

# Harming the Poor Through Social Rights Litigation: Lessons from Brazil

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## I. Introduction

The constitutionalization of social and economic rights, although still a contentious issue in some countries, is no longer as controversial and exceptional a practice as it once was. Several constitutions around the world currently recognize, in varying formulations, one or more so-called social and economic rights such as health, education, work, housing, food, and water.<sup>1</sup> But one of the common effects of constitutionalization, the increase of litigation invoking these rights (I shall call it “judicialization”), remains a highly contentious subject. Constitutional theorists disagree on whether it is appropriate for courts to adjudicate these rights,<sup>2</sup> and those who support courts’ involvement disagree about how far adjudication should go (often

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1. See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 177 (2005) (including a categorical listing of constitutions that include various socioeconomic provisions); Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. COMP. ECON. 103, 107 tbl.2 (2008) (listing the indices of constitutional commitment to social rights); Mary Ann Glendon, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, 16 HARV. HUM. RTS. J. 27, 30–34 (2003) (relating the importance of Latin Americans in the inclusion of social rights in the 1948 Universal Declaration of Human Rights); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523–26 (1992) (comparing and contrasting the rights that have been accepted in the United States and other Western countries).

2. Compare Flavia Piovesan, *Impact and Challenges of Social Rights in the Courts*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* 182, 184 (Malcolm Langford ed., 2008) (“[A] failure by the State to implement constitutional dictates, particularly those related to social rights, can be considered an unconstitutional act and subject to judicial review.”), with Aryeh Neier, *Social and Economic Rights: A Critique*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 283, 284 (Henry J. Steiner et al. eds., 3d ed. 2008) (“The concern I have with economic and social rights is when there are broad assertions . . . . There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.”).

along a spectrum that goes from procedural to substantive review, or from weak to strong review).<sup>3</sup> I shall call this the “justiciability debate.”<sup>4</sup>

The recent literature in English has overwhelmingly focused on the South African Constitutional Court and has been mostly critical of its perceived deferential approach, which is based largely on the traditional administrative law model of reasonableness review.<sup>5</sup> For those critics, such an approach renders social and economic rights meaningless and represents an abdication by the judiciary of its constitutional duty to protect these rights. In their view, once social rights are constitutionalized, courts should determine their content and enforce them assertively without being too worried about a duty of deference to the political branches.<sup>6</sup>

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3. Compare Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 708, 757 (2001) (summarizing debate over strong versus weak review by saying “individual rights are either supreme law, entrenched and enforced by an unreviewable judiciary or they are ordinary law changeable by legislative majority”), with Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 248 n.11 (1995) (contending that modern constitutional scholarship “tends to reject the claim that the problem of democratic debilitation is a serious one”).

4. See also SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 123 (2008) (“[I]t is possible to structure adjudication of positive human rights in a way [that] strengthens rather than detracts from democracy.”); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 163 (2008) (discussing the development of weak-form systems of judicial review and their relation to the enforcement of social and economic rights, utilizing cases from the South African Constitutional Court); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 391 (2007) (developing a theory of “constitutional dialogue” regarding the South African Constitutional Court’s approach to judicial enforcement of socioeconomic rights).

5. See Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or “What Are Socio-Economic Rights For?”*, in RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 33, 37 (Henk Botha et al. eds., 2003) (making a “descriptive claim, that the Constitutional Court has proceduralised its adjudication of socio-economic rights, because it leans toward seeing for itself a formal, structural or procedural, rather than a substantive role in adjudicating these rights”); Sandra Liebenberg, *Adjudicating Social Rights Under a Transformative Constitution*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 2, at 75, 90 (noting that critics of “reasonableness review” have argued that it “amounts essentially to an administrative law model, and that insufficient attention is paid to the substantive standards that should guide the determination as to whether the State has met its obligations in relation to socio-economic rights”); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151, 154 (2009) (observing that the South African Constitutional Court’s critics’ primary objection to the court’s deferential socioeconomic rights jurisprudence is that this deference weakens those rights); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L L. 113, 139–40 (2008) (lamenting the South African Constitutional Court’s refusal to define minimum essential levels of socioeconomic rights).

6. The literature on pre- and post-constitution South Africa is now vast. See, e.g., DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 237 (2007) (advocating a two-stage analysis and claiming that it could improve the inadequate “reasonableness” inquiry developed by the South African Constitutional Court for adjudicating social rights issues); EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES (Danie Brand & Sage Russell eds., 2002) (compiling articles that describe the content of different socioeconomic rights from the South African perspective); Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional*

Participants on both sides of the justiciability debate rely mostly on theoretical arguments about the legitimate role of courts in a democracy and on abstract discussions of their institutional capacity.<sup>7</sup> Very little, if anything at all, is said about the actual effects of justiciability on the ground. I believe this is an important omission. In my view, there is no a priori legitimate role for courts in a democracy with respect to the adjudication of social and economic rights, at least where these rights have been constitutionalized as rights and not as directive principles of state policy. Courts' legitimate role hinges strongly, in my view, on whether they can do a good job, i.e., on whether they can contribute to the protection of social and economic rights.

In this Article, I try to shed light on the justiciability debate from this different, more empirical perspective. My focus is the burgeoning, yet much less known, jurisprudence of the Brazilian courts and the empirical data that is gradually becoming available on the actual effects of that jurisprudence. For over ten years now, the Brazilian judiciary, led by its Supreme Federal Tribunal (STF), has consistently adopted an assertive stance in the adjudication of some social and economic rights, particularly education and health.<sup>8</sup> Unlike its South African counterpart, it has not shied away from determining the content of these rights and from issuing mandatory injunctions to compel the state to immediately provide the corresponding goods and services to litigants. This seems to be exactly the role that some social rights supporters want the judiciary to play, and many commentators

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*Questions: In the Interest of Justice?*, 3 INT'L J. CONST. L. 39, 64 (2005) (summarizing the South African Constitutional Court's approach to the jurisprudence of socioeconomic rights); William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969–Present*, 39 TULSA L. REV. 597, 598 & nn.5–6 (2004) (stating that “‘social rights’ are features of most of the world’s constitutions” and listing South Africa as an example); Sandra Liebenberg, *Needs, Rights and Transformation: The Adjudication of Social Rights in South Africa*, in (MIS)RECOGNITION, SOCIAL INEQUALITY AND SOCIAL JUSTICE 177 (Terry Lovell ed., 2007) (exploring the relationship between a jurisprudence of social rights and the transformative goals of the South African constitution); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 15–18 (2003) (discussing the justifications for opposing the constitutionalization of social rights and citing a South African case as an example); Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882, 891–96 (2004) (analyzing three recent key decisions by South Africa's Constitutional Court that vindicate the court's role as an enforcer of social rights); Theunis Roux, *Understanding Grootboom—A Response to Cass R. Sunstein*, 12 CONST. F. 41, 41 (2002) (critiquing Cass Sunstein's interpretation of the Constitutional Court's decision in *Grootboom*, in which it adopted “what is in effect an ‘administrative law model of socio-economic rights,’ . . . giving courts the power to order government to ‘devote more resources than it otherwise would’ to the regulatory problem at issue”).

7. See, e.g., Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973) (presenting two theoretical models of the role of the judiciary in answering constitutional questions); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEXAS L. REV. 73, 75 (2007) (arguing that justiciability doctrine is “fundamentally misconceived” in view of the role of the courts in a constitutional democracy).

8. See Octavio L.M. Ferraz, *Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa* 13 (August 20, 2009) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1458299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458299) (noting the high rate of success for claimants in Brazilian health-rights cases since 1998).

have indeed applauded the Brazilian court's assertive approach.<sup>9</sup> However, if one looks at those cases more closely and carefully—particularly from the empirical perspective I am suggesting—it is at best debatable whether this assertive judicialization enhances the protection of social rights.

To illustrate my point, I focus mostly on the judicialization of the right to health, on which a significant amount of empirical data has been collected recently. Most of my arguments, however, apply to other social and economic rights as well, and I believe they are relevant for other jurisdictions with similar contexts, legal cultures, and structures. My main contentions are these: (1) when pushed to enforce some social rights assertively, courts have a tendency (and an incentive) to misinterpret these rights in an absolutist and individualistic manner; (2) such interpretation unduly favors litigants (often a privileged minority) over the rest of the population; (3) given that state resources are necessarily limited, litigation is likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities; and (4) contrary to the contention of some scholars, enhancing access to courts would not solve the problem. My suggestion, based on these arguments, is that social and economic rights might be better protected when courts refrain from trying to enforce those rights assertively, as some social rights supporters expect and pressure them to do.

I am not arguing, I hasten to clarify, that social and economic rights should never be constitutionalized. In fact, nothing in my argument provides direct support against constitutionalization *per se*—although it might, indirectly, when the type of judicialization I criticize is shown to be an inevitable consequence of constitutionalization and to lead to a worse overall protection of these rights than would otherwise obtain had they not been constitutionalized.<sup>10</sup> I am also not arguing that courts are inherently

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9. For a recent article in English by a leading Brazilian activist defending judicialization, see Piovesan, *supra* note 2, at 182. See also Octavio Luiz Motta Ferraz, *Health Inequalities, Rights, and Courts: The Social Impact of the "Judicialization of Health" in Brazil*, in LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 1, 25 (Alicia Ely Yamin & Siri Gloppen eds., 2011) [hereinafter Ferraz, *Social Impact*] (finding numerous changes in judicial behavior necessary to allow health litigation to have a positive social impact in Brazil); Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 HEALTH & HUM. RTS. J. 33, 34 (2009) [hereinafter Ferraz, *Right to Health*] (arguing that the Brazilian interpretation of the right to health, and the litigation model it encourages, is potentially detrimental to health equity); Florian F. Hoffman & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, in COURTING SOCIAL JUSTICE 100, 100 (Varun Gauri & Daniel M. Brinks eds., 2009) (examining the origins and impact of litigation for health and education rights in Brazil); José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study Revisited*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 185, 185 (Roberto Gargarella et al. eds., 2006) (asserting that democratization in Brazil took place with the support of the judicialization of social rights).

10. This seems to be the argument previously put forward by Frank Cross. See generally Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001). Although my analysis echoes some of the points made by Cross, it differs from his analysis in an important respect. According to him, "[f]or positive constitutional rights to make sense, the advocates have to explain

incapable of adjudicating social rights appropriately. The South African Constitutional Court is a good example, in my view, that they are capable.<sup>11</sup> Rather, my argument is that in some places, such as Brazil (and perhaps other countries with similar contexts, legal cultures, and structures), the judicialization that followed constitutionalization has likely been detrimental (and certainly not helpful) to furthering the interests that social and economic rights are supposed to protect. Social rights supporters should therefore be wary of automatically viewing justiciability as an indispensable ally of constitutionalization.

This Article proceeds in three additional Parts. In Part II, I argue that whether courts should enforce social rights (the legitimacy question) cannot be abstractly evaluated independent of the actual consequences that justiciability produces on the ground in terms of protecting these rights. In Part III, I use the experience in Brazil with the so-called judicialization of health to illustrate and evaluate justiciability. I conclude, as already anticipated above, that we have enough cause to doubt whether the effects of justiciability are benign and perhaps should even advocate that social rights be taken away from Brazilian courts. In Part IV, I put forward a final argument against social rights justiciability as a potential vehicle for protecting the rights of the poor in highly unequal and inegalitarian countries, even where courts are genuinely willing to help the poor (an assumption that I claim should not be taken for granted).

## II. Legitimacy and the Actual Effects of Justiciability

Supporters of social rights justiciability depart from an argument that, at first sight, seems rather plausible. They claim that the political decision to include social rights as “rights” in the constitutional document does away with the concerns of legitimacy raised by opponents of justiciability.<sup>12</sup> If the majority of people gave an express mandate through their highest law to the judiciary to enforce social rights, then courts should proceed without any fear of encroaching into the reserved sphere of the political powers of the state, i.e.,

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why courts would do a better job of providing minimally adequate welfare support than would the legislative and executive branches.” *Id.* at 920. This seems to assume that constitutionalization can have no independent positive effect on legislatures and executives that might outweigh the negative effects of judicialization, which I do not believe Cross proves to be the case. If constitutionalization influences the political branches to adopt measures that enhance the enjoyment of these rights, as I believe was the case in Brazil and could potentially be the case elsewhere (including the United States, which is the sole focus of Cross’s concern), the negative effects of judicialization would have to outweigh those positive effects for constitutionalization to be unjustified.

11. For a defense of the South African Constitutional Court’s reasonableness approach, see Octavio L.M. Ferraz, *Poverty and Human Rights*, 28 OXFORD J. LEGAL STUD. 586, 588, 603 (2008).

12. Indeed, this is the position taken by the South African Constitutional Court. *See In re Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at 800 para. 77 (“In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.”).

of violating the principles of democracy and separation of powers. The thrust of this position is illustrated by a short passage in a judgment by the South African Constitutional Court in the famous *Treatment Action Campaign (TAC)*<sup>13</sup> case: “In so far as [social rights adjudication] constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself.”<sup>14</sup>

The weight of this argument, however, is much less than justiciability supporters seem to believe. It does, of course, refute radical positions against social rights justiciability based solely on “pure” legitimacy concerns, i.e., that social and economic issues such as health and education are matters of policy with which courts should *never* interfere.<sup>15</sup> This objection does not survive the constitutionalization of social rights as “rights.” Yet constitutionalization does not completely eliminate all concerns with legitimacy either. How courts should go about discharging their constitutional mandate to adjudicate social rights remains an important and debatable question even after constitutionalization.

This question of “how” has two distinct, interrelated aspects. One touches upon the idea of intrusiveness. There are different types of scrutiny utilized by courts when adjudicating social rights, ranging from more procedural (and thus less intrusive) to more substantive (and thus more intrusive). On the purely procedural side lies the traditional administrative law model of procedural propriety (due process). In these types of cases, courts do not interfere with the substance of the decisions made by the political branches but rather make sure that these decisions have followed appropriate procedures, such as affording a fair hearing. The famous American case *Goldberg v. Kelly*<sup>16</sup> is a good example of this approach. At the other end of the intrusiveness spectrum, courts define the content of social and economic rights and modify decisions of the political branches that fail to coincide with the judicial definition. The Brazilian right to health cases discussed later in this Article are of this sort.<sup>17</sup> In between these two extremes are intermediate cases where courts do not completely modify political decisions in their substance yet go beyond mere procedural defects, such as cases in which a benefit conferred to a class of citizens is extended to another group. These

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13. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC).

14. *Id.* at 755 para. 99.

15. See D.M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475, 482 (1992) (positing that a court could never interfere with a government program adopted pursuant to a socioeconomic constitutional right); see also Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359, 377 (1988) (maintaining that political and social rights should never be judicially enforced).

16. 397 U.S. 254, 261–66 (1970) (holding that due process requires a pre-termination evidentiary hearing before the discontinuation of welfare assistance).

17. See *infra* notes 58–66 and accompanying text.

include the South African case of *Khosa*,<sup>18</sup> where the court extended social benefits available to nationals to foreigners who had permanent residence and paid taxes in South Africa, and the American cases of *Murry*,<sup>19</sup> *Moreno*,<sup>20</sup> and *King v. Smith*,<sup>21</sup> where courts prevented the legislature from excluding certain groups from social benefits.<sup>22</sup> The reasonableness approach applied in cases such as *Grootboom* and *TAC* are also in this intermediate category.<sup>23</sup> There, the courts went so far as to declare that the housing and health policies of the state were unreasonable for overlooking particularly vulnerable groups—homeless people and babies at risk of contracting HIV. However, they did not mandate a particular policy in *Grootboom*, nor did they mandate a particular implementation schedule or the amount of resources to be spent in either *Grootboom* or *TAC*.

But this formal classification of types of scrutiny, although relevant, cannot itself determine whether the role of courts is legitimate or not. It is true, of course, that the more substantive the review, the more controversial it becomes in terms of legitimacy.<sup>24</sup> To evaluate legitimacy appropriately, however, one has to go beyond this formal categorization of scrutiny and investigate the effects that each type of scrutiny is producing on the ground, i.e., in the protection of the interests recognized by the constitutional norm. If it could be shown that some or all types of court interference lead to outcomes that are more harmful than helpful to the protection of interests

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18. *Khosa v. Minister of Soc. Dev.* 2004 (6) SA 505 (CC) at 535–42 paras. 68–89.

19. U.S. Dep’t of Agric. v. Murry, 413 U.S. 508, 514 (1973) (declaring unconstitutional a provision of the Food Stamp Act that withheld food stamps from indigent households that happened to contain an individual whom another non-indigent taxpayer claimed as a dependent).

20. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (invalidating an amendment to the Food Stamp Act that excluded “hippies” and other households of unrelated persons from the program).

21. 392 U.S. 309, 333–34 (1968) (striking down an Alabama law that denied federally funded aid to children whose mother cohabitated with a man to whom she was not married).

22. Intrusiveness can also vary depending on the strength of the remedy granted by the court, ranging from weak remedies such as declaratory relief to strong remedies such as injunctions. See TUSHNET, *supra* note 4, 33–36 (contrasting “strong-form” and “weak-form” judicial review). I am not concerned in this Article with so-called weak remedies.

23. See *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) at 762–64 paras. 124–133 (S. Afr.) (deferring to the government to implement a comprehensive policy in order to ensure the national effort to combat the HIV/AIDS pandemic complies with the constitution); *Gov’t of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 86 para. 96 (requiring the state to act in order to meet the requirements of § 26 of the constitution, including “the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need”).

24. See TUSHNET, *supra* note 4, at x–xi (observing that reasonable people often dispute the correctness of the conclusions that courts reach in judicial attempts to interpret and apply the underlying meaning of constitutional bills of rights); Michelman, *supra* note 6, at 17 (characterizing judicial enforcement of constitutionally protected social rights as “comfortably kosher” if this enforcement only entails, for example, deciding whether municipal land-use laws are “reasonable”); Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 124 (2001) (conveying judicial enforcement critics’ argument that courts are not equipped to make socioeconomic-program-implementation decisions that would require them to apply extensive knowledge of the programs or to make value judgments).

recognized in constitutional social rights norms, then the courts' prima facie claim to legitimacy derived from constitutionalization would seem to be seriously undermined. It might even be argued, depending on how negative the effects of judicialization are, that the constitution should be reformed to remove social rights from the courts.<sup>25</sup>

It might be objected that this approach, which links legitimacy so closely to the consequences of justiciability, is too contingent. It does not establish whether justiciability is legitimate as a matter of principle, as some commentators seem to believe it is. Wojciech Sadurski, for instance, has claimed that legitimacy and rights protection "are conceptually and politically distinct questions," and that "we might consider [judicial review] to be legitimate but regrettable from the point of view of rights."<sup>26</sup>

It seems implausible to me, however, to maintain the legitimacy of justiciability even when, in any of its potential forms mentioned above, it is proven to consistently lead to a worse situation in terms of rights protection than nonjusticiability would.<sup>27</sup> Surely, what justifies the judicial power to review political decisions is the probability that the practice of judicial review can improve these decisions.<sup>28</sup> This does not mean, of course, that all individual decisions have to achieve that aim, but rather that the practice itself is, on average, able to improve things.

But my main argument in this Article does not depend on accepting that legitimacy and effectiveness are linked. One could perhaps still hold that justiciability is legitimate in principle but, given its incurable ineffectiveness (or harmful effects) in practice in some countries, should be abandoned as a pragmatic move.<sup>29</sup>

If the approach I suggested above is correct, a verdict on whether social rights justiciability should be encouraged or rejected (for principled or pragmatic reasons) is strongly context dependent and hinges on a wealth of empirical data that, I admit, might be rather difficult to collect and analyze,

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25. Others have made pragmatic claims against justiciability. See Cross, *supra* note 10, at 920 (warning that relying on the judiciary to uphold socioeconomic rights could be "disastrous" since, historically, courts have not adequately concerned themselves with socioeconomic inequality); Sunstein, *supra* note 24, at 124 (relaying judicial enforcement critics' argument that allowing socioeconomic rights to be justiciable could undermine efforts to protect these rights, since courts lack the resources to properly enforce these rights, and since the citizens to whom these rights belong would no longer be able to have as much control over the rights through the democratic process).

26. Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275, 276 (2002).

27. See, e.g., Ferraz, *Right to Health*, *supra* note 9, at 38–40 (arguing that justiciability of the right to health in Brazil has failed to improve health equity in that country).

28. See Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227, 230–31 (2010) (stating that "the prominent theories purporting to justify judicial review are instrumentalist," and that under these theories, "judicial review is justified to the extent that it is likely to bring about *contingent* desirable consequences").

29. For a purely pragmatic argument, see Cross, *supra* note 10, at 862 ("[E]conomic and political barriers . . . prevent positive rights from being actualized effectively.").

especially for lawyers. This should be no reason, however, to abandon the approach. Rather, we should strive to get access to as much data as possible and come to provisional conclusions based on the available data. In the next Part, I apply the model just suggested using empirical data on the judicialization of health in Brazil.

### III. The Judicialization of Health in Brazil and Its Consequences

Brazil is internationally recognized as a success story in the fight against AIDS due to its state-funded drug distribution program set up by the government in the 1990s.<sup>30</sup> What is less well-known is that many HIV-infected Brazilian citizens were and are given HIV drugs due to court orders and not through federal, state, or municipal government programs, which are very large but not fully comprehensive due to resource limitations.<sup>31</sup> The impact of these court orders is significant. Estimates of the Federal Ministry of Health for the state of São Paulo, the most densely populated state in Brazil with close to 40 million people,<sup>32</sup> show that BRL85 million (approximately USD43 million)—the equivalent of 30% of the overall budget for high-cost drugs and more than 80% of the original budget for AIDS drugs—was spent in 2005 to comply with injunctions ordering the funding of new AIDS drugs not included in the government's health policy for more than 10,000 individuals.<sup>33</sup>

This same pattern, which became prominent with AIDS drugs litigation in the late 1990s and early 2000s, has now spread to several other conditions, including diabetes, hypertension, rheumatoid arthritis, cancer, eye diseases,

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30. See *A Regional Success Story: Sharing Knowledge to Tackle HIV and AIDS*, DEP'T FOR INT'L DEV., <http://www.dfid.gov.uk/casestudies/files/south-america/brazil/brazil-hiv-regional.asp> (citing a figure of 600,000 people living with HIV and AIDS in Brazil, compared to the figure projected in the mid-1990s of 1.2 million HIV infections by 2000). For a brief account of the program and how its success depended on the participation of civil society, see Jane Galvão, *Brazil and Access to HIV/AIDS Drugs: A Question of Human Rights and Public Health*, 95 AM. J. PUB. HEALTH 1110, 1112–13 (2005).

31. See Tatiana Vargas de Faria Baptista et al., *State Responsibility and Right to Health in Brazil: A Balance of the Branches' Actions*, 14 CIÊNCIA & SAÚDE COLETIVA [SCI. & PUB. HEALTH] 829, 836 (2009) (discussing the prominent role of the Brazilian judiciary in supplying medicine for HIV/AIDS and other diseases, which was necessitated “at least in part [by] the deficiencies of Public Administration”).

32. *Censo 2010: população do Brasil é de 190.732.694 pessoas* [*Census 2010: Brazil's Population Is 190,732,694 People*], INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA [BRAZ. INST. GEOGRAPHY & STAT.] (Nov. 29, 2010), [http://www.ibge.gov.br/home/presidencia/noticias/noticia\\_visualiza.php?id\\_noticia=1766&id\\_pagina=1](http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=1766&id_pagina=1).

33. Fabiane Leite, *Estados tentam barrar remédios via Justiça* [*States Try to Stop Treatment Through Justice*], FOLHA DE S. PAULO [SÃO PAULO SHEET], Oct. 3, 2005, available at <http://www.gestospa.org.br/web/noticias/conteudo1/?conteudo=151451403&autenticacao=0,79048>; see also MINISTÉRIO DA SAÚDE [BRAZ. MINISTRY OF HEALTH], O REMÉDIO VIA JUSTIÇA [TREATMENT THROUGH JUSTICE] (2005), available at [http://www.aids.gov.br/sites/default/files/o\\_remedio\\_via\\_justica.pdf](http://www.aids.gov.br/sites/default/files/o_remedio_via_justica.pdf) (presenting a study of 400 cases conducted by the Brazilian National STD and AIDS Programme).

and many others.<sup>34</sup> According to the most recent and still incomplete estimates, there are at least 40,000 lawsuits yearly against the Brazilian government in which claimants rely, almost always successfully, on the right to health, generating growing administrative burdens and significant costs to the already strained Brazilian public health system (“SUS,” or Unified Health System).<sup>35</sup>

Public opinion about this phenomenon, referred to as the “judicialization of health,” is divided into two highly polarized camps. On one side, there are those (mostly lawyers and health-related pressure groups), who applaud judicialization as a legitimate vindication of the constitutional right to health so often violated by the political branches.<sup>36</sup> On the other side, we find those (mostly congressmen and public health officials) who decry judicialization as an incompetent and illegitimate interference by courts on the realm of politicians and public health experts.<sup>37</sup> As I have argued above, neither of these extreme positions can be supported in the abstract, i.e., without further empirical inquiry into the actual consequences of judicialization. In the following subparts, I describe and analyze in more detail the Brazilian model of judicialization and its actual consequences.

#### A. *Defining the Right to Health*

The inquiry I am proposing, as is readily apparent, is fraught with difficulties. One of the difficulties lies in the very definition of the content of social rights in general, and the right to health in particular. It is not clear from the constitutional norm alone which specific treatments, equipment, and medicines individuals are entitled as a corollary to the right to health. These norms are often vague and indeterminate, and the Brazilian constitution is no exception. Here are the two most relevant provisions addressing the right to health:

Art. 6. Education, health, nutrition, labor, housing, leisure, security, social security, protection of motherhood and childhood and assistance to the destitute, are social rights, as set forth in this Constitution.<sup>38</sup>

Art. 196. Health is the right of all and the duty of the state and shall be guaranteed by social and economic policies aimed at reducing

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34. Ferraz, *Right to Health*, *supra* note 9, at 35–36.

35. *See* Ferraz, *Social Impact*, *supra* note 9, at 10–12 (discussing the social impact of the volume of right-to-health litigation).

36. *See id.* at 1–2 (discussing the Brazilian judiciary’s expansive interpretation of the right to health).

37. *See* Ferraz, *Right to Health*, *supra* note 9, at 34 (suggesting that the courts might be worsening the country’s already pronounced health inequities); Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 861–62 (2009) (explaining that the Brazilian courts’ decisions ordering the government to provide necessary medical treatment have been characterized as “excessive judicialization of the right to health”).

38. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6.

the risk of illness and other maladies and by universal and equal access to all activities and services for its promotion, protection and recovery.<sup>39</sup>

Indeterminateness is, of course, not a fatal obstacle to justiciability. But it does pose an important difficulty for it and for our task of evaluating its effects.<sup>40</sup> How can we establish if courts are doing a good job when they grant all sorts of treatment, equipment, and medicines to litigants if it is unclear whether the constitutional right to health includes these goods?

One option is to claim that this high indeterminacy is in itself a sufficient reason for courts to not get involved in any thoroughly substantive form of scrutiny. It is for the political branches, democratically elected, to decide the substantive content of the right to health; courts should, at most, simply control the procedural propriety of these decisions and prevent irrational and discriminatory implementations of the constitutional norm. Rather than decide if individuals have rights to particular treatments or goods, courts should make sure that whatever decision is made follows proper criteria of fairness, transparency, and rationality, as they did in *Soobramoney*<sup>41</sup> and had been doing in Brazil before 1997.<sup>42</sup>

Although I think this view is plausible in countries that have not constitutionalized social rights, or have done so expressly as nonjusticiable directive principles, it does seem implausible in countries where these rights are now part of the constitutional document. That approach would render the constitutional provisions recognizing social rights largely superfluous, since fairness, transparency, and rationality are well-established principles of administrative law that would apply irrespective of the inclusion of social

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39. *Id.* art. 196.

40. Some commentators seem to underestimate this problem. Michelman, for instance, dismisses the problem very quickly by saying, "'Reasonableness' is not, in any legal discourse known to me, a nonjusticiable standard (or are negligence law and general clauses beyond the pale?), and the remedy for violation, if found, would be a simple prohibitory injunction." Michelman, *supra* note 6, at 17. This seems to me an unwarranted oversimplification. In negligence cases, one is not dealing with complex polycentric issues of the sort involved in social rights adjudication, such as the housing policy discussed in Michelman's article.

41. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

42. See, e.g., ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 3 (Julian Rivers trans., Oxford Univ. Press 2002) (1986) (setting forth a theory in which "the jurisprudence of constitutional rights sets itself the task of giving rationally justifiable answers to constitutional rights questions"); NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY 117–23 (2008) (proposing procedural constraints for priority setting among health needs that involves making the rationales for limit-setting decisions publicly available and ensuring that these rationales are ones that "fair-minded people can agree are relevant for appropriate patient care under resource constraints"); CASS R. SUNSTEIN, DESIGNING DEMOCRACY 221–37 (2001) (analyzing the *Grootboom* court's decision and praising its approach as "respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met").

rights in the constitution.<sup>43</sup> When social rights are constitutionalized, it seems possible for courts to go further. The difficult question, of course, is *how much* further?<sup>44</sup> The following description of the jurisprudence of the Brazilian courts, which changed radically from very deferential to very assertive, might help us shed light on this question.

*B. The Brazilian Jurisprudence on the Right to Health: From Nonjusticiable Programmatic Norms to Justiciable Individual Rights*

For some time, it was largely agreed that the 1988 constitutional norms recognizing social and economic rights did not have an immediate effect, but were rather “programmatic,” i.e., were aimed at the political branches and depended, for their full efficacy, on the adoption of legislation specifying the details of their implementation.<sup>45</sup> As a consequence, they were seen as inappropriate for direct adjudication by the courts. The following passages from the Rio de Janeiro court of appeals in right-to-health cases in the mid- and late 1990s illustrate this position:

Programmatic norms established in the Federal Constitution do not give rise to individual rights of citizens to claim from the state high cost medicines, at the expense of other patients, equally needy. When complying with its public health obligations the administration must attend to the more pressing interests of the population.<sup>46</sup>

Given scarcity of resources, the State cannot privilege one patient over hundreds of others, also needy, who accept the limitations of the state machinery. The Judiciary cannot, to protect the litigant, intrude in the public administration’s policy aimed at attending to the population.<sup>47</sup>

This approach significantly resembles the one adopted by the South African Constitutional Court in *Soobramoney*, which was heavily criticized

43. Cf. Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 118 (2006) (noting that the Administrative Procedure Act “greatly enhanced the administrative state’s transparency, formal rationality, and procedural fairness”).

44. See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1888 (2001) (embracing the argument that social citizenship rights must become part of the constitutional framework to provide all citizens with a fair opportunity to participate in democratic decision making, but acknowledging that “[h]ow substantial the role of courts is in defining and enforcing these rights is a separate question”).

45. See Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J.L. & TRADE AMERICAS 291, 292–93 (2000) (“Many of [the Brazilian constitution’s] provisions . . . are not self-executing. They either require complementary legislation to fill in certain missing elements, or they are programmatic, mandating directives for substantive legislation and regulations.”).

46. T.J.R.J.-1, Trial No. 1998.004.00220, Relator: Des. Antonio Lindberg Montenegro, 17.12.1998, DIÁRIO DA JUSTIÇA DO ESTADO DO RIO DE JANEIRO [D.J.R.J.], 06.05.1999, 3047, 3047.

47. T.J.R.J.-8, Ap. Civ. No. 1994.001.01749, Relator: Des. Carpena Amorim, 20.10.1994, D.J.R.J., 07.02.95, 1, available at <http://srv85.tjrj.jus.br/ConsultaDocGedWeb/faces/ResourceLoader.jsp?idDocumento=0003FF57AF6F13F6DC434CD5C9E438D328F27CC402423511>.

by social rights supporters. In that case, an individual in need of renal dialysis challenged the decision of the local hospital to not provide him with the needed treatment due to insufficient resources.<sup>48</sup> The Constitutional Court refused to overturn the administrative decision based on the following reasoning:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.<sup>49</sup>

The concerns of both the Brazilian and South African courts were well expressed in another passage of *Soobramoney*: “[T]he danger of making any order that the resources be used for a particular patient [is that it] might have the effect of denying those resources to other patients to whom they might more advantageously be devoted.”<sup>50</sup>

Yet, as has been persuasively argued by many critics, these decisions seem to render the constitutional norms establishing social and economic rights meaningless.<sup>51</sup> These critics urge the courts to adopt a more assertive stance.<sup>52</sup> So far, the South African court seems resistant to these forceful calls. Despite having moved towards more substantive review in later cases such as *Grootboom*, *TAC*, and *Khosa*, it is still far from the truly substantive approach urged by its critics.<sup>53</sup> Its Brazilian counterpart, on the contrary, has

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48. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at 769 para. 1.

49. *Id.* at 776 para. 29.

50. *Id.* at 776 para. 30.

51. See BILCHITZ, *supra* note 6, at 136 (“[T]he approach adopted by the [Constitutional Court] attempts to circumvent the task of providing content to socio-economic rights . . .”); Pieterse, *supra* note 6, at 896 (“Primarily, doubt has been expressed as to the adequacy of the Constitutional Court’s ‘reasonableness test’ in fostering a coherent approach to social rights . . . [that] translates into tangible benefits for rights-bearers as a group.”).

52. See BILCHITZ, *supra* note 6, at 234 (suggesting that where there is a violation of socioeconomic rights, the courts should not “abdicate their role of providing content to these rights,” but rather, they should “declare the existence of such a violation and . . . use innovative orders . . . to require the other branches of government to explain how they propose to deal with the violation”).

53. In fact, some claim that the court has moved backwards with its decision in *Mazibuko v. City of Johannesburg* 2010 (4) SA 1 (CC) at 53–54 paras. 166–169 (holding that the city’s free water plan was reasonable and not a violation of the constitutional right of access to sufficient water under § 27 of the constitution). See, e.g., Murray Wesson, *Reasonableness in Retreat? The Judgment of the South African Constitutional Court in Mazibuko v. City of Joh[a]nnesburg*, 11 HUM. RTS. L. REV. (forthcoming 2011) (manuscript at 1–2), available at <http://hrlr.oxfordjournals.org/content/early/2011/03/25/hrlr.ngr002.full.pdf> (“Although *Mazibuko* has not yet attracted the level of commentary that accompanied its forebears, there is a perception that it marks a retreat from the Constitutional Court’s earlier decisions in *Government of the*

succumbed to the pressure (or temptation, depending on how one looks at it) and has completely abandoned the deferential approach of the mid-1990s expressed in the decisions quoted above.<sup>54</sup> Since 1997, it has been consistently applying a highly assertive and substantive model of review in which the content of the right to health is defined by the judiciary against the will of the political branches and forcefully imposed upon them through mandatory injunctions.<sup>55</sup>

It is important to note at this juncture that the Brazilian judicial system does not operate under a rule of *stare decisis* (with very few exceptions).<sup>56</sup> The courts have therefore decided hundreds of similar, if not identical, cases involving the right to health, and nothing prevents any court, from the *Supremo Tribunal Federal* (STF) to the lower courts, from changing this approach at any time. But the jurisprudence of social rights has been remarkably consistent so far for almost fifteen years, establishing a kind of *de facto* binding precedent in a case decided in 1997 and ever since quoted with approval in many decisions adjudicating the right to health.<sup>57</sup>

This paradigmatic case involved a man, João Batista Gonçalves Cordeiro, who suffered from a rare disease called Duchenne's muscular dystrophy.<sup>58</sup> This is a genetic degenerative disease that affects muscular cells and progressively leads to the death of the patient.<sup>59</sup> At the time (mid-

*Republic of South Africa v Grootboom, Minister of Health v Treatment Action Campaign and Khosa v Minister of Social Development.*" (footnotes omitted)).

54. See Ferraz, *Right to Health*, *supra* note 9, at 35–36 (describing the adoption of a stricter judicial standard in the 1990s and the related rise in claimant success against the government).

55. See generally Ana Márcia Messeder et al., *Mandados judiciais como ferramenta para garantia do acesso a medicamentos no setor público: a experiência do Estado do Rio de Janeiro, Brasil* [*Can Court Injunctions Guarantee Access to Medicines in the Public Sector? The Experience in the State of Rio de Janeiro, Brazil*], 21 *CADERNOS DE SAÚDE PÚBLICA* [J. PUB. HEALTH] 525 (2005) (documenting the high number of mandatory injunctions granted by Brazilian courts in right-to-health cases).

56. See Anna Silvia Bruno, *Bringing Uniformity to Brazilian Court Decisions: Looking at the American Precedent and at Italian Living Law*, 11 *ELEC. J. COMP. L.* 1, 6 (2007), <http://www.ejcl.org/114/art114-3.pdf> (contrasting the *Súmula vinculante* with *stare decisis*).

57. There are a minority of judges in lower courts and in courts of appeals across the country who disagree with the prevailing interpretation and often reject right-to-health claims. In the STF, however, the interpretation has so far been unanimous, with the exception of a couple of cases judged by Justice Ellen Gracie in which she seemed to adopt a dissenting interpretation restricting the right to health (she has since reverted, however, to the prevailing interpretation). See Daniel Wang & Fernanda Terrazas, *Decisões da Ministra Ellen Gracie sobre medicamentos* [*Decisions by Justice Ellen Gracie About Medicines*], *SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO* [BRAZ. SOC'Y PUB. L.] (July 19, 2007), [http://www.sbdp.org.br/artigos\\_ver.php?idConteudo=66](http://www.sbdp.org.br/artigos_ver.php?idConteudo=66) (reviewing Justice Gracie's judicial opinions about health and medicines).

58. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, *DIÁRIO DA JUSTIÇA* [D.J.], 17.04.1998, 64, 65.

59. See Nathalie M. Goemans et al., *Systemic Administration of PRO051 in Duchenne's Muscular Dystrophy*, 364 *NEW ENG. J. MED.* 1513, 1514 (2011), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMoa1011367> ("Duchenne's muscular dystrophy is an X-linked recessive muscle disorder, affecting 1 in 3500 newborn boys. Patients have severe, progressive muscle wasting, leading to early death. The disease is caused by mutations in the dystrophin gene (DMD),

1990s), there was no approved therapy for the condition in Brazil or elsewhere, but there was one private clinic in the United States, called Cell Therapy-Research Foundation, which guaranteed total cure through cell-transplantation therapy.<sup>60</sup> The total cost of the treatment, including transportation, accommodation, and food, came to USD63,806,<sup>61</sup> about twenty times Brazil's nominal GDP per capita.<sup>62</sup> Relying on his constitutional right to health, Cordeiro brought a lawsuit to force the state to fund his treatment in America. The lower court judge issued the requested mandatory interim injunction and ordered the government's compliance within forty-eight hours.<sup>63</sup> The state's lawyers used all possible appeals to no avail but finally reached the STF, the highest court in Brazil for constitutional matters. Among technical legal arguments—including the impropriety of expenditures without the formal procedures of legislative budgetary allocations, and technical medical arguments on the experimental character of the treatment involved—the state raised the following (expected) argument of resource limitations:

If the interpretation adopted in the previous decision is maintained, not only those suffering from Duchenne's muscular dystrophy will have the benefit. If the duty of the state to promote health entails a right to funding of treatment (experimental or not) not provided by the state services according to legislation, then it follows an unlimited right of all Brazilian citizens to the best, most expensive and most advanced treatment available in the world to any illnesses—many treated more effectively abroad—which would be very generous, but not feasible.

. . . .

Given the limited resources of the State, within which the programs and policies for the health of the population as a whole are established by legislation, complying with this decision will mean a risk for the health and life of thousands of poor patients who need urgent treatment . . . .<sup>64</sup>

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leading to disruption of the open reading frame, dystrophin deficiency at the myofiber membrane, and continued fiber degeneration.” (endnotes omitted).

60. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, D.J., 17.04.1998, 64, 65.

61. *Id.*

62. See U.N. Statistics Division, National Accounts Main Aggregates Database, Per Capita GDP in US Dollars: All Countries for All Years, <http://unstats.un.org/unsd/snaama/dnlList.asp> (last modified Dec. 2010) (reporting Brazil's nominal GDP per capita as USD2,564 in 1993 and USD3,602 in 1994).

63. S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, D.J., 17.04.1998, 64, 65.

64. *Id.* at 70.

The STF upheld the lower court's decision.<sup>65</sup> In doing so, it put to rest the doctrine of constitutional "programmatically," "nonjusticiable" norms still influential at that point, and dismissed any concerns of resource scarcity as irrelevant to the determination of the content of constitutional rights. The following passage of the decision became the hallmark of the prevalent jurisprudence on the right to health, and is repeated in hundreds of later decisions finding in favor of the plaintiff and ordering the state to provide all sorts of health goods:

Between the protection of the inviolable rights to life and health, which are subjective inalienable rights guaranteed to everyone by the Constitution itself (art. 5, caput and art. 196), and the upholding, against this fundamental prerogative, of a financial and secondary interest of the State, I believe—once this dilemma occurs—that ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health . . . .<sup>66</sup>

Under the prevailing jurisprudence of the Brazilian courts, therefore, courts see right-to-health litigation as a conflict between two competing and discrete interests. On one side, there is an individual's right to life and health; on the other side, there is the financial interest of the state. This entails a balancing exercise in which, in the view of the courts, the right of the individual must always prevail, irrespective of its costs. The Brazilian courts have thus effectively established an absolute right to the satisfaction of any health needs that individuals can prove they have—let us call this the right to "maximum health attention."

### C. *What Is Wrong with the Right-to-Health Jurisprudence of Brazilian Courts?*

As I claimed above,<sup>67</sup> the abstract norm that recognizes the right to health in article 6 of the Brazilian constitution can yield no clear and precise answer on the content of that right in terms of the specific health goods (treatments, equipment, etc.) to which individuals are entitled. The main obstacle is the problem of resource availability. The precise specification of what an individual should be entitled to under the right to health depends on the intractable problem of allocating limited resources among competing health needs, for which there is no correct answer at present (and perhaps there will never be).<sup>68</sup> Under such conditions of epistemic and normative

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65. S.T.F., Recurso Extraordinário [Extraordinary Remedy] No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1409.

66. *Id.* at 1418.

67. *See supra* subpart III(A).

68. *Cf.* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18 (1978) ("Tragic choices come about in this way. Though scarcity can often be avoided for some goods by making them available without cost to everyone, it cannot be evaded for all goods. In the distribution of scarce goods society has to decide which methods of allotment to use, and of course each of these

uncertainty, many would claim that the democratic process is, in principle at least, a better equipped and more legitimate process with which to make these decisions.<sup>69</sup>

But I also suggested that, at least in countries where the right to health has been constitutionalized with no express bar on courts to adjudicate it, courts should in principle be able to exercise a more robust role in ensuring that the political branches respect these norms. Forbath properly argues that what he calls “welfare rights” (among which I believe the right to health is included) are highly indeterminate but that their “range of plausible meanings” is more definite than that of what he calls “social citizenship rights.”<sup>70</sup> It is along these lines that I believe courts could, in principle, practice a legitimate form of adjudication. A total lack of attention to social rights or discriminatory implementation of these rights, for instance, would clearly not be within the range of plausible meanings of the constitutional norm. Moreover, courts could potentially go beyond these blatant cases of infringement of the constitutional norm and review the reasonableness of public policies without substituting their preferences for those of the political branches. The South African cases of *Soobramoney*, *Grootboom*, and *TAC* are all good examples of that approach.<sup>71</sup> What courts should not do, despite the insistent calls of social-rights supporters, is try to determine the precise content of these rights in terms of specific individual entitlements, as the Brazilian courts have been doing.

1. *The Right to Health as an “Absolute Right.”*—The first, and probably most important, mistake of the majority of Brazilian courts is to interpret the right to health in a way that effectively turns it into an absolute right.<sup>72</sup> As seen above, the current, overwhelmingly prevalent interpretation regards the right to health as an “inviolable” and “inalienable” right, a “fundamental prerogative,” inextricably linked to the right to life and thus

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methods—markets, political allocations, lotteries, and so forth—may be modified, or combined with another.”).

69. See ALEXY, *supra* note 42, at 341 (“For if law does not contain an adequate standard, then deciding about the content of social constitutional rights is a matter of politics. But this means that under the principles of the separation of powers and democracy, determining the content of social constitutional rights does not fall within the competence of courts, but of the ‘legislature directly legitimated by the people[.]’” (footnotes omitted)).

70. See Forbath, *supra* note 6, at 636 (“What it means to ensure that no member of the community is homeless or without adequate shelter is not self-evident; but the range of plausible meanings is vastly more definite and exigent than what it means to ensure ‘decent work’ for all, or to sustain every member as ‘a competent and respected contributor to political[,] . . . social, and economic life at large.’” (alteration in original) (citation omitted)).

71. See *supra* notes 23, 48–50 and accompanying text.

72. It is important to notice here that this interpretation is only applied, paradoxically, when individual litigation is at stake. In collective lawsuits the courts stress the non-absolute character of the right to health and the plaintiff (typically the attorney general’s office) often loses. See Hoffmann & Bentes, *supra* note 9, at 144 (noting the high success rate of individual claims as opposed to the common rejection of collective claims).

never to be set aside or even limited by “a financial and secondary interest of the state.”<sup>73</sup> Interpreted in this manner, the right to health becomes a right to any health good (treatment, equipment, etc.) that an individual can prove she needs, irrespective of its cost. It is an absolute right to *maximum health attention*. Not even highly developed countries would be able to afford it. To defend such a right in middle-income countries like Brazil is therefore utterly unreasonable.

So when Brazilian courts, based on this inadequate interpretation of the right to health, grant individuals certain treatments and equipment that political actions have not included in the public health system, they are clearly not doing a proper job. They are not simply substituting their own views of how scarce resources should be allocated for those of the political branches; they are doing so based on irrational criteria, i.e., an absolute right to maximum health attention.

An important and appropriate judicial task is to engage the intractable problem of resource allocation by forcing the political branches to be more transparent and justify their decisions in light of the legal concepts of nondiscrimination and reasonableness. However, the courts are not even contributing to that discussion. The problem of limited resources is simply dismissed as a “secondary interest of the state.”

This approach, which has been applied consistently for nearly fifteen years now and shows no sign of subsiding,<sup>74</sup> provides enough reason, in my view, for a justified exclusion of social rights from the purview of Brazilian courts. The nefarious consequences it produces, as shown below, make the case stronger.

2. *The Privileged-Litigant Minority and Its Unreasonable Demands from the Public Health System.*—If a significant portion of right-to-health cases decided against the state by the Brazilian judiciary concerned elementary, low-cost health goods for the most disadvantaged groups of the Brazilian population, the expansive interpretation and assertive stance of the courts would be perhaps less objectionable. It is plausible to argue that in a reasonably wealthy but highly unequal country like Brazil (GDP per capita around USD10,000)<sup>75</sup>—where the richest 10% of the population amasses more than fifty times the income of the poorest 10%,<sup>76</sup> where the infant mortality rate of the poorest 20% is nearly three times higher than that of the

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73. S.T.F., Recurso Extraordinário [Extraordinary Remedy] No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1409, 1418.

74. See *supra* notes 8–9 and accompanying text.

75. *The World Factbook: Brazil*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (last modified Apr. 6, 2011).

76. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008: FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 282 (2007), available at [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf). In the U.S. this ratio is about 16, in Sweden 6, and in Japan 4.5. *Id.* at 281.

richest 20%,<sup>77</sup> and where a large part of the population does not yet have access to basic sanitation and primary health care<sup>78</sup>—the public health system should prioritize the basic needs of the most disadvantaged. If their most basic health needs, e.g., basic sanitation, primary health care, and ordinary drugs such as antibiotics, are not satisfied, then it is arguable that the policy of the state is *prima facie* unreasonable in the sense proposed above. I say “*prima facie*” because not even this more restricted right to a *minimum* of health attention should be automatically enforced by courts, as I will argue in more detail in the concluding Part of this Article. For now, it suffices to say that the scenario just imagined, where litigation is trying to guarantee the basic health needs of the most disadvantaged, does not represent any significant portion of the judicialization of health in Brazil to date.

On the contrary, there is empirical evidence showing that the vast majority of cases are for high-cost medicines, such as new types of insulin for diabetes and new cancer drugs. The most recent and comprehensive study analyzed all 23,003 lawsuits currently active (with ongoing orders favoring claimants) in the state of São Paulo.<sup>79</sup> It found, confirming previous studies, that 66.1% of the suits involved medication (22.3% of that being insulin for diabetes), and 30.5% involved materials and equipment such as insulin pumps and gastric tubes.<sup>80</sup> Some of the drugs claimed have not been incorporated in the public health system for cost-effectiveness reasons (such as analog insulin),<sup>81</sup> while others are not even available in the Brazilian market.<sup>82</sup> In terms of costs, these latter imported drugs represent the bulk of the expenditure generated by litigation—over 78.4% according to recent estimates by the Ministry of Health.<sup>83</sup>

It is not difficult to guess who benefits from this type of litigation. It would be highly surprising if those families at the bottom of society, where

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77. *Id.* at 255.

78. See Harvey Morris, *Water and Sewage: Taps Turn On but There's Trouble with the Pipes*, FIN. TIMES, May 6, 2010, <http://www.ft.com/cms/s/0/dba87ed0-571c-11df-aaff-00144feab49a.html> (reporting that only 42% of Brazilians are linked to a sewage system and that only 32.5% of the waste is treated); cf. *Flawed but Fair: Brazil's Health System Reaches Out to the Poor*, 86 BULL. WORLD HEALTH ORG. 248, 248 (2008), available at <http://www.who.int/bulletin/volumes/86/4/08-030408.pdf> (observing that rural areas in Brazil continue to experience long queues at hospital emergency departments, beds spilling into corridors, and a scarcity of doctors and medicine).

79. Michel Naffah Filho et al., *S-Codes: um novo sistema de informações sobre ações judiciais da Secretaria de Estado da Saúde de São Paulo* [*S-Codes: A New System of Information on Lawsuits of the State Department of Health of São Paulo*], 84 BEPA 18, 27 (2010), available at [http://www.saude.sp.gov.br/resources/gestor/informacoes\\_de\\_saude/gais/bepa\\_84\\_gais\\_7.pdf](http://www.saude.sp.gov.br/resources/gestor/informacoes_de_saude/gais/bepa_84_gais_7.pdf).

80. *Id.* at 27.

81. Interview with Maria Cecilia Correa, Dir. of Litigation Dep't, Secretariat of Health of the State of São Paulo, in São Paulo, Braz. (July 2009).

82. Cláudia Collucci et al., *Ações por remédios caros favorecem ricos, diz estudo* [*Lawsuits for Expensive Drugs Favor the Rich, Study Says*], FOLHA DE S. PAULO [SÃO PAULO SHEET], July 24, 2010, available at <http://www.anapar.org.br/index.php/noticias/57-acoes-por-remedios-caros-favorecem-ricos-diz-estudo->.

83. *Id.*

living conditions are worst and health needs are greatest (where basic sanitation is not available and infant mortality is highest), were litigating for these high-tech, state-of-the-art drugs, procedures, and equipment. As expected, there is instead a high concentration of right-to-health litigation in the richest states, cities, and districts of Brazil. In a recent study of litigation against the federal government, it was found that of the 4,343 accumulated lawsuits during the years studied (2005–2009), 85% originated in the most developed states of the south and southeast, even though their population represents just 56.8% of the country's total population.<sup>84</sup> The least developed states of the north and the northeast, with 36% of the Brazilian population, accounted for only 7.5% of the lawsuits.<sup>85</sup> When the United Nations' Human Development Index (HDI) is used, the correlation becomes even clearer: the ten states with the highest HDI (above 0.8) have generated 93.3% of lawsuits, whereas the other seventeen states with the lowest HDI (below 0.8) together have originated only 6.7% of lawsuits.<sup>86</sup> The same pattern occurs in most studies of litigation against states and municipalities.<sup>87</sup>

The explanation for this high concentration of litigation in developed states, cities, and districts is hardly surprising: access to courts and lawyers is beyond the means and reach of most poor Brazilians. Given this profile in which most litigation focuses on health attention that cannot be regarded as a priority for a resource-constrained public health system operating in a highly unequal country, and which mostly benefits a small minority who is able to use the court system to its advantage, the case for taking social rights away from the Brazilian courts seems rather strong.

#### IV. Why More Pro-poor Judicialization Is Not a Solution

I have claimed so far that those who believe that social rights should improve the living standards of the poor—and, through that, diminish the significant inequalities prevalent in countries like Brazil and South Africa—have enough reason to argue against an assertive and substantive role for courts in adjudicating these rights. As the Brazilian experience indicates, when courts succumb to the pressure (or incentives) to “give teeth” to constitutional norms that recognize social rights, they end up transforming a collective and intractable issue of resource allocation among the numerous competing needs of the population into a bilateral dispute between single,

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84. Ferraz, *Social Impact*, *supra* note 9, at 12–13.

85. *Id.* at 13.

86. *Id.* at 13–14.

87. *Id.* at 14. According to a recent study of 170 cases brought against the municipal government of São Paulo in 2005 seeking drugs based on the right to health, 63% of the claimants lived in areas with low levels of “social exclusion,” while 67% relied on the services of private lawyers. Fabiola Sulpino Vieira & Paola Zucchi, *Distortions to National Drug Policy Caused By Lawsuits in Brazil*, 41 REVISTA DE SAÚDE PÚBLICA [REV. PUB. HEALTH] 1, 4 tbl.1, 5–6 (2007), available at [http://www.scielo.br/pdf/rsp/v41n2/en\\_5587.pdf](http://www.scielo.br/pdf/rsp/v41n2/en_5587.pdf). These data suggest that the intuitive hypothesis that the judicial channel is being “captured” by the middle classes is rather plausible.

needy individuals and a recalcitrant, stingy, and corrupt state. When the situation is framed in such a way, the overwhelming incentive is to satisfy the individual litigant's needs over the state's, irrespective of the consequences (and costs) involved. Given that resources are necessarily limited, such "protection" can be dispensed only to some individuals (the litigating minority) at the same time and at the expense of the needs of others (the nonlitigating majority). When litigants are already privileged in terms of living standards—as they tend to be, given that access to courts is costly in most places—social rights litigation serves to reinforce these privileges rather than improve the living standards of the poor or diminish inequalities.

This conclusion is not going to be easily accepted by those who passionately believe in courts as an important and indispensable contributor to social justice. They will likely hold on to their position and try to either refute my diagnosis, or claim that the pathology is curable through improvements in access to justice and in the jurisprudence of the courts. In this Part, I want to put forward a final argument against social rights justiciability as an effective strategy to help the poor, an argument that holds even if these two anomalies of the prevailing Brazilian model could be corrected, i.e., if access to courts became miraculously open to the poor and successful litigation focused on guaranteeing a decent minimum to the poor rather than an absolute maximum to a privileged minority.

The main obstacles here would be the highly unequal distribution of wealth that prevails in countries like Brazil, and the lack of normative and political consensus that social rights are supposed to radically change this situation (i.e., the lack of a strong egalitarian ethos). In highly developed and equal societies, where a strong egalitarian ethos prevails, the guarantee of a decent minimum of social goods to everyone is not only affordable but also largely uncontroversial and already a reality for most people.<sup>88</sup> The occasional interference of courts to extend this guarantee to excluded minorities is so rare and minor that no plausible challenge of illegitimacy can be raised. It would cause no major disarray in the budgetary allocations of the state or in the prevailing patterns of wealth distribution. The German Constitutional Court's recognition of a right to what it called an "existential minimum" can be seen in this light.<sup>89</sup> It does not significantly impact the overall resources

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88. See, e.g., Interview by Erik Owens with Grete Brochmann, Professor, The Inst. for Soc. Research, Oslo, in Chestnut Hill, Mass. (Apr. 10, 2008), available at [http://www.bc.edu/content/dam/files/centers/boisi/pdf/s08/BrochmannQ-and-A\\_--Rev2--.pdf](http://www.bc.edu/content/dam/files/centers/boisi/pdf/s08/BrochmannQ-and-A_--Rev2--.pdf) (stating that citizens of Norway are "guaranteed a minimum standard of living if [they] can't work" and that "support for the welfare state has not gone down in the Scandinavian countries").

89. See Christian Curtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK Y.B. U.N. L. 317, 330 (2007), available at [http://www.mpil.de/shared/data/pdf/pdfmpunyb/12\\_courtis\\_11.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/12_courtis_11.pdf) (stating that the German Federal Constitutional Court and the Federal Administrative Court have decided that there are "positive state obligations to provide an 'existential minimum' or 'vital minimum[.]' comprising access to food, housing and social assistance to persons in need").

available for the state to allocate through the political process or require significant additional resources to be raised through taxation.

But in countries like Brazil and South Africa, with intermediate levels of economic development and, importantly, with a historically high degree of economic and social inequality, even the guarantee of a decent minimum of social goods to everyone would demand massive transfers of resources from the rich to the poor, a measure that enjoys neither moral nor political consensus. It would not be economically impossible, however, since Brazil and South Africa are high-middle-income countries with GDP per capita around USD10,000.<sup>90</sup> The obstacles are of a different nature. No widespread agreement exists on the moral correctness for such massive redistribution and, perhaps even more problematic, political resistance to redistribution from powerful interest groups would be overwhelming. Recent political history provides a stark illustration of this. From 2002 to 2010, Brazil was ruled by a president, Luiz Inacio da Silva (“Lula”), whose main professed aims had always been the eradication of poverty and massive redistribution of wealth among the Brazilian population.<sup>91</sup> Despite having made important relative progress in both areas<sup>92</sup>—especially through a program of small conditional grants to families who keep their children in school and attend medical appointments (the Bolsa Familia program),<sup>93</sup> and through raising the minimum wage<sup>94</sup>—Brazil remains, after his eight years in power, one of the most unequal countries in the world.<sup>95</sup> Most importantly, no significant changes have been made to address inadequate social spending or the highly regressive taxation system,<sup>96</sup> leaving the structural causes of inequalities untouched. This is, of course, a problem in most Latin American

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90. *The World Factbook: Brazil*, *supra* note 75; *The World Factbook: South Africa*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last modified April 6, 2011).

91. See John Otis, *Huge Debt Keeps Brazil's Lula from Being a Working-Class Hero*, HOUS. CHRON., Nov. 23, 2003, at 1A (chronicling Lula’s “promises to redistribute land, roll back hunger and create 10 million jobs”).

92. See Gay Seidman, *Brazil's 'Pro-poor' Strategies: What South Africa Could Learn*, 72/73 TRANSFORMATION: CRITICAL PERSP. ON S. AFR. 86, 86 (2010), available at <http://muse.jhu.edu/journals/transformation/v072/72.seidman.pdf> (reporting a marked reduction in poverty and inequality in Brazil from 2001 to 2006).

93. *Id.* at 96.

94. *Id.* at 99.

95. *The World Factbook: Brazil*, *supra* note 75 (reporting a Gini index of 56.7, which represents the tenth-most unequal distribution of family income of any country).

96. See Julia E. Sweig, *A New Global Player: Brazil's Far-Flung Agenda*, 89 FOREIGN AFF., Nov.–Dec. 2010, at 173, 174 (characterizing Brazil’s rich as “poised to give up more” wealth due to the regressive nature of the taxation system); Angel Gurría, *Towards a Fiscal Policy for Development: Launch of Latin American Economic Outlook 2009*, ORG. FOR ECON. CO-OPERATION & DEV. (Oct. 28, 2008), [http://www.oecd.org/document/27/0,3746,en\\_2649\\_33973\\_41616731\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/27/0,3746,en_2649_33973_41616731_1_1_1_1,00.html) (exemplifying inadequate social spending through the lower spending and performance levels of the education sectors of Brazil and other Latin American countries as compared to OECD countries).

countries, vividly captured in the following passage of a recent report by the Organisation for Economic Co-operation and Development:

In a region where the wealthiest 10% of the population receive 41% of total income, and the poorest 10% obtain just 1%, the impotence of tax systems to reduce inequalities is particularly dramatic.

In 2007, Latin America was the region of the world in which the wealth of the richest families (i.e., those with over US[D]1 million of liquid savings) grew most; but 360 million Latin American people continue to live with purchasing power of under US[D]300 per month.

The paradox is that in many of the region's countries, social security spending remains highly regressive and is one of the chief obstacles to exploiting the redistributive potential of fiscal policy.

The quality of essential public goods, such as health, security or education, also fails to respond to the region's development needs, and does not make citizens feel a commitment towards the State.<sup>97</sup>

To make this example more specific, let us look at the housing problem in Brazil. According to recent official data, there are sixty million people (about one-third of the population) living in inadequate conditions in Brazil, of which almost seven million live in very precarious and insalubrious slums.<sup>98</sup> It is not implausible to suggest that if the normative and political consensus were present, Brazil could provide, in the short or medium run, all of those people (or at least the seven million in slums) with some decent minimum standard of accommodation. The question is, when the egalitarian ethos is not present, is it reasonable to expect that courts will ever have the will or the power to bring about this radical change through judicial orders?

It seems to me that change through judicial action is unlikely. Judges are among those who benefit most from the unequal distribution of wealth in Brazil (they are the highest paid public servants)<sup>99</sup> and have no historical

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97. Gurría, *supra* note 96.

98. Maria da Piedade Morais et al., *Monitorando o direito à moradia no Brasil (1992–2004)* [*Monitoring the Right to Housing in Brazil (1992–2004)*], POLÍTICAS SOCIAIS: ACOMPANHAMENTO E ANÁLISE [POLITICAL SCIENCE: COMPANION AND ANALYSIS], Feb. 2006, at 230, 237, available at [http://www.ipea.gov.br/sites/000/2/publicacoes/bpsociais/bps\\_12/ensaio4\\_monitorando.pdf](http://www.ipea.gov.br/sites/000/2/publicacoes/bpsociais/bps_12/ensaio4_monitorando.pdf).

99. The Brazilian constitution establishes that the highest salary in the Brazilian public service is that of the justices of the Supreme Federal Tribunal. C.F. art. 37, cl. XI. This salary, which is set by legislation, is currently BRL26,723 monthly (approximately USD16,700). Mariângela Gallucci, *Juizes federais marcam greve por reajuste de 14,79%* [*Federal Judges Arrange Strike for 14.79% Readjustment*], O ESTADO DE S. PAULO [STATE OF SÃO PAULO], Mar. 29, 2011, available at <https://conteudoclipppingmp.planejamento.gov.br/cadastros/noticias/2011/3/29/juizes-federais-marcam-greve-por-reajuste-de-14-79>. The lowest paid judges in the federal courts of Brasília earn BRL19,955 monthly. See Carolina Brígido, *Aumentos em serie no Judiciario* [*Increases in Pay Scale in the Judiciary*], O GLOBO DE BRASIL [BRAZ. GLOBE], Sept. 24, 2009, available at InfoTrac, File No. CJ208305401 (situating substitute judges at the bottom of the judicial pay scale and reporting a proposed increase in their salaries from BRL19,995 to BRL21,766). Although the salaries of lower court judges vary a lot from state to state, they are not much lower than those of federal judges. See Carolina Brígido, *STF eleva teto de juizes estaduais* [*Supreme Federal Tribunal*

record of complaining, or being minimally uncomfortable, about this situation.<sup>100</sup> Raising taxation on those who, like judges, are among the top 1% of income earners in Brazil, in order to fund the social rights of the poor would likely muster little support from the judiciary. It is not absurd to suggest that right-to-health litigation has been so “successful” in great part due to its insignificant effects on redistribution from the rich to the poor. But let us assume that this important motivational barrier could be overcome.

In 2009, Lula’s government announced a program setting aside in the budget BRL10 billion in order to provide subsidized loans so that citizens earning between zero and ten times the minimum wage could build their own houses (“Programa Minha Casa, Minha Vida”).<sup>101</sup> Should not the right to housing in the Brazilian Constitution mean that everyone has an enforceable right to minimally decent housing—a right that the state is violating through this clearly insufficient policy that leaves behind six million individuals? Should courts not step in as they have been doing in the field of health and assertively order the state to enforce at least this more plausible “decent minimum”?

That would be inadequate, in my view, for several reasons. I have already observed that satisfying even these minimum levels would require a significant redistribution of resources from the rich to the poor. I do think that this is morally required, yet I am doubtful that this is a majoritarian view in Brazilian society, even among the poor. Moreover, even a willing government would face enormous difficulties in rapidly changing the regressive and inegalitarian tax and spending policies currently in place. More politically feasible and less controversial (however limited) is the route adopted by Lula’s government: focusing on economic growth and redistributing on

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*Raises Ceiling for Judges*], O GLOBO DE BRASIL [BRAZ. GLOBE], Mar. 1, 2007, available at InfoTrac, File No. CJ159968304 (relating a decision by the Supreme Federal Tribunal to increase the maximum salary for state judges to BRL24,500). According to one study, income distribution in Brazil stood as follows in 2008: classes “A” and “B” (with household income above BRL4,561), represented 15.52% of the population; class “C” (regarded as the middle class, with income between BRL1,064 and BRL4,561), represented 51.89%; and classes “D” and “E” (with income below BRL1,064), represented 32.59%. Marcelo Cortes Neri, *The New Middle-Class*, FUNDAÇÃO GETÚLIO VARGAS [GETÚLIO VARGAS FOUNDATION], 5, 23 tbl.6 (Aug. 5, 2008), [http://www3.fgv.br/ibrecps/M3/M3\\_MidClassBrazil\\_FGV\\_eng.pdf](http://www3.fgv.br/ibrecps/M3/M3_MidClassBrazil_FGV_eng.pdf). Within class “A,” according to another study, those families earning above BRL16,600 represent 1% of the population. *Pobreza e riqueza no Brasil metropolitano [Poverty and Wealth in Metropolitan Brazil]*, COMUNICADOS DO IPEA [IPEA NOTICES], Aug. 2008, at 2, 9 fig.8, available at <http://www.ipea.gov.br/sites/000/2/destaque/estudoVF2.pdf>. If one considers that judges earn the above-mentioned salaries on their own (i.e., not counting potential income from other members of their families), they are clearly within the top 1%, and probably even higher.

100. On the contrary, they often complain and strike to enhance their salaries even further. The most recent example is the strike by federal judges for a 14.79% increase in their salaries as a constitutional right. Gallucci, *supra* note 99.

101. See Leslie Richards, *Affordable Housing Boom in Brazil Gathers Pace*, REAL EST. ARTICLES (Sept. 13, 2009), <http://www.realestatearticles.org/affordable-housing-boom-in-brazil-gathers-pace/> (reporting that “the numbers of individuals signing up for the scheme [were] soaring” within three months of its launch).

the margins through more modest programs such as the family grant and the housing policy.<sup>102</sup> The political success of such a strategy was confirmed with the election of the current president, Dilma Rousseff, who is from Lula's party, in 2010.<sup>103</sup>

So, even if poor people had effective access to the courts and started to litigate en masse to demand their minimum social rights, and even if courts were as receptive to their claims as they are to those of middle class right-to-health litigants (a highly unlikely combination of events, as already noticed), their mandatory injunctions would soon face a brick wall due to lack of political will and normative consensus on radical egalitarian measures. No court, however willing, would have the power to overcome that obstacle.

## V. Conclusion

The empirical data shows that health litigation in Brazil has clearly not benefited the poor. It has by and large benefited a minority of individuals who are able to access lawyers and courts to force the state to provide expensive treatment that the public health system should not provide under any plausible interpretation of the constitutional right to health. There is no reason to believe that this pattern does not apply to other social rights that could be judicialized in a similar way; for example, there is evidence that a similar problem is happening in education.<sup>104</sup>

In fields where social rights (such as housing) are not of interest to the middle classes, not much judicialization takes place.<sup>105</sup> If it did, however, it is very likely that courts would be neither willing nor able to adopt an assertive stance similar to what they have done in the field of health. This is because enforcement of such rights would demand a radical redistribution of wealth for which there is no current normative or political consensus in Brazilian society. Neither judges, legislators, public administrators, nor probably even the poor would support such radical measures.

Insisting that courts should adopt an assertive role in social rights adjudication in order to protect the poor is therefore unjustified. As much as

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102. Cf. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 80–84, 87 (2002) (pointing out that the International Monetary Fund believes that poverty should be fought through economic growth and not distribution of existing wealth through policies such as those favoring land reform and competition).

103. See Joe Leahy, *Rousseff Puts Focus on Industrial Policy*, *FIN. TIMES*, Apr. 12, 2011, at 6 (recognizing that Rousseff and her predecessor Lula both belong to the left wing Worker's Party).

104. Daniel Wei Liang Wang, *Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF [Resource Scarcity, Cost of Rights, and the "Reserve of the Possible" Clause in Brazilian Supreme Federal Tribunal Case Law]*, 8 *REVISTA DIREITO GV [GETÚLIO VARGAS L.J.]* 539, 539 (2008), available at <http://www.scielo.br/pdf/rdgv/v4n2/a09v4n2.pdf>.

105. See, e.g., Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* (World Bank Policy Research Working Paper Series, Paper No. 5109, 2009), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2009/11/03/000158349\\_20091103104346/Rendered/PDF/WPS5109.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2009/11/03/000158349_20091103104346/Rendered/PDF/WPS5109.pdf) (describing the inequality of legal mobilization between the poor and middle class in India with regard to public interest litigation).

social rights supporters (like me) might wish to eradicate poverty and inequality from our societies, this depends strongly on the political will to radically change the inegalitarian ethos that supports the current regressive taxation structure and expenditure policies of the state, not on the unlikely will and ability of courts to do so.<sup>106</sup> We should spend more time and effort trying to change that ethos than putting our faith in social rights litigation.

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106. My thesis seems to resemble that put forward by Goodwin Liu recently in an interesting article in the context of the United States:

[T]he judicial role I envision is one that cannot get off the ground without strong footholds established through the political process. The main implication of my thesis is not that the current policy landscape is fertile with litigation targets, but instead that it will remain barren until we reinvigorate public dialogue about our commitments to mutual aid and distributive justice across a broad range of social goods. Courts can elevate the legal status of distributive norms, but only when those norms have already found some expression in the institutions, policies, and practices of our public culture. This conception of legal evolution is one in which legislative enactments, as much if not more than judicial decisions, “contribute to a complex process by which fundamental law evolves with a strong connection to the people and popular needs.”

Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 268 (2008).