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# *A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review*

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*The tensions that are often thought to exist between democracy and constitutionalism are especially pronounced with respect to the entrenchment of economic and social rights. Within current understandings of judicial review, courts appear to lack the competency and the legitimacy for economic and social rights adjudication. In this article, I draw on the South African Constitutional Court's experience with justiciable economic and social rights to present a typology of judicial review, which incorporates deferential, conversational, experimentalist, managerial, and preemptory stances. I suggest that these five stances are part of a general judicial role conception that I term catalytic, because it opens up the relationship between courts and the elected branches and lowers the political energy that is required in order to achieve a rights-protective outcome. Not only is this role conception able to account for a more accurate portrayal of economic and social rights adjudication; I argue that it is also normatively desirable under defined conditions. Finally, I contrast this role conception with others to show that a court's role in economic and social rights adjudication is dependent on its perception of itself as an institution of governance as well as on the institutional rules that support that perception.*

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## 1. Introduction

Economic and social rights include the rights to access food, water, housing, health care, education, and social security—what might approximate the basic goods and services necessary to secure a dignified existence.<sup>1</sup> The terms themselves are indeterminate. They chart a path to protection that may diverge into a renegotiation of the legal rules of property; or of the way in which the legal system responds to differences in gender, race, disability, and nationality; or of the way in which law shapes the delivery of services, the planning of cities, and the functioning of hospitals, schools, transport, and industry. The indeterminacy of economic and social rights is not simply one of language; it belongs to law's unpredictable relationship with experience.

Here lies the fundamental concern for the adjudication of economic and social rights. In enforcing the duty to respect, protect, or promote economic and social rights—indeed, in being a duty holder themselves<sup>2</sup>—courts are called on to decide on the nature of such rights, their scope, and the obligations that flow from them. Facing the complexity of the myriad institutions that impact on the material terms of social life, they must discharge their role in enforcing the positive arrangements that determine who does what in order to secure economic and social rights.

Two prescriptions are currently offered to address this concern: the first counsels avoidance; the second, an embrace. On the one hand, courts should stay out of the contestations around economic and social rights, which are better employed as the moral “talk” of politics or, at most, as unenforceable guides for legislative or administrative decision-making.<sup>3</sup> The institutional features of courts that make resource-management decisions so difficult are said to threaten either a judicial usurpation of the representative branches or an abdication of the judicial role.<sup>4</sup> Such concerns, suggests Frank Michelman, may provide “moral cover for a choice that moral ideal theory condemns”—namely, the continued exclusion of economic and social rights from constitutional law. The second argument, on the other hand, suggests that courts should acknowledge that they are adjudicating economic and social rights in their everyday application of private law. “Every constitutional court,” claims Mark Tushnet, “enforces some vision of social or economic rights”<sup>5</sup> when they negotiate the terms of property, contract, or tort law.

<sup>1</sup> See the variety of enumerations in, for example, the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., art. 25, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, arts. 6–15; Sth. Afr. Const., ss 24–29.

<sup>2</sup> For the separate analysis of the duties to respect, protect, and promote rights, see, e.g., the General Comments issued by the United Nations Committee on Economic, Social and Cultural Rights. For an elaboration of the duties of the state to “respect, protect, promote and fulfil the rights in the Bill of Rights,” see Sth. Afr. Const., s 7.

<sup>3</sup> The institutional model of entrenching economic and social rights as “directive principles of state policy,” follows this analysis: see, e.g., Constitutions of Ireland, art. 45, India, Part IV; and Ghana, chapter 6.

<sup>4</sup> Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT'L J. CONST. L. 663, 683 (2008). For an influential summary of these concerns, see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

<sup>5</sup> MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 227 (2008).

The apparent opposition of these prescriptions loses its force when balanced against the variety of ways in which constitutional courts respond to the complaints of economic and social rights infringements—a variety now seen as representative of “weak” courts.<sup>6</sup> Furthermore, once we provide detail to this variety, we can loosen the hold of an alternative, third, prescription: that courts should adjudicate by assuming the posture of “weak” review. I provide this detail by engaging one court in context—the South African Constitutional Court.

In section 2 of this article, I present the variety of adjudicative stances employed in economic and social rights cases as a five-part typology. In adopting deferential review, the court assumes that the greater decision-making authority is placed on the elected branches in interpreting economic and social rights and determining the obligations that arise. In conversational review, the court relies instead on the ability of an interbranch dialogue to resolve the determination of rights. A third type of review is experimentalist review, whereby the court seeks to involve the relevant stakeholders—government, parties, and other interested groups—in solving the problem that obstructs a provisional benchmark of the right. Managerial review occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right, supervising its protection with strict timelines and detailed plans. Finally, peremptory review is involved when the court registers its superiority to interpret the right and in commanding and controlling an immediate response.

Importantly, these types do not sit along a plane of “strength” and “weakness” of judicial review because the power that the court deploys—its ability to enforce, with approximate finality, a predetermined norm—is multidimensional. The mode of review is coextensive with a number of different institutional responses and is specified by the interpretation of the right at hand, the evaluation of the government’s actions, and the design of a remedy.

Many aspects of one type of review are shared by those of another, and the five are not exhaustive. In section 3 of this article, I suggest that all five—deferential, conversational, experimentalist, managerial, and peremptory stances—are part of a general judicial role conception, which I term catalytic. The catalytic function of the court offers a principled yet highly contextual resolution to the challenges of adjudicating constitutional economic and social rights, which is knitted into the judicial culture and the wider constitutional culture.<sup>7</sup> I suggest that by engaging in a catalytic function, a constitutional court can open up the relationship with the elected branches and lower the political energy required in order to achieve a rights-protective outcome.

The catalytic metaphor helps to demonstrate that the Constitutional Court of South Africa deploys this variety of forms of judicial review as a deliberate choice, and that certain criteria guide this choice. I suggest that the choice of the form of review turns

<sup>6</sup> TUSHNET, *WEAK COURTS, STRONG RIGHTS*, *supra* note 5. Michelman acknowledges the potential of this variation, outside of U.S. constitutional law; see Michelman, *Explaining America Away*, *supra* note 4, fn 71.

<sup>7</sup> For a helpful presentation of this relationship in South Africa, see Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT’L J. CONST’L L. 106 (2008).

on the particular government action that has led to an alleged infringement of a right and only indirectly on the content of the right itself. For example, the Constitutional Court's explicit reluctance to define the normative "content" of economic and social rights—to articulate, for example, the juridical implications of a dignity-based interpretation of the right to housing or health care, or even to accept the very possibility of a judicial interpretation via a "minimum core" or otherwise "self-standing" right<sup>8</sup>—is matched by an implicit reluctance to be held to a specific form of review. However, I will show that where the lack of access to a good or service, which would secure an economic and social right, is affected by equality concerns, then the Constitutional Court's stance is more likely to be interventionist in character, suggesting a liberal-egalitarian impulse (rather than, for example, the communitarian or libertarian alternatives) in interpreting economic and social rights.

Finally, I contrast the catalytic stance with three other judicial role conceptions: that of a detached, an engaged, and a supremacist court. This presentation of role conceptions is, therefore, a second typology of economic and social rights adjudication that overlays the first. My theorization of role conceptions moves beyond the initial presentation of specific judgments and remedies by showing how a court's adjudication of economic and social rights will be linked to the court's perception of itself as an institution of governance and how this perception helps it to comprehend, and address, complaints. The theory also suggests that the typology, initially drawn from South Africa, can help us to understand the role of other countries' courts in the adjudication of economic and social rights.

## 2. A typology of judicial review

The function of a typology is familiar to the comparativist. It can classify previously disjointed features and present clusters of analysis that were previously kept apart. Nonetheless, in advancing new clusters, and the insights they deliver, typologies may create blind spots and contradictions. The models of review, discussed below, have grown out of appraisals of the "success" of a long, and living, tradition of public law cases, combining recent experience of South Africa with that of the United States and elsewhere.<sup>9</sup> My typology of judicial review, and of judicial role conceptions, does not so much herald a new form of judicial review for economic and social rights as it affirms and organizes developments tracked elsewhere, which are renewed by comparative study.<sup>10</sup>

<sup>8</sup> For a discussion, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

<sup>9</sup> This article bridges debates about "success" in judging and litigation, which have followed separate streams of literature. Once we accept "success" outside of an appraisal of the immediate win/loss case result, our appraisal is influenced by the time and space selected, as well as by normative criteria. I offer here a short-term and nation-based assessment of the actions of the South African Constitutional Court.

<sup>10</sup> The precursor in the United States is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

The South African Constitution's commitment to economic and social rights may not be unique in a survey of constitutional models around the world.<sup>11</sup> Even in the United States, we find examples of "constitutive" societal commitments, and even of judicial support for economic and social rights, both in the presently abandoned Supreme Court equal protection and due process jurisprudence,<sup>12</sup> as well as the more specific and explicitly entrenched examples from state constitutional law.<sup>13</sup> Yet South Africa clearly enjoys one of the most extensive and explicit constitutional permissions for judicial involvement. As a critical part of its transformative ambition, the South African Constitution of 1996 protects the rights of everyone to access housing, health care, food, water, social security, and education.<sup>14</sup> The government is obliged to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of those rights.<sup>15</sup> Such rights trigger both negative and positive obligations, in that they impose duties of noninterference with fundamental material interests and of positive provision of the goods and services necessary to secure them.<sup>16</sup> Each duty may give rise to complaints that are justiciable.<sup>17</sup> Courts are

<sup>11</sup> Other prominent examples can be found in the constitutions of Brazil, Colombia, India, Germany, and others. See, generally, COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo & Theunis Roux., eds., 2006) (describing the former three, and South Africa, as "new" democracies).

<sup>12</sup> Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?* 545 *Syr. L. Rev.* 1 (2005); see, further, Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969).

<sup>13</sup> Helen Herschkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131 (1999).

<sup>14</sup> S. Afr. Const. 1996 ss 26 (housing), 27 (health care, food, water and social security), 29 (education). See also s 28 (children's rights).

<sup>15</sup> S. Afr. Const. 1996 ss 26(2), 27(2).

Section 26 provides that:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 27 provides that:

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.
3. No one may be refused emergency medical treatment.

<sup>16</sup> Compare S. Afr. Const. 1996 s 26(3) (prohibition of arbitrary evictions) with s 26(1) (rights of access to adequate housing); See also s 7(2) ("The state must respect, protect, promote and fulfil the rights in the Bill of Rights").

<sup>17</sup> Justiciability was debated by drafters and confirmed, explicitly, by the Constitutional Court in its *Certification Judgment: Ex Parte Chairperson of the Constitutional Assembly: re Certification of the Constitution of the Republic of South Africa* 1996, (4) SA 744 (CC).

vested with a broad discretion to grant “just and equitable” remedies.<sup>18</sup> Hence, the structural terms of the Constitution, as well as the constitutional culture that was responsible for its entrenchment and that continues to agitate around it, litigate it, and hence legitimate it, are all part of this conferral of judicial power.

So far, the Constitutional Court has adjudicated claims of housing, health care, water, and social security rights,<sup>19</sup> as well as secondary claims for electricity, sanitation and lighting, and access to education.<sup>20</sup> In each of these cases, the Constitutional Court has advanced distinctive techniques for dealing with the challenge of economic and social rights. First, the Constitutional Court has been rigorous in examining claims of institutional self-certainty, peering into the rationale of legislatures or of bureaucracies when they make decisions that obstruct, limit, or condition the delivery of social goods and services. This has been achieved by inquiring into the purported reasonableness of government actions, assessed in context against the substantive promise of each right. Second, the Constitutional Court has ordered diverse remedies in order to address detected unconstitutionality, attempting to bring about change at different levels in different sectors. The Constitutional Court has done so declaring particular infringements and incompatibilities, by ordering engagement between the parties, by issuing timelines and other terms of delivery, by suspending its orders, or by reading in “curing words” to legislation.

The measures of such variety lie in the judicial approaches to interpretation, the degree of scrutiny of the government’s action, and the remedy ordered. Such measures are helped by Tushnet’s depictions of “strong” and “weak” courts and the forms of judicial review that accompany them.<sup>21</sup> Within this classification, strong courts tend toward rulelike interpretations of rights, heightened degrees of scrutiny, and muscular remedies. The assertive—and, perhaps, supremacist—practice of the U.S. Supreme Court is the case in point.<sup>22</sup> Weak courts, on the other hand, issue contextualized standards for interpreting rights, relaxed scrutiny, and, if liability is still found, relatively tentative and/or declaratory forms of relief. Importantly, the distinction of strong/weak is not represented as a dichotomy but as a continuum.<sup>23</sup> Strong rights

<sup>18</sup> S. Afr. Const. 1996, ss 38, 172(1)(b). See *infra*, text accompanying note 85.

<sup>19</sup> See *infra*.

<sup>20</sup> The latest case, *Nokotyana v. Ekurhuleni Metropolitan Municipality* [2009] ZACC 33, Case No CCT 31/09, involved rights to toilets and safety lighting as part of the right of access to adequate housing. See also *Joseph v. City of Johannesburg* [2009] ZACC 30, Case No CCT 43/09, in which the provision of electricity was argued to belong to the housing right, although ultimately held to fall within the duty of municipalities to provide basic services: S. Afr. Const. 1996, ss 152, 153; In *Head of Department: Mpumalanga Department of Education v. Hoërskool Ermelo* [2009] ZACC 32, the Court held that the head of a provincial education department may override school policy on language, on reasonable grounds, which include considerations of the rights of access to education: S. Afr. Const., s 29.

<sup>21</sup> TUSHNET, WEAK COURTS, STRONG RIGHTS, *supra* note 5.

<sup>22</sup> Two examples are *Cooper v. Aaron*, 358 US 1, 18 (1958), and *City of Boerne v. Flores*, 521 US 507 (1997). These cases are expressions of the U.S. Supreme Courts’ own supremacy in “exposition of the law of the Constitution,” over legislatures’ own interpretations: see *id.*, 21–22.

<sup>23</sup> *Id.*, 36 (suggesting the possibility of “blended” systems, with “strong-form review with respect to some constitutional issues, weak-form review with respect to others”).



can coexist with weak remedies and vice versa. A quadrant of judicial stances is established, with a range of possible approaches that categorize different courts in different jurisdictions or, at least, the different judgments in the different courts of different jurisdictions.

Tushnet's descriptive model is also potentially prescriptive. Strong articulations of rights and remedies in the area of economic and social rights may bring courts into disrepute and instigate a popular backlash within civil society against the very interests that the rights purport to protect. Weak courts, on the other hand, may combine muted expressions of rights with a more relaxed insistence on remedies, to protect themselves and the broader beneficiaries of constitutional rights. While weak courts may fail, therefore, to protect the immediate interests at hand, the dialogue they engender can assist those in a similar position by effecting change in laws and policies over the longer term. Nonetheless, a weak court has a tendency to become strong, after the precedents of prior cases have accumulated and the court has become invested in the results of its own decisions. The rights-protective advantages of weak courts may therefore be short-lived.

I argue that the weak/strong classification, while useful to comparative constitutional law, is suspended from the subtleties that contextualized study can provide. Attention to the degrees of strength and weakness of courts may obscure the variety of interactions between the courts and other institutions in resolving the challenges behind justiciable economic and social rights. Weak review may bear some parallels with the style of judicial deference or dialogue explicitly adopted by many courts,<sup>24</sup> but it fails to cast light on the matrix of interbranch and extrabranched relations that are required to secure economic and social rights. Strong review bears similarities to a more heavy-handed approach to judicial review by supremacist apex courts but may, just as easily, describe the very different managerial, hands-on approach by lower courts.<sup>25</sup> Departing midway between these approaches, which is neither weak nor strong (neither in Tushnet's sense, nor in more conventional understandings of judicial power), is the judicial promotion of party-driven experiments within the scaffolding of certain deliberative requirements.<sup>26</sup>

Indeed, the overall variety of the types of review I survey here, eschews classification in terms of judicial power or normative finality. The following five positions of deferential, conversational, experimentalist, managerial, and preemptory review open a scene of action, beyond that of the courts and the elected branches, to situate the Court within a web of relations involving litigants, beneficiaries of rights who are similarly situated to the litigants, other parties who will be harmed or helped by the judicial action, and the wider public. I demarcate these types of review and describe the relations between them; often, one type of review has arisen in response to the perceived disadvantages of another. Often, too, these advantages and disadvantages are

<sup>24</sup> See *infra*, section 2.1–2.2.

<sup>25</sup> See *infra*, section 2.4–2.5.

<sup>26</sup> See *infra*, section 2.3.

perceived, as such, by assessing their ability to address the broad aims of protecting fundamental material interests—in line with dignity—that are encapsulated by economic and social rights. By connecting them in this way, this typology is irreducibly normative in scope.

## 2.1. Deferential review

Deferential review is a model which belongs to the tradition of defending judicial review in democratic terms. In exercising deferential review, courts give credence to the democratic authority and epistemic superiority of, and textual conferral of tasks to, the legislative and executive branches.<sup>27</sup> While democratic authority is the best rationale for deference to the legislature, as the most electorally accountable and representative branch, epistemic authority is more fittingly assigned to the executive, as the branch equipped with the most technical resources and information. Epistemic authority is also a good rationale for deference to legislatures in countries where the legislative branch maintains its own experts, technical staffs, and resources, independent of the executive.

In deferring to the legal and epistemic authority of the elected branches, a court is able to address the double-pronged legitimacy and competency critiques applied to the adjudication of economic and social rights. By giving attention to the comparative competence of other institutions, deference suggests that the decision maker, to which the court defers, possesses important information, experience, and accountability that help it decide relevant questions correctly or, at least, in an abler fashion than the court could do.<sup>28</sup> Deference, particularly epistemic deference on expertise grounds, therefore involves both a positive statement about the abilities of the executive or legislature as a decision maker and a negative statement about the weakness of the court as a decision maker relative to these branches.<sup>29</sup> Although not usually given as a justification for deference, this relational feature can suggest a certain reciprocal obligation, on the branch deferred to, to exercise the abilities that have been attributed to it.<sup>30</sup>

On these grounds, a deferential court is slow to override or second-guess legislation or policy. Such is the consistent mode of the United States Supreme Court, in reviewing cases involving economic and social legislation.<sup>31</sup> In the most traditional formulation of deferential review, the Court intervenes only when it detects a clear legislative

<sup>27</sup> Arguments for deference can (but need not) parallel arguments for an obligation to obey the law: Frederick Schauer, *Deferring*, 103 MICH. L. REV. 1567 (2005); see, generally, JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233–249 (2d ed, 2009).

<sup>28</sup> For linking practices of deference to judicial underenforcement, particularly in relation to economic and social (or minimum welfare) rights, see LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES* 84–128 (2004).

<sup>29</sup> Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1291 (2006).

<sup>30</sup> Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

<sup>31</sup> E.g., *Dandridge v. Williams*, 397 US 471, 485 (1970).



mistake—one “so clear that it is not open to rational question.”<sup>32</sup> Only thus, in Thayer’s famous contribution to U.S. constitutional theory, could courts reconcile the practice of constitutional democracy with the inevitable fallibility of courts and the distortions that their contributions present to the legislative process. While Thayer’s demand for judicial restraint has not prevailed in cases involving fundamental values of political justice, there remains a “broad residual area of judicial passivity” in U.S. constitutional law, in which economic and social rights may be included.<sup>33</sup> In these domains, deference is said to allow the three branches of government to assume their appropriate role responsibilities without impinging on each other.

Many of the South African Constitutional Court’s earliest cases on economic and social rights have been characterized as deferential,<sup>34</sup> although the Court’s postures have been more engaged than what is observable in the U.S. Supreme Court (proving that degrees of deference are relative).<sup>35</sup> Deference can help us to understand the outcome of the first economic and social rights controversy heard in South Africa, in *Soobramoney v. Minister of Health*,<sup>36</sup> where the Constitutional Court held that no contravention of the right to access health care, to life, or of the guarantee of emergency medical treatment had occurred after the claimant had been denied access to renal dialysis in a public hospital. In assessing the claim, the Constitutional Court deferred to both the hospital’s guidelines for rationing treatment and the provincial authorities’ allocations for the general health budget.<sup>37</sup> For the former, the Constitutional Court found no reason to gainsay the greater expertise of the hospital in making the agonizing choice of rationing life-prolonging health care. Expertise was found to exist in the medical practitioners’ clinical experience and qualifications. Medical rationing, in the opinion of the majority, involved “areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious.”<sup>38</sup> For the latter, the competency of political organs to set budgets was assumed. In this respect, deference is consistent with a theory of democratic accountability.

Similarly, in *Grootboom*, where the Constitutional Court declared the government’s housing policy to be inconsistent with the right of access to housing, the judicial stance was deferential. Refusing to articulate any self-standing dimension, or “minimum

<sup>32</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–152, 144 (1893).

<sup>33</sup> Sager, *supra* note 28, 90.

<sup>34</sup> Dennis Davis, *Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite’?* 22 S. AFR. J. HUM. RTS. 301, 318 (2006).

<sup>35</sup> See further Part IIIC.

<sup>36</sup> *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) (*‘Soobramoney’*).

<sup>37</sup> *Soobramoney* 1998 (1) SA 765 (CC).

<sup>38</sup> *Soobramoney* (1) SA 765 (CC) at [30] per majority; [58] per Sachs J. See also [45], per Madala J (noting the “clinical and incisive judgment of the [authorized medical] practitioner”). For another example of deference (to science, rather than government), see the terms of the order in *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (*‘Treatment Action Campaign’*), discussed *infra*.

core,” of the right to access housing, the Constitutional Court inquired only into the “reasonableness” of government policy.<sup>39</sup> The “minimum core” doctrine, first articulated by the United Nations Committee on Economic, Social and Cultural Rights,<sup>40</sup> was rejected on grounds akin to those used to justify deference: the Constitutional Court felt it lacked the information and capacity to make such a determination.<sup>41</sup> The judicial posture, nevertheless, had some bite, since the Constitutional Court ultimately found that the housing policy did not meet the requirements of the right to access housing: “[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.”<sup>42</sup> Yet even with this assessment, the Constitutional Court offered only declaratory relief, preferring to defer, in its remedial stance, to the Department of Housing’s consideration of how best to meet the needs of vulnerable communities living in intolerable conditions or crisis situations.

The problem with deference is the danger of judicial abdication that it presents. Particularly in light of the positive obligations that flow from economic and social rights and in the face of an intransigent or incompetent government actor, the subtle reciprocity that is expected to flow from deference may not ensure that rights are sufficiently protected by the elected branches.<sup>43</sup> Always troublesome, this problem is exacerbated in a constitutional system, such as South Africa’s, in which the Constitutional Court has adopted the role of guardian of the present Constitution and in which practices of deference are tainted by the apartheid past. (Thayer’s contemporary A. V. Dicey, whose defense of parliamentary sovereignty would have such a strong if

<sup>39</sup> *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46, 66 (CC) (“*Grootboom*”).

<sup>40</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., & Cultural Rights., *Report on the Fifth Session*, Supp. No. 3, Annex III ¶ 10, U.N. Doc. E/1991/23 (1991); see, further, Young, *The Minimum Core*, *supra* note 8.

<sup>41</sup> *Grootboom* 2001 (1) SA 46 (CC) at 66 (S. Afr.) (declining to decide on the question of a minimum core of the right of access to adequate housing); *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) at 722 (S. Afr.) (“*Treatment Action Campaign*”) (declining to determine a minimum core standard for the right to health); *Mazibuko v. The City of Johannesburg* CCT 39/09 [2009] ZACC 28 (October 8, 2009) (CC) [52]–[68] (“*Mazibuko*”) (suggesting that a court-adopted quantified standard for the right to water would be inconsistent with the constitutional duty of “progressive realization” and with the proper role of the courts in a constitutional democracy).

<sup>42</sup> *Grootboom* 2001 (1) SA 46 (CC) [44]; however, see the suggestion that the Court’s presumption of the reasonableness of the overall housing policy was temporally contingent and later was disclosed as unfounded; see Dwight Newman, *Institutional Monitoring of Social and Economic Rights: A South African Case Study and New Research Agenda*, 19 S. Afr. J. Hum. Rts. 189, 204 (2003).

<sup>43</sup> Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise*, 16 S. Afr. J. Hum. Rts. 206, 250 (2000).

distorted influence on the constitutional structure of apartheid South Africa,<sup>44</sup> no longer enjoys the same appeal in South Africa.)

The problem of judicial abdication is highlighted by the concrete lack of redress experienced by the claimants in the *Soobramoney* and *Grootboom* cases. Justice Albie Sachs, for example, described the reaction by the wider public to its decision in *Soobramoney* as one of anger with the Constitutional Court for failing to provide a more appropriate remedy when the stakes were so high.<sup>45</sup> Similarly, the apparent inattention of the Constitutional Court to the direct plight of the claimants in *Grootboom* registered dramatically when, eight years after the judgment, Irene Grootboom passed away, still without a home.<sup>46</sup> The shortcomings of deference, made clear in actual constitutional practice, open the way to a broader range of approaches.

## 2.2. Conversational review

The second member of this typology is conversational review. Where deferential review may rely on passivity in order to spur a reciprocal protection of economic and social rights or to concentrate political energy regarding perceived failings on the elected branches, conversational review actively creates this reciprocity by relying on the effect of interbranch dialogue. In conversational review, all three branches assume a shared interpretive role over the right at issue. By offering an engaged scrutiny of government action that invites a response and an order which opens the way for a range of options, the obligations that flow from economic and social rights are negotiated between courts and the elected branches over time.<sup>47</sup>

Dialogue is perhaps the most resonant metaphor for describing the distance between U.S.-style judicial supremacy and comparative constitutional examples.<sup>48</sup> In comparative accounts, dialogue describes a practice in which reason-giving courts are able to adjudicate rights while elected and accountable legislatures are given the final word on the shape of the obligations that flow from them. At base is the

<sup>44</sup> For an important description of the distortion of parliamentary sovereignty in pre-1994 South Africa, see *AZAPO v. President of the Republic of South Africa* (4) SA 671 (CC), [1], per Mahomed DP (noting the institutionalization of apartheid “through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority”).

<sup>45</sup> Albie Sachs, *Social and Economic Rights: Can They be Made Justiciable?*, 53 SMU L. REV. 1381, 1386 (2000) (suggesting, with respect to *Soobramoney*, that “The public was angry with the Court—they felt it should have done something, anything, to save a life”).

<sup>46</sup> Christopher Mbazira, *Non-implementation of Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer Here to Stay?* 9 ESR REV. 2 (2008). Nonetheless, the declaratory relief that was delivered postdated a settlement agreement between the parties, which was made a Court order, and which narrowed the Court’s attention to the state’s housing program only; see SANDRA LIEBENBERG, *SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION* 400–405 (2010).

<sup>47</sup> For a depiction of a broad conversational model in the United States, see Robert Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001).

<sup>48</sup> Peter W. Hogg, Allison A. Bushell Thornton, & Wade K. Wright, *Charter Dialogue Revisited—Or ‘Much Ado About Metaphors’* 45 OSGOODE HALL L.J. 1 (2007). Of course, the metaphor is also part of a long-standing U.S. analysis; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

expectation that both branches attempt to provide reasonable interpretations of constitutional provisions and, thus, come closer to an understanding that is “correct.”<sup>49</sup> By allowing the legislature to disagree with the court, as long as this is reasonable and is clearly expressed, both actors share the role in elaborating constitutional norms. Thus, these theories have much in common with the theory of deferential review, by suggesting that courts should not control the contours of constitutional rights.<sup>50</sup> They give the court a greater role, however, in order that the court may contribute its own say to the evolving interpretation of a right and of the obligations and remedies that flow from it.

So far, constitutional practice in Canada has occasioned the most sustained study of dialogue between courts and legislatures. The limitations clause of Canada’s Charter of Rights and Freedoms explicitly allows the legislature to provide a justification for limiting rights and the “notwithstanding” clause allows for an ex post legislative override.<sup>51</sup> Courts may invite the legislature’s interpretive participation by employing explicitly reasoned tests of proportionality. And a dialogic interaction may arise if the court issues a suspended declaration of invalidity.<sup>52</sup> This style appears appropriate for other systems which, like Canada’s (and South Africa’s), combine a historical commitment to parliamentary sovereignty with a present-day constitutionalism.<sup>53</sup> Moreover, the effects of dialogue can also be observed in contexts that lack the institutional mechanisms that require and promote it. Hence, the use of dialogue has also been attributed to the U.S. Supreme Court, both by local scholars and comparativists.<sup>54</sup>

The open communication between courts and legislatures in conversational review invites a different interpretation of the early South African experience with reasonableness review and declaratory remedies. On this account, *Grootboom* involves a deferential treatment to housing policy, but importantly contemplates the possibility of further “legislative sequels” to the judicial action.<sup>55</sup> The Constitutional Court’s focus

<sup>49</sup> TUSHNET, *WEAK COURTS, STRONG RIGHTS*, *supra* note 5, at 209 (“The basic idea of dialogic judicial review is to encourage interactions—dialogues—among the branches about which of the competing reasonable interpretations of constitutional provisions is correct”).

<sup>50</sup> Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 *BROOK. L. REV.* 1109 (2006).

<sup>51</sup> Canada Charter, ss 1, 33.

<sup>52</sup> Hogg et al, *supra* note 48.

<sup>53</sup> See, e.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707, 710 (2001) (noting that the constitutional and statutory bills of rights adopted in Canada, New Zealand, and the United Kingdom attempt to create “joint responsibility and deliberative dialogue between courts and legislatures”); see, however, Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 *INT’L J. CONT’L L.* [14]–[15] (2010) (rejecting the “dialogue” concept as overinclusive and amorphous).

<sup>54</sup> For the rigorous “descriptive” portrayal, see Friedman, *supra* note 48. For a comparative assessment, see Kent Roach, *Sharpening the Dialogue Debate: The Next Decade of Scholarship*, 45 *OSGOODE HALL L.J.* 169, 187 (2007) (describing the effects of *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) and *Rasul v. Bush* 524 U.S. 466 (2004) on the Detainee Treatment Act respectively, and *Hamdan v. Rumsfeld* 548 U.S. 557 (2006) on the Military Commissions Act, as well as the former on the rules for the tribunals determining enemy combatant status).

<sup>55</sup> Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 *INT’L J. CONST. L.* 391, 393 (2007). *Grootboom* primarily involved a court-executive, rather than court-legislative interaction; however, these two interactions are clearly not mutually exclusive.

is not on resolving the immediate homelessness of the claimants but on the effective change of housing policy over the longer term. Such interaction has paid off, according to some commentators. For example, four years after the decision, the Department of Housing adopted a new program, which focused on assisting people in urban and rural areas with urgent housing needs as a result of natural disasters, evictions, demolitions, or imminent displacements.<sup>56</sup> In the interim, the decision helped to alleviate red-tape impediments to the government's acting to address the emergency housing needs of other vulnerable communities, which nearby property-owners had raised in subsequent litigation.<sup>57</sup>

When the Constitutional Court was required, two years after *Grootboom*, to adjudicate the right to health care, it similarly deployed a conversational stance.<sup>58</sup> The *Treatment Action Campaign* case was a challenge to the government's decision to restrict the rollout of antiretroviral drugs, which would prevent the transmission of HIV from mother to child during childbirth. This time, while purporting to adopt a deferential stance, the Constitutional Court found the government's policy unreasonable. It famously ordered the government to desist from preventing the rollout of drugs and to meet other treatment and counseling expenses. The Court refused to endorse the structural interdict and injunction remedies that had been made by the High Court at first instance, on the basis that "the government has always respected and executed orders of this Court."<sup>59</sup> Instead, the Constitutional Court made a mandatory order requiring the government to permit and to facilitate (in a minor respect) the public-health-sector use of the antiretroviral drug.

The Constitutional Court's decision in the *Treatment Action Campaign* case brought an end to a highly criticized aspect of the South African government's policy on HIV/AIDS and set in motion many other changes to the government's general stance toward the disease. Yet the remedies were not immediately effective. In some provincial governments, compliance was not forthcoming. A further application to the High Court for a contempt order was required in one province, which was not resolved until six months after the successful case.<sup>60</sup> With even minor delays, many lives were lost.<sup>61</sup>

<sup>56</sup> National Housing Code, chapter 12, *Housing Assistance in Emergency Circumstances*, discussed in LIEBENBERG, ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, *supra* note 46, 401.

<sup>57</sup> *Minister of Pub. Works v. Kyalami Ridge Envtl. Ass'n* 2001 (3) SA 1151 (CC).

<sup>58</sup> *Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>59</sup> *Treatment Action Campaign* 2002 (5) SA 721 (CC) para 129.

<sup>60</sup> See *Treatment Action Campaign v. MEC for Health, Mpumalanga & Minister of Health (Tranvsaal Provincial Division)* Case No 35272/02.

<sup>61</sup> For a sense of the high stakes of this case, it is helpful to note that a recent study suggested that 35,000 babies were born with HIV between 2000 and 2005 as a result of the South African government's decision not to implement a program to prevent mother-to-child transmission. Using modeling, the study estimated that against what was reasonably feasible in South Africa with ARV treatment or prophylaxis, at least 330,000 lives and a total of 3.8 million person-years were lost during that period: Pride Chigwedere et al., *Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa*, 49 *AQUIR. IMMUNE DEFIC. SYNDR.* 410 (2008).

The success of the remedies—in most of the provinces—was in large part due to the activities of the social movement that brought the case rather than merely the inter-branch conversation that was created by the Constitutional Court.<sup>62</sup> William Forbath has described the way in which the *Treatment Action Campaign* litigant worked to bring about the cultural transformation and institutional reforms required to secure the right to health care in this context; this strategy was also indispensable to the success of the court order, as well as interdependent with the judicial stance adopted by the Constitutional Court.<sup>63</sup> This success points up a further dimension of judicial review, which the conversational model highlights only indirectly, namely, the way in which a court facilitates the relationship between the government and the parties themselves,<sup>64</sup> especially where those parties connect with civil society.

### 2.3. Experimentalist review

A third type of review is experimentalist in character. Experimentalist review describes a dynamic, systematic practice of adjudication. This posture puts further pressure on the conversational theme by directing the parties—including, but not only limited to government—to negotiate and devise their own solutions to the “problem” which has diminished the enjoyment of economic and social rights. This style of review is intended to confront the systemic, or structural, features of the lack of enjoyment of economic and social rights. In experimentalist review, a court is not deferential; rather, it is ready to engage in a vigorous assessment of the reasonableness of policy or legislation. This will involve a contextualized investigation in light of the commitments of the Constitution. In this context, a court will be further prepared to order remedies that may take on a limited structural form. The political project is achieved not by prescribing the immediate steps toward a solution but by “nudging,” “linking,” and “destabilizing” public institutions.<sup>65</sup>

<sup>62</sup> Mark Heywood, *Current Developments: Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign against the Minister of Health*, 19 S. AFR. J. ON HUM. RTS. 278 (2003).

<sup>63</sup> William E. Forbath, *Realizing a Constitutional Social Right—Cultural Transformation, Deep Institutional Reform, and the Roles of Advocacy and Adjudication*, in STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY (Jeremy Perelman & Lucie White, eds., forthcoming 2010); see also Heywood, *supra* note 62. I have further contrasted the “jurisgenerative” potential of this case, with both popular constitutionalist and experimentalist theories, in Katharine Young, *Social Movements and Social Rights* (working paper).

<sup>64</sup> It should be noted that some dialogue theorists have stressed the importance of these extrabranched relations: Christine Bateup, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 HASTINGS INT’L & COMP. L. REV. 529 (2009); Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL’Y REV. 99, 114–136 (1996).

<sup>65</sup> These effects are borrowed from fields of behavioral law and economics, and from the economic sociology underlying new governance. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (on value of “nudging” decision makers); On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098 (2008).



The ability of such experiments to induce structural reform through litigation has gained prominence with writers in the tradition of “new governance,” and “democratic experimentalism.” They suggest that the dynamic and reciprocal relationship between courts and other institutions of government and governance can spur structural change while avoiding the problems of the traditional “command and control” courts.<sup>66</sup> This dynamic orientation has been documented in both the U.S. and Europe. In the U.S., for example, experimentalist litigation has been described as “destabilization rights” enforcement in which federal courts promote a direct form of democratic decision making with regard to schools, mental health, and housing programs in the United States. This is achieved because courts have been persuaded to disentrench the power of public institutions that have been otherwise immune to contestation.<sup>67</sup> In the European Union, courts have acted as “catalysts” for the European treaty’s values of participation, information, and principled decision-making by ensuring that substantively informed goals of representativeness and proportionality have been procedurally met.<sup>68</sup> Thus, superior courts have promoted democratic decision-making by providing an expansive interpretation of standing rules, a robust assessment of the adequacy of procedures for gathering scientific information for use in regulation, and a consideration of proportionality as informed by the commitment to transparency and accountability.

The case studies that have fueled attention to new governance scholarship have generally not involved economic and social rights either as causes of action or as other juridical categories, although there are exceptions.<sup>69</sup> Moreover, there are additional institutional differences between the Constitutional Court of South Africa and the U.S. and European courts emphasized in the new governance literature (as there are between these latter jurisdictions). Yet despite these differences, the Constitutional Court’s approach to the judicial review of economic and social rights displays many similarities to the experimentalist tendencies observed in the U.S. and Europe.

First, there is a general reluctance on the part of the Constitutional Court in economic and social rights cases to prescribe a solution; however, unlike deferential or conversational review, the Constitutional Court has sometimes delegated this task as

<sup>66</sup> Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004). For a summary of the departure from “national, top-down and sanctioned” law and government to a reflexive coordination between public and private actors, see Orly Lobel, *The Renewal Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>67</sup> Sabel & Simon, *Destabilization Rights*, *supra* note 66; see also Kathleen G. Noonan, Charles F. Sabel & William H. Simon, Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform, 34 LAW & SOC. INQUIRY 523 (2009).

<sup>68</sup> Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-Thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2006).

<sup>69</sup> Noonan, Sabel & Simon, *supra* note 64, see also 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 (2003).

a problem-solving activity to the parties themselves. Second, the Constitutional Court has affirmed that the judicial process should be used as a last, not first, resort, and it has continued to question the finality of its normative position-taking. At the same time, it has issued explicit encouragement to parties to seek it out.

Third, while conversational review may allow for a more patient remedial result, as a court is content to signal its message to the legislature and await a response, experimentalist review is more provocative, insisting on a different prioritization of interests and the input of a new set of actors within the legislative scheme. Using various degrees of remedial intervention, this type of review is more dynamic than the formal expectation that electoral politics will take its proper course. Moreover, experimentalist review goes further in forcing the active reconsideration of interests by the legislature. It is “linkage forcing,” seeking to link up the legislature’s accommodation of minority interests,<sup>70</sup> by retesting the interests that were taken into account, and rigorously resolving the balance of power if this test comes up short. This orientation has the potential to forestall the effect—identified by András Sajó with empirical support from Eastern Europe as well as in U.S. poverty law scholarship—that economic and social rights tend to support only middle-class interests, because of the latter’s relative ease of access in both legislative and judicial processes.<sup>71</sup>

Experimentalist review has occurred in recent housing rights and eviction cases before the Constitutional Court, in which public municipalities have sought to remove people from informal settlements, sometimes on grounds of safety and habitability of their dwellings; at other times, in an effort to upgrade the land and rezone it for other public housing purposes. In these cases, the Constitutional Court has ordered a “meaningful engagement” between the parties, which, by decentering the judicial activity, introduces a process whereby the parties are able to express their interests from their own vantage point. The Constitutional Court is able, therefore, to oversee a process in which parties can cast new light on their problem and deliberate over a solution; at the same time, public authorities previously immune from political scrutiny are placed in a position of having to justify their strategies and goals.

Thus, in *Port Elizabeth Municipality v. Various Occupiers*,<sup>72</sup> the Constitutional Court refused to order the eviction of sixty-eight people from undeveloped public lands, holding that the municipality in question had not satisfied a constitutional duty to make reasonable efforts to provide alternative accommodation. In canvassing the circumstances that would be relevant to a “just and equitable” eviction, the Constitutional Court emphasized the need to consider the vulnerability of occupiers (the elderly, children, disabled persons, and households headed by women);<sup>73</sup> the extent to which

<sup>70</sup> For an example drawn from the U.S. constitutional context, see V. F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection* 58 DUKE L. J. 955 (2009).

<sup>71</sup> András Sajó, *Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 11, 83. See, e.g., Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOKLYN L. REV. 861 (1990).

<sup>72</sup> 2005 (1) SA 217 (CC) (“*Port Elizabeth*”).

<sup>73</sup> PIE Act, s 4(6) and (7).

negotiations had taken place with the “equality of voice for all concerned”; the reasonableness of offers made in connection to alternatives; the “time scales proposed relative to the degree of disruption involved”; and the willingness of occupiers to respond.<sup>74</sup>

The Constitutional Court’s interest in negotiation—as a method for informing the standard of reasonableness and for ensuring delivery of the result—continued and evolved in *Occupiers of 51 Olivia Road v. City of Johannesburg*.<sup>75</sup> In that case, the Court ordered that an eviction on housing safety and health grounds required first a “meaningful engagement” between public landholders and the occupiers. Therefore, it suggested that the four hundred occupiers of two buildings in inner-city Johannesburg be allowed, first, to engage with the city in order to establish whether the city could help in alleviating the consequences of eviction and whether the unsafe buildings could be improved for an interim period. The Constitutional Court’s order required that negotiations include the question of when and how the city could fulfill its obligations to meet the housing rights of the occupiers.<sup>76</sup>

These cases have been described as portending “a hybrid dispute resolution mechanism that incorporates the flexibility of ADR [alternative dispute resolution] processes with the public norm-creating capacity of traditional adjudication.”<sup>77</sup> On this understanding, the Constitutional Court is attempting to generate values beyond the scope of the dispute, and yet spur the appropriate resolution in the particular case.<sup>78</sup> Yet it is precisely this hybridity that undergirds a tension in the experimentalist position. First, the Court’s attempts to correct the power imbalances of the weaker party are fraught with complications.<sup>79</sup> The very “immunity” rights that are relied on, in order to make participation meaningful and destabilization effective, are the economic and social rights that are the subject of contestations.<sup>80</sup> It is not only access to the democratic process but also to a degree of social security underlying that access that marks out the sensitivity of the Court to democratic failures. Finally, engagement is difficult when there is a palpable hostility between the parties.<sup>81</sup> For a stronger remedial position, we turn to managerial review.

<sup>74</sup> *Port Elizabeth*, 2005 (1) SA 217 [30].

<sup>75</sup> Case CCT 24/07; [2008] ZACC 1 [hereinafter “Olivia Road”].

<sup>76</sup> *Olivia Road*, Case CCT 24/07; [2008] ZACC 1 [14].

<sup>77</sup> Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797.

<sup>78</sup> Cf. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355 (1991).

<sup>79</sup> These challenges have been explored: see Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L. J. 347, 348 (2004); Amy J. Cohen, *Negotiation Meet New Governance: Interests, Skills, Selves*, 32 LAW & SOC. INQUIRY. (2008); see also Douglas NeJaime, *When New Governance Fails*, 70 OHIO STATE L. J. (2009).

<sup>80</sup> For the links between democratic experimentalism and Unger’s program, see Sabel & Simon, *supra* note 66. For Unger’s own presentation of “immunity rights,” which he suggests must accompany destabilization, and yet which restate the challenge of guaranteeing material security, see ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY*, 524–530. Arguably, such rights merely restate the challenge of guaranteeing material security.

<sup>81</sup> *Treatment Action Campaign* 2002 (5) SA 721 (CC); But see Sabel and Simon, *supra* note 66, 1073–1077 (noting the effect that deliberation may have in dislodging previous hostilities).

## 2.4. Managerial review

Managerial review suggests a heightened review of government action and a structured and/or mandatory form of relief that requires continuing, ground-level, day-to-day control. In the first place, alleged infringements of economic and social rights are closely scrutinized by the court, which may go so far to prescribe their substantive content. In the second place, detailed remedies are ordered and subject to ongoing supervision by the court. This can take place through varied stages, such as the court calling upon the state actor to present a plan for court approval, involving other parties in the scrutiny of the plan, calling on the state to account for the implementation of the plan at later, assigned dates, and sometimes the expenditure of public funds. The court may also retain the discretion to disapprove a plan and substitute its own.<sup>82</sup> Suspended declarations, then, can be seen as belonging, on some occasions, to a managerial stance, requiring a supervision that goes beyond the reciprocal stance of conversational review.<sup>83</sup> Along with structural or mandatory injunctions, judicial management can involve contempt proceedings against government officials.

The Constitutional Court, purportedly, has condoned the “managerial role.”<sup>84</sup> Through declarations, structural interdicts, mandamus, and the “fashion[ing of] new remedies,”<sup>85</sup> courts are required to ensure the protection and enforcement of constitutional rights. Yet the degree to which this has been entrenched is inconsistent. A resonant precursor to a managerial function in an appellate court context—and noted by the South African Constitutional Court—is the judicial leadership shown by the U.S. Supreme Court in both decisions pertaining to *Brown v. Board of Education*.<sup>86</sup> The

<sup>82</sup> Note the early promise expressed by Wim Trengove, *Judicial Remedies for Violations of Socio-Economic Rights*, Vol. 1, No. 4 ESR REV. (1999), available at [http://www.communitylawcentre.org.za/esr/esr1999/1999march\\_trengove.php](http://www.communitylawcentre.org.za/esr/esr1999/1999march_trengove.php); (noting that if the responsible state actor does not cooperate in the preparation of a plan, “the court has no option but to write its own plan . . . with the aid of the other interested parties and any court appointed experts”).

<sup>83</sup> Kent Roach & Geoff Budlender, *Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?* 122 STH. AFR. L. J. 325 (2005); cf Hogg, *supra* note 48.

<sup>84</sup> *Port Elizabeth* 2005 (1) SA 217 (CC) [39] (endorsing “managerial role of the courts”).

<sup>85</sup> Sth. Afr. Const., s 38 provides that, whenever a right in the Bill of Rights has been infringed or threatened, a court may grant “appropriate relief,” including a declaration of rights. In *Fose v. Minister of Safety and Security* 1997(3) SA 786, [19] (CC), appropriate relief was the relief necessary

to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

See also S. Afr. Const., s.172(1)(b), providing that the Constitutional Court may make any order which is just and equitable.

<sup>86</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 249 (1955) (*Brown II*) (suggesting that the federal courts engage in long-term supervision of the desegregation process).

finding that school segregation contravened equal protection broke heavily with previous interpretations and required a spectacular exercise of power by the U.S. Supreme Court. Segregation had been mandatory in seventeen states and allowed in four. In ordering the elimination of segregation “root and branch,”<sup>87</sup> the Supreme Court had to contend with recalcitrant governors and school boards. It later broached the deep structures of school segregation by upholding orders for compensatory education programs for students who had been segregated,<sup>88</sup> and authorizing district courts to use quotas, redraw attendance zones, and order the busing of students to schools.<sup>89</sup> The Civil Rights Act of 1964, for which *Brown* partially bears credit (although it should be noted that such credit is contested),<sup>90</sup> gave congressional and executive support to school desegregation. Structural injunctions by federal—and state<sup>91</sup>—courts became more prominent in handling school desegregation.<sup>92</sup> The judicial aftermath of *Brown* stands as an exemplar of extraordinary managerialism, both for the normative steps taken and the remedial schemes that followed from this commitment.<sup>93</sup>

In the U.S., managerial judging went on to encompass new judicial activities in controlling the reform of prisons, school management, and mental health settings. Judith Resnik, in her early account of this development, focused on the trend of managerial judging in each sector, highlighting both pretrial and remedial innovations.<sup>94</sup> In the latter respect, she pointed to a new intimacy between judges and the minutiae

<sup>87</sup> *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 438 (1968) (noting, thirteen years are *Brown II*, that a freedom-of-choice plan in schooling would not be sufficient to discharge the affirmative duty on school boards to take “whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”).

<sup>88</sup> *See, e.g., Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977) (affirming the district court’s modified decree ordering compensatory education programs for victims of segregation).

<sup>89</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (authorizing district court to use quotas, redraw attendance zones, and endorse optional majority-to-minority school transfers, and the busing of students, in order to achieve desegregation).

<sup>90</sup> The suggestion that the Court obstructed, rather than assisted, the enactment of the Civil Rights Act, has been made: MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). Klarman is highly critical of the violent backlash that resulted from the Court’s judgment and gives credit to African-American achievements in the economic and educational spheres as an alternative cause.

<sup>91</sup> *E.g., Crawford v. Board of Education* 17 Cal. 3d 280, 296-297 (1976) (finding its substantive basis in Californian as well as U.S. Constitution).

<sup>92</sup> When lower court judges refused to pressure Southern school systems to desegregate, Congress authorized Department of Justice school desegregation litigation, through the 1964 Civil Rights Act. It also prohibited the dissemination of federal funds to school systems (or anyone else) that discriminated on the basis of race.

<sup>93</sup> Again, during the early diagnosis of this in the U.S., both aspects were discussed: Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (drawing attention to the rights being recognized, rather than the remedial innovations, of early institutional litigation).

<sup>94</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (noting early trend of case management during pretrial and postdecision phases of public law cases).

of administering institutions usually governed by other branches of government.<sup>95</sup> In their study of the transformation of prisons, Malcolm Feeley and Edward Rubin likewise emphasized how new articulations of prisoners' rights and interventionist remedies were key in transforming American prisons.<sup>96</sup> These "policy-making judges" challenged the previous model of judicial enforcement by adopting the same methods that guide agencies:<sup>97</sup> that is, by using experts and proceeding incrementally.<sup>98</sup> They appointed special masters and drew up detailed injunctions to maintain control over lawsuits.<sup>99</sup>

Those skeptical of the replicability of the model to other areas of law suggest that the institutional reform of prisons was achieved because judges could cherry-pick cases from multiple inmate petitions, covertly select counsel, and work in tandem with prison officials to squeeze money from the state.<sup>100</sup> Overall, these institutional coordinates do not match the characteristics of the economic and social rights cases heard by the South African Constitutional Court; it is unlikely that the flow of information from housing or health care claimants would resemble the multitude of petitions that certain courts have received from prisoners. It is also unlikely that judges would collaborate with public housing agencies or health clinics to leverage for greater finances from the state, because such institutional relationships require a long time to develop, although it is perhaps not implausible in the future.<sup>101</sup>

Yet managerialism has been evident in the lower court decisions in economic and social rights cases in South Africa. When *Grootboom* was first considered by the trial

<sup>95</sup> Resnik, *Managerial Judges*, *supra* note 94, 410, see also 390 (describing how "judges become enmeshed in extended relations with institutions").

<sup>96</sup> MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 159 (1998) (suggesting "the basic relationship between the civil rights movement and prison reform is causal, not adventitious").

<sup>97</sup> Indeed, Feeley and Rubin suggest that judicial and agency policy making in modern government is indistinguishable. FEELEY & RUBIN, *supra* note 96, 322.

<sup>98</sup> Like administrators, judges should obtain "information from as many groups as possible," should "regularly [turn] to experts in the fields who [have] developed solutions through hands-on experience," and should deal with problems of uncertainty "by proceeding incrementally": FEELEY & RUBIN, *supra* note <tk>, 343.

<sup>99</sup> Compare with example used by Sabel & Simon, *Destabilization Rights*, *supra* note 96, noting the passing of the federal Prison Litigation Reform Act of 1996 (PLRA) as the legislative response to court action in these cases. The PLRA set out a requirement that injunctive orders terminate after two years unless the court makes a new finding that relief is still required to remedy current violations 18 U.S.C. §3626(b)(1)(A)(i), (b)(3) (2000).

<sup>100</sup> Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1297 (1999). See also FEELEY & RUBIN, *supra* note 96, 81.

<sup>101</sup> Cf. See August v. Electoral Commission 1999 (3) SA 1 (CC); Minister of Home Affairs v. Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO) 2004 (5) BCLR 445 (CC). In a later decision, the Constitutional Court ordered the state to report on the progress it had made toward replacing prisoners' death sentences with other sentences: *Sibiya v. Dir. of Pub. Prosecutions* 2005 (8) BCLR 812 (CC) at 9 (S. Afr.) (requiring state to report to the Constitutional Court with details on the progress made toward replacing the prisoners' death sentences with another appropriate sentence in light of the Court's holding in *Makwanyane* that the death penalty was inconsistent with the Constitution).



court, Judge Dennis Davis found that the Constitution empowered the court “to issue an order which identifies the violation of a constitutional right and then [to define] the reform that must be implemented” while, nevertheless, “affording the responsible state agency the opportunity to choose the means of compliance.”<sup>102</sup> Without being “prescriptive about the solutions,” he sought to “contain any future debate” by the provisional statement “that tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.”<sup>103</sup> The judge’s order would require shelter to be provided, as well as follow-up reports of implementation, within three months.<sup>104</sup> (This stance was adopted pursuant to the categorical command of section 28 of the Constitution, which guarantees “[e]very child the right . . . to basic nutrition, shelter, basic health care services and social services.”)<sup>105</sup>

Managerial orders are seen by the lower courts as appropriate responses to the problem of nonimplementation of declaratory orders.<sup>106</sup> In *Cape Town v. Rudolph*, for example, the High Court questioned whether “a declaration, standing on its own, will suffice.” In criticizing the outcome of *Grootboom*, because the declaration did not induce the state to comply with its constitutional obligations, the High Court decided to issue structural relief. “The circumstances, and in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents [homeless evicted persons] . . . makes this an appropriate situation in which . . . a structural interdict, is ‘necessary’, ‘appropriate’ and ‘just and equitable’.”<sup>107</sup>

Compared with the lower courts, the Constitutional Court has been less eager to adopt the managerial orientation.<sup>108</sup> In *Grootboom*, it chose to set aside the lower court’s order and substitute it with the more deferential declaration outlined above. There have been only limited departures from this trend.<sup>109</sup> More often, the detailed orders adopted by lower courts have been overturned, even when the substantive decision has been affirmed.<sup>110</sup>

<sup>102</sup> *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 [25] per Davis J (Comrie J concurring).

<sup>103</sup> *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 [25] per Davis J.

<sup>104</sup> *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 [26]–[27] per Davis J.

<sup>105</sup> Section 28, therefore, does not incorporate the standard of “progressive realization” attached to the general economic and social rights of ss 26 and 27.

<sup>106</sup> For a description of the problem of nonimplementation, see Mbazira, *Non-implementation of Court Orders*, *supra* note 46.

<sup>107</sup> *Cape Town v. Rudolph* 2004 (5) SA 39 (C) (S. Afr.). See also *Strydom v. Minister of Corr. Servs.* 1999 (3) BCLR 342 (W); *Treatment Action Campaign v. Minister of Health* 2002 (4) BCLR 356 (T); *Rail Commuter Action Group v. Transnet Ltd.* (1) 2003 (5) SA 518 (C); *Modderklip Boerdery v. President Van Die RSA En Andere* 2003 (6) BCLR 638 (T), *aff’d*, *Modderklip* 2005 (5) SA 3 (CC).

<sup>108</sup> Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 414–417 (2004) (suggesting that structural injunctive remedies may result in a “dynamic dialogue” between the courts and the other branches of government and that the “pragmatic decision not to exercise supervisory jurisdiction [has] compromised the efficacy” of previous court orders).

<sup>109</sup> See below, and see further Mitra Ebadolahi, *Note, Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic And Social Rights in South Africa*, 83 N.Y.U. L. REV. 1565 (2008).

<sup>110</sup> For a fuller discussion of the High Court’s role, see Danielle Elyce Hirsch, *A Defense Of Structural Injunctive Remedies In South African Law*, 9 OR. REV. INT’L L. 1, 7–8 (2007) (noting tendency for orders to be overturned by Constitutional Court on appeal, despite affirming decision).

One case in which the features of managerialism are observable is *Residents of Joe Slovo Community Western Cape v. Thubelisha Homes*. In adjudicating the right to housing for those living in an informal settlement slated for upgrade, the Constitutional Court continued to underscore the necessity of meaningful engagement and the provision of alternative accommodation in the course of the relocation of 4,386 households (said to constitute 20,000 residents) in an informal settlement east of Cape Town.<sup>111</sup> Again, the Constitutional Court was not content to rule on the final contours of the right to housing, instead, finding only that the respondents had acted reasonably in seeking an eviction on the basis of redeveloping the land for formalized housing. Nonetheless, the decision was accompanied by an order requiring the respondents to ensure that 70 percent of the new homes built on the site would be allocated to the original informal residents,<sup>112</sup> and that the temporary accommodation would meet particular quality standards.<sup>113</sup> This was combined with an order that an ongoing process of engagement between residents and respondents, concerning the relocation process, would continue.<sup>114</sup>

These features were part of an overall judgment that was, arguably, highly permissive regarding government policy. The *Joe Slovo Community* case suggests, perhaps, the outer limit of the Constitutional Court's willingness to manage. This is because managerial review exacerbates the concerns of competency and legitimacy. There is an added reluctance, on the part of courts, to invest political and economic capital into each case. Judges are wary of tying the court's reputation to the career of the case after judgment. Second, motions of contempt against government officials inevitably draw publicity to the Court, which, if portrayed as an expensive intervention, may be negative in character. Third, the budgetary consequences of managerialism are felt more directly by the court; managerialism may require the appointment of staff, masters, and other actors, which is both costly and diverts time from the docket. And finally, managerialism cannot address the inevitable uncertainty of the regulatory consequences for all the interests affected and of the responses of various affected actors. Resnik's early work documented the unintended consequences of fine-tuned managerial judging: an order to add twelve officers to the correctional staff of one facility "altered the seniority rights of the prison's unionized personnel and reduced the

<sup>111</sup> *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16.

<sup>112</sup> And not fewer than 1,500 houses: at [7] (18); *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16.

<sup>113</sup> Including that each unit be "at least 24m<sup>2</sup> in extent; . . . serviced with tarred roads; . . . individually numbered for purposes of identification; . . . have walls constructed with a [fireproof] substance called Nuteq; . . . have a galvanised iron roof; . . . be supplied with electricity through a pre-paid electricity meter; . . . be situated within reasonable proximity of a communal ablution facility; . . . make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and . . . make reasonable provision (which may be communal) for fresh water." At [7] (10) *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16.

<sup>114</sup> *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16 [7]. The steps for vacating the land were set out in a timetable annexed to the judgment, revisable after engagement.

staff resources available to other state prisons.”<sup>115</sup> Such small decisions build up over time to promote unintended changes in institutions beyond the Court’s reach.<sup>116</sup> Such changes may not only be counterproductive vis-à-vis the objectives of the Court order but also result in backlashes for which the Court will be held responsible.

These problems may be amplified in the economic and social rights context. For example, once the executive acts to implement a court order and institutes a program involving the allocation or reallocation of goods or services protective of economic and social rights, then it may be practically difficult for the executive to later withdraw or redesign such programs.<sup>117</sup> Moreover, a managerial approach to economic and social rights fuels the epithet of “queue-jumping” against successful litigants. Beyond the well-documented concern of a litigation explosion and of setting public policy by judicial decree lie the unpredictable effects on the wider pace and direction of transformation. In this way, managerial adjudication can be seen as a precursor, rather than a response, to experimentalism.

## 2.5. Peremptory review

A final stance offered by the Constitutional Court when adjudicating economic and social rights is here described as peremptory review. This type of review is closer to the conventional static model of judicial review that invites either the striking down of legislation or the upholding of it. Peremptory review involves the rigorous scrutiny of government legislation or policy. Once an infringement is found, the remedy may be for the Court to overturn the legislation or policy. Peremptory review also extends to other remedies in order to enforce the positive obligations that flow from economic and social rights. Instead of overturning the legislation, the Court may choose to uphold it with an amendment; instead of severing the impugned provision, it may read in words to “cure” it.

Peremptory review occurred in *Khosa v. Minister of Social Development*, when the Constitutional Court held that the exclusion of permanent residents from social benefits was contrary to the right of everyone to social security and to equality.<sup>118</sup> The majority elected to take a “hard look” at the legislature’s reasons for restricting benefits to South African citizens.<sup>119</sup> In doing so, the Court refused to exercise mere rationality review, noting that the search for reasonableness demanded more of the government than the search for rationality and nonarbitrariness; the latter standard, the Court conceded, would have been met by the legislation.<sup>120</sup> Instead, the Court’s test for

<sup>115</sup> Resnik, *Managerial Judges*, *supra* note 94, fn 142.

<sup>116</sup> See also Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994 (1999).

<sup>117</sup> Dixon, *supra* note 55, 410.

<sup>118</sup> S. Afr. Const., ss 9, 27.

<sup>119</sup> Liebenberg characterizes the judgment this way: Sandra Liebenberg, *Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate*, in CONSTITUTIONAL CONVERSATIONS 305 (Stu Woolman & Michael Bishop, eds., 2008) 329.

<sup>120</sup> *Khosa* 2004 (6) SA 505 (CC) [67] (noting a rational connection between the citizenship provision and the immigration policy.) The Court was unwilling to canvas the difference between the reasonableness standard within the internal limitation of s 26 and 27 and the limitations clause of s 36. See at [84].

“reasonableness” is substantively based—and grounded in the Constitution’s guarantees. These relate to the values of dignity, equality, and freedom—and to the prohibition on unfair discrimination in section 9.<sup>121</sup>

The majority carefully assessed the financial reasons for excluding noncitizens and the immigration policy’s preference for creating self-sufficiency in permanent residents. It held that these were, although rational, insufficient justifications.<sup>122</sup> In South Africa, “[s]haring responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.”<sup>123</sup> While the Court found acceptable a differentiation between permanent and temporary or illegal residents, the differentiation between permanent residents and citizens did not pass muster.<sup>124</sup> “Like citizens,” the Court held, permanent residents “have made South Africa their home.”<sup>125</sup> In this respect, the Court was willing to find morally irrelevant a difference that is ideologically laden in South Africa (as it is elsewhere).<sup>126</sup>

The remedy was to read in “curing words” into the legislation, thus making “citizens and permanent residents” eligible for grants.<sup>127</sup> This remedy had the virtue of ensuring that claimants would receive benefits immediately, and that the legislation would not be delayed for other people, in the position of the claimants, who would also be eligible for social benefits. Rather than order a negotiation between the parties to settle the issue, as would occur in the evictions decisions,<sup>128</sup> or order that the government desist from its actions (and provide some new interventions), as in *Treatment Action Campaign*, or evaluate and approve of the government’s agonizing choices, as in *Soobramoney*, the Court instigated a new legislative provision, without consultation, that it devised according to the infringement it found on the part of the government.

<sup>121</sup> Sth. Afr. Const., ss 9(3), 27. See also Sth. Afr. Const., preamble.

<sup>122</sup> *Khosa v. Minister of Social Development* 2004 (6) SA 505 (CC) [63]–[67]; but see [122]–[124] (Justice Ngcobo’s dissent on this point).

<sup>123</sup> *Khosa* 2004 (6) SA 505 (CC) [74].

<sup>124</sup> The lower court had struck down the citizenship requirement, thereby implying that the state was responsible for providing assistance to both permanent and temporary indigent residents; see discussion *Khosa* 2004 (6) SA 505 (CC) [9].

<sup>125</sup> *Khosa* 2004 (6) SA 505 (CC) [59].

<sup>126</sup> Siri Gloppen, *Courts and Social Transformation: An Analytical Framework*, in *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES*, *supra* note 11, 35, 38, fn 10.

<sup>127</sup> *Khosa v. Minister of Social Development* 2004 (6) SA 505 (CC) [98]. See also *Olivia Road* CCT 24/07 [2008] ZACC 1 (CC), reading in a proviso to the National Building Regulations and Building Standards Act 1977, which had created a criminal sanction for a person who had continued to occupy a potentially unsafe building after an administrative order to vacate. The Court’s proviso reserved its application only upon an order of the court: [51]. The Court expressed the view that “[t]his is not a case in which there are a myriad ways in which the Legislature could cure this section”: [54]. See also *Jafitha v. Schoeman; Van Rooyen v. Stoltz* 2005 (2) SA 140 [63], [67] (CC) (reading in a provision of the Magistrates’ Courts Act 1944, so that sales-in-execution against immovable property could only be authorized by a court “after consideration of all relevant circumstances”).

<sup>128</sup> *Occupiers of 51 Olivia Road v. City of Johannesburg*, Case CCT 24/07 [2008] ZACC 1; *Joe Slovo Community, CCT 22/08* [2009] ZACC 16 (CC).

The Court's stance is peremptory in the following ways. First, it engaged in a review that bordered on abstract review, agreeing to consider the constitutionality of legislation that had not yet been brought into force.<sup>129</sup> Second, it was quick to give substance to the reasonableness inquiry, linking this to the values of the Constitution and insisting on their relevance to an immigration and welfare policy. Third, it refused to ratify a settlement between the parties, since this would not address the legal uncertainty created by legislation impugned by the Court below, an uncertainty which would particularly impact the broader group of permanent residents as well as the applicants themselves.<sup>130</sup> In particular, it refused to resolve the immediate controversy, simply by extending the definition of citizen to a particular class of residents—Mozambican refugees.<sup>131</sup> A move to settle the case or minimally extend the definition of citizens, at once decentralized and pragmatist, would not have resolved all of the affected interests in the dispute—which the Court conceived as the interests of other permanent residents.<sup>132</sup> Finally, its remedy was peremptory. Rather than agree to a suspended order of invalidity, as requested by the state, the Court insisted on a more interventionist remedy. The suspension would have given Parliament eighteen months to amend the legislation;<sup>133</sup> instead the Court's reading in of "or permanent resident" to eligibility requirements took immediate effect.<sup>134</sup> For the Court, this is substance over form, removing the prospect of further delay and providing instant relief, both for the applicants and for other permanent residents otherwise ineligible for social support.<sup>135</sup>

### 3. The catalytic function

The typology of specific forms of judicial review reveals important features of the Constitutional Court's adjudication of economic and social rights. The five collected

<sup>129</sup> *Khosa* 2004 (6) SA 505 (CC) [32]: Particular legislation was not yet promulgated and thus not ready to enter into force: Welfare Laws Amendment Act, s 3.

<sup>130</sup> *Khosa* 2004 (6) SA 505 (CC) [35].

<sup>131</sup> This class had already been granted exemptions in the Aliens Control Act.

<sup>132</sup> Of course, this focus sidelines the less privileged categories of noncitizens such as temporary residents and undocumented immigrants; see Lucy Williams, *Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Perspective*, 21 *STH AFR. J. HUM. RTS* 436, 468 (2005).

<sup>133</sup> *Khosa* 2004 (6) SA 505 (CC) [33]. Cf. *Fraser v. Children's Court, Pretoria North* 1997 (2) SA 261 (suspending enforcement of the court order striking down a portion of the state's adoption laws to permit Parliament to amend the law without the adverse consequences that would result from an immediate declaration of invalidity).

<sup>134</sup> *Khosa* 2004 (6) SA 505 (CC) [96]. See, also, *National Coalition for Gay and Lesbian Equality (NCGLE) v. Minister of Home Affairs* 2000 (2) SA 1 [86] (again, "curing" the unconstitutional provision of the immigration law "by reading in, after the word 'spouse,' the following words: 'or partner, in a permanent same-sex life partnership'").

<sup>135</sup> *Khosa* 2004 (6) SA 505 (CC) [88]–[89]. The new Social Assistance Act 2004, which replaced the impugned legislation, did not incorporate the phrase "or permanent resident." Instead, the categories of permanent resident—and of refugees—are included as expressly eligible in regulations: *Social Assistance Act Regulations* (Government Gazette, Aug. 22, 2008) (Sth. Afr.).

here—deferential, conversational, experimentalist, managerial, and peremptory—differ in terms of the mode of interpretation, judicial security, and remedy. These diverse approaches have been adopted by a Constitutional Court that has demonstrated considerable unanimity since hearing its first economic and social rights complaint in 1998. These distinctive features do not turn, for now at least, on an ascending or descending majority.<sup>136</sup>

Of course, the different forms of judicial review contain features that blend into one another. In the famous *Treatment Action Campaign* case, for example, the Court adopted a conversational posture to the problem of obstruction of HIV/AIDS drugs in the delivery of health care, but asserted a certain degree of managerialism in requiring the testing and counseling of expectant mothers with HIV/AIDS. The way in which individual provinces were encouraged to adopt their own arrangements has also been described in experimentalist terms.<sup>137</sup> Similarly, *Joe Slovo* can be read as deferential to government policy, and yet retains experimentalist and even managerial features. Despite this blending, I suggest that the archetypes of each approach help to demonstrate that different forms of review are being employed to perform distinct ends; and yet hint at an overarching function for the Constitutional Court.

These five distinctive forms are replicated—to greater or lesser degrees—in comparative constitutional law. The typology thus reveals the migration of distinctive approaches to inter-branch and extra-branch interactions, as well as of constitutional doctrines and remedies.<sup>138</sup> As depicted by the typology, the forms of review are akin to those that have been developed, employed, and described in other constitutional contexts, such as the U.S., Canada, and Europe. Significantly, these arise from cases, controversies, and challenges outside of the economic and social rights context and within the general realm of public law.<sup>139</sup>

Each of the five institutional stances is itself linked to discrete theories of judicial review—of what courts should do under particular conditions. Indeed, I have shown in my typology how each of the stances may represent an answer to problems of the others (in the way that, for example, experimentalist review increases the level of,

<sup>136</sup> The Constitutional Court is, however, heading into its second generation, with the compulsory term limits now expired. Five new judges have been appointed, four by President Jacob Zuma. For commentary on the rocky politics of the current Court, particularly on the complaint against the Judge President of the Cape High Court, Judge Hlophe, see Theunis Roux, *The South African Constitutional Court and the Hlophe Controversy*, Paper delivered at Centre for Comparative Studies 21st Anniversary Celebration, Melbourne Law School, 27 November 2009.

<sup>137</sup> Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008).

<sup>138</sup> A borrowing which is, of course, encouraged by the Constitution: see S. Afr. Const., s 39(1) (that court “must” consider international law and “may” consider foreign law when interpreting the Bill of Rights). Like all legal borrowing, such approaches are transformed in the process; see further text, fn [173].

<sup>139</sup> I have not discussed the horizontality of the Constitution, and the effect that economic and social rights have on private law. For suggestions regarding the Constitutional Court’s preference to adjudicate through public law rather than reinterpret private property rights, see *President of the Republic of South Africa v. Modderklip Boerdery (Pity) Ltd* 2005 (5) SA 3 (CC). See also the careful treatment of common law in *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16.

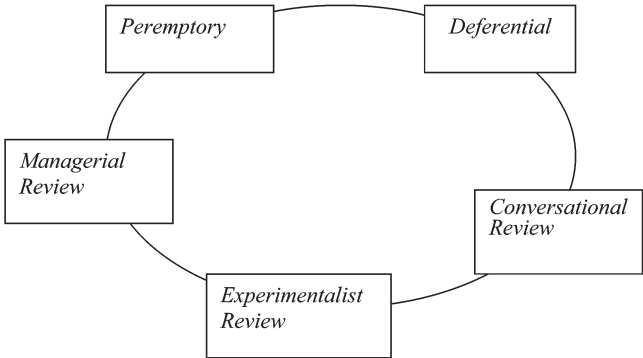


and changes the site of, the deliberation that may occur from conversational review; and that peremptory review works to remove the representation challenges of experimentalist review (thereby producing representation challenges of its own). I use an overarching metaphor to show that, despite their differences, these forms of review belong within an overarching role conception. Thus, despite this apparent eclecticism of the forms of review, a general role conception of the Constitutional Court can be apprehended: I term this catalytic. Below, I venture an explanation of the Court's choice to adopt one over another approach, as consistent with an attempt to catalyze a number of inter-branch responses, as well as the responsiveness of the wider constitutional polity. This leads me to revise a number of other possible explanations for the variety of the forms of review. Furthermore, I suggest that a catalytic role conception is not the only way that a court can respond to complaints of economic and social rights infringements. The contours of a second typology—of overall judicial role conceptions—make themselves apparent. In introducing the models of a detached, an engaged, and a supremacist court, I do not intend to be exhaustive. Nor do I align, in any strict sense, such role conceptions with the courts of particular countries.

A typology of forms suggests a range of functions; however, it can also expose elements comprising a common approach. If we suppose, for example, that the function is to vindicate rights and, in particular, the constitutional commitment to “respect, protect, promote and fulfill” economic and social rights,<sup>140</sup> we must engage in the postformalist, but fraught, assessment of “success” in public law litigation and adjudication. I end by broaching the tensions that arise from this goal.

### 3.1 From judicial review to judicial role conception

I have presented the typology of review as a range of approaches to interpretation, scrutiny, and remedy, each having developed, in part, out of the concerns raised within other modes of review, with each in turn producing problems of their own. An illustration of this effect is as follows:



<sup>140</sup> S. Afr. Const., s 7.

The overall effect of this variety of responses belongs, I suggest, to the role conception of a catalytic court. This allows us to have regard to the way in which the court sees itself in its interaction with other actors. Adopting the metaphor of the catalyst, I suggest that the Court acts to lower the political energy that is required in order to change the way in which the government responds to the protection of economic and social rights. In doing so, the Court itself remains largely unchanged (or is, at least, not the main focus of the change). The greater change occurs in the legislatures, bureaucracies, interest groups, and/or social movements representing claimants, who are forced to interact together in ways that would otherwise require a greater expenditure of political energy.<sup>141</sup> The interactions are not normatively neutral, in the sense that the catalyst is present to trigger and control certain changes and not others. Even deferential review, the least intrusive of all these stances, fits within the catalytic metaphor, due to the reciprocal role obligations that it can stimulate.

In broadly characterizing this catalytic role conception, I borrow partly from the writings of new governance scholars, who show how courts can catalyze various deliberative effects by elaborating and enforcing norms and by helping to “prompt and create occasions for normatively motivated and accountable inquiry and remediation by [other] actors.”<sup>142</sup> Nonetheless, I suggest that the role conception that best approximates the Constitutional Court’s efforts to navigate the challenges of economic and social rights is not, uniformly, a decentered one. As the presence of peremptory review in the typology makes clear, the Court’s specific form of review may sometimes be cast as centralized and hierarchical. The Constitutional Court’s role is more weighted and central, in part, because of the postapartheid constitutional settlement. During the heightened constitutional politics of the Interim Constitution which commenced in 1994, the Final Constitution of 1996 and its certification,<sup>143</sup> South Africa’s constitutionalism tackled what new governance defers: what has been referred to as the need for “anchoring premises beyond the possibility of experimental rejection.”<sup>144</sup> The Constitutional Court is now responsible for catalyzing change in keeping with the Constitution’s broad aspirations, entrenched rights, and overall commitment to transformation.<sup>145</sup>

<sup>141</sup> I use the term “political energy” in a similar way in which political scientists use the term “political capital,” which is a form of political power which can be possessed, increased, or spent. My main work here is not, however, to develop the insights that emerge from assessing the ways in which capital is converted between different institutions. New governance approaches have assisted in this respect: *e.g.* Liebman & Sabel, *supra* note 69.

<sup>142</sup> Scott and Sturm, *supra* note 68. The metaphor has also been used to capture the effect of U.S. state courts in education policy: MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY (2001) (suggesting that courts have contributed to improving education in Texas, Kentucky, and North Dakota by forcing change in school finance policy).

<sup>143</sup> *Certification Judgment*, 1996 (4) SA 744.

<sup>144</sup> Neil Walker, *EU Constitutionalism and New Governance*, in Grainne de Burca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 15, 32 (Grainne de Burca & Joanne Scott, eds., 2006) (suggesting this requirement in relation to European law).

<sup>145</sup> *See, generally*, Sth Afr. Const., esp. 7–39 (Bill of Rights). For the special role of the Constitutional Court, see ss 167(5), 172(2) (whereby the Constitutional Court must confirm the declarations of invalidity issued by lower courts in order for them to take effect, thus providing it with a critical supervisory role).

As is well known, the Constitution was entrenched in order to check government and judicial power while, at the same time, issuing a summons to all three branches to address the legacy of almost half a century of apartheid and its destructive imprint on the terms of social life.<sup>146</sup> The direction of change was itself made the subject of constitutional precommitment. The transformation was to be democratic, rights-protective, socially egalitarian, and focused on the burdens caused by the period of officially sanctioned racial discrimination in employment, land-holding, schooling, and other critical determinants of prosperity and poverty.<sup>147</sup> In the representative terms of the interim preamble, the constitution (and its court) must span “a bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, belief or sex.”<sup>148</sup> I suggest that a catalytic role conception is a response to this exhortation, as perceived both by the Constitutional Court and by the wider constitutional culture of South Africa.<sup>149</sup>

### 3.2. Justificatory and explanatory accounts of the catalytic function

While more substantively informed elements of transformation have been identified in South Africa,<sup>150</sup> the one unifying theme of transformation is that it problematizes the status quo. Nonetheless, we require more than a thesis of transformation in order to detect (or prescribe) which form of review the Court will adopt in each case. In venturing this task, four prominent explanations are available. I explore each of them, before suggesting a fifth, which focuses on the government's actions that underlie the complaint of an economic and social rights infringement.

The first is that the Court's choice of review depends on whether the complaint rests with a positive or a negative obligation flowing from the economic and social right at hand. This explanation relies on the truism that enforcement of a negative obligation—an infringement of a duty to respect rights because of active, and illegitimate, state interference—is less likely to threaten the traditional role of the Court, since it will require one-dimensional assessments of infringements and a curtailed remedial intervention. Sandra Liebenberg has suggested, for example, that the reasonableness inquiry is not applicable to an alleged infringement of negative obligations, because the situationally sensitive standard behind the duty of “progressive realization” is not required; the infringement will only be justified by the more stringent requirements

<sup>146</sup> Dikgang Moseneke, *Transformative Adjudication, Fourth Bram Fischer Memorial Lecture* (Apr. 25, 2002), 18 S. Afr. J. Hum. Rts. 309 (2002).

<sup>147</sup> Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. Hum. Rts. 146 (1998).

<sup>148</sup> Van der Walt suggests this statement is “a fair approximation of the way in which most people see the transformative purpose and nature of the Constitution”: A.J. van der Walt, *Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation*, 11 Stellenbosch L. Rev. 21, 226, 239 (2000) (Part 2).

<sup>149</sup> For a helpful demarcation of constitutional culture in the U.S. context, see Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 Harv. L. Rev. 4 (2004).

<sup>150</sup> E.g., Moseneke, *supra* note 146, Klare, *supra* note 147, Van der Walt, *supra* note 148.

of the general limitations clause.<sup>151</sup> Moreover, such an infringement, if found, can be remedied by a conventional order to desist from acting the way the government is presently acting. Since the court will not need to catalyze positive action on the part of the state, it can rest within conventional modes of review and remedy, which lie in the peremptory or deferential domains.

Yet, as the *Treatment Action Campaign* case makes clear, even negative infringements by the government are addressed by the Court using features of conversational and managerial review.<sup>152</sup> A clear lesson, from the legal realists onward, is that the background vulnerabilities that make active government interference burdensome to rights are also the result of state action. We might say, for example, that an active eviction, which interferes with a negative obligation to respect an individual's right to housing, will not be an infringement if alternative accommodation is available.<sup>153</sup> This reveals the continued instability of the negative/positive distinction, of duties no less than rights.<sup>154</sup> While we can still give some credence to the action/omission distinction, we must do so while conceding that it can obscure the prior effect of law's creations—of privileges and immunities, as well as of rights and duties—on present arrangements.<sup>155</sup> On this basis, the explanation of the choice of review as responsive to whether a positive or negative infringement is alleged can only be partly correct.

The second explanation that moves beyond a simple thesis of transformation is that the Court's stance toward review has changed as its jurisprudence matures. While deference was a key posture as the Court was developing an appropriate role in adjudicating economic and social rights, it has become less appropriate as the Court has grown in confidence. Now, more interventionist postures, such as managerial and peremptory review, have developed.<sup>156</sup> This explanation has much in common with Tushnet's prediction to the effect that weak courts strengthen over time, supported by the polity (along with the conversion of weak remedies into strong).<sup>157</sup> Yet this explanation, while certainly plausible in describing the Court's first tentative judgment in *Soobramoney*, fails to account for recent modes of review. Even now, we find a

<sup>151</sup> S. Afr. Constitution, ss 26, 27 (comprising both negative and positive obligations); s 36 (limitations clause); see Liebenberg, *Revisiting the Reasonableness Review/Minimum Core Debate*, *supra* note <tk>, 311. This focus on obligations is consistent with a rejection of the negative/positive rights distinction as categorizing different rights; see LIEBERBERG, ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, *supra* note 46, 54–59.

<sup>152</sup> See *infra*, text accompanying note [58]–[63]. Nonetheless, see the Court's arguable disavowal of the managerial aspects of *Treatment Action Campaign*; *Mazibuko* CCT 39/09 [2009] ZACC 28 (October 8, 2009) (CC) [64]. (Justice O'Regan arguing that "all the Court did was to render the existing government policy available to all").

<sup>153</sup> *Olivia Road*, Case CCT 24/07; [2008] ZACC 1 [14].

<sup>154</sup> E.g., HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* (2d ed. 1996).

<sup>155</sup> For a containment of Hohfeld's typology, see Alan Gewirth, *Are All Rights Positive?* 30 PHIL. & PUB. AFFAIRS 321 (2002).

<sup>156</sup> Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007).

<sup>157</sup> TUSHNET, *WEAK COURTS, STRONG RIGHTS*, *supra* note 5, 249.

continuing willingness of the Court to assume deferential or conversational review.<sup>158</sup> Perhaps Tushnet's reflection, that courts may reconvert weak remedies, after their strengthening, back into more effective weak remedies, has better explanatory traction.

Third is the explanation that the Court's choice of review differs on the basis of the judicial manageability of the economic and social right that is claimed. This explanation would find empirical support in U.S. experience.<sup>159</sup> The right to health care, for example, is notoriously complex—its meaning depends upon the availability and constraints of scientific and cultural knowledge, and its satisfaction is partly contingent on genetics or luck.<sup>160</sup> The right to water, on the other hand, is apparently a readily measurable commodity that can link individual entitlements—by the liter—to consumption and sanitation needs. The one would appear to be more judicially manageable than the other: so much was expected, at least, by the lower court in the *Mazibuko* case. In concluding that a free basic water policy of 25 liters per person per day was insufficient to meet their basic needs, to live in dignity and to avoid threats to their lives and health, the High Court judge had determined that managerial review—including an approved minimum core (resting at 50 liters per day) and a detailed plan of response—would be most appropriate. The right to access water appeared measurable and determinate, which the Supreme Court of Appeal affirmed.<sup>161</sup> On further appeal, the Constitutional Court disagreed, refusing to engage in any statement of a quantified standard and deferring to the government's determination.<sup>162</sup> Managerial review was not considered appropriate, even for an apparently "manageable" right.

Fourth, is the explanation that the Court can choose to engage in more vigorous review when the cost implications of its order are negligible. Its peremptory stance in *Khosa* was helped, for example, by the fact that the inclusion of indigent permanent residents in the social security regime would reflect "an increase of less than 2% on the present cost of social grants."<sup>163</sup> Similarly, the Court's experimentalist order in *Treatment Action Campaign* was assisted by the fact that the antiretrovirals were free;

<sup>158</sup> *Mazibuko* CCT 39/09 [2009] ZACC 28 (October 8, 2009) [56] (CC); *Joe Slovo Community*, CCT 22/08 [2009] ZACC 16.

<sup>159</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) ("Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social and even philosophical problems.' . . . [W]ithin the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect"), (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), and *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)).

<sup>160</sup> For an examination of how a right to health may be seen as incompletely theorized but reliant on notions of human capability, in Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, (2006) 18 *YALE J. L. & HUMAN.* 273, 306–311. For examples of its institutional dependence, see Katharine G. Young, *Securing Health through Rights*, in *INCENTIVES FOR GLOBAL PUBLIC HEALTH* (Thomas Pogge, Matthew Rimmer & Kim Rubenstein, eds., forthcoming, 2010).

<sup>161</sup> Compare *Mazibuko v. City of Johannesburg* [2008] 4 All SA 471 (W); [2009] ZAGPHC 106 (18 April 2008); Case No. 06/13865 (ordering the City to supply 50L of free water per person per day); with *City of Johannesburg v. Mazibuko* 2009 (3) SA 592 (SCA); 2009 (8) BCLR 791 (SCA); Case No. 489/08 [2009] (reducing the minimum entitlement to 42 liters per person per day).

<sup>162</sup> *Mazibuko v. The City of Johannesburg* CCT 39/09 [2009] ZACC 28 (October 8, 2009) [56] (CC).

<sup>163</sup> *Khosa* 2004 (6) SA 505 (CC) [62].

<sup>164</sup> *Khosa* 2004 (6) SA 505 (CC) [65].

their donation by pharmaceutical companies was guaranteed for a period of five years. Nonetheless, while this explanation tracks the cost-related objections to economic and social rights enforcement (which point to their tendency, to a greater extent than other rights, to require a reallocation of scarce resources on the part of the state), it is insufficient to account for the Court's changing modes of review. In *Khosa*, the additional cost for the government to bear (ranging—in a speculative way—between R243 and R572 million) was, demonstrably, not negligible. Increased appropriations were clearly required by such orders, at least in the short term. Moreover, understanding the Court's choice of review through the lens of cost is problematic. The Court has acknowledged that the cost of economic and social rights is a legitimate government concern; however, it has suggested that an increase in expenditure "may be a cost we have to pay for the constitutional commitment to developing a caring society."<sup>164</sup> More fundamentally, the Court does not engage in the task of assessing how its orders will increase or decrease expenses over the long term—an extremely difficult conceptual and practical task, which commentators acknowledge.<sup>165</sup>

I suggest that, in partial contrast to these four explanations, the choice of review adopted by the Court is more subtly responsive to the government's actions. Thus, I suggest that the choice of review responds to the government action: whether, for example, the government is deliberately obstructive and even hostile to economic and social rights, whether it is inadvertently overriding such rights, or whether it is genuinely unable to deliver them. To demonstrate this effect, I find it useful to invoke Kent Roach's and Geoff Budlender's characterization of government's actions toward economic and social rights, which may be considered unreasonable because of intransigence, incompetence, or inattentiveness.<sup>166</sup> An intransigent legislature or bureaucracy is one beset by inertia; immovable, through procedural practice or force of habit, and unable to change policy. An incompetent government is technically unable to access or process the information, or is practically constrained by a lack of funds.<sup>167</sup> An inattentive government, on the other hand, fails to comprehend the claims of the most materially vulnerable. This inattentiveness may be the product of the invisibility and exclusion of certain groups in public processes, due to the very fact of their material vulnerability, or because they are otherwise a politically vulnerable or unpopular minority.

<sup>165</sup> For a brief argument about the ways in which judicial enforcement can reduce expenditures over the longer term by minimizing more expensive intervention, or by creating other value, see Noonan, Sabel & Simon, *supra* note 67.

<sup>166</sup> Roach & Budlender, *supra* note 83, 345–350, borrowing from Chris Hansen, *Inattentive, Intransigent and Incompetent*, in CHILD, PARENT AND STATE 224, 232 (S. R. Humm, ed., 1994). Roach and Budlender also draw parallels to the principles of escalating regulatory responses in John Braithwaite, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (2002).

<sup>167</sup> Incompetence thus raises the challenge of the cost of the perceived action, suggested as a fourth explanation, but places it within a contextualized assessment of options available to the government.



This disaggregation of government action is a powerful way to understand the variety of review employed by the Court, and the attempts it makes to catalyze various responses. While Roach and Budlender have applied it to suggest a range of appropriate remedies,<sup>168</sup> it is also useful in understanding a range of modes of interpretation and evaluation of government's conduct. For example, inattentiveness is addressed by focusing political attention on the elected branches. Conversational review will be appropriate. However, if the inattentiveness is directed to a politically vulnerable class, which is unlikely to benefit from an increase in political attention, the Court is more likely to adopt peremptory review. Incompetence is best addressed through adopting the problem-solving capacity of experimentalist review or, if it is the result of a genuine lack of funds (that cannot be raised otherwise), deferential review. Finally, intransigence is best dislodged by the dynamism of experimentalist review or by the court's investment in managerial review.

This linking of review to the government's actions allows us to understand how the catalytic court is able to prompt a myriad of changes in order to secure the protection of economic and social rights. It also helps us to assess the choices made by the Court, and to acknowledge that in invoking certain types of judicial review in particular cases, the court may have miscalculated its catalytic function.<sup>169</sup> Moreover, the catalytic function of the South African Constitutional Court also helps to capture the modes of judicial review of all constitutional rights, not just economic and social rights.

This explanation ties in with a normative account of how the catalytic function helps to increase the protection afforded by constitutional economic and social rights. The analysis of *Khosa* suggests that the Court seeks to make its intervention compatible with democracy, and that the Court's vision of democracy is attuned to political vulnerabilities and inequalities. The very assessment of the government's actions—whether classified as intransigent, for instance, or inattentive—relies on a normative understanding of the obligations that the right imposes. A court, therefore, is not excused from engaging in prior interpretive work on the substance of economic and social rights when adopting the catalytic function.

We might say that the Constitutional Court is sounding out something like Ely's "representation-reinforcing" role as a justification for departing from deference, and from other forms of review,<sup>170</sup> and that the availability of the catalytic function allows

<sup>168</sup> S. Afr. Const., s 38, 172(1)(b); see also *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) [19] (conceding that the Court "may even have to fashion new remedies to secure the protection and enforcement" of the Constitution).

<sup>169</sup> Local commentators have criticized, for instance, the Court's decision in *Mazibuko v. The City of Johannesburg* CCT 39/09 [2009] ZACC 28; see, e.g., LIEBENBERG, ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION, *supra* note 46, 466–480 (suggesting the decision represents a retreat from previous economic and social rights decisions). It is noteworthy that the Court, in dismissing the challenge to the sufficiency of a free basic water supply, proceeded to confirm the importance of the litigation for water policy specifically, and for government policy in general: [159]–[169]. O'Regan J, writing for a unanimous Court, suggested that litigation around economic and social rights "fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy": [160].

<sup>170</sup> JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

it to address two elements that were underemphasized in Ely's account. First, the Constitutional Court arguably recognizes that procedural protections are reliant on substantive interpretations of constitutional democracy—a large part of which is the liberal-egalitarian protection of economic and social rights.<sup>171</sup> Secondly, we might attribute a certain pragmatic self-knowledge on the part of the Court, of the pitfalls of judicial overreach and public backlash.<sup>172</sup> The Court thus chooses to exercise more interventionist measures only in exceptional cases. And this justification returns us to the elusive goal with which we started: the means to secure economic and social rights within constitutional democracy.

### 3.3. Other role conceptions: Detached, engaged, and supremacist courts

What lessons does the South African Constitutional Court hold for other courts called to respond to claims of economic and social rights? How generalizable is the experience of a catalytic court working with a transformative constitution? Does the foregoing typology help us to understand the contemporary responses to economic and social rights by the Indian Supreme Court, the Colombian Constitutional Court, or the German Constitutional Court?<sup>173</sup> Alternatively, does it allow us to predict how economic and social rights complaints may be addressed by the Supreme Court of the United Kingdom (succeeding the House of Lords) as the parliamentary Bill of Rights evolves,<sup>174</sup> or the Canadian Supreme Court and the Charter (with the provincial bills of rights), or even the U.S. Supreme Court? Does it help us to understand supranational and international adjudication of economic and social rights?<sup>175</sup> Do these courts, too, move through the typology, triggered by their assessment of the government's response and of the failings of other forms of review?

I suggest that the catalytic court is not the only role conception that responds to complaints of economic and social rights infringements. For example, three opposing role conceptions—a detached court, an engaged court, and a supremacist court—all

<sup>171</sup> Michelman, *Liberal Political Justification*, *supra* note 4.

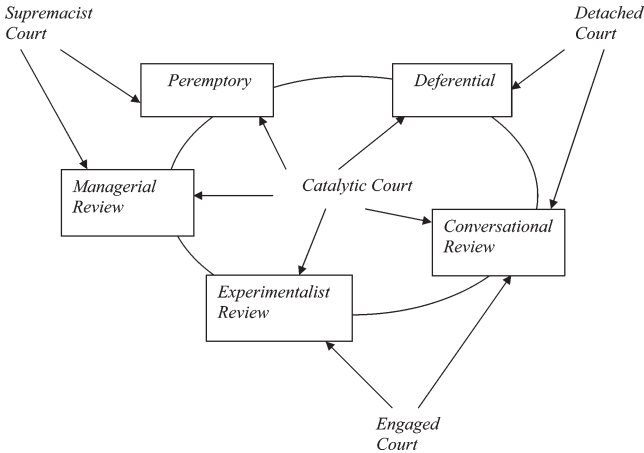
<sup>172</sup> Roux, *Principle and Pragmatism*, *supra* note 7.

<sup>173</sup> See COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES, *supra* note 11, 268–269 (noting the creation of special jurisdiction, sources of evidence, and remedies, in India, Colombia, and elsewhere); see also EXPLORING SOCIAL RIGHTS (Daphne Barak-Erex & Aeyal Gross, eds., 2007); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008). For a noteworthy recent decision of the German Constitutional Court, see BVerfG, 1 BvL 1/09 vom 9.2.2010, Absatz-Nr. (1-220) (holding that provisions in federal social assistance legislation did not comply with arts 1.1. and 20.1 of the Basic Law, as insufficient to guarantee a subsistence minimum that is consistent with human dignity).

<sup>174</sup> See, e.g., Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–2008, August 2008*, ch 5, esp [171]–[172], [181] (outlining advantages of the “South African model,” as against other stronger judicial, and weaker judicial, approaches).

<sup>175</sup> See, e.g., Scott and Sturm, *supra* note 68; Tara Melish, *Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. Int'l L. & Pol. 171, 339–343 (2006). For a recent endorsement of South Africa's model, for international enforcement, see Beth A. Simmons, *Should States Ratify? Process and Consequences of the Optional Protocol to the ICESCR*, 27 NORDIC J. HUM. RTS. 64 (2009).

utilize certain features of this typology. These role conceptions may openly reject many of the five stances discussed; however, none of them reject all five and most employ at least two. They may resemble the following diagram:



As depicted above, a detached appellate court evinces the features of deferential or, at most, conversational review. An engaged court displays the features of conversational and experimentalist review. And a supremacist court acts in both managerial and peremptory directions. The tendency of a court to avail itself of one or another approach may be guided by the explanations undergirding catalytic review as well as by the institutional design features within certain other constitutional arrangements. While I have not, in this article, detailed the institutional design features of the South African Constitution that favor broad access to the Court, such as standing rules, treatment of amicus contributions, and the publication of opinions, it is clear that these features abet the South African Constitutional Court’s catalytic function.<sup>176</sup> Similarly, the institutional design features of other jurisdictions may obstruct the choice of review as laid out in this typology.<sup>177</sup>

My depiction of different role conceptions helps to evaluate courts not on the basis of their jurisdiction or judicial ideology but, rather, on their likelihood of adopting one approach or another. The breadth of the typology frees up our current thinking about justiciable economic and social rights. First, it provides a different measure by which to evaluate and usefully categorize courts. This measure has the potential to depart from an ideology-bound classification. Our understanding need not be constrained, for example, by the ideology of judges or by their formalist or attitudinal bent. The cautions

<sup>176</sup> See, e.g., S. Afr. Const., s 38. For analysis of these latter two features for U.S. constitutionalism, see Bennett, *supra* note 47.

<sup>177</sup> For example, the New Zealand Supreme Court cannot engage in the peremptory review described here, because the Bill of Rights (NZ), s 4, does not allow the striking down of legislation. To accommodate this concern, the typology may be viewed, for comparative purposes, as attached to a local default norm: this explains why “deferential” may equate to a different stance in South Africa and the United States.

that such judicial characteristics raise for economic and social rights—that is, of formalist judges being disoriented by the complexity of allocative decision-making, of conservative judges justifying their preference for deregulation on a theory of economic growth, and of liberal judges demanding greater public spending and producing a public backlash against the poor<sup>178</sup>—is managed, if not overcome, by the forms of review available.

Second, an examination of the general role conceptions of courts that exist within the corners of this typology, allows us to resist a country-specific classification with respect to economic and social rights. We can see, for example, what the Indian Supreme Court and the South African Constitutional Court critically share: and why we may understand a reluctance to prescribe justiciable economic and social rights for a supremacist Court, similar to the United States Supreme Court.<sup>179</sup> Yet we can also recognize the situationally specific aspects of these features, which itself is an important breakthrough and one of the best justifications for constitutional comparison that one can provide.

## 4. Conclusion

In this article, I have suggested that the adjudication of economic and social rights by the South African Constitutional Court has taken place alongside a variety of styles of review. By this very variety, the South African jurisprudence on economic and social rights both extends and challenges the current prescriptions for courts in addressing these rights. While the overall posture of the Constitutional Court shows an affinity with a catalytic court, it engages in a range of individual and discrete forms of judicial review that are poised to facilitate the government's and the wider polity's efforts in realizing economic and social rights. This finding disaggregates the comparative account that is provided by the modeling of weak or strong courts and the modeling of experimentalist or new governance courts.

First, I have grouped these forms of review along a spectrum of five techniques: deferential, conversational, experimentalist, managerial, and peremptory review. Sometimes by demanding engagement, sometimes by justifying dialogue, sometimes by issuing decrees, though never by wholly taking over management, the Court “catalyzes” a transformation, which is calibrated according to the background political and institutional contexts and the rights infringement at issue. Second, I have classified the overriding role conception of the Constitutional Court as one involving a commitment to transformation, registered primarily by an attempt to catalyze the actions of government. I have pointed to areas in which the Constitutional Court is more likely to adopt a relatively muscular, command-and-control approach when the rights-claiming party is politically vulnerable and excluded. Finally, I have opened up the ways in which other apex courts—with quite different role conceptions—may nevertheless manage the challenges of adjudicating economic and social rights.

<sup>178</sup> Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 901–923 (2001).

<sup>179</sup> Michelman, *Explaining America Away*, *supra* note 4.