Econ., Soc. and Cultural Rts., Gen. Comment 3 on Its Fifth Session, U.N. Doc. E/1991/23 (Dec. 14, 1990), http://www.refworld.org/docid/4538838e10.html.

51. S. Afr. Const., 1996, ss. 27 provides:

Court has been asked on a number of occasions to consider defining a minimum core content for the economic and social rights in the Constitution and has each time refused.[52] Holding the state to rigid rules of socio-economic provision, the Court has said, does not take into account inter-individual variation, variations between different communities, or the competing demands on a state's resources over time, which may affect the level at which access to socio-economic resources needs to be provided. It is conceptually difficult for a court to define a minimum core that remains relevant and appropriate for all sectors of society and over time, especially without adequate information about people's socio-economic needs and evidence supporting a specific minimum core.[53] Moreover, the obligation to provide quantified bundles of socio-economic resources for all people in all circumstances may reduce state officials' ability to adapt to changing circumstances and changing needs. Defining core content to economic and social rights prevents sensitivity to the context in which real people utilize socio-economic resources.[54]

The foil to the South African Constitutional Court's rejection of the minimum core approach appears to be the Colombian Constitutional Court's embrace of a 'vital minimum' as the basis of enforcing

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(1) Everyone has the right to have access to—
(*a*) health care services, including reproductive health care;
(*b*) sufficient food and water; and
(*c*) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The section 26 right to housing is framed according to the same schema, with the right in subsection (1) qualified by the terms of subsection (2).

52. *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) [hereinafter *Grootboom*]; *Minister of Health v. Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para. 38 [hereinafter *Treatment Action Campaign*]; *Mazibuko, supra* note 10, at 30.

53. In *Grootboom*, *supra* note 52, at 26–28, the South African Constitutional Court held:

> It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. . . . In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.

54. *See Mazibuko, supra* note 10, at 30; "[W]hat the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context." Brian Ray has described the Court's preference for engagement with officials and regulators over the minimum core approach as the 'proceduralisation' of economic and social rights. Although the Court has been criticized for this preference, unsurprisingly by proponents of the minimum core approach, Ray argues that proceduralisation promises to strengthen and promote consistent attention to the values that constitutional rights protect. *See* BRIAN RAY, ENGAGING WITH SOCIAL RIGHTS: PROCEDURE, PARTICIPATION, AND DEMOCRACY IN SOUTH AFRICA'S SECOND WAVE (Cambridge Univ. Press 2016); Brian Ray, *Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation*, 27 S. AFR. J. ON HUM. RTS. 107 (2011).

economic and social rights. Where a person's lack of access to socio-economic resources like health care or social assistance threatens that person's life, dignity, or physical integrity, and the person has no other means of obtaining access to necessary resources, the Court has interpreted the Colombian Constitution's economic and social rights to require the state to provide access to a minimal level of food, clothing, and housing.[55] Conversely, where a person fails to convince a court that he or she has neither access to socio-economic resources nor means of obtaining access without state assistance, the right is not infringed and no state obligation to provide access arises.[56] In none of the cases dealing with the vital minimum principle, however, has the Colombian Court defined the extent or level of the vital minimum. The Court has said that economic and social rights will have been infringed if a lack of access to socio-economic resources threatens life, dignity, or physical integrity, but the Court must nevertheless determine on the facts of every case if the state's conduct threatens life, dignity, or physical integrity.

The South African and Colombian Constitutional Courts' wariness of minimum core arguments fit with the concerns I raise above in Section A about regulatory formalism. Enforcing a minimum core against the state may reduce the state's constitutional obligations to checking off a list of goods to be provided, while any attention on the benefits or value that access to these goods provides for people is lost. We do not value economic and social rights simply for the goods they deliver, but for the things that access to those goods allow us to be and do. The 'capabilities' approach to distributive justice enjoins recognizing that because individuals are different from one another, some will need more or less of a certain resource than others to live a life of dignity.[57] The 'survivalist' approach, by contrast, focuses state action on mechanical compliance with formal quantifications of rights and imposes no obligation on the state to consider inter-individual variations or the benefits socio-economic resources actually deliver for real people.[58]

55. The origin of the vital minimum principle in Colombia is a case involving the payment of pension benefits: Sentencia No. T-426/92 (Jun. 24, 1992) (Colom.), http://www.corteconstitucional.gov.co/relatoria/1992/t-426-92.htm.

56. With respect to pensions, see Sentencia No. T-516/93 (Nov. 10, 1993) (Colom.), http://www.corteconstitucional.gov.co/relatoria/1993/T-516-93.htm; Sentencia No. T-193/97 (Apr. 15, 1997) (Colom.), http://www.corteconstitucional.gov.co/relatoria/1997/T-193-97.htm. With respect to health care, see Sentencia T-527/93 (Nov. 10, 1993) (Colom.), http://www.corteconstitucional.gov.co/relatoria/1993/T-527-93.htm.

57. Amartya Sen and Martha Nussbaum have developed the capabilities approach: *see* AMARTYA SEN, DEVELOPMENT AS FREEDOM 74 (Anchor Books 1999); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (Belknap Press 2006); *see also* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 126–38 (2008).

58. Sen notes that defining an essential minimum is difficult even before inter-individual variation is considered. People can survive—merely survive—with incredibly little food. The quality of life improves cumulatively as the quality of diet improves. Defining the 'minimum nutritional requirement' is thus arbitrary: either the minimum is at the incredibly low level that allows mere survival, which seems to strip the right of all mean-

Proponents of the minimum core approach may yet argue it is consistent with a capabilities understanding of rights, because even if our objective is to ensure a life with dignity rather than a life with access to quantified amounts of socio-economic goods, we need some idea of what a life with minimum dignity looks like. This may be so, but defining a dignitarian minimum proves difficult in practice. Even the two dominant proponents of the capabilities approach disagree about whether a core 'list' of human capabilities can or should be described.[59]

2. The Room for Legislative Involvement

It turns out to be very difficult to argue that economic and social rights carry an inherent minimum core content precisely because the core content of rights remains contested.[60] It is even more difficult to argue that courts should be the institutions responsible for defining this core. The existence of legitimate and reasonable disagreement between people on the essential content of economic and social rights suggests that fixing this content—whether as a bundle of resources or as a list of capabilities that access to resources should enable—is a matter for public debate and deliberation to be carried on in the public forums representative of all of a nation's people.

A specific minimum core may yet resist consensus, but if it is to be set in a specific national and social context, it must at least take into account the disagreements between people about what a right's minimum core content should be.[61] Where economic and social rights are to be given a minimum core, the courts should not be the only, or even the main, institution responsible for doing so. The legislature is better suited to resolving, or at least airing, disagreement and gathering the

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ingful value, or it is at some level above this absolute minimum. Drawing a line at this latter level, however, has "an inherent arbitrariness that goes well beyond variations between groups and regions." AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 12 (Oxford Univ. Press 1982).

It is extremely interesting to note that in 1979 Philip Alston, eventually the author of the UN's minimum core doctrine in General Comment No. 3, argued that a hierarchy of development goals informed by a commitment to fulfilling basic needs for bundles of material resources was not consistent with the normative goals of human rights. Philip Alston, *Human Rights and Basic Needs: A Critical Assessment*, 12 HUM. RTS. J. 19, 55–56 (1979).

59. *Compare* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 74 (Cambridge Univ. Press 2000), *and* NUSSBAUM, *supra* note 57, at 79, *with* Amartya Sen, *Dialogue: Capabilities, Lists and Public Reason: Continuing the Conversation*, 10 FEMINIST ECON. 77, 78 (2004).

60. Young, *supra* note 57, at 138.

61. Jeremy Waldron makes a similar argument about rights in general, arguing that the interpretation of all constitutional rights should be a matter for public debate rather than the exclusive preserve of the courts. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (Oxford Univ. Press 1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2005–2006); Jeremy Waldron, *Can There Be a Democratic Jurisprudence?* 08–35 N.Y.U. PUB. L. & LEGAL RES. PAPER SERIES (2008), http://ssrn.com/abstract=1280923. For my own response to Waldron's argument, *see* Richard Stacey, *Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism,* 30 OXFORD J. LEGAL STUD. 749 (2010).

information on the basis of which a minimum core could begin to crystallize.[62] The Colombian judge responsible for crafting the vital minimum principle in the first place has subsequently held that the courts should enforce a vital minimum against the state only where a person is seeking to gain access to services or resources that are already provided for in law.[63] For its part, the UN Committee on Economic, Social and Cultural Rights has never suggested that courts should define the minimum core of each right.

Nevertheless, the debate about the minimum core has focused almost exclusively on the judicial role in defining the minimum core for economic and social rights.[64] These debates pay scant attention to the role of the legislature in articulating and defining economic and social rights, and for this reason present a somewhat impoverished account of rights enforcement. The entire political system—policymakers, legislatures, administrative officials, and courts—is responsible for developing the framework for the fulfillment of economic and social rights. This is not the mandate of the judiciary alone. Moreover, where social legislation does set a minimum core content to rights and sets clear targets for administrative officials, the need to pay attention to the constitutional foundations of the legislation does not disappear. The statutory specification of a minimum core should not remove our focus from the fundamental reasons we value rights in the first place, and neither does it remove any role for the courts. On the contrary, the courts' role in the context of a statutorily specified minimum core—or indeed any other statutory elaboration of a constitutional right—is to assess whether statutory rules are congruent with constitutional norms. The 'administrative law' model of rights enforcement provides one account of how this might be done.

C. *The Administrative Law Model of Rights Enforcement*

1. Moving Beyond the Minimum Core

The administrative law model is an alternative to the minimum core doctrine.[65] It takes a weaker view of economic and social rights in that courts are not made responsible for defining the content of rights. On the administrative law model, courts assess only whether officials' efforts to realize rights are reasonable in the circumstances. The enforcement of rights is similarly 'weak' on this approach, since there is a range of reasonable options a state could adopt in attempting to realize economic and social rights. Were a court to find that a state's policy or program of rights fulfillment was unreasonable it would do no more,

62. *Treatment Action Campaign*, *supra* note 52, at 28–29.

63. Sentencia No. SU-111/97 (Aug. 9, 1996) (Colom.), http://www.corteconstitucional.gov.co/relatoria/1997/su111-97.htm.

64. *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, 182 (2006); BILCHITZ, *supra* note 5; Bilchitz, *Towards a Reasonable Approach to the Minimum Core*, *supra* note 5; Bilchitz, *Giving Socio-Economic Rights Teeth*, *supra* note 5.

65. SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 6, at 221–38.

on this approach, than point out the unreasonableness and direct the state to address the defects in its program.[66]

The logic of reasonableness is pervasive. Even the Colombian Constitutional Court, with the principle of the vital minimum as the basis of economic and social rights enforcement, relies on reasonableness to adjudicate claims. In none of the Colombian cases has the Constitutional Court specified a vital minimum; rather, it has inquired into the reasonableness of a litigant's claim that the lack of access to socio-economic goods threatens life, dignity, or physical integrity. The vital minimum is translated into political action only after analysis of reasonableness in the circumstances, and not by a straightforward assessment of whether a quantified minimum has been provided or not.

While the U.S. Constitution is usually taken not to contain positive rights to socio-economic resources,[67] state constitutions often enshrine rights of this kind. The New York State Constitution provides that the "aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[68] In *McCain v. Koch,* a New York case dealing with emergency housing for homeless families with children, the court held that once an obligation to provide emergency shelter had been made by the state, the shelter had to meet 'reasonable minimum standards.'[69] This 'welfare clause' was relied on to assert a right of families with children to emergency shelter, in circumstances where the state already bore an obligation to needy families under the federal Aid to Families with Dependent Children Act. The trial court held that while the constitutional welfare clause did not require in explicit terms that shelter must be provided for needy families, once the obligation to provide shelter had been assumed by the state in statute it was required to ensure that shelter met 'reasonable minimum standards'.[70] The language here suggests a minimum core approach, but note that the court's conclu-

66. The notion of 'legitimate diversity' is used in the international human rights field to describe the range of options that are open to states in meeting their human rights obligations under international law. Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and 'Constitutional Justice,'* 19 EUR. J. INT'L L. 769 (2008); Mathias Kumm, *Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality Requirement, in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131 (GEORGE PAVLAKOS ED., Hart Publishing 2007). It has been borrowed, in South Africa, to describe the approach to judicial scrutiny of administrative actions intended to protect and fulfill rights. *See* Richard Stacey, *Democratising Review: Justifiability as the Animating Vision of Administrative Law,* 22 S. AFR. PUB. L. 79 (2007); Cora Hoexter, *The Future of Judicial Review in South African Administrative Law,* 117 S. AFR. L. J. 484 (2000). *See also* the South African Constitutional Court decision in *Bato Star (Pty) Ltd v. Minister of Envtl Aff.*, 23–25, 29–33 (2004) (S. Afr.). In the USA, courts have been loath to review social legislation for anything more than rationality, accepting that the federal Constitution does not impose any specific courses of action on the legislature. *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 60 (1992).

67. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

68. N.Y. CONST. art. XVII, § 1.

69. *McCain v. Koch,* 484 N.Y.S. 2d 985, 987 (N.Y. Sup. Ct. 1984).

70. *Id.*

sion flows from the state's legislative assumption of the obligation to provide a basic minimum rather than from the inherent nature of the right. Moreover, the judgment turns on what is reasonable in the circumstances, rather than on some universal and inflexible minimum core.

The South African Constitution explicitly sets reasonableness as the standard of scrutiny for the state's rights-fulfilling conduct. Each of the rights to housing, health care, social assistance, food, and water set out in sections 26(1) and 27(1) must be read in the context of the state's obligation in sections 26(2) and 27(2) to take reasonable steps, subject to available resources, to achieve the progressive realization of each right. The South African Constitutional Court has stated that determining the content of each of the rights—that is, working out what each right entitles citizens to—must proceed on the basis of a determination of what it would be reasonable for the state to provide, within its available resources, in order to realize the right progressively.

In *Minister of Health v. Treatment Action Campaign*, the Court held that "section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)."[71] Similarly in *Khosa v. Minister of Social Development*, the Court held that "the ambit of the [section] 27(1) right can . . . not be determined without reference to the reasonableness of the measures adopted to fulfill the obligation toward those entitled to the right in [section] 27(1)."[72] The right to water, as the Court stated in *Mazibuko,* "does not require the state upon demand to provide every person with sufficient water" but requires the state take reasonable steps toward meeting water needs.[73]

The judicial assessment of reasonableness involves neither an articulation of the content of the right in question, nor the imposition of a structural order setting out in precise terms how officials should act. In this way, the administrative law model avoids the pitfalls of regulatory formalism and judicial enmeshment. The extent of the court's involvement is to point out where official conduct is unreasonable. Moreover, the administrative law model is likely to lead to the same outcome as the minimum core approach in many cases: a failure to provide socioeconomic resources below the minimum level at which human life is possible or at which dignified human functioning becomes possible is probably unreasonable. If this is the case, though, there is no need to define the minimum core beforehand. All the hard work can be done by the criterion of reasonableness.

2. The Flaw in the Administrative Law Model

The judicial application of the administrative law model reorients the official pursuit of economic and social rights towards reasonableness. Unreasonable conduct violates rights, while reasonable conduct

71. *Treatment Action Campaign*, *supra* note 52, at 29.
72. *Khosa v. Minister of Soc. Dev.*, (2004) 6 SA 505 (S. Afr.) at para. 43.
73. *Mazibuko*, *supra* note 10, at 25.

upholds rights. All the courts are required to do is make an assessment of reasonableness, steering a middle course between holding rights non-justiciable and creating an immediately enforceable and absolute duty to provide socio-economic goods.[74] The drawback, as critics of the administrative law model have pointed out, is that the criterion of reasonableness is an amorphous and empty one that ultimately provides no guidance to state officials without the intervention of the courts.[75] Reasonableness on its own carries no evaluative standard that can be parlayed into a workable model of implementing rights. As it stands, the model allows only courts to make a finding on the reasonableness of state policy. The criterion of reasonableness and judicial determinations of unreasonableness do not identify an accessible, substantive standard by which officials involved in efforts to realize economic and social rights can by themselves, without the intervention of courts, ensure that their conduct is reasonable. It seems that courts must be involved in the administration of the administrative law model of rights enforcement because they have the final word—perhaps the only word—on what is reasonable.

This flaw in the administrative law model can be remedied if institutions other than the courts are empowered to determine the reasonableness of rights-fulfilling conduct. This requires filling in the criterion of reasonableness with evaluative content that is available to and accessible by officials in the regulatory system, and not within the exclusive knowledge of the courts. The ideal vehicle for communicating this evaluative content is the social legislation enacted to promote the economic and social rights in question. Social legislation not only sets out the formal rules and processes with which official conduct must be congruent, but also embodies the substantive objectives that the protection and fulfillment of economic and social rights are meant to achieve. In this way, reasonableness is filled in with evaluative criteria.

By reorienting official conduct to the substantive objectives of social legislation rather than an amorphous criterion of reasonableness in the exclusive province of the courts, official conduct may be brought more into line with the constitutional norms on which the legislation rests. Official conduct should, in other words, be consistent not only with the formal rules that constrain official behavior, but also with the substantive objectives against which official conduct is to be evaluated. A focus on reasonableness alone does not provide a solution to the problem of persistent and recurring non-compliance with social legislation, because it provides no standards of evaluation. If reasonableness is to work in holding officials to economic and social rights obligations,

74. SUNSTEIN, DESIGNING DEMOCRACY, *supra* note 6, at 233.

75. Bilchitz, *Towards a Reasonable Approach to the Minimum Core*, *supra* note 5, at 10. *See also* Langford & Stacey, *Water*, *supra* note 15, at 34–37; Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. HUM. RTS. 448, 457 (2004); Carol Steinberg, *Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence*, 123 S. AFR. L. J. 264 (2006); Nick de Villiers, *Procedural Fairness and Reasonable Administrative Action within the Social Assistance System: Implications of Some Settled Class Actions*, 22 S. AFR. J. HUM. RTS. 405 (2006); BILCHITZ, *supra* note 5.

courts must pay attention to the evaluative standards contained in legislation intended to advance economic and social rights.

D. *The Catalytic Court*

The minimum core approach and structural injunctions both take a view of economic and social rights as strong, while the administrative law model takes a weaker view. Remedies for rights violations can themselves be weak or strong. Katharine Young suggests a typology of five judicial responses along these continuums, arguing that a "catalytic" court can "lower the political energy" needed to reorient government action toward the protection of rights by drawing on each of the models in the typology as circumstances require.[76] The objective of the catalytic court is to decenter the courts in the project of economic and social rights fulfillment and locate the court as a partner, with the other branches of government, in that project. This is a promising approach to the extent that it offers an alternative to approaches that see courts as the primary drivers of rights fulfillment.

The weakest type of review Young describes is "deferential" review, in which courts defer to the democratic authority of the elected branches and are slow to find public authorities in violation of obligations to fulfill economic and social rights. Deference to the elected branches may nevertheless concentrate political energy on the failures or shortcomings of a government's economic and social rights programs even without finding a violation of rights.[77]

"Conversational" review sees courts engaging slightly more, although without ordering government to act in particular ways. The conversational approach to rights enforcement has been alternately described as the "new Commonwealth" model, acknowledging the fact that in some Commonwealth jurisdictions—the UK and New Zealand primarily—courts have no power to overturn legislation on the grounds of unconstitutionality.[78] The "notwithstanding" clause in the Canadian Charter of Rights and Freedoms places Canadian courts in the category of conversational review by fostering "dialogue" between the court and the legislature.[79] The idea is that the "correct" interpretation of rights and how to enforce them emerges from the contested space in which all branches of the political system contribute their own ideas.[80]

"Experimental" review builds on this conversation. Courts and administrators maintain vigorous and close scrutiny of the effects of policy and legislation, attempting to identify and find solutions to fail-

76. YOUNG, *supra* note 7, at 172–74.

77. *Id.* at 147.

78. Gardbaum, *supra* note 18.

79. Rosalind Dixon, *The Supreme Court of Canada,* Charter *Dialogue and Deference*, 47 OSGOODE HALL L. J. 235 (2009); Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007).

80. YOUNG, *supra* note 7, at 147.

ures of rights-implementing programs as they arise.[81] Experimentalist courts do not make "strong" orders that prescribe the steps officials must take, but in bringing parties to a dispute together and requiring some form of meaningful engagement between them, hope to nudge government toward adopting new approaches to the realization of rights.

The stronger types of review on Young's typology are "managerial" review, which captures the imposition of structural interdicts in response to institutional reform litigation, and "peremptory" review, in which courts assert their superiority over other branches by striking down legislation or government policy as unconstitutional or interpreting it in ways that make it constitutional.[82]

The catalytic court chooses a response from within this typology of review in each case. Young suggests that this choice is influenced most immediately in each case by "the particular obstructive stance taken by the government, that underlies the complaint of an economic and social rights infringement."[83] This approach is a significant advance over the approaches to judicial review that argue for the application of either one or the other of the approaches described above. Young's approach allows courts to be flexible in their responses to administrative recalcitrance, adapting to the circumstances as necessary rather than bound to a particular type of review or order. What the catalytic court model lacks, however, is an indication of the standards of scrutiny against which threats to or infringements of economic and social rights will be assessed, whichever form of review is followed. Young's model does not offer a substantive decision rule courts can follow in deciding what constitutional economic and social rights oblige a government to do in each case. As a result, the catalytic courts model offers an account of the form of judicial review, but not an account of its substantive limits. Courts are directed as to what form of review to follow—deferential, conversational, experimental, managerial, or peremptory—based on the circumstances of government recalcitrance, but are left with the same impoverished and norm-insensitive models of rights enforcement that each of these existing models brings.

This gap can be filled by a clear focus on the constitutional norms, expressed as economic and social rights, which social legislation encodes in rules for official conduct. Whichever type of review a catalytic court chooses, it should exercise that type of review mindful of the need to maintain the connection between constitutional commitments and efforts to meet them, both in the text of social legislation and in

81. *Id.* at 150. *See also* Sabel & Simon, *Minimalism and Experimentalism in the Administrative State*, *supra* note 19; Sabel & Simon, *Destabilization Rights*, *supra* note 19.

82. YOUNG, *supra* note 7, at 193–94.

83. *Id.* at 177, 189. Young considers four explanations for the choice of review type before suggesting that courts are most influenced by the attitude of the government itself. *See also* Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?* 122 S. AFR. L.J. 325 (2005); Chris Hansen, *Making it Work: Implementation of Court Orders Requiring Restructuring of State Executive Branch Agencies*, *in* CHILD, PARENT AND STATE 224 (S. Randall Humm ed., 1994).

official implementation of social legislation. This requires the recognition of the role that social legislation plays in communicating constitutional commitments to officials. The objective of courts under any of these types of review should be to ensure that officials understand and appreciate the normative objectives encoded in statutory and regulatory frameworks for economic and social rights fulfillment, and to ensure that official conduct is congruent with those normative objectives. A catalytic court that is focused on normativity decenters the judiciary in the way that Young favors. By orienting officials toward an understanding of the constitutional foundations of social legislation, officials come to appreciate the substantive objectives of the legislation that governs their behavior and should reduce, in turn, the need for courts to actively manage the bureaucratic and regulatory processes by which social legislation is implemented.

Young's catalytic court approach envisages a dynamic court, flexible and responsive to changing political and institutional circumstances. The approach does not address the lack of attention to constitutional normativity that already plagues the existing models of rights enforcement, however. Adding an element of normativity to Young's dynamic court approach, in the form of attention to the way the social legislation both communicates constitutional commitments to officials and sets rules for their conduct in enforcing constitutional rights, introduces a "regulatory constitutional" character to this dynamic approach. This model depends, however, on a theoretical unpacking of legislation's function as a mechanism for communicating constitutional norms to officials. The idea of normative congruence provides this theoretical substance and offers a new perspective from which to assess the constitutional acceptability of a state's efforts to achieve economic and social rights.

II. Dynamic Regulatory Constitutionalism

A. *The Idea of Normative Congruence and the Role of Social Legislation*

The principle of congruence is a core feature of the rule of law. It requires that the exercise of public powers and the performance of public functions by government officials be congruent with rules set out beforehand. More specifically, a commitment to the rule of law requires that the law must set and enforce limits to a society's institutions of power and impose substantive legal limits on government which serve to both constrain and guide the behavior of state officials.[84] Without such rules and without adherence to them, society will be ruled according to the whims of the men and women in power and not according to law. The principle of congruence implies and presupposes a body of positive legislation that sets limits to and describes the modalities of government power.

84. Brian Z. Tamanaha, *The Tension Between Legal Instrumentalism and the Rule of Law*, 33 Syracuse J. Int'l L. & Com. 131 (2005). Carol Harlow, too, describes the rule of law as requiring 'bounded' government: Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 Eur. J. Int'l L. 187, 207 (2006).

I use the principle of congruence and the attention to positive law that it implies in offering a theoretical account of the gap in the existing models of economic and social rights enforcement. This new theoretical perspective on the place and function of social legislation lies at the heart of dynamic regulatory constitutionalism. I start with Lon Fuller's canonical account of the principle of congruence.

1. The Normative Extension of the Principle of Congruence

Accounts of the rule of law usually offer one or other "laundry list" of principles of legality.[85] The majority of the principles describe the characteristics that laws themselves must have if they are to be effective, as a technology of governance, in creating order in society. The first seven of Fuller's principles are of this nature. But Fuller goes on to say that the eighth principle, which he calls the principle of congruence, is "the basic principle of the Rule of Law."[86] The principle of congruence does not describe a characteristic that laws must have but rather demands that whatever the law says, official conduct must be congruent with it. The question of official congruence with previously declared rules can only arise once rules have been declared. In this sense the rule of law relies heavily on positive legislation that set the rules for official conduct. Legislation has a central place in Fuller's conception of the rule of law.[87]

Further, the principle of congruence is the basic principle of the rule of law because if officials do not comply with rules, it will not matter that the rules meet the requirements of the other seven principles of legality. However, faithful to the first seven principles of legality, these positive laws are the effectiveness of law as a technology of government will be undermined if officials act incongruently with those laws.

In requiring only that officials comply with previously declared rules, whatever they are, the principles of congruence and the rule of law generally carry no specific substantive content.[88] The rule of law as such does not commit a government to the protection of economic and social rights, for example, or to the protection of private property, liberty, or market capitalism.[89] Fuller and others argue that the rule of

85. Laundry lists are presented by, for example, A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188–95 (MacMillan 8th ed. 1915) (1885); FULLER, *supra* note 9, at 33-38; Joseph Raz, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 211 (Oxford Univ. Press 1979); Lawrence Solum, *Equity and the Rule of Law*, *in* THE RULE OF LAW – NOMOS XXXVI 120 (Ian Shapiro ed., N.Y.U. Press 1994); and TOM BINGHAM, THE RULE OF LAW (Penguin 2010). See, *e.g.*, Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, *in* THE RULE OF LAW AND SEPARATION OF POWERS 154 (Richard Bellamy ed., Ashgate 2005).

86. FULLER, *supra* note 9, at 214.

87. Sánchez-Cuenca, *Power, Rules, and Compliance*, *in* DEMOCRACY AND THE RULE OF LAW 69 (José María Maravall & Adam Przeworski eds., Cambridge Univ. Press 2003).

88. T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 L.Q. REV. 221 (1999).

89. For arguments about the close connections between the rule of law and the latter three political ideals, *see, e.g.*, FRIEDRICH HAYEK, LAW, LEGISLATION AND LIBERTY: VOLUME 1: RULES AND ORDER (Univ. of Chicago Press 1973); Richard Epstein, *Property Rights*

law is the specific excellence of law, allowing it to achieve whatever purposes a society chooses to put it to. The specific excellence of knives, by analogy, is sharpness:[90] whether a knife is used to chop vegetables or commit murder, it will do neither well unless it is sharp. A carpenter will do better in constructing buildings when his tools are sharp, whether those buildings are orphanages or hideouts for thieves.[91]

A content-free conception of the rule of law is one that accepts that whatever purposes laws have those purposes will be more effectively achieved if the legal system upholds the principles of the rule of law. Economic and social rights and clearly articulated statutory goals of social justice can, in principle, be translated into rules that confine and direct government action just as easily as any other set of substantive commitments. The idea of normative congruence accepts that the rule of law does not carry any inherent substantive content, but insists that in those circumstances where a legal system or a statutory framework is committed to a set of normative principles or foundations, the conduct of officials and agencies must be congruent not only with formal rules for conduct but also with these normative principles. The principle of normative congruence has two components.

The first is the idea that where social (or other) legislation is animated by a set of normative commitments, the statutory and regulatory rules for official conduct must bear a connection to this normative foundation. There must be a rational connection between the formal terms of the rules that govern official behavior and the normative commitments that underlie the regulatory project. Compliance with the rules, in other words, must tend toward the fulfillment of the project's normative commitments. Where rules are not closely connected to these normative foundations, official conduct may be incongruent with the normative elements of social legislation even though it is not incongruent with the formal rules themselves.

The second component is that officials charged with implementing the rules for the realization of economic and social rights must themselves have a clear idea of the normative commitments that underlie the regulatory project. Every legal framework for the fulfillment of rights must be implemented at various sites by a handful of institutional actors. These include policy-makers at high levels of the executive, administrators and officials in the bureaucratic machinery of a regulatory system, and the courts of review asked to examine the conduct of these actors. Where these actors do not share a uniform understanding of the normative bases of the regulatory system they are involved in enforcing, or do not share a common understanding of how those nor-

and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State (presented at the Mont Pelerin Society Conference on The Market Economy in the Welfare State, Aug. 17, 2009), http://www.mps2009.org/files/Epstein.pdf; RICHARD EPSTEIN, DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW (Harvard Univ. Press 2011); and Ronald Cass, *Property Rights Systems and the Rule of Law*, SSRN ELECTRONIC PAPER COLLECTIONS, http://www.ssrn.com/abstract_id=392783.

90. Raz, *supra* note 85, at 225–26.

91. FULLER, *supra* note 9, at 153.

mative principles inform and infuse specific rules for official conduct, courts may find that official conduct is inconsistent with governing or empowering law. Circumstances of official intransigence, incompetence, or inattentiveness, on the basis of which Young's catalytic court will select an appropriate type of judicial review, result from varying degrees of normative incongruence between official understandings of law and the law's normative foundations.

A legal system's normative commitments stand as a guide to institutional action. A shared and common understanding of how normative commitments do in fact guide action is important to ensuring that the full range of public efforts in following rules and implementing social legislation is oriented to the same core objectives. The value of a legal system's "visionary unity," Frank Michelman argues,

> is the value of having all the institutional sites in which the legal order resides . . . pulling in the same and not contrary directions, working in ultimate harmony (which is not to say without difference and debate) toward the vision (the elements of which must always be open to interpretation) of a well-ordered . . . society depicted in very broad-brush fashion by [its] founding values.[92]

2. Achieving Normative Congruence: Dynamic Regulatory Constitutionalism in Action

Judicial processes and court orders that foster visionary unity or normative congruence across the legal system, from the constitution all the way through to the coalface of regulatory and administrative action, hold the promise of driving the administrative fulfillment of economic and social rights. A number of court decisions around the world stand as examples of the effective employment of dynamic regulatory constitutionalism as a mechanism of leveraging one or the other of the existing models of rights enforcement toward normative congruence and more effective fulfillment of economic and social rights. At the same time, however, there are examples of judgments in cases complaining of failures to fulfill economic and social rights that do not generate unity (or fail to overcome disunity) as to the constitutional foundations of regulatory rules. In the sections that follow I describe cases in Colombia, Argentina, South Africa, and the United States as examples of both dynamic regulatory constitutionalism, and as examples of missed opportunities to rely on dynamic regulatory constitutionalism to move the administrative state toward normative congruence.

a. Colombia's Displaced Person's *Case*

In Colombia, two Constitutional Court cases have imposed extensive structural injunctions in efforts to end systematic non-fulfillment of economic and social rights. The *Displaced Persons* case has been far

92. Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution, in* CONSTITUTIONAL LAW OF SOUTH AFRICA 37–38 (S. Woolman et al. eds., Juta 2d ed. 2005) (describing in particular the implications of the commitment to the rule of law in South Africa's Constitution).

more successful in bringing structural changes to government regulation than the *Health Care* case, however. The *Displaced Persons* case was a response to the crisis of internally displaced persons (IDPs) caused by Colombia's long-running civil violence and armed opposition. Without an adequate state response to their plight, IDPs' rights to a decent life, personal integrity, health, social security, and education are all threatened, on a massive scale and in a prolonged and ongoing manner.[93] The source of these violations is not the conduct of a single entity or institution, but the structural problems that affect the entirety of the state's policy response.[94] In 2004, the Colombian Constitutional Court responded to a *tutela* seeking a declaration that this constituted an unconstitutional state of affairs, specifying the minimum levels of protection owed to internally displaced persons and the state's corresponding duties in protecting threatened rights, and ordering the action to be taken in guaranteeing these rights.[95] The Court was thus asked to issue a structural injunction to remedy the unconstitutional state of affairs resulting from inadequate state policy and thereby protect the minimum levels of a range of economic and social rights.

The *Displaced Persons* case was not the first time the courts had dealt with internal displacement. The Constitutional Court itself had found violations of the rights of IDPs on seventeen previous occasions. Each of these orders resulted in a remedy narrowly tailored to the particular rights violations in each case. While these remedies may have brought relief to the individual complainants in each case, the large scale of internal displacement and the frequent and persistent resort to the Court for assistance under the *tutela* cried out for a more fundamental and structural response to the problem. In one of these earlier decisions, the Court flagged the need to "tilt the political agenda" in the direction of solving the problem of internal displacement, as a matter of priority.[96]

The Court recognized that the state was not responsible for the situation of internal displacement but that it nevertheless bore a constitutional obligation to protect the rights of those affected and adopt an appropriate policy response.[97] In working out the levels of protection that the rights in the Constitution obliged the state to provide with respect to IDPs, as a class of people whose rights were specifically threatened, the Court relied extensively on Colombia's international law obligations and in particular the UN's "Guiding Principles on Displaced Persons."[98] The Court infused constitutional economic and social rights with content on the basis of these international principles and used this fuller understanding of constitutional rights to engage

93. Sentencia T-025/04, *supra* note 11, § 2.2.

94. *Id.* § 5.2.

95. *Id.* § 2.1.

96. *See id.* § 5.2.

97. *Id.*, § 6.

98. Commission on Human Rights, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998), http://daccessods.un.org/access.nsf/Get?Open&DS=E/CN.4/1998/53/Add.2&Lang=E.

with the state in developing a structural—rather than an individualized—response to the rights violations suffered by IDPs.

The Court's method of engagement with the state was innovative; it embarked on a process of gathering information from the government in order to assess the state of its policy responses to the problem. The Court did this by ordering several of the state agencies and institutions implicated in responding to internal displacement to respond to a questionnaire regarding their respective approaches to IDPs. In analyzing the government's responses, the Court's aim was to determine whether features or omissions in the design, implementation, monitoring, or evaluation of state policy had contributed significantly to official blindness to the rights violations experienced by IDPs.[99] The Court's conclusion, on the basis of the evidence supplied by the state, was that official policy was essentially on the right track and had in recent years made considerable efforts towards reducing the numbers of IDPs and mitigating the rights-infringing consequences of internal displacement. It was further apparent from the state's responses to the Court's request for information that the state was committed to addressing the problems of internal displacement. The Colombian state thus shared the Constitution's vision of protecting a vulnerable group of people—i.e., IDPs—from the consequence of inadequate access to socio-economic resources.

The root cause of the structural problem, then, was not the lack of a shared vision of the Constitution's normative commitments, but an inability on the part of policymakers to translate that vision into an effective policy response. In addressing this policy failure, the Court's judgment focused the government's attention on the principles encoded in the "Guiding Principles." Reference to these principles provided direction and structure to the state's policy response, in two ways. First, it highlighted the need for the state to gather information about the socio-economic needs of IDPs. What the policy response was missing was a set of indicators or benchmarks according to which the neediest individuals could be identified and their situations addressed. Second, and more generally, the principles directed the state towards an understanding of how constitutional rights are to be interpreted in the context of IDPs, and what level of material provision or minimum standards those rights guarantee for people in situations of internal displacement. The Court's order ultimately included an instruction to the state to establish subsidy programs to meet the basic health, food, and shelter needs of IDPs.[100]

This case is an outstanding example of dynamic regulatory constitutionalism in action. In the first place, the Court assessed the state's existing policy response to a situation of ongoing rights violations in light of a set of instructions, in the form of international legal principles, about how to deal with that specific problem. These principles provided the substantive criteria against which state policy was evalu-

99. Sentencia T-025/04, *supra* note 11, § 6.
100. Landau, *supra* note 3, at 226.

ated, and the Court's order for the state to establish subsidy programs was influenced by these principles. Second, the dynamic process by which the Court sought to gain an understanding of the state's policy position demonstrates a commitment to assessing the state of official understanding of the core constitutional commitment to social justice and to ensuring that officials share with the Constitution, legislators and the Court itself, a vision of the substantive objectives of the catalogue of economic and social rights as they affect IDPs.

b. Colombia's Health Care *Decision*

The Court's attempt to rely on a similar model of adjudication in regard to Colombia's health care system, however, was undermined by the government's active opposition to the vision of public health embedded in the Constitution and the Court's failure to assert more clearly the Constitution's vision of health care. In 1993, Colombia laid the statutory foundation for a national health care system. Law 100 provided for a private health insurance scheme, closely regulated by the state. Regulators were to set rates, define deductibles and premiums, set the content of packages and benefits, and define who was eligible for coverage.[101] Fifteen years after its passage, the health care system still fell short of the details set out in the legislation. Many of the benefits clearly set out in the law were simply not being provided to people, unless an order of court had compelled officials to do so. In addition, officials had not specified levels of benefits mandated by the legislation nor outlined the state's obligations to provide health care services. These "grey zones" left individuals with no sense of the level of health care they were entitled to.[102] In 2008 alone, over 140,000 *tutelas* for the protection of the right to health were filed in the courts, with the majority of these claims relating to health treatments and services that should have been provided under Law 100.[103] The problem with health care in Colombia was that the legal rules for the provision of health care were simply not being complied with, and courts were being relied on to an unbearably large degree to compel compliance with the law in individual cases.

In 2008, the Constitutional Court embarked on a project to reform the health care system and eliminate the structural causes of non-compliance with the health care legislation. It began in much the same way as it did in the *Displaced Persons* case, gathering information from the state and private health services providers on their respective health care efforts.[104] There are two elements of the judgment that are relevant to an assessment in light of dynamic regulatory constitutionalism. The first is that the Court did order a series of structural changes to the health care system, some of which were little more than a restatement of injunctions contained in the legislation. For example, Law 100 estab-

101. Yamin & Parra-Vera, *supra* note 25, at 433.
102. *Id.* at 435.
103. *Id.* at 436, 443.
104. *Id.* at 445–46.

lished two tiers of health care insurance—a contributory scheme and a subsidized scheme—with different levels of coverage. The law envisaged that the two tiers would be amalgamated into a single comprehensive health care system, with similar benefits available to all participants of the scheme.[105] By 2008, this had still not been done, so the Court ordered the national Commission on Health Regulation to take the necessary steps to unify the two tiers of health coverage, and to do so according to a unification plan that was transparent, participatory, and based on relevant indicators and benchmarks.[106] The Court also ordered the Commission to update the benefits included in the scheme, immediately and annually, through a process inclusive of the views of the medical community and health care consumers.[107]

Although these changes were ordered without a declaration of a state of unconstitutional affairs,[108] the Court made clear that the foundation of its order was the need to bring to an end a situation in which the institutions of state responsible for health care provision had failed to put in place a system for the effective realization of the right to health without recourse to the *tutela*.[109]

The second relevant aspect of the judgment is the way the Court chose to emphasize the rights that the structural reforms of the system were meant to fulfill. The Court reiterated its earlier declaration that economic and social rights entitle people to a level of provision that guarantees a vital minimum.[110] The right to health care, in turn, contains an essential core that is guaranteed to all persons on an immediately enforceable basis, while the non-core elements of the right are subject to progressive realization.[111] The Court thus adopts the UN CESCR's minimum core approach and implies that the health care system must, no matter what else it does, prove capable of fulfilling this core content. The minimum core content of the right to health thus becomes the evaluative standard by which the state's health care plan is to be assessed for its constitutional acceptability.

The Court did not follow through with this apparent embrace of the minimum core doctrine, however, because it refrained from giving any indication of what the essential core of the right to health is.[112] Instead, it left it to a "broad public dialogue" to establish the contours of the essential core. In doing so, however, the Court gave no indication of the normative principles that should guide this dialogue. Dynamic regulatory constitutionalism requires that the dialogue or engagement between courts, government, and society proceed on the basis of some account of the normative foundations on which the regulatory endeavor rests and to which the programmatic realization of

105. Landau, *supra* note 3, at 224; Yamin & Parra-Vera, *supra* note 25, at 446–47.
106. Sentencia T-760/08, *supra* note 24, § 6.1
107. *Id.*
108. Yamin & Parra-Vera, *supra* note 25, at 446.
109. Sentencia T-760/08, *supra* note 24, § 2.2.
110. *See* Sentencia T-426/92, *supra* note 55.
111. Sentencia T-760/08, *supra* note 24, § 3.
112. *Id.* § 3.5.2.

rights should be directed. In this case, by emptying the right to health of all content and leaving the determination of its essential, minimum content to processes of public debate, the Court left a vacuum open to any number of competing norms. By opening the right to health up to public definition without setting any normative parameters to that process, the Court abdicated its obligation to articulate and maintain a focus on the constitutional norms rights express.

As it happened, the process of public definition of the right to health was hijacked by the government and by the health services providers, unsurprisingly resulting in a reformulated health care system unresponsive to individual health needs. The medical community is made up of extremely well organized and largely self-interested health care corporations. The consumers of health care, on the other hand, are a non-organized mass of individuals, with few economic means and mostly with no access to the information needed to formulate coherent submissions about the content of a right to health.[113] Public debate about rights between these two groups reflected this imbalance in power and allowed health care providers themselves to determine the content of rights likely to be asserted against them.

More concerning still was the response of the government itself. After declaring a state of social emergency, President Alvaro Uribe issued decrees filling in the gaps in the health care system, circumventing Court-ordered public debate. What is worse, the decrees limited access to specialized care, reduced the grounds for the enforcement of the right to health through the *tutela*, and created a technical body to determine medical necessity within the context of the concept of a vital minimum, removing this decision from the control of attending doctors.[114] The Constitutional Court later ruled that Uribe's declaration of a state of emergency and his subsequent decrees were unconstitutional,[115] but the full impact of the government's attempts to define the right to health narrowly has yet to be seen.

The principle of dynamic regulatory constitutionalism requires that, at the very least, courts make clear the constitutional commitments at which government conduct in pursuing rights must be aimed. While the process of articulating these commitments may be one of dialogue and engagement between the branches of government, it would seem to be a mistake for the courts to withdraw from this process entirely and leave the government and its agents a blank slate on which to inscribe the normative content of economic and social rights. In the *Health Care* decision, the government's ultimate non-compliance with the Court's structural injunctions can be explained as a function of the fact that the government was allowed the room to commit itself to a set of normative objectives that are different from those underlying the structural changes the Court ordered.

113. Yamin & Parra-Vera, *supra* note 25, at 455–56.

114. *Id.* at 453.

115. Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2010, Sentencia C-252/10 (Colom.), http://www.corteconstitucional.gov.co/relatoria/2010/c-252-10.htm.

c. Argentina's Benghalensis *Litigation*

The *Benghalensis* litigation in the mid-1990s in Argentina was an attempt to hold the government to the provisions of a 1990 statute (Law 23,798) setting out the foundations of a national response to the scourge of HIV/AIDS.[116] The statute made the broad declaration that the fight against HIV/AIDS was a national priority, but, more specifically, mandated the establishment of a comprehensive national policy for treating and preventing the disease and appointed the national department of health to implement the law and coordinate the efforts of provincial health departments.[117] The legislation was, however, incompletely implemented in the years immediately following its passage. The personnel of the national health care administration were split into two groups: those eager to establish a comprehensive national HIV/AIDS policy, and those opposed to both official recognition of the disease and policy efforts to address it.[118] This normative disunity was due partly to President Carlos Menem's Vatican-friendly social conservatism,[119] and partly to the fiscal conservatism required by World Bank structural adjustment programs and the Inter-American Development Bank.[120] Rather than increasing public health spending, the Menem government privatized and decentralized health care. Despite the passage of national framework legislation focusing national attention to HIV/AIDS and mandating a comprehensive national policy response to it, by the mid-1990s there was no national policy in place and the fight against the disease could not be said to be a priority of public spending.

The "ideological blockage" to the implementation of the legislation was a result of the competing normative considerations driving the government officials charged with implementing the legislation. The political objectives the government was intent on pursuing were quite opposed to those set out in the legislation in the first place. The *Benghalensis* case was accordingly filed by a collective of lawyers, civil society groups, and activists to compel government compliance with Law 23,798, relying heavily on a right to health and corresponding state obligations introduced by Argentina's 1994 constitutional reforms.

The courts' responses were consistent with dynamic regulatory constitutionalism. Judgments were driven by the desire to remove the ideological blockages driving the state away from fulfilling constitutional commitments, and to refocus official energy on the constitutional foundations of Law 23,798. The first court order was issued less than a week after the matter was first heard, ordering the national health department to provide viral load tests and ARV treatment within 48 hours. This temporary injunction was subsequently confirmed by the trial court and upheld by two superior courts. In the final hearing of the matter in the Supreme Court of Argentina, the Court affirmed the view

116. Law No. 23798, Sept. 14, 1990, [26972] B.O. 2 (Arg.).
117. *See* Bergallo, *supra* note 31, at 1620.
118. *Id.* at 1621.
119. *Id.*
120. *Id.* at 1622.

that Law 23,798 was based on the foundation of the right to health, acknowledged the fundamental nature of the right to health itself, and pointed out the interconnections between the right to life and the right to health. Finally, the Court indicated how an interpretation of rights and the rules set out in Law 23,798 defined the government's duty to adopt a comprehensive and coordinated national plan for the treatment of HIV/AIDS.[121] The Supreme Court, here, demonstrated an awareness of both of the components of normative congruence; namely, congruence between social legislation outlining government's obligations and underlying constitutional norms, and congruence between official conduct and the constitutional foundations of social legislation.

While the courts' structural orders for compliance with the terms of Law 23,798 had an immediate effect on the applicants seeking access to HIV/AIDS treatment, the broader and more long-lasting impact was in bringing normative coherence to state policy. The political agenda shifted in the wake of the litigation towards an acknowledgment of HIV/AIDS as a matter of national priority. The administrative resistance to the adoption of a policy could no longer be sustained in light of a Supreme Court decision affirming the connections between fundamental constitutional rights and the statutorily mandated national HIV/AIDS treatment program. As political priorities shifted, the budget allocation to HIV/AIDS grew from $19 million to $70 million in 1998, and the program expanded from Buenos Aires across the country.

The structural orders in the *Benghalensis* litigation were undergirded by a clear expression of the links between constitutional rights to health and life, fundamental national commitments to combatting HIV/AIDS, and the terms of Law 23,798. In making these links clear, the courts were able to reorient national political ideologies and priorities towards Argentina's commitment to health care. The success of the court's structural interventions thus occurred in the context of a successful realignment of official priorities with the relevant law's underlying normative commitments.

The post-*Benghalensis* litigation was far less successful, however. After the new HIV/AIDS legislation was in place, declaring the fight against the disease as a national priority and setting measures to be taken in that fight, claims that the state had failed to provide the level of service set out in the law continued to come to the courts. This second generation of HIV/AIDS litigation turned on more straightforward complaints of non-compliance with existing law and policy on the part of the government and its administrative officials. Representative of this wave of litigation was the *AV* case, which sought an order of court compelling the continued provision of ARVs despite the economic

121. Asociación Benghalensis y Otros, *supra* note 31, at pt. V.

chaos that hit Argentina in 2001–2002.[122] The court upheld these claims, issuing injunctions requiring the provision of ARVs to the complainants according to the terms of the legislation and national regulatory framework. As increasing numbers of people found the public supply of ARVs drying up, the courts issued increasing numbers of injunctions. Indeed, health care officials advised patients to approach the courts for injunctions in order to get ARVs. As in Colombia, access to health care under the framework legislation became impossible without the assistance of the courts and an individualized injunction.[123]

These cases persisted until at least 2010.[124] Judgments in these matters made no attempt to account for the persistence of non-compliance with the terms of the HIV/AIDS law. Instead, approached as simple cases of non-compliance with the terms of legislation and HIV/AIDS treatment policy, the judgments did no more than require officials to adhere to the formal content of the previously declared rules. In turn, officials adhered to these rules only once ordered to do so by the court. The result was a situation in which the constitutional right to health, translated into a statutory entitlement to anti-retroviral medication, was threatened or infringed but for the intervention of the courts. The systemic causes for these violations of rights were never considered nor addressed, and as a result, the violation of rights continued except in those cases where individuals were able to win an injunction from the courts.

In this second generation of HIV/AIDS litigation in Argentina, the courts' failure to do anything more than order formal compliance with regulatory rules, or to look into the underlying causes of persistent non-compliance with legislation, resulted in a situation of long-standing regulatory recalcitrance and judicial enmeshment in the provision of health care services. A judicial strategy based on dynamic regulatory constitutionalism would have led the courts to engage with officials in an effort to understand whether the reasons for persistent non-compliance was perhaps a similar ideological blockage, not in the executive branch but among the administrative officials responsible for implementing the law. The process of engagement might reveal, on the other hand, that while there is a shared vision of the constitutional imperatives of the regulatory framework, the impediment to effective realization of these imperatives is something like the lack of resources. Without an approach based on dynamic regulatory constitutionalism, however, the courts may not make these discoveries.

d. New York State Courts

In the United States, the New York Court of Appeals case dealing with the state's obligation under the New York State Constitution to

122. Juzgado Nacional de Primera Instancia en lo Civil y Comercial, Sala II [1a Inst.] [Federal Court of First Instance in Civil and Commercial Matters], 27/2/2004, "A.V. y otros c. Ministerio de Salud de la Nación / amparo," Expte. No. 3223/02 (Arg).

123. Bergallo, *supra* note 31, at 1634–35.

124. *Id.* at 1635.

ensure adequate compensation for judges, highlighted the need for government action to adhere to the state's constitutional commitments: "When this Court articulates the constitutional standards governing state action, we presume that the State will act accordingly."[125] Even though the right to judicial compensation is only tangentially an economic and social right (and more a question of separation of powers), the court's expression of the principle of shared vision and institutional unity is important. Moreover, the principle has been relied on by state courts in adjudicating the economic and social rights included in state constitutions. In cases dealing with the state constitutional rights to free, adequate, or substantially equal public education, for example, state courts have increasingly focused on whether public school systems provide an education that meets the demands of contemporary society. The constitutional standard is "the adequacy of outcome," not "the equality of inputs."[126] Reorienting officials to the former standard, rather than the latter, is part of the judicial effort in these cases to ensure that regulatory efforts are sensitive to the substantive objectives at the heart of state constitutional rights to education and thus more likely to ensure the longer-term regulatory fulfillment of rights to education.

In *McCain v. Koch*,[127] the New York Supreme Court paid close attention to the welfare clause in the New York State Constitution and the provisions of New York's Aid to Families with Dependent Children Act in order to describe the obligations that state officials bore to homeless families. The Court's approach is consistent with the idea of normative congruence, since the evaluative standard for the state's obligation to provide shelter comes from close attention to the statutory framework, and not from a contextually unmoored exegesis of the constitutional right alone. On appeal, the New York Court of Appeals confirmed that the courts do indeed have the power to set minimal standards for the achievement of statutorily imposed obligations to provide shelter, provided that they are fashioned as a temporary measure until the legislature adopts its own minimum standards.[128] The basis of these interim minimum standards, the court held, was the common law requirement of habitability.[129] Once formal minimum standards are set, there can be no question that the state can be held by the courts to their terms.[130]

125. Maron v. Silver, 925 N.E.2d 899, 915 (N.Y. 2010).

126. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 205 (2003). *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Rose v. Council for Better Education, 790 S.W.2d 186 (K.Y. 1989); Connecticut Coalition for Justice in Education Funding Inc v. Rell, 990 A.2d 206 (Conn. 2010); and Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (for state cases relying on a more normatively grounded conception of adequate education).

127. McCain v. Koch, 484 N.Y.S. 2d 985 (N.Y. Sup. Ct. 1984).

128. *Id.* at 923.

129. Hershkoff & Loffredo, *supra* note 2, at 951–52.

130. *McCain*, 484 N.Y.S. 2d at 923.

There are two elements of the court's approach here that align it with dynamic regulatory constitutionalism, both of which are rooted in the court's attention to the background legal framework for state action. First, the obligation to provide a minimum standard is not free-standing but is rather a result of the legislation requiring aid to families with dependent children. This federal statutory obligation, combined with the state obligation under the welfare clause to provide assistance to the needy, imposes the obligation on the state to provide emergency shelter for families and, with that obligation firmly embedded in this combined reading of the state constitution and federal legislation, to provide shelter of a minimally acceptable standard.

Second, the court identified the standards of "minimal habitability" in the common law, itself an expression of the "standards which this society at this time finds acceptable within the meaning of the word shelter." In this case the common law, rather than legislation, played the critical role in defining the standard of shelter to which a right to welfare could be said to commit the state to providing. The Court drew from positive law, rather than some inherent minimum core content of economic and social rights, in adopting an interim standard of minimal shelter pending the formal promulgation of rules for the provision of shelter. As it turned out, once the formal rules were adopted they were more stringent than the court's rules.[131]

e. South Africa's Engagement Orders

In *Mazibuko v. City of Johannesburg*, a city policy committed to deliver 6,000 liters of water per household per month, free of charge. A number of residents in one of Johannesburg's poorest suburbs challenged the policy as irrational, unreasonable, and in violation of the state's obligation in terms of section 27(2) of the constitution to take "reasonable" steps to fulfill the right to water. The basis of the complaint was that each household was given the same quantity of free water, regardless of how many people lived there. The Constitutional Court rejected the challenge and upheld the City's water policy, finding that it fell "within the bounds of reasonableness and therefore [was] not in conflict with either section 27 of the constitution or with the national legislation regulating water services."[132]

In adjudicating the matter, the Constitutional Court concerned itself only with the question of whether the City's plan for delivering water to the people of Johannesburg demonstrated an appropriate understanding of the constitutional foundations of the regulatory system. The City, moreover, proved to be an engaged and committed partner in the project of rights-fulfillment, supplying extensive evidence of its policymaking process to the court. Although the court admitted that the City's "comprehensive and persistent engagement" in this regard may have been spurred by the litigation, the result was nonethe-

131. *Id.*

132. *Mazibuko and Others v. City of Johannesburg and Others* 2010 (4) SA 1 (CC) at 5 para. 9 (S. Afr.).

less that the City had taken steps, in response to citizen reliance on constitutional rights, to conform its policy to the constitution.[133] On the basis of the evidence provided by the City, the court concluded that the City's policy actions were based on an acceptable understanding of the constitutional principles at the heart of the regulatory system. That understanding, moreover, was shared by other institutional actors in the regulatory system, most obviously legislators, subordinate rule makers, and the judges themselves. The court did not make an attempt to step into the shoes of the administrators and policy-makers and formulate either a comprehensive water delivery policy or stipulate an amount of water that the City must provide to each citizen or household. In confining itself to the question of whether the City's conduct was driven by a constitutionally acceptable understanding of the objectives of the regulatory endeavor, the Court focused on the "administrative issues" rather than the "technical" ones.[134] This response is an example of dynamic regulatory constitutionalism.

In other decisions, the Constitutional Court's insistence on engagement has come at the expense of a focus on constitutional values. Engagement orders were made in three cases from the same era as *Mazibuko*, twice involving eviction from public land and buildings (*Olivia Road*[135] and *Joe Slovo*[136]) and once in a matter involving the closure of temporary refugee camps (*Mamba*[137]). In *Olivia Road* and *Joe Slovo*, groups of people were occupying buildings and land owned by public authorities. In both cases, the public authorities concerned sought the eviction of the occupiers because they wanted to redevelop the land for urban renewal projects. The relevant legislation, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 (the PIE Act), requires evictions to happen only on the order of a court. In *Olivia Road* the Johannesburg High Court issued an injunction prohibiting eviction, while in *Joe Slovo* the Cape Town High Court granted an eviction order. Both cases were appealed to the Constitutional Court. In both cases, the Constitutional Court ordered the public authorities to "engage meaningfully" with the occupiers to ensure that the occupiers were not left homeless by eviction, and that their constitutional rights to housing were protected. In *Olivia Road,* the court's engagement order directed the parties to have regard to "the values of the Constitution" in coming up with a solution,[138] and although the settlement ultimately agreed to by the parties was hailed as a success, this was in large part due to the fact that the City had, by the time the case was litigated in the Constitutional Court, abandoned

133. *Id.* at 48 para. 96.

134. R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 388 (Brookings 1983).

135. *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2008 (5) BCLR 475 (CC) (S. Afr.).

136. *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (S. Afr).

137. *Mamba v. Minister of Social Development,* unreported, CCT 65/08 (S. Afr.).

138. *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg* 2008 (5) BCLR 475 (CC) at 5 para. 1 (S. Afr.).

the practice of evicting people from inner city buildings as part of its redevelopment policy.[139]

In *Joe Slovo*, the Court upheld the eviction order, but nevertheless ordered the public authorities involved to engage meaningfully with the evictees in order to ensure adequate alternative housing. Since the proposed development in this case would have affected 20,000 people, the Court imposed a strict timetable for engagement and set guidelines for the substance of the engagement.[140] Reaction to this order was ambivalent at best, with several commentators critical of the court's lack of attention to the substance of the right and the flexibility afforded to the public authorities in complying with the engagement order.[141]

The third case, *Mamba*, involved the government's response to a wave of xenophobic attacks on foreigners during 2008. Temporary shelters were established to house people displaced by these attacks, but when after only a short while the government announced plans to close these shelters, the residents of the camps approached the courts for relief. The Constitutional Court, in a very brief judgment that is not reported in the law reports, made an order in substantially similar terms to that in *Olivia Road*. The outcome was vastly different to *Olivia Road,* however, as the government simply began closing camps, interpreting the engagement order as requiring nothing more than informing camp residents of the camps' imminent closure.

As a mechanism or model for the enforcement of economic and social rights, engagement orders will remain disconnected from the constitutional foundations of rights unless courts emphasize the substantive objectives to which engagement must be directed. In *Mazibuko*, the court was called on to decide whether the City's decision to provide a certain monthly amount of water to each household free of charge was "reasonable" within the meaning of the constitutional right to have access to sufficient water. The City's policy obligations already articulated the substantive parameters within which the City's conduct was to be assessed, and there was no complaint that the City had failed to meet these parameters. The only question to be answered was whether the City's positive, substantive commitments were congruent with the underlying constitutional commitment to provide access to sufficient water.

Without a clear articulation of substantive commitments in positive law, or a clear statement by a court of the substantive limits and purposes of engagement between the public and government, a court order that the state engage with the people may allow the state to comply with the order while nevertheless avoiding constitutional obligations and undermining constitutional rights. The flexibility that engagement

139. Brian Ray, Residents of Joe Slovo Community v Thubelisha Homes and Others: *The Two Faces of Engagement*, 10 HUM. RTS. L. REV. 360, 368 (2010).

140. *Id.* at 365–66; *see also* Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, UTAH L. REV. 797, 834–35 (2009).

141. *See, e.g.*, SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 308–311 (Juta 2010).

affords, and the indeterminacy of the engagement process, might well mean that an engagement order becomes a "meaningless platitude."[142] The *Mamba* case serves as a warning of this possibility. In *Olivia Road*, the City came around to a similar vision of the right to housing as both the PIE Act and the Constitutional Court, in spite of the Court's failure to articulate that vision as a guiding principle of engagement.

Engagement orders create a process by which state officials can be led towards an understanding of the constitutional foundations of the regulatory schemes they are mandated to implement, and to develop policies that are sensitive to constitutional obligations. Where the courts do not maintain the focus on underlying constitutional commitments and ensure that the process of engagement is inflected by these commitments, there is little reason to believe that the outcome of the engagement process will advance commitments to economic and social rights. As a strategy of economic and social rights enforcement, engagement orders will be significantly strengthened by the focus on normativity that dynamic regulatory constitutionalism brings to constitutional adjudication.

3. The Importance of Congruence

These examples show that a lack of shared vision is not only a violation of the principle of congruence and thus of the rule of law, but may also lead to a failure to consistently achieve the objectives of social legislation. Enforcing the requirement of normative congruence as a fuller conception of the rule of law has the benefit of fostering unity around a vision of the regulatory project and improving the likelihood that official pursuit of economic and social rights will uphold the reasons for which we value those rights in the first place. Moreover, the idea of normative congruence provides a standard against which to evaluate and assess official conduct in realizing rights. It fills the evaluative gap in the existing models of economic and social rights adjudication and avoids the problems of regulatory formalism that come from a mechanical and normatively unmoored implementation of regulatory rules. Filling that gap, however, requires focus on positive law–whether in the form of social legislation as in South Africa and Argentina, the common law as in New York, or a country's international law commitments as in Colombia. Positive law of this kind proves a crucial link in both the project of fulfilling the constitutional commitment to economic and social rights and in articulating the substantive criteria against which the congruence of official conduct can be assessed.

To add substance to the idea of normative congruence, it is worth locating its roots in Fuller's own conception of the rule of law. The important point in this respect is the distinction Fuller draws between rules understood as a form of managerial control, and law understood as a mechanism of regulating the exercise of power.[143] The former is a

142. Ray, *supra* note 139, at 367 (quoting Sandra Liebenberg, *Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down*, BUSINESS DAY (June 22, 2009)).

143. FULLER, *supra* note 9, at 207.

means by which a subordinate is directed toward accomplishing the tasks a superior wants accomplished, while the latter establishes a different sort of relationship between law-giver and subject. While a managerial superior gives orders that her subordinates follow in order to achieve a specific task, the citizens of a law-bounded society obey the laws as they pursue their own plans and conduct their own lives. Managerial directives regulate the relationship between the superior and the subordinate, but law regulates the multiplicity of relationships between numerous people. Law, Fuller says, is not like management. Government does not issue orders that direct citizens to achieve specific tasks, but rather guarantees the integrity of the system within which citizens interact with one another.[144]

The distinction is important. A principle which demands that "the actions of the superior conform to the rules he has himself announced" makes no sense in the management relationship, since managerial directives cannot bind managers.[145] But law binds government as much as it binds the members of a society governed by law. Fuller is less concerned with law as a technology of governance here than with a consideration of how the law's binding effect on government affirms a view of persons as thinking, rational beings: government is limited by the obligation to explain how its particular laws or acts of political power are consistent with or justified by previously declared and general rules.[146] Because law takes individuals to be rational and thinking beings capable of conforming their behavior to the rules law sets, government's own acts and decisions must be capable of being justified and defended to the rational thinking people they affect on the basis of general principles to which the government is already committed.[147]

To this I add the idea that where a government acts in ways that do not advance its previously declared normative commitments, it runs a similar risk of forfeiting the justificatory basis for its actions. Where the rules that govern official behavior are part of a regulatory framework that is committed to constitutional or policy goals, or which rests on a substantive conception of justice, the link in the chain of justification has to be forged with reference to those normative commitments. Government action that is not congruent with normative commitments, or

144. *Id.* at 210.

145. *Id.* at 208.

146. Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78-79 (H.H. Gerth & C. Wright Mills eds., Oxford Univ. Press 1958); MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 9 (Max Rheinstein & Edward A. Shils eds., Harvard Univ. Press 1954). The legitimation of government action and laws through rational explanation on the basis of formally declared rules fits quite comfortably into Max Weber's formal legal rationality as a "basic legitimation" or "inner justification" of power.

147. Allan, *supra* note 88, at 231–32. A similar distinction has been described in the South African legal transformation from the authoritarian apartheid state to a constitutional democracy based on human dignity, equality and freedom. *See* Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31 (1994); *see also* David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture*, 14 S. AFR. J. HUM. RTS. 11 (1998).

is not justifiable in light of those commitments, is no less a threat to the rule of law than a failure to act in terms of the formal rules a government declares beforehand. The normative extension to the principle of congruence involves congruence with previously declared rules as well as with the normative commitments that the previously declared rules purportedly serve.

B. *Social Legislation as a Tool of Intra-Governmental Communication*

The shared or common vision of the normative foundations of a regulatory system, which the second component of the idea of normative congruence demands, is not a feature or a characteristic of the rules and principles of a particular society's laws, but rather a product of the minds of the people who operate the processes and institutions of the legal system. Dynamic regulatory constitutionalism is, at its core, the project of working out how legislators, policymakers, and officials understand the constitutional foundations of social legislation, and ensuring that these institutional actors have as coherent and as closely shared a vision of these normative foundations as possible.

Along with the first component of the idea of normative congruence, we can begin to see a fuller picture of how the model of dynamic regulatory constitutionalism defines the role of courts in enforcing social legislation. The specific rules that social legislation sets for official conduct should be seen against the background of the more abstract normative commitments that motivate that legislation in the first place. The regulatory or statutory prescriptions for official conduct, for example, in the provision of water supplies or the provision of health care services or housing, can be understood as attempts to achieve broader goals of social justice expressed as rights to sufficient water, health care, and housing. The role of the courts in the enforcement of social legislation, then, is to maintain the focus on the normative commitments that underlie the legislation, both by affirming the connections between constitutional commitments and rules for official conduct, and by ensuring officials understand the constitutional foundations of the rules that govern their conduct.[148]

In this light, social legislation can be understood to fulfill an important function not only in stating the rules that officials must comply with, but also in communicating fundamental normative commitments to officials.[149] While legislation, or law more generally, is often understood as a tool for regulating society, an alternative understanding is that legislation that imposes limits to executive and administrative

148. Helen Hershkoff takes a similar view of the role that state constitutional economic and social rights impose on state courts, arguing that courts are in the business of ensuring that government uses its powers to move closer to the achievement of the constitutionally prescribed, substantive goals of socio-economic provision. *See* Hershkoff, *Positive Rights and State Constitutions*, *supra* note 2, at 1138, 1145; *see also* Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1901, 1912–913 (1998–1999).

149. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

power regulates government conduct rather than social behavior. HLA Hart takes the former view, seeing law as "a means of social control" and a "guide to conduct."[150] This is certainly true for criminal law, say, but legislation empowering administrative agencies and officials is of a different nature since it applies to public officials rather than private citizens.[151] Legislation dealing with resource allocations and general policy directives "can only be addressed to administrative agencies" and are intended primarily to direct and control the behavior of the administrative branch: it constitutes a set of "internal government instructions."[152] Indeed, even the decision to include economic and social rights in a constitution is an instruction to the legislature, limiting certain kinds of legislation and compelling others.[153]

Understanding legislation of this type as primarily a tool of intra-governmental communication, rather than a tool of social control, shifts the rule-of-law inquiry from one focused on strict adherence to formal rules to one assessing the efficacy of communication between legislators and administrative officials and the level of coherence between their respective understandings of the purposes of legislation. Where legislation is intended to communicate normative commitments to officials, and to set the parameters for official conduct, the requirement of normative congruence becomes the focal point of adjudication. Enforcing social legislation is a matter of maintaining close oversight of agency action and ensuring that administrative decisions and actions in terms of legislation remain congruent with the normative commitments that underlie social legislation, and does not stray from the formal decision rules set out in the legislation.

The idea of normative congruence and the conception of social legislation as a tool for intra-governmental communication thus combine to outline a role for the courts in enforcing economic and social rights and upholding social legislation against officials. The courts' primary objective should be to lead officials toward an understanding of the normative content of the rules governing their behavior. This process of engagement between courts and officials is dynamic, ongoing, and iterative. Courts engage substantively with officials in attempting to work out whether officials' understandings of the regulatory system's

150. H.L.A. HART, THE CONCEPT OF LAW 39, 134 (Oxford Univ. Press 1961).

151. *See* F.A. HAYEK, LAW, LEGISLATION, LIBERTY: RULES AND ORDER 137 (Univ. of Chicago Press 1973) ("Much of the greatest part of what is called public law, however, consists of administrative law, that is the rules regulating the activities of the various administrative agencies."). *See also* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). Dan-Cohen distinguishes between "decision rules" as those that govern the functions officials must perform, and "conduct rules" which govern private behavior. He locates the roots of this distinction in the classical jurisprudence of Jeremy Bentham, *A Fragment on Government* (quoted by Dan-Cohen at 626–27).

152. Rubin, *supra* note 149, at 371, 374.

153. Hershkoff & Loffredo, *State Courts and Constitutional Socio-Economic Rights*, *supra* note 2, at 929; Hershkoff, *Positive Rights and State Constitutions*, *supra* note 2, at 1156 ("These positive rights are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve constitutionally fixed social ends.").

normative foundation differs from the other branches' understandings of these normative foundations. Indeed, courts may discover that officials have no idea of the normative foundations of the rules they are enjoined to follow. Identifying points of difference, if any, is a first step in realigning official conduct under social legislation to the legislation's normative objectives and fulfilling the constitutional rights that express those objectives.

Conclusion

In directing courts toward upholding the two components of normative congruence, dynamic regulatory constitutionalism does not favor a particular model of economic and social rights enforcement. Rather, it suggests that whichever model a court chooses to enforce economic and social rights, whether structural injunctions, the minimum core doctrine, the administrative law model, or a catalytic court approach, the court should ensure that both of the components of normative congruence are upheld. Courts should assess, in other words, whether there is congruence between the formal rules for the pursuit of economic and social rights and the constitutional foundations of those rights, and second, whether officials responsible for implementing legislation understand the normative content of the rules that govern their conduct.

In upholding the first component, courts will strike down as unconstitutional any legislation that is not congruent with normative commitments of constitutional economic and social rights. This is not a particularly groundbreaking conclusion, since it is uncontroversial to suggest that courts have the power to strike down legislation when it infringes constitutional rights. However, where legislation or regulations encode rules that are not consistent with the constitutional foundations of economic and social rights, government compliance with this legislation will fail to uphold or advance rights even though it is formally compliant with rules. The first component of normative congruence highlights the problems of regulatory formalism, pointing out that formal compliance with rules that are not committed to the normative project or economic and social rights fulfillment may explain why regulatory schemes persistently fail to deliver the promise of economic and social rights.

The second component of normative congruence extends the focus on normativity onto the attitudes of officials. Dynamic regulatory constitutionalism requires judicial engagement with officials on the normative substance of their decisions in order to ascertain whether officials themselves are committed to the project of realizing economic and social rights. Where courts find that officials have a markedly different understanding of the regulatory scheme's normative foundations, or none at all, the courts' role is to remedy this visionary disunity and lead officials toward an understanding of precisely how the normative commitments a legal system expresses in constitutional rights and

in social legislation inflect and inform the rules that govern official behavior.

To the extent that the existing models of judicial economic and social rights enforcement all fail to pay due regard to the importance of normativity in the enforcement of rules, dynamic regulatory constitutionalism fills a gap in the existing literature. Dynamic regulatory constitutionalism shares the flexibility of the catalytic court approach, suggesting that courts adopt whichever model of rights enforcement or remedy is most appropriate in the circumstances, as long as due regard is given to the normative foundations of the regulatory endeavor. Dynamic regulatory constitutionalism offers an interpretive perspective for judicial engagement with the other branches of government, rather than a discrete or complete alternative model for the enforcement of economic and social rights.

The idea of normative congruence requires that whatever a legal community's fundamental commitments, the project of maintaining the exercise of power within the limits of the law must take these fundamental commitments into account. Constitutional economic and social rights express normative commitments, but are also a manifesto for government action. Social legislation both communicates normative commitments to officials and sets the public agenda for meeting them. Judicial review of official conduct for its compliance with this legislation should be contoured by a commitment to upholding both the formal rules and the fundamental constitutional values on which they are based. Dynamic regulatory constitutionalism allows courts to do so by participating as a partner with legislators, policymakers, and state officials in the public project of realizing economic and social rights.