

THE ROLE OF JUSTICE IN THE CONSTITUTION: THE
CASE FOR SOCIAL AND ECONOMIC RIGHTS IN
COMPARATIVE PERSPECTIVE

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INTRODUCTION

Modern liberal constitutions grounded in Enlightenment ideals, starting with the late eighteenth-century French and American constitutions, are not ordinarily thought of as imposing requirements of justice, and even less so of distributive justice. In the broadest terms, such constitutions are meant to concentrate on safeguarding four essential pillars: limitations on the powers of government; adherence to the rule of law; protection of a core of fundamental rights; and assuring certain guarantees necessary for the maintenance of a working democracy.¹ On the other hand, most post-World War II liberal democratic constitutions do comprise a set of social and economic rights calling for the provision of some welfare benefits, minimum shelter, some level of education, and some health care benefits.² These social and economic rights do plainly comport a distributive justice component. Indeed, in the pursuit of a minimum of material well-being for all, based on the equal basic needs and equal dignity of each person within the relevant constitutional unit, it is necessary to effectuate certain economic redistributions. Thus, for example, assuming that a constitution requires that everyone within society have the opportunity to fulfill certain basic health needs, that would most likely require some wealth redistribution that could be achieved through progressive taxation. In this latter case, the constitution would incorporate the distributive justice precept “to each according to her basic health needs,” and given the typical wealth disparities within advanced contemporary societies, the achievement of this constitutional mandate would require some measure of wealth redistribution.

The contrast between the apparent lack of distributive justice component in eighteenth-century constitutions as opposed to constitutions enacted since the mid-twentieth century is best understood by reference to the United Nations 1948 Universal Declaration of Human Rights³ (UDHR) and the two United Nations covenants, respectively, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

¹ See Michel Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, 25 EUR. J. INT’L L. 177, 178 (2014).

² See NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ, SUSANNE BAER, & SUSANNA MANCINI, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1398–1401 (3d ed. 2016).

³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

Social and Cultural Rights (ICESCR), which were adopted in 1966 and made part of international law in 1976.⁴ The ICCPR focuses on rights already prevalent in the eighteenth century, such as freedom of speech and freedom of religion, whereas the ICESCR concentrates on rights with a distinct twentieth-century imprint, such as rights to food, shelter, education, and health.⁵ At the most general level, the introduction of social and economic rights may be understood by reference to the marked differences between the pre-industrial economies and societies of the eighteenth century and the advanced industrialized economies and corresponding societies of the mid-twentieth century. More specifically, however, there are two particular developments that account for the actual contents of the 1948 UDHR and of the two United Nations covenants. First, as a reaction to the horrors of the Holocaust, the world community, as congregated in the United Nations, agreed that every human being possesses the same inherent dignity and ought to therefore be protected by universal human rights.⁶ Whereas persons within the reach of a nation-state's liberal constitution may be protected by the fundamental rights assured by the latter, these rights do not extend to non-citizens abroad who may be subjected to state-sponsored massacre, torture, or otherwise inhumane treatment. The 1948 UDHR seeks to overcome this, by declaring that all human beings have fundamental rights *qua humans* and that these rights extend worldwide and as against all authorities foreign or domestic.⁷ Second, immediately after World War II, there was a basic disagreement between the two major powers, the United States and the Soviet Union. The United States championed civil and political rights, such as those enshrined in its 1791 Bill of Rights, which have become designated as "first-generation rights".⁸ The Soviet Union, on the other hand, downgraded the latter rights, which it portrayed as *bourgeois* in nature, while insisting on social and economic rights, referred to as "second-generation rights," and which it linked to dispensing welfare to all

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Exec. Doc. No. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

⁵ ICCPR, *supra* note 4; ICESCR, *supra* note 4.

⁶ UDHR, *supra* note 3, at 1.

⁷ The 1948 UDHR has no legal binding force and is hence largely moral and aspirational in nature. Since 1976, however, the two United Nations covenants are binding under international law.

⁸ Spasimir Domaradzki, Margaryta Khvostova, & David Pupovac, *Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse*, 20 HUM. RTS. REV. 423, 423-25 (2019).

within the communist system.⁹ As a consequence of this, the two United Nations covenants emerged as a compromise between these two contending visions.¹⁰

State-sponsored social welfare entitlements go back to the late nineteenth century and were first institutionalized by Germany's conservative chancellor Otto von Bismarck to stem the rising power of socialist parties.¹¹ Although currently constitutionalized within most democracies, economic and social rights have thus far failed to gain any traction in U.S. constitutional jurisprudence.¹² However, since President Franklin Roosevelt's New Deal in the 1930s, the United States has become a social welfare state in many ways comparable to most economically advanced Western democracies, though the welfare entitlements of Americans have consistently remained only statutory in nature and are hence subject to ordinary legislative repeal.¹³ In his famous 1941 State of the Union Speech, at which he spoke of his four freedoms, including "freedom from want," Roosevelt called for expanded pension coverage, unemployment benefits, medical care, and employment opportunities for all Americans.¹⁴ More recently, pursuant to a law signed in 1965 by President Lyndon Johnson, the United States significantly expanded its social welfare safety net through deployment of the Medicare and the Medicaid programs.¹⁵

Leaving aside that the breadth of social welfare protection varies from one national setting to another, does it much matter from a

⁹ Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 694–95 (1998).

¹⁰ *Id.* at 706–11.

¹¹ See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 220 (2009).

¹² Perhaps the most dramatic expression of the United States' adversity to the constitutionalization of social welfare rights is provided by the U.S. Supreme Court's decision in *Dandridge v. Williams*, where a state statutory provision limited the per-family government allocation of funds to cover the minimum child welfare needs of those who could not otherwise afford them in a way that was inadequate to the maintenance of such needs in families with a large number of children. Characterizing the limitation in question as a reasonable economic policy designed to discourage giving birth to children that one could not afford to support and thus further burdening the state's finances, the Court held it to be constitutional. In so doing, the Court rejected the claim that the contested state limitation deprived the indigent child with numerous siblings of the equal protection of the laws by not providing for her basic needs the same way that the state did provide for all similarly situated children who happened to have no more than a few siblings. *Dandridge v. Williams*, 397 U.S. 471 (1970).

¹³ Some U.S. state constitutions do provide social welfare protections. See, e.g., N.Y. CONST. art. XVII, § 1. However, for purposes of the present analysis, only the U.S. federal Constitution will be considered.

¹⁴ President Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941) in 87 CONG. REC. H., at 44, 44–47.

¹⁵ Social Security Amendments of 1965, H.R. 6675, 89th Cong. (1965).

jurisprudential or a pragmatic standpoint whether the corresponding rights are constitutionalized or left to majoritarian public policy preferences? Upon initial consideration, the pragmatic answer is yes and no: yes, because constitutionalized social welfare entitlements are better entrenched than if subjected to majoritarian whims, as evinced by the anxieties caused in the United States by periodic politicians' proposals to eliminate or curtail safety net mainstays such as Social Security, Medicare, or Medicaid;¹⁶ and no, because second-generation rights appear not as easily amenable to judicial protection as are first-generation rights, which makes the former arguably unwieldy within the constitutional sphere and hence seemingly more felicitously left to majoritarian public policy. From a jurisprudential perspective, on the other hand, there are no uncontested right answers as jurists and scholars are in sharp disagreement.¹⁷

In this Article, I advance the thesis that the ideal of liberal constitutional democracy requires some dispensation of justice in general, and of distributive justice, in particular. More specifically, the ideal in question calls for the constitution to prescribe a minimum of justice that I have designated as the "justice essentials" of the constitution.¹⁸ Moreover, these justice essentials are as relevant to eighteenth-century constitutions as they are to their more recent counterparts though, as will be detailed below, the actual components of the justice essentials of a given constitutional order are dependent, in part, on time and space. Consistent with commitment to the said justice essentials, the minimum of distributive justice that liberal constitutions ought to dispense in the context of the present-day globalized economy requires inclusion of second-generation rights. That, in turn, gives rise to two daunting problems. First, the already mentioned difficulty of incorporating second-generation rights that are positive in nature—as they require active government intervention in order to be implemented—in a constitutional framework suited to the vindication of first generation typically negative rights—which as exemplified by traditional free speech rights primarily require the government to

¹⁶ See e.g., Patricia E. Dilley, *Hope We Die Before We Get Old: The Attack on Retirement*, 12 ELDER L.J. 245, 250–51 (2004); Alan Rapperport & Maggie Haberman, *Trump Opens Door to Cuts to Medicare and Other Entitlement Programs*, N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/us/politics/medicare-trump.html> [https://perma.cc/LK76-33UV]; Katie Glueck, *Biden and Sanders Trade Criticism over Honesty, Social Security and Guns*, N.Y. TIMES (Jan. 21, 2020), <https://www.nytimes.com/2020/01/21/us/politics/joe-biden-bernie-sanders-social-security.html> [https://perma.cc/7XN3-C9FZ].

¹⁷ See *infra* notes 41–43, 47 and accompanying text.

¹⁸ See MICHEL ROSENFELD, *ACHIEVING JUSTICE THROUGH THE CONSTITUTION: MEASURING LIBERAL PLURALISM AGAINST ILLIBERAL POPULISM* (forthcoming 2021).

refrain from acting.¹⁹ Second, given the increased transnational movement of capital and labor in the era of globalization, it appears increasingly problematic for traditional nation-state constitutions to handle the redistributive imperatives laid out by the justice essentials. Notwithstanding these difficulties, I will conclude that contemporary liberal democratic constitutions, including that of the United States as plausibly further elaborated through judicial interpretation, ought to prescribe and protect some bundle of social and economic rights.

The Article proceeds as follows. Part I lays out the argument for a nexus between the liberal constitutional democratic ideal and distributive justice, and the consequent requirements of a minimum of justice as framed by the justice essentials of the relevant constitutional order. Part II examines the dichotomy between first-generation and second-generation constitutional rights through a comparative analysis of contemporary constitutions that enshrine social and economic rights. Part III briefly sets out the strong distributive justice case for constitutional protection of social and economic rights in the context of the present-day globalized economy. Finally, Part IV lays out the case for U.S. adoption of the latter rights through plausible judicial elaborations of constitutional protections within the scope of the Due Process and Equal Protection clauses of the U.S. Constitution.

I. THE JUSTICE ESSENTIALS OF THE LIBERAL CONSTITUTIONAL IDEAL

Going all the way back to its modern origins in the French and American revolutions, the ideal of liberal constitutionalism has carried within it an essential component of dispensing justice and, above all, distributive justice.²⁰ As the two revolutions in question were focused primarily on overthrow of feudal privilege and social and political dominance, however, their battle cries were centered on liberty, autonomy, democracy and equal citizenship, thus subsuming or largely hiding their deeply embedded justice dimension. The best iterations of the transition from feudal hierarchy—grounded in status-based distributive inequalities determined at birth—to the ideal of equal

¹⁹ Tellingly, the First Amendment to the U.S. Constitution starts with the words: “Congress shall make no law . . . [abridging freedom] of religion, . . . of speech, or of the press . . .” U.S. CONST. amend. I.

²⁰ Liberal constitutions also typically address issues of procedural justice as evinced by various provisions of the U.S. Bill of Rights. See U.S. CONST., amends. V, VI, VII. Also, under certain circumstances, such as those of the post-communist constitutions in Eastern Europe and of the post-apartheid constitution in South Africa, it may be desirable to constitutionalize certain compensatory or retributive justice measures. For present purposes, however, the focus will be limited to issues relating to distributive justice.

citizenship casting every member of the polity as a subject of equal justice are the French 1789 Declaration of the Rights of Man and Citizen and the U.S. 1776 Declaration of Independence with its dictum that “all men are created equal.” To be sure, both the French and the American eighteenth-century forays into liberal constitutionalism fell far short from the ideal they invoked: the former most notably for its exclusion of women from equal citizenship;²¹ and the latter for its failure to even include an equality provision within its 1787 Constitution given its backing of slavery that would continue till the end of the U.S. Civil War in 1865.²² Nevertheless, distributive justice is inherent in, and essential to, modern constitutionalism, and the import of this is now perhaps more critical than ever before. Given the baseline of equal citizenship, constitutions must set the broad outlines of allocation of benefits and burdens within the polity. Within the domain of material socio-economic distributions, justice can range, in theory, from a libertarian allocation of mere equal formal (purely negative) constitutional rights to a broad egalitarian guarantee of generous (in large part positive) social and economic constitutional rights. That said, when looking back at the eighteenth century, it is worth invoking Adam Smith’s conception of a free-market economy led by the invisible hand of competition toward the most distributively fair material allocation throughout society consistent with the public good.²³ And consistent with this, it is easy to envision how constitutions of that period could be regarded as compatible with distributive justice imperatives without having to address explicitly any social welfare issues. Indeed, a free economic market requires maintenance of public order, the protection of liberty and property rights, as well the enforcement of contracts. Accordingly, equal civil and political rights throughout the citizenry should be constitutionally adequate to foster distributive justice throughout the polity.²⁴ In short, one can posit that eighteenth-century constitutions did actually guarantee a minimum of material distributive justice at

²¹ See OLYMPE DE GOUGES, THE DECLARATION OF THE RIGHTS OF WOMAN AND THE FEMALE CITIZEN (Fr. 1791).

²² See U.S. CONST. amend. XIII, which abolished slavery and made it unconstitutional. See David A. J. Richards, *Revolution and Constitutionalism in America*, reprinted in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 85 (Michel Rosenfeld ed., 1994).

²³ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

²⁴ It might be objected that it makes little sense to speak of distributive justice if the economic market itself determines just allocations as opposed to some socio-political redistributive scheme. This objection is easily refuted so long as one realizes that free markets are not “natural” phenomena, but institutionally framed and backed systems of human interaction based on certain legal institutions and socio-economic norms and practices.

least implicitly.²⁵ Moreover, even eighteenth-century constitutions were not completely bereft of social welfare provisions as the 1791 French Constitution mandated that the state should “provide work for the able-bodied poor who may have not been able to obtain it for themselves.”²⁶

Importantly, the domain of distributive justice associated with the liberal constitutional ideal is not confined to that of material welfare. In addition, constitutions must also dispense the broad outlines of distributively just allocations within the domain of identitarian justice and within that of representational justice. From the identitarian standpoint, distributive justice’s task is above all twofold: first, it must carve out the subject class of those entitled to equal citizenship to the extent that the latter is broadly defined in terms of a relevant *ethnos*, and, second, it must adjudicate between competing or conflicting claims to identitarian recognition, self-expression, and path to self-fulfillment. In the present context, *ethnos* is understood in its broadest plausible connotation as encompassing any conceivable basis of solidarity within a socio-political unit. The *ethnos* is distinguished from the *demos* and provides the latter with the glue that holds it sufficiently together to cohere into a working unified socio-legal and political unit.²⁷ For any democracy to work adequately there must be a sufficient commonality or convergence of values, culture, and interests among those who constitute its citizenry. Whereas the family and the tribe work on the basis of person-to-person interactions, within the space carved out by the nation-state, which is typically circumscribed by contemporary constitutions, it is relationships among strangers that are by far predominant. Accordingly, in Benedict Anderson’s famous formulation, the nation-state must come together as an “imagined community.”²⁸ The *ethnos*, in turn, determines who belongs to the relevant imagined community, and it thus singles out those within the borders of the relevant political unit who are entitled to share in the allocation of the benefits and burdens of citizenship. The relevant *ethnos* may be constructed along a broad spectrum spanning from an

²⁵ Actually, even twentieth century libertarian political philosophers have argued that any redistributions of wealth apportioned through the workings of the free market are distributively unjust. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 155 (1974).

²⁶ LA CONSTITUTION FRANÇAISE Sept. 3, 1791, art. 1 (Fr.).

²⁷ The present discussion summarizes the much more extensive treatment of this subject in MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY 149–52 (2010).

²⁸ See BENEDICT ANDERSON, IMAGINED COMMUNITIES 12, 22, 197 (rev. ed. 2006) (national identity is based on delimiting an imagined community).

exclusionary strictly ethnic-based conception of national identity²⁹ to a very inclusionary vision of the latter that welcomes all those willing to share certain key common values and to engage in a broadly defined common project.³⁰

The second dimension of identitarian justice arising under the liberal constitutional ideal concerns the inevitably plural composition of any contemporary *ethnos*. Modern nation-states are typically multi-ethnic, multicultural, and religiously and ideologically diverse. Moreover, even if a constitutional democracy were to systematically disregard all these group-based differences—as the French Constitution pretty much does³¹—its citizenry would nevertheless be individualistically pluralistic. Indeed, as a free and equal member of the polity, each person has her own interests, preferences, and path to self-fulfillment and self-realization. Identitarian distributive justice requires recognition of group and/or individual claims to equal opportunity or equal treatment on the basis of how one identifies and with which group one joins to pursue commonly shared values and objectives. Thus, for example, in a polity with competing religions embracing conflicting visions and values, the constitution should afford recognition to, and guarantee equal treatment of, each of them; or proportionate treatment according to their respective number of adherents; or treatment that properly factors their historical embeddedness and role within the construction of the identitarian glue that holds the relevant polity together.

The third prong of distributive justice associated with the liberal constitutional ideal, representational justice, relates to the intersection between the *ethnos* and the *demos*. Who shall choose representatives and what and for whom shall be the principal concern of those who govern? Most generally, all citizens ought to be allocated an equal right

²⁹ For example, Hungary recently enacted a new constitution in the name of the “Hungarian nation” as distinguished from the “Hungarian people” in whose name the previous constitution spoke. See MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, Preamble (2010) (The current constitution differentiates between the “Hungarian nation” and “nationalities living with us . . . [as] constituent parts of the State.”); Carol Schaeffer, *How Hungary Became a Haven for the Alt-Right*, ATLANTIC (May 28, 2017), https://www.theatlantic.com/international/archive/2017/05/how-hungary-became-a-haven-for-the-alt-right/527178/?utm_source=share&utm_campaign=share [https://perma.cc/UK5B-V2GK] (describing the platform for preserving an ethnically pure state propounded by Hungary’s most right-wing political party in the governing coalition platform).

³⁰ Although historical realities have often contradicted this ideal, the United States national and constitutional identities project an imagined community open to waves of immigrants coming from all corners of the world in the pursuit of freedom and a better life so long as they embrace the values embodied in the U.S. Constitution and sincerely endeavor to partake in the benefits and burdens of American citizenship. See ROSENFELD, *supra* note 27, at 158–62.

³¹ 1958 CONST. art. I (Fr.).

to vote. Consistent with this, past deprivations of the vote and other political rights to African American slaves and women were inherently distributively unjust as they disproportionately favored white men to the detriment of all others in the U.S. polity. Also, in the case of women, for example, the deprivation of the right to vote amounted to an identitarian as well as a representational injustice. Indeed, as the Enlightenment ideal requires that all humans be considered to be equal, thus enshrining the “postulate of equality,”³² depriving women, who are in principle equal to men, of the vote requires some explanation or rationalization. Let us assume that the rationalization offered is—one advanced in the nineteenth century—that a woman’s social role as wife and mother does not dispose her or inform her sufficiently to be entrusted with the responsibilities of self-government.³³ Based on this, women are deprived of recognition in the political sphere as well as of representation. In other words, issues pertaining to women’s identity, status, social role, and aspirations are thus politically taken away from them and either altogether left out or dependent on being filtered by men into the political arena.

Under the ideal of liberal constitutionalism, the constitution must dispense distributive justice in relation to all three of material welfare, identity-based recognition, and representation—or to borrow from the political philosopher Nancy Fraser, economic redistribution, recognition, and representation.³⁴ What distributive justice requires or what any of its above highlighted three dimensions command are highly controverted subjects over which philosophers, judges, lawyers, and politicians very much disagree. Accordingly, constitutions could not, and are not usefully meant to, address all questions of justice or to function as the exclusive fountainhead of a system of comprehensive justice within the polity within which they are enshrined as the highest law of the land. With a view to circumventing this difficulty and drawing on John Rawls’s concept of “constitutional essentials” as necessarily linked to his theory of political justice as fairness,³⁵ the thesis that will guide the present inquiry can be encapsulated in the proposition that the ideal of liberal constitutionalism necessarily calls for implementation of some “justice essentials.”

³² MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL & CONSTITUTIONAL INQUIRY* (1991).

³³ *Bradwell v. Illinois*, 83 U.S. 130 (1872) (Because of the role as wife and mother, women can be prohibited from practicing law.).

³⁴ See NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 2–6 (2009).

³⁵ See JOHN RAWLS, *POLITICAL LIBERALISM* 227–230 (expanded ed. 2005).

To further elucidate the concept of “justice essentials”, it is instructive to briefly focus on the particulars of Rawls’s “constitutional essentials” which are linked to what he considers to be institutional requirements of a modern distributively just political society. These particulars are of two kinds: the first pertains to the general structure of government; and the second to equal basic rights and liberties for all citizens.³⁶ Moreover, in what is especially noteworthy from the present perspective, Rawls specifies that the structure of government requirement can be satisfied by a variety of possible arrangements, such as a presidential or a parliamentary system.³⁷ In contrast, equal rights allow for much less of a margin of variation as freedom of speech, of association, equality, and the right to vote must be protected in much the same manner in any polity bent on conforming with “constitutional essentials.”³⁸

The “justice essentials” associated with the ideal of liberal constitutionalism, on the other hand, also involve two essential particulars: a distributive scheme that harmonizes *demos* and *ethnos*; and an overall project of justice that strikes a workable equilibrium between the universal, the singular, and the plural. And in this context, the universal corresponds to the imagined community that gives itself a constitution; the singular, to every individual who is subject to the relevant constitution; and the plural, to the various groups that are, or ought to be, afforded recognition by their polity’s constitution.³⁹ Also, the first of these particulars is susceptible to being satisfied by a vast number of different configurations. These range from highly democentric constitutions that leave adequate space for ethnocentric pursuits to constitutions built upon the *ethnos* and that structure the *demos* so as to operate mainly within and among constitutionally enshrined ethnocentric units.⁴⁰ The second of these particulars, in contrast, consists in complying with a minimum of justice that is non-negotiable and without which a constitutional arrangement would be bound to fail from the perspective of the project carved out by the ideal of liberal constitutionalism. The minimum of justice involved must per force take into serious account the demands of the universal as well as those of the singular and of the plural as these emerge in the relevant

³⁶ *Id.* at 227.

³⁷ *Id.* at 228.

³⁸ *Id.*

³⁹ See ROSENFELD, *supra* note 18.

⁴⁰ The French model relying on a unified *demos* that saturates the public sphere combined with a private sphere amenable to the accommodation of a plurality of ethnocentric pursuits seems to occupy one end of the spectrum whereas a constitution, such as that of Switzerland which gives ethnocentric priority to its various cantons with guarantees of strong democracy within each of these, comes close to occupying the other end of the spectrum.

constitutional polity. Specifically, this requires carving out a path toward reconciling and accommodating the competing demands of the universal, the singular, and the plural in a way that allows for a proper balance among them. In other words, the minimum of justice requires neither disregarding nor belittling the demands of the universal, the singular, or the plural while avoiding disproportionate prevalence of any one of them over the others. Finally, as further detailed in what follows, constitutions encompassed within the path toward the ideal of liberal constitutionalism may exceed the minimum of justice under consideration, but they may not fall short of it.

Although the present concern is mainly with issues of economic redistribution, from the standpoint of the justice essentials material welfare issues are intertwined with issues of recognition and of representation. Moreover, this link between the three constitutionally essential facets of distributive justice is particularly relevant for purposes of determining what the minimum of justice requires under any given set of relevant circumstances. On the one hand, there cannot be any enjoyment of liberty or equality without the benefit of a minimum of material well-being. On the other hand, any persistent lack of that minimum corresponds to a lack of recognition. The dignity of the individual and his sense of self-respect or of his being respected by others cannot be meaningfully sustained if he is reduced to near starvation, shockingly substandard housing, and to a complete lack of means for attending to his most pressing health care needs. The subsistence and dignitarian needs may coincide in part but may also at times require aggregation. Thus, adequate food and shelter is required both by the postulate of equality—viewed as commanding the same basic rights for all within the polity—and by the need to treat every person in accordance with her most basic inherent dignity. At the same time, dignity, but not the minimum level of material welfare, may call for affording a certain level of education to all. Finally, it is obvious that a minimum of material welfare is a prerequisite for the exercise of political rights and for obtaining the most rudimentary level of equality in representation. Representation, however, is also important in the present context for another purpose. That purpose is a line-drawing one where reasonable minds may disagree about some element relating to the actual boundaries of the justice essentials within a given constitutional order. Suppose there is a consensus among all constitution makers that their contemplated constitution should protect the medical needs of the citizenry, but a disagreement over whether the medical needs to be constitutionally addressed ought to be only those that qualify as emergency ones or all those widely accepted as materially contributing to maintaining or restoring the health of every individual. In that case, assuming the more restrictive right is

constitutionalized, then arguably justice in representation provides fair means to advance a more comprehensive justice than that actually constitutionally postulated as the requisite minimum for justice essentials purposes. More generally, representational justice, besides playing a key role in its own right, also figures prominently in sorting out constitutional from infra-constitutional entitlements consistent with the dictates of the justice essentials.

II. SOCIAL AND ECONOMIC RIGHTS IN COMPARATIVE PERSPECTIVE AND THE SECOND-GENERATION RIGHTS CONTROVERSY

As already noted, social and economic rights abound in contemporary constitutions while controversy revolves around them. The controversy in question centers on contestations against such rights being genuine ones on both theoretical and practical grounds. From a philosophical standpoint, some have argued that such rights automatically fail the strict correlation test between right and duty that the very concept of right requires.⁴¹ From a more pragmatic legal perspective, on the other hand, many argue that second-generation rights are, unlike their first-generation counterparts, unenforceable, and more pointedly judicially unmanageable.⁴² I first briefly consider the theoretical issue and then through a comparative constitutional analysis evaluate the legal/constitutional as opposed to political viability of social and economic rights.

A. *Philosophy and the Correlation Between Right and Duty*

The philosopher Maurice Cranston has called upon a strict correlation between right and duty and accordingly argued against second-generation human rights.⁴³ Pursuant to this view, a party has a right to something if what she is entitled to corresponds fully to what another party has the duty to provide her. Strict correlation emerges clearly in the realm of legal contracts. For example, A contracts with B to buy a specific painting at a mutually agreed upon price. A then pays B, but B refuses to hand over the painting; whereupon A sues B, and the judge in the case issues an order of specific performance compelling B

⁴¹ Joel Feinberg & Jan Naverson, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970).

⁴² See, e.g., Paul Hunt, *Reclaiming Economic, Social and Cultural Rights*, 1 WAIKATO L. REV. 141, 154 (1993).

⁴³ See MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* (2d ed. 1973).

to deliver the painting to A. This paradigmatic contractual case can be, for the most part, substantially replicated in the context of first-generation constitutional or human rights, so long as the latter remains purely negative rights. Thus, for instance, the U.S. First Amendment forbids laws abridging the free exercise of religion.⁴⁴ Accordingly, my constitutional right to pray to whomever I choose and in whichever manner I prefer strictly correlates with the governmental duty to abstain from legislating or otherwise intervening so as to hinder my freedom to pray as I choose. In contrast, a second-generation right to decent shelter to which thousands of indigents are deemed entitled cannot be satisfied without government action over time and thus defies strict one-to-one correlation between right and duty.⁴⁵ And consistent with conceptual adherence to strict correlation, the second-generation right in question is best envisioned as a justified aspiration calling for a public policy commitment to provide adequate housing for the poor over a reasonable period of time.

As emphatically asserted by Chief Justice Marshall in *Marbury v. Madison*,⁴⁶ there is no legal right without a remedy, or in other words, there is no right without any corresponding duty. But that does not entail strict correlation as otherwise the domain of constitutional rights would have to be radically downsized. Suppose, for example, that political speech in a late nineteenth-century setting (completely bereft of today's multimedia outlets) is typically carried out in public parks, and that police close all such parks for the foreseeable future. Let us further stipulate, that this complete closure violates the government's negative duty regarding the right at stake. But what if only half of the parks are closed? Or if they open for a limited number of hours every day? Or else, all closed for a few days to perform urgent maintenance tasks? Without focusing for now on line-drawing issues, it seems obvious that the government duty is not usefully considered as having been violated in at least some of these suggested scenarios. More generally, both from a constitutional and a philosophical perspective, it seems preferable to adopt a broader more relational and more contextual conception of the nexus between right and duty than that espoused by proponents of strict correlation.⁴⁷

At the theoretical level, once strict correlation is discarded as overly restrictive, the main question is where to set the minimally

⁴⁴ U.S. CONST. amend I.

⁴⁵ *Gov't of South Africa v. Grootboom*, 2000 (1) SA 46 (CC).

⁴⁶ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

⁴⁷ See, e.g., Michael Da Silva, *Correlativity and the Case Against a Common Presumption About the Structure of Rights*, 54 J. VALUE INQUIRY 289 (2020); Ronen Perry, *Correlativity*, 28 L. & PHIL. 537 (2009).

acceptable nexus between right and duty on the spectrum spanning from no remedy (which is equivalent to no enforceable duty) to strict correlation. First, it should be specified that the relevant correlation is that between *legal* right and duty as completely separate from any corresponding *moral* entitlement and obligation.⁴⁸ Thus, for example, if there were a universally acknowledged moral right to private property and a correlative moral duty to respect the private property rights of others, there would nonetheless be no meaningful corresponding legal right in a polity in which private property possession could be trampled upon with impunity by the state and by private parties. Second, a bird's-eye view of all types of constitutional rights reveals that their actual enforcement is bound to be, at least to some extent, partial, conditional, deferred, piecemeal, and fluctuating. Moreover, even under the best of circumstances, it is very unlikely that all those entitled to a given constitutional right will be able to secure a remedy in every single case in which a violation of that right has occurred. Take again the right to private property of the owner of a house and surrounding garden abutting on a public sidewalk. All trespass on the property would be a violation of the right, and all non-owners, whether private parties or state officials, would have a legal or constitutional duty not to enter the property unless authorized by the owner. Nevertheless, it is unlikely that there would be any enforcement for minor trespasses within a few steps of the sidewalk by passing-by walkers or by a police officer erroneously knocking on the house's door while answering a request to check the house next door. Enforcement could also be conditional and fluctuate depending on police presence in the neighborhood. Should there be a drastic reduction in police availability, this could well encourage would-be intruders to violate our owner's property rights with little fear of being held accountable. Full property rights could also be partially deferred if our owner who enjoys barbequing in his garden is prohibited from doing so for a while due to governmental emergency environmental regulations. Finally, an underground gas line disruption may prompt the municipal government to take over part of our owner's garden for an indeterminate period of time for purposes of completing all necessary repairs.⁴⁹

⁴⁸ The distinction drawn here is completely independent from whether or not the legitimacy of law is dependent on its moral content as long debated between legal positivists and natural law proponents.

⁴⁹ Arguably, all these examples could be interpreted as pointing to the property right in question having to be fine-tuned so as not to encompass all the seeming violations alluded to above. Consistent with that argument once the right is tightened, so would correspondingly the duties. For present purposes, however, it seems more useful to consider rights in terms of the expectations they are reasonably likely to entail rather than depending on ex post facto boundary adjustments based on unforeseen and often purely contingent occurrences.

With these observations in mind, what seems crucial from a theoretical perspective is that for some claim to amount to a genuine legal right, it must trigger some obligation on the part of the corresponding duty holder such that the latter is legally compelled to either abstain from acting or to act in a way that is designed to significantly address the legitimate demands brought forth by the right holder. To what extent must the duty holder be compelled to act or forgo action in order to satisfy the obligation to the right holder in a “significantly” sufficient manner? Accounting for pertinent contextual factors, there is a strong argument for adopting a proportionality-based criterion combined with reasonableness as a minimum requirement. Thus, for example, in the above-mentioned reference to the right to pray, it is both reasonable and proportionate for a complete government forbearance resulting in a strict correlation between constitutional right and duty. In contrast, in the adequate shelter for indigent citizens situation, it would be proportionate to have the government meet all the right holders’ claims over time through a promptly initiated systematic building project urgently pursued to complete the task as soon as reasonably feasible. Also, for purposes of adhering to this building project, the government would be obligated to limit its budgetary discretion and to postpone or set aside certain priorities it might have otherwise given precedence to. On the other hand, it would be reasonable, and hence not in violation of the government’s duty to provide adequate shelter, for the latter to temporarily delay completion of the building project to attend to a major unforeseen emergency such as a natural disaster or a deadly epidemic. Furthermore, assuming individual rights to adequate shelter owed to several thousands of individuals and a three-year construction project, the mere fact that some of these individuals would be housed within a few months and certain others would have to wait up to three years would not in any way negate any of the rights or violate any of the duties involved. That is, unless the order set for the allocation of housing units were disproportionate or unreasonable. To further clarify this with another example, assuming that a right to government-provided healthcare included both necessary and elective medical treatment, prioritizing the former and occasionally postponing the latter due to justified limitations in available resources would be both proportionate and reasonable whereas the contrary would be neither.

Rights-based claims have priority over other requests addressed to others or non-rights-based demands on government. A genuine right imposes a duty on one or more parties, and honoring the obligation deriving from such duty requires significantly addressing that which the right requires as reasonably and proportionately as possible under currently prevailing circumstances. Except where perfect correlation

between right and duty is practically feasible, the duty holder must prioritize efforts towards satisfying the corresponding right and therefore in many cases sacrifice, postpone, or modify objectives that the duty holder would otherwise choose to pursue in the first place. As there may be conflicting rights seeking vindication all at once and other compelling societal needs competing within the ambit of limited resources, the amount of actual effort that a duty holder must expend at any given time to satisfy a corresponding right holder's entitlement ought to be proportionate and reasonable. Moreover, constitutional rights have priority over infra-constitutional ones and over majoritarian policies. Accordingly, significantly addressing a claim to entitlement pursuant to a constitutional right requires meeting a distinctly higher threshold than in the case of an infra-constitutional right. In other words, whereas all legally valid rights-based claims, whether constitutional or statutory, are equally entitled to satisfaction, where strict correlation is impossible satisfying constitutional proportionality and reasonableness requires a higher hurdle than in cases arising under infra-constitutional laws or regulations.

In sum, from a theoretical perspective the more flexible and nuanced contextual approach to the nexus between right and duty that I have just outlined seems clearly preferable to the strict correlation theory referred to above. If failing strict correlation implies that no genuine right is involved, then any constitutional right to adequate housing or healthcare would at best be the equivalent of a mere policy-based preference that may be ignored or revoked through a mere majoritarian process.⁵⁰ If, on the other hand, a constitutional right creates some tangible entitlement and a corresponding significant obligation not subject to majoritarian overriding, then the more flexible theoretical approach seems far better suited to account for the nature and scope of entitlements and corresponding obligations promulgated by the vast majority of contemporary constitutions.

B. *Social and Economic Rights in Comparative Constitutional Law*

Even if one deemed them perfectly sound in theory, second-generation rights would still pose daunting practical challenges when

⁵⁰ If a constitution treats a right to healthcare as merely aspirational, such as a constitutional declaration in a preamble to the effect that it commits to allow for the "pursuit of happiness," then it does not institute any right at all. If, on the other hand, the constitution is understood to prescribe adoption of laws relating to healthcare but leaves the content of such laws entirely up to the discretion of the legislature, that would be tantamount to the absence of any *constitutional* rights on the subject.

tackled from within the bounds of human rights or constitutional law. These challenges relate to all three of the right holder's legal entitlement, the duty holder's corresponding legal obligation, and the legal enforcer's—in most cases a court—decision-making criteria and remedial toolbox. Significantly, the ICESCR, which has been ratified by 171 countries⁵¹ and adopted in many of them as law or referred to in constitutional adjudication, includes, among others, the following rights: “the right of everyone to social security, including social insurance”;⁵² “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”;⁵³ the right to “conditions which would assure to all medical service and medical attention in the event of sickness”;⁵⁴ and, “the right of everyone to education,” and specifically to a free primary education.⁵⁵ Upon first impression, none of the just mentioned rights circumscribe as readily ascertainable a right holder's entitlement as the right to pray under the U.S. Constitution to which reference was previously made.⁵⁶ What is an adequate standard of living or of housing? What medical services should be guaranteed to all the sick? What should be an acceptable minimum of social security? Furthermore, assuming overcoming the indeterminacies affecting the entitlements of rights holders, how could the government's obligations as duty holder be specified? Supposing an agreement on what constitutes adequate housing and an ascertainment that 100,000 individuals lack such housing, how should one specify how long to give the government to satisfy all rights holders or how the government should proceed in cases of conflicting priorities and budgetary shortfalls? Finally, does the judge deciding a housing rights dispute have adequate standards of adjudication or adequate remedies distinguishable from overtaking a seemingly purely legislative task

⁵¹ Formally, the ICESCR creates treaty-based international law as distinguished from constitutional law. However, in substance, the content of some of the human rights created by the ICESCR is virtually identical to that of certain social and economic rights adopted by various nation-state constitutions. Some countries, such as Argentina, have actually incorporated the ICESCR into their constitution. See Art. 75, § 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The United States has signed but not ratified the ICESCR. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://indicators.ohchr.org> [<https://perma.cc/2YF9-N7Y7>] (click on the United States on the map). In any case, for purposes of the present general discussion relating to content, in contrast to reference to a particular national constitution, human rights and constitutional rights will be used interchangeably.

⁵² ICESCR, *supra* note 4, art. 9.

⁵³ *Id.* art. 11.

⁵⁴ *Id.* art. 12.

⁵⁵ *Id.* art. 13.

⁵⁶ See U.S. CONST., amend I, *supra* note 44.

involving a budgetary decision and prescription of a government housing building project over a set number of years?

C. *Varied Constitutional Approaches to Social and Economic Rights*

To be in a position to provide cogent answers to these questions, it is first necessary to concentrate on the broadly ranging and varied contemporary constitutional approaches to social and economic rights as these emerge in many different jurisdictions across the world. Unlike first-generation rights that are nearly universally judicially enforceable, constitutionally enshrined social and economic rights can be divided into three different categories. In roughly one-third of the cases, the constitution makes these rights aspirational only; in another third, justiciable; and in yet another third, some such rights are justiciable and others aspirational.⁵⁷ Upon closer inspection, a much more complex and variegated set of distinctions comes into play. In cases involving a purely aspirational understanding of social and economic rights, these seem ultimately to boil down to moral exhortations to legislators to address certain basic material needs without creating or implying any significant legal right or obligation. In contrast, when rights that are aspirational require legislators to enact legal provisions to secure certain material essentials, but do not allow for individual claims under the rights themselves (as opposed to existing legislation made pursuant to these rights) to be judicially enforceable, then there is some guaranteed benefit for the citizenry and a duty under the constitution imposed on the state.⁵⁸ In some situations, aspirational rights may indirectly provide some justiciable individual constitutional rights. This has happened in certain cases where repeal of existing legislation advancing a social welfare objective enshrined in the constitution has been successfully challenged as being unconstitutional.⁵⁹ In addition, aspirational social welfare rights that do not themselves provide individual rights may in certain cases indirectly do so through other constitutional rights, such as that to equality. For example, the Latvian Constitutional Court held that a childcare benefit limited to non-working parents violated the equality rights of working parents.⁶⁰ Another indirect path toward judicial vindication of social welfare

⁵⁷ See Courtney Jung, Ran Hirschl, & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMPAR. L. 1043, 1043 (2014).

⁵⁸ *Id.* at 1081–82.

⁵⁹ See *infra* notes 87–92 and accompanying text.

⁶⁰ DORSEN ET AL., *supra* note 2, at 1455 (discussing the Latvian Constitutional Court judgment of September 1, 2005).

rights is that embraced in France where the latter is characterized as “constitutional objectives.”⁶¹ These objectives not only mandate the legislature to adopt appropriate laws in their furtherance but also require constitutional invalidation of laws that hamper their pursuit.⁶² Finally, Germany’s constitution, the Basic Law, does not provide for social and economic rights, but these have been integrated to a significant degree in the catalogue of the country’s justiciable rights. This has been due not only indirectly through the right to equality, but also through the overall interpretative gloss provided by the Basic Law as a whole that sets Germany as a democratic, rule of law (*Rechtsstaat*) and a social welfare state (*Sozialstaat*).⁶³ Thus, for example, based on the social welfare right to education, the German Constitutional Court has held that individuals have a constitutional right to judicial review of administratively generated deprivations of equality in higher education.⁶⁴

In all but the purely aspirational cases, there may be sufficient elements of entitlements and corresponding obligations to fit within the broad outlines of the relational and contextual conceptual correlation between rights and duties embraced above. More importantly for our purposes, however, a full handle on the scope of benefits and drawbacks associated with constitutionalized social and economic rights requires evaluation of actual judicial disposition of cases arising in jurisdictions where such rights have been treated as justiciable. Accordingly, I proceed to discuss exemplary cases from relevant constitutional jurisdictions.

Before turning to the selected relevant cases, it bears emphasizing that an important criterion for their selection is that they all involve social welfare obligations imposed on the state that result in some benefit to those with a plausible claim to a constitutional entitlement. Moreover, whereas all the cases discussed below concern social welfare issues from a substantive standpoint, some of them are decided pursuant to other constitutionally prescribed rights or principles, such as equality or dignity. Also, in examining cases in which courts treat social welfare rights as justiciable, I will ignore whether such determination is uncontestedly faithful to the relevant constitution.

⁶¹ See Preamble to France’s 1946 Constitution incorporated into its present 1958 Constitution, which guarantees “to all, notably to children, mothers and elderly workers, protection of their health, material security, rest and leisure.” 1958 CONST. pmb1.

⁶² See DORSEN ET AL., *supra* note 2, at 1417 n.1.; Rosenfeld, *supra* note 1.

⁶³ See Grundgesetz [GG] [Basic Law], art. 20 § 1, translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0118 [<https://perma.cc/KQZ4-E8LL>].

⁶⁴ See *Numerus Clausus I Case*, 33 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGGE] 303 (1972).

Thus, for example, the Indian Constitution provides that its constitutional principles regarding social welfare benefits are not justiciable, and yet the Indian Supreme Court has treated them as justiciable in some of its decisions.⁶⁵ Finally, the order of presentation of the cases discussed below will not be based on subject matter or jurisdiction, but instead on how close the judicial disposition involved approximates that typically characteristic of the paradigmatic adjudication of first-generation (negative) rights.

The following cases can be roughly divided into three different categories. The first of these comes closest to the paradigmatic first-generation negative right as it matches an individual right and a government duty and allows for a direct judicial remedy enabling the right holder to obtain her claimed entitlement. Thus, for example, if everyone is constitutionally entitled to a minimum of subsistence, then a failure by government to provide that minimum to a particular individual could be fully remedied by a judicial decree commanding the government to comply with its duty. The second category also matches an individual right and a government duty but is only amenable to a class-wide judicial remedy allowing some individuals to receive a prompt remedy while forcing others to stand in line over an extended period of time. The above-mentioned example, relating to a decent housing right belonging to 100,000 indigent citizens and requiring a three-year government construction project, well illustrates this second category. Finally, the third category is one that gives some indirect vindication to a social welfare right through invocation of another constitutional right. The right to equality plays an important role in this respect and calls for addressing a key distinction. Many equality claims have nothing to do with social welfare entitlements as all wrongful exclusions from the class of recipients of a government benefit give rise to a constitutional equality claim. Thus, for instance, if the government subsidizes free public golf courses and tennis courts but prohibits their use to an ethnic minority, members of the latter would have a clear constitutional equality grievance that in no way implicates any social welfare entitlement. On the other hand, if the same ethnic minority were deprived of basic subsistence benefits enjoyed by all other needy citizens, then their equality grievance would plainly relate to their basic social welfare interests.

D. *Cases Treating Social Welfare Claims as Involving Individual*

⁶⁵ See DORSEN, ET AL., *supra* note 2, at 1399; *Delhi Jal Bd. v. Nat'l Campaign for Dignity & Rts. of Sewerage & Allied Workers* (2011) 8 SCC 568 (India) (Parliamentary legislation has failed to reach millions of "poor, downtrodden and disadvantaged" persons, hence warranting judicial intervention.).

Rights Calling for Direct Individual Remedies

A most forceful and direct vindication of an individual's constitutional social welfare right emerges in a key decision regarding health services by the Colombian Constitutional Court. In this 2008 decision⁶⁶ pursuant to a *tutela* action (a broadly available writ liberally enabling individuals to sue for claimed violations of fundamental rights), the court held that an individual is entitled to a judicial remedy ordering the State to provide specific previously refused or unavailable health services "that are indispensable to maintain one's health when one's life, personal integrity or dignity is seriously threatened."⁶⁷ In reaching that conclusion, the court emphasized that the right to health services has a negative as well as a more pervasive positive dimension.⁶⁸ On the one hand, the State must refrain from acting in ways that endanger the health of the citizenry while, on the other, the State needs to undertake programmatic and administrative action to satisfy the individual health rights that are constitutionally protected. Remarkably, the Court stressed that although the positive dimension of the right generally affords the state significant discretion, that is not the case in the more urgent instances where an immediate remedy is appropriate even if that requires the state to mobilize additional resources.⁶⁹ Moreover, in a very thorough and well-reasoned opinion the court placed the urgent cases requiring a direct judicial remedy for aggrieved individuals in the broader context of rights to health services under the Colombian Constitution. As a positive right, that to health services obliges the government to adopt appropriate programs susceptible of gradual implementation to meet the health needs of the citizenry.⁷⁰ Not all claims of government programmatic failures or inadequacies justify a *tutela* action, as the court uses criteria of reasonableness and proportionality to assess the constitutional adequacy of relevant governmental actions or inactions.⁷¹ However, where those criteria are not met, the court can order the legislature to enact appropriate laws with a view to curing identified programmatic deficiencies.⁷² In cases of

⁶⁶ Corte Constitucional [C.C.][Constitutional Court], Sala Segunda de Revisión, julio 31, 2008, M.P: M.J.C. Espinosa, Sentencia T-760/08 (Colom.), summarized English translation at https://www.escri-net.org/sites/default/files/English_summary_T-760.pdf [https://perma.cc/E3Z5-AGS5].

⁶⁷ *Id.* ¶ 4.4.1.

⁶⁸ *Id.* ¶ 3.3.2.

⁶⁹ *Id.* ¶¶ 3.3.2, 3.3.6.

⁷⁰ *Id.*

⁷¹ *Id.* ¶ 3.2.2.

⁷² *Id.* ¶ 3.3.15.

tutela where the court finds a violation of the government programmatic and progressive health policy obligations to meet the citizenry's health services rights, the objective is to issue a judicial order requiring the government to secure the effective enjoyment of the implicated rights.⁷³ Mindful of delicate separation of powers issues likely to arise when courts order legislators or the executive to launch a positive undertaking, the court made it clear that judicial orders in the context of programmatic health services must be "respectful of the process of public debate, decision and policy implementation, characteristic of a democracy."⁷⁴ Accordingly, it is not the duty of judges to tell the relevant authorities what specific action should be undertaken, but instead judges must issue orders prompting authorities to implement appropriate measures leading to effective enjoyment pursuant to a process that allows for citizen participation.⁷⁵

Although the Colombian Constitutional Court has vowed to respect the expenditure priorities set in national budgets, it has provided individual *tutela* remedies imposing government assumption of non-budgeted additional expenditures in several other cases. One such case resulted in an order to perform an expensive medical procedure contrary to then existing regulations in order to prevent a violation of an individual's right to enjoy minimum subsistence conditions.⁷⁶ Other cases required providing medications to HIV patients and mandatory vaccinations for children living in a poor neighborhood in Bogotá. For the Colombian Court, the sheer additional cost involved is not an impediment for "upholding the effective enjoyment of rights and the state's duty to safeguard life, personal integrity and human dignity."⁷⁷ In reaching this conclusion, the court emphasized that the protection of all constitutional rights entail unavoidable costs.⁷⁸

Unlike its Colombian counterpart, the South African Constitutional Court has considered the eventuality of unanticipated additional governmental expenditures as a key consideration in denying direct individual remedies in cases involving constitutionally protected healthcare rights. Thus, in *Soobramoney v. Minister of Health*,

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ This case as well as the others mentioned in this paragraph are summarized in Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOB. STUD. L. REV. 529, 645 (2004).

⁷⁷ *Id.* at 643.

⁷⁸ *Id.*

KwaZulu-Natal,⁷⁹ the court held that the individual right to access healthcare under section 27 of the country's constitution did not entitle a terminally ill patient to be provided life-prolonging renal dialysis. Nevertheless, the court did recognize an enforceable individual right to emergency medical services when suffering a crisis calling for immediate medical treatment.⁸⁰ Although this involves a very restricted direct individual right that requires making available resources such as ambulances and hospitals, it still imposes a positive governmental duty to provide certain limited services and to absorb the costs associated with the latter.⁸¹

Minimum welfare and pension rights have also at times been judicially vindicated through direct remedies for aggrieved individuals. The Supreme Court of India in the "Right to Food" case⁸² issued an order of mandamus requiring government implementation of a program to provide meals at schools. The Colombian Constitutional Court carved out an implicit right of survival requiring individual remedies regarding entitlements to basic subsistence needs and minimum pension benefits.⁸³ The Estonian Supreme Court specified that the constitutional right to subsistence benefits is subject to legislative implementation except when assistance falls below a minimum level, at which point the courts have a duty to intervene.⁸⁴ Moreover, in some cases, courts have provided individual remedies to rights that are functionally equivalent to social welfare rights even though they are formally labelled as some other right or as some combination with the latter. Thus, by combining the right of healthcare with that to equality, the Italian Constitutional Court held that emergency medical treatment could not be withheld from those who could not afford the fees associated with it.⁸⁵ In another decision based on equality grounds, the Italian court held that experimental cancer

⁷⁹ *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1997 (1) SA 765 (CC) at 14 ¶ 36 (S. Afr.).

⁸⁰ *Id.* at 9–10 ¶ 20.

⁸¹ *See id.* The court characterizes the right to emergency medical services as a "negative" one because it draws on available resources, such as existing ambulances and hospitals. To the extent that the right in question is extended to those who cannot pay for the costs involved, however, individual vindication of the right requires some level of "positive" government action and expenditure. *See id.*

⁸² *People's Union for Civ. Liberties v. Union of India*, W.P.(C.) No. 196 of 2001, S.C. India, 28 Nov. 2001 (interim order).

⁸³ Corte Constitucional [C.C.] [Constitutional Court], junio 24, 1992, Sentencia T-426/92 (Colom.).

⁸⁴ *Riigikohus* [Supreme Court], Jan. 21, 2004, Constitutional Review Chamber Judgement 3-4-1-7-03 (Est.).

⁸⁵ Corte Cost., 17 luglio 1998, n. 267, G.U. n. 29, 1998 (It.) [hereinafter *Italian Cancer Treatment Case*].

treatment provided to certain terminally ill patients could not be denied to similarly situated others.⁸⁶

Somewhat different, but still for the main functionally equivalent, are cases involving the reduction or elimination of legislatively established benefits in accordance with constitutionally established social welfare rights. Thus, the constitutional tribunals in Poland and Hungary invalidated reductions in the levels of government benefits relating to social welfare and pension entitlements.⁸⁷ These decisions were predicated in part on protection of social welfare rights but also on vindication of the principle of legal certainty which had assumed particular importance in the context of post-socialist constitutions in Eastern European countries.⁸⁸ The 1995 Hungarian Constitutional Court decision is particularly notorious as it pitted preserving settled levels of social welfare benefits against urgent and weighty budgetary pressure bearing on the future health of the Hungarian economy. The reduction of benefits imposed by the Hungarian government and later judicially invalidated was undertaken at the behest of would-be foreign investors who agreed to reinvigorate the then ailing Hungarian economy subject to a prior commitment to significant fiscal restraint.⁸⁹ In the aftermath of the decision in the case, commentators disagreed on whether the maintenance of the social welfare benefit levels involved would spell economic distress for the country, or whether they would merely prompt the Hungarian government and the would-be foreign investors to work out their budgetary issues without altering constitutionally protected existing social welfare levels of expenditure.⁹⁰ Furthermore, the Hungarian judiciary has not been alone in resisting serious governmental initiatives toward fiscal restraint in the vindication of social welfare rights. The Portuguese Constitutional Court in various cases held that genuine budgetary considerations did not necessarily justify reductions in public employees' salaries or pensions.⁹¹ In one of these cases decided in 2014, Portugal was facing an economic crisis and depended on loans from the European Union and the International Monetary Fund, which in turn required certain

⁸⁶ Corte Cost., 26 maggio 1998, n. 185, Giur. it. 1998 (It.).

⁸⁷ See Decision of Feb. 11, 1992, K 14/91, 1992 ORZECZNICTWO TRYBUNAL KONSTITUCYJNY [OTK] [Constitutional Tribunal] (Pol.); Alkotmánybíróság (AB) [Constitutional Court] June 30, 1995, MK 56/1995. No. 43/1995 (Hung.).

⁸⁸ See DORSEN ET AL., *supra* note 2, at 1482.

⁸⁹ I am following the account of the circumstances surrounding this case provided in TUSHNET, *supra* note 11, at 235–37.

⁹⁰ *Contra* Bowen v. Gilliard, 483 U.S. 587, 604–05 (1987) (Concerning a United States statutory child support program, Justice Stevens stated, “Congress is not . . . bound to continue [this program] at all, much less at the same benefit level.”).

⁹¹ These cases are summarized in DORSEN ET AL., *supra* note 2, at 1486, 1488.

structural changes. Nevertheless, the court ruled against reductions in certain benefits on the grounds that the amounts that would be saved by the reductions at issue would be too insignificant to affect the crisis.⁹²

For our purposes, the lessons to be drawn from the Polish, Hungarian, and Portuguese cases just discussed, is that by preventing reductions in benefits relating to constitutional social welfare rights, courts afforded protection to individuals who otherwise would have had their levels of benefits reduced. Also, in several of these cases, the courts upheld the individual rights at stake in spite of serious budgetary implications, thus imposing substantive limitations on governmental economic policy objectives. Arguably, these instances of judicial enforcement of social welfare rights, that trumped legitimate government fiscal and budgetary concerns, could be justified pursuant to some plausible conception of the justice essentials within each of the relevant constitutional settings involved.

E. *Cases Treating Social Welfare Rights as Affecting Classes of Right Holders Slated to Receive Their Entitlements Sequentially over Time*

A prime example of a judicial imposition of a social welfare obligation on the government, which did not result in an immediate satisfaction of an individual plaintiff's constitutional entitlement, is the *Grootboom* case decided by the South African Constitutional Court.⁹³ Section 26(1) of the South African Constitution grants a right of access to adequate housing.⁹⁴ In interpreting this provision, the court specified that the "state is obliged to take positive action to meet the needs of those living in extreme positions of poverty, homelessness or intolerable housing."⁹⁵ In general terms, the South African Constitution has made it clear that government has the responsibility to set up and administer programs designed to vindicate social welfare rights within the scope of its budgetary capabilities.⁹⁶ Moreover, so long as a government program is reasonable, the courts are not supposed to intervene. In *Grootboom*, the court found the contested government program adequate for purposes of medium- and long-term housing needs, but unreasonable in its failure to meaningfully provide for "people in desperate need."⁹⁷ Accordingly, the court ordered the government to

⁹² *Id.* at 1488.

⁹³ *See Gov't of the Republic of S. Afr. v. Grootboom* 2000 (1) SA 46 (CC).

⁹⁴ *See* S. AFR. CONST., 1996, § 26(1).

⁹⁵ *Grootboom*, at 20 ¶ 24.

⁹⁶ *See* S. AFR. CONST., 1996, § 27(2).

⁹⁷ *Grootboom* (1) SA at 52 ¶ 64; *see id.* at 11 ¶ 14, 17–18 ¶ 20, 33–34 ¶ 43, 67–68 ¶ 99.

modify its existing program in order to meet the needs of those in the same dire conditions as those experienced by the plaintiff, Mrs. Grootboom.⁹⁸ The upshot was that the government was ordered to build adequate housing for those in desperate need within a reasonable time and all those within that category were supposed to be individually accommodated by the end of the building period. Mrs. Grootboom was thus not entitled to immediate satisfaction of her constitutional right but was slated to be adequately housed sometime between the completion of the first units meant for those in desperate need and the full realization of the court-ordered program.⁹⁹

Another case about the right to shelter for the most economically disadvantaged members of society was the *Ahmedabad* one decided by the Indian Supreme Court.¹⁰⁰ This case concerned pavement-dwellers who were evicted from huts that were illegally built on the municipality's main pathway. The question raised was whether the government eviction orders at stake amounted to a violation of the right to life under Article 21 of the Indian Constitution in the absence of the government providing a suitable alternative for relocation. Noting that the constitutional right to life includes a right to shelter, the court held that the government had the obligation to construct dwellings and make them available to the poor.¹⁰¹ In reaching its decision, the court emphasized that:

As regards the question of budgeting, it is true that Courts cannot give direction to implement the scheme with a particular budget as it being the executive function of the . . . State to evolve their annual budget. As an integral passing annual budget, they should also earmark implementation of socio-economic justice to the poor.¹⁰²

In short, whereas the court order gave the government latitude in configuring the requisite shelter units and in the timing of the requisite construction, the affected individuals were all supposed to receive their constitutionally mandated shelter within a reasonable period of time.

Another example of a court-mandated government program, this time in the area of healthcare rights, is provided by *Prakash Mani Sharma v. Government of Nepal*.¹⁰³ The Nepal Supreme Court found

⁹⁸ *Id.* at 67–68 ¶ 99.

⁹⁹ In point of fact, it appears that Mrs. Grootboom was never provided with the housing she was entitled to at some point as four years after the court's decision she had seemingly "disappeared." See TUSHNET, *supra* note 11, at 244 n.55.

¹⁰⁰ *Ahmedabad Mun. Corp. v. Nawab Khan*, (1996) AIR 1997 S.C. 152 (India).

¹⁰¹ *Id.* at 159.

¹⁰² *Id.* at 165.

¹⁰³ *Prakash Mani Sharma v. Gov't of Nepal* (Writ No. 064-WS-0230 of year 2060) (SC). Decided in 2066 BS (2009).

that existing government programs failed to prevent or address the serious problem of uterus prolapse which led to premature death for a majority of the country's women. This was in violation of these women's constitutional right to life, which includes a right to healthcare.¹⁰⁴ The existing government programs and resources were woefully inadequate as the women lacked access to health facilities, proper equipment, medical professionals and were relegated to unsafe abortions and great poverty.¹⁰⁵ In view of this, the court ordered the legislature to enact appropriate legislation within a reasonable time, and the executive branch of government to set up facilities and to provide free treatment and consultations for the aggrieved women. Thus, although the judicially ordered legislation and executive programs and resources would require gradual realization within a reasonable period of time, the goal was to eventually afford all women with the healthcare necessary to surmount the problems associated with uterus prolapse.

As all three cases discussed deal with social welfare rights of persons in extreme poverty who lack an acceptable minimum of shelter or of healthcare, the decisions imposing positive obligations on government clearly satisfy the justice essentials criterion. It is worthy of notice that all the three countries involved were saddled, at the times of the cases discussed, with high levels of poverty. Even taking that into account, so long as the respective governments under judicial command were financially able to assume the burden of the positive actions imposed on them, it would seem unreasonable and disproportionate not to address the most basic needs of those in the direst predicament.

F. *Cases Involving Indirect Enforcement of Social Welfare Rights Through Vindication of Other Constitutional Rights*

Cases within this category must satisfy two conditions: first, they must come to a significant extent within the scope of a non-social and economic right, such as equality or dignity; and second, the judicial enforcement of the latter right ought to substantially advance constitutionally recognized social welfare interests. As noted earlier,

¹⁰⁴ The court also found a violation of Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which provides that reproductive health is considered part of the human rights of women. *Id.* ¶¶ 17–18.

¹⁰⁵ *Id.* ¶ 1.

many vindications of constitutional equality claims have no social welfare rights implications.¹⁰⁶ Similarly, many dignity claims, such as the assertion that Holocaust denial amounts to an affront against the constitutionally protected dignity of Holocaust survivors in Germany,¹⁰⁷ do not bear any non-purely contingent link to social welfare interests.

The German Constitutional Court has held in several cases that the minimum of subsistence for children is constitutionally guaranteed as a matter of basic dignity. In the *Children Allowance* case,¹⁰⁸ the court concluded that the State was obligated to provide for the burdens of childcare either through tax deductions or through state subsidies. In the *Minimum Livelihood* case,¹⁰⁹ the court specified that income tax law must allow safeguarding the minimum conditions of livelihood consistent with respect for human dignity. Like the German Basic Law, the European Convention of Human Rights (ECHR) does not protect social and economic rights. Nevertheless, the European Court on Human Rights (ECtHR) found that Greece had violated the right against inhuman and degrading treatment for failure to provide for the most basic needs of an Afghan refugee who had been living in Greece during several months in extreme poverty.¹¹⁰

The Polish Constitutional Tribunal held eviction of pregnant women, minors, and disabled persons to be in violation of the right to dignity and indicated that families in difficult material and social circumstances had the right to special assistance by public authorities.¹¹¹ Along similar lines, the Hungarian Constitutional Court held that although there is no constitutional right to housing, the right to life requires state-provided housing where a person's life would otherwise be endangered.¹¹² Furthermore, the Italian case requiring extending experimental cancer treatment to all those who would otherwise die from the disease, which was mentioned in Section B

¹⁰⁶ See *supra* Section II.C.

¹⁰⁷ Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, BGBl. I, at 3322, last amended by Gesetz, Oct. 10, 2013, BGBl. I at 3799 art. 6(18), § 130 (F.R.G.); *Holocaust Denial Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BverfGE] 241 (Ger.).

¹⁰⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 23, 1976, 43 Entscheidungen des Bundesverfassungsgericht [BverfGE] 108 (Ger.).

¹⁰⁹ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1990, 82 Entscheidungen des Bundesverfassungsgericht [BverfGE] 60 (Ger.).

¹¹⁰ *MSS v. Belgium*, App. No. 30696/09, 2011–I Eur. Ct. H.R. 255.

¹¹¹ Decision of Apr. 4, 2001, K 11/00, 2001 ORZECZNICTWO TRYBUNAL KONSTYTUCYJNY [OTK] [Constitutional Tribunal] (Pol.).

¹¹² Alkotmánybíróság (AB) [Constitutional Court] November 7, 2000, AK 2000/329, No. 42/2000 (Hung.).

above,¹¹³ also deserves inclusion here. Indeed, based on the Italian Constitution's right to equality, the Constitutional Court opined that public authorities had to secure the enjoyment of the fundamental right to essential medical treatment for those lacking the means to pay for it. Finally, the Portuguese Constitutional Court relied on the right to equality to invalidate reductions in public employee salaries and pensions called for in the state budget law of 2013.¹¹⁴ Even in the face of an economic crisis requiring budgetary reductions, the court held that the right to equality requires a just distribution of public costs. Reductions in salaries for public employees not matched by any comparable reductions in the private sector were found disproportionate as were reductions in all employee pensions. Accordingly, these reductions were held unconstitutional. Moreover, mindful of the State's need for budgetary cuts, the Court suggested that public authorities pursue other alternatives that would not result in disproportionate allocations of public costs. Although this decision does not require the State to exceed its planned budget, it does limit the latter's options in the quest to limit expenditures.

G. *Second-Generation Rights Versus First-Generation Rights and Their Respective Policy-Based and Budgetary Implications*

Unlike purely negative first-generation rights which may only necessitate the State to refrain from any action, second-generation rights do require some State action. Nevertheless, in one category of cases, those boiling down to judicial invalidation of an existing or proposed law that would infringe already protected social welfare rights, the State action component is at best minimal.¹¹⁵ Beyond this, from the right holder's standpoint in justiciable cases either an immediate remedy is available—e.g., an order to provide emergency medical treatment at no cost to those unable to pay—or a deferred remedy over a foreseeable period of time—e.g., planned State-financed construction of housing units or court ordered adoption of suitable legislation within a judicially set deadline. Whereas immediate remedies are preferable to deferred ones, the latter can significantly contribute to the entitlements of the concerned right holders.

¹¹³ See Corte Cost., 26 maggio 1998, n. 185, Giur. it. 1998 (*Italian Cancer Treatment Case*).

¹¹⁴ Tribunal Constitucional [Constitutional Court], Proceedings no. 2/2013, 5/2013, 8/2013, and 11/2013, DR 78 Series 1-A of 22-04-2013, 2328, <https://dre.pt/application/file/a/260304> [<https://perma.cc/Z49X-TNV8>] (Port.).

¹¹⁵ Cases declaring a new law reducing subsistence or pension benefits unconstitutional could well be all that is needed to restore a previously working constitutionally approved protection of the relevant social welfare entitlements.

Accordingly, social welfare rights holders seem clearly better off with justiciable guarantees than with having to depend on the vicissitudes of majoritarian policies.

From the state duty standpoint, on the other hand, second-generation rights present two difficulties that are not inherent to first-generation rights. First, enforcement constrains legislative discretion which in some cases is virtually eliminated due to judicially ordered specific lawmaking obligations. And second, satisfying constitutionally protected social welfare entitlements almost invariably entail budgetary implications requiring either a shifting of, or an increase in, government expenditures. Constraints on legislative discretion, whether due to negative prohibitions in the case of first-generation rights or of affirmative obligations to enact social welfare laws that would not otherwise see the light of day, are inevitable in any constitutional system that endeavors to afford meaningful protection to anti-majoritarian rights. From the pure perspective of the pursuit of majoritarian political initiatives, it may well be equally frustrating to endure a judicial strike down of a popular law that discriminates against a widely reviled religious minority as it would be to accept a judicially mandated legislation that imposes an obligation to provide cost-free essential healthcare services to the most needy citizens.

Accordingly, the difficulties relating to the constraints on legislative discretion due to social welfare rights seem better considered as raising questions of degree rather than of kind. In the broadest terms, one can object to enforceable social and economic rights both because they expand the realm of legislative constraints, and because they apparently do so to a much greater extent than do civil and political rights. The first of these objections is, upon further thought, not intrinsically tied to social and economic rights. Some commentators have been critical about what they regard as an unwarranted inflation of fundamental rights,¹¹⁶ whereas others have favored the expansion of such rights.¹¹⁷ In essence, therefore, the objection in question is one levelled by those with restrictive conceptions of anti-majoritarian rights against those with more expansionist views of such rights. Moreover, whether or not social welfare rights require more extensive legislative constraints than other rights, hardly seems paramount in the present context. It may be much more upsetting to a larger majority of a particular citizenry to have a court strike down a very intensely favored

¹¹⁶ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

¹¹⁷ Compare Justice Kennedy's majority opinion in *Obergefell v. Hodges*, 576 U.S. 644, 651–81 (2015) (same sex marriage is protected by the Fourteenth Amendment's Due Process Clause) with Chief Justice Roberts's dissent, *id.* at 686–713 (arguing that legalization of same-sex marriage should be left to legislators).

anti-abortion law than having a court instructing public authorities to institute a free lunch program in public schools. Consistent with this, the mere fact that enforcement of social welfare rights may increase judicial constraints on majoritarian policies will not be considered any further in the present context as the conflict between restrictive and expansive conceptions of rights is theoretically separable from the categories of rights that it may relate to.

The difficulties posed by the budgetary implications of judicial enforcement of social welfare rights, in contrast, do pose a vexing problem that may seem mostly absent in the context of first-generation rights. Interestingly, the cases discussed above come from wealthy countries such as Germany and Italy as well as from those with large incidences of poverty such as Colombia and Nepal. Reasonable minds may disagree over whether it is legitimate for courts to impose direct budgetary obligations on legislatures or public authorities. And one may readily concede that judicially decreed added government expenditures are likely to be relatively much more onerous in poor than in rich countries. Nevertheless, consistent with the demands of the justice essentials associated with the liberal constitutional ideal, the increased expenditures in all the above cases dealing with the direst needs of the most disadvantaged members of the citizenry are plainly called for by the minimum required in terms of distributive justice. Where to draw the line between the said minimum which must be constitutionally protected, and other distributive justice concerns left to majoritarian resolution may be a matter of debate. Also, the domain of minimum justice should evidently be greater for rich nations than for poor ones. But in any event, for any country where economic conditions are not so dire as to render distributive justice concerns superfluous,¹¹⁸ state satisfaction of the most basic needs of the most disadvantaged is definitely within the minimum imposed by the justice essentials. Moreover, the minimum in question is justified both from the standpoint of economic redistribution and from that of recognition.¹¹⁹

Once we transition from a theoretical comparison of first-generation and second-generation rights in the abstract to their implementation in actual historical settings, it becomes apparent that meaningful protection of first-generation rights often depends on positive state action. For example, if one's right to own private property were only protected by a complete lack of action by the State, this could

¹¹⁸ DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS § 3. (1751, 1777), <https://davidhume.org/texts/m> [<https://perma.cc/G9NL-EGM7>].

¹¹⁹ See *supra* Part I. The minimum needs of the worst-off must be paid out of contributions from the better off and such redistributions will contribute to the dignity of the most disadvantaged ones.

more often than not result in frustration of the benefits to which the right holder is expected to be entitled. Without police protection, trespassers and thieves could invade a private residence with impunity. At the same time, without a system of valid legal title to property registration and verification, and without courts to settle real estate disputes, the rights of buyers, sellers and inheritors of real property would remain unbearably fragile and insecure. Moreover, even as traditionally a negative right as that to freedom of speech can at times be conditioned on positive state action for its realization. This occurs in the heckler's veto cases under the First Amendment.¹²⁰ These cases involve unpopular but constitutionally protected speech in front of a hostile audience that may become threatening to the speaker. Under such circumstances, protection of both free speech and public peace are better achieved wherever possible through police control of the hostile crowd than through removal of the provocative speaker. Accordingly, a proper level of enjoyment of constitutionally guaranteed first-generation rights, such as those to private property or to freedom of speech, quite frequently depends on positive government undertakings with significant budgetary implications.

A further inquiry into implementation of first-generation rights also reveals that they sometimes require staggered state fulfillment of entitlements over time, judicial orders commanding adoption of particular legislation, and judicial overriding of budgetary limitations or imposition of remedies requiring redirection or increases in public expenditures. A prime example of a staggered remedy is that provided by the judicially ordered constitutionally mandated racial desegregation of public schools arising after the U.S. Supreme Court's landmark decision in *Brown v. Board of Education*.¹²¹ If the Court had limited itself to invalidating state laws mandating racial segregation in public schools, then it would have afforded a purely negative remedy consisting in the removal of legal barriers to racial integration. The Court, however, interpreted the Equal Protection Clause as requiring implementation of a right to a racially integrated public school education. This imposed on the States found to have violated the Constitution a duty to affirmatively intervene "with all deliberate speed" to achieve an actually racially integrated system of public education.¹²² But because of massive white resistance to racial integration, little progress had been achieved in well over a decade, which prompted the Court to decide in favor of greater judicial

¹²⁰ See, e.g., *Terminiello v. Chicago*, 337 U.S. 1 (1949).

¹²¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹²² See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

intervention noting that the federal courts' "equitable powers to remedy past wrongs is broad."¹²³ Accordingly, the Court upheld a lower court order requiring state authorities to bus students across town in order to achieve prompt integration of public schools that had thus far remained largely segregated.

In the pursuit of racial desegregation, U.S. federal courts also ordered state authorities to take measures that required additional state expenditures which had not been previously budgeted, and which necessitated an increase in state taxes contrary to state law. Thus, in *Missouri v. Jenkins*, the U.S. Supreme Court struck down a lower federal court order directly raising local taxes against state law prohibiting such increases to comply with a federally mandated school desegregation plan on the grounds that such law violated comity principles embedded in U.S. federalism.¹²⁴ Nevertheless, the Court made it clear that federal judges were empowered to order the State to raise taxes at a rate adequate to cover its financial obligations under the relevant desegregation plan and to enjoin the enforcement of any state law that would purport to prevent the State from generating the requisite financing. In other words, federal courts can impose the incurrence of additional expenditures on States in order to remedy violations of equal protection rights so long as certain federalist formal constraints are adhered to.

Finally, judicial orders to legislatures mandating adoption within a limited time frame of laws designed to satisfy entitlements associated with fundamental rights have long been issued both in the context of first-generation rights as in that of second-generation ones. Thus, for example, if a law grants higher pension benefits to men than to women, a court could simply invalidate such law as violative of constitutional equality between the sexes and leave it up to the legislature to either do nothing, add to the pensions of women or lower those of men, so long as parity between the sexes is realized. In the alternative, however, as is frequently done by the German Constitutional Court,¹²⁵ a court could order adoption of a specific legislation that follows judicially laid-down instructions. In our example, the court could give the legislature six months to raise the level of women's pensions to that of men. In this particular example, the court would command legislation and impose an additional financial burden on the State. In other cases, such as that in which the South African Constitutional Court found the

¹²³ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

¹²⁴ *Missouri v. Jenkins*, 495 U.S. 33 (1990).

¹²⁵ Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504, 504-07 (1987), reprinted in DORSEN ET AL., *supra* note 2, at 178, 180.

unavailability of same-sex marriage under law unconstitutional¹²⁶, the judicial remedy consisted in ordering the legislature to include same-sex marriage in an amendment to its existing marriage law. And obviously, this latter remedy does not require any state assumption of additional expenditures.

In spite of traditionally articulated conceptual and practical differences, the above comparison between first-generation and second-generation rights reveals much more of a continuum rather than any unbridgeable gap. Both from the respective perspectives of rights holders and of duty-bound state actors, social welfare rights can find adequate vindication through easy adaptation and expansion of judicial tools and practices developed in the context of first-generation rights adjudication. Also, it is evident that a minimum of justice under the justice essentials calls for constitutional guarantees that make the State responsible for satisfaction of the most basic needs of those in the most precarious predicament. What needs to be investigated further at this point is whether, and to what extent, the minimum of justice under consideration ought to be raised depending on the actual level of wealth of particular constitutional units.

III. THE CONSTITUTIONAL MEASURE OF SOCIAL WELFARE RIGHTS RELATIVE TO THE JUSTICE ESSENTIALS IN A GLOBALIZED ECONOMY

Once the idea of a constitutionally backed minimum of justice is accepted, it seems obvious that the minimum in question should be set in relation to the actual level of wealth prevailing in the relevant constitutional unit. If a society can barely manage to feed all of its most needy citizens, it would make little sense to constitutionally mandate universal state-guaranteed healthcare. In contrast, in a country as rich as the United States, with no social and economic constitutional rights, the fact that forty-six million inhabitants lacked healthcare insurance before adoption of the Affordable Care Act in 2010¹²⁷ would easily lend support to a proposal to constitutionalize health insurance rights consistent with the demands of minimum justice. Besides emphasizing that minimum justice is context-dependent, there are a few further points to keep in mind throughout the discussion that follows. First, after the fall of the Soviet Union, with communist ideology largely discredited, differences in material wealth and income have not loomed as

¹²⁶ *Minister of Home Affs. v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.).

¹²⁷ U.S. CENSUS BUREAU & U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 20 (2009), <https://www.census.gov/prod/2009pubs/p60-236.pdf> [<https://perma.cc/KG3E-4XEA>].

inherently unjust.¹²⁸ Second, the globalized economy has greatly increased wealth throughout the world as well as exacerbated wealth disparities within the world's leading economies.¹²⁹ And third, a conclusion that minimum justice requires constitutionalization of a particular social welfare right in a given country, such as healthcare insurance in the United States, does not imply any preference among alternative means through which the State may meet its constitutional obligations. Thus, assuming the United States should constitutionalize a right to health insurance, minimum justice would be indifferent as between the following plausible alternatives: the enactment of a law regulating a private sector system of affordable healthcare supplemented by state subsidies to those unable to buy health insurance for themselves; or, state-provided healthcare for all, either free of charge or at a reasonable cost for those who can afford it and free of charge for the rest.

Globalization has dramatically exacerbated differences in income and wealth. Whereas inequalities in wealth had somewhat decreased in advanced capitalist economies during the 1950–1970 period,¹³⁰ in 2010 the top 0.1% held 20% of the world's wealth, the top 1%, 50%, and the top 10%, 80 to 90%.¹³¹ In the United States, in 2019 with very low unemployment, 10.5% of the population lived in poverty.¹³² Moreover, incidences of poverty were very unevenly distributed with Black poverty at 18.8%, Hispanic poverty at 15.7% while white poverty stood at 9.1%.¹³³ Also, at the end of 2019, before the onset of the coronavirus pandemic, twenty-six million Americans, representing 8% of the population, still lacked healthcare coverage.¹³⁴

Economists disagree as to whether the enormous increases in inequalities in wealth in the era of globalization will eventually stifle overall economic growth or whether neoliberal free market policies

¹²⁸ This is borne out whether one adopts a neoliberal capitalist perspective relying on global free markets to maximize wealth extending to the largest possible swath of humanity; or a liberal egalitarian one, such as that enshrined in Rawls's "difference principle," according to which differences in wealth are justified to the extent that they improve the material well-being of those who are economically worst off. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹²⁹ François Bourguignon, *Inequality and Globalization: How the Rich Get Richer as the Poor Catch Up*, 95 *FOREIGN AFFS.* 11, 14–15 (2016).

¹³⁰ See THOMAS PIKETTY, *LE CAPITAL AU XXIE SIÈCLE* 51 (2013).

¹³¹ *Id.* at 698.

¹³² See Jeanna Smialek, Sarah Kliff, & Alan Rappeport, *U.S. Poverty Hit a Record Low Before the Pandemic Recession*, *N.Y. TIMES* (Sept. 15, 2020), <https://www.nytimes.com/2020/09/15/business/economy/poverty-record-low-prior-to-pandemic.html#:~:text=WASHINGTON%20%E2%80%94%20A%20record%2Dlow%20share,industry%20disruptions%20have%20thrown%20millions> [https://perma.cc/QL85-WG36].

¹³³ *Id.*

¹³⁴ *Id.*

provide the best means towards the maximization of wealth.¹³⁵ Proponents of the former view emphasize that extreme inequalities threaten both democracy and the market itself.¹³⁶ In the words of Heather Boushey: “We need to recognize how economic power translates into political and social power, and reject old theories that treat the economy as a system governed by natural laws separate from society’s.”¹³⁷

Furthermore, even some free market economists have acknowledged that although there would be a trade-off, it would be difficult to argue against some sacrifice in efficiency in exchange for more equity, fairness, and compassion.¹³⁸ On either of these two competing economic theories, the prevailing inequalities amply support the conclusion that those in poverty and without any healthcare protection in the wealthiest country in the world are being deprived of the justice essentials from the standpoint of all three among economic redistribution, recognition, and representation.

Whereas it seems beyond dispute that the most basic needs of the most disadvantaged ought to be constitutionally guaranteed, it may be more difficult to determine how far the wealthiest countries of the world should go in constitutionalizing social welfare interests consistent with the demands of minimum justice. As the proper scope of constitutionally protected social welfare interests is to be justified in relation to standards of reason and of proportionality, it is useful to briefly address two salient dimensions of the political economy of the wealthiest nations as well as certain relevant insights regarding distributive justice amidst greatly expanding inequalities in the context of the proliferation of considerable wealth.

The two most relevant dimensions of the political economy for our purposes are the order of magnitude of state expenditures and the nature and size of inequalities in wealth distribution and redistribution in the contemporary globalized economy. Moreover, because the United States’ recent experience alongside these two dimensions is exemplary and all the more striking in light of its complete lack of constitutional social and economic rights, it makes sense to single it out

¹³⁵ See Katy Lederer, *A Gen-X Adviser to Biden Argues Equality Is Good for Growth*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/business/heather-boushey-biden-economic-inequality.html> [<https://perma.cc/MB5J-CSUC>] (comparing economist Heather Boushey who argues that addressing inequalities can lead to economic growth to economist Casey Mulligan who argues that increases in equity cause decreases in market efficiency).

¹³⁶ *Id.*

¹³⁷ HEATHER BOUSHEY, UNBOUND: HOW INEQUALITY CONSTRICTS OUR ECONOMY AND WHAT WE CAN DO ABOUT IT xiv (2019).

¹³⁸ See Lederer, *supra* note 135 (citing Casey Mulligan).

for purposes of highlighting the types of conditions that ought to impact the magnitude of the proper scope of the justice essentials in advanced economies.

The Tax Cuts and Jobs Act of 2017¹³⁹ cost more than \$1.5 trillion and benefited corporations and the wealthiest Americans in a highly disproportionate way.¹⁴⁰ The top 1% of the population initially garnered around 25% of the benefits deriving from the tax cuts and were projected to receive up to 83% of its benefits by 2027.¹⁴¹ At the same time, corporations received a major tax rate reduction from 35% to 21% with the stated purpose of expanding and providing more and better paying jobs.¹⁴² After the first two years of said tax reduction, however, a large proportion of corporations used their tax savings to pay dividends or to repurchase their shares rather than to increase their work force.¹⁴³ In addition, the 2017 law reduced the estate tax that already greatly benefitted the very wealthy at an approximate cost of \$80 billion over a decade, leaving only 0.1% of all estates subject to federal taxes.¹⁴⁴ Finally, in line with the current global economy, 35% of U.S. corporate equities are owned by foreign investors, and thus the 2017 law is forecast to result in a \$700 billion cost to the U.S. Treasury for the benefit of overseas interests.¹⁴⁵

Since the coronavirus pandemic seriously impacted the U.S. economy starting in March 2020, a unified U.S. Congress adopted relief bills to reinvigorate a depleted economy, compensate for massive new unemployment, and address the pandemic, which cost around \$3

¹³⁹ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018).

¹⁴⁰ Nicholas H. Cohen & Manoj Viswanathan, *Corporate Behavior and the Tax Cuts and Jobs Act*, 2020 U. CHI. L. REV. ONLINE 1, 7 (2020).

¹⁴¹ TAX POL'Y CTR, DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT 5 (Dec. 18, 2017), <https://www.taxpolicycenter.org/publications/distributional-analysis-conference-agreement-tax-cuts-and-jobs-act/full> [https://perma.cc/G89S-9WA5].

¹⁴² See Cohen & Viswanathan, *supra* note 140, at 2.

¹⁴³ Emanuel Kopp, Daniel Leigh, Susanna Mursula, & Suchanan Tambunlertchai, *U.S. Investment Since the Tax Cuts and Jobs Act of 2017* 8 (Int'l Monetary Fund, Working Paper WP/19/120, 2019).

¹⁴⁴ Howard Gleckman, *Only 1,700 Estates Would Owe Estate Tax in 2018 Under the TCJA*, TAX POL'Y CTR. (Dec. 6, 2017), <https://www.taxpolicycenter.org/taxvox/only-1700-estates-would-owe-estate-tax-2018-under-tcja> [https://perma.cc/D25X-NAXQ].

¹⁴⁵ See Paul Krugman, *Trump's \$700 Billion Gift to Wealthy Foreigners*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/opinion/trump-taxes-wealthy-foreigners.html> [https://perma.cc/EE35-5RCR].

trillion.¹⁴⁶ More recently, the U.S. House of Representatives passed the Heroes Act with a cost of \$3.4 trillion to address a large number of problems arising from the pandemic, but as of this writing this bill is stalled in the U.S. Senate.¹⁴⁷

Although the above-mentioned projects costing trillions of dollars have raised concerns about the size of the U.S. debt,¹⁴⁸ they have been adopted with in some cases near congressional unanimity and in others with clear congressional majorities.¹⁴⁹ Reductions in taxes are distinguishable from government spending in that they leave money in the pockets of private actors by collecting less from them. But that distinction is of little consequence for present purposes, particularly since the 2017 tax law has not led to a significant expansion of the economy or of increases in tax revenues.¹⁵⁰ What is crucial from the standpoint of considerations based on the justice essentials is that the U.S. government can afford choosing among policymaking alternatives that carry a price tag in an order of magnitude in the trillions of dollars.

Turning to the question of increases in U.S. wealth inequalities in the era of globalization, a recent Rand Corporation working paper concludes that from 1975 till 2018 the top 1% in the U.S. has taken away nearly \$50 trillion from the country's bottom 90%.¹⁵¹ From 1945 till 1974, differences in wealth within the U.S. economy were both stable and more equitable than in more recent years. The \$50 trillion figure

¹⁴⁶ 15 U.S.C. § 9001 (LEXIS through Pub. L. No. 116-163, approved October 2, 2020); Craig Konnoth, *Narrowly Tailoring the COVID-19 Response*, 11 CALIF. L. REV. ONLINE 193, 200 (2020), <http://www.californialawreview.org/wp-content/uploads/2020/05/Konnoth-37-Final-Firstpages-193-208.pdf> [https://perma.cc/LY25-JQMB].

¹⁴⁷ Emily Cochrane, *House Passes \$3 Trillion Aid Bill over Republican Opposition*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/house-simulus-vote.html?searchResultPosition=2> [https://perma.cc/G72Z-7629].

¹⁴⁸ See e.g., Richard Kogan & Paul N. Van de Water, *Rising Federal Debt Should Not Shortchange Response to COVID-19 Crisis*, CTR. BUDGET POL'Y PRIORITIES (Sept. 9, 2020), <https://www.cbpp.org/research/federal-budget/rising-federal-debt-should-not-shortchange-response-to-covid-19-crisis> [https://perma.cc/6LRY-4P5G]; Jeff Stein, *U.S. Government Debt Will Nearly Equal the Size of the Entire Economy for First Time Since World War II, CBO Finds*, WASH. POST (Sept. 2, 2020, 5:15 PM), <https://www.washingtonpost.com/us-policy/2020/09/02/government-debt-economy-coronavirus/> [https://perma.cc/QC5D-LNNP].

¹⁴⁹ See, e.g., Congressional voting records for the CARES Act: *Roll Call Vote 116th Congress—2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00080 [https://perma.cc/SM98-RTJ7] (where the bill was passed with a vote of 96-0, with four not voting).

¹⁵⁰ William G. Gale, *A Fixable Mistake: The Tax Cuts and Jobs Acts*, BROOKINGS (Sept. 25, 2019), <https://www.brookings.edu/blog/up-front/2019/09/25/a-fixable-mistake-the-tax-cuts-and-jobs-act> [https://perma.cc/QL6N-QXBR].

¹⁵¹ See Carter C. Price & Kathryn A. Edwards, *Trends in Income from 1975 to 2018* 12 (Rand Corp., Working Paper No. WR-A516-1, 2020), https://www.rand.org/pubs/working_papers/WRA516-1.html [https://perma.cc/M5GH-67Q8].

represents the sums the bottom 90% would have earned between 1975 and 2020 had the conditions prevalent in the preceding period remained stable throughout. Moreover these \$50 trillion were not only “lost” to the bottom 90% but transferred from them to the top 1%. On a concrete level, a Black man earning \$35,000 at present would have earned \$26,000 more had income disparities remained constant.¹⁵² Similarly, a college-educated prime-aged employee currently earning \$72,000 would have earned up to \$63,000 more had levels of inequality remained stable.¹⁵³ Under the same metric, half of all full-time workers earning \$50,000 or less now earn less than half what they otherwise could have.¹⁵⁴

To compound all this, the above inequalities are allocated unequally among those disadvantaged by them. Thus, lower-wage earners and their families, who are disproportionately people of color, suffer far more from chronic diseases and have been far worse affected by COVID-19.¹⁵⁵ Moreover, these disparities have been compounded by the rising costs necessary to maintain a dignified middle-class life.¹⁵⁶ A 2018 two-working-person household earns around the same as a one-working-person household would have had the rate of inequality remained stationary.¹⁵⁷ Accordingly, large numbers of people currently struggle to meet their housing, healthcare, education, childcare, and transportation costs.¹⁵⁸

Finally, the Rand working paper emphasizes that market economies do better when the entire population has more disposable income.¹⁵⁹ Seventy percent of the U.S. economy is dependent on consumer spending, and the economy thrived after World War II as long as the level of inequality remained stable.¹⁶⁰ Since then, however, the vast increases in inequality and wage stagnation have reduced

¹⁵² *Id.* at 15.

¹⁵³ *Id.* at 47–48.

¹⁵⁴ *Id.* at 42.

¹⁵⁵ Nick Hanauer & David M. Rolf, *The Top 1% of Americans Have Taken \$50 Trillion From the Bottom 90%—And That’s Made the U.S. Less Secure*, TIME (Sept. 14, 2020, 9:30 AM), <https://time.com/5888024/50-trillion-income-inequality-america> [<https://perma.cc/PJ8A-RBND>]; Molly Kinder & Martha Ross, *Reopening America: Low-Wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/research/reopening-america-low-wage-workers-have-suffered-badly-from-covid-19-so-policymakers-should-focus-on-equity> [<https://perma.cc/4L89-EEP9>].

¹⁵⁶ ORG. FOR ECON. CO-OPERATION AND DEV., UNDER PRESSURE: THE SQUEEZED MIDDLE CLASS 16 (2019), <https://www.oecd.org/els/soc/OECD-middle-class-2019-main-findings.pdf> [<https://perma.cc/7HJ8-ECHG>].

¹⁵⁷ See Price & Edwards, *supra* note 151, at 32–39.

¹⁵⁸ See Hanauer & Rolf, *supra* note 155.

¹⁵⁹ See Price & Edwards, *supra* note 151, at 28–30.

¹⁶⁰ See Hanauer & Rolf, *supra* note 155.

consumer demand and slowed the economy.¹⁶¹ As of 2014, the U.S. GDP had thus been reduced by nine percent, which amounted to overall losses in the trillions of dollars.¹⁶²

Some have attributed the dramatic increase in inequalities in the United States to phenomena such as globalization and automation that are beyond the country's control and that forces it to adapt to remain competitive in a world economy where capital and labor can no longer be effectively managed within national boundaries.¹⁶³ Others disagree and maintain that the current American predicament is closely tied to national policy decisions made since 1975 and that therefore the \$50 trillion transfer to the top 1% is a matter of choice rather than of economic necessity.¹⁶⁴ Even assuming that globalization is principally responsible for the current level of economic inequalities in the United States, the sheer size of the 2017 tax cuts and of the COVID-19 legislation discussed above prove that the United States has the capacity to engage in massive internal economic redistribution while remaining competitive in the global arena. More generally, to the extent that globalization is the cause for increasing inequalities within nation-states, national constitutional social and economic rights, may well require reinforcement by infusing full legal force on transnational and international equivalents, such as the rights included in the ICESCR. Exploration of plausible combinations of national and international social welfare rights is beyond the scope of the present undertaking. What does require further inquiry at this point, however, is the question regarding the requirements of minimum constitutionally guaranteed distributive justice in countries that approximate the level of wealth and of wealth inequalities currently manifest in the United States.

As noted above, philosophical theories of distributive justice range from the libertarian one limiting equal distribution, to formal rights to the egalitarian one which counsels massive economic redistribution to minimize material inequalities to those consistent with satisfying the social welfare needs of all.¹⁶⁵ Robert Nozick, one of the foremost twentieth-century libertarian political philosophers, argued just before the onset of the current increasingly inegalitarian trajectory, that the

¹⁶¹ See Price & Edwards, *supra* note 151, at 1.

¹⁶² Federico Cingano, *Trends in Income Inequality and Its Impact on Economic Growth* 18 (Org. for Econ. Co-operation and Dev., Emp. and Migration Working Paper No. 163, 2014).

¹⁶³ See e.g., David H. Autor, Lawrence F. Katz, & Melissa S. Kearney, *Trends in U.S. Wage Inequality: Revising the Revisionists*, 90 REV. ECON. & STAT. 300 (2008); David S. Lee, *Wage Inequality in the United States During the 1980s: Rising Dispersion or Falling Minimum Wage?*, 114 Q.J. Econ. 977 (1999); Robert J. Gordon & Ian Dew-Becker, *Controversies About the Rise of American Inequality: A Survey* (Nat'l Bureau of Econ. Rsch. Working Paper No. 13982, 2008).

¹⁶⁴ See Price & Edwards, *supra* note 151, at 3.

¹⁶⁵ See *supra* Part I.

private property regime generated by the free market economy could not be subjected to any redistribution, through taxation or otherwise, that would comport with justice.¹⁶⁶ Consistent with this, Nozick claimed that no state assuming more extended powers than those necessary to carry out a minimal night watchman function could be deemed legitimate.¹⁶⁷ In other words, according to Nozick's libertarian vision, the market economy is an independent self-regulating system, and the sole legitimate role for the State is to protect that system from external disruption or interference. From this it follows that there is no room for any state-backed social welfare rights.

Not only the massive inegalitarian surge since the 1970s, but also the vast institutional changes that have occurred since then clearly underscore the unsuitability of a libertarian approach to a determination of what ought to currently amount to a minimum of justice from a constitutional perspective. Indeed, globalization has greatly multiplied the plurality of national, transnational, and international legal regimes that bear on economic, social, and political relationships within and across national borders.¹⁶⁸ In particular, the combination of the plurality of legal regimes and the great mobility of capital and labor has at once given great flexibility to transnational corporations and vastly reduced the bargaining power of workers in many industries and services. Transnational corporations not only can seek to relocate in fiscal havens with more favorable corporate laws, but also in a large number of cases they can largely avoid the law of their places of business in favor of a largely self-serving private contractual regime that avoids official judicial oversight by subjecting disputes to business-friendly private arbitrators. From the standpoint of labor, on the other hand, job security becomes more precarious as a consequence of various factors, including automation and the availability of cheaper labor in less developed countries. Moreover, whereas inequalities in wealth have greatly increased throughout countries with advanced economies, greater disparities exist between certain countries, such as the United States where the gulf between the haves and the have-nots is much greater than in other countries, such as those in Western Europe.¹⁶⁹

To render the global economy fairer and more accountable and to reduce the harms of its most salient externalities, such as climate

¹⁶⁶ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

¹⁶⁷ *Id.* at 123–25.

¹⁶⁸ See ROSENFELD, *supra* note 18, at ch. 1. The following discussion briefly summarizes relevant points more fully addressed in the cited chapter.

¹⁶⁹ FACUNDO ALVAREDO, LUCAS CHANCEL, THOMAS PIKETTY, EMMANUEL SAEZ, & GABRIEL ZUCMAN, *WORLD INEQUALITY REPORT 2018* (2018).

change, would require stringing together a series of legal and administrative measures securing coordination between national, transnational, and international actors and sources of law. Environmental threats are for the most part global in scope, and thus effectively combatting them depends heavily on worldwide cooperation.¹⁷⁰ Corporate accountability and fair dealing as well as amelioration and equalization of labor conditions, on the other hand, can benefit incrementally through subjection to a plurality of national and extranational layered and segmented legal regimes that intersect without necessarily becoming fully integrated into a single harmonious hierarchically blended system.¹⁷¹ Accordingly, independently of whether transnational or international measures actually bear some of the burden of providing for the social welfare needs that minimum justice calls for satisfying within a given constitutional democracy, it behooves the nation-state authorities to assume the duty to meet the needs of minimum justice as much as possible. And, based on the prevailing economic situation described above in the United States, it seems amply justified to guarantee the entire cluster of social welfare rights that are included in the ICESCR to Americans as well as to citizens in other advanced economies with comparable levels of wealth.

The principal social welfare rights protected by the ICESCR that ought to be constitutionalized to satisfy the justice essentials in countries with advanced economies include: the right to earn a living through dignified work and through provision of appropriate technical and vocational training;¹⁷² fair wages allowing for a decent life for the wage earner and her family, as well as safe and healthy working conditions;¹⁷³ the right to form and join labor unions, and the right to strike within reasonable limits;¹⁷⁴ the right to social security and social insurance;¹⁷⁵ adequate food, housing, and continuous improvement of living conditions;¹⁷⁶ the right to receive the medical services required to preserve one's health, the prevention and control of epidemics, and the

¹⁷⁰ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹⁷¹ See Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415 (2008) (contrasting layered regulations—such as those that superimpose EU laws on those of national member states without achieving a fully federalized system—with segmented ones—such as those of the World Trade Organization (WTO), an international treaty-based regime aimed at imposing a common legal regime on worldwide trade).

¹⁷² ICESCR, *supra* note 4, art. 6.

¹⁷³ *Id.* art. 7.

¹⁷⁴ *Id.* art. 8.

¹⁷⁵ *Id.* art. 9.

¹⁷⁶ *Id.* art. 11.

control of environmental and occupational hazards;¹⁷⁷ and the right to education, including higher education and free primary education.¹⁷⁸ Moreover, in the wealthiest countries, such as the United States, the minimum of social welfare rights consistent with the justice essentials should in some cases go further than those guaranteed by the ICESCR. For example, given the vast array of opportunities reserved for those with higher education credentials, and the high cost of such education making it prohibitive for large segments of the population, the United States should subsidize university education for those who could otherwise ill afford it. This seems all the more justified given that public higher education in many Western democracies is largely tuition-free.¹⁷⁹ Finally, rights such as the ICESCR ones mentioned above are already for the most part protected, either constitutionally or through infra-constitutional legislation, in economically advanced Western democracies, including in the United States. Wherever relevant, however, constitutionalization remains preferable to avoid unwarranted majoritarian-led reductions in benefits that would contravene the justice essentials.

Failure to meet the minimum sketched above would violate the distributive justice requirements imposed by the justice essentials as they relate to the world's wealthiest countries. Also, the minimum in question implies all three of economic redistribution, recognition, and representation, and it does so at all three levels of the universal, the singular, and the plural. This can be illustrated by focusing on the single case of the right to healthcare services, which is guaranteed to all through state-administered socialized medicine in a large number of Western democracies, but denied as of this writing to around twenty-six million persons in the United States.¹⁸⁰ From a broad distributive justice perspective, medical needs could be variously subjected to two broad principles of substantive justice: "to each according to her means" or "to each according to his needs."¹⁸¹ Although there is no universal consensus regarding which of these principles should govern healthcare issues, a strong preference can be expressed in favor of adopting a criterion of needs rather than of means in any country such as the

¹⁷⁷ *Id.* art. 12.

¹⁷⁸ *Id.* art. 13.

¹⁷⁹ See, e.g., Katie Lobosco, *Americans Are Moving to Europe for Free College Degrees*, CNNMONEY (Feb. 23, 2016, 11:24 AM), <https://money.cnn.com/2016/02/23/pf/college/free-college-europe/index.html> [<https://perma.cc/2FUQ-C7VS>].

¹⁸⁰ See Smialek, Kliff, & Rappeport, *supra* note 132.

¹⁸¹ For a listing of these and other criteria of distributive justice, see CHAIM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 1–24 (Jaakko Hintikka, Donald Davidson, Gabriël Nuchelmans, & Wesley C. Salmon eds., 1980).

United States where discretionary governmental expenditures in the trillions of dollars have repeatedly been made as already alluded to above.¹⁸² Basic medical care is essential for the material well-being of every individual, and it should not be denied because it requires a measure of economic redistribution that calls for a relatively small sacrifice from those that find themselves in the country's higher wealth brackets. Basic medical care is also paramount to maintain one's dignity and sense of well-being. And finally, lack of basic medical care because of poverty also carries representational implications in as much as it tends to exacerbate disparities between the medically uninsured poor and their better-off counterparts within the confines of the political sphere. Furthermore, these distributive injustices are bound to have repercussions at all three levels of the constitutional polity. At the universal level, which is that of the relevant constitutional community taken as a whole, it seems unseemly that some of those who ought to count as parties to the basic constitutional social pact are deprived of some of the most basic material and dignitarian attributes in a setting bathed in enormous streams of wealth. At the level of the singular, twenty-six million individuals are glaringly deprived of one of the mainstays of the minimum of justice that ought to be constitutionally assured. And in addition, at the level of the plural, to the extent that the lack of medical insurance afflicts certain racial and ethnic minorities much more than those not within disadvantaged groups, it adds group-regarding inequities to individual-regarding ones.

IV. THE CASE FOR SOCIAL AND ECONOMIC RIGHTS UNDER THE U.S. DUE PROCESS AND EQUAL PROTECTION CLAUSES

As already noted, the U.S. Constitution does not provide directly for social and economic rights, and on the few occasions that the U.S. Supreme Court could have afforded these rights some modest indirect recognition, it refrained from so doing. As noted above, in *Dandridge v. Williams*, the Court refused 5-3 to grant an equal protection right to a minimum of subsistence for children in dire need who happened to be in large families.¹⁸³ By upholding a state law that prescribed a dollar maximum of subsistence per family as a valid economic regulation, the Court's majority gave no meaningful consideration to the plight of large families with insufficient means to provide the minimum basic subsistence to all their children—a position which was sharply criticized

¹⁸² See *supra* Part III.

¹⁸³ *Dandridge v. Williams*, 397 U.S. 471 (1970); see also discussion of *Dandridge*, *supra* note 12.

by the dissenting justices as will be further discussed below.¹⁸⁴ In another equal protection case, *San Antonio Independent School District v. Rodriguez*,¹⁸⁵ the Court upheld a state public school financing scheme that favored wealthier neighborhoods to the detriment of economically disadvantaged ones and asserted that discrimination based on poverty was not subject to heightened judicial scrutiny as discrimination based on race or sex would.¹⁸⁶ On the due process front, on the other hand, the Court not only did not recognize social and economic rights, but it also once held that infra-constitutional laws advancing social welfare objectives were unconstitutional. This is what happened in the now repudiated *Lochner v. New York* case,¹⁸⁷ where the Court interpreted the Due Process Clause of the Fourteenth Amendment as protective of a libertarian free market way of life and thus invalidated a New York state law limiting the working hours of bakery employees as an illegitimate infringement on private property and freedom of contract rights.

In what follows, I examine whether, in spite of the U.S. Supreme Court's past decisions, there is a sound and plausible doctrinally defensible path to protection of social and economic rights under the Due Process and Equal Protection clauses. Moreover, as I conclude that there is such a path, I also explore whether, based on current practices and adaptations consistent with the latter, the U.S. federal courts can avail themselves of the full panoply of remedial tools that foreign courts adjudicating social welfare cases have used to resolve issues such as those addressed in the non-U.S. decisions discussed in Part II.

Before proceeding further, however, it is important to address a few preliminary matters to dispel misunderstandings and to properly circumscribe the scope of the following analysis. First, the case for constitutional recognition of social and economic rights in the United States is not based on any guess or prediction regarding any future U.S. Supreme Court changes from its current positions. Given the Court's current conservative majority, there does not seem to be any openness within the foreseeable future to the recognition of any social welfare dimension that may be interpreted as deriving from any existing constitutional right.

Second, it seems quite self-evident that proponents of originalism would reject social and economic rights out of hand. On the one hand, that should be of little concern either based on an outright rejection of

¹⁸⁴ *Dandridge*, 397 U.S. at 508-09 (Marshall, J., dissenting).

¹⁸⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁸⁶ *Id.* at 28-29.

¹⁸⁷ *Lochner v. New York*, 198 U.S. 45 (1905).

originalism,¹⁸⁸ or on the fact that neither the actual jurisprudence to date on due process nor that on equal protection can be seriously regarded as consistent with originalism. Indeed, as famously underscored by Justice Holmes in his *Lochner* dissent, in that case the Court's majority strayed far from the Framers' intent.¹⁸⁹ Similarly, after the repudiation of *Lochner*, dissenting justices in major due process cases, including those recognizing a constitutional right to abortion or to same-sex marriage, repeatedly bemoaned that the Court's decisions belied originalism.¹⁹⁰ Furthermore, the same can be said about contraventions against originalism found in the prevailing equal protection jurisprudence. As the framers of the Equal Protection Clause were comfortable with racial segregation, a logically consistent originalist would have to concede that *Brown v. Board of Education* was wrongly decided, and that state-mandated racial segregation may be morally but not constitutionally repugnant.¹⁹¹ And even if anyone were to dispute this latter conclusion, it is inconceivable that any originalist—whether bent on original intent or original meaning—could legitimate the Court's decision that same-sex marriage is protected under both equal protection and due process.¹⁹²

Third, the perspective considered in the following examination is that of a hypothetical U.S. Supreme Court Justice sitting at present on the Court. Such a hypothetical Justice would share all the same judicial tools, types of arguments, and practices that currently sitting Justices avail themselves of. At the same time, our hypothetical Justice—just as any current Court Justice—could not as a practical matter rely on or revive certain among the Court's past holdings, or in good faith seek to push through certain unprecedented completely out-of-touch interpretations of the Constitution. Indeed, no matter how rigidly originalist or far on the political libertarian or social conservative right a contemporary Justice may be, it would be inconceivable given contemporary mores for such a Justice to publicly advocate for a return to *Plessy v. Ferguson*¹⁹³ or to *Bradwell v. Illinois*¹⁹⁴ which held constitutional the exclusion of women from the practice of law.

¹⁸⁸ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers were not originalists and that they expected subsequent generations to adapt the Constitution to their own needs).

¹⁸⁹ See *Lochner*, 198 U.S. at 65 (Harlan, J., dissenting).

¹⁹⁰ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 724–26 (2015) (Thomas, J., dissenting).

¹⁹¹ Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 432.

¹⁹² See, e.g., *Obergefell*, 576 U.S. at 686–87 (Roberts, C.J., dissenting); *id.* at 713 (Scalia, J., dissenting); *id.* at 721 (Thomas, J., dissenting).

¹⁹³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁹⁴ See *Bradwell v. Illinois*, 83 U.S. 130 (1872).

Similarly, on the egalitarian redistributive left, it would be unthinkable for a present-day Justice to maintain that the U.S. Constitution affords direct protection to social and economic rights much in the manner as the ICESCR does, or that the United States is constitutionally a social welfare state as contemporary Germany is.¹⁹⁵

One of the conceptually awkward tensions confronting substantive due process proponents both on and off the Court relates to the difficulty in cogently reconciling the repudiation of *Lochner* with the embrace of *Griswold*¹⁹⁶ and its progeny.¹⁹⁷ Indeed, from the standpoint of critics of substantive due process, the only thing that sets these two cases apart is ideology: *Lochner* reads in a libertarian gloss on the Constitution whereas *Griswold* counters that with a liberal individualist one. Reliance on the justice essentials, in contrast, allows for reconciliation of the refutation and endorsement at stake without raising the specter of an ideological divide. Indeed, *Lochner* was wrongly decided because whether or not the justice minimum in 1905 required protecting employee working conditions and addressing the bargaining advantages enjoyed by employers, it certainly did not justify any constitutional skewing in favor of employers' interests as against those of their workers. Consistent with this, *Griswold* and its progeny were rightly decided as a matter of recognition under the justice essentials. These cases constitutionalize the liberty, autonomy, and dignity of the individual in a way that balances the singularity of each person as against the will of the majority that stands as the expression of the universal—in the sense of the constitutional unit as a whole—and as against that of certain among the plurality of groups within the polity such as the religious communities opposed to same-sex marriage.

Either lack of the social welfare minimum or discrimination regarding social welfare essentials given the economic stance of the nation as a whole are certain to adversely affect the basic recognition rights called for by the justice essentials. A lack of sufficient food, shelter, medical care, or pension resources have an obvious adverse impact on the dignity and sense of self-respect of the person. As a matter of fact, such lacks certainly inflict a comparable dignitarian injury to that produced by the failure to legalize same-sex marriage. Moreover, the lacks in question also adversely affect individual liberty and individual autonomy. In short, consistent with existing and long-established substantive due process jurisprudence, our hypothetical

¹⁹⁵ See *supra* Introduction.

¹⁹⁶ Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 324 (2014).

¹⁹⁷ See generally John Hart Ely, *The Ages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

U.S. Supreme Court Justice could plausibly and justifiably decide in favor of the constitutional protection of basic social welfare interests under the Due Process Clause.

Turning to the Equal Protection Clause,¹⁹⁸ the starting point for our hypothetical Justice is the dissenting opinion in the *Dandridge* case. As emphasized by the dissent, the Court's majority regarded the challenged policy as involving an economic regulation, which is typical in the review of legislation affecting business interests, thus completely glossing over the fact that the contested law led to the deprivation of "the literally vital interests of a powerless minority."¹⁹⁹ What implementation of the law in question actually achieved was to provide for the most basic subsistence needs of some of the most desperately poor children, while depriving of such subsistence other children who happened to be in exactly the same dire predicament. The dissenting opinion found the classification of the affected needy children into large and small families arbitrary and unreasonable, and thus violative of even the minimum scrutiny standard employed by the Court in cases regarding social and economic classifications.²⁰⁰

Although the reasoning of the *Dandridge* dissent may help our hypothetical Justice in the most extreme circumstances, the dissent in the *Rodriguez* case provides a much more far-reaching doctrinal basis for protection of social welfare interests consistent with the justice essentials. One of the main branches of equal protection jurisprudence is the "fundamental interests" one.²⁰¹ Discrimination regarding a fundamental interest has been assessed by the courts under a strict scrutiny standard and has led to striking down as unconstitutional certain deprivations of generally protected rights due to poverty. Thus, the U.S. Supreme Court struck down as unconstitutional a poll tax that effectively deprived those unable to pay it of the right to vote;²⁰² court costs that prevented an indigent criminal defendant from appealing a conviction;²⁰³ and court fees that barred those who could not afford them from obtaining a divorce.²⁰⁴ In *Rodriguez*, however, the Court's majority rejected treating discrimination based on poverty much the same as discrimination based on race on the grounds that poverty is not

¹⁹⁸ See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (The Fourteenth Amendment only applies to the States, but the Supreme Court has interpreted the Fifth Amendment Due Process Clause as comprising an equal protection component applicable to the federal government.).

¹⁹⁹ *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

²⁰⁰ *Id.* at 528–29.

²⁰¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 97–98 (1973).

²⁰² *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

²⁰³ *Griffin v. Illinois*, 351 U.S. 12 (1956).

²⁰⁴ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

immutable, and declined to rule that a free state-provided public education amounted to a fundamental interest.²⁰⁵ In his dissent, Justice Marshall sharply criticized the Court's 5-4 majority, emphasizing that education is crucial to an informed electorate and that it therefore amounts to a fundamental interest which should not be dispensed by the State in a way that disadvantages the poor absent some compelling reason.²⁰⁶ In other words, even though poverty is not immutable and students who live in poor neighborhoods do receive a free state education, for the *Rodriguez* dissenters, state allocation of lesser resources for the education of the poor as compared to what it provides to their richer counterparts amounts to an unmistakable equal protection violation.²⁰⁷

An inferior state education due to poverty adversely affects equality of opportunity in higher education and in the workplace as well as disadvantaging the poor in the exercise of democratic rights. Accordingly, the impact of an inferior state education for the poor has economic redistribution, recognition-based, and representation-based distributive justice implications. Notably, the *Rodriguez* dissenting Justices writing in 1973 made it a point to distinguish discrimination against the poor in education from discrimination against them regarding welfare or housing.²⁰⁸ Although Justice Marshall drawing attention to this distinction may have been more rhetorical than substantive given his dissent in *Dandridge*, the distinction in question seems certainly much less persuasive in 2020 than it might have been almost a half a century ago. Indeed, given the great exacerbation of wealth inequalities detailed above,²⁰⁹ our hypothetical Justice could build on Justice Marshall's fundamental interests jurisprudence. More specifically, it seems justified to claim at present that all those social welfare needs that ought to be satisfied pursuant to the justice essentials amount to fundamental interests for equal protection purposes. And accordingly, the State should provide for such needs either directly or through appropriate legislation.

Turning to the remedial issues likely to arise in due process or equal protection decisions relating to social welfare interests, the United States could easily approximate the foreign jurisprudence detailed in Part II in some respects, but not in others. The cases that seem easiest are those like *Dandridge* and *Rodriguez* that concern laws that exclude, or discriminate against, those with social welfare interests clearly within the scope of the justice essentials. Thus, for example, if state-

²⁰⁵ See *Rodriguez*, 411 U.S. at 28–29.

²⁰⁶ *Id.* at 113–17 (Marshall, J., dissenting).

²⁰⁷ See generally *id.* at 62–133 (Brennan, J., White, J., Marshall, J., dissenting).

²⁰⁸ See *id.* at 115 n.74.

²⁰⁹ See *supra* Part III.

administered health insurance required a co-pay for medicines and visits to physicians, our hypothetical Justice would have no difficulty in holding the co-pay in question unconstitutional as applied to those too poor to afford it. In such a case, the remedy would be akin to that in *Harper*, in which the Court held that Virginia had to allow those who could not afford the poll tax to vote without paying it.

Given that many of the social welfare entitlements that deserve constitutional protection are currently safeguarded by statutory law, cases challenging statutory reductions or elimination of existing benefits should also be fairly easily manageable from a remedial standpoint. Suppose the U.S. Congress enacts massive cuts to Social Security, Medicare or Medicaid, and that as a result, those at the bottom of the economic scale become deprived of the minimum necessary for a dignified level of subsistence. In a case challenging the said cuts as violative of the due process and equal protection rights of those about to become destitute, our hypothetical Justice can hold the cuts unconstitutional, provided she addresses two important questions. The first concerns the level of judicial scrutiny to be applied to assess the purposes that Congress aimed at with its cuts in benefits; the second relates to the budgetary consequences of a contemplated constitutional invalidation. As indicated above, the best approach to social welfare claims combines criteria of reasonableness and of proportionality.²¹⁰ Currently, however, the U.S. Supreme Court does not use the standard of proportionality in due process and equal protection cases, though one Justice has relied on it in some concurring and dissenting opinions.²¹¹ Instead, the Court has relied on the multi-tiered level of scrutiny standard which, for present purposes, somewhat complicates the analysis. Suffice it to stipulate for now that with the size of the amounts of recent tax cuts and of coronavirus relief discussed above,²¹² one could settle either on an intermediate or strict scrutiny standard and conclude that cuts depriving the most desperately needy of subsistence or of most basic healthcare would be unconstitutional barring some truly catastrophic economic collapse. The budgetary consequences of constitutional invalidation, on the other hand, could be easily handled by limiting the reach of the constitutional prohibition to those who would be deprived of a dignified life as a consequence of the newly mandated cuts. Accordingly, either Congress reduces its proposed budgetary cuts, or it redistributes them by exempting the poor while imposing a greater economic burden on those who can well afford it.

²¹⁰ See *supra* Section II.A.

²¹¹ See, e.g., *United States v. Alvarez*, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring); see also *District of Columbia v. Heller*, 554 U.S. 570, 682, 690 (2008) (Breyer, J., dissenting).

²¹² See *supra* Part III.

The one truly problematic area for our hypothetical Justice is requiring a court order to enact positive legislation to remedy a violation of a social welfare constitutional right. Suppose, for example, that the United States lacks any healthcare legislation, thus leaving the entire field to the private market—a situation that may be actually approximated should the U.S. Supreme Court strike down the whole Affordable Care Act as unconstitutional as requested by the Trump administration in currently pending litigation.²¹³ Our hypothetical Justice may properly decide, in the circumstances, that an indigent person with no means to secure any healthcare on the private market has endured both a due process dignitarian injury and an equal protection fundamental interest deprivation. The most obvious remedy in such a case would be to require Congress to enact reasonable legislation affording the very poor adequate healthcare consistent with the justice essentials, much like the German or South African Constitutional Court would.²¹⁴ That remedy, however, has not been used in the United States where the Supreme Court has repeatedly struck down federal laws it has found unconstitutional but not ordered Congress to enact particular laws to remedy constitutional deficiencies.²¹⁵

Although our current hypothetical Justice could not avail herself of this important latter remedy frequently used in connection with social welfare rights in other jurisdictions, there seems to be no logical impediment for an eventual future judicial embrace of such a remedy. Traditionally, there seemed to be a great divide between negative and positive rights and between striking down legislation as unconstitutional and requiring legislation to provide an otherwise unavailable constitutional remedy. As discussed already, the distinction between negative and positive rights is much more blurred and nuanced in the present than it was in the past.²¹⁶ On further reflection, judicially striking down a law should not be regarded as categorically radically

²¹³ Sheryl Gay Stolberg, *Trump Administration Asks Supreme Court to Strike Down Affordable Care Act*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/06/26/us/politics/obamacare-trump-administration-supreme-court.html> [<https://perma.cc/QJ87-H5HW>].

²¹⁴ See *supra* Section II.C.

²¹⁵ Federal courts also cannot directly order States to adopt laws as that is deemed to be “commandeering” in violation of federalist constraints imposed by the U.S. Constitution. See *New York v. United States*, 505 U.S. 144 (1992). Nevertheless, federal courts can indirectly order States to undertake positive action that may include legislation or specific budgetary or tax action as exemplified in *Missouri v. Jenkins*. *Missouri v. Jenkins*, 495 U.S. 33 (1990). (holding indirect federal prompting of states to take affirmative legislative action is justified under the Constitution’s Supremacy Clause. Given that Congress is a co-equal branch of the federal government, there is no analogous justification for court ordered legislation at the federal level.)

²¹⁶ See *supra* Section II.C.

different from judicially ordering enactment of a law that reasonably and proportionately addresses a constitutional deficiency. Indeed, in either case, the Court's action stems from a legitimate antimajoritarian function designed to keep legislation within constitutional grounds. Thus, for example, the U.S. Supreme Court struck down as unconstitutional an extremely popular federal law, the Violence Against Women Act of 1994, in the *United States v. Morrison* case.²¹⁷ Would it be any more substantially intrusive on the U.S. Congress if it were judicially ordered to pay for the urgent healthcare cost of the poorest Americans through use of the Spending Clause;²¹⁸ or to enact legislation resulting in the coverage of such costs by private or public actors pursuant to its powers under section 5 of the Fourteenth Amendment?²¹⁹

CONCLUSION

Since the Enlightenment, the ideal to which liberal constitutions have aspired comprises an inherent distributive justice component that requires a measure of economic redistribution, recognition, and representation to be properly calibrated among the constitutional unit as a whole, each individual person within it, and the relevant competing groups among which the citizenry is ideologically and politically apportioned. Whether explicit, implicit, or aspirational, the distributive justice imperative that confronts all liberal polities splits into justice essentials that must be incorporated within the relevant polity's constitution and into contested justice issues left for infra-constitutional resolution. At present, social and economic rights ought to be constitutionally guaranteed consistent with adherence to the justice essentials. Since the end of World War II and adoption of the ICESCR, liberal constitutions have for the most part adopted social and economic rights, though some have made them merely aspirational while others have to various degrees made them judicially enforceable. The two main objections against social and economic rights as contrasted to civil and political rights, namely that the former break the correlation between right and duty and that they are largely judicially unenforceable, have proven largely unwarranted. This is in no small part due to the fact that the traditional contrast between first and second-generation rights has become increasingly blurred as the former have increasingly required positive state intervention rather than mere state abstention for their vindication. The United States has been a

²¹⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

²¹⁸ U.S. CONST. art. I, § 8, cl. 1.

²¹⁹ U.S. CONST. amend. XIV, § 5.

social and economic constitutional rights outlier and has on repeated occasions constitutionally ruled against the justice essentials as attested by the U.S. Supreme Court decisions in *Lochner*, *Dandridge*, and *Rodriguez*. The U.S. Constitution lacks social and economic rights and leaves therefore no room for their direct judicial enforcement. However, based on the example provided by several other jurisdictions, these rights can be judicially enforced indirectly through reliance on constitutional rights or principles involving equality or dignity. This opens the door for U.S. judicial indirect vindication of social and economic rights through the Due Process and Equal Protection clauses. In the last analysis, from a broader global perspective, it would be optimal if social welfare rights could be aligned at the national constitutional, transnational and international levels so as to spread the justice essentials to all those who are currently experiencing an unfair lack of economic resources, dignity, or path to meaningful access to democratic representation.