January 2008

The Minimum Core of Economic and Social Rights: A Concept in Search of Content

Katharine G. Young
Boston College Law School, katharine.young.3@bc.edu

Article

The Minimum Core of Economic and Social Rights: A Concept in Search of Content

Katharine G. Young†

I. INTRODUCTION

The concept of the "minimum core"[1] seeks to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights. By recognizing the "minimum essential levels" of the rights to food, health, housing, and education,[2] it is a concept trimmed, honed, and shorn of deontological excess. It reflects a "minimalist" rights strategy, which implies

---

† S.J.D. candidate and Byse Teaching Fellow, Harvard Law School. The author thanks Sandra Liebenberg, Frank Michelman, Vlad Perju, Henry Steiner, and Mark Tushnet for helpful comments on a prior draft. Special thanks also to Philip Alston for early prompting. Different parts of this paper have also benefited from presentations to the Project on Justice, Welfare, and Economics at Harvard University, the Byse Workshop at Harvard Law School, and the Graduate Workshop at Harvard's Edmond J. Safra Foundation Center for Ethics. All errors remain the author's own.

1. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Report on the Fifth Session*, *Supp. No. 3*, Annex III, ¶ 10, U.N. Doc. E/1991/23 (1991) [hereinafter *General Comment No. 3*].

2. *Id.*

that maximum gains are made by minimizing goals.[3] It also trades rights-inflation for rights-ambition, channeling the attention of advocates towards the severest cases of material deprivation and treating these as violations by states towards their own citizens or even to those outside their territorial reach. With the minimum core concept as its guide, economic and social rights are supposed to enter the hard work of hard law.

Yet rights-ambition is a difficult stance, and even minimalist ambitions can be misplaced. Critics of the concept have suggested that paring down such rights to an essential core threatens the broader goals of economic and social rights, or pretends a determinacy that does not exist.[4] A long-standing criticism faults the minimum core for directing our attention only to the performance of developing states,[5] leaving the legal discourse of economic and social rights beyond the reach of those facing material deprivation in the middle or high income countries. A more recent criticism points to the concept's tendency to rank different claimants of rights, while ignoring the more salient assessment of rights versus macroeconomic growth or defense policies.[6] Even the primary conceptual questions remain unanswered. Is the minimum core in Mali the same as the minimum core in Canada?[7] If country-

---

3. This is a slight variation on the perspective of Michael Ignatieff, who defines minimalism as an outlook capable of accommodating the fact that "people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong." Michael Ignatieff, *Human Rights as Ideology*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY 53, 56 (Amy Gutmann ed., 2001). Ignatieff suggests that this entails targeting "unmerited suffering and gross physical cruelty," from which he excludes economic and social rights deprivations altogether. Michael Ignatieff, *Dignity and Aging*, *in* HUMAN RIGHTS AS POLITICS AND IDOLATRY, *supra*, at 101, 173; *cf.* Joshua Cohen, *Minimalism about Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190, 192 (2004) (distinguishing what he terms "justificatory minimalism" from "substantive minimalism," and canvassing the possibilities of a minimalism that encompasses economic and social rights). The position of minimalism maintained in relation to arguments about a minimum core does not necessarily signal an acceptance of pluralism. *See infra* Parts II-III.

4. *E.g.*, Brigit Toebes, *The Right to Health*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169, 176 (Asbjørn Eide, Catarina Krause & Allen Rosas eds., 2d ed. 2001) [hereinafter ECONOMIC, SOCIAL AND CULTURAL RIGHTS] ("States could be encouraged to put the elements not contained by the core into an 'indefinite.'").

5. MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 143-44, 152 (1995) [hereinafter CRAVEN, THE INTERNATIONAL COVENANT]. *But cf.*, U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶ 18, U.N. Doc. No. E/C.12/2001/10 (May 10, 2001) [hereinafter *Statement: Poverty and the Covenant*] ("[B]ecause poverty is a global phenomenon, core obligations have great relevance to some individuals and communities living in the richest States.").

6. Karin Lehmann, *In Defense of the Constitutional Court: Litigating Economic and Social Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163 (2006).

7. *Compare* Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 4, at 27 (suggesting that "[t]he immediate obligations of states under Article 2 imply that countries with more resources have a higher level of core content or immediate duties than those with more limited resources"), *and* Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on* Soobramoney's *Legacy and* Grootboom's *Promise*, 16 S. AFR. J. ON HUM. RTS. 206, 250 (2000) ("There is thus a distinction between relative (state-specific) core minimums and absolute core minimums. For instance, Canada's core minimum will go considerably beyond the absolute core minimum while Mali's may go no further than this absolute core."), *with* Fons Coomans, *In Search of the Core Content of the Right to Education*, *in* EXPLORING THE CORE CONTENT OF ECONOMIC AND SOCIAL RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES 159, 167 (Danie Brand & Sage Russell eds., 2002) [hereinafter EXPLORING THE CORE CONTENT] ("A country-dependent core would undermine the concept of the

specific, is it otherwise context-sensitive or context-blind?[8] Is it a more general or more precise instantiation of the parent right?[9] And, who gets to determine what it is?

As applied, the concept is no less problematic. The United Nations Committee on Economic and Social Rights ("the Committee"), the first international body to articulate the concept, has, since 1990, variously equated the minimum core with a presumptive legal entitlement, a nonderogable obligation, and an obligation of strict liability.[10] At the constitutional level, advocates of the concept (whose positions, as we will see, are most developed in relation to the economic and social rights provisions of the South African Constitution)[11] have argued for the concept's immediate enforceability, justiciability, and value as a benchmark against which government programs can be temporally oriented and assessed.[12] These positions, superficially persuasive for resolving the challenges of economic and social rights implementation, are hopelessly incompatible in practice.

One response to these conceptual and doctrinal criticisms would be to jettison the concept of the minimum core. Some commentators have urged this course of action, even those who are otherwise committed to the economic

---

universality of human rights."), *and* Geraldine Van Bueren, *Of Floors and Ceilings: Minimum Core Obligations and Children*, *in* EXPLORING THE CORE CONTENT, *supra*, at 183, 184 ("[T]here would be no point in having a minimum core of state responsibility if it were not universal.").

8. *See* Coomans, *supra* note 7, at 180. Commans warns that a sensitivity to context would mean that:

> [T]he people's needs and the available opportunities would determine the core of a right, rather than starting with the right itself. In effect this would make implementation of a right dependent on the outcome of a political bargaining process that would entail identifying the needs of the people along with the desirable and feasible opportunities, and abandoning a rights-based approach.

Id.; *cf.* Danie Brand, *The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künneman*, *in* EXPLORING THE CORE CONTENT, *supra* note 7, at 99, 106 ("[T]he core content is of necessity a shifting concept.").

9. *Compare* DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 198 (2007) ("[T]he role of the court in this respect would be to set the general standard that constitutes the minimum core obligation of the state . . . ."), *with* Scott & Alston, *supra* note 7, at 250 (advocating "the responsibility to exercise best judgment in the national and local context . . . balanc[ing] reaction to deprivation on a 'calling it as we see it' case-by-case basis with a pragmatic sense of what remedies are desirable and likely to prove effective").

10. *Compare General Comment No. 3*, *supra* note 1, ¶ 10, (allowing an infringement of the minimum core when "every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations"), *with* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12)*, ¶ 47, U.N. Doc. E/C.12/2004 (Aug. 11, 2000) [hereinafter *General Comment No. 14*] ("[A] State party cannot, under any circumstances whatsoever, justify its non-compliance with . . . core obligations . . . which are non-derogable . . . ."), *and Statement: Poverty and Covenant*, *supra* note 5, ¶¶ 16, 18.

11. S. AFR. CONST. 1996 ss. 26-27 (establishing rights of access to housing, healthcare, food, water, and social security).

12. *See, e.g.*, Pierre de Vos, *The Essential Components of the Human Right to Adequate Housing—A South African Perspective*, *in* EXPLORING THE CORE CONTENT, *supra* note 7, at 23, 23-24, 26 [hereinafter de Vos, *Essential Components*] (advocating justiciability); *cf.* Theunis Roux, *Understanding* Grootboom*—A Response to Cass R. Sunstein*, 12 CONST. F. 41, 46-47 (2002) (suggesting a strict priority-setting approach which would outline "the temporal order in which government chooses to meet competing social needs," with assistance from the minimum core concept in the International Covenant on Economic, Social and Cultural Rights).

and social rights framework.[13] At base, these critics take two skeptical positions—that "universality" in the claims of differentially situated people is an impossible goal, and that contextualized claims, advanced locally, are too complex to be addressed by the discourse and institutions of rights. With predictions of judicial overreach at the national level and juridical confusion at the international level,[14] these skeptics counsel abandonment of the minimum core.

This Article offers the conceptual steps toward a second, less defeatist, response. It argues that the rejection of the minimum core concept, or its alternate embrace, is available only on the basis of a clearer analysis of its interpretation. Without this clarity, the concept cannot supply a predetermined content to economic and social rights, rank the value of particular claims, or set the level and criteria of state justification required for a permissible infringement. Indeed, I suggest that it is unlikely that the concept will ever offer the relative determinacy required for these three tests. Yet it can assist as an object of interpretive agreement— or disagreement—around claims for socioeconomic protection. What must be discarded, perhaps, are the goals of fixture, closure, and determinacy structured into the concept by its advocates.

In making this inquiry, it is necessary to disentangle the inconsistencies and controversies that have so far accompanied the concept. These are currently hidden to observers, who are (all too) content to confine their analysis to either international or constitutional law, but rarely both or, alternatively, restrict their observation to either the normative or the institutional problematic. This Article seeks to end the confusion by examining and reconceptualizing the foundations of the various approaches underlying the commentary on the minimum core. In Parts II through IV, it disaggregates three major approaches and evaluates them separately. The plurality and contestation around these three approaches have blurred the rationales and justifications of the minimum core and produced many of the difficulties in its operation. Finally, in Part V, the Article turns to address these operations more explicitly.

The first approach, examined in Part II, locates the minimum core in the essential minimum and is commonly used by those seeking an absolute foundation for economic and social rights. This approach reaches for a moral standard for prescribing the most promising content to the minimum core, such as how the liberal values of human dignity, equality, and freedom, or how the more technical measure of basic needs are minimally sustained within core formulations of rights. Despite its familiarity to constitutionalists and internationalists (existing in harmony, not dissonance, between the two fields),[15] this explicitly normative exercise is potentially the most paradoxical.

---

13. *See, e.g.*, ERIKA DE WET, THE CONSTITUTIONAL ENFORCEABILITY OF ECONOMIC AND SOCIAL RIGHTS 96 (1996); Lehmann, *supra* note 6; Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1904 (2004) [hereinafter Tushnet, *Social Welfare Rights*].

14. Tara Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of the Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 177-78 n.13 (2006) (describing the difficulties of an abstract "minimum core" guiding concrete litigation).

15. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1868-69 (2003) (describing the methodological difference between human rights law and other areas of public international law).

It may lead to abstract interpretations that fail to resonate with rights-claimants, to provide the much-needed detail of the priorities and politics behind rights formulations, or to give a reliable measure for effective enforcement or supervision in positive law. While useful in connecting political and ethical justifications to the interpretation of economic and social rights, this approach is problematic when it acts to close off, rather than open, a conversation on rights.

The second approach, discussed in Part III, situates the minimum core in the minimum consensus surrounding economic and social rights. Under this theory, the fledgling concept of the minimum core gains universal credibility by tying its fortunes to the basic—and not hypothetical—consensus reached within the communities constituting each field. Such an approach unites the themes of legitimacy and self-determination common to both international and constitutional law and is consistent with the practice-bound determinations of the Committee, which originally relied largely on the accretion of content from state reports to formulate the minimum core.[16] Yet this type of method propels international and constitutional formulations along different and uncertain paths, setting limits on the capacity for guidance of each in establishing appropriate—and appropriable—content for the minimum core. The end result is an amalgam of universal and country-specific cores, whose adjustability belies the pretensions of each "core" to represent an absolute (and nonderogable) minimum.

The third approach locates the minimum core in the content of the obligations raised by the right, rather than the right itself. This approach has been employed in the more recent General Comments of the Committee.[17] Of the three perspectives, the focus on obligations admits the greatest attention to the institutional aspects of supervising, enforcing, and claiming rights, which the first approach deliberately defers, and the second only implicitly fosters. Thus, a division of core and non-core obligations most explicitly addresses the institutional competence of the international organ declaring noncompliance, or of the domestic court declaring a violation of a justiciable obligation, and may factor in pragmatic considerations of costs and feasibility in assessing which obligations to treat as core. Yet, as Part IV of this Article shows, the practical constraints that are given prominence within the concept of minimum core obligations—namely the supervisory competence of the Committee, or the jurisdictional competence of a court—ultimately carry it too far from its normative ambitions.

After examining each approach, Part V presents what it deems to be more plausible alternatives. It suggests that the minimum core concept will always elude attempts at definition along essentialist, positivist, or even institutionalist lines. Instead, it argues that a better approach is to reverse the

---

16. *General Comment No. 3*, *supra* note 1, ¶ 10.

17. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 18: The Right to Work (art. 6)*, ¶ 31, U.N. Doc. E/C.12/GC/18 (Feb. 6, 2006) [hereinafter *General Comment No. 18*]; *General Comment No. 14*, *supra* note 10, ¶¶ 43-45; U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 15: The Right to Water (arts. 11, 12)*, ¶¶ 37-38, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter *General Comment No. 15*].

inquiry—by searching not for content to the minimum core concept, but rather for new concepts to facilitate the rights' "content," operating as law. This Part therefore examines whether we can defer much of the supervisory and enforcement work to benchmarks and indicators, much of the obligations analysis to the assessment of causality and responsibility, and much of the normative and political work to more open expressions of economic and social rights. One consequence of this approach is to transfer the ambitions for the minimum core concept into other areas. These are examined briefly. A second consequence is the departure from the analytic science of stipulating core and non-core needs along a discourse of rights. If there is any work left for the minimum core, it may only be in its potential—not yet assessed—to register the claims for recognition of material disadvantage from previously obscured claimant groups. This conclusion reveals an important insight into what is gained (and lost) from the comparative exercise, and the degree of "bricolage" that rights-advocates who move between fields of law must incorporate.[18]

* * *

Before analyzing the three approaches and examining the possibilities of a fourth, we begin by examining the origins of the minimum core, its current operation, and its predicted future. The next two sections mark out both the international and constitutional legal operations for the concept and restricts its analysis to economic and social rights rather than other human rights.[19] This is necessary because the concept of a minimum core is not confined, structurally at least, to economic and social rights. Conceivably, claimants and advocates could apply the concept of a minimum essential content to all universal, compelling, and predictable interests appropriately labeled as rights.[20]

Let us consider the operation of cultural rights. In the original articulation of the minimum core, the Committee did not refer to examples of cultural rights,[21] despite the inclusion of cultural rights within its mandate. In

---

18. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1285-86 (1999) [hereinafter Tushnet, *The Possibilities of Comparative Constitutional Law*] (citing CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 16-17 (1962), who distinguished between the conceptual orientations of engineering and bricolage).

19. This Article adopts the terminology of "economic and social rights" to describe these rights, which are contrasted, along with cultural rights, with the more traditionally understood "civil and political rights." *See* Universal Declaration of Human Rights, art. 21, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); *see also* International Covenant on Economic, Social and Cultural Rights, pmbl., Dec. 16, 1966, 993 U.N.T.S. 3, 9 [hereinafter Covenant] (recognizing that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights"). Economic and social rights are described in various constitutional contexts as "social welfare rights" and "economic rights" (North America), "socio-economic rights" (South Africa), and "social rights" (Europe). For an explanation of the diverging classifications of economic and social rights between international and constitutional law, even between post-1966 constitutions, see, for example, Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT'L J. CONST. L. 56, 61-62 (2004).

20. *Compare* BILCHITZ, *supra* note 9, at 190-99 (defending the minimum core by analogy to the right to privacy), *with* Griswold v. Connecticut, 381 U.S. 479 (1965).

21. *See General Comment No. 3*, *supra* note 1; *infra* note 79 and accompanying text.

2005, the Committee purported to correct this imbalance by issuing a General Comment on the aspects of cultural rights protected under the International Covenant on Economic, Social and Cultural Rights ("the Covenant"), and including a definition of a "minimum core" of cultural rights.[22] Notwithstanding this development, this Article does not extend its analysis to cultural rights.[23] While it concedes that cultural rights are often inappropriately overlooked in commentary on the Covenant,[24] and while it acknowledges the mutually dependent relations between the economic, social, and cultural aspects of material well being,[25] this Article limits its analysis to economic and social rights for two reasons. First, at the level of political agency, challenges arise in addressing claims of redistribution that are unlike those involved in struggles for recognition.[26] These differences become clear when investigating the normative sources of a plausible core of economic and social rights and the obstacles to consensus. Although the three categories of rights were placed within the same Covenant,[27] economic and social rights are more central to the international ideological disagreement of the last century and to the international agreement (at least on the nature of the practical challenge in socioeconomic provision, if not the shape of the solution) for this century.[28] Disagreement and agreement on cultural rights is somewhat dissimilar: most relevant to this Article's aims is the need to allow for change and multiplicity in the expression of cultural rights,[29] which is differently attenuated for economic and social rights. Secondly, at a more methodological level, I argue that there are important tensions between economic and social rights on the one hand and cultural rights on the other, which caution against a grouped analysis. From one view, group rights for minority cultures harm material interests by keeping unequal distributions in place, a tension which is

---

22. *See, e.g.*, U.N. Comm. on Econ., Soc. & Cultural Rights [ECOSOC], *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (art. 15)*, ¶ 39, U.N. Doc. E/C.12/GC/17 (Jan 12, 2005) [hereinafter *General Comment No. 17*].

23. Neither are property rights and labor rights examined in any length in this Article, despite their inclusion in some expressions of economic and social rights. *See, e.g.*, Daintith, *supra* note 19, at 58-61.

24. Asbjørn Eide, *Cultural Rights as Individual Human Rights*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 4, at 289 (describing cultural rights "almost as a remnant category" in commentary on the Universal Declaration of Human Rights and the Covenant).

25. *See, e.g.*, JEANNE M. WOODS & HOPE LEWIS, HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL, AND CULTURAL DIMENSIONS, xvii (2005).

26. *See* NANCY FRASER & AXEL HONNETH, RECOGNITION OR REDISTRIBUTION? A POLITICAL-PHILOSOPHICAL EXCHANGE (2003) [hereinafter FRASER & HONNETH, RECOGNITION OR REDISTRIBUTION] (debating the appropriate separation between the politics of recognition and redistribution in critical theory).

27. JOHN P. HUMPHREY, HUMAN RIGHTS & THE UNITED NATIONS 158-62 (1984); Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987) (describing the transition to two separate Covenants from one original covenant on human rights).

28. *See* United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc A/RES/55/2 (Sept. 18, 2000); *see also* U.N. Millennium Development Goals, http://www.un.org/millenniumgoals (last visited Nov. 1, 2007) [hereinafter MDGs] (claiming that the eight MDGs—which include the halving of extreme poverty, the halting of the spread of HIV/AIDS, and the provision of universal primary education by 2015—"form a blueprint agreed to by all the world's countries and all the world's leading development institutions").

29. *E.g.*, Dominic McGoldrick, *Culture, Cultures, and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 447, 450 (Mashood A. Baderin & Robert McCorquodale eds., 2007).

particularly salient for women in the private sphere.[30] From a different perspective, individual cultural rights, which may also sound in intellectual property rights, harm the material interests of group populations unable to access the market.[31] For these reasons, it is worth separating the substantive analysis of cultural from economic and social rights, although the structural exploration may be similar.

A. *The International Role*

The Committee—the supervisory body responsible for clarifying the terms and implementation of the Covenant[32]—issued its General Comment on the minimum core at an auspicious moment: shortly after the 1989 collapse of the communist economies and shortly before those advocating neoliberal policies raced in to restructure them. Since then, the Committee has used the "minimum core" to give substance to the Covenant's enumerated rights to food, health, housing, and education,[33] and the emerging right to water.[34] Commentators have proposed the minimum core as the concept to guide the interpretation of the economic and social rights protected in other international human rights instruments.[35] The Committee has also applied the minimum core, not only to its supervision of national systems of political economic organization, but also to its supervision of states parties' individual (and collective) activities in global trade, aid, development, and security regimes.[36]

---

30. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN 7, 9 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999).

31. Covenant, *supra* note 19, art 15(1)(c) recognizes the "right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." But see *General Comment No. 17*, *supra* note 22, ¶¶ 1-3, for the Committee's attempt to distinguish human rights from intellectual property rights. This question is also raised by Margaret Chon in her article, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2827-28 (2006).

32. The Committee, a group of independent experts operating under the mandate of the U.N. Economic and Social Council, was established in 1986, a decade after the Covenant entered into force.

33. *See, e.g.*, *General Comment No. 14*, *supra* note 10, ¶ 43; U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 13: The Right to Education (art. 13)*, ¶ 57, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment No. 13*]; U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 12: The Right to Adequate Food (art. 11)*, ¶ 8, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment No. 12*]. The two general comments on the right to adequate housing have not nominated a minimum core, but these have been elaborated elsewhere. *See, e.g.*, U.N. Dev. Programme, UNDP Human Development Report 2000, Housing Rights, § 18 (Nov. 20, 1999), *available at* http://hdr.undp.org/en/reports/gloabl/HDR2000/papers/leckie.pdf [hereinafter UNDP 2000 Housing Rights].

34. *General Comment No. 15*, *supra* note 17, ¶ 37.

35. *See, e.g.*, Thomas Hammarberg, *Children*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 4, at 353, 366-67 (suggesting that a minimum core obligation is useful for ordering the priorities of poor countries with respect to the rights of children under the Convention on the Rights of the Child, despite the different articulation of obligations in the Convention on the Rights of the Child). TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A MANUAL ON PRESENTING CLAIMS 170-71 (2002) (discussing the usefulness of the minimum core concept for the Inter-American Commission on Human Rights).

36. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 8: The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, ¶ 7, U.N. Doc. E/C.12/1997/8 (Dec. 12, 1997) [hereinafter *General Comment No. 8*] (asserting that "the State and the international community itself [must] do everything possible to protect at least the core content of the economic, social and cultural rights of the affected

The concept anticipates three accomplishments. For international lawyers attempting to give legal bite to the standard of obligation established by the Covenant, the minimum core initiates a common legal standard, disassembling the inherent relativism of the programmatic standard of "progressive realization" set out in the text of the Covenant.[37] This standard of obligation, which distinguishes the Covenant from other human rights instruments, gives state parties the latitude to implement rights over time depending upon the availability of necessary resources, rather than requiring them to guarantee rights immediately.[38] Nevertheless, the Committee has insisted that the "progressive realization" of the Covenant rights requires the taking of "deliberate, concrete and targeted" steps.[39] The minimum core provides an understanding of the direction that the steps should follow and an indication as to when their direction becomes retrogressive.[40]

Secondly, for those hoping to provide an objective standard across different state systems of political economy, the minimum core concept purports to advance a baseline of socioeconomic protection across varied economic policies and vastly different levels of available resources.[41] States parties to the Covenant represent most of the present-day diversity in choices of political and socioeconomic ordering (with the notable exception of the United States, which has signed, but not ratified the Covenant).[42] For

---

peoples of that [targeted] State"). With respect to development, see *General Comment No. 15*, *supra* note 17, ¶ 38; *General Comment No. 14*, *supra* note 10, ¶¶ 39-40, 45; and *Statement: Poverty and the Covenant*, *supra* note 5, ¶ 17 (" When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect."). With respect to trade, see *General Comment No. 12*, *supra* note 33, ¶ 20; and U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of a Mission to the World Trade Organization*, U.N. Doc. No. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) (*prepared by* Paul Hunt).

37. In 1987, Rapporteur Philip Alston had pointed to this problem in recommending that the Committee "must find a way of conveying to states the fact that priority must be accorded to the satisfaction of minimum subsistence levels of enjoyment of the relevant rights by *all* individuals." Philip Alston, *Out of the Abyss? The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 359-60 (1987).

38. *See* Covenant, *supra* note 19, art. 2(1); *cf.* International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. For an illuminating discussion of the history of drafting this standard of obligation, see Alston & Quinn, *supra* note 27.

39. *General Comment No. 3*, *supra* note 1, ¶ 9.

40. *Id.* (describing the inconsistency between "deliberately retrogressive measures" and progressive realization). Although the Committee described retrogression as a move away from the direction of full realization (rather than a move below any minimum), there are unexplored parallels between a "ratchet-effect" standard of retrogression and a state-specific minimum core. For a criticism of the Committee's refusal to make deliberately retrogressive measures a prima facie violation, see CRAVEN, THE INTERNATIONAL COVENANT, *supra* note 5, 131-32. For a hint of this relationship at the national level, see Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clause*, 20 S. AFR. J. HUM. RTS. 448, 458, discussed *infra* note 321.

41. *See, e.g.*, *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Annex, U.N. Doc. E/CN.4/1987/17 (June 2-6, 1986) *reprinted in* 9 HUM. RTS. Q. 122, 126 (1987) ("States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2000/13, *reprinted in* 20 HUM. RTS. Q. 691, 695 (1998) ("Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.").

42. *See generally* Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79 (1992) (exploring the compatibility of the Covenant's rights, as self-monitored in other Western industrialized democracies, with those of various states in the United States). The Covenant has been before the Senate since 1978.

advocates worried about commandeering sovereign macroeconomic choice, a minimum content for economic and social rights would seem to reduce (if not eliminate) this risk, increasing the latitude for states to pursue their own "particular form of government,"[43] within the broad human rights framework.[44]

Thirdly, for commentators wishing to introduce a manageable legal impetus to global redistributive debates, the minimalist connotations of the minimum core concept signal an acceptable moderation. Bård-Anders Andreassen and other advocates from the development field suggested in the 1980s that minimum standards would provide the basis for a more progressive, if restrained, redistribution of resources rather than more extensive efforts, thus placating the self-interest of developed states.[45] These commentators also sought to delimit economic and social entitlements to their barest forms in order to avoid the disruption of production incentives, which would work against their practical success.[46]

While the logic of these three arguments continues to hold, the first and the second are accompanied by traces of anachronism. When advocates claim "retrogression" in debates about economic and social rights, they are more concerned with establishing the deliberateness of the state policy or its causal effect, rather than whether it has impacted some essential minimum.[47] Similarly, when advocates of the minimum core assert its modesty in relation to states parties' sovereign political economic choices, they are usually aware that many policies have been conditioned by international financial institutions rather than the states themselves and that "sovereignty" is often more respected in the breach.[48]

---

43. *General Comment No. 3*, *supra* note 1, ¶ 8.

44. Matthew Craven, *The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289, 316 (David J. Harris & Stephen Livingstone eds., 1998).

45. Bård-Anders Andreassen, Tor Skålnes, Alan G. Smith & Hugo Stokke, *Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights*, *in* HUMAN RIGHTS IN DEVELOPING COUNTRIES, 1987-1988, at 333, 342 (arguing that "a minimalist focus . . . may better urge international redistributive effort at least by those states that already have passed well beyond a minimal level in their own countries"). Although Andreassen et al.'s "minimum threshold" proposal should not be confused with the "minimum core" approach, not least because it references society-wide rather than individual levels of enjoyment, similar rationales can be traced to each approach.

46. *Id.* at 341-42 (warning that "[a]brupt, overambitious attempts at large scale redistribution might produce disincentives to protection and attendant dislocations to the point where the position of the least advantaged might in fact be lowered").

47. *General Comment No. 3*, *supra* note 1, ¶ 9 (noting "deliberately retrogressive measures . . . would need to be justified by reference to the totality or rights . . . and in the context of the full use of the maximum available resources"). For the suggestion that "deliberate" does not suggest a requirement to intentionally reduce the enjoyment of economic and social rights, see OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, at 28, U.N. Doc. HR/P/PT/12, U.N. Sales No. E.04.XIV.8 (2005).

48. For an empirical study of the universal (if uneven) influence of global exports and trade, as well as transnational production, on national social and economic policy, see, for example, GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE (David Held & Anthony McGrew eds., 2002); see also JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 516 (2d ed. 2004) (describing the rise of structural adjustment lending since 1979 and development of the World Bank's mission to "guide the economic trajectory of entire nations"); and JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002) (providing an account of the role of international institutions in structural economic reform).

I suggest that the third argument, along global redistributive lines, holds the most relevance for contemporary debates. Although the legal support for the Committee's recent assertion that the minimum core gives rise to "national responsibilities for all States, and international responsibilities for developed States, as well as others that are 'in a position to assist'"[49] requires more analysis, one can see why a minimum legal standard would be a prerequisite. The Committee's system of liability makes states, which are in a position to assist in the protection of the minimum core, liable for not doing so, based on the cogency of a legal minimum. States which are not able to deliver the minimum core to their citizens may resist sanction if they have sought international support which has not been forthcoming.[50] Legal support for this inquiry rests on the obligation to provide "international assistance and cooperation"[51] in the collective realization of economic and social rights under the Covenant. Alternatively, legality stems from the core's status (which is itself highly contestable) as customary international law, and even as treaty-overriding jus cogens. A minimalist definition of economic and social rights is needed to mediate the legal, as well as political and philosophical,[52] challenges of holding states accountable for the socioeconomic deprivations experienced by citizens in other states.

B. *The Constitutional Predecessor and Its Potential*

The minimum core concept does not have the same purchase in efforts to interpret the economic and social rights protected in a variety of constitutional contexts.[53] Of national courts, the South African Constitutional Court has come closest to defining the minimum core of economic and social rights.[54] The role that the concept may play in setting out a minimum sphere

---

49. *Statement: Poverty and the Covenant*, *supra* note 5, ¶ 16.

50. *E.g.*, *General Comment No. 12*, *supra* note 33, ¶ 17.

51. Covenant, *supra* note 19, art. 2(1). See also the reference to international cooperation in Article 11 (the right to adequate standard of living and, in particular, the right to food and to be free from hunger); Article 15(4) (cooperation in the scientific and cultural fields); and Articles 22-23 (the role of the specialized agencies and other forms of international action). *See also* U.N. Charter arts. 55, 56; SIGRUN I. SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 83-98 (2006); Alston & Quinn, *supra* note 27, at 186-92.

52. *See* Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147 (2006) (replying to the statism of Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005)).

53. The constitutional protection of economic and social rights occurred in Western Europe following the end of World War II. *See, e.g.*, DONALD SASSOON, ONE HUNDRED YEARS OF SOCIALISM 117-67 (1996) (describing the adoption of democratic and social rights in the immediate post-war years). Economic and social rights are also a feature of many post-colonial constitutions in Africa, as well as the African Union. *See* RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 245-64 (2004). Some Latin American constitutions also include protections of economic and social rights. *See* MARY ANN GLENDON, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS J. 27, 35 (2003). Controversially, post-communist constitutions include such protections as well. *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 176-78 (2005). Not all of these constitutions contain legally enforceable economic and social rights. *See* Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35 (2006) (referencing different constitutional texts).

54. The Court has placed the minimum core under the more general purview of reasonableness review. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at 722 (S. Afr.) (declining to determine a minimum core standard for the right to health and noting the Court's

of protection in the many other constitutional democracies with economic and social rights guarantees—such as India, Argentina, Hungary, or Spain,[55] or even for the state constitutions of the United States[56]—is furthered by the textual similarities between rights protected in different constitutions (and the international human rights covenants) and by the transnational judicial dialogue which complements and expands upon these similarities.[57] Nonetheless, it appears that this potential has yet to be grasped by judges or by advocates asserting economic and social rights in constitutional law.

The relative rarity of the minimum core concept's application in constitutional law obscures its deeper connection with this system of law. A little digging reveals that the concept inherits its structure from the German Basic Law,[58] where the "core" or "essential content" of certain constitutional rights lies beyond the reach of permissible limitation.[59] Despite the fact that the provision gives rise to a "remarkable variety of views as to what it means"[60]—a criticism not confined to German constitutional commentary, but exemplified by Parts II to IV of this Article—the protection of an essential component of rights, which remains secure against limitation, is a common structural feature of constitutions, either articulated as part of the right itself, or within a constitutional limitation clause.

This genealogy signals the first constitutional operation for the minimum core—as a concept which mediates the necessary limitations on rights by requiring a particular level of justification if the minimum of the right is not satisfied, which the state, rather than the claimant, must prove. Similarly, because the minimum core concept confronts the degree to which rights can be "progressively realized," as well as limited, it can borrow from

---

own lack of institutional capacity); *South Africa v Grootboom* 2001 (1) SA 46 (CC) at 66 (S. Afr.) (declining to decide on the question of a minimum core of the right of access to adequate housing and pointing to a lack of information before the court necessary for such a determination).

55. For a (somewhat optimistic) discussion of the concept's deployment in jurisprudence in these countries, see Fons Coomans, *Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context*, *in* JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS 1, 9-13 (Fons Coomans ed., 2006) [hereinafter JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS].

56. *E.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1193 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989) (describing the more promising potential for rights in education, health, nutrition, and shelter to operate at the state level rather than the federal level).

57. *See, e.g.*, Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 21-27 (2004) (describing the influence of transnational law—especially the Universal Declaration of Human Rights—on the text of Montana Constitution).

58. GRUNDGESETZ [GG] [Constitution] art. 19(2) (F.R.G.) (stating "[i]n no case may the essential content of a basic right be encroached upon") (in the author's translation, "Wesensgehalt" refers to "essential content" rather than "essence").

59. Esin Örücü, *The Core of Rights and Freedoms: The Limits of Limits*, *in* HUMAN RIGHTS: FROM RHETORIC TO REALITY 37 (Tom Campbell et al. eds., 1986). As well as the German Basic Law, Örücü referenced the core formulation in the Turkish Constitution of 1961 (replaced in 1982).

60. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 178 n.15 (1994); *see also id.* at 306 ("Despite early expectations, the [essential content] provision has played little part in the decisions.").

international law to target retrogressive policies, and indicate when the state's negative obligations to protect rights have been violated.[61] And finally, proponents of the concept suggest that it can assist in the development of a justiciable minimum for economic and social rights.[62] This possibility accords with the Committee's suggestion that the minimum core should guide the domestic adjudication and enforcement of the Covenant.[63] The alignment of the core with justiciability is also reinforced by the increasingly accepted justiciability of economic and social rights in courts around the world.[64]

We might expect the minimum core to travel between different constitutional systems in one of two ways: as a concept with a substantively defined content, borrowing much from international law, or as the latent structure of the minimum legal content to be given substance via the developments in the domestic jurisprudence on the content of economic and social rights. Counter to the justiciability suggestion, I will argue that this articulation can proceed outside of the juridical domain via transgovernmental and transadvocacy networks,[65] which are well positioned to interpret economic and social rights.

Nonetheless, for either operation to proceed on cogent terms, the minimum core concept must first be understood. In the following three parts of this Article, I present three rival approaches to defining the minimum core, which vie for attention, not always explicitly, in the minds of its advocates. These approaches raise the essentialist, positivist, and institutionalist dimensions of giving content to economic and social rights, leading to tensions and incompatibilities for those promoting the minimum core concept. Once separated, these three approaches point to distinctive operations—that I argue suggest new concepts—in the economic and social rights discourse.

---

61. *See, e.g.*, S. AFR. CONST. 1996 ss. 26(2), 27(2) (protecting rights to access housing (26(2)) and healthcare, food, water, and social security (27(2)) according to progressive realization, like the Covenant).

62. *See, e.g.*, de Vos, *Essential Components*, *supra* note 12, at 24, 26.

63. *See, e.g.*, *General Comment No. 18*, *supra* note 17, ¶ 49; *General Comment No. 15*, *supra* note 17, ¶ 57; *General Comment No. 14*, *supra* note 10, ¶ 60; *General Comment No. 12*, *supra* note 33, ¶ 33.

64. Recent case law of the South African Constitutional Court has most explicitly addressed the challenges of justiciability. *See, e.g.*, *Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) (S. Afr.); *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); *In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) (S. Afr.). Yet the justiciability of economic and social rights has been confirmed earlier, in other jurisdictions. *See, e.g.*, S. Muralidhar, *Judicial Enforcement of Economic and Social Rights: The Indian Scenario*, *in* JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 55, at 237; David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53 (2006) [hereinafter Marcus, *Supranational Adjudication*] (describing justiciability under United Nations human rights conventions; European, Inter-American, and African arrangements; and in international criminal law).

65. *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (describing the transnational conversation between advocacy networks); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (extending transnationality to the transgovernmental conversation); Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (examining the transjudicial conversation).

II. THE MINIMUM CORE AS NORMATIVE ESSENCE

The first approach, which I label the Essence Approach, is distinguished by its search for the "essential" minimum of each right. This approach gives definition to the core elements of the right by virtue of their heightened relation with a superior or foundational norm or norms. When this is done explicitly, the approach usually incorporates a justification as to why those norms—such as survival, life, or human flourishing—are superior or fundamentally important, and why the non-core content of the right attracts a lesser priority or status. When this is not explicit, the justification resembles a tautology, describing the core content as "the key part" or the "'archetypical' understanding" of the right.[66]

The strongest example of the Essence Approach views the right's core content as an embodiment of "the intrinsic value of each human right . . . [containing] elements . . . essential for the very existence of that right as a human right."[67] It is the absolute, inalienable, and universal crux, an "unrelinquishable nucleus [that] is the raison d'être of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements."[68] In this way, supporters of this approach defend the minimum core by the familiar tropes of rights discourse, although, in my observation, they espouse a more strident and yet more compromising viewpoint. It is more strident because its supporters dispense with general, broad, and accommodating descriptions of rights, preferring a pointed focus on the "hierarchy within the hierarchy" of the material interests protected by economic and social rights.[69] Yet it is paradoxically more compromising because it recognizes—and encourages—the limits to rights at their periphery, discarding the view of rights as substantive trumps.[70]

In more analytic terms, the Essence Approach mimics the structure of foundationalist linear arguments common to rights, which move from the deepest or most basic propositions for the interests underlying rights, through a series of derivative concerns, each one supported by and more concrete than the last. The "core" of the right is thus its most basic feature, which relies on no other foundations for justification.[71] This is best demonstrated by an example taken from the right to adequate housing. David Bilchitz, for

---

66. Rolf Künnemann, *The Right to Adequate Food: Violations Related to Its Minimum Core Content*, *in* EXPLORING THE CORE CONTENT, *supra* note 7, at 71, 82 (describing the core content as "the 'key part' of the normative content, containing the central elements of the normative content").

67. Coomans, *In Search of Core Content*, *supra* note 7, at 166-67.

68. Örücü, *supra* note 59, at 52.

69. Participants in the debates of analytical jurisprudence will recognize that this statement favors the "interest theory" over the "will theory" of rights. Proponents of the Essence Approach (and more general elaborations of rights to resources like education and health) often implicitly prefer the interest theory, without alluding to this debate. For an exception, see BILCHITZ, *supra* note 9, at 187 n.29, who favors the interest theory because of its superior ability to justify rights for incompetent rights-holders such as children and animals.

70. For the classic formulation of "rights as trumps," see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi, 297-98, 363-68 (1977).

71. *E.g.*, Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 21 (1993) [hereinafter Waldron, *A Right-Based Critique*] ("Sometimes we may reach a level of 'basic-ness' below which it is impossible to go—a set of judgments which support other judgments in the theory but which are not themselves supported in a similar way.").

example, justifies this right on the basis of the importance of the right to shelter, which flows from a right to be protected from exposure to the elements, which in turn finds its basis in one's ability to survive.[72] Jeremy Waldron, on the other hand, emphasizes the justification of freedom, which underlies the right to access a place for activities like sleeping, excreting, and washing, when they are prohibited in public places and by the organization of private property.[73] I use these examples to demonstrate not only the chain of justificatory reasoning that accompanies rights arguments, but also the possibility of conflicting justifications. Yet there semblance between justificatory reasoning and the Essence Approach is a strained one, because the implication of a "minimum" core can narrow the range of foundations, rather than enlarge them. And it is precisely this minimalism that upsets the foundational support, so that the base point of the right is also its narrowest. This puts into question the ability of the core to accommodate contrasting normative foundations. In the following Section, I compare two rival "essences" within the suggested normative hierarchy of economic and social rights, which mirror the steps taken by defenders of the right to have access to housing. The first sets out the minimum requirements for survival, relying on the "basic needs" of rights-holders as a sufficiently determinable standard for the minimum core. The second elaborates the minimum requirements for human flourishing, drawing from philosophical accounts of foundational values for ascertaining the super-valued core of rights. As we will see, such accounts lead in very different directions, thwarting efforts at giving a certain, determinate meaning to the normative core. Although only two theories are suggested here, it follows that the "core" of the right, defined according to other political theories—from liberalism to communitarianism to market socialism[74]—proliferates in content and scope.

---

72. BILCHITZ, *supra* note 9, at 187. Bilchitz has written extensively about the advantages of adopting the minimum core for South Africa's Constitution.

73. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991). However, note that Waldron was not writing about the minimum core specifically.

74. Aside from the two focused upon here, one can mention the different emphasis and content (and sometime hostility) reserved for a minimum degree of social and economic protection and/or entitlement in different theories of redistribution, for example, liberal egalitarianism in JOHN RAWLS, A THEORY OF JUSTICE (1971); and Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973). On a social citizenship conception held before and during the New Deal, see CASS R. SUNSTEIN, A SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 62 (2004) [hereinafter SUNSTEIN, A SECOND BILL OF RIGHTS]; and William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (describing a focus on decent work, livelihood, and material security). On market socialism, see, ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (rev. sub. ed. 2004). On civic republicanism, see Frank I. Michelman, *The Supreme Court 1985 Term —Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 20, 41 (1986) (describing an orientation towards civic virtue and the general good, the assurance of the material basis necessary for an independent citizenry, and at least the avoidance of extreme disparities in wealth, education, and power); Jon D. Michaels, Note, *To Promote The General Welfare: The Republican Imperative To Enhance Citizenship Welfare Rights*, 111 Yale L.J. 1457 (2002) (invoking civic republicanism as the appropriate theoretical foundation for U.S. welfare rights); and William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1990) (combining market socialism with republicanism). On communitarianism, see Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 735-36, 800-01 (2005) (adapting the communitarian theories of Michael Walzer, Michael Sandel, and Amitai Etzioni).

A. *A Needs-Based Core: Life, Survival, and Basic Needs*

In the first formulation, the minimum core reflects the aspects of the right which satisfy the "basic needs" of the rights-holders, rather than any supplementary, elective, or more ambitious level of interests. This type of inquiry immediately orients the "core" of the right to the essential and minimally tolerable levels of food, health, housing, and education. Yet this formula provides little guidance in substantiating the minimum core without answering a second question—that is, what are the "basic needs" needed for?[75] This question may be answered instrumentally—for example, "basic needs" are the material interests or resources required for basic functioning, or conversely for human flourishing (two very different normative goals, the latter relating directly to our second contested essence for the minimum core). Or we may answer this question categorically,[76] in the sense that "basic needs" are required for "a minimum condition for a bearable life,"[77] or for "a decent chance at a reasonably healthy and active life of more or less normal length."[78]

The Committee's original formulation—suggesting that the "minimum essential levels of each of the rights" require the satisfaction "of essential foodstuffs, of essential primary healthcare, of basic shelter and housing, or of the most basic forms of education"[79]—is suggestive of the more categorical (or more flatly instrumental) formula of "basic needs" amounting to survival and life. The international precursors to the Committee's articulation of the minimum core—the statements by experts which pointed to the minimum subsistence rights protected under the Covenant—similarly adopted a categorical focus.[80] The Inter-American Commission also affirmed the connection between the rights of survival and basic needs, linking both instrumentally to personal security.[81]

Survival links logically to life. Interpretation of both international instrumental and constitutional provisions have made this connection, drawing on the intuitive relation between the material protections necessary for the

---

75. As many theorists have noted, claims of needs have a relational structure, taking the form "[a] needs x in order to y." *E.g.*, NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY 163 (1989) [hereinafter FRASER, UNRULY PRACTICES].

76. Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, *in* LEGAL RIGHTS 87, 92-93 (Austin Sarat & Thomas R. Kearns eds., 1996) (acknowledging the position that there may be no categorical meaning, only instrumental meaning (citing BRIAN BARRY, POLITICAL ARGUMENT 48-49 (1965))).

77. Waldron, *supra* note 76, at 92.

78. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 23 (2d ed. 1996).

79. *General Comment No. 3*, *supra* note 1, ¶ 10.

80. *See supra* note 41; *see also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, *supra* note 41, ¶¶ 9-10.

81. Annual Report 1979-1980, Inter-American Comm'n on Human Rights, OEA/Ser.L/V/II.50, doc. 13 rev. 1, at 2 (1980), *available at* http://www.iachr.org/annualrep/79.80eng/chap.6.htm. As the Inter-American Commission has stated:

> The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the 'rights of survival' and 'basic needs' is a natural consequence of the right to personal security.

Id.

right to life on the one hand, and the rights to food, health, and housing on the other. For example, the Human Rights Committee extended the application of the right to life to the preventive health and food contexts, by requiring the adoption of positive measures to protect life through the elimination of disease epidemics and malnutrition.[82] More recently, human rights advocates involved in the inter-American context have suggested that the right to life should form the orienting framework for economic and social rights litigation.[83] Courts in domestic systems have referenced the right to life in the context of emergency healthcare and shelter in India[84] and the right to minimum welfare in Canada.[85] Even early participants in the American welfare rights movement pointed to the right to life—and the right to live—as founding the constitutional protection of citizens' welfare entitlements.[86]

Of course, these examples are attributable to the legal persuasiveness of the right to life, which is protected in the foundational texts of both covenants and constitutions in a form sometimes substituting for, and sometimes surpassing, the protections of other material interests. In this sense, it is strategically sound (as well as jurisdictionally contingent), to invoke the connections between the right to life and other economic and social rights.[87] Yet there are other reasons to emphasize life. A connection between the minimum core and the basic needs required for life and survival is useful because it focuses attention on the most urgent steps necessary for the satisfaction of those rights, which precondition the exercise of all rights—

---

82. See, for example, ICCPR, *supra* note 38, art. 6, which was cited in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 127, U.N. Doc. HRI/GEN/1/Rev.6 (2003). The Comment stated, at ¶ 5:

> The Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

Id.

83. James L. Cavallaro & Emily Schaffer, *Less As More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 272 (2004) (favoring an expansive construction of the right to life (as well as the right to property) which may be indirectly protective of economic and social rights). *But cf.* Melish, *supra* note 14, 312-33 (foreseeing problems of norm-dilution and underbreadth and, instead, advocating a direct approach to litigation framed by the economic and social rights themselves).

84. Samity v. State of W.B., (1996) 4 S.C.C. 37 (India) (the right to emergency healthcare); *see* Sheetal B. Shah, Note, *Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India*, 32 VAND. J. TRANSNAT'L L. 435, 450 (1999); *see also* Ahmedabad Mun. Corp. v. Nawab Khan Gulab Khan, (1996) Supp. 7 S.C.R. 548 (India) (right to life incorporated right to shelter and requirement of alternative housing for evictees); Olga Tellis v. Bombay Mun. Corp., (1985) 3 S.C.C. 545 (India) (finding that the right to dwell on pavements accepted as part of the right to life and the right to livelihood).

85. Gosselin v. Quebec, [2002] S.C.R. 84, 429, 641 (Can.) (Arbour, J., dissenting) (arguing that the right to life is infringed by a large decrease of social security to recipients under thirty).

86. MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 37 (1993); *see also* Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 82 (Norman Dorsen ed., 1971).

87. Cavallaro & Schaffer, *supra* note 83 (arguing for the centrality of the right to life on strategic, rather than philosophic, grounds). One need only think of the associations built up in the United States over time, between the right to life and the state's restrictions on abortion, which dampens the enthusiasm for many of building an extensive life protection from the due process clause.

what Henry Shue has termed "basic rights."[88] This focus on life and survival is able to transcend the prioritization of civil and political rights over economic and social rights by drawing attention to the moral equivalence of subsistence rights and security rights because of their mutual relation to survival.[89] Putting to one side the difficulties in "equivalence" once the question of who the relevant duties holders are and what the correlative duties consist of,[90] the focus on life, survival, and basic needs has the additional advantage of pointing to the requirements for rights protections that are apparently self-evident, rather than requiring a more controversial examination of what is needed for the satisfaction of more elaborate aims, and a "thicker" understanding of the good life.[91] For proponents of this survival-based view, the boundaries drawn around the minimum core are neater, and more cognizable, than those around the more ambitious formulations. Thus, a fixed set of entitlements may emerge, helped by less open-ended criteria such as triage or urgency.[92]

Nonetheless, I argue that there are a number of objections to the economy of ambition behind the focus on "basic needs." Most significant is the objection that the minimalist focus on survival and life misses the important connections between dignity and human flourishing that are intrinsic to many interpretations of the right to life. These expansive interpretations, issued by both international human rights tribunals and national courts, allow the protection of life to serve as a vehicle for other norms.[93] Advocates of a survival-based "basic needs" inquiry dismiss these more elevated conceptions of life as both too encompassing and too unlimited, likening them to "a free-for-all provision, implicated by default in all human rights abuses that affect a person's 'dignity' or 'life prospects.'"[94] Yet what these detractors miss is that the focus on biological survival can set the interpretations of economic and social rights on the wrong ground. A focus on needs may disclose little about what (or "whose") basic functioning deserves priority. We need additional principles over simple survival, for example, those we would find when we ask whether the minimum core of the right to

---

88. SHUE, *supra* note 78, at 19 ("[R]ights are basic . . . if enjoyment of them is essential to the enjoyment of all other rights.").

89. *Id.* at 25. (suggesting not only a moral equivalence, but perhaps the greater moral duty to prevent deprivations of the material essentials of survival, because of the utter helplessness that the latter can engender).

90. CECILE FABRE, SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE 53-54 (2000) (suggesting that Shue's argument sacrifices important features of rights).

91. *E.g.*, BILCHITZ, *supra* note 9, at 179-80 (favoring a survival-based definition to the minimum core as fitting more adequately with a thin theory of the good applicable to a diverse range of individuals). For the source of the thin theory of the good, and its restriction to the bare essentials, see RAWLS, *supra* note 74, at 348.

92. BILCHITZ, *supra* note 9, at 187 (arguing that the interest in survival is the most urgent, due to its prior importance to other values).

93. Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769, 771 (1989) (articulating this important relation as one of "permeability," which refers to "the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights").

94. Melish, *supra* note 14, at 326 (decrying expansive formulations of life as representing a "potentially illimitable scope, capable of subsuming into their protective embrace virtually all nationally and internationally recognized human rights").

health addresses the medical needs of the elderly population,[95] or of those of the terminally ill.[96]

Moreover, the emphasis on minimalism behind the core becomes suggestive, when attached to life, of a more scientific assessment of the commodities necessary for biological survival. This assessment reveals its own controversies and indeterminacies. As Amartya Sen pointed out long ago, the requirements of survival are not as straightforward as they might appear.

> People have been known to survive with incredibly little nutrition, and there seems to be a cumulative improvement of life expectation as the dietary limits are raised. . . . There is difficulty in drawing a line somewhere, and the so-called 'minimum nutritional requirements' have an inherent arbitrariness that goes well beyond variations between groups and regions.[97]

The determinations of "normal" life expectancy and mortality patterns, the adequate caloric and nutritional food packages, and minimum room for housing space, all fail as determinate universal content for the rights to food, health, or housing. Of course, the existence of a range of disagreement around the line drawn can still deliver a nominate standard which may allow for a context-sensitive adjustment in particular cases with little precedential importance. Yet this concession takes us outside of the realm of the minimum core, understood as the content of a legal right, and into the more flexible arena of setting standards and devising benchmarks.[98]

This minimalist mode of investigation actually recalls the discourse, ascendant in the development literature of the 1970s, of "basic needs."[99] This discourse, which indicated a turn away from pure economic growth strategies towards social indicators and antipoverty strategies, was an earlier rendering, and perhaps forecaster, of the focus on "human" development and the Millennium Development Goals.[100] One effect of the attention to "basic

---

95. *See generally* Norman Daniels, *Justice between the Young and the Old: Rationing from an International Prospective*, *in* CHOOSING WHO'S TO LIVE: ETHICS AND AGING 24, 25 (James W. Walters ed., 1996) (referring to fears of the elderly population's "'bottomless pit' of needs").

96. *See, e.g.*, *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at 771-72 (S. Afr.) (holding that the constitution's right of access to healthcare does not guarantee provision of renal dialysis for terminally ill patient); Scott & Alston, *supra* note 7, at 251-252 (endorsing the separate reasons of Justice Sachs in *Soobramoney* as demonstrating "a philosophy of the value of human life in a context of a philosophy of unavoidable dying"); *see also* Lehmann, *supra* note 6, at 168 (suggesting that, in "the starkest terms, the choice was between Mr. Soobramoney's death and the death or suffering of others."). For further discussion, see *infra* note 319 and accompanying text.

97. AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 12 (1982); *see also* Jean Drèze, *Democracy and the Right to Food*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 45, 55 (Philip Alston & Mary Robinson eds., 2005) (pointing to the multiplicity of interpretations of the term "freedom from hunger," even when limited to nutrition).

98. *See infra* Part V.

99. Robert S. McNamara, President of the World Bank, Address Before the Board of Governors (Sept. 25, 1972), *in* THE MCNAMARA YEARS AT THE WORLD BANK: MAJOR POLICY ADDRESSES OF ROBERT S. MCNAMARA 1968-1981, at 228 (1981) (advocating the paradigm to reconcile the "growth imperative" with social justice by giving "greater priority to establishing growth targets in terms of essential human needs"). The approach was originally advocated by the International Labour Organization. CYPHER & DIETZ, *supra* note 48, at 513.

100. Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals*, 27 HUM. RTS Q. 755 (2005).

needs" was to make explicit the instrumental benefits of basic needs satisfaction for a national economy, rather than regarding such a focus as anathema to economic growth.[101] Another more directly pertinent effect was to sponsor research into the "inner limit" of human needs in areas of nutrition, housing, health, literacy, and employment. For example, the United Nations Environment Programme encouraged research on an "inner limit" of minimum human needs, which, along with an "outer limit" of ecological requirements, would act as constraints on development policy.

The World Bank dispensed with the basic needs strategy in the 1980s in favor of the more interventionist approach of "structural adjustment," which it believed would better respond to the globally dependent development challenges for less-developed states.[102] Yet the failure of the basic needs strategy can be attributed to its own theoretical shortcomings as well as to global trends. Even advocates of the approach warned that it could collapse into a technical exercise of finding the conditions in which the abstract human animal could survive.[103] Its detractors warned of the irrelevance of prescribing "inner limits" for actual populations. As critic Gilbert Rist remarked, its usefulness was restricted to "anti-societies" or "non-societies."[104] And finally, as Philip Alston noted in his extensive survey, the development hierarchy promoted by basic needs (with its opposition to nonmaterial indicators of development and its limited approximation of what civil and political rights might entail) did not match the normative goals of human rights.[105]

It is a stretch, but not a great stretch, to suggest that the criticisms of the basic needs strategy also apply to the survival-based interpretation of the minimum core. Although the former was developed in the development field, and the latter in the legal, there is an important analogy between them. Both the basic needs strategy and the survival-based minimum core attempt to bracket other dimensions of human values by prescribing the "inner limits" of survival. Yet such values are bracketed at great cost. Not only does bracketing the values limit its usefulness for its target populations by inaccurately understanding their actual needs, the approach could actively harm their interests by reducing them to "passive . . . recipients of predefined services rather than as agents involved in interpreting their needs and shaping their life conditions."[106] There are empirical links between material deprivation and a lack of democratic voice, because of the lack of accountability when things go wrong. Famines, as the argument famously goes, do not occur in

---

101. *E.g.*, INT'L LABOUR ORG., EMPLOYMENT, GROWTH AND BASIC NEEDS: A ONE-WORLD PROBLEM (1976).

102. *See, e.g.*, CYPHER & DIETZ, *supra* note 48, at 516.

103. JOHAN GALTUNG, GOALS, PROCESSES, AND INDICATORS OF DEVELOPMENT: A PROJECT DESCRIPTION 13 (1978) (pointing to potential problems in theoretical abstraction, as well as "cultural biases and historical specificities . . . in the concept of needs").

104. GILBERT RIST, THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH 163, 167-68 (new rev. ed. 2002).

105. Philip Alston, *Human Rights and Basic Needs: A Critical Assessment*, 12 HUM. RTS. J./REVUE DES DROITS DE L'HOMME 19, 55-56 (1979).

106. FRASER, UNRULY PRACTICES, *supra* note 75, at 174. Liebenberg applies Fraser's terminology to South Africa's economic and social rights. *See* Sandra Liebenberg, *Needs, Rights and Transformations: Adjudicating Social Rights*, 17 STELLENBOSCH L. REV. 5 (2006) [hereinafter Liebenberg, *Needs, Rights and Transformations*].

democracies.[107] The "last resort" rights of democratic participation (which is "preservative of all rights,"[108] whereas life is "foundational to all rights") are important in guiding the definition of economic and social rights. This demands consideration of a competing interpretation of the normative essence of the minimum core, which engages more explicitly with the values behind the rights.

B. *A Value-Based Core: Dignity, Equality, and Freedom*

A value-based core goes further than the "basic needs" inquiry by emphasizing not what is strictly required for life, but rather what it means to be human. There is, of course, a connection between these teleological theories and those related to life, especially the most expansive conceptions of life, which seek to imbue human life with a special meaning and give substance to the right to live as a human being.[109] Nonetheless, I distinguish the value-based core by its more pointed emphasis on human dignity, equality, or freedom. This Section focuses on how human dignity, a value that arguably represents the reigning ideology of both human rights and liberal constitutionalism, substantiates the minimum core.[110]

The value of dignity evokes the individual's claim to be treated with respect and to have one's intrinsic worth recognized and has origins in Christian natural law, Kantian philosophy, and more existential theories of personal autonomy and self-determination.[111] Dignitarian interpretations of rights inform much of the canon of international human rights, from the Universal Declaration of Human Rights onwards,[112] including post-World

---

107. AMARTYA SEN, DEVELOPMENT AS FREEDOM 152-53 (1999) (criticizing the conception of development that proceeds without attention to civil and political rights). Neither, might we add, does genocide. PETER UVIN, AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA (1998) (criticizing the development community's positive assessment of Rwanda's development, on the basis of traditional indicators, leading up to the genocide of 1994).

108. *See* Frank Michelman, *Welfare Rights in a Constitutional Democracy*, 3 WASH. U. L.Q. 659, 677 (1979) (providing a needs-based theory of minimum welfare, determinable by social, political, economic, and cultural context). For a current application to South Africa, see André van der Walt, *A South African Reading of Frank Michelman's Theory of Social Justice*, *in* RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 163, 167-96 (Henk Botha, André van der Walt & Johan van der Walt eds., 2003) (contrasting Michelman's "needs-based theory" with "traditional rights-based theory" and the emphasis on the values of either property, procedural fairness, or equality).

109. *E.g.*, *S v Makwanyane* 1995 (3) SA 391 (CC) at 506 (S. Afr.) ("[I]t is not life as mere organic matter that the [Interim] Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity . . . . The right to life is more than existence—it is a right to be treated as a human being with dignity . . . ."). For making the same connection from the opposite angle, in affirming access to social security for non-citizens, see *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at 530 (S. Afr.) ("[T]he basic necessities of life [must be] accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.").

110. LOUIS HENKIN, THE AGE OF RIGHTS 6-10 (1990).

111. *E.g.*, EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002); Oscar Schachter, Editorial Comment, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983).

112. Universal Declaration of Human Rights, *supra* note 19, pmbl.; *cf.* American Declaration of the Rights and Duties of Man, OAS Res XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser.L./V/1.4 Rev. (April 1948) (beginning with: "The American peoples have acknowledged the dignity of the individual . . . ."; followed by preamble, beginning: "All men are born free and equal, in dignity and in rights . . ."); African Charter on Human and Peoples' Rights, art. 5, June

War II constitutions.[113] The preamble of the Covenant, like the International Covenant on Civil and Political Rights, acknowledges that the rights enunciated within them "derive from the inherent dignity of the human person."[114] A school of international legal scholarship made human dignity central to the inventory of values, which it sought to devise for the world public order. Thus, the founders of the New Haven School of international law sought to both contain and stimulate a policy-oriented jurisprudence founded on dignity, using anthropological and historical sources.[115] In a variety of constitutions, jurists have relied almost inevitably on human dignity when peeling back the justifications for rights.[116] In American constitutional law, dignity has played an important, albeit more covert, role.[117]

There are many juridical examples of how the norm of dignity has practically guided the interpretation of economic and social rights. The German Constitutional Court has used it to give meaning to the "existential minimum" of social welfare in the German Basic Law, by which society is obliged to provide everyone with the socioeconomic conditions adequate for a dignified existence.[118] The South African Constitutional Court has affirmed the important relationship between dignity and social assistance.[119] The

---

27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 (" Every individual shall have the right to the respect of the dignity inherent in a human being . . . .").

113. *E.g.*, MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 175, 263 (2001) ("Most of the constitutions and treaties of the latter half of the twentieth century belong to the dignitarian family."); *see* GRUNDGESETZ [GG] [Constitution], art. 1, § 1 (F.R.G.) (making human dignity "inviolable").

114. Covenant, *supra* note 19, pmbl.; ICCPR, *supra* note 38, pmbl.; *see also* U.N. Charter pmbl. (expressing belief in "the dignity and worth of the human person").

115. MYRES S. MCDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 7 (1959); *see also* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 318 (1999) (using McDougal and Lasswell's approach to appraise individual criminal accountability for human rights violations in internal conflicts).

116. *See, e.g.*, Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 3, 15, 26 (Vicki C. Jackson & Mark Tushnet eds., 2002) (locating the value of dignity within postwar constitutions).

117. *E.g.*, Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, *in* ZUR AUTONOMIE DES INDIVIDUUMS [FOR INDIVIDUAL AUTONOMY] 249 (Dieter Simon & Manfred Weiss eds., 2000) (explaining the areas of modern American constitutional law in which the idea of human dignity plays a role, while noting its inability to overcome the negative character of American constitutional rights); *see, e.g.*, Hugo Adam Bedau, *The Eighth Amendment, Human Dignity and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 151 (Michael J. Meyer & William A. Parent eds., 1992) (discussing Chief Justice Earl Warren and human dignity). For a recent example, see *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas's ban on sodomy violates the Due Process Clause).

118. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 290-93 (Julian Rivers trans., Oxford University Press 2002) (1986) (discussing the Welfare Judgment of 1951, the first *numerus clausus* judgment, and the University Judgment, both decided in the 1970s, which derived an enforceable subjective right from the protection of dignity and the right to life and other principles of the Grundgesetz).

119. *See, e.g.*, *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) at 27, 33 (S. Afr.); *Mashavha v President of the RSA* 2004 (12) BCLR 1243 (CC) at 29 (S. Afr.); Arthur Chaskalson, *Human Dignity as a Foundational Value for Our Constitutional Order*, 16 S. AFR. J. HUM. RTS 193, 204 (2000) ("[T]he social and economic rights . . . are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, healthcare, food, water or in the case of persons unable to support themselves, without appropriate assistance?").

African Commission on Human and Peoples' Rights has held that the right to food "is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of other rights as health, education, work and political participation."[120]

Advocates of the value of human dignity contend that it enriches socioeconomic jurisprudence by justifying claims for social services when groups lack material conditions necessary for a life of dignity and by focusing on the actual needs and circumstances of each individual.[121] Interpretations of dignity consistent with the protection of economic and social rights affirm "that people who are denied access to the basic social and economic rights are denied the opportunity to live their lives with a semblance of human dignity"[122] and that "a social failure to value human dignity is at stake when individuals and groups experience deprivations of subsistence needs."[123] Such a value goes beyond mere survival needs, by attending to the effect on dignity of various redistributive interventions or omissions.

Nonetheless, the value of dignity creates its own challenges for substantiating the minimum core. As recognized by commentators in both international law and constitutional law, "dignity" can be measured subjectively or objectively.[124] In its subjective sense, dignity (and its correlative—the harm of injury to dignity) refers to the subjective effect of treatment on a claimant's feelings of self-worth and self-respect.[125] The subjective measure of dignity allows context and individual circumstances to be taken into account, yet it also has two disadvantages. First, it is precisely this sensitivity to context that prevents its usefulness as a more general guide to determining the minimum core of economic and social rights, if we understand that to be a fixed and universal (or even society-wide) measure. Secondly, the subjective measure of harm to dignity pulls the interpretation of rights in a status quo-preserving direction by keeping the allotments in place, which might be unjustified on more objective grounds. It is not implausible that in the area of economic and social rights, subjective dignity might be harmed by redistribution away from the wealthy and might also fail to disturb the low expectations of poor people about their entitlements.[126] I argue that a

---

120. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Comm. No. 155/96, 2001-2002 Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex V, ¶ 68, *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96b.html (declaring obligation not to destroy or contaminate food sources).

121. Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 18 (2005) [hereinafter Liebenberg, *Interpreting Socio-Economic Rights*].

122. Pierre de Vos, *Substantive Equality after* Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence*, 2001 ACTA JURIDICA 52, 64 (2001).

123. Liebenberg, *Interpreting Socio-Economic Rights*, *supra* note 121, at 23.

124. *E.g.*, Schachter, *supra* note 111; *cf.* Weinrib, *supra* note 116, at 15-16 (examining universal and particularized meanings of human dignity).

125. RAWLS, *supra* note 74, at 225, 386-89 (describing self-respect as the most important primary good).

126. Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT, *supra* note 95, at 78, 80 (noting "the habit of individuals subject to deprivation to lower their standards regarding what they need, want, and deserve"). For a description of this tendency, and a radical proposal for challenging it, see UNGER, *supra* note 74, at 514 (setting out an institutional program to destabilize certain obstinate conceptions of rights protections and security).

subjective dignity-based minimum core of rights to food, health, housing, and education may do little to challenge the current set of distributions in society and may in fact obstruct redistributive efforts.

An objective notion of dignity removes these difficulties. In the past, objective protections of dignity for economic and social rights have tended to revert to the formulaic conceptions of basic needs.[127] Nonetheless, the objective notion may satisfy broader objectives. A comparative approach may help us examine the broad, constitutionally mediated notion of objective dignity.[128] For example, South Africa's constitutional protection of equality prohibits harm to dignity, but this harm must be experienced according to some society-wide standard. This standard, which incorporates a departure from the statuts quo, acknowledges South Africa's "transformative" ambitions, which seek to overcome the legacy of apartheid.[129] Thus, if a class of people adversely affected by particular social programs which vigorously reallocate material resources—by way of a steeply progressive income tax, inheritance tax, land redistribution, land title reform, reorganization of public education, or public health funding—feel indignation at this gesture, the constitutional protection of dignity is probably not implicated.[130]

If we reverse this application of "reasonable umbrage" to regulate not only the application of overly redistributive policies, but also those which are insufficiently redistributive, we may imagine that the core of rights to food, health, housing, and education are infringed when current allocations or proposed reallocations of material resources cause "reasonable umbrage" in the population at large.[131] Because of its link to dignity, reasonable umbrage at the content of socioeconomic policies or programs would be something less than an outrage to the conscience of humanity[132] and something more than an annoyance.

---

127. *See* Schachter, *supra* note 111, at 851.

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

129. For analysis of South Africa's transformative ambitions, see Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998). *See generally* RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION, *supra* note 108 (a collection of South African scholarship on the implications of transformative constitutionalism, with a special focus on economic and social rights).

130. Michelman, *Reasonable Umbrage*, *supra* note 128, at 1412-14 n.169 (citing *Pretoria v Walker* 1998 (2) SA 363 (CC) at 406 (S. Afr.) ("[F]or some time to come, all poverty relief programmes, public housing programmes or programmes to extend primary healthcare or access to basic education will inevitably benefit black people more than white . . . . It would, accordingly, be spreading section 8 [the equality and equal protection clause] far too thin to achieve its purpose if each and every measure of such kind were to be regarded as effecting [constitutionally suspect] indirect discrimination . . . ." (second alteration in original)); *see also* Law v. Canada (Minister of Employment and Immigration), [1999] S.C.R. 497, 37 (Can.).

131. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (applying the concept of reasonableness to socioeconomic rights adjudication).

132. This standard, evocative of international criminal law, is not inapt to describe violations of economic and social rights in some places. *See*, *e.g.*, Press Release, U.N. Subcommission on the Promotion & Prot. of Human Rights, Subcommission Continues Debate on Realization of Economic, Social and Cultural Rights, U.N. Doc. HR/SC/99/11 (Aug. 12, 1999), (then-Expert Asbjørn Eide declaring that "[t]he scope of hunger [is] appalling in its magnitude . . . and an outrage to the conscience of mankind"); *see also* David Marcus, *Famine Crimes in International Law*, 97 AM. J. INT'L L. 245

Yet as Frank Michelman emphasizes, the redistributions (and lack of redistributions) which impact dignity in post-apartheid South Africa, or even in Canada, may be very different from what is considered "reasonable" in the more laissez-faire constitutional culture of the United States.[133] To the constitutionalist mindset, the ambitions for universality in setting an objectively defined minimum core based on dignity are, in reality, very difficult to satisfy. The "relative" scale of the dignitarian experience, matching different levels of commodities, is explained well by Amartya Sen's overt recognition of how the baseline of goods required for "appearing in public without shame" will be variable between different societies.[134] The content of economic and social rights—and thus the minimum core—will be similarly inconsistent, not only because of varied resources, but also because of the different cultural expectations that may run parallel to this influence.

This "reasonable" (or "relational") assessment brings an important subtlety to the process of articulating the content of economic and social rights.[135] Yet what it also does is challenge the idea of a fixed, predetermined, and non-negotiable baseline. Other attempts at providing the contours and boundaries of the norms of distributive justice similarly demur at delivering abstractions and reference-ready lists. If we consider the normative project of articulating the necessary baselines of "human capability" across differently situated societies and groups, we find a deliberate refusal to settle on a minimum.[136] Indeed, the question of drawing up such a list, even provisionally, divides the positions of Amartya Sen and Martha Nussbaum—two central advocates of the capabilities approach—and maps well onto the arguments against the minimum core. Martha Nussbaum's universalist project "isolates those human capabilities that can be convincingly argued to be of central importance in any human life, whatever else the person pursues or chooses,"[137] as the appropriate underpinning of basic constitutional principles.[138] Other feminists have criticized the attempt as insufficiently

---

(2003) (arguing for the formal criminalization—as crimes against humanity—of intentional or reckless government policies which result in mass starvation).

133. Michelman, *Reasonable Umbrage*, *supra* note 128, at 1418; Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 76 (2003) (examining how constitutional law "draws inspiration, strength, and legitimacy from constitutional culture, which endows constitutional law with orientation and purpose").

134. AMARTYA SEN, INEQUALITY REEXAMINED 115 (1992) ("In a country that is generally rich, more income may be needed to buy enough commodities to achieve the *same social functioning*."). Sen traces this conception to Adam Smith's idea of "necessary goods." *Id.* (citing ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 351-52 (Clarendon Press 1975) (1776)).

135. *See* Liebenberg, *Interpreting Socio-Economic Rights*, *supra* note 121, at 23.

136. SEN, INEQUALITY REEXAMINED, *supra* note 134, at 108-09 (pointing out the problem of social variation in describing poverty, but noting the potential for intercultural and interpersonal agreement on capabilities).

137. MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 74 (2000). Nussbaum's current ten-point version sets out the importance of life, bodily health, bodily integrity, the use of the senses, imagination and thought, the development of emotions, practical reason, forms of social affiliation, concern for other species, opportunity for play, and the political and material control over one's environment. *Id.* at 77-80. We can contrast this with the inventory of eight values devised by the New Haven School: power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. *See* Wiessner & Willard, *supra* note 115, at 318.

138. Wiessner & Willard, *supra* note 115, at 5 (drawing parallels with JOHN RAWLS, POLITICAL LIBERALISM (1996)).

concerned with human difference and particularity.[139] Amartya Sen's two objections to the list—namely its possible inattentiveness to context and its possible displacement of public reasoning[140]—are pertinent in evaluating the structure of the minimum core in a theory of distributive justice. They are equally apt for a legally defined, rather than philosophically credentialed, minimum core.

C. *Questioning the Essence Approach*

The Essence Approach sets up a normative investigation into why we value economic and social rights and which of their aspects should be most important. This approach is helpful in ensuring that advocates are able to articulate the minimum core of rights through vocabularies that draw attention to the important ethical justifications for economic and social rights (as for all human rights). This approach is consistent with the insight that rights belong to a category of legal entitlement that is, for special reasons, immune to the vagaries of short-term politics or cost-benefit decisionmaking.

Yet as I have shown, as between the "basic needs" and "human dignity" inquiries, there are no axioms that can deliver an uncontested minimum core. This contestation suggests that a different expression of the content of rights may be more suitable than the pointed advocacy of a normative minimum. Because the normative foundations are open to disagreement, the minimum core will look different to an advocate of human flourishing in comparison with an advocate of basic survival, just as the core will look different in various instantiations of both survival and dignity. Disagreement is not merely a feature of philosophical debate, but is quickly revealed by constitutional comparison.

For example, there are competing (although not uncomplementary) values alongside human dignity that could inform the interpretation of the minimum core.[141] The values of equality and liberty, for example, are more appropriate for some in formulating a normative minimum for economic and social rights, and may produce both more concrete and interventionist measures.[142] These were famously reconciled by John Rawls to advance a set of principles for the just distribution of "primary goods," which could serve to guide a "maximin" policy of maximizing distributions to those in the minimum (or worst off) position.[143] In German constitutional law, for

---

139. *E.g.*, Karin Van Marle, *'The Capabilities Approach,' 'The Imaginary Domain,' and 'Asymmetrical Reciprocity': Feminist Perspectives on Equality and Justice*, 11 FEMINIST LEGAL STUD. 255, 256, 272-73 (2003) (suggesting that Drucilla Cornell's approach to an "imaginary domain" and Iris Young's approach to "asymmetrical reciprocity," show a greater concern for difference than Nussbaum's "capabilities approach"). Van Marle registers Cornell's own doubts about reducing the "central" capabilities to a list. *Id.* at 272-73.

140. Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 333 n.31 (2004).

141. *See supra* note 74 (drawing attention to different redistributive theories, such as communitarianism, civic republicanism, and market socialism, which emphasize different values).

142. *See, e.g.*, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 35 (1969) (developing a theory of a constitutional right to "minimum protection").

143. RAWLS, *supra* note 74, at 132-33.

example, the value of equality rivals dignity as a guide to the Basic Law's protection of an "existential minimum." Some German commentators argue that, in measuring the standard of living of rights-claimants in relation to that of others, an equality norm is more reliable than investigations into dignity.[144]

Thus, from survival, life, dignity, equality, and freedom, we can find many different cores for each economic and social right.[145] The problem with the competing values is endemic, even before parsing out the different weight given to particular values for each right. An interpretation of the right to education, for example, draws more heavily on freedom, while an interpretation of the right to health relies more on the value of dignity. The problem is also present before we recognize the highly contingent resonance of each value in different constitutional systems. There is no escape from disagreement, which I argue suggests that the enterprise of setting up an essential core through normative argument—rather than an interpretation of the rights themselves—is the wrong approach. While the normative compulsion behind economic and social rights should be the subject of dialogue and contestation, the resulting legal standard should retain a more open, contestable, or fluid formulation.

Perhaps the greatest problem for the Essence Approach is that it relies on a fixed and stable version of normative argument. Even an "overlapping consensus" on the essential core, on the basis of what all reasonable conceptions might be,[146] cannot assist. As well as leading to the thinnest and most abstract formulation—a formula more suited to a lexical ordering than a definitive core[147]—the formula for a reasonable overlap fails to invite the voice necessary for an inquiry into the evolving moral language of rights.[148] Advocates often disagree over what is basic to rights, even as they agree with the general attempt to deliberate. In order to respond to this disagreement, many endorse an "ethic of fallibility," which requires all who engage in the deliberation to recognize the possibility that they are mistaken.[149] Such an ethic would assign a different type of focal point—an institutionally revisable one—for the interpretation of rights.

An intuition of this incompatibility is perceptible in the South African Constitutional Court's reluctance to give meaning to the minimum core through a simple articulation of values. Despite its singular engagement with the underlying normative values of the South African Constitution—using a

---

144. ALEXY, *supra* note 118, at 284 (emphasizing the assessment of "factual" equality).

145. *E.g.*, Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 400-01 (2007) (exploring the likely disagreement with the value-based core for rights to housing and health case in the South African context).

146. RAWLS, *supra* note 138, 133-34 (1993) (advancing a resolution to reasonable disagreement, by appeal to what each person (or state) *ought to* agree on); *see* Dixon, *supra* note 145, at 400 (suggesting this version of consensus would be likely for the most minimalist formulations, such as temporary shelter over adequate housing).

147. Rawls relied on more general organizing principles for society—the difference principle being one—rather than a narrowed version of what was meant by each socioeconomic entitlement, whether health, education, food, or shelter. *E.g.*, RAWLS, *supra* note 74, at 65-68.

148. *E.g.*, Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1511 (1988) (condoning Rawls's experiment while drawing attention to its problems for the norm of self-government).

149. *E.g.*, Waldron, *A Right-Based Critique*, *supra* note 71.

sophisticated reference to norms of dignity, equality, and liberty in guiding its interpretation, the Constitutional Court has balked at efforts to define the minimum core. For example, in *Grootboom*,[150] the Constitutional Court refused to rule on what the minimum core of the right to housing should be, citing its lack of information sufficient to make such a determination. Instead, it chose the more flexible route of assessing the reasonableness of the government's housing policy and used the values of the constitution to provide a normatively charged account of reasonableness, so that the government's failure to cater to all groups did not meet the constitution's requirements. Similarly, in ruling on the government's refusal to distribute antiretroviral drugs in *TAC*,[151] the South African Constitutional Court refused to articulate a minimum core of the right to health, instead holding that the government's obstruction of efforts to prevent mother-to-child transmission of HIV/AIDS with antiretrovirals were unreasonable in light of the constitution's protection of the right of access to healthcare. Reasonableness, according to this standard, is more stringent than the deferential inquiry provided by administrative review, because it allows the court to focus on a sector of society that has a "claim to inclusion in a socioeconomic program" which has benefited others.[152] Reasonableness invites a deliberation on values that is particularly significant to the transformed South African constitutional system.[153] Yet the vehicle of reasonableness is substantively different—more normatively open and sociologically framed—from the inquiry into a minimum essential core of the right. A value-based or needs-based minimum cannot compete.

III. THE MINIMUM CORE AS MINIMUM CONSENSUS

The difficulties inherent in ascertaining and justifying the essential normative boundaries of the minimum core prompt consideration of a second approach to its definition. This approach asks not what normative minimum should be given priority in each right, but rather where consensus has been reached on content. In the Consensus Approach, the minimum core content is the right's agreed-upon nucleus. Elements outside of the core translate to the plurality of meanings and disagreement surrounding the right.

Subscribers to the Consensus Approach therefore attest to a "wider agreement,"[154] an accumulation of state practice,[155] and a "synthesis of . . .

---

150. *South Africa v Grootboom* 2001 (1) SA 46 (CC) 66 (S. Afr.).

151. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) 272 (S. Afr.).

152. Murray Wesson, Grootboom *and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 S. AFR. J. HUM. RTS. 284, 293 (2004) (demonstrating how this standard differs from the deferential, so-called "*Wednesbury* standard"). *But cf.* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001) (describing *Grootboom* in terms of administrative law standards of reasonableness).

153. *See, e.g.*, D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L.J. 398, 413 (1999).

154. *E.g.*, Sage Russell, *Minimum State Obligations: International Dimensions*, *in* EXPLORING THE CORE CONTENT, *supra* note 7, at 11 ("There now exists wider agreement on the core elements of these rights.").

155. *See, e.g.*, *General Comment No. 3*, *supra* note 1, ¶ 10 (invoking the "extensive experience gained by the Committee . . . examining States parties reports").

jurisprudence"[156] as founding the core content of each right. Although unacknowledged in their practice, this approach is adopted by many activists when they assert that consensus on the key components of the core is a way of overcoming questions about content.[157] Similarly, it is adopted by the detractors of economic and social rights when they claim that an absence of consensus is the reason to delay the elaboration of a core.[158]

Applying this consensual scale to economic and social rights has advantages in ascertaining the settled meaning of each right's core, while allowing pluralist disagreement at its fringes. In this way, it is akin to H.L.A. Hart's famous distinction between "a core of certainty and a penumbra of doubt,"[159] which accompanies the application of general rules to particular situations. It has much in common with the Essence Approach in that it tends to prefer the most persuasive normative articulations of the minimum core. This is because moral argument may actually take its shape from the need to persuade.[160] Yet the Consensus Approach also explicitly addresses two central challenges to the Essence Approach: that resolving disagreement by an abstract, overlapping consensus of reasonable political theories does not resolve the problems of representation and voice, and that even broad ethical agreements may not resonate enough with social facts to constitute law.[161] It does this by focusing on an observed empirical agreement. A consensus on the minimum—or at least, some approximation thereof—may serve the normative goals of sovereign equality in international law and self-government in constitutional law, or following an alternative normative register, the translation of reason through the "modern ius gentium."[162] The Consensus Approach thus renders politically legitimate—and "valid"—the universal application of the minimum core.

---

156. Scott Leckie, *The Human Right to Adequate Housing*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 4, at 149, 155 (arguing that "[a] synthesis of the jurisprudence of the UN Committee on Economic, Social, and Cultural Rights, the European Commission and Court of Human Rights and the former European Commission on Human Rights, the European Committee of Social Rights supervising the ESC and the contents of UN resolutions and legal texts addressing housing rights issues . . . reveals much of the substance and core content of this right").

157. Ligia Bolivar & Enrique Gonzalez, *Defining the Content of ESC Rights—Problems and Prospects*, *in* CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING RESOURCE 151, 156 (Int'l Human Rights Internship Program & Asian Forum for Human Rights and Dev., 2000).

158. *E.g.*, Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 A.M. J. INT'L L. 462, 475 (2004) (noting the "widespread differences in domestic approaches to the treatment of economic, social, and cultural rights" and dismissing the "'build it and they will come' attitude" that seeks to generate consensus rather than be grounded on present consensus).

159. H.L.A. HART, THE CONCEPT OF LAW 123 (2d ed. 1994).

160. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 47-48 (1987) (contending that moral views which are likely to gain wide acceptance for a significant length of time are more likely to satisfy the requirements of normative justification); *see also* HART, *supra* note 159, at 193-200 (applying a similar claim to the "minimum content of natural law").

161. HART, *supra* note 159; *see also* Frederick Schauer, *(Re)taking Hart*, 119 HARV. L. REV. 852 (2006) (book review) (drawing attention to Hart's insights into the systematic features of law).

162. Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 128 (2006) [hereinafter Waldron, *Foreign Law and the Modern* Ius Gentium].

A. *The Core Consensus: A Positivist Inquiry*

As an orienting theory for the minimum core in international law, the search for the minimum consensus on each economic and social right looks to additional treaties with overlapping content or more specific obligations with respect to economic and social rights, such as widely ratified human rights treaties or regional agreements, and the international jurisprudence flowing from them.[163] It is therefore significant to the Consensus Approach that the Covenant now has 153 State Parties.[164] Yet the substantive commitment and implementation behind ratification are also significant.[165] Thus, the Consensus Approach also references the national measures for protecting economic and social rights, such as federal and state constitutional texts, stable and long-lasting legislative regimes, and judicial precedent. In the United States, for example, this approach would draw attention to the explicitly protected rights provided for in some state constitutions,[166] the judicial pronouncements that have upheld a set of minimum constitutional entitlements with respect to public education and welfare in the Supreme Court,[167] and the body of legislative protections that have existed in the United States since the New Deal. In fact, the historical efforts of Franklin D. Roosevelt have arguably served to engender several cultural commitments in the United States, including at least support for the right to education, the right to social security, the right to be free from monopoly, and perhaps even the right to a job.[168] Through comparative analysis of sociolegal equivalents,[169] a converging set of principles regarding socioeconomic protection is empirically "uncovered" rather than deductively "discovered."

---

163. *E.g.*, Van Bueren, *supra* note 7 (describing the optional protocols to the Convention on the Rights of the Child and the International Labour Organization (ILO) Convention No. 182 and arguing that the adoption by states of additional, more focused, treaties has resulted in an expanded minimum core of children's rights); *see also* Marcus, *supra* note 64, at 63 (advocating normative development by supranational adjudication in different bodies).

164. Office of the U.N. High Comm'n for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, (June 15, 2006), http://www2.ohchr.org/english/bodies/docs/ratificationstatus.pdf.

165. For the skeptical view on the significance of treaty ratification, see, for example, Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). *Cf.* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EURO. J. INT'L L. 171 (2003).

166. *E.g.*, Hershkoff, *supra* note 56; Martha F. Davis, *The Spirit of our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 372 (2006) (noting the common state constitutional right to welfare and canvassing different state constitutional protections of education, public health, and the right to work and associate).

167. LAWRENCE G. SAGER, JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 95-102 (2004) (presenting a range of seemingly inconsistent Supreme Court decisions with respect to welfare payments and public education, which can be understood to set out the protection of a right to minimum welfare on the basis of a ballpark needs criteria).

168. SUNSTEIN, A SECOND BILL OF RIGHTS, *supra* note 74 (showing how Franklin D. Roosevelt's proposed second bill of rights of 1944 grounded particular economic and social rights in American constitutional culture).

169. For a similar practice in private law, see KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Oxford Univ. Press, 3d rev. ed. 1998) (1977). For a tentative exploration in public law, see VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (2d ed. 2006); and Tushnet, *The Possibilities of Comparative Constitutional Law*, *supra* note 18.

The Consensus Approach is akin to the positivist approach of the Committee, which has relied explicitly on the reports of states parties to elucidate the developing content of the minimum core. For example, in 1991, its chairperson, Philip Alston, suggested that "clarification" of the normative content of the rights to food, health, housing, and education, should "be achieved through the examination of States parties' reports . . . . [T]he approaches adopted by States themselves in their internal arrangements (and explained in their reports to the Committee) will shed light upon the norms, while the dialogue between the State and the Committee will contribute further to deepening the understanding."[170] It is worth recalling the significant integration of national economies that was occurring at the time of this statement.[171]

The Committee's heavy focus on state practice is arguably a result of the absence of an enforceability mechanism under the Covenant. Unlike the International Covenant on Civil and Political Rights, the Covenant does not give its Committee the jurisdiction to hear complaints.[172] The development of an informal jurisdiction to interpret the meaning of state parties' obligations, by a close reading and distillation of the content of state reports, has thus allowed the Committee to compensate for its lack of formal authority to hear individual complaints and issue binding interpretations.[173] According to some observers, the General Comments, which have been published from these efforts, have developed an authoritativeness usually reserved for advisory opinions and enjoy a significant degree of acceptance by state parties.[174] The Committee continues to work to establish a more formal complaints jurisdiction.[175] If its methodology deviates too far from consensus, the

---

170. Philip Alston, *The Committee on Economic, Social and Cultural Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 473, 491 (Philip Alston ed., 1992) (emphasizing the importance of state reports and criticizing present performance); *see also General Comment No. 3*, *supra* note 1, ¶ 10 (relying on experience "of more than a decade of examining States parties reports").

171. JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 46-47 (2005) (discussing the end of the central planning, internal economic integration, and global economic separation of the second world in 1989 and the nonaligned economic independence of the post-colonial third world).

172. *See* First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302; ICCPR, *supra* note 38, art. 28 (establishing Human Rights Committee). *But see* U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Economic, Social and Cultural Rights: Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its First Session*, U.N. Doc. E/CN.4/2004/44 (Mar. 15, 2004).

173. For an analysis of how the "concluding observations" work to register noncompliance, see Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 96-97 (1992); and CRAVEN, THE INTERNATIONAL COVENANT, *supra* note 5, at 87-89.

174. M. MAGDALENA SEPÚLVEDA, THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 42 (2003) (suggesting the General Comments are more meaningful than those issued by the Human Rights Committee); *see also* CRAVEN, THE INTERNATIONAL COVENANT, *supra* note 5, at 91 (describing the "considerable legal weight" of the Committee's interpretations of the Covenant). Although the legal status of the General Comments is uncertain, the Committee commenced with their publication after an invitation by the Economic and Social Council which was endorsed by the General Assembly. G.A. Res. 42/102, at 202, U.N. GAOR, 42d Sess., 93d plen. mtg., U.N. Doc. A/Res/42/102. (Dec. 7, 1987).

175. There have been long-standing attempts to create a complaints or communications mechanism. *See, e.g.*, THE RIGHT TO COMPLAIN ABOUT ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Fons Coomans & Fried van Hoofeds., 1995). Among the first acts of the new Human Rights Council

Committee (and the General Comments it issues) likewise loses legal authority.

The focus on consensus is endorsed by many commentators, who are eager to establish mechanisms that monitor economic and social rights and can operate without the cooperation of particular state parties in delivering reports.[176] An international group of experts gathered in 1997 to assess the implementation of the Covenant. Similarly, they reiterated the continued importance of consensus, registered by state practice, holding that "the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights."[177] To understand this dynamic, it is important to evaluate the operation of consensus as constitutive of the minimum core.

B. *Consensus as a Normative Concept: Sovereignty and Self-Government*

I argue that the Consensus Approach is no less normative than the Essence Approach, differing only because it reaches for consensus—itself a norm—over the values of human dignity or basic needs. In the sense that consensus is valued as a norm for its own sake (rather than valued instrumentally, for its ability to guide what will satisfy some norms that resist direct articulation or clarification), its importance lies in its ability to deliver legitimacy to the operation of both international and constitutional law. In this sense, consensus bears a relation to—and may be a proxy for—the more stringent requirement of state consent, itself the basic creed of international law,[178] and to the ideal of democratic self-rule in constitutional law.[179]

(formerly the United Nations Commission for Human Rights) was a resolution on an Open-Ended Working Group on an Optional Protocol to the Covenant. *See* U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Economic, Social and Cultural Rights: Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Third Session*, U.N. Doc. E/CN.4/2006/47 (Mar. 14, 2006) (*prepared by* Catarina de Albuquerque). *But cf.* Dennis & Stewart, *supra* note 158 (criticizing attempts to establish a complaints mechanism).

176. Eibe Riedel, *New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural Rights—The Example of the Right to Health*, *in* PRAXISHANDBUCH UNO: DIE VEREINTEN NATIONEN IM LICHTE GLOBALER HERAUSFORDERUNGEN [UN MANUAL, THE UNITED NATIONS IN THE LIGHT OF GLOBAL CHALLENGES (author's trans.)] 345, 347 (Sabine von Schorlemer ed., 2003) (noting the recent trend by the Committee to undertake country analyses in the absence of the State Party and to offer Concluding Observations on the basis of information presented by specialized agencies and nongovernmental organizations).

177. *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, *supra* note 41.

178. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 2003) (describing the sources of international law as what count as "*evidences* of the existences of consensus among States concerning particular rules and practices" (emphasis removed)); J.G. MERRILLS, ANATOMY OF INTERNATIONAL LAW: A STUDY OF THE ROLE OF INTERNATIONAL LAW IN THE CONTEMPORARY WORLD 1-5 (describing international law as "an agreement" between states).

179. For a classic expression, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195-97 (Jon Elster & Rune Slagstad eds., 1988). *See also* Bruce A. Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984)

Consensus renders legitimate the coercion implicit in law by helping to ensure the sovereign equality of all states (in international law) or the equal participation of all citizens (in constitutional law) in the agreement to be bound by laws.[180]

The importance of consensus in international law is evidenced in the voluntarist structure of both treaties and customary international law. For general treaty regimes, consent precedes ratification and the acceptance of obligation.[181] It also justifies the practice of allowing (certain) treaty reservations and a "margin of appreciation" to constrain the application of international law in domestic legal systems. For customary international law, consensus is also a foundational feature. The positive sources of customary international law—opinio juris and state practice— are important precisely because they are proxies for consent, even if expressed tacitly.[182] In permitting exceptions, custom again gives priority to consent, precluding customary law's application to persistently objecting states.

Nonetheless, the centrality of consensus shifts with respect to human rights. For both treaty-based and customary human rights norms, the norm of consensus is secondary to the higher moral goals suggested by these conventions. For the obligations which flow from these moral goals, consent may be both constitutive and destructive.[183] For example, while states' ratifications are required in order to establish obligations, the principal human rights treaties are purportedly universal in scope and there are limits to the reservations that countries can make in becoming parties.[184] Many commentators argue that consensus should not count for human rights as it does for other obligations, because human rights treaties have been established to protect minorities.[185] Similarly, the peremptory norms of custom, which rely on a normative rather than consensus-based hierarchy, are

---

(presenting the higher agreement expressed during "constitutional moments" as key to understanding constitutional self-restraint and judicial review).

180. Neuman, *supra* note 15, at 1864-65 (noting the parallel operation of consensus across constitutional and international human rights law).

181. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

182. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (referring to "international custom, as evidence of a general practice accepted as law"). See also BROWNLIE, *supra* note 178, at 4-11, and cases cited therein.

183. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1, 4-5 (2007) (citing Belilos v. Switzerland, 132 Eur. Ct. H.R. 28, 60 (1988)) (demonstrating a trend whereby human rights organs give special priority to human rights treaties over formal State consent).

184. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28) (ruling, in response to reservations attached to the Genocide Convention, that the "object and purpose of the Convention . . . limit . . . the freedom of making reservations"). The doctrine of invalid reservations would seem to detract from norms of consent, but see Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002), who suggests that severing invalid reservations may maximize, rather than obstruct, state consent.

185. *See, e.g.*, Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 850-53 (1999) (criticizing the use of consensus theories in human rights).

supposed to ameliorate the self-interest of sovereignty in international law.[186] Indeed, I argue that the ideal of peremptory norms is an important piece of the puzzle of the minimum core's status, especially as to its nonderogability. As we will see below, this urge to rank norms against the trend of consensus[187] evokes the same deontological paradox.

Some commentators seek to dissolve the tension between consensus and ethical normativity by "universalizing"[188] the norms themselves. Abdullahi An-Na'im, for example, suggests that "human rights are much more credible . . . if they are perceived to be legitimate within the various cultural traditions of the world."[189] The argument that the Universal Declaration of Human Rights constitutes customary international law follows in this vein.[190] Its supporters usually evoke, not its superior moral persuasiveness (as one might expect) but, rather, the latent consensus present at its adoption by the General Assembly in 1948[191] or its later invocation by many of the world's courts and decisionmakers.[192] The grounding of the minimum core in a minimum consensus ensures its validity across the varied regimes.

Similarly, the norm of consensus helps to secure the legitimacy and validity of constitutional norms. In constitutional theory, consensus operates to register the necessary degree of self-government of the citizens of a constitutional polity. Alexander Bickel famously claimed that "coherent, stable—and *morally supportable*—government is possible only on the basis of consent."[193] More recent measures in constitutional theory point to the versions of wider cultural agreement that shift over time but are always indirectly informing the interpretation of rights in constitutional adjudication.[194] Some commentators argue that consensus is in fact more meaningful in American constitutional law than in other more internationalist, constitutional systems.[195] Yet whether American constitutionalism is

---

186. Vienna Convention on the Law of Treaties, *supra* note 181, art. 53 (stipulating that any treaty conflicting with a peremptory norm—"accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"—is void).

187. For a seminal expression, see Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

188. Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 43, 45 (2001) (endorsing the political project of "concerted efforts to build a public and worldwide consensus around the idea of human rights, including political strategies, diplomatic initiatives, agreement of explicit principles, and conclusion of an international accord").

189. HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 3 (Abdullahi Ahmed An-Na'im ed., 1991).

190. International Bill of Human Rights, G.A. Res. 217 (III), pmbl., U.N. Doc. A/810 (Dec. 10, 1948).

191. *See, e.g.*, GLENDON, *supra* note 113, at 222 (pointing to the "core of fundamental principles . . . widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language of rights").

192. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 63 (2003) (likening the origins of the Universal Declaration of Human Rights (UDHR) to "a sort of birth defect" because of the absence of many states at its original adoption, and relying instead on the later affirmation of the Universal Declaration).

193. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 20 (2d ed. 1986).

194. Post, *supra* note 133.

195. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1999 (2004) (contrasting the "democratic constitutionalism" informing American constitutional law with the

exceptional in its commitment to consensus is a matter of debate because the tension between the democracy-overriding self-restraints presented by rights on the one hand, and democracy itself on the other, is unavoidable for all constitutional democracies.[196]

This brief survey of the role of consensus as a norm in both systems of law would be incomplete without acknowledging the alternative status of consensus as an operational guide for other norms, rather than a norm for its own sake. In this view, the importance of consensus is due, not to its connection to the self-representation of the units expressing agreement, but rather to its ability to assist in the determination of normative principle. Here, consensus (and particularly international consensus) is important because it reveals the normative standards that evolve with reason. It is this use that Jeremy Waldron advocates in extolling the Supreme Court's use of international law in *Roper v. Simmons*.[197] Consensus here harkens to the international law of the past and its aim to represent the "common law of mankind." These principles—captured by the traditional concept of the law of nations, or *ius gentium*—reflect the common agreement on principles of (domestic) law which are demonstrated by the work of judges, jurists, and lawmakers from different parts of the world.[198] Because the relevant consensus remains incomplete and must be supplemented by a sense of justice to guide newer norms (a sense itself informed by the character of the consensus), the approach depends upon a reflective equilibrium between natural and positive law.[199] This equilibrium differs from the "overlapping consensus" of moral principles discussed in relation to the Essence Approach, precisely because of its connection to positive law. For Waldron, consensus points to "a set of enduring intermediate principles that one might use as touchstones for real-world legal systems."[200]

C. *The Limits of Consensus*

Whether necessary for sovereignty and self-government on the one hand, or for principled legality on the other, the Consensus Approach to the minimum core is beset by several limitations. In brief, the approach fails because it makes legitimate only the lowest common denominator of international protection, a problem exacerbated by the relative dearth of explicit pronouncements on what the minimum formulations of economic and

---

"internationalist constitutionalism" of Europe, which "is based on . . . universal rights and principles that derive their authority from sources outside of or prior to national democratic processes").

196. *E.g.*, Holmes, *supra* note 179, at 222-24 (presenting the inevitable challenge for binding the hands of sovereignty, described by JON ELSTER, ULYSSES AND THE SIRENS 94 (1984)).

197. 543 U.S. 551 (2005); *see* Waldron, *Foreign Law and the Modern* Ius Gentium, *supra* note 162. *But cf.* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (criticizing as illegitimate the "swelling of the denominator" that underlies a justification based on international consensus).

198. Waldron, *Foreign Law and the Modern* Ius Gentium, *supra* note 162, at 132, 133, 137 (using the law of nations—the *ius gentium*—to encompass a more comprehensive meaning than, for example, customary international law or federal common law).

199. *Id.* at 136 (citing RAWLS, *supra* note 74, at 48-51).

200. Waldron, *Foreign Law and the Modern* Ius Gentium, *supra* note 162, at 134 (citing S. THOMAS AQUINAS, SUMMA THEOLOGICA Pt. I-II, Q. 95, Art. 4, Reply I, at 298 (R.J. Henle trans., 1993).

social rights are and what they should be. Moreover, the Consensus Approach founders on its inability to give appropriate guidance on the decision as to whose consensus is to count: judicial consensus as a special place for unfolding reason; governmental and intergovernmental declarations as a more appropriate test for legitimate law (captured at a particular, normatively charged moment or subject to ongoing development); or the consensus established between special experts in policy areas influencing economic and social rights (such as those drawn from public health, education, housing, or land reform areas), who are more familiar with the institutions and organizations that constitute the concrete efforts to deliver on the material requirements behind rights.

The "lowest common denominator" implication is particularly problematic for approaching the content of economic and social rights. The dearth of consensus is due in part to the late secularization of the protection of material interests in human rights history compared with other categories (or "generations") of rights.[201] It is also a feature of the ideological disagreements of the Cold War period, when Western governments worked actively to demote the importance of economic and social rights[202] and when the human rights nongovernmental organizations headquartered in the West, including Human Rights Watch and Amnesty International, followed suit.[203] Yet even with the end of this polarization, consensus continues to lead to conservative and abstract expressions of the content of economic and social rights. Especially in the case of the justification for self-government, the most comprehensive version of agreement represents the thinnest or broadest (as well as lowest) common denominator. As a long-standing criticism of the treaty system makes clear, the requirement for consensus across different legal systems will impede a norm's progress and development.[204] Practically, this leads to a bias towards the status quo, as well as to deliberately vague, uncontroversial, and unimaginative expressions. As one observer notes, the choices for an international organization to develop a norm across widely variant legal, cultural, and economic reference points are to do nothing, or to do very little.[205] Consensus on rights may neglect or distort the duties

---

201. *See, e.g.*, THE HUMAN RIGHTS READER: MAJOR POLITICAL WRITINGS, ESSAYS, SPEECHES, AND DOCUMENTS FROM THE BIBLE TO THE PRESENT (Micheline R. Ishay ed., 1997) [hereinafter THE HUMAN RIGHTS READER] (emphasizing the humanism within religious expressions of rights, their later secularization into civil and political rights, the socialist challenge, and adaptations into the rights discourse of new social movements).

202. Alston & Quinn, *supra* note 27. For a description of this tension as far back as the UDHR, see GLENDON, *supra* note 113, at 115-17.

203. David P. Forsythe & Eric A. Heinze, *On the Margins of the Human Rights Discourse: Foreign Policy and International Welfare Rights*, *in* ECONOMIC RIGHTS IN CANADA AND THE UNITED STATES 55, 63 (Rhoda E. Howard-Hassman & Claude E. Welch, Jr. eds., 2006). A lack of motivation is still discernable. *See* Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS Q. 63, 65-72 (2004) (suggesting methodological challenges and a sense of futility as the cause).

204. *See* Bruno Simma, *Consent: Strains in the Treaty System*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485, 494 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983) (contending that the "lowest common denominator" provisions deemed necessary to encourage widespread ratification may diminish the entire exercise).

205. Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights through the Use of International Human Rights Law and Procedures*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 189, 202 (Rebecca J. Cook ed., 1994) ("Under a universal human

embodied in nonsecular religious traditions that exist incompatibly with the language of "right."[206] The consensus may also be more "declared" than "lived" and be based on aspirations rather than on traditional or current practices.[207]

Moreover, a requirement for consensus fails to meet its own standards for self-government and equality by leading to the paradox (in the case of unanimous requirements) that if 1% of the community does not subscribe to a consensus, it fails to succeed, in which case the opinion of 99% is violated.[208] Replacing unanimity requirements with majority consensus presents its own paradox because of the inevitable tendency to prejudice the minority articulation of rights. The claims of minorities, which may be overborne by majority interests in democratic systems, are a main reason for the existence of rights.[209] This returns us to the argument that the very design of the international system of human rights is to counter the shortcomings of a consent-based system rather than support them.

If the limits of the Consensus Approach are different for national systems of law, it is a difference in degree and not in kind. It is the pluralism which exists across different national (and subnational) systems that leads to abstract and broad versions of consensus in international law. The same pluralism is a feature of modern constitutional politics, although in a less exaggerated form (since the diversity of the world's cultural traditions is not represented in any single nation). For the constitutional legitimacy which is linked to self-government, we rely on broad and capacious expressions of consensus rather than narrow determinants. There are evident contradictions in distilling a minimum concrete content for the "minimum core" consistent with these trends towards breadth and abstraction.

If we take a more realist view of how and where consensus is achieved in international and national policy debates, we become even more uneasy. Official agreements are heavily influenced by compromise rather than reason. Sometimes, the compromise tends towards coercion. This criticism applies to the field of national lawmaking, where the shortcomings of legislative, administrative, and judicial expressions of "consensus" have been long-

---

rights treaty . . . to which more than 100 states . . . are party, an international body might not so easily identify an actual or evolving international standard or, if it can do so, that standard may be heavily influenced by the least common denominator 'drag.'").

206. *See generally* THE HUMAN RIGHTS READER, *supra* note 201, at xv-xix, 1-72 (excerpting texts from religious humanism and Stoicism which incorporated moral and humanistic principles, often deployed as duties, but noting the incompatibilities with, for example, divine revelation); WOODS & LEWIS, *supra* note 25, at 43-50 (presenting examples of religious appeals to charity and the benefactor's own moral development). For a helpful examination of rights translation, including a right to an adequate standard of living, in both Confucianism and Islam (the latter expressed in conditional terms), see Cohen, *supra* note 3, at 205, 208 and sources cited therein.

207. Kirsten Hastrup, *Representing the Common Good: The Limits of Legal Language*, *in* HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS 16, 16-17 (Richard Ashby Wilson & Jon P. Mitchell eds., 2003).

208. *See also* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 310 (rev. ed. 2005) (for an extensive critique exploring the difficulties of applying consent as a standard in international law).

209. Benvenisti, *supra* note 185, at 850 (emphasizing the ability of the international human rights regime "to ameliorate some of the deficiencies of the democratic system").

standing objects of empirical study.[210] In the same way, it applies to the burgeoning and less studied field of international lawmaking, including the work of international organizations, supranational tribunals, and the more informal transnational conferences and expertise-sharing, which constitute the global consensus.[211]

Indeed, the influence of economists' theories of liberalization and deregulation, ubiquitous in the restructuring and structural adjustment environment of the 1990s, are more visible and yet less legitimate instantiations of consensus in the international environment. During this period, the economic strategies of the "Washington Consensus" converged on the desirability of growth strategies which would remove economic and social entitlements and thus harm the poor—at least in the short term.[212] The neoliberal blueprints were influential in informing the regime change in the transitioning post-communist states, as well as the structural reforms and poverty reduction strategies in development projects, which were prerequisites for the award of loans or debt relief.[213] The "consensus" on structural reforms is empirically apt, even if it hides the real motivations behind the adoption of such policies.

It is perhaps no coincidence that the overtly state-oriented commentary of the Committee drifted away from state practice during the 1990s,[214] or at least looked for broader instantiations of consensus than those offered by evidence of states' convergence on neoliberal economic policies. Counterexamples from state practice were available—sometimes expressed by courts defending their constitutional regimes against the reforms promoted by the executive at the instigation of the international financial institutions.[215] And the "chastening" of these ideas in light of empirical evidence[216] suggests that the driving ideas of this period were not in fact expressions of consensus,

---

210. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (applying models from public choice to illuminate decision making in political institutions); Jerry Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989). For a less cynical portrayal from the legal process school, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

211. For an application of legal process to the international legal system, see, for example, ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS (1968). *See also* Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2619 (1997) (pointing out the successors of legal process and yet urging a more thorough account of transnational legal process).

212. STIGLITZ, *supra* note 48, at 11-16, 73-74, 134-42 (offering a practitioner's critique of "market fundamentalism"); Forsythe & Heinze, *supra* note 203, at 63 (linking the demands of the Washington Consensus to the weakening of economic and social rights).

213. *E.g.*, PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004) (investigating conditionality and its effect on human rights); Frances Stewart & Michael Wang, *Poverty Reduction Strategy Papers Within the Human Rights Perspective*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT, *supra* note 97, at 447, 462-70 (noting important discrepancies between conditional poverty reduction strategies and human rights agendas).

214. *See infra* Part IV.

215. *E.g.*, Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921 (2004) (describing Hungary's rejection of market reforms via a judicial defense of economic and social rights).

216. For a conception of chastened neoliberalism, see THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

but rather deviations from longer-term and truer instantiations.[217] Lawrence Sager, writing about American constitutional law, promotes a similar critique in respect of the retrogression in welfare policy in recent years.[218] He argues that a long-term view can "blunt the force of contemporary political currents"[219] while still paying heed to an underlying constitutional consensus.

Recourse to the long-term view leaves consensus on uncertain ground. When is a consensus "truly" given, and when is it a deviation? Are there other norms more relevant to the "core" of the right, such as the quality of reasoning (as we saw was featured in the Essence Approach), in place of the quantity of belief?[220] In the end, these realist features suggest an important insight: namely, that focusing on consensus alone thwarts the definition of a minimum core. There is good reason to explore other rationales for the minimum core concept, both because consensus pulls the content too broadly and thinly, and because its theoretical promise—of self-governing pluralism in both international and constitutional law—proves elusive. Perhaps consensus merely popularizes the inquiry.

IV. THE MINIMUM CORE AS MINIMUM OBLIGATION

The problems foreshadowed by the Essence and Consensus Approaches to the minimum core point to a third, somewhat different approach. This approach investigates whether a minimum obligation (or minimum set of obligations) can correlate to the minimum core. Of course, this approach is not a true alternative to the purely normative and consensus-driven approaches, as it relies on, and incorporates, these justifications within its assessment of obligation. That is, the more normatively convincing and empirically accepted the definition of the essential protections, the easier to demarcate the attendant obligations as minimum. But that pragmatic connection between sound norms and effective duties can obscure a different set of influences on the definition of the core, which take the institutional competences and remedial opportunities—both in practical and normative terms—as the paramount guides in setting the minimum. In characterizing this approach, I highlight these institutional and procedural arguments.

The shift to obligations reflects two constructive points in the economic and social rights canon. The first is that a focus on the duties required to implement the rights, rather than the elements of the rights themselves, enables the analysis of realistic, institutionally informed strategies for rights protection: that is, of solutions for "what it actually takes to enable people to be secure against the standard, predictable threats to their rights."[221] The second is that an analysis of the duties that correlate to each right confronts the erroneous dichotomy of "positive" and "negative" rights, making clear

---

217. *See, e.g.*, Ackerman, *supra* note 179.

218. SAGER, *supra* note 167, at 158-59.

219. *Id.* at 158.

220. SHUE, *supra* note 78, at 73 ("[O]ne must assess the quality of reasoning, not measure the quantity of belief . . . ."); *cf.* SUNSTEIN, A SECOND BILL OF RIGHTS, *supra* note 74 (for an application to constitutional law); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995) (for an application to international law).

221. SHUE, *supra* note 78, at 160.

how all rights—civil, political, economic, social, and cultural—contain correlative duties of the state to both ("negatively") refrain from and ("positively" or affirmatively) perform certain acts in certain circumstances. This analysis makes the equally significant point that the "negative" nonintervention duties are not, a priori, more important than the "positive."[222] Thus, "core obligations" are both negative and positive obligations and are actively addressed to both judicial and other legal institutional settings.

This insight can explain the Committee's departure from its earlier project to identify the minimum core obligation via a gradualist, consensus-informed starting point to its present efforts to produce a template of "core obligations" that straddle different rights, duties of positive provision, and wider institutional strategies. The Committee now uses the "core obligations" list to outline the necessary steps of "operationalizing" rights and attempts to circumvent the difficult questions of form and content of legal entitlement. In some ways, this has introduced a more technical vocabulary around "core obligations," which seeks both to guide state action and to signal "violations" under the Covenant.[223] Many commentators outside of the Committee have seized on this formulation in order to settle the institutionally derived justiciability concerns for economic and social rights in both international and national tribunals. Yet the shift of attention from the core content of each right to core obligations raises a new set of possibilities and challenges for the workability of the minimum core idea.

A. *Supervising Core Obligations: From Typologies to Templates*

The project of defining "core obligations" that now occupies the Committee is one of ranking and delineating the multiple obligations that may correlate with the realization of economic and social rights. It is a project that rests on, but seeks to supersede, previous analytical distinctions and typologies, such as the distinction drawn between "conduct"-based obligations and "result"-based obligations, and the indexing of the different duties to respect, protect, and fulfill rights.[224] While the duty-holder, true to human rights theory, is the state itself, such analytics help in differentiating and

---

222. This is nevertheless contentious. *See* FABRE, *supra* note 90, at 47-49 (suggesting the doctrine of acts and omissions intuits that, in most cases, negative duties are more important).

223. Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23 (1996) (proposing a more rigorous signal of noncompliance for the failure to fulfill minimum core obligations).

224. The first typology set out for subsistence rights came from SHUE, *supra* note 78, at 52 (suggesting the duties to (1) avoid depriving, (2) protect from deprivation, and (3) aid the deprived). *See also* Eide, *Economic, Social and Cultural Rights as Human Rights*, *supra* note 7, at 23-24 (presenting typology of duties to respect, protect, and fulfill). Other duties have been proposed, such as the duty "to promote" rights. *See* G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, *in* THE RIGHT TO FOOD 97, 106-108 (Philip Alston & Katarina Tomaševski eds., 1984). More specific, institutionally-oriented duties, such as the duty to "create institutional machinery essential to [the] realization of rights" and the duty to "provide goods and services to satisfy rights," have also been suggested. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 187-89, 189 (3d ed. 2008). The typology of respect, protect, and fulfill has been adopted by the Committee, although the obligation to fulfill is further delineated to include obligations to facilitate and provide (the right to food), *General Comment No. 12*, *supra* note 33, ¶ 15, and the obligation to promote (the right to health), *General Comment No. 14*, *supra* note 10, ¶ 62.

giving legal priority to the range of alternative responses that the state may take, whether they lie in actively providing for particular entitlements or in protecting the existing social institutions which have helped to secure them. Proponents of this approach suggest that in focusing on obligations rather than content, one need not take a position on the hierarchy of the elements of each right, but concentrate on the more practical issue of timing.[225]

For example, "core obligations" encompass both obligations of conduct, which require a specific course of conduct (whether an act or omission), and obligations of result, which are fulfilled by a course of conduct left to the state's discretion. Some commentators have suggested that the minimum core concept relates only to obligations of result because it is able to signal only the extent to which individuals are enjoying (or will enjoy) their rights rather than assess the policies and procedures that bring about that result. Thus, for example, Tara Melish presents a helpful four-dimensional quadrant of the duties flowing from economic and social rights—utilizing both the result-conduct and individual-collective distinction—and places the minimum core obligation in the result-based, individual-based category of duties.[226] Nonetheless, this view does not accord with the "core obligations" orientation of the Committee. In contrast to an earlier view that the Covenant imposed only "obligations of result,"[227] the Committee's position is now to recognize a mixture of the two types of obligation[228] and include both types within its assessment of "core obligations." This attitude gives implicit credence to the inevitable collapsibility of the two notions when the rights themselves come under closer analysis. Like the process-substance dichotomy in the field of constitutional law,[229] the conduct-result distinction endures as much for its ability to further conceal some already hard-to-see relationships as for its ability to point out the obvious. Obligations of conduct will frequently rely on an objective towards which the conduct aims. And obligations of result will themselves imply a particular course of action.[230] Thus, the shift from core content to core obligation may entail a greater emphasis on conduct depending on how it is cast, but does not dispense with the substantive goals of certain minimum criteria.

Similarly, the influential typology of duties suggested by Henry Shue and applied, in an adapted form, by the Committee, highlights the act and omission dimensions of the obligations of conduct—both duties to protect and

---

225. Audrey R. Chapman & Sage Russell, *Introduction to* CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS 1, 9 (Audrey R. Chapman & Sage Russell eds., 2002) [hereinafter CORE OBLIGATIONS].

226. Melish, *supra* note 14, at 248.

227. *Report of the International Law Commission*, 2 Y.B. INT'L L. COMM'N 1, 20 (1977).

228. *E.g.*, *General Comment No. 3*, *supra* note 1; *see also* U.N. Econ. & Soc. Council [ECOSOC]. Comm. on Econ., Soc. & Cultural Rights, *Summary Record of the 21st Meeting*, ¶ 7, U.N. Doc. E/C.12/1990/SR.21; *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, *supra* note 41, at 694; Alston & Quinn, *supra* note 27, at 165 (describing the obligation under Article 2(1) to "undertake to take steps" as one of conduct).

229. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (questioning the departure from substance in John Hart Ely's seminal work on a process-based constitutional theory, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)).

230. CRAVEN, THE INTERNATIONAL COVENANT, *supra* note 5, at 107.

respect—and retains a focus on the result-based duties to fulfill.[231] With this abstraction, commentators have been able to formulate the varied types of positive and negative obligations flowing from the recognition of an economic and social right. In more concrete terms, for example, a government-sponsored forced eviction is incompatible with the duty to respect a right to housing, a government failure to regulate the security of tenure for rental accommodations or informal settlements implicates the duty to protect the right, and the inadequate provision of emergency housing facilities exemplifies a failure of the duty to fulfill a right.[232] The Committee has designated all three types of obligations as "core," provided they impact on the prioritized content of economic and social rights. Although the so-called "tertiary" duties (the duties to fulfill) are supposedly less precise than the other forms of obligation,[233] the Committee has included them under the core obligations umbrella.

Yet, despite this heavy analytical arsenal, the enumeration of core obligations has been far from coherent. Instead, the Committee has followed a meandering course of logic as to what amounts to such obligations, delivered by recourse to the work of the UN specialized agencies, the declarations of international gatherings of particular expertise, and a consensus of the Committee members themselves.[234]

The Committee's first attempt to enumerate core obligations leaned heavily on the "organizing principles" that would be necessary to substantiate the content of each right in more concrete terms, and focused on the availability, accessibility, and quality of the material good relating to each right.[235] These principles formed the basis of the core content of the right to food, set out in General Comment Number 12 in 1999,[236] which commenced a

---

231. *Id.* at 110-14 (pointing out this overlap and outlining the different obligations to respect, protect, and fulfill); *see also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, *supra* note 41, ¶ 6 (endorsing the typology, with examples).

232. *See also General Comment No. 12*, *supra* note 33; *General Comment No. 13*, *supra* note 33; *General Comment No. 14*, *supra* note 10; UNDP 2000 Housing Rights, *supra* note 33 (all invoking the respect, protect, and fulfill typology). For an example of the South African Constitutional Court finding a negative violation of the right to housing in section 26(1), see *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC) at 91-92 (S. Afr.) (holding South Africa's Magistrates's Court Act (permitting "a person to be deprived of existing access to adequate housing") unconstitutional where it permitted the sale in execution of people's homes in order to satisfy even petty debts). For commentary on *Jaftha*, see Liebenberg, *Needs, Rights and Transformations*, *supra* note 106, at 27-29.

233. *See* Scott & Macklem, *supra* note 173, at 77 ("[O]ne must not attach too great a degree of imprecision to the obligation to fulfill social rights.").

234. For a discussion of the expertise of the Committee, see SEPÚLVEDA, *supra* note 174, at 29-44 (describing the Committee's present working methods).

235. The Special Rapporteur on Primary Education, Katarina Tomaševski relied on the principles of availability, accessibility, acceptability, and adaptability. *See* Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Preliminary Report of the Special Rapporteur on the Right to Education*, ¶¶ 51-74, U.N. Doc. E/CN.4/1999/49 (Jan. 13, 1999) (*prepared by* Katarina Tomaševski); *see also* BRIGIT C.A. TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW 364-65 (1999) (adopting similar principles of availability, accessibility, equality, and quality for substantiating the protection offered by the right to health).

236. *General Comment No. 12*, *supra* note 33, ¶ 8 (identifying the core content as encompassing "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable with in a given culture; [and t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights"); *see also id.* ¶¶ 12-13 (providing a further definition of "availability" and "accessibility").

separate phase of the Committee's analysis of individual rights after the early 1990s.[237] These principles, which largely respond to the "basic needs" inquiries of the Essence Approach, also add cultural and environmental considerations. More to the point, they differ from the search for an essence by refusing to place these principles in a normative hierarchy. For example, the Committee's General Comment on the right to food evades the question of whether the core content of the right relates to the "freedom from hunger" provision of the Covenant, or the broader and more extensive right to adequate food.[238] A similar ambivalence attends the General Comment on the right to education, which does not suggest that primary education should be prioritized over higher education within the minimum core.[239] Those who have utilized the operational principles suggest that their contribution lies in directing policy rather than law.[240]

In later comments, the Committee departs from referencing the operational principles of availability, accessibility, and quality within the enumeration of "core obligations," although such principles figure as universally applicable to the normative content of the right to the highest attainable standard of health and the right to water in the General Comments that set out to clarify their content.[241] Instead, the list of "core obligations" (appearing awkwardly alongside statements of "general legal obligations," "specific legal obligations," "international legal obligations," and "violations") references several institutional obligations that require immediate performance. In the case of the right to health, the General Comment links the minimum core obligations to the declarations of international experts in health, population, and development, and to the mutually supporting rights of access to food, shelter, housing, sanitation, and potable water.[242] Thus, for example, a "core obligation" flowing from the right to health is to provide essential drugs defined under the World Health Organization (WHO) Action Programme on Essential Drugs;[243] another is to implement a national public health strategy "on the basis of epidemiological

---

237. Chapman & Russell, *supra* note 225, at 10 (noting "a lapse of several years" in commentary on the content of rights).

238. Covenant, *supra* note 19, art. 11. For an argument that freedom from hunger constitutes that minimum core of the right to food as implied by *General Comment No. 12*, see Künnemann, *supra* note 66, at 83. For an argument from customary international law, see Smita Narula, *The Right to Food: Holding Global Actors Accountable under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 780-97 (2006). As a matter of custom, the right is applicable to the United States, despite its failure to ratify the Covenant, unless it can claim status as a persistently objecting state.

239. *General Comment No. 13*, *supra* note 33, ¶ 57 (suggesting that the core includes both the provision of primary education and the adoption and implementation of "a national educational strategy which includes provision for secondary, higher and fundamental education").

240. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Economic, Social and Cultural Rights: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶¶ 33-40, U.N. Doc. E/CN.4/2004/49/Add.1 (Mar. 1, 2004) (*prepared by* Paul Hunt) [hereinafter ECOSOC, Right to Health] (contrasting organizational principles with the legal vocabulary of respect, protect, and fulfill).

241. *General Comment No. 15*, *supra* note 17, ¶ 12; *General Comment No. 14*, *supra* note 10, ¶ 12; *see also General Comment No. 18*, *supra* note 17, ¶ 12.

242. *General Comment No. 14*, *supra* note 10, ¶ 43.

243. *Id.* ¶ 43(d) (setting out the obligation "[t]o provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs").

evidence, addressing the health concerns of the whole population."[244] It is difficult to determine whether the Committee designated these obligations as core because of their immediate practicability or their greater moral salience; on both grounds, the core obligations are subject to criticism.[245] The Committee's response to the practicability of the core obligations (and by implication, their affordability) is to posit a duty of assistance and cooperation on both state parties and non-state actors who are "in a position to assist."[246]

In its latest General Comments, the Committee has once again shifted its articulation of core obligations. Although they follow the same template, core obligations are now more general. Thus, for example, a recent General Comment, published in 2005 in relation to the right to work, suggests that "core obligations" relate mainly to duties of nondiscrimination.[247] The substance of these "core obligations" contains little overlap with the normatively prioritized principles of the right to work in other (specialized) treaties.

Two different sorts of explanation account for the Committee's diverging methodology with respect to core obligations. The first is the most obvious. It suggests that the Committee issues comments on different rights in the Covenant and finds it appropriate to adapt its orientation to the unique obligations raised by each right. For example, the right to health raises more complex issues of priorities, duties, and supervision than do the rights to food and water.[248] The right to work, to o, entails unique historical and ideological challenges by virtue of its more explicit incompatibility with capitalist labor markets and global economic integration.[249] At base, this explanation grasps that all economic and social rights are not created equal and that the Committee's modifications of "core obligations" respect this difference. Nonetheless, it fails to account for the timing of the Committee's shifts, and the fact that rights which raise similar distributional questions and challenges—such as food and water—are assigned very different core obligations.

The second explanation for the Committee's shift follows a more expansive view of its efforts within the international treaty system. It registers the pressures on the Committee to operate meaningfully with respect to the Covenant while not impacting other substantive treaty regimes. On this view,

---

244. *Id.* ¶ 43(f) (setting out a participatory process and a reference to indicators and benchmarks to give content to the process).

245. Karrisha Pillay, *South Africa's Commitment to Health Rights in the Spotlight: Do We Meet the International Standard?*, *in* EXPLORING THE CORE CONTENT, *supra* note 7, at 61, 66-68 (recommending that South Africa's healthcare priorities not be set by General Comment No. 14 because of its failure to include an obligation to meet the challenge of the HIV/AIDS pandemic as core); Benjamin Mason Meier, *Employing Health Rights for Global Justice: The Promise of Public Health in Response to the Insalubrious Ramifications of Globalization*, 39 CORNELL INT'L L.J. 711, 735-36 (2006) (suggesting that the essential drugs goal can be met by few states).

246. *General Comment No. 15*, *supra* note 17, ¶ 38 ("particularly incumbent on States parties . . . and other actors in a position to assist"); *General Comment No. 14*, *supra* note 10, ¶ 45.

247. *General Comment No. 18*, *supra* note 17, ¶ 31.

248. *E.g.*, BILCHITZ, *supra* note 9, at 220-25 (proposing application of an additional "pragmatic" minimum core for the right to healthcare, as opposed to a more principled approach to the minimum core specified for food, water, and shelter).

249. Richard Lewis Siegel, *The Right to Work: Core Minimum Obligations*, *in* CORE OBLIGATIONS, *supra* note 225, at 21, 24-26.

core obligations allow the Committee to claim its own jurisdictional turf. This might explain why the core obligations that are supposed to flow from the right to work share little with the fundamental labor rights—against child labor and forced labor—which figure in the conventions of the International Labour Organization.[250] Moreover, this explanation aligns with a more general trend that has resulted from the expansion of international treaties. For example, José Alvarez has identified the impetus of controlling "mission creep" and overlapping "regime complexes" in international law:

> [W]hen an [international organization] . . . becomes such an effective treaty machine that states can no longer keep up with their respective reporting obligations, it is natural that the organization itself would need to enunciate the 'core' obligations expected of all members, even though no such setting of priorities is explicitly authorized by its constitutive instrument . . . .[251]

Adopting a more critical frame towards the process of "fragmentation" in international law, Martti Koskenniemi suggests that the specializations of "trade law" and "human rights" law have begun to reverse established legal hierarchies by giving greater credence to the structural bias within the relevant functional expertise.[252] This explains the different substance and greater legal priority of core obligations emanating from the international trade regime and the international labor regime over the regime of human rights. If we apply this account to the Committee's work, we can predict a reversal in the normative prioritization behind core obligations, as the Committee negotiates its own agenda in relation to organizations established under the enforceable trade, development, and labor regimes. The incentive on the Committee to avoid, or at least control, areas of overlap subverts both the Consensus Approach and the Essence Approach, leaving "core obligations" a substitute term for the Committee's (circumvented) authority. This explanation predicts that core obligations will become narrower and ultimately compromised by the strength of the other substantive regimes. Before addressing this issue more fully below, I turn to a rather different recommended content for core obligations: the aspect of the minimum core which gives rise to justiciable complaints. This takes us outside of the supervisory competence of the Committee to the adjudicatory competence of both national and supranational courts and tribunals.

---

250. There are important differences between the "core rights" of the ILO and the right to work in Article 6 of the Covenant. *E.g.*, Philip Alston, *'Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004) (examining the implications of the core rights jurisprudence of the ILO); *cf.* Brian Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EURO. J. INT'L L. 409 (2005). The emphasis on "core obligations," however, does not reflect these differences and areas of possible overlap.

251. José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 327 (2006) (referring to the core obligations under the ILO); *see also* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006) (examining conflicting human rights norms in multiple international treaties and institutions).

252. Koskenniemi, *supra* note 183, at 4; *see also* U.N. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (*prepared by* Martti Koskenniemi).

B. *Enforcing Core Obligations: Justiciable Complaints*

As well as assisting the Committee in its efforts to rank and cabin the duties held by states, the Obligations Approach serves to substantiate the minimum core by reference to the justiciability of economic and social rights. The work of the minimum core concept is to assist in the adjudication of economic and social rights in domestic courts and supranational tribunals.[253] Supporters of this approach contend that the "inherently justiciable" elements of economic and social rights make "a very sound starting point for any discussion about the 'core content.'"[254] This approach targets the justiciability obstacle raised by economic and social rights, which has obstructed efforts to interpret them.[255] It bears certain similarities with the Consensus Approach in that it references judicial authority in order to substantiate content, but it does not do so merely to measure empirical agreement, but rather in order to resolve institutional challenges. The focus on justiciability is thus more attentive, like the Committee's General Comments, to the institutional competence of the body articulating the minimum core (in this case, a court or tribunal). It thus constrains the minimum core to the minimum sphere of enforceable protection of economic and social rights.

South African constitutional law, a vanguard in many areas of constitutional rights,[256] has inspired much comment ary on the way that the minimum core concept might resolve the justiciability challenges of economic and social rights.[257] For example, the amicus curiae in both the right to housing and the right to medical treatment decisions under the South African Constitution relied heavily on fashioning their claims into an argument for the minimum core. They asserted that, without its judicial inclusion, the new constitution's economic and social rights might become "empty rights and false promises."[258] A minimum core points to the content of the state's negative obligation to respect rights (which, unlike the positive obligations,

---

253. *General Comment No. 14*, *supra* note 10, ¶ 60 ("Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant."); *see also General Comment No. 15*, *supra* note 17, ¶ 57 (encouraging incorporation of instruments recognizing the right to water).

254. de Vos, *Essential Components*, *supra* note 12, at 24 (examining the possible core content of the right of access to adequate housing in the South African Constitution); *see also id.* at 26 (calling for "an appreciation of the interrelated and mutually enforcing nature of the concept of inherently justiciable aspects to the right on the one hand and the idea of a set of minimum core obligations on the other").

255. *E.g.*, David Marcus, *Supranational Adjudication*, *supra* note 64, at 55 (describing the perception of a lack of content and of non-justiciability as two parts of a negative feedback mechanism).

256. Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 766-67 (2003) (suggesting that "[t]he South African experience in the constitutional adjudication of social rights has profound implications for the international community at large").

257. BILCHITZ, *supra* note 9, at 179-83; Liebenberg, *Needs, Rights and Transformation*, *supra* note 106; Roux, *supra* note 12; Scott & Alston, *supra* note 7.

258. *See, e.g.*, Press Release, Community Law Centre on its Amicus Intervention, Statement on Constitutional Court Case: *Treatment Action Campaign v Minister of Health* (Apr. 30, 2002) (on file with author) (calling for the recognition of a "basic core right to the necessities of life"); *see also* Heads of Argument for Human Rights Comm'n of S. Afr. Cmty. Law Ctr. as Amici Curiae Supporting Respondents, ¶¶ 26-29, 34-36, *South Africa v Grootboom* 2001 (1) SA 46 (CC) 66 (S. Afr.) (CCT 11/00) (relying on the minimum core to substantiate the right of access to housing).

may not warrant a "progressive realisation" inquiry).[259] And, as Sandra Liebenberg has pointed out, the minimum core may also be important for its potential to reverse the onus of proof in socioeconomic claims about rights infringement, because once claimants have proved that their minimum core is not protected, it is for the state, rather than the applicant, to prove that it has taken "reasonable legislative and other measures, within its available resources, to achieve the progressive realization of th[e] right"[260] or to show that any limitation "is reasonable and justifiable."[261] In this sense, the minimum core may be instrumental in ensuring a "practical justiciability" of economic and social rights, turning a "paper right" of access to court into a practical reality.[262] Domestic justiciability makes this reversal of proof considerably more meaningful than its present (plausible, and yet contested[263]) operation in international law, given the current supervisory procedures and lack of a complaints jurisdiction.[264] In international law, the burden of proof may also be discharged by demonstrating attempts to secure international assistance, which would seem to be unavailable at the domestic level.[265]

This possibility is, of course, controversial. Many detractors suggest that the minimum core cannot resolve the justiciability challenges posed by economic and social rights, but instead will only amplify them. Because the minimum core concept suggests a substantively defined minimum content for economic and social rights, many fear that it will drastically alter the separation of powers between courts, legislatures, and government.[266] This objection rests in the long-articulated concern that if judges are allowed to adjudicate on the meaning and content of economic and social rights, they will assume greater power over setting socioeconomic policy, which they are neither competent enough to decide nor accountable enough to administer.[267]

---

259. *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC) at 91 (S. Afr.); Liebenberg, *Needs, Rights and Transformations*, *supra* note 106, at 25-29.

260. S. AFR. CONST. 1996 ss. 26(2), 27(2); *see also* Liebenberg, *Interpreting Socio-Economic Rights*, *supra* note 121, at 22-26.

261. S. AFR. CONST. 1996 s. 36; *see also* Liebenberg, *Interpreting Socio-Economic Rights*, *supra* note 121, at 26-29 (emphasizing a heightened proportionality analysis).

262. Liebenberg, *Interpreting Socio-Economic Rights*, *supra* note 121, at 21 nn.100-01 (referring to the arguments of the amicus curiae in *TAC*).

263. CRAVEN, THE INTERNATIONAL COVENANT, *supra* note 5, at 142-44 (suggesting that the Committee did not intend to create a "presumption of guilt" by adopting the language of prima facie violation, but that this is its inevitable effect).

264. For a discussion of work around the complaints procedure, see *supra* note 175.

265. *E.g.*, *General Comment No. 12*, *supra* note 33, ¶ 17; *see also* Eide, *Economic, Social and Cultural Rights as Human Rights*, *supra* note 7, at 27 (suggesting that the burden raised by the minimum core may require the state to prove that it has unsuccessfully sought international support to ensure the realization of the right); *see also Statement: Poverty and the Covenant*, *supra* note 5, ¶ 16 (affirming this possibility). One can see structural parallels with the Debt Initiative for Heavily Indebted Poor Countries Initiative, launched by the World Bank and the International Monetary Fund in 1996, and the conditional relief of debt.

266. *E.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

267. *See* Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003) (labeling this the "institutional" concern and discussing possible solutions); *see also* Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 900 (1976) (conceding, after examining a rich basis for justification, that "it may be that institutional considerations governing the relations between the judiciary and the legislative branch will forever preclude" judicial enforcement of economic and social rights).

Mark Tushnet, for example, has suggested that the minimum core concept coincides with a strong model of judicial review—requiring a large measure of scrutiny and a high level of justification in reviewing the acts of government that result in any deprivations of a strongly formulated substantive right.[268] This conception accords with the South African government's own response.[269]

According to this objection, both a predetermined and substantively defined minimum core *or* one that is conceded to be indeterminate bestow too much power and discretion on judges in reviewing the activities of government. As well as centralizing power in an unaccountable body, a constitutionalized minimum core concept empties the democratic process of its necessary content, preventing citizens from entering in to vital debates about the minimum substance of social and economic protection.[270]

As will be shown, this double-fisted objection—which presents probably the central objection to the recognition of economic and social rights in American constitutional law[271]—can be answered by translating the minimum core into the formulation of inherent justiciability. This strategy ensures that the minimum core is so "minimum" that it may have a negligible effect on the separation of powers, curtailing judicial action except in cases of extreme social and economic deprivation[272] or when only negative violations of economic and social rights are perpetrated.[273] In both cases, judicial intrusions into the democratic branches may be justified and can be carried out by traditional judicial remedies.

In focusing on the justiciability of rights alone, the approach that equates the minimum core with justiciability recalls the legal realist-inspired insights

---

268. Tushnet, *Social Welfare Rights*, *supra* note 13, at 1903-05.

269. For additional insight, see Aarthi Belani's interview with counsel for the South African Minister of Health, Marumo T. K. Moerane, in the *TAC* litigation in 2003. Aarthi Belani, *The South African Constitutional Court's Decision in* TAC*: A "Reasonable" Choice?* 36-37 n.169 (Ctr. for Human Rights & Global Justice, Working Paper No. 7, 2004), *available at* http://www.chrgj.org/publications/wp.html (follow hyperlink under 2004 working papers). The counsel considered the Constitutional Court's reasonableness standard to be a "partial victory" for the government, because it would involve less constraint than a minimum core approach. *Id.*

270. *See* SEYLA BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT 155 (1996) ("[I]f all questions of economics, human welfare, busing, anything that touches the social sphere, are to be excluded from the political scene, then I am mystified. I am left with war and speeches. But the speeches can't just be speeches. They have to be speeches about something." (citing Hanna Arendt, *On Hannah Arendt*, *in* HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 301, 316 (Melvin Hill ed., 1979) (quoting Mary McCarthy))).

271. *E.g.*, Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695 (arguing that welfare rights require "political decisionmaking by the judiciary"); Cross, *supra* note 266; *see also* Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 86-102 (pointing to the absence of any justiciable standard for determining when constitutional economic and social rights may be satisfied).

272. *E.g.*, Rodolfo Arango, *Basic Social Rights, Constitutional Justice, and Democracy*, 16 RATIO JURIS 141 (2003) (arguing for a judicial role in the correction of extreme deprivations of rights, in a compensatory mode); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 144-48, 153 (1991) (examining the protection of citizens against "abject subjection to the whims of others occasioned by extreme states of poverty" and a limited judicial role). For an explicit incorporation of urgency and the protection of survival into the core, see BILCHITZ, *supra* note 9, at 187-91.

273. *E.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 35-48 (1999).

of the legal process school, which point to the over- and underenforcement problems of rights that make it "both pointless and indeterminate"[274] to speculate about their shape and meaning because of the inevitable fact that courts or nonjudicial officials will deliver only the most useful definition according to their institutional competency. In its most exaggerated sense, the minimum core of each economic and social right is whatever is left for a court to rule on after the hoary institutional questions—mediated by the doctrines of standing, ripeness, mootness, and the political question doctrine,[275] as well as the availability of rights-respecting remedies[276]—have curtailed its ability to give expression to the right.

Not surprisingly, what is left of the minimum core may bear little resemblance to the Essence and Consensus Approaches—an outcome parallel to the effect of the core obligations issued by the Committee. The problems of justiciability (as well as the problems of remedies) so far leave very little room for courts to articulate the minimum legal threshold of economic and social rights.[277] Without reconceiving the limits of the judicial role,[278] this room is reserved only for the less controversial, "negative" (duty) formulations of economic and social rights, the adjudication of which does not risk costly remedies or intrusive demands. Again, we are returned to the hierarchy of state duties to desist or to act. Equating the minimum core content with justiciability favors the negative articulation of economic and social rights rather than holding the positive obligations to scrutiny, notwithstanding their equivalent effect on enjoyment.

Nonetheless, the narrowed entrenchment of the minimum core into purely negative, easily enforceable formulations does not necessarily occur. As we have seen, the justiciability of the obligations which flow from economic and social rights in South Africa has expanded significantly to embrace both "positive" and "negative" duties of the state.[279] This has registered most explicitly in South African cases, and yet a trend towards justiciability is even perceptible in U.S. federal courts, whereby new remedial practices are available for enforcing standards of positive provision in areas of education, mental health, and policing.[280]

---

274. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 925 (1999). Levinson advocates the strongest version of this approach.

275. *See* U.S. CONST. art. III, § 2; *see, e.g.*, Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 59 (1982).

276. *See* Levinson, *supra* note 274, at 889-99; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678-79 (1983).

277. For a seminal statement in which he entertains a new paradigm for overcoming these problems, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). *See also* Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 16, 18-28 (1979) (advancing a theory of structural reform which gives meaning to public values rather than resolving disputes).

278. For a recent extension of Chayes's insights and for ways in which to enforce obligations of "disentrenchment" on public institutions, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

279. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (affirming the state's positive duty to provide housing).

280. For an important exploration of this trend in U.S. federal courts and its potential, see Sabel & Simon, *supra* note 278, at 1022-52.

This trend is assisted by the growing discussion of the "horizontality" of rights, which may be seen to expand the state's duty to protect rights, revealing how the actions of the state may be at issue even when no "state action" is present. That is, the action of the state may be, at base, legally structuring the actions of private parties in ways that reveal its failure to comply with the duty to protect economic and social rights.[281] It marks the difference between a classical liberal constitution and a more affirmative constitution, which some argue separates the U.S. Constitution from others around the world.[282] It also invites the attention of expanded, unconventional remedies.[283] For present purposes, it suffices to indicate that the inherent justiciability of a right may include both negative and positive duties.

Yet even with a somewhat expanded recognition of justiciability, there are important reasons not to equate the definition of the minimum core to the decision rules leading to justiciability and remedies. A conceptual separation of the minimum core gives courts and tribunals the freedom to give "optimal" expressions of economic and social rights protections by adjusting justiciability or remedial doctrines rather than the meaning of the right itself.[284] Instead of being restricted to the purview of justiciability, the minimum core may overlap with the "under-enforced domain" of constitutional or human rights.[285] Such rights may be "partly aspirational, embodying ideals that do not command complete and immediate enforcement."[286] This course of action, well-theorized by Lawrence Sager, allows a constitutional rights discourse to withstand the centralizing tendencies of courts.[287] The minimum core of economic and social rights would then take its place as part of the "signposts to the neighborhood of constitutional justice,"[288] guiding the decisionmaking of nonjudicial officials and providing a litmus test for determining the government's political

---

281. *E.g.*, S. AFR. CONST. 1996 s. 8(2); Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); A.J. van der Walt, *The State's Duty to Protect Property Owners v The State's Duty to Provide Housing: Thoughts on the* Modderklip *Case*, 21 S. AFR. J. HUM. RTS. 144 (2005).

282. The textual grounding of this statement, and its potential exaggeration, is revealed by comparative study. *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (contrasting the U.S. Constitution with the German Basic Law but interrogating the interpretation of the U.S. Constitution as negative only).

283. For an experimentalist account, see Sabel & Simon, *supra* note 278, and see also Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991), for a precursor.

284. *E.g.*, Richard H. Fallon, Jr., *The Linkage between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 643 (2006) (asserting that "it will frequently be an open choice whether to make the adjustment within justiciability, substantive, or remedial law").

285. SAGER, *supra* note 167, at 84-128; *see also* DWORKIN, *supra* note 70, at 93 (distinguishing "between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution").

286. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1324-25 (2006) (extending Sager's underenforcement thesis to condone a separation of the right and its institutional articulation for nonjudicial officials as well as for courts (internal citation omitted)).

287. SAGER, *supra* note 167. For further support of constitutionalism outside of the courts, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); and JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

288. SAGER, *supra* note 167, at 146-47.

legitimacy. A second compromise, furthered by Mark Tushnet's modeling of strong and weak judicial review, is to combine the strong version of the adjudicated minimum core with a weak version of remedy.[289] The "strength" of the rights may be measured in terms of the level of review employed by the court, and the "strength" of the remedy may be measured in terms of a mandatory, time-lined, or precise order, versus a declaratory, open-ended, or negotiated one, or one subject to legislative override.[290]

C. *Unraveling Cores: The Challenge of Polycentricity*

In both the monitoring and adjudication contexts, the enumeration of the core as an expression of core obligations or justiciable complaints is ultimately unsatisfactory. Despite collecting a set of important institutional duties and challenges together, the project is prone to unravel. This is because the insurmountable problem for the notion of core obligations is that the particular forms of duties are intrinsically polycentric and cannot be subject to a definitive ranking; that is, the exercising of splitting each cluster into the constituent Hohfeldian elements, and assigning particular clusters as "core," is ultimately bound to come undone.[291]

The challenge of polycentricity is not to deny the importance of understanding the many and varied duties that flow from the recognition of economic and social rights, and of working to delineate particular institutional obligations around them.[292] It is, however, inconsistent with the project of demarcating the "core." Some commentators have argued that, in fact, duties to protect and duties to respect bear an inverse relation to each other—that is, as the duties to respect rights expand, the duty to protect must narrow. Certainly, in Henry Shue's typology, such a relationship is imagined, thus rendering the idea of "core obligations" inherently ambiguous. Shue has argued that the duties expand or contract in relation to each other—for example, the (positive) duty to protect what he terms "subsistence" broadens as the (negative) duty to respect it narrows, and vice versa. Thus, reliance on the state's "core" duty to avoid depriving economic and social rights, which would resemble the classical liberal duty of restraint of harm, would be insufficient in all but the most rights-respecting societies. Similarly, reliance on an alternative core duty to protect economic and social rights would create a vast law enforcement and police power, or at least inquire more vigorously into the actions and omissions of institutions.[293] The creation of multiple "core

---

289. Tushnet, *Social Welfare Rights*, *supra* note 13, at 1912 (suggesting, from comparative study, that the dynamics come in several forms, the most interesting being a combination of strong substantive right and weak remedy). *But see* Sturm, *supra* note 283 (introducing negotiation and other measures which complicate "strength" and "weakness" classifications).

290. TUSHNET, *supra* note 287, at 1912.

291. *See* Jeremy Waldron, *Introduction to* THEORIES OF RIGHTS 1, 10-11 (Jeremy Waldron ed., 1984).

292. The term "polycentricity" was applied to this context by Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-98 (1978), referring to a polycentric (or "many centered") problem as one unsuited to resolution by adjudication. Fuller derived the term from MICHAEL POLANYI, THE LOGIC OF LIBERTY (Liberty Fund 1998) (1951).

293. SHUE, *supra* note 78, at 60-61 (revising an earlier emphasis on negative duties by broadening the focus on institutions, instead of simple law-and-order contexts); *see also* THOMAS

obligations," as the Committee has attempted, cannot address this symbiotic relationship. Because it seeks to rank each obligation according to its correlation with the core, it cannot capture the dependence of one over the other.

Secondly, we have seen that the listing of "core obligations" may often be more about the signaling by international organizations of their own jurisdictional powers and competence. We can see parallel dynamics at work in the judicial process, with courts relying on a justiciable "core" as falling under their particular competence. The risk, in both supervisory and adjudicatory mechanisms, is that the greater the technical response to institutional competence and jurisdiction, the greater the slide of the minimum core in normative force.

V. THE CONTENT IN SEARCH OF A CONCEPT?

Neither the Essence, Consensus, nor Obligations Approaches satisfactorily conclude the search for the content of the minimum core. The Essence Approach asks the right question—why, after all, should we respect economic and social rights if we do not attach great importance to norms like survival or dignity? Yet the essentialist approach does injustice to the question, which is better posed within a more pluralist interpretative frame of "rights" rather than "minimum cores." Moreover, merely pointing to normative goals does not by itself resolve problems of validity and application. The Consensus Approach commends itself by focusing on both agreement and validity, and yet the resulting core is likewise impeded by uncertainty as to whose agreement counts. Finally, the correlation between "core" rights and "core" duties addressed in the Obligations Approach is defeated by the polycentricity of duty-holders and begs additional questions, such as who the duty-holders are and how the obligations may be grounded given present institutional strictures.

This Part examines the quest for a minimum core in reverse. Such an examination starts from the proposition that the legal ventures at stake in the concept of the minimum core—of claiming, ranking, and limiting in the area of economic and social rights—are inadequately understood. Simply reaching for the minimum core label often stands in place of this analysis. Once the challenges in these activities are explicitly addressed, the perceived need for the concept recedes, and the more relevant questions—of benchmarking, limiting, globalizing, and claiming—can be pursued. I give brief detail to each operation in turn, in order to call for a new research agenda while concluding the old.

A. *Prescribing Content: Indicators and Benchmarks*

The first goal for the emerging economic and social rights discourse is to meet the challenges of enforcement and supervision. As we have seen, the minimum core concept promises to guide the emerging and measurable

---

POGGE, WORLD POVERTY AND HUMAN RIGHTS 160 (2002) (presenting a framework of ascending institutional commitments).

content of economic and social rights in both international and constitutional fields, facilitating the operation of the "progressive . . . realization" obligation attached to each right,[294] the effect of limitations,[295] and the reversal of the burden of proof to the state which is not providing a minimum degree of material protection. The Obligations Approach runs closest to this vision, by focusing on the duties that flow from each right, but it ultimately comes undone by its inability to account for the multiple obligations that necessarily correlate to each right.

I argue that instead of demarcating different rights and obligations as "core" and "non-core," the Committee and the courts are better equipped to supervise and enforce the (predominantly) positive obligations attached to economic and social rights by using indicators and benchmarks and the (predominantly) negative obligations by an assessment of state responsibility and causality.[296] Indicators usually refer to a set of statistics which "indicate" phenomena that are not directly measurable and may be based on either quantitative or qualitative information, as long as it can be consistently measured over time.[297] Indicators may invite crossnational comparisons but may also take a deliberately self-referential character.[298] Benchmarks are goals or targets set according to the differing situations of each country and are sometimes referred to as "minimum thresholds."[299] Thus, in an important respect, they do not "rank" rights so much as prioritize different temporal targets for an evolving rights protection to meet.

Attention to indicators and benchmarks is not new. Indeed, both are central to the Committee's practice. Through a practice of "scoping"—which involves both the state under review and the Committee—the Committee designates adjustable targets for each state party to achieve by the next reporting period.[300] Importantly, the level of economic resources within a state is not the only factor relevant to setting the benchmark.[301] Like the parallel

---

294. S. AFR. CONST. 1996 ss. 26-27; Covenant, *supra* note 19, art. 2(1). Sections 26 (housing) and 27 (healthcare, food, water, and social security) both stipulate the right in Subsection 1, and set out its implementation in Subsection 2, with the following provision: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." S. AFR. CONST. 1996 ss. 26-27.

295. S. AFR. CONST. 1996 s. 36; *see also* S. AFR. CONST. 1996 s. 7(3) (identifying the rights in the Bill of Rights as subject to constitutional limitation); Iles, *supra* note 40, at 452, 455-63 (investigating the relationship between Section 36 and the "internal limitations" clauses of the economic and social rights provisions—that is, sections 26(2) and 27(2), which reduce the ambit of sections 26(1) and 27(1) respectively); *supra* note 60 and accompanying text (pointing out the historical links between the core concept and limitations in German constitutional law).

296. An example of this type of analysis is undertaken in *General Comment No. 7* on forced evictions. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions*, supp. 2, Annex IV, U.N. Doc. E/1998/2 (1998).

297. For an attempt to distill a single definition of "indicators," see Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1076-77 (2001).

298. Katarina Tomaševski, *Indicators*, *in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 4, at 531, 542.

299. Green, *supra* note 297, at 1080.

300. *E.g.*, *General Comment No. 15*, *supra* note 17, ¶ 54; *General Comment No. 14*, *supra* note 10, ¶ 58; Riedel, *supra* note 176, at 356. Eibe Riedel has been a member of the Committee since 1997.

301. See Alicia Ely Yamin, *Reflections on Defining, Understanding and Measuring Poverty in Terms of Violations of Economic and Social Rights Under International Law*, 4 GEO. J. ON FIGHTING POVERTY 273, 300 (1997) for a critique of Robert Robertson, *Measuring State Compliance with the*

measures taken for the Human Development Index of the Human Development Reports (and their extension), [302] other indicators, such as what is needed to maximize human capabilities, are relevant.

Many commentators suggest that this latter inquiry may be helped by a clearer definition of the minimum core of each right. [303] As early as 1990, the Special Rapporteur on Economic, Social and Cultural Rights called for "indicators [to] . . . assist in the development of the 'core contents.'" [304] A special meeting of experts in 1993 concluded that indicators relied first on a clarified content of the rights and obligations. [305] Yet might these observers be mistaken? While there is, of course, an important relationship between the underlying norms that guide the formulation of indicators and their adherence to rights, what is needed to guide this assessment may be a more open formulation of rights, rather than the fixed and narrow parameters of the minimum core. A brief comment about how indicators work in practice suggests how this might be so.

The use of indicators and benchmarks is complex. By presenting a veneer of objectivity and by allowing measures to become the ends rather than the means of rights fulfillment, indicators, and benchmarks—or, at least, their fixed or uncritical usage—can flout the substantive promise of human rights. [306] They are most effective at confronting this possibility when they are set within a participatory process and when they articulate clear connections with rights expressed as "dynamic and constantly changing" [307] standards rather than absolute concepts. This approach demands "an open accounting of where judgment lies, why it has been located there, and upon what evidence it is based." [308] It is furthered by openness—and revisability—in the interpretation of rights.

Of course, completely open-ended norms perpetuate the image of economic and social rights as vague and imprecise. Nonetheless, once it is acknowledged that all rights are open to contestation, such a criticism should

---

Obligation to Devote "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights, 16 HUM. RTS. Q. 693 (1994).

302. *See* Mahbub ul Haq, *The Birth of the Human Development Index*, *in* READINGS IN HUMAN DEVELOPMENT: CONCEPTS, MEASURES AND POLICIES FOR A DEVELOPMENT PARADIGM 103 (Sakiko Fukuda-Parr & A.K. Shiva Kumar eds., 2003) [hereinafter READINGS IN HUMAN DEVELOPMENT] and other articles in the collection.

303. *E.g.*, Yamin, *supra* note 301, at 300 (contrasting the goal of human capabilities with that of particular bundles of commodities).

304. U.N. Econ. & Soc. Council [ECOSOC], *Realization of Economic, Social and Cultural Rights*, ¶ 7, U.N. Doc. E/CN.4/Sub.2/1990/19 (July 6, 1990) (*prepared by* Danilo Türk) ("[I]ndicators can . . . assist in the development of the 'core contents' of some of the less developed rights in this domain, and can provide a basis from which a 'minimum threshold approach' can be developed.").

305. *See* World Conference on Human Rights, *Report on Other Meetings and Activities*, ¶ 153, U.N. Doc. A/CONF.157/PC/73, (Apr. 20, 1993) ("[T]he seminar concluded that the first priority was to identify and clarify the content of the various rights and obligations. Only then would it be possible to identify the most appropriate way to assess progressive achievement, which may or may not involve the use of statistical indicators.").

306. Annjanette Rosga & Margaret Satterthwaite, The Trust in Indicators: Trying to Measure Human Rights 21, 24-25, 27 (Mar. 17, 2007) (unpublished manuscript, on file with author).

307. RAMON C. CASIPLE, EMERGING FRAMEWORK AND APPROACHES IN DETERMINING ESC RIGHTS' STANDARDS AND INDICATORS: A PHILIPPINE GRASSROOTS EXPERIENCE (2000), http://www.portal-stat.admin.ch/iaos2000/casiple_final_paper.doc; *see also* Rosga & Satterthwaite, *supra* note 306, at 27.

308. Rosga & Sattherthwaite, *supra* note 306, at 30.

not distract from the efforts to set indicators and benchmarks. While these technical measures inescapably require norms in the first place (a point made clear by the differences between rights-based and development indicators), there is reason to doubt that the "minimum core" is the best expression of what those rights are. The articulation of the right that admits of its own openness is more able to ground a meaningful—and perhaps more "trustworthy"[309]—indicator for local and international monitoring.

Just as indicators and benchmarks are important for the international legal field, they also play a role in the constitutional field. This approach may suggest different standards for different subunits (for example, city or rural areas). Standards which rely on open normative criteria can then be ratcheted up or bootstrapped in a wider national effort of coordination.[310] Here, bootstrapping and benchmarking single out an approach to regulation, which is oriented to information gathering and learning, and which is more compatible with the flexibility and tailoring required for a social provision. While a fuller exploration of this "experimentalist" program is beyond the scope of this Article, it is worth noting that it contains important clues as to how a framing ideal of economic and social rights may be a guide to, and a prompt for, more contextual elaborations.[311]

B. *Justifying Limits: The Move to Balancing*

The second activity for the minimum core is to set the level required to justify an infringement of economic and social rights. For those advocating the nonderogability of the minimum core, the level of justification is impossible to meet.[312] For others (common to the constitutional field), derogation is justified on strict criteria, but this does not necessarily include budgetary considerations. Of the three approaches, the Essence Approach is most suited to policing the "limits of limits."[313] This is because it installs a deliberate incommensurability between what belongs to the reason-based, deontological core, and what may be assailed at the periphery.[314] Thus, the

---

309. *Id.*

310. *See* Sabel & Simon, *supra* note 278. For a review of this widespread movement in Europe, see, for example, TONY ATKINSON, BEA CANTILLON, ERIC MARLIER & BRIAN NOLAN, SOCIAL INDICATORS: THE EU AND SOCIAL INCLUSION (2002) (describing the setting of common objectives and the design of national policies and reporting procedures within the open method of coordination).

311. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 339 (1998) (describing a project of "democratic experimentalism," whereby "change may proceed by bootstrapping, as local incrementalism leads to complementary reforms at higher levels"); *see also id.* at 345-47 (noting the ability of agencies to "break [the] cycle" of governments in a federal system unable to learn from each other, according to a range of different purposes).

312. Non-derogability is used in its conventional sense, which establishes an absolute obligation. *See, e.g.*, *General Comment No. 14*, *supra* note 10, ¶ 47; *Statement: Poverty and the Covenant*, *supra* note 5, ¶ 18 ("[B]ecause core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster.").

313. *See* Örücü, *supra* note 59, at 45-53.

314. This is a slight distortion of Dworkin's distinction between policy (which may invite the balancing of competing interests) and principle-based analysis (which precludes interest-balancing tests). *See* DWORKIN, *supra* note 70, at 82-84, 297-99; Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90

core contains the incommensurable values which always trump other considerations except in catastrophic instances; the periphery remains susceptible to limitation by considerations of economic or social policy.[315]

While this intransigence is arguably the concept's most significant contribution—enabling rights advocates to put aside the costs and benefits of economic analysis and its focus on efficiency in order to ensure minimal material protections—it is, according to many of its critics, its weakest attribute. For these opponents, the only chance of success for taking economic and social rights seriously comes about not by introducing the false barrier of incommensurability, but by emphasizing the cost considerations that go into all rights.[316] In this view, rights do not lose their strength if they include social and economic considerations in their very definition, but become manageable tools for balancing different, and oftentimes differently weighted, considerations.[317]

Whether a core formulation meets the halfway point between outright trumping and an informed balancing by abandoning the incommensurability of the full right while retaining a minimalist commitment depends upon our ability to establish a definite minimal content. And as I have argued, the Essence Approach is not able to establish this because of its inability to accommodate disagreement.

This theoretical conundrum is reflected in practice. For example, the interim South African Constitution, like the German Basic Law, which indirectly gave rise to the concept, commanded that a limitation not "negate the essential content of the right in question."[318] After uncertainty reigned on how to apply this provision,[319] the certified constitution dispensed with its "essential content" caveat. Like many other courts around the world, the South African Constitutional Court has adopted the formula of balancing and proportionality to justify limitations.[320] This occurs not at the level of the right itself, but rather at the level of balancing, which admits utilitarian considerations.

The revision of this clause has not prevented commentators from suggesting a relationship between the minimum core concept and the

---

COLUM. L. REV. 2121, 2148-50 (1990) (presenting a hierarchy behind incommensurability and pointing to criticisms).

315. Frederick Schauer, *Commensurability and its Constitutional Consequences*, 45 HASTINGS L.J. 785, 792 (1994) (noting that those who view individual rights as absolutist claims against the interests of the majority appear to rely on an incommensurability of values).

316. HOLMES & SUNSTEIN, *supra* note 273, at 99. For a criticism, see Jonathan M. Barnett, *Rights, Costs, and the Incommensurability Problem*, 86 VA. L. REV. 1303, 1323-27 (2000).

317. For a translation of constitutional rights norms into "optimization requirements," see ALEXY, *supra* note 118, at 47-48.

318. S. AFR. (Interim) CONST. 1993 s. 33.

319. These challenges were recognized by the South African Constitutional Court in the context of the right to life. *S v Makwanyane* 1995 (3) SA 391 (CC) at 446 (S. Afr.) ("It seems to have entered constitutional law through the provisions of the German Constitution . . . . The difficulty of interpretation arises from the uncertainty as to what the 'essential content' of a right is, and how it is to be determined."). The Constitutional Court noted that the core formulation was also included in the Namibian and Hungarian constitutions. *Id.*

320. For the leading examination, see *id.* at 436, which sets out a test under the limitations clause (s. 33) of the Interim Constitution, which is said to apply with equal force to S. AFR. CONST. 1996 s. 36. *See* IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 177, 178-85 (5th ed., 2005).

proportionality-based limitations clause.[321] For example, the South African Constitution, like the Covenant, prevents limitations from interfering with the "nature of the right."[322] Yet it is more correctly perceived that the language of rights already heightens the normative protection that the interest is due and is subject to balancing only afterwards.

Consider the example from the first case raising the right to health adjudicated in South Africa.[323] Mr. Soobramoney was a forty-one-year-old man suffering from chronic renal failure. Because he was diabetic and suffering from other medical conditions, he did not qualify for a kidney transplant; nor did he qualify for renal dialysis from the public hospital. He argued that his constitutional right to health required the state to provide him with dialysis.[324] This claim was rejected by the South African Constitutional Court, which reasoned that the excessive cost of dialysis was not a reasonable burden for the state to bear. As Karin Lehmann has argued, from the perspective of the rights-holder, the decision to deny medical treatment was not because his interest belonged at the periphery of his right to health. Rather, it was made on the basis of the general welfare. In comparing Mr. Soobramoney's request with a differently situated patient in need of dialysis, "[t]heir subjective interest in receiving treatment is identical. The considerations that inform the decision as to which one of them will have their right realized is external to their subjective interest. It is entirely utilitarian."[325] This decision, therefore, constitutes a state limitation of the right that the court deemed a justifiable infringement.[326]

Balancing is not arbitrary. As Robert Alexy has theorized, balancing can be subject to its own discipline, which may protect the substance of rights far more than building a firewall ex ante. Like the resources that they purport to protect, rights are also subject to the law of diminishing marginal utility: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."[327] Without examining the balancing exercise in detail here, it is important to draw attention to the fact that the range of constitutions around the world which protect economic

---

321. *See* Iles, *supra* note 40, at 458 ("If there were a minimum core concept in our socioeconomic rights jurisprudence, s 36 [the general limitations clause] would have a meaningful role to play in justifying failures by the state to deliver this minimum core. The internal limitations would serve to justify failures to expand on the minimum core."); *see also* Heads of Argument for Human Rights Comm'n of S. Afr. Cmty. Law Ctr. as Amici Curiae Supporting Respondents, *supra* note 258, ¶¶ 36, 84-86 (pointing out a potentially illuminating relationship between an implied minimum core and the general limitations clause, with reference to *General Comment No. 3*, *supra* note 1).

322. S. AFR. CONST. 1996 s. 36(1)(c); Covenant, *supra* note 19, art. 4. For a suggestion of the link between Article 4, the prohibition on conflicting with the nature of a right, and "core content," see Coomans, *In Search of the Core Content of the Right to Education*, *supra* note 7, at 166.

323. *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at 771-72 (S. Afr.).

324. *Id.* at 774. Soobramoney's arguments are based upon Section 27(3), which states that "[n]o one may be refused emergency medical treatment," Section 27(1), which provides that "[e]veryone has the right to have access to . . . health care services." Both arguments failed. *See* S. AFR. CONST. 1996 ss. 27(3), 27(1).

325. Lehmann, *supra* note 6, at 190.

326. *See* S. AFR. CONST. 1996 s. 36.

327. ALEXY, *supra* note 118, at 102.

and social rights (mainly those ratified after 1945),[328] also contain similarly worded limitations clauses, which allow for proportionality reasoning.

C. *Signaling Extraterritoriality: The Globalist Challenge*

Extraterritoriality is implied by the Committee's assertion that the minimum core may give rise to "national responsibilities for all States and international responsibilities for developed States, as well as others that are 'in a position to assist.'"[329] This statement catapults the operation of the minimum core outside of the supervision of national systems of socioeconomic organization and into the supervision of states' individual (and collective) activities in the international arena. Yet the minimum core designation obscures the harder questions of causality and liability that operate in this area. Rather than simply attesting to a minimum core, research in this area is more productively addressed to questions of institutional responsibility, cooperation, or interdependence.[330] The minimum core cannot do this work itself—the Consensus Approach comes closest to attempting this, but flounders on the need for norms outside of consensus.[331]

The Committee has so far pursued several credible analyses of extraterritoriality. For example, in its General Comment on Economic Sanctions in 1997, the Committee positioned the minimum core as the litmus test for the extraterritorial violations arising from states' collective security decisions.[332] It drew parallels between civil and political rights, and economic and social rights, asserting that "[j]ust as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that [targeted] State."[333] The Committee was thereby drawing the causal link between the policies of economic sanctions pursued collectively by states and the material deprivations experienced by citizens of other states. While here is not the place to embark on the analysis of this connection, and the challenges of implementation that it raises,[334] it is nevertheless an example of the minimum core serving as a proxy for negative liability, which could probably arise independently of the minimum core.[335]

---

328. *See supra* note 53.

329. *Statement: Poverty and the Covenant*, *supra* note 5, ¶ 16.

330. *See, e.g.*, Cohen & Sabel, *supra* note 52.

331. *See supra* Part III.

332. *General Comment No. 8*, *supra* note 36, ¶ 7.

333. *Id.*

334. Narula, *supra* note 238, at 786 (noting that, despite the scandal surrounding the U.N. Oil-for-Food program, which operated in Iraq between 1996 and 2003 and which was marked by corruption, the existence of the program itself supports the exceptions for food importation during economic sanctions); *see also* Matthew Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION, *supra* note 29, at 71, 75 (noting the difficulties in assigning legal responsibility for deprivation when the sanctioning state exercised no formal jurisdiction or control over the population concerned).

335. *See also* Craven, *The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION, *supra* note 29, at 77; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory

In the area of aid and development, the Committee has suggested that "core obligations establish an international minimum threshold that all developmental policies should be designed to respect . . . . If a national or international antipoverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party."[336] Supportive of this enterprise, although lacking its deontological character, is the expansion of the development project beyond the measurement of aggregate economic growth into the indices of "human development"[337] and the "millennium development goals,"[338] thus contributing both measurement and motivation to a minimum standard for all countries to follow. Here again, the institutional obligations are an underexplored area of focus. Obligations arise with respect to states' membership in international financial institutions, such as the International Monetary Fund, the World Bank, and regional banks,[339] as well as the United Nations agencies themselves[340]—along with the way that economic and social rights are taken into account in states' unilateral lending or aid policies. This is, of course, a contentious issue—the Committee's suggestion that extraterritoriality is legally, rather than morally, imposed (a position also taken by the U.N. Commission's Special Rapporteur on the Right to Food)[341] has been disputed by states, markedly the United States.[342]

Extraterritoriality is probably most contentious in the collectively endorsed regime of global trade.[343] For its supporters, the minimum core is supposed to delineate a minimally protected sphere into which economic self-interest cannot penetrate. Here, causality is most controversial, given the variety of actors in the international trade regime, including transnational corporations and international agencies. The demarcation of economic and

---

Opinion, 2004 I.C.J. 136, at 180 (July 9) (suggesting that the Covenant applies to Israel's occupation in the West Bank).

336. *Statement: Poverty and the Covenant*, *supra* note 5, ¶ 17; *see also General Comment No. 14*, *supra* note 17, ¶¶ 39-40, 45 (describing international obligations flowing from the right to health for states with respect to their membership of international organizations, international financial institutions, and coordinated disaster relief measures and noting states' obligations to provide international assistance and cooperation); *General Comment No. 15*, *supra* note 17, ¶ 38 (repeating states' obligations to provide international assistance and cooperation with respect to the right to water).

337. *See, e.g.*, READINGS IN HUMAN DEVELOPMENT, *supra* note 302.

338. *See* MDGs, *supra* note 28. The Committee itself has referenced the commitments of the MDGs. *See, e.g.*, *General Comment No. 15*, *supra* note 17, ¶ 54 (linking national benchmarks on the right to water to the indicators adopted in the Millennium Declaration based on States' commitment to halve, by 2015, the proportion of people who are unable to reach or to afford safe drinking water).

339. *E.g.*, *General Comment No. 12*, ¶ 41, *supra* note 33; *General Comment No. 15*, *supra* note 17, ¶ 36 (linking the IFI's to the states themselves).

340. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 2: International Technical Assistance Measures*, ¶ 9, U.N. Doc. E/1990/23 (1994).

341. *See* U.N. Econ. & Soc. Council [ECOSOC], *Report of the Special Rapporteur on the Right to Food*, U.N. Doc. E/CN.4/2006/44 (Mar. 16, 2006) (*prepared by* Jean Ziegler).

342. See U.N. Comm'n on Human Rights, 60th Sess., 51st mtg., at 16 U.N. Doc. E/CN.4/2004/SR.51(Apr. 16, 2004), where U.S. Representative Richard S. Williamson suggested that the Special Rapporteur should be chastised for his "irresponsible and unfounded statements."

343. *See, e.g.*, *General Comment No. 12*, *supra* note 33, ¶ 20; ECOSOC, Right to Health, *supra* note 240.

social rights and obligations in the area of trade is as complex[344] as it is urgent.[345] Yet, it is not clear that the concept of the minimum core assists us any better than the general language of economic and social rights, and the analysis of the obligations they might entail.[346]

D. *Making Claims: A Word on Language*

If the minimum core is unable to assist in the difficult challenges of prescribing rights or of ranking obligations, its intuitive appeal may reside elsewhere. Do advocates of the minimum core (and, as noted by one South African commentator, "[m]ost human rights scholars are minimum core campaigners")[347] perceive something that these analytics miss? Does the concept retain a hold on our normative imaginations that we should be wary to discard?

These remarks on language follow the intuition that there is much to be gained from a concept that directs attention and priority in the area of economic and social rights to those groups most marginalized, vulnerable, and subject to the greatest level of material disadvantage. This applies to both international and national planes of legal decisionmaking. And yet this intuition points to a different intellectual strategy than that raised by the other activities. Rather than attempting to reconcile the minimum core concept with settled foundations, a new research agenda may assess its potential instrumentally and critically. In one sense, this move is in keeping with the wider project of instrumentalizing the vocabularies of social justice, with all of its attendant dangers and opportunities.[348] In other, more aesthetic terms, this strategy departs from the search for the "rhetoric of order" behind the claims of the core of economic and social rights, but instead seeks to assess the concept as an "energy source," one that might inspire or motivate change or reform.[349] We are no longer within the "rigorously charted moral space of

---

344. Andras Sajo, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U. J. INT'L L. & POL. 221, 250 (2002) (suggesting but dismissing in the present environment the possibility of legal obligations, but recognizing the "intellectual challenge" presented); *cf.* Thomas Pogge, *Introduction*, *in* FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 1, 6 (Thomas Pogge ed., 2007).

345. *E.g.*, ROBERT HOWSE & MAKAU MUTUA, INT'L CTR. FOR HUMAN RIGHTS & DEMOCRATIC DEV., PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000), http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html (examining legal obligations to respect human rights in trade and investment agreements).

346. Research into the relevant legal responsibilities have inspired a range of "linkages" studies. *E.g.*, Joel P. Trachtman, *Legal Aspects of a Poverty Agenda at the WTO: Trade Law and "Global Apartheid,"* 6 J. INT'L ECON. L. 3 (2003) (canvassing liberalization and redistribution as measures that are both within the institutional reach of the WTO); *cf.* Robert Wai, *Countering, Branding, Dealing: Using Social Rights in and around the International Trade Regime*, 14 EUR. J. INT'L L. 35 (2003).

347. Lehmann, *supra* note 6, at 180.

348. *E.g.*, FRASER & HONNETH, RECOGNITION OR REDISTRIBUTION, *supra* note 26; *see also* Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and The Incorporation Of The Social*, 26 MICH. J. INT'L L. 199, 241 (2004) ("in second generation reforms, human rights are better understood not as the answer to the social deficit but as the terrain of struggle").

349. Pierre Schlag, *Rights in the Postmodern Condition*, *in* LEGAL RIGHTS, *supra* note 76, at 263, 264.

the analytical philosophers"[350] that the Essence Approach most fully recalls, nor do we rely on the positivist toolkit of the Consensus Approach or the institutionalist insights of Obligations. Instead, we must adopt instrumental, motion-oriented metaphors to investigate this claim.

Such analysis may invite a different prospect and a different politics for the minimum core concept. It is not one that can prescribe a more determinate formula for the Committee, for supranational tribunals and constitutional courts, or socioeconomic policy makers. Instead, it assesses whether the minimum core concept might catalyze claims and broach new alliances by drawing attention to the expressive and symbolic features of the minimum core idea. It recognizes that the language deployed in claims of material distribution or redistribution—discourses involving poverty, material need, and the statistics of available GDP—has profound political consequences. In other words, even if a concept has an admirable legal pedigree or a recognizable institutional operation, it is still meaningful to investigate how it structures the discourse around the redistributions in question. Theorists of the welfare state, in the United States and elsewhere, have long sought to expose the damaging moral and political work done by the words used to describe the condition of "the poor." Key words like "dependency,"[351] (especially in the United States) have focused attention on a perceived lack of self-reliance and self-control on behalf of certain groups. Labels like "pauper" have sought to separate able-bodied people from the disabled, sick, and elderly. Indeed, in every needs-based program, advocates and detractors alike have drawn distinctions between the deserving and the undeserving poor.[352] Such distinctions stigmatize the claimants in classifications which are at odds with the notion of rights. This stigma sounds in a failure to shore up political support for economic and social rights, and indeed, is at the base of political backlash against them.[353]

It is thus necessary to investigate whether the core and non-core distinctions of economic and social rights simply repeat these categorizations. The fact that the concept seeks to set universal entitlements for every individual based on the theory of rights apparently distinguishes it from merits-based classifications—by adopting "targeting within universalism" and "helping the poor by not talking about them"[354] as long-term, politically nuanced policy strategies. But I believe that it is necessary to investigate whether the minimum core language also manages somehow to smuggle the desert-based classifications back in. It becomes necessary to examine, for

---

350. *Id.* at 264.

351. *See* Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS: J. OF WOMEN & CULTURE IN SOC'Y 309 (1994).

352. MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 8 (1989) (describing how American political discourse on poverty "slipped easily, unreflectively, into a language of family, race, and culture rather than inequality, power, and exploitation"); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

353. FRASER & HONNETH, RECOGNITION OR REDISTRIBUTION, *supra* note 26.

354. Theda Skocpol, *Targeting with Universalism: Politically Viable Policies to Combat Poverty in the United States*, *in* THE URBAN UNDERCLASS 411, 427 (Christopher Jencks & Paul E. Peterson eds., 1991) (proposing targeting within universalism).

example, the ideological work done by the survival-based or dignity-based investigations in the Essence Approach.[355]

Secondly, this attention to language must examine how, in particular contexts, the concept may confront the dominant discourses of material redistribution. Does the minimum core run counter to the privatization, deregulation, and liberalization discourses, which work both to undermine and to depoliticize the guarantee of a minimally protected economic and social right? By setting up an explicit incommensurability with economic vocabularies, the Essence Approach of the minimum core concept has the most potential to confront the assumptions of neoliberalism.[356] However, its operation may produce, in some contexts, entirely the opposite effect. This is because the minimalist focus within the core may well legitimate neoliberalism, especially if the claim for the minimum core is made in order to increase the bundles of commodities or consumption share of the disadvantaged, while failing to challenge the underlying economic institutions which have produced the disadvantage in the first place. For example, as Nancy Fraser has shown, the effect of a minimum wage guarantee in a neoliberal regime might be to subsidize (if indirectly) the employers of low-wage, temporary labor and possibly act to depress all wages. In a social democratic regime, in contrast, the guaranteed minimum might alter the balance of power between capital and labor and provide a long-term resistance to the commodification of labor power.[357] This type of analysis is needed before we simply align our intuitive support for language of the minimum core with our support for those suffering the greatest material deprivation.

VI. CONCLUSION

This Article has shown that the Essence, Consensus, and Obligations Approaches to the minimum core provide it with a paradoxical grounding. To restate, the Essence Approach fails to deliver a determinate "core" to economic and social rights because of the inevitability of disagreement in the ordering of both values and needs, and because it is disengaged with the institutional background that impacts how legal rights are realized and enforced. While the normative inquiry—and especially the focus on dignity—is helpful in charting the substantive content of rights, it misfires when placed within the minimalist and rigid "core" formulation. The Consensus Approach seeks to remove these shortcomings, yet produces only a vague and conservatively articulated "core," which conceals the troubling question of whose consensus counts and whose consensus (and disagreement) is peripheral. The Obligations Approach is incompatible with a "core" designation, due to the polycentric obligations that correlate with each economic and social right, the relativity between their "negative" and

355. Liebenberg, *Needs, Rights and Transformation*, *supra* note 106, at 35 (celebrating "the manner in which Mokgoro J in *Khosa* subverts the normal discourse around social assistance creating dependency on the State by highlighting its role in relieving the burden on poor communities and fostering the dignity of permanent residents").

356. Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701 (2004) (suggesting that economic and social rights can directly challenge neoclassical economics).

357. *See* FRASER & HONNETH, RECOGNITION OR REDISTRIBUTION, *supra* note 26, at 78.

"positive" formulations, and the danger of capture into vocabularies of institutional jurisdiction or justiciability.

The virtue of disaggregating these approaches lies in understanding the root of the conceptual confusion. The resulting clarity helps us to distill several competing operations for the concept: in prescribing content, ranking obligations, signaling extraterritoriality, and introducing a new language of claiming. Many of these operations are not, in the end, suited to the concept of the minimum core. First, positive obligations often rely on benchmarks to become operational and negative obligations often raise questions of state action and responsibility. The substance of both is informed by a rigorous interpretation of rights, not cores, and thus to the interests that are important to shield from politics or cost-benefit analysis. Second, limitations on rights are likewise made permissible by the exercise of balancing, rather than by minimizing on the interpretation. Third, challenges of extraterritoriality raise the same questions of obligations and their negative and positive implications, but these are made more complex by the additional difficult questions of causality, mutual interdependence, or responsibility outside of the statist frame. And finally, the language of rights claiming matters—it requires critical analysis, rather than mere acceptance, especially when misrecognition and stigma are so quick to accompany the claims of the poor. It is these operations that are obscured by the minimum core concept and warrant the attention—and the ambition—of advocates of economic and social rights. Their future answers will be important indeed.