The Full Realization of Our Rights: The Right to Health in State Constitutions

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THE FULL REALIZATION OF OUR RIGHTS: THE RIGHT TO HEALTH IN STATE CONSTITUTIONS

Cynthia Soohoo† & Jordan Goldberg‡

State constitutions... are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

—Justice William J. Brennan†

It is arguable that [the] debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable—there is now too much evidence to the contrary.

—Malcolm Langford‡

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INTRODUCTION

Although the U.S. legal community has historically viewed socio-economic rights with skepticism, there is substantial popular support for these rights. Eighty-two percent of Americans strongly believe that there should be “equal access to quality public education” and seventy-two percent of Americans strongly believe that health care should be considered a human right. Many Americans are surprised to hear that these rights have not been recognized as guaranteed by the U.S. Constitution, but they need look no further than state constitutions to find them. All state constitutions contain provisions for public education, and almost a third of state constitutions reference public health. Despite inclusion in a surprising number of state constitutions, with the exception of cases grappling with state constitutional rights to education, state socio-economic rights provisions remain dramatically under-enforced. In contrast, outside of the United States, there are a growing number of cases in which courts are enforcing socio-economic rights provisions. This Article focuses on reproductive health law and policy as an area in which state governments have both failed to affirmatively promote the right to health and improperly imposed barriers to prevent women from accessing reproductive health care, both potentially in violation of their own state constitutional obligations. Further, it considers how courts seeking to enforce right-to-health provisions in state constitutions could benefit from examining the comparative experiences of state courts and the high courts of other countries that have enforced similar socio-economic rights provisions.

The failure of state courts to enforce socio-economic rights provisions can be traced a reluctance to enforce state constitutional

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4 This Article addresses the potential for enforcing social and economic rights that are contained in some state constitutions and does not address whether the United States Constitution should be interpreted as protecting similar rights. However, several scholars have raised whether the United States Constitution should be interpreted, or has implicitly been interpreted, to contain such guarantees. See, e.g., Cass R. Sunstein, Why Does the American Constitution Lack Social and Economic Guarantees?, 56 SYRACUSE L. REV. 1, 5 (2005) [hereinafter Sunstein, Social and Economic Guarantees]; B. Jessie Hill, Reproductive Rights as Health Care Rights, 18 COLUM. J. GENDER & L. 501, 503 (2009).


rights where there is no clear federal analogue. State courts have also expressed concern that enforcement of socio-economic rights would improperly entangle courts in political questions that are better left to the political branches. The prioritization of civil and political rights (which generally coincide with our federal constitutional rights) over socio-economic rights and the perception that socio-economic rights are unenforceable reflect broader historical attitudes about socio-economic rights.

Despite full recognition of socio-economic rights in the Universal Declaration of Human Rights in 1948, the “post-World War II human rights architecture gave short shrift” to their enforcement. Legal scholars and commentators associated “civil and political” rights with restraints on government action and “socio-economic” rights with prescriptions for government action. Based on this distinction, civil and political rights were deemed a proper subject for judicial intervention, and socio-economic rights were viewed as unenforceable. Internationally, however, this perception of socio-economic rights is rapidly changing.

Over the past two decades, there has been a dramatic increase in socio-economic rights cases around the world. These cases have begun to establish a methodology for enforcing socio-economic rights. Courts have recognized that governments have a negative obligation to respect socio-economic rights and have developed criteria for determining whether governments are fulfilling affirmative duties to progressively realize rights. Interpreting a newly minted post-apartheid constitution that explicitly and unequivocally endorses socio-economic rights, the South African Constitutional Court has emerged as a leader in this developing

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8 Langford, supra note 2, at 7.
9 See Brian Ray, Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights, 45 STAN. J. INT’L LAW 151, 151 (2009); Sunstein, Social and Economic Guarantees, supra note 4, at 5.
10 See Michael J. Dennis & David P Steward, 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 AM. J. INT’L L. 462, 465 (2004) (“From the outset, and for good reason, economic, social and cultural rights, unlike civil and political rights, have been defined primarily as aspirational goals to be achieved progressively.”).
11 A recent book edited by Malcolm Langford includes “almost two thousand judicial and quasi-judicial decisions from twenty-nine national and international jurisdictions.” Langford, supra note 2, at 3.
12 Id. at 14–17 (describing cases involving state interference with socio-economic rights); id. at 22–24 (describing cases concerning the state obligation to progressively realize socio-economic rights).
jurisprudence. Its cases address many of the conceptual criticisms that have plagued socio-economic rights enforcement, including concerns about separation of powers, institutional competence and judicial enforcement.

In addition to the conceptual challenge of changing attitudes about socio-economic rights, state courts seeking to enforce these provisions face a practical challenge of developing the appropriate standard of judicial review. It is common practice for state courts to look to federal courts for guidance in enforcing state constitutional rights. However, the lack of socio-economic rights provisions in the federal Constitution leaves state courts with the choice of adopting the federal rational basis review standard, declining to enforce the socio-economic provisions, or striking out on their own. Given the textual differences between the state and federal Constitutions, we argue that developing distinct state socio-economic rights jurisprudence is the most appropriate choice.

State constitutions are very different from the federal Constitution. They have different histories and framers and grant a broader scope of power to state governments. State constitutions often reflect different, more local values than the federal Constitution and may have been influenced by different political ideas when they were drafted and amended. Although our contemporary understanding of the federal Constitution has evolved over time, the U.S. Constitution is the oldest federal constitution in existence. Dating back to 1787, it was written long before the progressive social movements of the late nineteenth and early twentieth centuries, as well as the international human rights movement in the 1940s. While some state constitutions predate the federal Constitution, others were drafted as late as 1968, and

14 See Philip Alston, Foreword to SOCIAL RIGHTS JURISPRUDENCE, supra note 2, at ix, ix (discussing the dominance of the South African Constitutional Court in the field of comparative constitutional law).
15 See id.
16 See, e.g., State v. Anderson, 295 Conn. 1, 988 A.2d 276 (Conn. 2010) (noting that “[t]he protection afforded against double jeopardy under the Connecticut constitution ‘mirrors, rather than exceeds,’ that which is provided by the constitution of the United States” despite lack of parallel language (quoting State v. Michael J., 875 A.2d 510 (Conn. 2005))); Adaway v. State, 902 So. 2d 746, 752 (Fla. 2005) (holding that while language of Florida Constitution’s provision prohibiting “cruel and unusual punishment” was arguably broader than federal constitution, there was no need to go further than the federal analysis in this case); State v. Johnson, 316 S.W.3d 390, 395 (Mo. App. 2010) (“While the Missouri Constitution may extend protections farther than those provided by the United States Constitution, such is not the case with respect to searches and seizures, for article I, section 15 of the Missouri Constitution is parallel to and co-extensive with the Fourth Amendment.”).
many have been amended multiple times. Some states even drafted their constitutions in the shadow of the Universal Declaration of Human Rights and looked to the declaration for guidance and inspiration.

Given these differences, the explicit inclusion of socio-economic rights in some state constitutions, and the lack of federal analogue for these rights, state courts interpreting these types of provisions need to look beyond federal models for enforcing state constitutional rights. Some state courts have made significant progress in this area, particularly in the enforcement of state right-to-education provisions. However, state courts struggling to interpret and enforce these provisions could find the burgeoning global jurisprudence concerning enforcement of socio-economic rights instructive.

This Article is divided into four parts. Part I looks at the historic division between civil and political and socio-economic rights and the criticisms of socio-economic rights that have led some legal scholars to declare them unenforceable. It considers more recent scholarship suggesting that all rights have negative and positive aspects, and looks to international human rights law, which implicitly recognizes the negative and positive aspects of all rights and conceptualizes them in a different and perhaps more helpful way. Rather than categorizing rights as positive or negative, human rights law recognizes that all rights impose three categories of obligations on governments—the obligations to protect, respect and ensure. Part I also challenges claims that judicial enforcement of socio-economic rights is improper because courts do not have the political legitimacy or the institutional competence to engage in “policy making.” These criticisms reflect a misplaced skepticism about socio-economic rights and an assumption that judicial enforcement will always require the court to wade deep into policy making. Further, such criticism ignores the potential for judicial enforcement of negative obligations, as well as the development of a standard of review that incorporates appropriate deference to the political branches and allows for dialogue with courts. In the U.S. context in particular, these criticisms fail to account for the palpable differences between state and federal constitutions and courts.

Part II reviews the recent socio-economic rights cases in South Africa to better understand how the South African Constitutional Court conceptualizes and enforces these rights. South Africa has

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18 See infra note 266 and accompanying text.
19 See infra notes 256–65 and accompanying text.
recognized that socio-economic rights consist of a negative obligation to be free from government deprivations of, or undue interference with, socio-economic rights, as well as a positive obligation to ensure fundamental rights. The affirmative obligation does not create individual enforceable rights, but requires that the government develop a reasonable policy to meet societal needs. This obligation is subject to the limits of reasonableness and available resources, and it may be progressively realized. The Court’s decisions reflect a careful balancing of pragmatic concerns about institutional competency, separation of powers, and the ability to enforce judicial orders with the Court’s responsibility to ensure that the political branches meaningfully implement their constitutional duty to respect, protect, and ensure socio-economic rights.

In contrast, some state courts in the United States have declined to enforce unique constitutional rights, holding that socio-economic rights provisions are unenforceable and that such issues are better left to the legislative branch. Others have actively wrestled with socio-economic rights. Part III discusses the differences between state constitutions and the U.S. Constitution and the ways in which those constitutions can be interpreted to better protect these rights. It considers why these differences may make it inappropriate for states to apply federal standards of review to enforce state constitutional provisions. Differences in constitutional scope, purpose, and historical context require that state courts develop their own jurisprudence for enforcing state constitutional rights. Such independent jurisprudential development by state courts is particularly appropriate for socio-economic rights provisions that have no federal analogue.

Part III also looks at state right-to-education cases to analyze how courts have dealt with many of the same issues tackled by the South African Constitutional Court, including judicial competence, separation of powers, and enforceability of court orders. One barrier that state courts seeking to enforce socio-economic rights may face is the lack of domestic experience with socio-economic rights. This Part argues that while state courts are not bound by judicial decisions from other countries, they do have to enforce the constitutional rights provided in their own constitutions and could benefit from looking to decisions of the South African Constitutional Court and other nations’ high courts that recognize and interpret socio-economic rights.

Finally, Part IV considers how state education cases and the experience of the South African Constitutional Court can help develop a theory to enforce right-to-health provisions in state
constitutions. This Part argues that government interference with a women’s ability to make reproductive health decisions and to act to protect her health may violate the right to health under state constitutions. It also considers whether states violate their affirmative obligation under state right-to-health provisions when they fail to adopt reasonable policies designed to ensure that women have access to reproductive health services.

I. SOCIAL AND ECONOMIC RIGHTS

A. The Historic Division Between Rights

Popular legal discourse often separates rights into two categories: civil and political rights and socio-economic rights. Civil and political rights are generally described as including the rights to liberty, free speech, free exercise of religion, freedom from torture and fair trial. Socio-economic rights generally refer to rights to food, shelter, education, and healthcare. Internationally, this dichotomy was reinforced when political pressure and Cold War posturing resulted in the division of the rights contained in the Universal Declaration of Human Rights into two separate human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The United States ratified the ICCPR in 1992. It has signed, but not ratified the ICESCR.

As a general principle, human rights law recognizes the indivisibility and interdependence of the rights contained in the two covenants, which are jointly referred to as the International Bill

of Rights. Although no formal hierarchy was assigned to the covenants, in the years following their ratification, the rights contained in the ICESCR were often given a second-class status. This was reflected in common references to civil political rights as "first generation" rights, which constitute the "basic requisites of civil and democratic society," and socio-economic rights as "second generation" rights," with the implied assumption that they came later in both time and priority. Contemporaneous human rights documents and mechanisms reinforced this status. Norwegian human rights scholar Malcolm Langford has written that "[t]he post-World War II human rights architecture gave short shrift to the enforcement of social rights," pointing out that that individual complaints concerning violations could only be made under the ICCPR and not the ICESCR. This division was also reflected in constitutions written after World War II, where socio-economic rights provisions were often drafted as directive principles rather than enforceable rights.

Today, most countries recognize the fundamental nature of the rights protected by both the ICESCR and the ICCPR. One hundred and sixty nations are parties to the ICESCR. One hundred and sixty-five are parties to the ICCPR. The United States is one of the few countries that have failed to ratify the ICESCR. The constitutions of 187 countries contain rights to education and health care, and thousands of cases have adjudicated socio-economic rights.

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31 Langford, supra note 2, at 7.
35 See Langford, supra note 2, at 3.
Despite the widespread ratification of these treaties, however, the view that socio-economic rights and civil and political rights are fundamentally different persists and is reflected in critiques that conflate socio-economic rights with positive rights. The next section argues that these critiques reflect a false distinction between socio-economic and civil and political rights. In particular, they fail to recognize that socio-economic rights often have negative aspects and that respecting civil and political rights often requires significant government action and expenditures.

B. The False Distinction Between Rights

Although contested socio-economic rights claims may more frequently involve decisions about social policy, it is important to understand that not all socio-economic rights claims are positive rights claims. Distinctions between civil and political rights and socio-economic rights should be understood as “historical and descriptive rather than inherent and normative.” As such, courts should not reject all socio-economic rights claims based on the assumption that they will always require judicial involvement in social policy or greater expenditure than claims involving civil and political rights. Further, arguments that economic and social rights claims involving affirmative government obligations are inherently unenforceable need to be reconsidered in light of the developing jurisprudence from other countries and from U.S. state courts that illustrates the justiciability of affirmative socio-economic rights.

In the United States, legal and popular understandings of rights stem from the United States Constitution, which is often described as a Constitution of limited, enumerated powers. This means that Congress, the President, and the courts have been granted certain specific powers by the Constitution, and that all other actions are beyond their collective powers. The Bill of Rights, which lays out the shared rights of all individuals in the United States, has been described as granting only negative civil and political rights. These rights are commonly understood to give individuals protections against government invasions of their rights as opposed to requiring that the government provide them with any specific benefits or protections. A prime example of this type of negative right is the

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37 See Helen Hershkoff, “Just Words:” Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 STAN. L. REV. 1521, 1523 (2010) (noting that the federal Constitution “consistently has been interpreted as excluding affirmative claims to
right against government seizure of property without due process of law and just compensation.\(^{38}\)

Despite the historical perception that the U.S. Constitution only grants negative rights,\(^{39}\) scholars in recent years have questioned both the distinction between negative and positive rights and the accuracy of characterizing all individual rights in the United States as civil, political, and negative.\(^{40}\) Cass Sunstein, a prominent constitutional scholar, has challenged the accuracy of characterizing federal constitutional rights as negative rights, pointing out that the rights guaranteed by the federal Constitution “cannot exist without public assistance.”\(^{41}\) Protecting property and contract rights, free speech, and religious liberty all require the expenditure of funds.\(^{42}\) He has also argued that the federal Constitution need not be read to exclude socio-economic rights because “the meaning of the Constitution changes over time.”\(^{43}\) Indeed, many different rights have been read into the Constitution, including, for example, a ban against sex discrimination that is not present in the text.\(^{44}\)

Other scholars have made similar arguments.\(^{45}\) Professor David Currie, for example, has taken issue with the idea that the U.S.
Constitution guarantees only negative rights. He has pointed out that while the Sixth Amendment’s right to counsel in criminal prosecutions “looks like just another right to be left alone: the government may not prevent a criminal defendant from having a lawyer. . . . [The Supreme] Court has long held that it imposes an affirmative duty on the government to provide legal assistance if the defendant cannot afford it.”46 Similarly, Professor Currie has noted that in protecting the right to contract, the Supreme Court has “unequivocally interpreted a provision forbidding government intrusion to require the government to protect the citizen against a third party” and that “at least as early as Hobbes it had been recognized that a contractual right was worthless without state coercion.”47

Nonetheless, despite strong academic arguments to the contrary, the U.S Constitution continues to be interpreted as a guarantor of negative rights only.48 Typically, that understanding ends the conversation on negative versus positive rights in the United States. Conspicuously absent from that discussion, however, has been the recognition that not only do many state constitutions separately guarantee individual rights and liberties in the United States, a significant number contain clear positive and affirmative guarantees of social and economic individual rights.49 While enforcement of those rights raises the traditional questions of judicial competency and separation of powers, the existence of this separate and potentially powerful source of socio-economic rights cannot be ignored. Faced with these existing guarantees of important rights, the next step should be to determine how best to vindicate them in the courts and

the rights it provides are phrased negatively, many are also phrased affirmatively. Even as to the rights which are phrased negatively, their enforcement may require the imposition of affirmative obligations on government. The conventional wisdom treats the affirmative rights as exceptions to the general rule, but there is nothing inexorable about this conclusion.” (footnote omitted)); Christiansen, supra note 36, at 346 (“A typical negative right . . . is equally imprecise and gives rise to a comparable need for interpretation . . . as much as a typical positive right . . . .”).

46 Currie, supra note 40, at 873.
47 Id. at 875; see also id. at 886 (“I think, however, that this survey has shown Judge Posner’s proposition that the Constitution is a charter of negative rights only must be applied with caution. From the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can in some sense be described as positive.”).
48 See Rao, supra note 39, at 245 n.235 (“As Judge Posner has explained, ‘The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them.’” (citation omitted) (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983))). In its more recent decisions, the Supreme Court has continued to uphold this interpretation. Id. (citing DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 196 (1989)).
49 See infra Part III.C.1.a.
legislatures around the United States. Because of the lack of federal experience enforcing socio-economic rights provisions, state jurists and advocates seeking to enforce these state constitutional rights must look elsewhere for guidance.

C. Criticisms of Socio-Economic Rights

Even where socio-economic rights have been granted or recognized, efforts to enforce those rights have faced significant barriers, both practical and theoretical. Most of the critiques of socio-economic rights derive from concerns about their positive enforcement. The basic argument is that judicial recognition of an obligation to fulfill socio-economic rights will inevitably require courts to make policy decisions. Because courts lack both the legitimacy and the competency to develop detailed policy and allocate resources, opponents of socio-economic rights argue that such decisions should be left to the political branches.

The legitimacy argument contends that policy decisions involving allocation of finite resources are inherently political. Decisions that require a selection between potentially conflicting priorities should be made by the legislative or executive branches of government, both of which are politically accountable to the people for their choices.50 This critique is often linked to arguments about the separation of powers. The problem with this argument is that it proves too much. Courts by their very nature are anti-democratic institutions. Whenever a court recognizes a right, be it socio-economic or civil and political, it restricts the will of the majority as expressed, though imperfectly, through the legislative and executive branches and checks the majority’s ability to infringe upon the right. Further, judicial protection of rights always imposes institutional costs. Even enforcement of traditional civil and political rights, including due process or equal protection, frequently requires policy changes that impose additional program costs.

A related criticism maintains that courts, as institutions, are not built to develop policy.51 The argument contends that negative rights claims, which typically involve individual rights violations, are easier for courts to manage because they “involve discrete cases, they examine precise rights, and their remedies implicate only a cessation

50 See Langford, supra note 2, at 31; Christiansen, supra note 36, at 347–48 (arguing that allowing courts to interpret social values impermissibly intrudes upon the duties of the legislative branch).

51 See Langford, supra note 2, at 35.
of action by government. In contrast, socio-economic rights cases are deemed ill-suited for a judicial forum because their resolution requires government action to address complex issues that may involve multiple stakeholders who often are not before the court, significant expenditure of funds, and choices between competing priorities.

Although courts may not have a staff of experts on particular policy issues, they do have various mechanisms to bring relevant and necessary information before them, including special masters, referees, amicus briefs, and experts who can be called as witnesses. Further, as Professor Helen Hershkoff has noted, institutional competence is “a comparative question,” and “legislatures in many states suffer from numerous institutional deficits that affect their ability to focus on complex issues in a sustained and informed manner.” For instance, many state legislatures are composed of part-time legislators who meet for short sessions and have small legislative staffs. Moreover, state courts may have more experience deciding cases that have a policy impact than federal courts with their limited jurisdiction. Unlike the federal courts, many state constitutions grant state courts expansive jurisdiction, reaching so far as to allow them to grant advisory opinions or hear “taxpayer standing” cases, in which any state taxpayer may challenge a particular law on constitutional grounds.

Related to arguments about legitimacy and competency are claims that socio-economic rights represent political aims, rather than concrete rights and are too vague for courts to enforce. In response to this critique, Professor Hershkoff has argued that if an issue is properly before a court, that court has a duty to “rise to the challenge” of developing a manageable standard, rather than abdicate its constitutional duty. She has pointed out that courts regularly enforce “substantive norms, almost all of which are without a determinative

52 Christiansen, supra note 36, at 345.
55 Id. at 1176–77.
56 Id. at 1181.
59 Hershkoff, Positive Rights, supra note 54, at 1182.
edge and require value selection." In this respect, socio-economic rights issues are no different than cutting edge issues in other areas, and courts need only engage in the same process of looking to evolved standards and customs and to the opinions of experts in the field. Again, differences between state and federal courts may make this task less daunting. As "common law generalists, state courts have broad experience articulating normative frameworks for complex social and economic issues."  

Further, both the legitimacy and competency arguments overstate the role that judges play in enforcing economic and social rights. In the socio-economic context, just like in the civil and political context, "courts are not being asked to make law or policy but review it against a set of criteria." The issue for enforcement of socio-economic rights is how to develop the appropriate judicial standards for review. When courts are asked to adjudicate violations of the government’s negative obligation to refrain from interfering with socio-economic rights, judicial review would be similar to review of traditional civil and political rights claims. In sketching out what judicial review of state obligations to fulfill socio-economic rights should look like, Professor Hershkoff has proposed a "jurisprudence of consequences." Unlike the federal rational basis standard, which starts with a presumption of constitutionality, a jurisprudence of consequences would impose "a duty on the state to justify its legislative choices as a well-grounded means of moving toward a prescribed constitutional goal." While this approach would necessarily engage the court in considering whether policy furthers a constitutional right, Hershkoff has recognized that there is often "no single ‘right’ answer to complex social problems." Rather than determining what the right policy should be, judicial review would focus on whether the laws are "likely to effectuate the constitutional goal."  

D. The Obligation to Respect, Protect, and Fulfill

Another way to step outside of the negative/positive rights dichotomy is to use the human rights framework, which recognizes that all rights encompass different types of government obligations.

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60 Id. at 1180.
61 Id. at 1181.
62 Langford, supra note 2, at 34.
63 See Hershkoff, Positive Rights, supra note 54, at 1183-86.
64 Id. at 1184.
65 Id. at 1185.
66 Id. at 1184.
Rather than categorizing rights as positive or negative, human rights law recognizes that all rights entail three types of obligations: (1) the obligation to respect, (2) the obligation to protect, and (3) the obligation to fulfill. These three aspects of rights are also reflected in the South African Constitution, which provides that the state “must respect, protect, promote and fulfill the rights in the Bill of Rights.”

The obligation to respect captures the government's duty to abstain from violating or interfering with rights, and correlates with negative rights concepts that we are most familiar with in the United States under our federal Constitution. However, governments can also violate the obligation to respect socio-economic rights by improperly interfering with individuals' ability to enjoy and access these rights. For instance, Professor Langford has discussed developing international jurisprudence finding that forced evictions can violate the government's obligation to respect the right to housing.

The obligation to protect requires government action to protect individuals from rights violations committed by non-governmental actors. Although U.S. law generally does not require government to protect against such violations, as a normative and political matter, we take for granted that the government should adopt legislation to protect and punish rights violations by private actors. For instance, government actions to protect against rights violations include the adoption of laws prohibiting assault and murder and the more recent adoption of domestic violence laws (violations of the rights to life and personal security). They also include laws that prohibit discrimination on the basis of race and sex in the work place, and more recent laws prohibiting discrimination on the basis of sexual orientation (violations of the right to equality and non-discrimination). Internationally, human rights bodies have found governments in violation of their human rights obligations where their efforts to prevent or punish rights violations lack due diligence.

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67 Cleveland, supra note 20.
69 See Langford, supra note 2, at 14–15.
70 The U.N. Committee on Economic, Social and Cultural Rights defines the obligation to protect as “measures by the State to ensure that enterprises or individuals do not deprive individuals of their access [to the relevant right]” U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment 12: The Right to Adequate Food (Art. 11), ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999).
73 See generally Lee Hasselbacher, Note, State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of
The obligation to fulfill is perhaps the most controversial of the three obligations. The Committee on Economic, Social and Cultural Rights has identified two components of the obligation to fulfill. First, governments have an obligation to take adequate steps within their available resources toward progressive realization of the right.\(^4\) This obligation explicitly acknowledges that full realization of the positive aspects of socio-economic rights cannot be accomplished immediately and is subject to resource limitations. Second, the Committee has suggested that governments have an obligation to make sure that socio-economic rights are met at a minimum level.\(^5\) This obligation, defined as the "minimum core," is immediately enforceable and not subject to progressive realization.\(^6\)

II. SOUTH AFRICAN CASES ON SOCIO-ECONOMIC RIGHTS

Part II of this Article analyzes the South African Constitutional Court's major socio-economic rights cases and endeavors to understand the Court's theory of socio-economic rights, including the nature of the government's obligation and the court's role in enforcement.

A. Background and Summary of Cases

The Constitutional Court's socio-economic rights jurisprudence is embodied in four recent cases: *Soobramoney v. Minister of Health* (1997), \(^7\) *Republic of South Africa v. Grootboom* (2000), \(^8\) *Minister of Health v. Treatment Action Campaign* (2002), \(^9\) and *Khosa v. Minister of Social Development* (2004).\(^8\) Before discussing the Court's decisions, a brief description of the relevant constitutional provisions and a summary of the cases are in order.

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\(^4\) See ICESCR, supra note 24, art. 2(1), 993 U.N.T.S. at 5 (providing that a State Party undertake to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures").

\(^5\) See Langford, supra note 2, at 22.

\(^6\) The CESCR Committee discusses minimum core as "minimum essential levels of each of the rights." ECOSOC, Comm. on Econ., Soc. & Cultural Rights, General Comment 3: The Nature of States Parties Obligations, ¶ 10, U.N. Doc. HRI/GEN/1/Rev.6, at 14 (May 12, 2003) [hereinafter General Comment 3].

\(^7\) 1997 (12) BCLR 1696 (CC) (S. Afr.).

\(^8\) 2000 (11) BCLR 1169 (CC) (S. Afr.).

\(^9\) 2002 (10) BCLR 1033 (CC) (S. Afr.).

\(^8\) 2004 (6) BCLR 569 (CC) (S. Afr.).
The principal provisions protecting socio-economic rights in the South African Constitution are Section 26 concerning housing and Section 27 concerning social security, food, water, and health care. In addition, Section 28 sets forth the rights of the child, which include economic and social rights provisions. Sections 26 and 27 are structured in a parallel fashion. Subsections 26(1) and 27(1) set out general rights to have access to adequate housing and to health care services, sufficient food and water and social security, respectively. Subsections 26(2) and 27(2) both provide that the "state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the respective rights.

Subsections 26(3) and 27(3) then specifically enumerate prohibited actions that violate the substantive rights in Subsections 26(1) and 27(1). Thus, Subsection 27(3) provides that "[n]o one may be refused emergency medical treatment" and Subsection 26(3) prohibits evictions or home demolitions without a court order "considering all the relevant circumstances" and prohibits legislation permitting arbitrary evictions.

The Court’s first socio-economic rights case was a difficult one. In 1997, Thiagraj Soobramoney, a forty-one-year-old man in the final stages of chronic kidney failure, sought a court order directing the provincial hospital to provide him ongoing dialysis treatment. Mr. Soobramoney was not a candidate for a kidney transplant and would require regular dialysis for the rest of his life. Without the dialysis, he could not survive. The Constitutional Court rejected Mr. Soobramoney’s claim that he was entitled to ongoing dialysis treatment under Subsection 27(3)’s emergency medical treatment provision. Instead, it considered his case under the state’s obligation to take reasonable measures to provide access to health care under Subsections 27(1) and 27(2). The Court held that Mr. Soobramoney

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82 See id. § 28(1).
83 See id. §§ 26(1), 27(1).
84 Id. §§ 26(2), 27(2).
85 See id. §§ 26(3), 27(3).
86 Id. § 27(3).
87 Id. § 26(3).
88 Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC) at 1700 (S. Afr.).
89 See id. at 1698–99 (noting that appellant suffered from chronic renal failure and was ineligible for transplant due to a heart condition).
90 Article 27(3) states that "[n]o one may be refused emergency medical treatment." S. Afr. Const. 1996, § 27(3). The Court held that emergency medical treatment did not include "ongoing treatment of chronic illnesses for the purpose of prolonging life." Soobramoney, 1997 (12) BCLR 1696 (CC) at 1701.
91 See Soobramoney, 1997 (12) BCLR 1696 (CC) at 1704; see also S. Afr. Const. 1996,
was not entitled to ongoing dialysis because the hospital had a reasonable plan to allocate scarce dialysis resources, which gave priority to patients with treatable medical conditions, and that it had applied the plan fairly and rationally.\textsuperscript{92} Underscoring the wrenching nature of socio-economic cases, Mr. Soobramoney died of a stroke within hours of hearing the court’s decision, and the media criticized the Court for “sentencing Soobramoney to death.”\textsuperscript{93}

Three years later, the Court considered a case brought by Irene Grootboom, as well as 390 other adults and 510 children\textsuperscript{94} who were rendered homeless following eviction from informal settlements on land earmarked for the construction of low-income housing.\textsuperscript{95} Although the Court rejected the respondents’ request for an order requiring the government to immediately provide them adequate basic shelter or housing,\textsuperscript{96} it found that the government had violated its obligations under Subsection 26(2) because its housing plan in the Cape Metro area “failed to provide for any form of relief to those [like the respondents] desperately in need of access to housing.”\textsuperscript{97} As a remedy, the Court issued a declaration stating that the constitution required that state to “devise and implement within its available resources a comprehensive and coordinated programme progressively to realize the right of access to adequate housing,” which had to include reasonable measures to “provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”\textsuperscript{98}

In the 2002 case, \textit{Minister of Health v. Treatment Action Campaign},\textsuperscript{99} the Constitutional Court considered the government’s policy on the provision of nevirapine within the public health sector.\textsuperscript{100} Nevirapine is an antiretroviral drug given to HIV-positive pregnant women to reduce the risk of mother-to-child transmission.\textsuperscript{101} The government argued that its policy of limiting the availability of nevirapine to selected pilot sites in each province was reasonable

\textsuperscript{\textsection 27(1)-(2).}

\textsuperscript{92} \textit{Soobramoney}, 1997 (12) BCLR 1696 (CC) at 1704–05.


\textsuperscript{94} \textit{Gov’t of the Republic of South Africa & Others v. Grootboom & Others} 2000 (11) BCLR 1169 (CC) at 1176 n.2 (S. Afr.).

\textsuperscript{95} \textit{Id.} at 1176.

\textsuperscript{96} \textit{See id.} at 1204–05, 1208.

\textsuperscript{97} \textit{Id.} at 1208.

\textsuperscript{98} \textit{Id.} at 1209.

\textsuperscript{99} \textit{2002} (10) BCLR 1033 (CC) (S. Afr.).

\textsuperscript{100} \textit{See id.} at 1035.

\textsuperscript{101} \textit{Id.} at 1035 n.3.
because it did not want to provide the drug without a "full package" of other interventions. In particular, the government expressed concern that the efficacy of a dose of nevirapine at birth would be counteracted by the transmission of HIV from mother to infant through breastfeeding. The Court, however, found that the government’s policy violated Section 27(2)’s mandate to undertake reasonable measures to ensure the access to health care provided for in Section 27(1)(a). The Court held that the policy was not reasonable because it failed to address the needs of poor mothers and their children who did not have access to the pilot sites.

The 2003 case, *Khosa v. Minister of Social Development*, challenged the statutory exclusion of lawful permanent residents from social service grants for older South Africans, arguing that government policy violated the right to social security under Section 27(1)(c) and (2). The Court found that the government’s exclusion of lawful permanent residents constituted unfair discrimination and declared that although the government was not obligated to immediately realize social security for all, adopting discriminatory criteria was not reasonable.

**B. The Nature of Socio-Economic Rights**

1. **Negative Component of Socio-Economic Rights**

When the Constitutional Court certified the South African Constitution in 1996, it was asked to consider whether the constitution’s socio-economic rights provisions were justiciable. The Court rejected arguments that the costs of enforcing socio-economic rights made them unenforceable, noting that many civil and political rights "will give rise to similar budgetary implications without..."
compromising their justiciability."\textsuperscript{109} But the Court stopped short of expressing unqualified support for the affirmative enforcement of socio-economic rights, explaining that "\textit{[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion."\textsuperscript{110} In its later cases, discussed below, the Court articulated a commitment and methodology for affirmative government obligations, but its recognition of a negative aspect of socio-economic rights is also significant.

In discussing the negative and positive components of the right to housing in \textit{Grootboom}, the Constitutional Court suggested that the government’s negative obligations—to not interfere with or impair access to housing—are immediately enforceable, but that the government’s affirmative obligations may be more circumscribed. The Court read the first section of Article 26 to "\textit{confer[\textsuperscript{[}]} a general right of access to adequate housing."\textsuperscript{111} This general right places "\textit{at the very least, a negative obligation \ldots upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."\textsuperscript{112}

The negative obligation recognized by the Court correlates to the "obligation to respect" and to some degree the "obligation to protect" recognized under international human rights law.\textsuperscript{113} Although most scholarship to date has focused on government’s affirmative socio-economic rights obligations, internationally, there are a growing number of cases regarding the government’s duty to abstain from interfering with human rights.\textsuperscript{114} Interestingly, the Court in \textit{Grootboom} wrote that "other entities and persons," in addition to the state, have negative obligations not to prevent or impair housing access rights.\textsuperscript{115} This is consistent with developing international jurisprudence concerning both the state "obligation to protect" by taking measures to ensure that private actors do not deprive

\textsuperscript{109} \textit{In re Certification of the South African Constitution} 1996 (4) SA 744 (CC) ¶ 78 (S. Afr.); see also Goldstone, \textit{supra} note 93, at 4 (noting that the "dichotomy between positive and negative rights breaks down at a fundamental level because many judicial decisions involve some determination of the allocation of public funds").

\textsuperscript{110} \textit{In re Certification}, 1996 (4) SA 744 (CC) at 60–61.

\textsuperscript{111} \textit{Govt. of the Republic of South Africa & Others v Grootboom & Others} 2000 (11) BCLR 1169 (CC) at 1184 (S. Afr.).

\textsuperscript{112} \textit{Id.} at 1188.

\textsuperscript{113} The South African Constitution recognizes and incorporates these obligations. Section 7(2) obligates the government to "respect, protect, promote and fulfil the rights in the Bill of Rights." S. AFR. CONST. 1996, § 7(2).

\textsuperscript{114} \textit{See} Langford, \textit{supra} note 2, at 14. Malcolm Langford writes that violations of the obligation to respect "are frequently the subject of reports by non-governmental organisations and some predict that they will [form] the majority of cases under the proposed complaints procedure for the International Covenant on Economic, Social and Cultural Rights." \textit{Id.}

\textsuperscript{115} \textit{Grootboom}, 2000 (11) BCLR 1169 (CC) at 1188.
individuals of their rights and the “horizontal application of fundamental rights” to impose human rights obligations on private actors.\footnote{116}

Similarly, in \textit{Treatment Action Campaign}, the Court recognized that the right to access health care includes a negative obligation. The government’s nevirapine policy essentially prevented doctors from providing the drug to public health patients who did not have access to the pilot sites, violating the government’s negative obligation by undermining the women’s right to decide their course of treatment and their ability to access medically appropriate services.\footnote{117}

The Constitutional Court has also issued a number of decisions interpreting the government’s negative obligations in housing rights cases involving forced evictions.\footnote{118} In addition to the negative obligations created by Subsection 26(1), these cases rely on the specific prohibition of arbitrary evictions in Subsection 26(3) and its implementing legislation.\footnote{119} These cases are interesting because they recognize that, although the government does not have an affirmative obligation to make housing immediately available, it cannot act (through an eviction proceeding) to deprive people of existing housing without taking into account the impact of the eviction on the right to housing and considering alternative ways to resolve the situation.\footnote{120} The cases also suggest that the court must balance the property rights of those seeking to evict with the housing rights of those they seek to evict. The “critical point” made by Justice Sachs in \textit{Port Elizabeth Municipality v. Various Occupiers},\footnote{121} is that “in the clash between property rights and ‘the genuine despair of people in dire need of accommodation,’ the court should not automatically

\footnote{116} An in-depth discussion of “horizontal application” of fundamental rights is beyond the scope of this Article. \textit{See} Langford, \textit{supra} note 2, at 20–21. The South African Constitution explicitly provides for horizontal application of the bill of rights. Section 8(2) states that a provision of the bill of rights “binds a natural [and] juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” \textit{S. Afr. Const.} 1996, § 8(2). Courts “must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right.” \textit{Id.} § 8(3)(a).

\footnote{117} \textit{Minister of Health & Others v Treatment Action Campaign & Others} 2002 (10) BCLR 1033 (CC) at 1049 (S. Afr.). (citing \textit{Grootboom}, 2000 (11) BCLR 1169 (CC) at 1188). The respondents argued that there was “no rational or lawful basis for allowing doctors in the private sector to exercise their professional judgment in deciding when to prescribe Nevirapine, but effectively prohibiting doctors in the public sector from doing so.” \textit{Id.} at 1041 (quoting Resp’t Aff. ¶ 22.11 (prepared by Siphokazi Mthathi, Deputy-Chairperson for Treatment Action Campaign)).

\footnote{118} For a detailed discussion of these cases, see Sandra Liebenberg, \textit{South Africa: Adjudicating Rights Under a Transformative Constitution}, in \textit{Social Rights Jurisprudence}, \textit{supra} note 2, at 75, 91–95.

\footnote{119} \textit{Id.} at 92.

\footnote{120} \textit{Id.} at 92–95.

\footnote{121} 2004 (12) BCLR 1268 (CC) (S. Afr.).
privilege property rights. Their role instead is to find a just and equitable solution in the context of the specific factors relevant in each particular case."\textsuperscript{122}

2. Positive Obligation: Progressive Realization Versus Minimum Core

Although the Constitutional Court continues to recognize that socio-economic rights have both negative and positive components, its major socio-economic rights cases focus on the enforceability of the state’s affirmative obligations.\textsuperscript{123} These cases recognize a positive obligation to progressively realize socio-economic rights, but decline to recognize them either as individual rights or as an immediately enforceable obligation to provide some minimum level of the right—an obligation also known as the “minimum core.”\textsuperscript{124} Instead, the South African Constitutional Court enforces the government’s affirmative economic and social rights obligations by forcing the government to adopt and implement a reasonable policy to address societal needs.\textsuperscript{125} The Court’s decisions regarding the government’s affirmative obligation have made a considerable contribution to developing human rights jurisprudence concerning judicial enforcement of the “obligation to fulfill” socio-economic rights. However, it has also been criticized for rejecting the minimum core approach that has been championed by the CESC\textsuperscript{r} Committee.\textsuperscript{126}

\textit{a. Rejection of Individual Rights}

The Court has consistently refused to hold that the state’s affirmative obligations give individuals rights that can be immediately enforced.\textsuperscript{127} Instead, it has found that the state’s positive

\textsuperscript{122}Liebenberg, \textit{supra} note 118, at 92 (quoting \textit{Port Elizabeth Municipality v Various Occupiers} 2004 (12) BCLR 1268 (CC) at 1280) (footnote omitted).

\textsuperscript{123}See \textit{Minister of Health \& Others v Treatment Action Campaign \& Others} 2002 (10) BCLR 1033 (CC) at 1042-43 (S. Afr.); \textit{Gov’t of the Republic of South Africa \& Others v Grootboom \& Others} 2000 (11) BCLR 1169 (CC) at 1183 (S. Afr.).

\textsuperscript{124}General Comment 3, \textit{supra} note 76, ¶ 10.


\textsuperscript{126}See Liebenberg, \textit{supra} note 118, at 90.

\textsuperscript{127}The Court’s approach is somewhat at odds with courts in the United States, which have emphasized that judicial remedies should be limited to the plaintiffs before the court and that courts should not engage in broader systemic relief. \textit{See}, e.g., Campaign for Fiscal Equity, Inc.
obligations require the development and implementation of policies to realize socio-economic rights for the society as whole.\(^{1}\) Thus, in *Grootboom*, the Court reversed the order of the court below requiring that shelter be provided to the applicants before the court.\(^{2}\) Although the plaintiffs were living in "intolerable" conditions, it was "a painful reality that their circumstances were no worse than those of thousands of other people."\(^{3}\) Under such circumstances, the Constitutional Court held that making housing available only to the plaintiffs before the court would give them an unfair preference.\(^{4}\) Similarly, in *Sooobramoney*, the Court rejected Mr. Soobramoney’s individual claim for dialysis.\(^{5}\) In considering the reasonableness of his claim, it looked at the cost and impact of providing dialysis to all similarly situated individuals, not just the cost in his individual case.\(^{6}\) The Court discussed the "danger of making any order that the resources be used for a particular patient" without a broader sense of whether resources might "more advantageously be devoted" to others.\(^{7}\) The Court’s unwillingness to create individual, immediately enforceable rights is further illustrated by its refusal to recognize an immediate right to shelter for children in *Grootboom* even though the constitution’s children’s rights provision\(^{8}\) could have been read to support the obligation. Instead, the Court held that the state does not have an immediate obligation to provide shelter for children who are in their parents’ care.\(^{9}\) It wrote that the obligation to provide shelter "is imposed primarily on the parents or family."\(^{10}\) The state only


\(^{12}\) Gov't of the Republic of South Africa & Others v Grootboom & Others 2000 (11) BCLR 1169 (CC) at 1208 (S. Afr.).

\(^{13}\) Id. at 1205.

\(^{14}\) Id.

\(^{15}\) Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC) at 1701 (S. Afr.). Mr. Soobramoney also argued that he had a right to dialysis under Article 27(3), which provides that “[n]o one may be refused emergency medical treatment.” Id. at 1700 (quoting S. Afr. Const. 1996, § 27(3)). The Court held that the emergency medical treatment only applied to sudden catastrophes and not to ongoing treatment of chronic illness. See id. at 1703–04.

\(^{16}\) See id. at 1705.

\(^{17}\) Id. at 1706.

\(^{18}\) The South African Constitution provides that “[e]very child has the right . . . to family care or parental care, or to appropriate alternative care when removed from the family environment . . . [and] to basic nutrition, shelter, basic health care services and social services.” S. Afr. Const. 1996 § 28(1)(b)–(c).

\(^{19}\) Grootboom, 2000 (11) BCLR 1169 (CC) at 1204.

\(^{20}\) Id.
becomes responsible for shelter when a child is removed from his or her family.138 The Court’s analysis reflects its continuing concern that creating a “direct and enforceable right” for some individuals would undermine the “carefully constructed constitutional scheme for progressive realisation of socio-economic rights.”139

b. Rejection of Minimum Core

Beyond rejecting the individual claims at issue in the cases, the Court has also refrained from adopting the minimum core concept developed by the Committee on Economic, Social and Cultural Rights. In Treatment Action Campaign, the Court explicitly declined to recognize that everyone has an immediate right to a minimum core.140 While the Court’s holding relied on a textual reading of the health care provision,141 it discussed its practical concerns with the minimum core concept:

It is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in [the health care and housing provisions] on a progressive basis.142

In addition to resource concerns, the Court questioned judicial competence to make the factual determinations necessary to engage in a minimum core analysis or to decide what constitutes the minimum core.143 It also expressed concerns about making decisions that would “have multiple social and economic consequences for the community”144 or that would require “deciding how public revenues should most effectively be spent.”145 Thus, the Court appears more comfortable reviewing the reasonableness of the policies adopted by

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138 Id.
139 Id. at 1202.
140 See Minister of Health & Others v Treatment Action Campaign & Others 2002 (10) BCLR 1033 (CC) at 1049 (S. Afr.) (deciding that “the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them”).
141 See id. at 1045.
142 Id. at 1046.
143 See id. at 1047 (“[C]ourts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be . . . .”); see also Grootboom, 2000 (11) BCLR 1169 (CC) at 1188 (“The [CESCR] committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.”).
144 Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) at 1047.
145 Id.
the government to meet its constitutional obligations than defining the
core of the right or stating what the policy should be.  

Despite its rejection of a minimum core right, the Court did not completely abandon the cause of individuals facing severe denials of socio-economic rights. In *Grootboom*, for example, the Court explained that "[t]here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether measures taken by the State are reasonable." Although the *Grootboom* appellants were not entitled to a court order requiring the government to provide them shelter, the Court held that the government’s failure to take their situation into account rendered its housing policy unreasonable.

C. Reasonableness Review

In addition to establishing that the constitution’s socio-economic rights provisions do not create an individual entitlement, the Constitutional Court has made clear that the government’s affirmative obligation is subject to the limitations of reasonableness. Such limitations allow the government to take into account its available resources in formulating policy and to realize its obligations over time. These positive obligations are “established and delimited” by Subsection (2), which provides that the state must take “reasonable legislative and other measures . . . within its available resources . . . to achieve the progressive realisation of this right.”

In *Grootboom* and the cases following it, the Constitutional Court sought to provide guidance about what constitutes a reasonable government policy to progressively realize socio-economic rights within its available resources and the role that the court should play in ensuring that the government fulfills its obligations. These cases establish a careful balance between deference to the legislative branch

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146 See id. ("The Constitution contemplates . . . a restrained and focused role for the courts, namely, to require the State to take on measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.").

147 *Grootboom*, 2000 (11) BCLR 1169 (CC). Similarly, in *Treatment Action Campaign*, the Court stated that although evidence in certain cases "may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them." *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) at 1046 (footnote omitted).

148 *Grootboom*, 2000 (11) BCLR 1169 (CC) at 1208.

149 *Khosa v. Minister of Social Development* 2004 (6) BCLR 569 (CC) at 589 (S. Afr.). The Court stated that “the ambit of the section 27(1) right can . . . not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1).” Id.

150 *Grootboom*, 2000 (11) BCLR 1169 (CC) at 1184.
and its institutional competency to establish policy in the first instance and the recognition that the Court has an important role to play in ensuring that the government is fulfilling its constitutional obligations. Although the Court's reasonableness analysis must be done on a case-by-case basis, its jurisprudence to date makes clear that the government's policy must take into account the needs of those facing the most dire deprivation of rights, must not violate other constitutional rights, and must be adopted and implemented in good faith.

1. Judicial Deference to Reasonable Policies

From the outset, the Constitutional Court has been careful to establish the need for deference to reasonable government policies. The Court's deference appears rooted in the recognition of two important considerations in enforcing affirmative government obligations. First, there are often multiple ways for the government to fulfill its affirmative obligations. Mindful of concerns about judicial competency and separation of powers, the Constitutional Court has repeatedly stated that its job is not to opine whether "more desirable or favourable measures could have been adopted, or whether public money could have been better spent." Thus, "[c]ourt orders concerning policy choices made by the executive should . . . not be formulated in ways that preclude the executive from making . . . legitimate choices." Second, the Court has stressed the need to allow flexibility in policies. Circumstances may change, budgets may shrink, or better policy options can emerge. The government should remain free to change its policies as long as it continues to meet its constitutional obligations. Thus, in *Treatment Action Campaign*, although the Court ordered the government to make nevirapine available at all public health facilities, it made clear that its order did not preclude the government from adapting its

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151 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) at 1047 (finding that "[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations" (quoting *Grootboom*, 2000 (11) BCLR 1169 (CC) at 1191) (internal quotation marks omitted)).

152 *Grootboom*, 2000 (11) BCLR 1169 (CC) at 1191; *see also Khosa*, 2004 (6) BCLR 569 (CC) at 590–91.

153 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) at 1066.

154 *See id.* ("A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law.").

155 *See id.* at 1072.
policy "in a manner consistent with the Constitution if equally appropriate or better methods become available."\textsuperscript{156}

Although the Court gives deference to the government, its review is not perfunctory. The Court has emphasized that it is obliged to "consider whether in formulating and implementing . . . policy the State has given effect to its constitutional obligations."\textsuperscript{157} Programs adopted by the government must be "capable of facilitating the realisation of the right," and they must be reasonable.\textsuperscript{158} The government action must also be "taken in good faith,"\textsuperscript{159} and "the [s]tate must take steps to achieve [its] goal,"\textsuperscript{160} moving as "expeditiously and effectively as possible."\textsuperscript{161} In addition, the Court will look beyond the government’s legislative scheme and consider how the legislation and policy are actually being implemented. Such review ensures that the executive adopts "well-directed policies and programmes" that are "reasonable both in their conception and their implementation."\textsuperscript{162}

2. What’s Reasonable?

\textit{a. Reasonable Programs Cannot Neglect Those Most in Need}

Although the Court rejected an approach that would require the immediate realization of a minimum core of socio-economic needs, its reasonableness review requires policy-makers to take into account the needs of those who lack basic necessities.

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right . . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.\textsuperscript{163}

\textsuperscript{156} Id.
\textsuperscript{157} Id. at 1062.
\textsuperscript{158} Gov’t of the Republic of South Africa & Others v Grootboom & Others 2000 (11) BCLR 1169 (CC) at 1190–91 (S. Afr.).
\textsuperscript{159} Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC) at 1706 (S. Afr.).
\textsuperscript{160} Grootboom, 2000 (11) BCLR 1169 (CC) at 1192.
\textsuperscript{161} Id. (quoting General Comment 3, supra note 76, ¶ 9).
\textsuperscript{162} Id. at 1191.
\textsuperscript{163} Id.
In *Grootboom*, the Court found that the government’s national housing program constituted “a major achievement,” aimed at “achieving the progressive realisation of the right of access to adequate housing.”\(^{164}\) The program, however, did not include a component to deal with those in desperate need.\(^{165}\) Thus, the Court found that the housing program fell short of obligations imposed on the government because it “fail[ed] to recognise that the State must provide for relief for those in desperate need.” The Court emphasized that the acute and immediate needs of the homeless cannot be ignored by a housing program that focuses instead on medium and long-term objectives.\(^{166}\)

The recognition that reasonable policies must take into account those most in need was echoed in *Treatment Action Campaign*. There, the Court noted that the program adopted by the government failed to address the needs of women who relied on public health services and did not have access to pilot sites.\(^{167}\) Although the government limited the availability of nevirapine in public hospitals, doctors in the private sector were able to prescribe the drug.\(^{168}\) The Court expressed concern that the impact of the government’s limitation of the drug to its research sites would be borne by poor women unable to access private health services.\(^{169}\)

### b. Fundamental Rights: Non-Discrimination

In *Treatment Action Campaign* and *Grootboom*, the Court found the government’s policies unreasonable because the needs of the homeless and women who relied on government health care were not being taken into account. In both cases, the Court was troubled that the government policies failed to address the needs of disadvantaged segments of society. It instructed that “[a] programme that excludes a significant segment of society cannot be said to be reasonable.”\(^{170}\)

In *Khosa*, the Court articulated another factor that must be taken into account in determining whether a government program to realize

\(^{164}\) Id. at 1198.

\(^{165}\) See id. at 1200. The court found that the program failed the reasonableness analysis because there was “no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods or fires, or because their homes are under threat of demolition.” Id. at 1198.

\(^{166}\) Id. at 1201.

\(^{167}\) *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) at 1054 (S. Afr.).

\(^{168}\) See id. at 1040–41, 1053, 1055.

\(^{169}\) See id. at 1055.

\(^{170}\) Id. at 1054 (quoting *Grootboom*, 2000 (11) BCLR 1169 (CC) at 1191).
socio-economic rights satisfies the reasonableness review—whether the program infringes on other fundamental rights. Specifically, the Court held that a government benefits program was not a reasonable means to achieve the right to social security because it explicitly excluded lawful permanent residents. In doing so, the Court suggested that, in addition to considering whether a program is reasonably designed to progressively realize the right, it will also consider whether the program infringes on other fundamental rights, such as equality: “When the rights to life, dignity and equality are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the State has complied with the constitutional standard of reasonableness.” In judging the reasonableness of the methods by which the legislature chooses to give effect to the state’s positive obligations, the Court must take into account whether the program “unreasonably limits other constitutional rights.”

Interestingly, the Court suggested that the state could justify not paying benefits to all for financial reasons, but required that the criteria it uses to limit payments must be consistent with the South African bill of rights. Had the government maintained that the exclusion of permanent residents was temporary or that it was “an incident of attempts by it progressively to realize everyone’s right of access to social security,” the Court may have reached a different decision. Instead, the government contended that “non-citizens have no legitimate claim of access to social security.” Because the state had no plan or intention to progressively realize permanent residents’ right to social security, the Court focused its review on the reasonableness of the exclusion rather than the reasonableness of the social service program as a whole.

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171 Khosa v. Minister of Social Development 2004 (6) BCLR 569 (CC) (S. Afr.).
172 Id. at 589.
173 Id. In Soobramoney, the Court suggested that if health care decisions were made in an unconstitutionally discriminatory manner, it would have been grounds to interfere with the government’s program. See Soobramoney v Minister of Health (KwaZulu-Natal) 1997 (12) BCLR 1696 (CC) at 1707 (S. Afr.); see also Goldstone, supra note 93, at 5.
174 See Khosa, 2004 (6) BCLR 569 (CC) at 589.
175 Id. at 591.
176 Id.
177 See id. at 589 ("What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights of life and dignity, the social-security scheme put in place by the State to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination."); see also id. at 600 ("The only challenge to the scheme is that it denies access to non-citizens. There is no suggestion that the scheme is otherwise inappropriate or inconsistent with the Constitution.").
The government argued that the expense, its immigration policy, and the need to encourage immigrant self-sufficiency justified the exclusion of lawful permanent residents.\(^\text{78}\) Although the Court conceded that the exclusion might be rational, it held that its reasonableness standard required more than rationality and that a rational differentiation might still be discriminatory.\(^\text{79}\) Although citizenship was not listed explicitly in the constitution's non-discrimination provision, the Court found that it was analogous to the grounds that were listed.\(^\text{80}\) In determining whether the discrimination was unfair, the Court considered the position of permanent residents in society, noting that they have "little political muscle" and that citizenship is an attribute that is difficult to change.\(^\text{81}\) It concluded that the exclusion constituted intentionally unequal statutory treatment that carried with it a strongly stigmatizing effect.\(^\text{82}\) The Court also found that the exclusion adversely affected permanent residents by undermining their dignity and forcing them into relationships of dependency on their families and communities.\(^\text{83}\)

The Court's decision was driven by "the importance of providing access to social assistance to all who live permanently in South Africa."\(^\text{84}\) It rejected the government's justifications for its policy because "the impact upon life and dignity that a denial of such access has[] far outweighs the financial and immigration considerations on which the state relies."\(^\text{85}\) It concluded that "the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable

\(^{78}\) The Court suggested that limiting the cost of social welfare is a legitimate concern, and that it would be permissible to control permanent resident applications to exclude those who may become burdens to the state. See id. at 595. The Court also determined, however, that after the state chooses to admit permanent residents and allows them to make their homes in South Africa, it cannot later abandon them. In such instances, the social welfare expense "may be a cost we have to pay for the constitutional commitment to developing a caring society." Id.

\(^{79}\) Id. at 596. The Court distinguished its test from U.S. federal courts' rational basis standard, asserting that its test is higher than mere rationality. See id. The rational basis standard led U.S. courts to uphold rational, yet discriminatory provisions affecting permanent residents. In City of Chicago v. Shalala, 189 F.3d 598 (7th Cir. 1999), the Seventh Circuit applied a rational basis standard of review to uphold a federal program that excluded permanent residents from receiving benefits. See id. at 603–09. The court noted that heightened scrutiny was improper for federal classifications based on alienage because of Congress's power to regulate immigration. See id. at 604 (citing Mathews v. Diaz, 426 U.S. 67, 84–85 (1976)).

\(^{80}\) See Khosa, 2004 (6) BCLR 569 (CC) at 597 (S. Afr.) ("To be considered an analogous ground of differentiation . . . the classification must . . . have an adverse effect on the dignity of the individual, or some other comparable effect.").

\(^{81}\) Id.

\(^{82}\) Id. at 598.

\(^{83}\) See id. at 599 ("[T]he exclusion of permanent residents [from the scheme] . . . is likely to have a severe impact on the dignity of [the persons concerned].").

\(^{84}\) Id. at 601.

\(^{85}\) Id.
legislative measure as contemplated by section 27(2) of the Constitution.\textsuperscript{186}

c. Good Faith

Another factor influencing the Court’s reasonableness analysis is the government’s good faith in creating and implementing its policy initiatives. In *Sooobramoney*, for example, the Court appeared convinced that the department of health had done its best to develop a fair system to allocate dialysis, a scarce commodity, and that the program it developed was not discriminatory. Thus, it deferred to the provincial administration, writing that the Court “will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities.”\textsuperscript{187} In later cases where the Court was not convinced that the government policy reflected a true commitment to achieving socio-economic rights, it was less deferential to the government’s decisions and judgment.

The *Treatment Action Campaign* case followed years of government failure to make nevirapine available despite evidence of its safety and efficacy and an offer by the drug manufacturer to make it available for free.\textsuperscript{188} In light of past history suggesting that the government did not take its constitutional obligations seriously, the Court declined to defer to the government’s expertise in developing health policy. Instead, it independently reviewed the evidence and rejected several of the government’s contentions. For instance, the government submitted an affidavit contending that “[mother-to-child transmission] of HIV-1 through breastmilk negates all the gains of the use of Nevirapine in the mother during delivery and in the newborn child within 72 hours after birth.”\textsuperscript{189} The Court, however, found the government’s conclusion unsupported by the underlying data and concluded instead that the “wealth of scientific material . . . makes plain that sero-conversion of HIV takes place in some, but not all, cases and that nevirapine thus remains to some extent efficacious

\textsuperscript{186} Id.

\textsuperscript{187} *Sooobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC) at 1706 (S. Afr.).

\textsuperscript{188} See Goldstone, *supra* note 93, at 5 (“Some senior ministers, and even President Thabo Mbeki . . . have denied that the virus HIV is the cause of AIDS. As such, only two testing stations in two medical facilities were set up within the country, effectively denying Nevirapine to 90 percent of South Africa’s pregnant mothers.”); see also Ray, *supra* note 9, at 162 (suggesting that the political background and “oblique references in the judgment . . . suggest that the Court was reacting to what it perceived as a refusal by the government to take seriously its constitutional obligations under Section 27 when developing the pilot program”).

\textsuperscript{189} *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) at 1052 (S. Afr.).
in combating mother-to-child transmission even if the mother breastfeeds her baby." The Court also discounted the government's concern about development of nevirapine-resistant strains of HIV, concluding that the danger of such mutation "is small in comparison with the potential benefit of providing a single tablet of nevirapine to the mother and a few drops to her baby at the time of birth." Finally, the Court dismissed the government’s safety concerns about the drug, stating that those concerns presented “no more than a hypothetical issue.” According to the Court the only evidence of potential harm involved administration of nevirapine on an ongoing basis to HIV positive individuals. For prevention of mother-to-child transmission, the WHO recommended a dose of nevirapine “without qualification,” an endorsement reflecting the medical consensus that the single dose would cause harm to neither mother nor child. Moreover, the government’s policy of making nevirapine available at sites that catered to 10% of public sector births and to the private sector undermined its claims of safety concerns.

In Khosa, the Court disagreed with a basic premise of the government’s policy—its position that permanent residents did not have a right to social security. Given that the government’s policy was based on an erroneous assumption about the rights of permanent residents, the Court was less willing to defer to its policy decisions. As a result the Court independently scrutinized the evidence and declined to defer to the government’s judgment. The government argued that the cost of providing benefits to permanent residents made it reasonable to exclude them. Although the government failed to provide definite evidence regarding the additional cost of the grants, the Director of Social Services in the National Treasury estimated that it could range between R243 million and R672 million. Using the higher estimate, the Court challenged the government’s judgment about the significance of the cost, stating that the additional amount the government would have to pay “reflects an increase of less than 2% on the present cost of social grants,” which

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190 Id.
191 Id.
192 Id.
193 Id. at 1052–53.
194 Id. at 1053.
195 See Khosa v. Minister of Social Development 2004 (6) BCLR 569 (CC) at 593 (S. Afr.).
196 See id. The Court acknowledged that such financial concerns were legitimate and reasonable, but did not justify a blanket exclusion of all non-citizens from social security. Id.
197 Id. at 594.
198 Id.
would be "only a small proportion of the total cost" of the program.199 In dissent, Justice Ngcobo argued that, given the paucity of information about cost, the Court should defer to the political branches because they have "the expertise necessary to present a reasonable prediction about future social conditions."200

3. The Court's Role

The cases discussed above establish the Court's framework for finding violations of the economic and social rights provisions. But the question remains whether judicial involvement in socio-economic rights will lead to improved enforcement and implementation of socio-economic rights consistent with the government's constitutional obligations. To answer this question, this subsection looks at the Court's judicial remedies and considers the potential advantages of a dialogic process for implementation of socio-economic rights.

a. Appropriate Remedies

The Constitutional Court has been reticent to impose mandatory orders or ongoing court supervision of compliance—actions Mark Tushnet refers to as "strong" judicial remedies.201 Rather than reflecting the view that it is never appropriate for the court to issue injunctive relief or retain supervisory jurisdiction, however, the cases suggest a more contextual approach in which the Court determines the appropriate relief after evaluating the specific circumstances of a case.

The Court has made clear that it has the power to issue mandatory orders and supervisory injunctions,202 but has acknowledged that such orders may not be appropriate in every instance, stressing the need to retain flexibility to tailor its remedy to the circumstances of the case.203 Thus, despite its power to do so, the Court has consistently declined to retain supervisory jurisdiction,204 seeking instead to give

199 Id.
200 Id. at 615.
201 Tushnet, supra note 53, at 1911 (noting that in the South African cases the courts have favored weak remedies that do not spell out in detail what government officials are to do).
202 In Treatment Action Campaign, the Court rejected the government's argument that its power is limited to declaratory relief. Emphasizing its "duty to ensure that effective relief is granted," the Court stressed that it has a wide range of powers to enforce the Constitution, including mandamus and supervisory jurisdiction. Minister of Health & Others v Treatment Action Campaign & Others 2002 (10) BCLR 1033 (CC) at 1064, 1066 (S. Afr.).
203 See id. at 1066.
204 See, e.g., Gov't of the Republic of South Africa & Others v Grootboom & Others 2000 (11) BCLR 1169 (CC) at 1191 (S. Afr.) (granting supervisory jurisdiction to the South African Human Rights Commission).
the government the opportunity to develop the specifics of a policy that meets constitutional muster. In Grootboom, for example, it issued a declaration that the government’s policy was unreasonable and left it to the government to revise its approach.\(^{205}\)

Kent Roach has suggested that declarations and recommendations are appropriate remedies for socio-economic rights “at least to start the process of compliance.”\(^{206}\) Declarations take into account concerns about the Court’s institutional competency in crafting policy and its ability to ensure compliance. Because its effectiveness requires a dialogue between the court and the government, the appropriateness of declaratory relief will depend on the good faith of the government, the “moral suasion of the judicial body,” and the political pressure that can be exerted by civil society and other relevant stakeholders.\(^{207}\)

In Treatment Action Campaign and Khosa, the Court showed less deference than in Grootboom, and the remedies it ordered were further reaching. In Treatment Action Campaign, the Court ordered the government to remove the restrictions on nevirapine at public health facilities that were not pilot sites, to make the drug available when medically indicated, and to make provisions for counseling and testing to support the use of the drug.\(^{208}\) Similarly, in Khosa, the Court rewrote the Social Assistance Act to include permanent residents.\(^{209}\)

The Court’s willingness to order the government to take action in Treatment Action Campaign reflects the fact that the case did not stretch the Court’s institutional competency. The lengthy record before the Court, the drug manufacturer’s offer to make nevirapine available for free, and the relatively straightforward policy choice made it easier for the Court to challenge government policy and order specific policy changes. Moreover, in both Treatment Action Campaign and Khosa, the Court was able to issue orders that were limited in scope, requiring alterations to the government’s existing policies, rather than the development of entirely new policies from scratch.\(^{210}\) Finally, in both instances, the government arguably had not

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205 See Grootboom, 2000 (11) BCLR 1169 (CC) at 1191.
207 Id.
208 Id. at 1071.
209 See Khosa v Minister of Social Development 2004 (6) BCLR 569 (CC) at 602–03, 605–06 (S. Afr.).
210 See Ray, supra note 9, at 178 (stating that in Treatment Action Campaign, “the Court was able to take a direct role to fill the gap that the government’s recalcitrance had created but at the same time to still avoid the problems that were likely to arise by engaging in extensive
acted in good faith, making it less appropriate for the Court to issue declaratory relief and leave it to the government to devise and implement a policy that complied with its order.

Although its decisions have stopped short of supervisory jurisdiction, the Court indicated that such relief may be appropriate when "necessary to secure compliance with a court order."211 The government's "failure to heed declaratory orders or other relief granted by a court in a particular case," the Court explained, would be one such case.212 Thus, Grootboom might be understood as reflecting a preference for giving the government an opportunity to develop a compliant housing policy in the first instance in a case where there is no prior history of bad faith. If the government action at issue establishes bad faith, however, the Court is more likely to issue a mandatory order. If there is a history of failing to comply with court orders, supervisory jurisdiction may be appropriate. In support of this theory, Brian Ray pointed out that in more recent housing cases, the Cape Town High Court proved willing to invoke the oversight powers that the Constitutional Court declined to use because the City of Cape Town failed to comply with the Grootboom decision.213

b. Dialogic Review and Acceptance and Implementation

In addition to looking at the remedies the Court chooses, it is important to analyze how judicial review can increase acceptance of socio-economic rights as a societal value, create processes for more transparent and inclusive policy decision making, and amplify political pressure for meaningful implementation.

Irrespective of whether courts issue strong or weak judicial remedies in socio-economic rights cases, knowing that courts may

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201[ Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) at 1071.
212 Id.; see also Roach, supra note 206, at 53–54 ("Declarations can work in cases in which governments have been inattentive to rights, but the stronger relief of injunctions accompanied with judicial retention of supervisory jurisdiction may be appropriate in those cases where governments are either unwilling or simply incompetent to provide socio-economic rights.").
213 See Ray, supra note 9, at 181–84. In the first case, the court ordered the City to report back to the court within four months to deliver a report on the steps it took to comply with its constitutional obligations to make provisions for emergency housing. See City of Cape Town v Rudolph & Others 2004 (5) SA 39 (CC) (S. Afr.). In the second case, the court held that the city could not evict residents of an informal settlement until it had implemented the Grootboom decision and developed a plan to accommodate residents of an informal settlement. See In the Matter Between the City of Cape Town & the Various Occupiers of the Road Reserve of Appellant Parallel to the Sheffield Road in Phillippi, No. A 5/2003 (Sept. 30, 2003) (S. Afr.); see also Liebenberg, supra note 118, at 98 (noting that the "High Courts have generally granted supervisory orders more readily" than the Constitutional Court).
require a reasonable justification for policy choices may encourage
the government to pay greater attention to developing robust policies
and devoting sufficient resources to socio-economic rights. Further,
requiring the government to prove that its policies are reasonable
in court may increase the transparency of the government’s
decision-making process. As Joanne Scott and Susan Sturm have
written, courts can serve as a catalyst for elaborating norms and
engaging relevant actors.214

The dialogue between the court and the government initiated by
declaratory relief that may evolve into stronger forms of judicial
intervention has been described as a “dialogic”215 form of judicial
review. Other commentors have described this type of judicial review
as “policentric” because it involves “a sharing of interpretative
authority with the legislative and executive branches.”216 Scholars
argue that such forms of review are more appropriate for enforcement
of economic and social rights than traditional juricentric models.
By requiring the active engagement of the political branches, the
dialogic and policentric approaches increase institutional competence,
democratic legitimacy, and the likelihood of robust enforcement.217
Further, a public dialogue between the court and the government
creates openings for the involvement and mobilization of civil
society, building public support and political pressure for change.
Thus, while a strictly judicial legal response may result in a faster
legal resolution, engaging the government and civil society in
developing a solution may ultimately be a more effective mechanism
for meaningful long-term change.218

III. STATE CONSTITUTIONS AND INDIVIDUAL RIGHTS

A. Individual Rights Under State Constitutions

State constitutions share many characteristics with the federal
constitution—they set up the basic structure of government, lay out

214 See Joanne Scott & Susan Sturm, Courts as Catalysts: Re-Thinking the Judicial Role in
215 See Roach, supra note 206, at 51–52
216 Ray, supra note 9, at 153–54.
217 See id. at 172–74 (investigating the comparative advantages of the policentric approach
in the different branches of government); see also Roach, supra note 206, at 52 (arguing that
the dialogic approach aims to “promote healthy partnerships between courts and governments
and ... [is] often concerned with producing systemic reforms to prevent violations in the future”
(footnote omitted)).
218 See Ray, supra note 9, at 177 (comparing the differences between legal and political
responses to social and economic questions).
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governmental responsibilities, and protect individual rights.219 However, state constitutions can be very different, both from the federal Constitution and from each other, in the scope of their commands and grants. Many state constitutions reflect the time at which they were adopted and embody the unique values of their framers and state.220 While the federal Constitution gives specific enumerated powers to the federal government, states are viewed as having plenary power over the health, safety and welfare of their people and state constitutions are normally viewed as limiting those powers.221 Both the federal Constitution and state constitutions protect rights from government infringement and serve as a blueprint for government action, but many state constitutions include a broader array of individual rights, including socio-economic rights provisions. This Part will discuss these differences with a view toward encouraging advocates to look to their state constitutions for protections of human rights, particularly the right to health.

In 1977, U.S. Supreme Court Justice William Brennan, who formerly served on the New Jersey Supreme Court, authored a seminal article exhorting legal advocates to use state courts and state constitutions to advance and protect individual rights.222 Justice Brennan wrote that state courts have used state constitutions to protect individual rights at a variety of junctures in U.S. history, but that state constitutions essentially faded into the background "during


221 See G. Alan Tarr, Understanding State Constitutions, 65 Temp. L. Rev. 1169, 1180 (1992) (describing early views of states' constitutional limits on plenary powers); George T. Anagnost, The Arizona Constitution: Sources, Structure & Interpretive Cases, Ariz. Att'y Mag., Mar. 2009, at 14, 15 (noting that state constitutions "recite both open-ended powers and concomitant limitations"); see also Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982) ([S]tate Constitutions are separate sources of individual freedoms and restrictions on the exercise of power by the Legislature. By contrast, the U.S. Constitution is a grant of enumerated powers to the federal government. Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights. Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete." (citations omitted)); Gangemi v. Berry, 134 A.2d 1, 5 (N.J. 1957) ("The government of the United States is one of enumerated powers; and in its very nature the State Constitution is not a grant but a limitation of the exercise of the sovereign power inherent in the people, subject to the limitations imposed by the grant to the general government and, as well, those so fundamental in the social compact as to be necessarily implied.").

222 See Brennan, supra note 1.
the 1960's [when] our rights and liberties were in the process of becoming increasingly federalized." Justice Brennan "pointed out that the Framers of the U.S. Constitution considered state constitutions, rather than the federal Constitution, to provide the principal legal bulwark for individual liberties," and observed that many individual rights were protected more fully by state constitutions.

While Justice Brennan appeared most concerned with reversals and narrowing of decisions relating to significant federal individual constitutional rights found in the United States Constitution and therefore urged state advocates to look to their own state constitutions' protection of those same rights, state constitutions often contain affirmative guarantees of social and economic rights that are not contained in their federal counterpart. In the three decades since Justice Brennan's article, a rich scholarship has developed that identifies the possibilities for vindicating state constitutional rights beyond those that mirror federal individual rights. Yet despite the

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223 Id. at 495; see also Daniel Gordon, Brennan's State Constitutional Era Twenty-Five Years Later—The History, The Present, and the State Constitutional Wall, 73 TEMP. L. REV. 1031, 1047 (2000) ("According to Brennan, state law came and went, and federal law came and stalled. . . . Federal constitutional and state constitutional law both served alternatively like dominant and recessive genes to control the growth of individual rights.").


225 See id. (describing Brennan's concerns about the Supreme Court's retreat from protecting individual constitutional rights); see also Bolick, supra note 224, at 140 (discussing the federal judiciary's increasingly limited reading of certain federal constitutional rights as compared with state interpretations of identical state constitutional provisions that created notably broader protections for the same rights).

wealth of opportunities for advancing socio-economic rights under these state constitutions, practitioners and advocates have continued to focus on federal courts as the best forums to vindicate individual rights. As Judge Jeffrey Sutton of the United States Court of Appeals for the Sixth Circuit noted in a recent essay, law schools are part of the problem. Law schools almost never teach state constitutional law, leaving most lawyers without any familiarity with their own or any other state constitution, much less the potential for using state constitutions to advance individual rights. Moreover, a certain skepticism exists about the potential for state courts to adequately address serious constitutional violations and deprivations. This skepticism has led to advocates primarily bringing individual rights


See id. at 166–67 (noting that no law school offers state constitutional law as “a core part of its curriculum,” that in 2007-2008, only eighty law schools taught courses that even touched on state constitutional law, and that “[n]ot one of the top fifteen law schools . . . offered” any general state constitutional or state government law course); see also A Symposium with Women Chiefs, 13 CARDOZO J.L. & GENDER 305, 325 (2007) (quoting Judith Kaye, former Chief Judge of the New York Court of Appeals, who, in discussing a speech she had given about the New York State Constitution, recounted that “[a] lawyer came up to me afterwards, and said, ‘Judge Kaye, I feel like I am swimming in a whole new sea of culture. I didn’t know we had a State Constitution,’” and observing in response that “the fact is we have had a State Constitution since 1777”).

See, e.g., Meredith Johnson Harbach, Is the Family a Federal Question?, 66 WASH. & LEE L. Rev. 131, 186–88 (2009) (noting the academic and jurisprudential “impasse” over whether the “federal judiciary is institutionally and normatively superior to the state courts” and whether federal courts “are the better forum [for constitutional adjudication] because of their technical competence, predisposition toward enforcing constitutional rights, and independence,” as well as some scholars’ argument that “state courts are just as competent to decide federal questions, and that courts’ hospitability to federal constitutional claims is not the appropriate measure for parity” (footnotes omitted)). Harbach observes that “the Supreme Court has offered support for both positions.” Id. at 188

Of course, much of this skepticism exists as a result of the failure on the part of some state courts to adequately enforce civil rights in the 1950s and 60s under the Civil Rights Act of 1964 and some of the more expansive federal constitutional decisions that came out of the Warren Court during that time. See, e.g., Kenneth Katkin, “Incorporation” of the Criminal Procedure Amendments: the View from the States, 84 Neb. L. Rev. 397, 407 n.43 (2005) (“During the era of the Warren court, this country saw a wave of judicial activism in the Federal judiciary largely because State courts, particularly in the Deep South, were unwilling to provide the most basic protections to citizens of their State.” (quoting People v. Tisler, 469 N.E.2d 147, 165 (Ill. 1984)) (Clark, J. concurring)). This Article does not argue that all state constitutions provide more expansive protections for individual rights than does the federal Constitution—certainly the federal floor of protections for those rights may be the best available protection in many jurisdictions. Nonetheless, as discussed in this Article, there are some states that have gone further.
cases in federal court under the federal Constitution, thereby limiting the development of state constitutional law.\textsuperscript{230}

Nonetheless, the significant differences between state constitutions and the U.S. Constitution may bear renewed attention, as advocates and jurists continue to seek to more fully vindicate individual rights. State constitutions have different histories, both from the U.S. Constitution and from each other. The federal Constitution was the product of negotiations between states with widely divergent interests and ideological positions, resulting in a fairly narrow document that has remained relatively stable over the years. State constitutions were drafted in response to more localized interests and needs. As a result, many state constitutional guarantees protect individual rights in a more targeted and often more expansive way than their federal analogues or contain rights “such as the right to privacy, that have no explicit federal analogue.”\textsuperscript{231} Moreover, state constitutions are often more malleable. While the U.S. Constitution was authored in 1787, ratified in 1788, and has been amended only twenty-seven times, the constitutions of the fifty states were adopted during a variety of historical periods and may have been amended twenty times or two hundred times.\textsuperscript{232} Each time a state constitution has been adopted or amended, the landscape of individual rights in that state has changed.

Until 1897, when the Fourteenth Amendment to the U.S. Constitution slowly began to be “incorporated” against the states,\textsuperscript{233} state constitutions were viewed as the sole protectors of individual rights against state governments.\textsuperscript{234} Indeed, from the beginning of the

\textsuperscript{230} See Frank B. Cross, \textit{Gay Politics and Precedents}, 103 Mich. L. Rev. 1186, 1196, 1212-16 (2005) (noting “[t]here is a generalized preference for the federal courts in individual rights or civil rights litigation, including gay rights litigation” and describing some history behind that preference); Burt Neuborne, \textit{The Myth of Parity}, 90 Harv. L. Rev. 1105, 1129 (1977) (defending recourse to federal courts to vindicate individual rights, although recognizing that “by assuming state court inferiority and by seeking to funnel important constitutional cases into federal trial courts, civil liberties lawyers may be engaged in self-fulfilling prophecy which helps perpetuate the second-class status and performance of state trial courts”).

\textsuperscript{231} Id. at 1172; see also Davis, supra note 226, at 372 (noting that “[m]any state constitutions articulate rights that are not mentioned in the federal constitution, such as positive rights to welfare, health, education and the right to work”).

\textsuperscript{232} See infra note 266 and accompanying text.

\textsuperscript{233} See Brennan, supra note 1, at 493 (“The break-through came in 1897 when the prohibition against taking private property for public use without payment of just compensation was held embodied in the fourteenth amendment’s [due process clause] . . . . But extension of the rest of the specific restraints was slow in coming.”).

\textsuperscript{234} See Dennis J. Braithwaite, \textit{An Analysis of the “Divergence Factors”: A Misguided Approach to Search And Seizure Jurisprudence Under the New Jersey Constitution}, 33 Rutgers L.J. 1, 44-45 (2001) (arguing for an approach to state constitutional interpretation that relies first on the state constitution, as opposed to relying on the federal constitution and using the state constitution to fill in gaps, noting the “original view that ‘state constitutions are the basic charters of individual liberties’ and arguing that this ‘view that state constitutions are the basic instruments that protect individual liberties did not evaporate when state courts stopped looking
Founding period, state constitutions were viewed as the primary protector, and potentially creator, of individual rights in the states. At the same time, while the U.S. Constitution does not have explicit guarantees of social and economic rights, many state constitutions do. These guarantees include the right to education and in some cases the right to health, welfare, or care for the needy. Scholars have discussed the rights contained in state constitutions in a number of contexts, but many agree that the structure and purpose of state constitutions, along with these unique guarantees, impose greater obligations on state governments to promote fundamental rights.

1. Structure and Purpose of State Constitutions

a. A Blueprint for Government

The Supreme Court has stated on multiple occasions that states have an "undoubted power to promote the health, safety, and general welfare." Perhaps as a result, state constitutions are more comprehensive documents, operating as a blueprint for state government. They often provide citizens of the states with more explicitly articulated rights than the U.S. Constitution and also impose to them to protect fundamental liberties because those liberties were federalized during the 1960's and that "[t]he fact that the U.S. Supreme Court applied the Federal Bill of Rights to the states, did not relieve state courts from their obligation to enforce individual liberties under the state charter" (quoting Stewart G. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 707, 718 (1983); Fitzpatrick, supra note 226, at 1835 (noting that "invocation of state constitutions to protect individual rights was in fact the historical norm for much of the nation's existence").

235 See A Symposium with Women Chiefs, supra note 228, at 326 ("[A]fter all, the State Supreme Courts, the state's highest courts, were the first courts in this country to deal with individual rights. The Federal Constitution was not implicated until modern times." (quoting Deborah Poritz, former Chief Justice of the New Jersey Supreme Court)). However, according to one jurist, "the truth is that both the federal and state constitutions held little interest to individual-rights lawyers, professors and law students for the first 100 years of our history... [I]t was not until the early 1900s that constitutional litigation in general and individual-rights litigation in particular became a significant part of the state or federal court dockets." Sutton, supra note 227, at 170.

236 See, e.g., ALASKA CONST. art. VII, §§ 1, 4, 5 (education, health, welfare); MONT. CONST. art II, § 3; (right to "clean and healthful environment); N.Y. CONST. art. XVII, §§ 1, 3 (care for the needy, public health); id. art. XI, § 1 (education); WYO. CONST. art. VII, § 20 (health and morality).

237 See, e.g., Hershkoff, Positive Rights, supra note 54; see also Braithwaite, supra note 234, at 23-45 (discussing this in the context of the New Jersey Constitution).

238 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); see also Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) (Providing for the "health, safety, morals or welfare of its people" are "powers of government inherent in every sovereignty").
much more concrete requirements on state governments to provide for their citizens. As one commentator explained:

State constitutions . . . tend[] to be quite lengthy and much more detailed. They include substantially more areas of concern than the federal document. There is a greater elaboration on the structure, purposes, operation, and financing of state and local government; often exhaustive descriptions of the power and duties of public entities, agencies, and officials; and, usually, a broad, expanded, state-specific expression of individual rights.

b. Guarantors of Individual Rights

When the United States was still forming, state constitutions were drafted to create state governments, outline their obligations, and enshrine protections for the rights of the citizens of the states. Over the course of two centuries, state constitutions have come to house a variety of different rights and responsibilities of both the government and the people. These rights sometimes even extend to protect individuals from the actions of non-governmental actors, a concept far outside the traditional understanding of the federal Constitution. Special articles in some state constitutions also impose specific duties on the state government to achieve certain policy goals. This too differentiates state constitutions from the federal Constitution, which gives the federal government certain powers but does not dictate how those powers are to be used.

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239 See Tarr, supra note 221, at 1172.


241 See Tarr, supra note 221, at 1170–79 (describing the creation and purposes of the state constitutions).


243 Tarr, supra note 221, at 1172 ("[W]hile the Federal Bill of Rights only protects against governmental invasions of rights, some state guarantees—either expressly or implicitly—extend protection against non-governmental violations of rights as well."); see also supra Part I.D (discussing the obligation to protect); supra note 116 and accompanying text (discussing the "horizontal application" of human rights to private actors).

244 See Tarr, supra note 221, at 1177 (discussing the free public education requirement in the New Jersey Constitution, N.J. CONST. art. 8, § 4, and the healthful environment guarantee in the Illinois Constitution, ILL. CONST. art. 11, § 1).

245 Id.
c. Different Framers, Different Ideas

Often, advocates and sometimes even state courts behave as though state constitutions are merely copies of the federal Constitution, but this is clearly not the case. The basic framework of many state constitutions predates the United States Constitution.246 Other state constitutions were adopted in the midst of particularly strong social movements that influenced their framers in unique ways.247 Just as the U.S. Constitution has been interpreted with reference to the motivations of the framers and the historical context of each provision, state constitutions each have unique framers and historical contexts.248 In some cases, these situations gave rise to provisions protecting state values completely unique to the state. Western states’ constitutions for example, have special limitations on water usage.249 Some southern states and Hawaii protect fishing rights.250 In other cases, these contexts led state framers to include guarantees that they considered important, such as the right to pursue and obtain happiness251 even though such concepts had been specifically rejected by the framers of the federal Bill of Rights.252

246 See Gordon, supra note 223, at 1054–55 (noting that the Vermont Supreme Court in Baker v. State, 744 A.2d 864 (Vt. 1999), relied on the Vermont common benefits clause, VT. CONST. ch. 1, art. 7, which was incorporated into the first Vermont Constitution in 1777); see also Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982) (“Understanding of the relationship between the United States Supreme Court and a state Supreme Court as interpreters of constitutional rights begins with the recollection that the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution.”).

247 See Lauck, supra, note 220, at 204 (describing the circumstances underlying the South Dakota Constitution’s creation); see also Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 HASTINGS CONST. L.Q. 1, 5 (1997) (noting that the Virginia Constitution was written in 1776 before the Declaration of Independence was authored).

248 See Gordon, supra note 223, at 1055 (describing how the Vermont Supreme Court relied in part on the "history of the American Revolution in northern New England" in interpreting the Vermont Constitution’s common benefits clause).

249 See, e.g., ARIZ. CONST. art. XVII (addressing riparian and existing water rights); TEX. CONST. art. 3, § 49-d (addressing the acquisition, storage, treatment and transportation of water).

250 See, e.g., ALA. CONST. amend. 597 (granting all persons the right to fish in the State of Alabama); FLA. CONST. art. X, § 16 (addressing marine net fishing); HAW. CONST. art. XII, § 7 (protecting “traditional and customary” rights related to the subsistence, cultural, and religious practices of the state’s native population).

251 See, e.g., IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."); see also Grodin, supra note 247, at 3 (“The Iowa language (sometimes with a more extensive statement of rights) appears in the constitutions of California, Colorado, Nevada, New Jersey, New Mexico, North Dakota, Ohio, and Vermont.”).

252 Moreover, some of the language adopted by state constitutional drafters, such as a guarantee that residents be able to “pursue and obtain happiness and safety,” was explicitly rejected by the drafters of the federal Constitution. Grodin, supra note 247, at 7–8 (discussing
Finally, as Justice Brennan argued in his landmark article, even when state framers used terms that were similar to those in the United States Constitution, the historical context of the state's constitution and its adoption, as well as changes in the state's values over time, could lead to a different interpretation of the state provisions than that adopted by the United States Supreme Court in interpreting comparable federal provisions.253

Constitutions adopted after the “Founding era” reflect the different political landscape. For example, Arizona’s constitution, adopted in 1910, is imbued with a “healthy skepticism about concentrations of power balanced by a deep-seated optimism that government should play an active, positive role for social betterment.”254 South Dakota’s constitution was adopted when the state was petitioning for statehood, and it was framed by veterans of the Civil War who valued patriotism and public service above all else.255

Other state constitutions were influenced by changes in international mores abroad.256 Jurists in both Montana and New Jersey have written about their state framers’ reliance on the Universal Declaration of Human Rights.257 In fact, former Chief Justice James Zazzalli of the New Jersey Supreme Court has maintained that “[t]he New Jersey Constitution in some ways is closer to the international guarantees contained in the [UDHR] than it is to the nation’s federal law.”258 In discussing the importance of human rights in the United States, former Chief Justice Zazzalli also pointed out that New Jersey ratified its current constitution in 1947, just one year before the Universal Declaration of Human Rights, and “provided . . . expansive individual rights, such as equal rights for

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253 See Brennan, supra note 1, at 502–04; see also Doe v. Maher, 515 A.2d 134, 148–49 (Conn. Super. Ct. 1986) (discussing how the concept of “natural rights” influenced the framers of both the Due Process Clause and the Connecticut Constitution); Gordon, supra note 223, at 1050–52 (evaluating Justice Brennan’s argument that state constitutions are independent sources of protections and that federal constitutional authority only provides minimalist protections).

254 Anagnost, supra note 221, at 17.

255 Lauck, supra note 220, at 219–21.

256 See Davis, supra note 226, at 371 (“[S]ome state laws have been crafted in the shadow of, and were thus influenced by, international agreements such as the Universal Declaration of Human Rights.”).


258 Zazzalli, supra note 257, at 679.
women, the right to be free from discrimination, and a child’s right to a thorough and efficient education.” Drafted after more than one hundred and fifty years of experience with the federal Constitution, the 1947 New Jersey Constitution more fully protects individuals within the state from both government action and inaction than does its federal counterpart. Chief Justice Zazzalli particularly emphasized the right to housing, which also exists in the United Nations Declaration. He noted that, while the United States Supreme Court has held that there is no right “of access to dwellings” under the United States Constitution, the New Jersey Constitution has been interpreted to protect “housing and shelter” as “necessary for the general welfare [and that] . . . New Jersey towns must provide their fair share of affordable housing.”

Similarly, a section of the Montana Constitution provides that:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

This provision is unique and its history is linked to the drafting of the Puerto Rican constitution and to the Universal Declaration of Human Rights.
d. Flexibility and Responsiveness: A Dual-Edged Sword

State constitutions are also amended more frequently than the federal Constitution. Indeed, some state constitutions have been amended more than 200 times. This flexibility and adaptability could make state constitutions more responsive to changing values and progressive developments than the federal Constitution, and allows each state to ensure that its governing document accurately reflects the citizens’ wishes. In some cases, the simple amendment process has led to rights-restrictive amendments—most recently in the case of same-sex marriage—but there have also been successful progressive movements toward liberalizing and strengthening individual rights and limiting overreaches of state governments.

The comparative ease with which state constitutions are and have been amended has also meant that there are far more “framers” of state constitutions than there are of the federal Constitution. Some have argued that states’ frequent recourse to amendment has meant that “state constitutions are constantly changing, and the political perspective and aims of those amending the constitution may well differ from those of the constitution’s initial ratifiers.” However, the shift over time in a constitution’s language, or even in the state’s adoption of multiple constitutions, can also be viewed as a helpful

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267 See Schlam, supra note 240, at 298–310 (discussing the interaction between an easy constitutional amendment process and judicial independence and willingness to elaborate on individual rights in the state constitution).

268 See John G. Culhane, Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights, 84 CHI.-KENT L. REV. 437, 438 n.8 (2009) (noting that, at the time the article was drafted, twenty-seven states had adopted amendments banning same-sex marriage in their states).


270 See Tarr, supra note 221, at 1184 (“For most state constitutions, unlike the Federal Constitution, it is inaccurate to speak of the ‘Founders’ or even of a ‘founding epoch.’”).

271 Id.
interpretive aid to see how the state framers intended to change their constitution’s meaning over time.\textsuperscript{272} Moreover, although the amendments often change discrete elements of the constitution, broadening rights in one area or restricting government behavior in another, state constitutions have in general retained their fundamental character and content, indicating continuity of state values and structure rather than continual change.\textsuperscript{273}

Nonetheless, regular recourse to amendment creates a paradox: state constitutions may grant broad rights to state residents or citizens, but those rights can be taken away with greater ease than the less expansive rights granted by the federal Constitution.\textsuperscript{274} This attribute of state constitutionalism demonstrates its difference from federal constitutional law and jurisprudence. State constitutionalism is a more malleable and fluid system—the judiciary has more power to interpret and guide state constitutional policy and rights, but state citizens also have more power to respond when they are unhappy with the results.\textsuperscript{275} Judicial review under state constitutions may lead to a broad vision of rights, but state voters can roll back those interpretations if they do not believe they reflect the state values of the day.\textsuperscript{276}

In fact, the give and take of state constitutional change may be viewed as a way to test public beliefs about individual rights. For example, after the Hawaiian Supreme Court held that the Hawaii Constitution protects same-sex marriage, that state’s citizens amended

\textsuperscript{272} See id. at 1187–88 (using the New Jersey Constitution as an example of the changing intent of that state’s constitutional framers).

\textsuperscript{273} Id. at 1188; see also Kristen Ford, Column, \textit{History of Original Constitutional Provisions in Idaho}, \textsc{Advocate}, Sep. 2002, at 30 (noting that the Idaho constitution has existed since 1889 and that “[t]here are actually many constitutional provisions that have not been amended one iota since” that point).

\textsuperscript{274} Fitzpatrick, \textit{supra} note 226, at 1854 (“The relative ease in amending state constitutions to overturn unpopular state constitutional decisions reveals a fundamental paradox of state constitutional law: State constitutions are, in theory, supposed to provide fundamental rights, yet those rights often can be overridden by majority vote.”).

\textsuperscript{275} This limitation on the expansiveness of state constitutions was the subject of discussion among several chief justices of state supreme courts in 2007. Justice Barbara Pariente of the Florida Supreme Court noted that “[u]nfortunately, our state constitution can be amended fairly easily by the voters and the recent trend in Florida has been that in reaction to every decision that protects individual rights or sets a threshold that is higher than a federal provision to limit that expansion by placing a constitutional amendment on the ballot.” \textit{A Symposium with Women Chiefs, supra} note 228, at 332. She later pointed out, however, that “the people have a right to amend their constitution, so if they do not want greater rights than provided in the United States Constitution, that is their right.” \textit{Id.} at 333.

\textsuperscript{276} See id. at 332–33; see also Gordon, \textit{supra} note 223, at 1034 (noting that while many state courts had answered Brennan’s call to interpret their constitutions independently from the United States Constitution, “Brennan . . . overestimated the effectiveness of state constitutions in protecting individual rights” in part because of the ease with which some state constitutions can be amended).
the constitution to ban it, indicating that the public did not support that right.\textsuperscript{277} In contrast, many state supreme courts have interpreted their constitutions to require public funding for abortion, and none of those states have amended their constitutions to overrule those decisions.\textsuperscript{278} While the protection of fundamental rights should, in theory, be isolated from the whims of public opinion, some academics and jurists believe that, without public support, courts will refrain from expanding individual liberties.\textsuperscript{279} The public’s ability to amend state constitutions also responds to arguments about the court’s legitimacy in deciding socio-economic rights cases that involve policy decisions. And, some argue that this back and forth within and between states over advancing individual rights may eventually result in the overall advancement of individual rights under both state and federal law.\textsuperscript{280}


\textsuperscript{279} See, e.g., R.A. Lenhardt, \textit{Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage}, 96 CAL. L. REV. 839, 856–57 (2008) (noting that the United States Supreme Court refrained from addressing interracial marriage until the 1960s, when public support for the institution had become fairly widespread, while the California Supreme Court held unconstitutional that state’s bar against interracial marriage in 1948 long before there was public support for the decision); \textit{see also} Barry T. Albin, Justice, N.J. Supreme Court, Democracy and the Uncertain Fate of Individual Rights, Address at the New Jersey Bar Association Annual Meeting and Convention (May 13, 2009) (arguing that courts do not move faster than public opinion in most cases, even when faced with questions about individual liberties, that protecting individual liberties, particularly in times of crisis, requires civil engagement and commitment as well as judicial review). \textit{See generally} William H. Rehnquist, \textit{Constitutional Law and Public Opinion}, 20 SUFFOLK U. L. REV. 751, 769 (1986) (discussing the impact of public opinion and public events on jurists, describing in detail public events during the steel crisis in the 1950s, and concluding that “[j]udges need not and do not ‘tremble before public opinion’ in the same way that elected officials may, but it would be remarkable indeed if they were not influenced by the sort of currents of public opinion which were afoot in the Steel Seizure Case”).

\textsuperscript{280} See, e.g., Lawrence G. Sager, \textit{Cool Federalism and the Life-Cycle of Moral Progress}, 46 WM. & MARY L. REV. 1385, 1397–98 (2005) (arguing that state experimentation with “political justice” is a key first step to achieving overall advancement of rights); Sutton, supra note 227, at 176 (arguing that engaging in individual rights litigation using state constitutional law “may facilitate the development of federal constitutional law,” and asserting that “[i]n these settings, the state courts are the vanguard—the first ones to decide whether to embrace or reject innovative legal claims”).
B. Interpreting State Constitutions

With their unique histories, varied political and cultural contexts and closer nexus between the law and the citizens it governs, state constitutions may offer broader protections for individual rights than does the more static and removed federal Constitution. ²⁸¹ In order to vindicate these additional protections, state courts are often asked to approach questions about unique state rights without much guidance from federal courts and sometimes without guidance from any other state court. ²⁸²

1. Jurisprudential Standards in State Court

The different structure and purpose of state constitutions, as well as the inclusion of unique positive social or economic rights within those documents, may make it inappropriate for states to apply the same standards of review used by federal courts. ²⁸³ Some, for example, have criticized state courts’ use of federal rational basis review. ²⁸⁴ Federal courts use rational basis review when there is no fundamental right at stake. It defers to legislative judgment as long as there is some “rational” relationship between the stated purpose of the legislation and the legislation itself. ²⁸⁵ However, where state constitutions grant additional fundamental rights or where the balance of interests seems better addressed with a different standard, there is no reason for state courts to mechanically apply federal jurisprudential standards. ²⁸⁶ Moreover, where state constitutions grant

²⁸¹ Hershkoff, Positive Rights, supra note 54, at 1138.
²⁸² See Mont. Envtl. Info. Ctr. v. Dep’t of Envtl. Quality, 988 P.2d 1236, 1246, 1249 (Mont. 1999) (recognizing that the Montana Constitution’s “right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana’s Constitution, and that any statute or rule which implicates that right must be strictly scrutinized”); cf. In re Roberto d.B., 923 A.2d 115 (Md. 2007) (applying the Maryland Equal Rights Amendment to the rights of a biological father and mother as against a gestational carrier).
²⁸³ Helen Hershkoff, a prominent state constitutionalism scholar, has critiqued state courts that use federal rational basis review of state legislative acts when the state constitution in question grants specific rights to individuals. See Hershkoff, Positive Rights, supra note 54, at 1137; see also Sutton supra note 227, at 175 (arguing that the federal standards of review may not be the best way to assess state constitutional rights claims).
²⁸⁴ See, e.g., Hershkoff, Positive Rights, supra note 54, at 1137 (arguing that a state court’s use of rational basis review, which grants substantial deference to the state legislature, is misplaced when assessing the rights of the poor).
²⁸⁵ Id. at 1153.
²⁸⁶ See id. at 1137 (arguing that “[w]hen a state constitution creates a right to a government-provided social service, the relevant judicial question should be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power”).
exceptional rights or contain directive policy statements that require state governments to enforce them, state courts may have an obligation to review state action with an eye toward "ensur[ing] that the government is doing its job and moving policy closer to the constitutionally prescribed end."\textsuperscript{287} For example, while the United States Supreme Court has decided that there is no federal constitutional right to education, and therefore uses rational basis review for government policies impacting education in the absence of other fundamental rights,\textsuperscript{288} state constitutions almost uniformly contain an explicit right to public education, which should lead courts to review education laws with closer scrutiny.\textsuperscript{289}

Even in cases where state courts interpret a right that exists in both federal and state constitutions, they are not bound by federal standards of review and can properly choose for themselves how best to approach their cases. In a recent essay, Sixth Circuit Judge Jeffrey Sutton noted that while the "[t]hree distinct levels of scrutiny—rational basis, intermediate or strict—may be the best way to assess equal-protection claims, . . . it is hardly the self-ordained way."\textsuperscript{290} In fact, Judge Sutton has suggested that it may be more appropriate for individual state courts to adopt standards based on state constitutional norms rather than national ones.\textsuperscript{291} Some state courts have already done this in certain contexts; for example, several states have recognized a doctrine of "fundamental fairness" that does not exist under federal law but gives more breadth to state constitutional rights, including those that exist under both state and federal law.\textsuperscript{292} In

\textsuperscript{287} Id. at 1138.
\textsuperscript{289} Eli Savit, Note, Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools, 107 Mich. L. Rev. 1269, 1291 & n.139 (2009) (noting that each state constitution has a provision at least relating to state-provided public education).
\textsuperscript{290} Sutton, supra note 227, at 175.
\textsuperscript{291} See id. at 175–76.
\textsuperscript{292} See, e.g., Oberhand v. Director, 940 A.2d 1202, 1213 (N.J. 2008) ("Our Court has recognized that `[f]undamental fairness is a doctrine that is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees.’ . . . New Jersey’s doctrine of fundamental fairness, which is encompassed within the protections of Article I, Paragraph 1 of our State Constitution, ‘serves to protect citizens generally against unjust and arbitrary governmental action.’") (internal quotation marks omitted)); In re B.B.W., 2003 MT 377, ¶ 14, 319 Mont. 425, ¶ 14 ("Montana law recognizes that parents facing termination of their parental rights must not be placed at an unfair disadvantage at any stage of a termination proceeding.” (citing Matter of A.S.A., 852 P.2d 127, 129 (Mont. 1993))). This guarantee of fundamental fairness derives from article II, section 17, of the Montana Constitution, which guarantees that "[n]o person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. Maryland law likewise recognizes a notion of fundamental fairness. See Borchardt v. State, 786 A.2d 631, 681 (Md. 2001) (Raker, J., dissenting) ("Although this Court has generally interpreted Article 24 [of the Maryland Constitution] in pari materia with the Due Process Clause of the Fourteenth Amendment, we have interpreted it more
addition, the New Jersey Supreme Court has rejected the three-tiered analysis adopted by the United States Supreme Court in analyzing state equal protection claims. Instead, when faced with a claim under article I, paragraph 1 of the New Jersey Constitution, which grants broad inalienable rights, that court uses a test that “balances the individual or class interests with the interests put forth by the State” and “as a result [of using this test instead, New Jersey’s] . . . jurisprudence moved in a different direction.”

2. Reluctance at the State Courts

Despite some courts’ willingness to use the full scope of their authority to create jurisprudential standards to interpret state constitutions, other state courts have been reluctant to fully enforce unique state constitutional rights. Those state courts have preferred to follow federal jurisprudence even in cases in which the state constitution differs greatly from the federal Constitution. In other cases, courts have simply refused to enforce affirmative rights, looking to the federal idea of “political questions” to avoid interpreting novel state provisions. For example, despite a clear affirmative right to education under the Pennsylvania Constitution, the courts in Pennsylvania have declined to address whether the state’s educational policy meets the constitutional standard, instead holding that “what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program . . . are matters which are exclusively within the purview of the General Assembly’s powers, broadly in instances where fundamental fairness demanded that we do so.” (footnote omitted).

293 A Symposium with Women Chiefs, supra note 228, at 328 (quoting former Chief Justice Deborah Poritz of the New Jersey Supreme Court describing that court’s approach to the New Jersey version of the Equal Protection Clause); see also Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (discussing New Jersey courts’ use of a balancing test, rather than a two-tier test, to analyze rights claims under the state constitution).

294 See, e.g., Atkins v. Curtis, 66 So. 2d 455, 458 (Ala. 1953) (“Section 88 of the Alabama Constitution of 1901 makes it the duty of the legislature to require the several counties to make adequate provision for the maintenance of the poor. Appellee points to the fact that this is a mandatory duty. But of course there is no way to force the legislature to perform that duty, although it has always undertaken to do so.”).

295 See, e.g., State v. Hendricks, 258 S.E.2d 872, 877 (N.C. Ct. App. 1979) (“Though the language in the North Carolina Constitution (Article I, Sec. 20), providing in substance that any search or seizure must be ‘supported by evidence,’ is markedly different from that in the federal constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.”).

296 See PA. CONST. art. III, § 14 (requiring the Pennsylvania legislature to maintain and support a system of public education).
and they are not subject to intervention by the judicial branch of our government."  

3. Comparative Sources for Positive Rights

One of the reasons that some scholars and jurists struggle with the concept of enforcing affirmative rights is that there is very little precedent to look to for guidance. However, as Shirley Abrahamson, the former Chief Justice of the Wisconsin Supreme Court, has noted, "[t]he American federal system has made seasoned comparatists of all of us." She pointed out that every lawyer trained in the United States has been taught the "comparative law method, drawing upon examples and opinions from numerous states and state courts." While no other state court decision can have precedential value in a case regarding Wisconsin law, state courts often look to other state courts' decisions for guidance. According to Judge Abramson, there is no reason that the law of non-American jurisdictions could not be similarly persuasive and helpful. In fact, she has noted that "foreign opinions could function like superstar amicus briefs, offering otherwise unavailable viewpoints, delivered from unique perspectives, by some of the world's leading legal minds." James R. Zazzalli, former Chief Justice of the New Jersey Supreme Court, has echoed the idea that comparison to other countries' law is hardly unique to the state court system: "Indeed, the Chief Justice of the Supreme Court of the United States, John Marshall, repeatedly affirmed the importance of international law in American jurisprudence." In fact, it can be a reciprocal relationship, given that "in defining the scope of free speech rights, the European Court has relied on, and cited to, the New Jersey Supreme Court."  

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300 Id.
301 Id. at 286 (concluding that if American jurists and scholars explore non-American jurisdictions with the “modest intent to borrow ideas on classifying, discussing, and solving a particular problem, . . . we may . . . find unexpected answers or new challenges to domestic legal issues”).
302 Id. at 287.
303 Zazzali supra note 257, at 678.
304 Id. at 671 (noting that the European Court has "extensively referenced" a decision in which the New Jersey Supreme Court “held that individuals may be entitled to free speech protections at privately-owned shopping centers").
Even when state courts are willing to explore new rights in their state constitutions and to use new standards to evaluate them, they are faced with the challenge of how to interpret and enforce them. Some scholars, and indeed some state jurists, have argued that the complexity involved with enforcing guarantees of positive rights suggests that courts should not address them. But other sources of guidance are available, both from other states and other countries, to help reduce this complexity and facilitate state court enforcement of such rights. While it would be inconsistent with the aims of affirmative state constitutional guarantees to look to the federal court interpretations of federal constitutional provisions for guidance, state courts should and often do look to their sister state courts to interpret provisions found in many state constitutions. Similarly, they could look to high courts in other countries when interpreting constitutional provisions with similar texts and purposes.

C. Existing Jurisprudence on Rights Guarantees in State Constitutions

1. Specific Guarantees

State constitutions became a renewed focus for advocates and jurists after Justice Brennan wrote his call to action article in 1977. Since then, other jurists, scholars, and advocates have recognized the opportunities in state constitutions to give content and force to the unique state provisions that include affirmative guarantees of social and economic rights. Among the most common of these are the right to education, the right to assistance for the poor, and the right to happiness and safety. Despite the fact that many state constitutions contain these types of guarantees, many such rights have not been examined by the courts. Nonetheless, many scholars and some courts have analyzed how these provisions impose obligations on the

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305 See generally Abrahamson & Fischer, supra note 299; Marshall, supra note 226; Zazzali, supra note 257.
306 See generally sources cited supra note 305.
307 Jackson, supra note 257, at 19 (noting that "many state courts have experience with the benefits of comparative law by looking to the interpretations of other state courts" in part because of many jurisdictions' comparable constitutional provisions).
308 See Chia & Seo, supra note 57, at 129 ("[S]tate constitutions often include social and economic provisions, such as the right to public education."); see also Grodin, supra note 247, at 3 (noting that approximately thirty state constitutions provide for the right to pursue "happiness" or "happiness and safety" within their statements of rights).
309 See Davis, supra note 226, at 396 ("The 'public health' provisions of... state constitutions have... received little interpretation from the courts.").
states and have begun to address the role of courts in enforcing them.  

a. Case Study: The Right to Education

One of the reasons that "American courts have been reluctant to recognize social and economic rights [is] because of a belief that enforcement and protection of such rights would strain judicial capacities." Federal courts have, for the most part, managed to avoid these types of issues through use of the political question doctrine. State courts, however, are faced with a more difficult quandary when state constitutions squarely and explicitly guarantee residents of their states certain affirmative rights that require government action. The school funding cases provide the best picture of how courts in different states have grappled with this challenge. These cases took several forms, but at least eleven state supreme courts have engaged with the legislatures in their states to force some type of action. Some of these courts have merely provided guidance, while others have ordered the state governments to enact certain policies and provide certain specific amounts of funding. Taken together, the "education cases" present a catalogue of different methods by which socio-economic rights claims might be brought to state courts and how the courts might review and enforce them.

Although most state constitutions have contained a "right to education" since their framing, litigation around education really took off after the United States Supreme Court rejected the claim that there was a federal fundamental right to education in San Antonio Independent School District v. Rodriguez. In that case, the Court was asked to determine whether a financing system for public education in Texas, which was based upon property taxes, was unconstitutional because it discriminated against poor residents of the state. Appellees argued that a right to education could be derived

310 See supra note 226.
311 Sunstein, Social and Economic Guarantees, supra note 4, at 16.
313 See Chia & Seo, supra note 57, at 131-36 & 131 tbl.1 (listing three states whose courts gave the legislature guidance without articulating specific required actions, three that entered into a "dialogue" between legislative action and judicial review of those actions, one that applied pressure by either implicitly or explicitly indicating a deadline for a constitutionally adequate law, and four states that required the political branches to enact specific legislation).
314 See id. at 133, 135-36.
315 411 U.S. 1 (1973). The Court held that education was not a fundamental right, even though it recognized "the undisputed importance of education." Id. at 35; see also Chia & Seo, supra note 57, at 125-26 (stating that after Rodriguez, plaintiffs initiated state court suits in forty-five states to secure equitable funding for public education).
316 See Rodriguez, 411 U.S. at 16-17.
from the need to be able to properly use the right to free speech and
the right to vote.\textsuperscript{317} The Court rejected those assertions, noting that
many other basic standards of living, such as food and shelter, are
also necessary to fully enjoy the constitutional guarantees but that
those are not constitutionally protected.\textsuperscript{318} In contrast, all fifty state
constitutions guarantee some right to education or public schools.\textsuperscript{319}
In fact, the right to education has been one of the most entrenched
in state constitutions. By 1868, three-quarters of the thirty-seven
then-existing states recognized “a fundamental state constitutional
duty to provide a public-school education.”\textsuperscript{320} After Rodriguez,
litigants went to state court in many of those states to demand that
their governments fulfill those constitutional guarantees.

\begin{itemize}
\item \textit{i. Balancing Constitutional Obligations with Reluctance to
Prescribe Policy}
\end{itemize}

The education cases, sometimes called the “school funding cases,”
have posed significant institutional challenges for state courts. Courts
are faced with a violation of a constitutional right that occurs when
the government fails to take action. Ameliorating the constitutional
violation may require the court to order the government to take some
affirmative action, which generally requires the government to
expend state funds.\textsuperscript{321} One common thread in these cases is the
courts’ efforts to balance their obligation to enforce and protect
constitutional rights with their traditional institutional reluctance to
prescribe policy. In almost all of the cases in which the courts
ultimately ordered the legislature to take specific action, that order
came years after the courts originally heard the cases and found
constitutional violations.\textsuperscript{322}

\begin{footnotes}
\item[317] Id. at 35.
\item[318] Id. at 37.
\item[319] Savit, supra note 289, at 1291 (noting that while most of these state provisions are brief
and vague, each creates at least some constitutional right to education).
\item[320] Steven G. Calabresi & Sarah E. Agudo, Individual Rights Under State Constitutions
When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in
\item[321] See Chia & Seo, supra note 57, at 136–38 (discussing the recent situation in New York,
where educational spending reform got tied up in politics and resulted in a state court ordering
the state to provide funds to the New York City schools for operations and facilities under a
court-determined budget).
the twenty-eight year “generational struggle” that led the court to direct the state Commissioner
of Education to address a wide range of constitutionally derived quality of education
 guarantees); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (noting
that the case did “not arrive before us on a blank slate,” but began eight years prior and
was itself based on a 1982 ruling); Pauley v. Kelly, 255 S.E.2d 859, 874 (W. Va. 1979)
(exhaustively summarizing the history of judicial forbearance but asserting the existence of
\end{footnotes}
In Texas, for example, several school districts challenged the state’s school financing system in 1984, arguing that it violated the state constitution’s guarantee of an “efficient” education. Finding in favor of the school districts, the Texas Supreme Court held that the “school finance system was not ‘efficient’ as required by . . . the Texas Constitution.” Nonetheless, the court postponed the injunction issued by the lower court to give the legislature a chance to address the problem. A year after the decision, the legislature passed a bill that the school districts again challenged as inadequate. The court again held that the system was “inefficient,” noting that the legislature had failed to “restructure the system,” but again “postponed the effective date of [its injunction] to give the Legislature time to respond.” The legislature tried a second time, and again the Texas Supreme Court rejected its efforts. Finally, six years after the original decision, the court upheld the legislature’s third attempt as constitutional.

ii. Creating Content for the Right

The education cases demanded that courts establish both whether the “right to education” was justiciable and what was required to fulfill that right. Some state constitutions guarantee a particular kind of education, such as a “thorough and efficient” education, while

“ample authority that courts will enforce constitutionally mandated education quality standards”).

323 See Edgewood Indep. Sch. Dist. v. Kirby (Edgewood IV), 917 S.W.2d 717, 726 (Tex. 1995).
324 Id. (citing Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I), 777 S.W.2d 391, 397 (Tex. 1989)).
325 See Edgewood I, 777 S.W.2d at 399.
326 See Edgewood IV, 917 S.W.2d at 726.
327 Id. (quoting Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II), 804 S.W.2d 491, 496 (Tex. 1991)).
328 Id. (citing Edgewood II, 804 S.W.2d at 498–99).
329 See id. at 726–27 (citing Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III), 826 S.W.2d 489, 524 (Tex. 1992)).
330 See id. at 750 (holding that the new bill was “constitutional in all respects”). Similarly, the school funding cases in New Jersey began in 1973 with a simple holding that the state’s financing system was unconstitutional because it was inequitable; twenty years later, the court was still deeply engaged in setting forth specific requirements to meet the constitutional threshold. Compare Robinson v. Cahill, 303 A.2d 273, 284–86 (N.J. 1973) (allowing the state to decide whether to assign its constitutional obligation to provide a thorough and efficient system of education to local governments), with Abbott V, 710 A.2d 450, 456, 507–08 (N.J. 1998) (recalling its mandate under Abbott IV “that the State provide parity funding” for poorer school districts and requiring that “Abbott” districts provide half-day preschool). See also infra notes 346–54 and accompanying text (discussing the New Jersey Supreme Court’s consideration of the constitutional school funding requirements).
331 See, e.g., N.J. CONST. art. VIII, § IV.
others simply mention education, leaving it to the courts to untangle its meaning. In some cases, courts have held that the guarantee itself implies that the education must be “minimally adequate.” While explicating the meaning of terms in a constitution is well within the purview of every court, these cases raised questions about when a court is simply explaining an already existing right and when a court is creating law or policy. Moreover, while all state constitutions guarantee the right, all states also currently provide some form of public education, leaving courts in the difficult position of determining whether the state’s efforts, normally limited by budget and other concerns, fulfill the constitutional mandate. Indeed, for this reason, some argue that courts should refrain from accepting these cases on the basis of the political question doctrine. However, other courts and scholars have insisted that the rights contained in the state constitutions belong to the people and must be enforced, regardless of whether they are considered negative or positive. In fact, some state courts have emphasized that their role is to interpret the constitution and to analyze whether the actions of the government are in keeping with its requirements. The Kentucky Supreme Court went so far as to state that it would be “literally unthinkable” for a state court to leave such analysis to the discretion of the legislature.

One of the significant critiques of socio-economic rights is that they lack clear parameters, lending themselves better to policy resolutions than judicial orders. An important lesson to be gleaned

332 See, e.g., Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330–32 (N.Y. 2003) (articulating the “minimally adequate” requirement for a sound basic education in New York). This approach is similar to the minimum core approach adopted by the U.N. Committee on Economic and Social Rights. See Langford, supra note 2, at 22; supra text accompanying note 76; see also discussion supra Part II.B.2.b.

333 See, e.g., Chia & Seo, supra note 57, at 127–28 (explaining the lack of clear boundaries between legislative and judicial duties in the area of educational funding).

334 See generally id. at 127–30

335 See, e.g., Bess J. DuRant, The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools, 59 S.C. L. Rev. 531, 535–43 (2008) (criticizing the state courts’ decisions in school funding cases and arguing the courts are not designed to effectively address such issues).

336 See supra notes 42–45 and accompanying text. See generally Abbott v. Burke (Abbott I), 495 A.2d 376, 382 (N.J. 1985) (discussing the possible severity of legislative inaction threatening rights such as education); Hershkoff, State Constitutions, supra note 226, at 24 (arguing that state constitutions are a means to secure civil rights and liberties in state courts); A Symposium with Women Chiefs, supra note 228, at 325–26 (arguing people should do their “homework” and alert the courts if they believe judicial interpretations of a state constitution are incorrect).


338 See Hershkoff, Positive Rights, supra note 54, at 1179–82 (addressing critics who believe courts are unable to create manageable standards for welfare rights).
from the state education funding cases is that, when faced with a constitutional challenge based on a state-granted constitutional right, state courts have effectively used their institutional knowledge and capacity to come up with content and meaning for rights that may have been placed in the constitution at the founding but had never been given definition.

For example, in West Virginia, a group of parents challenged the state’s funding scheme for public schools as violating the West Virginia Constitution’s guarantee of a “thorough and efficient” education for all children in the state. In determining the meaning of “thorough and efficient” and what those words obligated the state to provide, the West Virginia Supreme Court relied on “dictionary definitions current at the time [the West Virginia Constitution was written] and those now extant; pronouncements by courts; reliable extra-judicial commentary; and definitions set or inferable from debates and proceedings of the bodies” that created the state’s constitution. With those resources as the basis, the court concluded that “a thorough and efficient system of schools ... develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.” The court went further to add that from this definition stemmed a legal obligation on the part of the state to, among other things,

develop[] in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; [and] (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance . . . .

The court ultimately remanded the case for a trial on the merits, but gave direction to the lower court on how to conduct that trial and the types of evidence that might be necessary. In doing so, the court pointed out that “great weight will be given to legislatively established standards,” but also noted that the constitution “requires the development of certain high quality educational standards, and that it is in part by these quality standards that the existing

340 Id. at 874.
341 Id. at 877.
342 Id.
343 See id. at 878–83 (examining the various education statutes in West Virginia and developing lines of inquiry for consideration on remand).
educational system must be tested." The court added that in order to allow the legislative branch the appropriate level of involvement in the case, the trial court needed to add the leaders of the legislative branch as parties, essentially to give them the opportunity to present their arguments about what should meet the standard.

In New Jersey, the courts were similarly asked to determine the requirements for a "thorough and efficient education" under their state constitution. In 1973, the New Jersey Supreme Court began with the simple question whether a state educational financing system based primarily on local funding could satisfy its constitutional requirement. The court concluded it could not, but did not direct the state to provide any other particular system. Instead, it held that the state must propose its own solutions and set the issue for future argument. Twenty years and multiple court cases later, the New Jersey Supreme Court changed course and began mandating specific standards. First, it held that "[a] thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society," and went further to hold that in order to bring poorer students up to this standard, the state must add "something more . . . to the regular education" system. In 1990, after reviewing the legislature's attempt to address these inequalities, the court again struck down the legislature's financing scheme and held that "in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed." By 1998, in a decision that the court hoped would "be the last major judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts," the court required the state's Department of Education to provide preschool for three and four year olds in the underprivileged school districts that had

344 Id. at 878
345 See id. at 883 (requiring the trial court, on remand, to add the Speaker of the House of Delegates and the President of the Senate of West Virginia as defendants).
347 See Robinson, 303 A.2d at 287.
348 See id. at 298.
349 See id.
351 Id. at 408.
been the subject of these many court cases.\textsuperscript{353} The court noted that “because the absence of such early educational intervention deleteriously undermines educational performance once the child enters public school, the provision of pre-school education . . . has strong constitutional underpinning.”\textsuperscript{354}

The state courts’ varied approaches to state educational funding challenges present several key lessons, but perhaps the most important one is also the most basic: affirmative rights in state constitutions have meaning, and they must be treated as seriously as other rights commonly found in the state and federal constitutions.\textsuperscript{355}

IV. ENFORCING THE RIGHT TO HEALTH IN STATE COURTS

Like the right to education, the right to health or language supporting a right to health exists in many state constitutions but has never been fully enforced. This section considers how more robust state enforcement of the right to health could improve reproductive health law and policy.

Failure to recognize a right to health care has enabled state governments to ignore their obligation to promote access to health care and in some cases to affirmatively erect barriers burdening or preventing access to health care services. This is particularly true in the area of reproductive health care where politics over women’s reproductive choices often trump respect for a woman’s right to access the health care she needs. Indeed, failure to recognize the right

\textsuperscript{353} Id. at 464.

\textsuperscript{354} Id.

\textsuperscript{355} Although there is no consensus on whether these school funding cases have been successful in ameliorating the educational inequities that prompted the litigation in the first place, the academic literature now largely recognizes that the cases had some positive impact on the educational systems within those states. See, e.g., Derek Black, Unlocking The Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right, 51 WM. & MARY L. REV. 1343, 1361 (2010) (describing state education cases as “broaden[ing] the concept of equity to include a substantive component requiring states to offer all students a meaningful education that would prepare each student to participate actively in society”); Kimberly Jenkins Robinson, The Case for a Collaborative Enforcement Model for a Federal Right to Education, 40 U.C. DAVIS L. REV. 1653, 1671 (2007) (recognizing “positive outcomes from school finance litigation” even while arguing that there need to be “additional measures to address the disparities in educational opportunities,” particularly between states). Professor William S. Koski, who rejects the question of whether judicial involvement is appropriate in the education context in favor of determining how best that judicial oversight can be exercised, recently offered an interesting take on this litigation. See William S. Koski, The Evolving Role of the Courts in School Reform Twenty Years After Rose, 98 Ky. L.J. 789, 793 (2009). Professor Koski suggests that the new form of “judicial ‘experimentalism’” seen in the most recent iterations of these cases may be the best answer. Id. Such a model requires that “[courts] first destabilize the institutional status quo (that has not served the needs and interests of disadvantaged children) and work toward reform through ongoing stakeholder negotiation, evolving measures of performance to address dynamic ‘conditions on the ground,’ and transparency to the stakeholders and the public.” Id.
to health has allowed state policy makers to consistently short-change women’s interests.

Judicial enforcement of the right to health could change this dynamic. The international community recognizes that reproductive health is an integral aspect of the right to health, and that “[t]he realization of women’s right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.” Clear recognition that access to reproductive health services is a fundamental right could impose an obligation that state governments take women’s reproductive health needs seriously, or at the very least, refrain from affirmatively undermining women’s access to reproductive health care.

A. The Right to Health as a Negative Right

While many articles explore the positive obligations that governments must undertake to protect civil and political rights, there is relatively little discussion about the negative rights component of economic and social rights. Discussions about economic and social rights in the United States focus on the positive obligation to ensure access and related criticisms about expense and judicial competency. However, exploration of the negative aspect of the right to health may be helpful in the context of reproductive rights where state governments are increasingly erecting roadblocks in the way of women’s access to reproductive health services, including abortion.

As discussed above, the South African Supreme Court has made clear that the state has a negative obligation to refrain from violating or unduly interfering with the rights to access housing and health care. The Canadian Supreme Court has also recognized a negative


357 General Comment 14, supra note 356, ¶ 21.
right against government interference with an individual’s ability to access health care services. Although the Canadian Charter does not have a right to health, the Canadian Supreme Court has interpreted the right to “personal security, inviolability and freedom” under Section 7 to restrict the government’s ability to burden individual’s ability to access health services.\textsuperscript{358}

In \textit{Chaoulli v. Québec},\textsuperscript{359} the Canadian Supreme Court considered a challenge to a Quebec statute that prohibited private health insurance for services covered by the public health system.\textsuperscript{360} Appellants argued that the law deprived Quebecers of the ability to access health care services that did not come with the waiting periods inherent in the public health system.\textsuperscript{361} The majority of justices found that the provision violated the Quebec Charter’s analogue to the Canadian Charter’s personal inviolability provision. Three of the justices also found that it violated the Canadian Charter.\textsuperscript{362}

The three-justice concurrence described the harm in \textit{Chaoulli} as a “legislative scheme [that] denies people the right to access alternative health care”\textsuperscript{363} and the “loss of control by an individual over [his or] her own health.”\textsuperscript{364} Drawing on the court’s prior decision in \textit{R. v. Morgentaler},\textsuperscript{365} the justices found a violation of the right to security of the person where people in need of health care who cannot afford to pay for private care “have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences.”\textsuperscript{366} In \textit{Morgentaler}, the Supreme Court considered the constitutionality of a law that created criminal penalties for women who failed to obtain the authorization of a three doctor “therapeutic abortion committee” before having an abortion.\textsuperscript{367} The court found that the delay caused by the mandatory procedures infringed upon the right to security of the person.\textsuperscript{368} The court rejected the government’s argument that it should only consider the


\textsuperscript{359} [2005] 1 S.C.R. 791, 2005 SCC 35 (Can.).

\textsuperscript{360} See id. at 806-07.

\textsuperscript{361} See id. at 807.

\textsuperscript{362} See id. at 794.

\textsuperscript{363} Id. at 848 (McLachlin, C.J., and Major & Bastarache, J.J., concurring).

\textsuperscript{364} Id. at 850.

\textsuperscript{365} [1988] 1 S.C.R. 30 (Can.).

\textsuperscript{366} Chaoulli, 1 S.C.R. at 849 (McLachlin, C.J., and Major & Bastarache, J.J., concurring).

\textsuperscript{367} See Morgentaler, 1 S.C.R. at 45.

\textsuperscript{368} See id. at 59. Section 7 provides that the state may not interfere with the security of the person unless it conforms with the “principles of fundamental justice.” Id. at 72. The court found a section 7 violation because the procedural problems with access to abortion that led to the delay failed to comply with the principles of fundamental justice. See id. at 70.
purpose of the legislation and not harm caused by "administrative inefficiency," noting that the delay resulted from the "cumbersome operating requirements" of the law itself.\textsuperscript{369} The court added that even if it were possible to separate the purpose of the legislation from its administration, the unconstitutional effect of the statute alone would be sufficient to strike it down.\textsuperscript{370}

In a recent article, Professor Jessie Hill argued that \textit{Treatment Action Campaign} and \textit{Chaoulli} should be understood as two cases in which the negative health care right is "conceived as a right to be free from state-imposed harm."\textsuperscript{371} She writes that the "negative right of noninterference with medical treatment decisions has already been recognized to some extent within our own constitutional jurisprudence" and that this negative right is "easily assimilated into the negative structure of American constitutional rights."\textsuperscript{372}

Moreover, the right to protect one's health using medical care is implicit in Supreme Court cases that have required abortion regulations to contain an exception to protect a woman's health.\textsuperscript{373}

\textbf{B. State Jurisprudence on the Right to Health in the Abortion Context}

Professor Hill's article focuses on the Supreme Court's implicit recognition of a limited right to health as part of the guarantee of personal liberty under the United States Constitution.\textsuperscript{374} In the context of state constitutional law, however, some state courts have gone even further, expressly recognizing that their state constitutions either explicitly or implicitly protect individuals' ability to protect their own health. These cases do not always fit within the negative/positive rights framework, instead incorporating elements of each. Court decisions from Connecticut, New Jersey, and Montana provide three clear examples.

In Connecticut and New Jersey, cases recognizing a right to health involved challenges to state prohibitions on funding for medically necessary abortions except in situations where the abortion would be necessary to save the pregnant woman's life.\textsuperscript{375} A Connecticut state
court struck down the funding prohibition on statutory and constitutional grounds. It held that the state constitution's right to privacy encompassed three "fundamental rights . . . the right to secure an abortion, the right to preserve one's health, and the right to maintain the patient-physician relationship," and found that the regulation violated the right to privacy in all respects. Further, in recognition of the importance of the right to make decisions necessary to preserve and protect one's health, the court suggested that even if the right was not covered by the right to privacy, it "stands in a separate category as a fundamental right protected by the state constitution." Although the state argued that it was not obligated to remove a financial burden it did not impose, the court held that when viewed within the framework of the Connecticut Medicaid program, the regulation nonetheless violated the constitutional right to privacy.

The Supreme Court of New Jersey faced a similar challenge to an abortion funding restriction. The court held that the state constitutional right to privacy, implied by the state constitutional guarantees to life, liberty and the pursuit of safety and happiness, barred the state from limiting abortion funding to instances where it was necessary to save the woman's life, rather than also to preserve her health. In so holding, the court stated that although the state constitution did not contain an explicit right to health provision, "New Jersey accords a high priority to the preservation of health." The government could not fund services necessary for childbirth but refuse funding for medically necessary abortions. The court held that the regulation violated the women's and physicians' rights to privacy under the state constitution and violated the women's equal protection rights under the state's equal rights amendment. See Maher, 515 A.2d at 157, 162.

The court noted that there may also be a fundamental right "to appropriate medical treatment" in Connecticut, deriving from the "unbroken 350 years of statutory laws of [the] state and its predecessor governments." Id. at 150 n.33. Although it was unnecessary for the court to reach that question, the court stated that "if the right to such medical care reached the level of being fundamental . . . failure to fund . . . medically necessary abortions would clearly and explicitly impinge on this constitutional right." Id.

The court found it significant that the Medicaid program covered all medically necessary services except abortions services, including birth procedures, and required that any loans a woman received to pay for an abortion be deducted from her welfare cash allowance. See id. at 154, 156-57.

See N.J. CONST. art. I, § 1.


Id. at 934. In a footnote, the court went even further, stating that the statute was "not even rationally related to any legitimate state interest" because although the state could rationally distinguish between nontherapeutic and medically indicated abortions in order to forward its "legitimate interest in protecting potential life, that interest ceases to be legitimate
court ultimately concluded that “[a] woman’s right to choose to protect her health by terminating her pregnancy outweighs the State’s asserted interest in protecting a potential life at the expense of her health.” 384 Clearly, even while declining to guarantee the right to health as a fundamental right, the New Jersey Supreme Court believed that the state constitution contained strong protections for women to act to protect their own health whether or not the state agrees with their decisions.

The Connecticut and New Jersey cases address the states’ obligation to fund medically necessary abortions for indigent women in instances where the state funds all other medically necessary services, including pregnancy care. The cases hold that the states’ decision to single out some medically necessary abortions for exclusion constitutes impermissible government interference with women’s ability to make decisions and access services to protect their health. 385 These cases have both negative and positive aspects. In requiring the states to pay for services, the courts have enforced positive obligations. The courts’ reasons for doing so, however, are based in part on the idea that by funding one type of healthcare but not another, the state is burdening a woman’s ability to protect her own health; thus, a negative conception of the right to health applies as well.

The state’s negative obligation to refrain from imposing on the right to health may also arise when it acts to burden women’s access to health services in other contexts. These regulations take many forms, but their common purpose is to prevent women from obtaining abortions by decreasing the accessibility of services and erecting legal and practical obstacles in the way of women seeking abortions. Such impositions include the adoption of laws designed to delay women’s access to abortion services and laws designed to make it more difficult for reproductive health providers to provide abortion services. 386 Despite recognition by many international and national

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384 Id. at 937.
386 See CTR.FOR REPROD. RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS, AND HARASSMENT 46–49 (2009) [hereinafter DEFENDING HUMAN RIGHTS] (discussing variety of laws impacting abortion patients and providers, such as enforced waiting periods, counseling requirements and restrictions on types of facilities permitted to provide abortion services). A right to health interpreted consistently with human rights law would also impose an obligation to take measures to prevent threats and harassment of women and abortion providers, which undermine women’s ability to access abortions, as part
health organizations that the right to health requires the ability to access safe, legal abortion and other reproductive healthcare services, states across the United States have regulated and restricted these services to such a degree that in some places, they are barely accessible.\textsuperscript{387}

Abortion providers are often subjected to targeted restrictions on abortion providers or “TRAP” laws, which require them to comply with regulations far more complex and onerous than those imposed on providers of similar types of healthcare services.\textsuperscript{388} Although not justified for health reasons and often prohibitively expensive for providers to comply with, many states have adopted TRAP laws.\textsuperscript{389} As Professor Hill points out, “TRAP laws often have the effect, and

\textsuperscript{387} See DEFENDING HUMAN RIGHTS, supra note 386, at 15–18 (discussing the shortage of abortion providers, and the result that some women have to travel extraordinary distances to reach an abortion clinic); see also id. at 65 (finding that Mississippi has only one abortion clinic, requiring some women in the state to travel for up to four hours for an abortion).

\textsuperscript{388} See CTR. FOR REPROD. RIGHTS, TARGETED REGULATION OF ABORTION PROVIDERS: AVOIDING THE “TRAP” (2003), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_avoidingthe trap.pdf [hereinafter AVOIDING THE “TRAP”]; National Abortion Federation, The TRAP: Targeted Regulation of Abortion Providers, http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/trap_laws.pdf (last visited Nov. 1, 2010). Courts have varied in their treatment of TRAP laws, while generally recognizing that such laws are enacted based at least in part on state opposition to abortion rather than concerns about safety or health. See Tucson Women’s Clinic v. Eden, 379 F.3d 531, 544–47 (9th Cir. 2004) (striking down several provisions of the Arizona TRAP law as unconstitutional, remanding for trial on other provisions, and noting that “abortion providers can be a politically unpopular group” and that legislature may have targeted providers for differential treatment). Compare Greenville Women’s Clinic v. Bryant, 222 F.3d 157, 175 (4th Cir. 2000) (upholding a TRAP law that imposed significant requirements on abortion providers, stating that “the importance of the deeply divided societal debate over the morality of abortion and the weight of the interests implicated by the decision to have an abortion can hardly be overstated” and holding that “in adopting an array of regulations that treat the often relatively simple medical procedures of abortion more seriously than other medical procedures, South Carolina recognizes the importance of the abortion practice while yet permitting it to continue, as protected by the Supreme Court’s cases on the subject”), with Greenville, 222 F.3d at 205 (Hamilton, J., dissenting) (arguing that TRAP law upheld by majority “singles out and places additional and onerous burdens upon abortion providers which are neither justified by actual differences nor rationally related to the state’s legitimate interest in protecting the health and safety of women seeking first trimester abortions. Rather, ‘its sheer breadth is so discontinuous with the reasons offered for it that [Regulation 61-12] seems inexplicable by anything but animus toward the class that it affects.’ The fact that Regulation 61-12 was directed towards a politically unpopular group in the absence of any existing public health problem only bolsters this conclusion.” (alteration in original) (footnote omitted) (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

\textsuperscript{389} See, e.g., AVOIDING THE “TRAP,” supra note 388, at 2–4 (describing the requirements that TRAP laws impose on abortion providers); see also DEFENDING HUMAN RIGHTS, supra note 386, at 105 (noting that if a proposed Missouri law requiring all abortion providers to meet the requirements of ambulatory surgical centers went into effect, Missouri would be left with only one provider).
perhaps the purpose, of increasing the cost of abortion services both to patients and to clinics," and may even effectively shut down abortion providers.\footnote{Hill, supra note 4, at 545–46. ("[S]ome have suggested that TRAP laws are responsible for running some abortion providers out of business, making abortions less accessible in a given geographic area.")}

In addition, abortion clinics are often the targets of protests, violent or otherwise. At many facilities, employees face daily harassment both at work and at home.\footnote{See DEFENDING HUMAN RIGHTS, supra note 386, at 25, 34.} The constant physical threat and harassment, in combination with onerous regulatory requirements and stigma against abortion, has led to a shortage of clinics and doctors in many states.\footnote{See id. at 38, 55–57, 65–66, 72, 81–83, 92, 99–100 (discussing the shortage of abortion providers in Alabama, Mississippi, Missouri, North Dakota, Pennsylvania, and Texas).} Yet states often fail to take adequate steps to protect these clinics, their workers or the patients attempting to access the care within.\footnote{See id. at 34 (discussing the failure of states to take measures to respond to threats and harassment, despite possessing an obligation to do so).}

Many states have also passed laws designed to delay women from accessing abortion services. For example, it has become commonplace for states to institute waiting periods before women can obtain abortions. Twenty-five states impose such waiting periods and several states require women to visit clinics at least two times.\footnote{GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1 (2010), available at http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.} In Mississippi, this means a woman, who may live several hours away from the state’s only abortion clinic, must travel to the clinic to hear a litany of state-mandated biased statements and then wait at least twenty-four hours before she is permitted to return to the clinic to obtain an abortion.\footnote{See DEFENDING HUMAN RIGHTS, supra note 386, at 64.} The mandatory delay can be expensive and burdensome for women who must twice arrange for childcare, request time off from work, manage other personal relationships and commitments, and, if the distance to the clinic is very far, incur the expense and inconvenience of an overnight trip.

At least one state supreme court has relied on a state constitutional right to health to strike down one type of restrictive abortion legislation. The Montana Supreme Court referenced that state’s right to health in a case striking down a physician-only law that would have prohibited any medical professional other than a physician from performing an abortion.\footnote{See Armstrong v. State, 989 P.2d 364 (Mont. 1999). In Armstrong, a group of healthcare providers challenged a Montana statute prohibiting physician assistants from performing abortions, arguing that the statute violated women’s constitutional right to privacy.} While the plaintiffs only argued their case...
under the state constitution's right to privacy, the court went further to address other constitutional rights that would have caused it to reach the same conclusion. The court wrote that the Declaration of Rights in the Montana Constitution contained "overlapping and redundant rights and guarantees . . . . Thus, the rights of personal and procreative autonomy . . . find protection in more than just [the right to privacy]." The court further explained that "the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one's own health and bodily integrity without government interference" is also protected by the right "to seek safety, health and happiness in all lawful ways."

The Montana Supreme Court recognized that where the state constitution provided a right to health that protects the "right to seek and obtain medical care from a chosen health care provider," the state legislature could not impose unnecessary restrictions on that choice. Advocates in other states could similarly argue that "states that have an obligation to protect the public health prevent women from accessing important healthcare by imposing waiting periods, under the Montana Constitution. See id. at 367. The Montana Supreme Court found that the right to privacy under the Montana Constitution was intended to be far stronger than the right to privacy under the federal Constitution, for a variety of reasons, including that the text is explicit and different from the federal text and that the records of the constitutional convention showed that the framers not only intended it to be broader than a right against search and seizure but had specifically referenced Griswold in discussing their intentions for the provision. Id. at 373–79. The court therefore held that:

Article II, Section 10 of the Montana Constitution broadly guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference . . . [and] more narrowly, . . . that Article II, Section 10, protects a woman's right of procreative autonomy—i.e., . . . the right to seek and to obtain . . . a pre-viability abortion, from a health care provider of her choice.

Id. at 370. The court then concluded that because the right to privacy was a fundamental right, a court would have to apply strict scrutiny to any law burdening it to determine whether the state had a compelling interest. See id. at 374. The court asserted that "[f]ew matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health," id. at 378, that "medical decisions affecting one's bodily integrity and health must often and necessarily be made in partnership with a healthcare provider," id. at 380, and that "the individual typically seeks out and may consent to the most risky and intimate invasions of body and psyche, largely upon her or his personal trust in the education, training, experience, advice, and professional integrity of the health care provider he or she has chosen." Id. Ultimately, the court held that the Montana had no compelling interest in preventing a woman from being able to choose the healthcare provider of her choice to perform an abortion. See id. at 384.

See id. at 367.

Id. at 383.

Id.

Id.
TRAP laws, or biased-counseling requirements. Although few courts in the United States have addressed such claims before, the South African and Canadian decisions, along with Armstrong, provide useful guidance about how to analyze these types of claims. Even recognizing only a negative right to health should require courts to strike down state laws that actually impede state residents from obtaining essential healthcare.

C. Positive Rights to Health Under State Constitutions

While several state courts have recognized that an explicit right to health or some implied right to health require the government to refrain from coercing health care choices or burdening individuals’ ability to protect their own health, few if any courts have gone further than that to require state governments to affirmatively protect this right. Professor Elizabeth Weeks Leonard has noted that while some state constitutions “mention health expressly,” either the courts of that state or the text itself “follow the federal preference for negative rights, declining to impose any affirmative duty on the state or right of individuals.” However, the state education cases and South African experience enforcing a positive right to health discussed earlier can provide guidance to state courts asked by litigants to give meaning to right-to-health provisions despite institutional reluctance and challenges.

1. Other Sources of Affirmative Health Obligations

While the majority of this section addresses how state courts might enforce affirmative obligations under explicit state right-to-health provisions, it is important to note at the outset that a state duty to promote the health of its people could be found under, or supported by, other constitutional provisions and by the general duties of state governments. In such situations, the state duty to enforce that right and concurrent obligation of courts to ensure that enforcement are the same as they would be if the right were more explicit.

401 See Hill, supra note 4, at 537–47 (describing why these types of regulations would likely be unconstitutional under a negative right to health).

402 See generally Leonard, supra note 6 (examining state constitutions and health care rights). As noted earlier, the funding cases have positive rights aspects to them in that they require state funding, but the cases themselves clearly state that such funding is only required when the state funds care for continuing a pregnancy. No court has issued a decision requiring state funding for abortion in the absence of state funding for pregnancy care or to fund health care in general.

403 Id. at 63.
In concluding that the state must fulfill its constitutional obligation to provide a thorough and efficient education for all children in the state, the West Virginia Supreme Court recognized that "public education is a prime function of our State government." As discussed earlier, protecting the "health, safety and welfare" of its citizens is also a "prime" role of government. Just as the West Virginia and New Jersey Supreme Courts have given content to the right to education based on how their state's citizens are intended to benefit from that education, certain types of preventative and universally required health care are necessary for citizens to be able to live fully, and to be able to pursue happiness and safety.

Moreover, as noted in the education cases, affirmative government action to ensure the right to health may be required to secure other rights. For women to achieve the equality granted by many state constitutions' equal rights amendments, it may be necessary for those states to affirmatively provide them with reproductive healthcare. In other states, surely, the rights of citizens to "pursue[e] and obtain[] safety and happiness" must in some part depend on their ability to "attain . . . [and] maintain good health."


While several state courts have already recognized that the interaction of many different state constitutional rights creates at the very least a negative right to health, there are a handful of state

405 See, e.g., Parke v. Bradley, 86 So. 28, 29 (Ala. 1920) ("The prevention of disease and the conservation of health, by all of the means known to modern science, is universally recognized as one of the most important and imperious duties of government . . . ."); In re Sonsteng, 573 P.2d 1149, 1153 (Mont. 1977) (noting that "the state . . . possesses plenary power to make laws and regulations for the protection of public health, safety, welfare and morals").
406 See Pauley, 255 S.E.2d at 877 (recognizing education is necessary for "useful and happy occupations, recreation and citizenship"); Abbott II, 575 A.2d 359, 403 (N.J. 1990) (holding that fulfilling the constitutional right to education "requires such level of education as will enable all students to function as citizens and workers in the same society").
407 See Right to Choose v. Byrne, 450 A.2d 925, 933 (N.J. 1982) (stating that a person's right to control his or her own body trumps any competing state interest in preserving life); Grodin, supra note 247, at 1–3.
408 See, e.g., Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (finding that the state's Medicaid program violated Connecticut's equal rights amendment because, while covering all of a male's medical expenses, it did not pay for a woman's therapeutic abortion).
409 Byrne, 450 A.2d at 933 (quoting N.J. CONST. art. 1, § 1); see also Grodin, supra note 247, at 27–34.
411 See Doe, 515 A.2d 134; Armstrong v. State, 989 P.2d 364 (Mont. 1999); Byrne, 450
constitutions that go further and provide an affirmative right to health. Some of these provisions have been explored in a tangential manner, as in *Armstrong* in Montana. Several others, however, have never been interpreted by their state courts. For example, both Alaska and Hawaii have relatively newly created constitutions that explicitly require the state government to act to protect and promote the public health.\(^{412}\) Perhaps in part because of their recent vintage, these rights have gone all but unmentioned in those states’ jurisprudence. Nonetheless, they provide significant opportunities for advocates in those states to push for expansion of access to healthcare and full enjoyment and enforcement of state residents’ constitutional rights.

As in the state education funding cases (where states were already providing public education) and the South African cases (where the court assessed whether existing policies were reasonable), enforcement of the state’s affirmative obligations likely will not require that courts order the creation of policies out of whole cloth. Hawaii and Alaska have multiple laws addressing different aspects of health care and departments of health designed to enforce them.\(^{413}\) Therefore, an action to enforce the right to health in Alaska, for example, would likely be based on the difference between what the state is already doing and what the state constitution obligates the state to do.

One possible right to health challenge could be a case brought by women in Alaska to challenge whether the state’s reproductive health policies are sufficient to ensure their right to health. Just as the South African Constitutional Court and courts in the education cases have given content and meaning to the right to education by engaging in dialogue with the legislature, hearing evidence from experts, and

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\(^{412}\) *See* [Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health.")]; [Haw. Const. art. IX, § 1 ("The State shall provide for the protection and promotion of the public health.")]. Notably, in Hawaii, this health provision is located in a section of the state constitution entitled “Public Health and Welfare,” and while all nine of the other provisions in the section provide that the State “shall have the power to” protect certain rights, the health provision is completely directive, and actually orders the state to provide for the public health. *Compare* Haw. Const. art. IV, § 1, with id. art. IV, §§ 2–10.

\(^{413}\) *See*, e.g., [Alaska Stat. § 18.09.010 (2008) (establishing the Alaska Health Care Commission, created to “provide recommendations for and foster the development of a statewide plan to address the quality, accessibility, and availability of health care for all citizens of the state”); id. § 18.15.355 to .395 (public health laws relating to tracking of public health information, containment of infectious diseases, powers of department of health in public health disasters); id. § 21.55.300 (Alaska law governing public health insurance eligibility); Haw. Rev. Stat. § 321-1 to 335-5 (2008) (broad range of health laws governing department of health services, mental health, prenatal and maternal health, nutrition, and other health-related services)].
employing other methods to gather information or research specific issues, an Alaskan court faced with a challenge to its health policies could utilize those same tools to determine the state's obligations.

Although the state might argue that the right to health is too vague, the court could give content to the right by looking to prevailing understandings of health at the time the constitution was drafted, as the West Virginia Supreme Court did in the education context. In addition, just as the New Jersey Supreme Court relied on experts in the field of education to determine that the right to education requires half-day preschool for three and four year olds, it also would be necessary and appropriate for the court to consult evolved standards and customs and opinions of experts in the field of health.

In making the case that reproductive health is an essential component of the right to health, plaintiffs could rely on the expert opinions of public health scholars and the World Health Organization. A recent study by the Columbia Mailman School demonstrated that access to comprehensive reproductive healthcare for all women is essential "to ensure that women can attain good health, maintain it through their reproductive years and age well." Similarly, the WHO has stated that access to contraception and safe abortion is essential to protect women's health and that "abortion [must be] safe and accessible to the full extent of the law." In fact, the WHO recognizes that "[a]chievement of sexual and reproductive health..."
is . . . a human rights issue" and collaborates with other organizations on “a number of initiatives aimed at strengthening capacity in countries to measure progress towards the achievement of universal access to sexual and reproductive health.”

In order to articulate a framework for evaluating the state’s health policy, a state court, particularly one reviewing a constitution that had been influenced by human rights law, might look to how expert international human rights bodies have viewed the right. The U.N. Committee on Economic, Social and Cultural Rights, for example, has developed criteria for fulfillment of the right to health, which might be used as a “superstar amicus brief,” as discussed by Justice Abrahamson, to guide a court toward an understanding of what a state’s obligations might be.

The Committee has recognized that women’s health and sexual and reproductive health are an essential part of government’s right-to-health obligations. The Committee states that the elimination of discrimination against women in health care requires governments to develop a comprehensive strategy “for promoting women’s right to health throughout their life span,” including “policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive [health] services.” The Committee has also recognized that accessibility is an essential element of the right to health. The Committee discusses four dimensions to accessibility: non-discrimination, physical accessibility, economic accessibility, and information accessibility. Non-discrimination requires that health care be accessible to all, “especially the most vulnerable or marginalized sections of the population.” Physical accessibility requires that facilities and goods and services “be within safe physical reach” for all segments of the population. It also includes building access for persons with disabilities. Economic accessibility requires that irrespective of whether health care services are privately or publicly funded, they must be “affordable for all, including socially disadvantaged groups.” Finally, informational accessibility includes “the right

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420 Development Goal 5, supra note 418, at 1, 3.
421 Abrahamson & Fischer, supra note 299, at 287.
422 General Comment 14, supra note 356, ¶ 21.
423 The Committee recognizes four components: availability, accessibility, acceptability, and quality. Id. ¶ 12.
424 See id. ¶ 12(b).
425 Id.
426 Id.
427 Id.
428 Id.
to seek, receive and impart information and ideas concerning health issues."\(^{429}\)

Applying the Committee’s criteria to enforce state right-to-health provisions, courts could inquire whether the state recognizes its responsibility to promote women’s health and whether it has developed reasonable policies to progressively realize that goal. The policy should seek to provide a full range of sexual and reproductive health services and take into account the needs of the most vulnerable and marginalized. If state reproductive health services lag behind other types of services or if they fail to account for the needs of poor or disadvantaged women, plaintiffs might argue that the program is not reasonable because it discriminates against women\(^{430}\) or that it fails to take into account those in the most dire circumstances.\(^{431}\)

Such an analysis might require greater scrutiny of programs that categorically exclude certain groups, including immigrants and native populations.

In developing a reasonable policy, the state should take into account physical barriers to accessibility and should consider the distances women must travel to health facilities and whether there are sufficient trained doctors and health care workers to provide services. States should ensure that health facilities are physically accessible and that women may safely travel to and enter them. Where women have to travel great distances for reproductive health services, the state should take action to make services more accessible. For services such as abortion, for which there may be very few providers, it might require the expansion of abortion services at state healthcare facilities.

State policies should also ensure that women have the right to seek and receive information concerning health issues.\(^{432}\) States should not fund programs that provide misleading information about sexual and reproductive health, and should not impede women’s access to needed information. States also should ensure that women are able to understand and communicate with medical professionals. This might require the state to hire more translators at clinics so that non-English-speaking women can be fully educated about their options.

Finally, economic accessibility requires that all women are able to afford health services.\(^{433}\) Although affordable services can be

\(^{429}\) Id. (footnote omitted).
\(^{430}\) See supra Part II.C.2.b.
\(^{431}\) See supra Part II.C.2.a.
\(^{432}\) Cf General Comment 14, supra note 356, ¶ 12(b) (requiring informational accessibility for healthcare).
\(^{433}\) Cf. id. (requiring healthcare and services to be “affordable for all”).
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provided by private health services and insurance, where the market fails to result in affordable services, the state may have to step in. In addition to ensuring that indigent women are eligible for state Medicaid programs, a reasonable policy might require additional funding for contraceptive services.

While giving content to these rights may be a multi-step process, judicial enforcement of constitutional rights is at the core of our system of constitutional democracy. Ensuring meaningful access to reproductive health services cannot be accomplished overnight and may require a significant expenditure of public funds. While clearly recognizing that the state has an obligation to develop a policy to address women’s reproductive health needs, courts should acknowledge that the obligation may need to be realized progressively and that some degree of deference to the legislative and executive branches may be appropriate. But the courts can play an important role by forcing the political branches to acknowledge their obligations to ensure the right to health, helping to define what the right to health requires, engaging the political branches in an iterative process to develop policy that meets constitutional standards, and where necessary and justified by the record, requiring that the government take certain positive steps to meet its obligations.

CONCLUSION

In order to fully enforce socioeconomic rights in our state constitutions, state courts must address both the negative and positive aspects the rights over time, first by preventing the state from actively interfering with the exercise of these rights and ultimately by encouraging or, if necessary, forcing the state to fulfill them. Looking at the right to health, and particularly women’s right to reproductive health, it may be necessary to approach litigation with both frameworks in mind and take the process one step at a time.

While developing this body of law may require some patience, it is important to recognize both that states have an obligation to enforce state constitutional rights and that state courts are not without guidance as they face challenges in developing workable approaches

434 See Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (“The issue before us—the constitutionality of the system of statutes that created the common schools—is the only issue. To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.”); Fred C. Zacharias, True Confessions About the Role of Lawyers in a Democracy, 77 FORDHAM L. REV. 1591, 1608 (2009) (noting that in a constitutional democracy, individual rights such as those in a bill of rights are “enforced through judicial review”).
for that enforcement. The lack of attention to socio-economic rights in state constitutions can be attributed to a variety of factors, including the tendency of advocates to focus on federal courts as the sole venue for vindicating rights and the reluctance of courts of all types to venture into new territory. However, the development of human rights jurisprudence abroad and the emergence of a body of state law giving content to affirmative rights have set the stage for renewed attention to state constitutional social and economic guarantees. As Justice Brennan said, in order for individuals in the United States to fully enjoy all of their rights, state courts must enforce the rights found in their own constitutions.435 Advocates can encourage the development of a new frontier of state constitutionalism by mining state constitutions for their potential guarantees and helping courts find the guidance they may need from courts both at home and abroad.

435 See Brennan, supra note 1.