JUDGMENTS OF THE UNITED STATES SUPREME COURT AND THE SOUTH AFRICAN CONSTITUTIONAL COURT AS A BASIS FOR A UNIVERSAL METHOD TO RESOLVE CONFLICTS BETWEEN FUNDAMENTAL RIGHTS

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ABSTRACT

This article describes the methods utilized by the United States Supreme Court to resolve specific cases involving conflicts between federal constitutional rights, a federal constitutional right and a state constitutional or statutory right, and an international treaty right and a federal constitutional right. Consideration of particular decisions representative of the manner in which the Court resolves conflicts between rights in the three typologies described above illustrates how the Court views such conflicts and the rationales employed to resolve apparent conflicting rights.

The rationales used by the United States Supreme Court will be compared to the South African Constitutional Court's decisions in the *Soobramoney*, *Grootboom*, and *South African Broadcasting Corp. Ltd.* cases. The first two of these cases deal with conflicting socio-economic constitutional rights, while the third case addresses conflicting civil-political constitutional rights. By comparing the reasoning utilized by both courts, this article illus-

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trates distinct judicial methods applied to rationally resolve conflicts between significant individual rights.

Both the United States and South African cases address the relationship between constitutional rights. In each instance, the high courts tackle problematic themes associated with the constitutional rights asserted and attempt to reconcile conflicts between rights in a manner that reaffirms each right's sanctity, while maintaining their respective Constitution's internal consistency. The comparison serves to permit presentation of a universal method to resolve conflicting fundamental rights for judicial authorities to use across the broad array of legal situations in which conflicts between significant rights occurs.

INTRODUCTION

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, Art. 8, G.A. res. 217A (III), U.N. Doc A/810 at 75 (1948).

The preservation and protection of fundamental rights within the domestic legal order occurs primarily through constitutional courts of final appeal. These courts render decisive conclusions to the extent that a municipal legal regime will enforce or undermine rights guaranteed under domestic legislation. Exploration of the rationales employed by these judicial bodies in explicating fundamental rights within the national sphere is the subject under examination in this work.[1]

Since a survey of all such final arbiters of constitutional rights decision-making is not practicable, this assessment of the decisions articulated by the United States Supreme Court and the South African Constitutional Court endeavors to illuminate the methods utilized and the reasons put forth in determining fun-

[1] *See generally* Thomas Poole, *Legitimacy, Rights and Judicial Review*, 25 OXFORD J. LEGAL STUD. 697 (2005) (analyzing the theoretical underpinnings of rights as determined by judicial bodies); *see also* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006) (arguing philosophical grounds for judicial determination of infringement of rights).

damental rights in the domestic context.[2] Presentation of a universal method to resolve conflicting fundamental rights is possible by comparing and contrasting specific decisions rendered by these courts.[3] Such a method provides the hope that all rights that are deemed fundamental are vigorously protected and preserved.[4]

The framework for accomplishing the above task is the discussion of three typologies of cases decided by the United States Supreme Court and four cases resolved by the South African Constitutional Court.[5] The three United States rubrics under inspection are cases involving conflicts between federal constitutional rights, a federal constitutional right and a state constitutional or statutory right, and an international treaty right and federal constitutional right.[6] The South African cases are *Soo-*

[2] *See* Geo Quinot, *The Right to Die in American and South African Constitutional Law*, 37 COMP. & INT'L L.J. S. AFR. 139 (2004) (highlighting differences between the Supreme Court of the United States and South African Constitutional Court in fundamental rights jurisprudence, in the right to die context).

[3] The selection of these two courts is deliberate, since both occupy similar jurisdictional authority to produce binding interpretations of constitutional provisions. *See* S. AFR. CONST. s. 167; Marbury v. Madison, 5 U.S. 137, 177 (1803). S*ee generally* Bradford R. Clark, Symposium, *The Constitutional Origins of Judicial Review: Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319 (2003); Michael J. Gerhardt, Lindquist & Vennum Symposium, *The Future of the Supreme Court: Institutional Reform and Beyond: Super Precedent*, 90 MINN. L. REV. 1204, 1208-09 (2006); David E. Marion, *Judicial Faithfulness or Wandering Indulgence? Original Intentions and the History of* Marbury v. Madison, 57 ALA. L. REV. 1041 (2006); Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT'L L. & POL. 695 (1996); Albie Sachs, Symposium, *South Africa's Unconstitutional Constitution: The Transformation from Power to Lawful Power*, 41 ST. LOUIS L.J. 1249 (1997); Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669 (1997); Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR. L.J. 134 (1997).

[4] *Cf.* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999) (articulating possible benefits of comparative scholarship to domestic constitutional precepts, if undertaken in particularly mindful method of appropriateness of borrowing or evaluating foreign constitutional concepts within a social and cultural context).

[5] *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 132–33 (2005) (listing case selection methods the comparative constitutionalist should employ to increase value and quality of scholarship to field as whole).

[6] *See generally* DANIEL A FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (2d ed. 2005) (discussing intellectual origins, ratification process, and post-civil war amendments to the American Constitution, reproducing various drafts of the Constitution and Bill of Rights, and noting the Supreme Court's use of constitutional history in its decisions); *see also* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS VOLS. 1-2 (6th ed. 2005) (outlining Supreme Court decisions in various areas of interpretation of constitutional amendments).

bramoney v. Minister of Health[7] and *Government of the Republic of South Africa v. Grootboom*,[8] which involve conflicts between constitutional socio-economic rights, and *South African Broadcasting Corporation Ltd*.[9] that addresses the political-civil rights of fair trial and freedom of expression. A fourth South African case, *Treatment Action Campaign*,[10] will receive limited analysis as it relates to international treaty rights conflicting with constitutional rights.

This work is divided into four parts. The first part discusses United States Supreme Court cases dealing with conflicts between federal constitutional rights and compares these decisions with those of the South African Constitutional Court in *South African Broadcasting Corp. Ltd.* and *Soobramoney*. The second part addresses the opinions of the United States Supreme Court resolving conflicts between a federal constitutional right and a state constitutional or statutory right and contrasts these opinions with that of the Constitutional Court in *Grootboom*. The third part presents the United States Supreme Court's resolution of conflicts between a federal constitutional right and an international treaty right and compares this jurisprudence with *Treatment Action Campaign* and the South African cases previously mentioned. The fourth and final part of this work presents a universal method for resolving conflicts between fundamental rights, which all judicial authorities may employ to both preserve and protect fundamental rights in conflict.[11]

[7] 1997 (12) B.C.L.R. 1696 (CC) (S. Afr.).

[8] 2000 (11) B.C.L.R. 1169 (CC) (S. Afr.).

[9] Case CCT 58/06 (21 September 2006), *available at* http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT58-06 (last visited Nov. 4, 2007).

[10] Minister of Health v. Treatment Campaign 2002 (10) BCLR 1033 (CC).

[11] *Cf.* Erika de Wet, *The International Constitutional Order*, 55 INT'L COMP. L. Q. 51 [U.K.] (2006) (arguing for the increasing concept of an international constitution, independent and coexistent with municipal constitutions providing definite precepts impacting national jurisprudence).

I. U.S. FEDERAL CONSTITUTIONAL RIGHTS AND SOUTH AFRICAN CONSTITUTIONAL RIGHTS

A. Estes v. Texas *compared to* South African Broadcasting Corp. Ltd.

The South African Constitutional Court recently addressed, for the first time, the propriety of televising court proceedings. A comparison of the United States Supreme Court's first opinion on televising similar proceedings initiates the discussion of the conception, rationales, and processes utilized by these different judicial bodies. The comparison is apt because the courts are tackling similar issues in the first instance, albeit in differing historical periods.

i. Estes v. Texas

The United States Supreme Court first addressed the constitutionality of televising court proceedings in 1965.[12] The Court discussed whether a criminal defendant's Fourteenth Amendment constitutional right of due process was violated because television cameras were present in the courtroom and broadcasted his trial.[13] Actually, the only portions of the trial broadcast live and with sound were two preliminary hearings, opening and closing State arguments, the jury's return of the verdict, and the trial judge's receipt of the jury verdict; additional portions of the trial (not including any defense counsel summations) were silently videotaped for later broadcast.[14]

[12] *See* Estes v. Texas, 381 U.S. 532 (1965) (reversing conviction because petitioner was denied due process of law by the circus atmosphere at trial); *see also* Daniel H. Erskine, *An Analysis of the Legality of Television Cameras Broadcasting Juror Deliberations in a Criminal Case*, 39 AKRON L. REV. 701, 701 (2006) (discussing that "most recent judicial opinion to confront the problem of televising jury room deliberations in a capital criminal case took place in the Texas Court of Criminal Appeals."); s*ee also* The Supreme Court Term, 1964, *Fair Trial: Televising of State Criminal Trial*, 79 HARV. L. REV. 146 (1965-1966) (describing case and contemporary reaction to ruling).

[13] *See Estes*, 381 U.S. at 534-35. The pertinent portion of the Fourteen Amendment reads "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV § 1.

[14] *See id*. at 536 ("These initial hearings were carried live by both radio and television, and news photography was permitted throughout.").

The Court addressed the defendant's Sixth Amendment constitutional guarantee to public trial and asserted this assurance required that a criminal defendant be "fairly dealt with and not unjustly condemned."[15] A defendant's right to a public trial coexists with the general public's right to access the courtroom, so the Court decided the press, under the First Amendment constitutional right to freedom of the press, retains the same privilege as the general public to access the courtroom.[16] Physical access to the courtroom by the press did not amount to a right to televise court proceedings because such broadcast did not, in the Court's opinion, contribute to the attainment of truth.[17] Therefore, the Court found a violation of the defendant's right to due process because the intrusion of television cameras into the courtroom negatively impacted the jurors, which, the Court opined, was the greatest reason to find the defendant's trial lacking in fairness.[18] At the time of the Court's decision, forty-eight states and all twelve circuits of the federal judiciary denied the media the ability to televise trials.[19]

To conceptualize the decision of the Court in terms of conflicting rights, the Court found one right, due process, to be superior to other apparently coequal rights. The right of the criminal defendant to a public trial coexisted with his right to a fair trial to satisfy his right of due process, but the press' right to be unen-

[15] *See id.* at 538-39. The Sixth Amendment to the Constitution reads in the pertinent portion: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

[16] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); *see also Estes*, 381 U.S. at 540; *see also* Pennekamp v. Florida, 328 U.S. 331 (1946) (challenging the affirmance of convictions and sentences for contempt of court entered by respondent state court); *see also* Bridges v. California, 314 U.S. 252 (1941) (discussing the right of the press to report on an ongoing trial inside the courtroom).

[17] *See Estes*, 381 U.S. at 544. This sentiment appears to be a strong impetus for banning all television cameras in any federal court.

[18] *Id.* at 545. The Court voiced its additional other concerns: "The quality of the testimony in criminal trials will often be impaired." *Id.* at 547. "A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge." *Id.* at 548. "Finally, we cannot ignore the impact of courtroom television on the defendant." *Id.* at 549. Yet, the Court conceded: "At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited." *Id.* at 541.

[19] *Id.* at 544.

cumbered by restrictive legal conditions failed to engender analogous justification.[20] This result occurred because the Court placed greater weight on due process than access or transparency of the proceedings.[21] The Court sought to reconcile conflicting rights by producing a proportional state where each right exists within a singular realm, but the space occupied by each right is dissimilar or proportional to the value associated with the right by the Court. Some rights, like due process, garner greater weight based upon the Court's evaluation of the factual situation as a whole. Less valuable rights must cede value to fundamental rights with assigned greater value.

The Court permits the right of greater value to supersede other rights, but the Court does not negate the guarantees of the lesser valued rights.[22] Instead, less valuable rights, in the Court's estimation, exist at a lower level of enforcement. These rights exist, but must accommodate the primary position of the most valuable right. There is no doubt that reconciliation between rights, in a sense, is achieved by permitting media access to trial proceedings, while not constitutionalizing the right to televise court proceedings. The preeminent right of due process circumscribes other rights, but does not establish a rule that all media coverage of a criminal trial violates due process. The result harmonizes rights in the given factual situation, but fractionalizes rights into certain delineated values, which establish one right to govern the scope of all other rights.

ii. South African Broadcasting Corp. Ltd.

The South African Constitutional Court addressed whether the national broadcasting company possessed a "right to broadcast the entire proceedings [of the Supreme Court of Appeal] live on television and radio, as well as the right to produce edited highlights packages for television and radio audiences."[23] The pro-

[20] A prior restraint on the press in the context of a criminal trial is impermissible. *See* Okla. Publ'g Co. v. Dist. Ct. of Okla., 430 U.S. 308, 311 (1977); *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[21] *Cf.* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 603 (1982) (asserting First Amendment to includes right of access to criminal trials, to ensure Amendment's underlying precept of advocating informed discussions of governmental affairs).

[22] In other cases, the Court has utilized the terminology of qualified or presumptive right. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1979).

[23] *S. Afr. Broad. Corp. Ltd.*, Case CCT 58/06 at ¶ 6. The press had access to the proceeding by physical presence absent electronic devices. *Id.* at ¶ 52.

ceedings were an appellate action of criminal convictions for corruption.[24] The Court examined the constitutional rights of a defendant to fair trial and the media's freedom of expression.[25] The right to freedom of expression contained in Section 16 of the Constitution includes "(a) freedom of the press and other media; [and] (b) freedom to receive or impart information or ideas."[26] The right to fair trial is composed of numerous subsidiary rights.[27] Coupled with these enumerated rights, the values of dignity, freedom, and equality are incorporated into the substance of the right to a fair trial.[28] Together with the principles underlying the right to public trial, the precept of open society is established.[29]

[24] *Id.* at ¶¶ 4, 5 (civil forfeiture order also under appeal related to criminal convictions).

[25] *Id.* at ¶¶ 14, 15 (discussing the issues before the court).

[26] S. AFR. CONST. ch. 2, § 16(a)-(b) *available at* http://www.info.gov.za/documents /constitution/1996/96cons2.htm#16.

[27] These rights are:

> (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court. S. Afr. Const. ch. 2, § 35(3). Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. S. Afr. Const. ch. 2, § 34. A public hearing, however, does not include an automatic right to live televised broadcast of the trial. *S. Afr. Broad. Corp. Ltd.*, 2006 (CC) ¶ 51.

[28] *Id.* at ¶ 22 ("[E]mbracing 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.'").

[29] *Id.* at ¶ 50 (stating that both arguments of a right to a public trial and a fair trial must be considered separately).

Open society promotes accountability of the judiciary to the people.[30]

The Court reasoned determination of which right prevailed in this situation was inappropriate, and framed the question to be resolved as "how best to give effect to the requirement of the Constitution that the appeal hearing be *both* 'fair' and 'public.'"[31] Consideration of how to effectuate both rights rejects the "model of 'clashing' rights in which one right had to prevail at the expense of the other."[32] The more appropriate test, the Court opined, is to reconcile conflicting fundamental rights that impact upon each other in the factual context presented.[33] However, this test must be applied against the backdrop of circumstances that require one right to take precedence over another right, despite the fact that the Constitution does not formulate such rights in a hierarchical manner.[34]

The Court's survey of global jurisprudence revealed that a general right to broadcast live court proceedings does not exist in other democratic societies.[35] Further, in this instance, a third party asserted this non-existent right over the objections of all litigants.[36] The Court upheld the lower court's prohibition on television and radio broadcast of the proceedings, but issued guidance on how future resolution of similar situations should be evaluated.[37]

Particularly, the Court raised concerns with televising court proceedings because of the "intense impact" upon the viewer's perception and the distortion of the actual manner legal matters were presented in court by broadcast media edits.[38] The potential for manipulation and distortion of televised court proceedings

[30] *Id.* (noting that open justice does not lead to absolute right of access by public and press to judicial proceedings).

[31] *S. Afr. Broad. Corp. Ltd.*, 2006 (CC) ¶ 47 (emphasis in original) (S. Afr.).

[32] *Id.* at ¶ 48.

[33] *Id.* at ¶ 53 (explaining the appropriate measure for a court to determine whether broadcasting proceedings are within the interests of justice); *see id.* at ¶ 51 (including the interests of justice in this context).

[34] *S. Afr. Broad. Corp. Ltd.*, 2006 (CC) ¶ 55 (stating certain rights to take precedence over others).

[35] *Id.* at ¶¶ 58, 60 (citing to scholarly work by Eric Barendt regarding the general right to broadcast live court proceedings).

[36] *Id.* at ¶ 59 (explaining the opposition to the broadcast of court proceedings).

[37] *Id.* at ¶¶ 67, 68 (holding that prohibition of broadcasting proceedings to be valid).

[38] *S. Afr. Broad. Corp. Ltd.*, 2006 (CC) ¶ 68 (stating the impact television has in possibly distorting the character of court proceedings).

through editing raised concerns about assuring the right to fair trial—and for this reason, full live broadcasts are preferred over an edited highlight, sound-byte format.[39] Justice, therefore, requires the fortification of constitutional rights through guarantees of "accuracy and balance" in televising court proceedings.[40] These guarantees are necessary to effectuate the Constitution's mandate for a free and open society that shall be well-informed of the judicial process by appropriately formulated guidelines governing broadcast of court proceedings in any electronic medium.[41] The Court advocates for an experimental procedure to permit analysis of the best methods to protect all parties' rights when court proceedings are televised.[42]

The Constitutional Court takes a similar approach to the Supreme Court. Certain rights receive disproportionate values. Yet, the Constitutional Court expressly asserts that reconciliation of conflicting rights so as to harmonize each right with the other is preferable to allowance of one right to trump others. In a reconciliation method, all rights would coexist in equal proportion with each other. Each right retains an equivalent place value, but, the Constitutional Court asserts, some situations require disproportionate valuation of fundamental rights to effectuate underlying constitutional doctrines.

Realization that harmonization of rights in all circumstances is impossible leads the Constitutional Court to favor reconciliation of rights, but refrain from dictating all cases require application of this principle. The Court recognizes the frustration in granting all rights coequal status because in such a situation none of the rights may receive full expression. Here, the Court differs from its American brother who recognizes that all rights can not be equal and determines to effectuate applicable rights in a manner so that the total expression of those rights retains deference to each right. In other words, the Constitutional Court tries to reconcile competing rights in one sphere, while the Supreme Court seeks to harmonize rights contained in different spheres in a common overlapping area. Within the overlapping area, rights

[39] *Id.* at ¶¶ 68, 69 (explaining the preference for live broadcasts).

[40] *Id.* at ¶ 69.

[41] *Id.* at ¶ 70 (indicating television and radio are not necessarily the best mediums to inform citizens about judicial proceedings).

[42] *Id.* at ¶ 72 (arguing that there should not be hastily improvised procedures).

harmoniously coexist, but one right may occupy a disproportionately larger part of the overlapping area then other rights.

B. Bartnicki v. Vopper *compared with* Soobramoney

Another comparison helps to elaborate the present discussion. The two analyzed opinions cope with private individual rights. The American case deals with the right to privacy and freedom of the press, while the South African matter addresses the right to life and access to emergency medical treatment. These two cases reflect on the intrusion of the state upon individual conduct whether by permitting publication of private conversations or denying access to medical facilities for life-sustaining treatment.

i. Bartnicki v. Vopper

The Supreme Court addressed the conflict between the freedom of the press to publish overheard private conversations and citizens' right to privacy.[43] The published conversations occurred between two negotiators concerning the subject matter of a pending collective-bargaining agreement between the school teachers' union and the school board.[44] The negotiators proposed a strike and drastic action involving destruction of school board members' homes.[45] These statements were made over a cellular telephone and intercepted by a third-party who disseminated the recorded conversation, which ultimately lead to the broadcast of the conversation over the radio, television, and publication in local newspapers.[46]

The Court tackled the clash between the right of the press and the individual's right to privacy.[47] The Court sought to resolve the question "'[w]here the . . . publisher of information has ob-

[43] *See* Bartnicki v. Vopper, 532 U.S. 514, 518 (2001) ("[T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech.").

[44] *Id.* (discussing the issues between the Pennsylvania State Education Association and the Wyoming West Valley School Board).

[45] *Id.* at 518–19 (Petitioner stated: "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys.").

[46] *See id.* at 519.

[47] *See Id.* at 529.

tained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?'"[48] The Court declined to address the broader issue of "whether truthful publication may ever be punished consistent with the First Amendment."[49]

Examining the interests protected by criminalizing third party interception of private conversations, the Court addressed two societal interests served by the law: "first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the harm to persons whose conversations have been illegally intercepted."[50] The Court determined criminally punishing publishers of private statements who procured such statements far removed from the initial illegal interception and whose publication of private statements served the general public interest did not effectuate the above societal interests.[51]

A third justification for punishing the publishers of private communication, the chilling effect on private discourse public dissemination of private conversations would have, did not substantiate criminal punishment in the Court's determination.[52] Despite the fear of publication of private conversation, the Court opined that the public importance of such matters may rise to a level that causes the right to privacy to give way when balanced against the public interest in dissemination of truthful information of public concern.[53] Therefore, a stranger's illegal interception of a private conversation, while invading an individual's

[48] *Id.* at 528 (quoting Boehner v. McDermott, 191 F.3d 463, 484-85 (C.A.D.C. 1999) (Sentelle, J., dissenting). On criminalizing speech generally in American jurisprudence, *see* Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 285-335 (2003).

[49] *Bartnicki*, 532 U.S. at 529. This question arose initially in New York Times Co. v. United States, 403 U.S. 713 (1971), reserved in Landmark Commc'ns, Inc. v. Va., 435 U.S. 829, 837 (1978), and reiterated in Florida Star v. B.J.F., 491 U.S. 524, 535, n.8 (1989). *See generally* KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2004) (describing history of free speech in America as well as evolution of various doctrinal legal concepts on first amendment jurisprudence).

[50] *Bartnicki*, 532 U.S. at 529.

[51] *See id.* at 529. The Court went further and stated "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *See id.* at 529-30.

[52] *See id.* at 533.

[53] *See id.* at 533-34.

right to privacy, does not trump the freedom and right of the press to publicize such private speech about a matter of public concern.[54]

Here, the Supreme Court reaffirms a paradigm of proscribed values for certain rights, which it employed in *Estes*. The Court finds a greater inherent value to the right of freedom of the press than to the right of privacy.[55] Modifying the formula used in *Estes*, the Court asserts that if the inherent value of one right is less than another right's value, then the greater valued right retains priority.

The Supreme Court's decision reiterates that all rights require effective application in a given factual scenario. Yet, the Court rejects the goal of harmonizing competing rights in favor of a proscribed dominant right that overshadows other similarly situated rights. The terminology changes from reconciliation to competition between rights. A clear winner permits consistent application and anticipation of the right most valued. Predictability is favored over the uncertainty of constantly evaluating which right receives priority or greater value as the facts change.[56] This approach approximates the South African Constitutional Court's formulation in *South African Broadcasting Corp. Ltd.* absent the decree to attempt to harmonize conflicting rights rather than have one right trump all other rights.

The Supreme Court modifies *Estes* by announcing a firm rule that rights contain measurable inherent value. When rights clash, the Court looks at the inherent value of each right and places the most valuable right above all other rights.

[54] *Id.* at 535. In the words of one of the Justices describing the ruling in the case subsequent to its decision, "when an ill-gotten communication touches on matters of public concern, and the party making the disclosure played no part in the illegal interception, we held, the First Amendment shields the disclosing party from liability." Judicial Conference of the Second Judicial Circuit of the United States, 225 F.R.D. 269, 345 (2001) (remarks of Supreme Court Justice Ruth Bader Ginsburg).

[55] *Cf.* Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 167-75 (2003) (analyzing case and suggesting Court decided one right to trump all others).

[56] *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1879) (advocating "bad man" perspective of law to ensure predictability of punishments or rewards law ascribes to particular conduct).

ii. Soobramoney

In 1997, the South African Constitutional Court decided the fate of a dying forty-one year old man who had suffered a stroke in 1996 and entered the final stages of chronic renal failure.[57] His life could be prolonged with the assistance of regular kidney dialysis treatment, which he sought at a state hospital in 1996.[58] The hospital possessed twenty working dialysis machines, but the hospital lacked the economic resources and staff to treat all patients seeking treatment for chronic renal failure.[59] As a result of this lack of financial and human resources, the hospital established an evaluative policy to select those patients who would most benefit from dialysis treatment.[60] The policy automatically admitted those patients whose renal failure could be completely cured by the dialysis treatment.[61] All other patients were subject to a secondary screening process that applied a set of guidelines developed by the hospital to determine a patient's eligibility for admission to dialysis treatment.[62]

The primary evaluative guideline under the secondary screening was the patient's freedom from the chronic illnesses of ischametic heart and cerebro-vascular disease to successfully undergo a kidney transplant.[63] Mr. Soobramoney suffered from both chronic diseases, and therefore proved ineligible under the hospital guidelines for admission to dialysis treatment; thus, he sought and gained admission to a private hospital for dialysis.[64] Yet in 1997, due to his lack of employment and exhaustion of his finances, he lost access to this private, non-state treatment and sought a court order to compel the state hospital to admit him for dialysis treatment based upon his constitutional rights to emergency medical treatment and to life.[65]

The Constitutional Court, in addressing Mr. Soobramoney's constitutional claims, stressed that the South African Constitu-

[57] Soobramoney v. Minister of Health, 1997 (12) BCLR 1696 (CC).

[58] *Soobramoney*, 1997 (12) BCLR ¶ 1.

[59] *See id.* at ¶¶ 1-3.

[60] *See id.* at ¶ 3. The hospital sought additional state funds to augment its lack of staff and additional dialysis machines, but was told by the state that no additional funds were available. *See id.* at ¶ 2.

[61] *See id.* at ¶ 3.

[62] *See Soobramoney* at ¶¶ 3-4.

[63] *See id.* at ¶ 1.

[64] *Soobramoney*, 1997 (12) BCLR ¶¶ 1, 5.

[65] *See id.* at ¶¶ 5-7 (citing S. AFR. CONST. ch. 2, § 27(3), (11)).

tion is a transformative foundational document, which aspires to secure a new social condition for all South Africans.[66] Therefore, the rights to emergency medical care and to life are dependant upon the resources available and are limited by the lack of availability of such resources.[67] Within the context of limited resources, an individual's constitutional rights must be evaluated.[68]

The constitutional right to life must be construed according to certain positive obligations imposed upon the state by such a right.[69] The right to life within the Constitution acquires meaning through examination of the history surrounding the adoption of the South African Constitution, other relevant constitutional clauses, and the Constitution's Bill of Rights as a whole.[70] Together, this interpretative construct is called the purposive approach.[71] Through this purposive approach, a generous interpretation of the right occurs so as to ensure full protection of the right, while recognizing that the context of limited resources may require circumscription of the right through a narrow and specific articulation of the right's interpretation.[72]

The definition of the constitutional provision prohibiting denial of emergency medical treatment is its ordinary meaning and is determinative of the extent of the right within the context of limited resources.[73] Emergency treatment is medical treatment re-

[66] *See id.* at ¶ 9 (citing S. AFR. CONST. preamble). *See* Sandra Liebenberg, *Socio-Economic Rights*, CONST. L. S. AFR. 33-1, 33-9 (2003) (asserting significant link between socio-economic rights and fundamental constitutional precepts affirms central transformative purpose of Constitution to address inequities).

[67] *Soobramoney*, 1997 (12) BCLR ¶ 11.

[68] *Id.* (stating that the "rights themselves are limited by reason of the lack of resources."). *But see* Darrel Moellendorf, *Reasoning About Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 S. AFR. J. HUM. RTS. 327, 330-31 (1998) (noting amorphous definition of available rights, in failure of Court to grant same status to socio-economic rights as civil rights, and in granting undue weight to constrictions within present budgetary system).

[69] *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶ 15 (S. Afr.) (concluding that the South African Bill of Rights imposes positive obligations on the state).

[70] *Id.* at ¶ 16.

[71] *See id.* at ¶ 16 (announcing that the purposive approach has been adopted by the court); *see also* Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on* Soobramoney*'s Legacy and* Grootboom*'s Promise*, 16 S. AFR. J. HUM. RTS. 206, 235 (2000) (announcing the acceptance of applying the purposive approach for interpreting the Bill of Rights).

[72] *Soobramoney*, 1997 (12) BCLR ¶ 17 (citing the "generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights").

[73] *See id.* at ¶ 13 (explaining that "emergency medical treatment" is within the scope of coverage by the Constitution).

quired because of a sudden unanticipated urgency.[74] Such treatment may not constitutionally be denied in this circumstance.[75] Therefore, the Constitution only requires, because the right is explicitly in negative terms, that an individual be given medical treatment when a sudden catastrophic immediate need for remedial treatment is necessary to avert an immediate harm to the individual.[76]

The Court next considered Mr. Soobramoney's situation in light of the facts and purposive approach to interpreting the Constitution, and found that the hospital implemented evaluative guidelines that selected patients who would benefit the most from dialysis treatment, i.e. those patients whose renal failure would be cured by dialysis.[77] The Court found the hospital's guidelines rational, taken in good faith, and promulgated by the medical authorities whose responsibility it is to generate such policies that affect the utilization of scarce medical resources. Therefore the Court would not interfere with such determinations.[78]

The Court opined that the medical authorities determined utilization of scarce dialysis machinery by patients like Mr. Soobramoney, whose life may only be prolonged, detrimentally limited access to treatment by patients who could be cured by such treatment.[79] Hence, the purposive approach renders interpretations of the right to emergency medical treatment and to life that

[74] *See id*. at ¶ 18 (describing emergency medical treatment as being sudden and urgent, without an opportunity to make other arrangements).

[75] *See id*. (citing Article 21 of the South African Constitution, which affirms the duty of state-run hospitals to extend medical assistance for the preservation of human life).

[76] *See id*. at ¶19 (positing that providing resources to "everyone" would deplete state resources for preventative care and curable illnesses); s*ee also* Scott & Alston, *supra* note 71, at 236 (noting the duties of the state not to refuse services "which are available" and not to turn a person away from a hospital "which is able" to provide necessary treatment).

[77] *See Soobramoney*, 1997 (12) BCLR ¶ 25 (finding the current hospital program to be rational, as it maximized the favorable outcome of treatment); *see also* Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4, 5 (2006) (noting that Richard Goldstone recently retired as a Justice of the South African Constitutional Court).

[78] *See Soobramoney*, 1997 (12) BCLR ¶¶ 29-30 (citing English case law in support of this rule); *see also* Goldstone, *supra* note 77, at 5 (asserting the Court decided Soobramoney's situation was not an emergency; therefore, the Court lacked authority to order hospitals to acquire more dialysis machines).

[79] *See Soobramoney*, 1997 (12) BCLR ¶¶ 26, 28 (postulating that if hospitals were required to treat all patients suffering from chronic renal failure, the hospital's "carefully tailored programme would collapse").

are inconsistent with Mr. Soobramoney's contended definition of these rights.[80] The Court's interpretation of these rights allows full effect to be given to each of these rights while honoring these rights in relation to the overall constitutional text.[81]

The *Soobramoney* decision articulates a rational decision approach to interpretation of conflicting rights.[82] The opinion is pragmatic and practical, acutely focusing on the exercise of rights within the reality present before the Court.[83] The approach flows from a plain language interpretation of constitutional text coupled with an originalist conception of reading constitutional mandates within the historical context that bore them. Rights, whether fundamental or constitutional, are effective only to the extent their language is achievable. In this sense, there is no conflict between rights in the decision, but the absence of an ability to achieve the rights set down in the Constitution. The Court's formulation conveys the notion that scarce resources justify the result that an individual's right to life may not be preserved. The equation is supplemented with an analogous formulation that an individual's right to emergency medical treatment does not extend to a chronic condition not yet causing the individual death.

The South African approach differs greatly from the above Supreme Court's decision determining that rights possess inherent values, which predictably determine the priority of conflicting rights. Whereas the Constitutional Court determines textual limitations require circumscription of rights, the Supreme Court adheres to harmonizing the prioritized right with other rights to achieve a harmonious solution. The South African Court faces the problem of scarce resources as a limiting factor to total expression of constitutional rights whereas the Supreme Court construes rights as totally vested as written, or valuable *ab initio*. This interpretative difference contributes to the varying resolution of the conflicts between constitutional rights in these two jurisdictions.

[80] *See id*. at ¶ 36 (announcing that the state's failure to provide renal dialysis facilities for all persons was not a violation of their constitutional rights).

[81] *See Soobramoney*, 1997 (12) BCLR ¶ 36 (affirming the state's constitutional duty).

[82] *See* Liebenberg, *supra* note 66, at 41-41, 41-42 (indicating that a "large degree of deference would be accorded to budgetary priorities by provincial administration").

[83] *See* Justice Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1385-86 (2000) (noting practicalities recognized in the decision).

II. U.S. FEDERAL CONSTITUTIONAL RIGHTS CONFLICTING WITH STATE CONSTITUTIONAL/STATUTORY RIGHTS AND SOUTH AFRICA'S *GROOTBOOM* DECISION

Both cases analyzed in this Section deal with the fundamental right to property and the right to be free from governmental interference with the right. The United States case deals with the ability of government to seize private property for economic development, while the South African case addresses the utilization of governmental processes to deprive individuals of property. The underlying conflict in both cases is the right of government versus the right of the individual. The stakes in the contest are the basic norms free government is founded upon—the right to own private property.[84] The essentiality of this concept to liberal democratic regimes necessitates comparison between the views of an entrenched liberal democracy and those of a new democratic regime born in the modern era.[85]

A. Kelo v. New London

The United States Supreme Court assessed whether seizure of private homes by the state pursuant to an approved economic development plan and state statutory framework was constitutional under the Fifth Amendment.[86] The State of Connecticut,

[84] *See* Eduardo M. Penalver, *Property Metaphors and* Kelo v. New London*: Two Views Of The Castle*, 74 FORDHAM L. REV. 2971, 2975-76 (2006) (noting predominate American conception of inviolability of private property by the state).

[85] James Madison, *The Papers of James Madison, in* THE FOUNDERS' CONSTITUTION ch. 16 (William T. Hutchinson et al. eds., 1962-77) (according to James Madison: "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.") (emphasis in original).

[86] *See* U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation"); *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2006) ("The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."); *see also* Kelo v. New London, 545 U.S. 469, 472-74, 476-78 (2005) (considering whether a city's development plan to take property for a private purpose was constitutional); *see also* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 240-42 (holding that the government, because of the due process mandated by the Fourteenth Amendment, must compensate the owner for private property that is taken for public use). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES (Aspen Pub., 2d ed. 1997) (detailing general American constitutional law legal precepts).

by statute, specifically authorized state taking of land for public use and in the public interest pursuant to an economic development plan.[87] Prior precedent firmly held the taking of private property by the state may not be for the purpose of "conferring a private benefit on a particular private party" or "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[88] Neither of these prohibitions covered the case at bar.[89] Indeed, after taking the land, the state planed to convey large tracts of the property to private parties for private use and development with no public right of access.[90] In surveying the decisions on public purpose, the Supreme Court concluded that its jurisprudence took into consideration the varying needs of different states across the nation and the wide latitude the federal government gave to the individual state legislatures to determine the specific circumstances that justified taking private property.[91] The Court found the taking of 115 private residences pursuant to an economic development plan to "unquestionably serve[] a public purpose," because economic rejuvenation has been a function of government, is indistinguishable from other recognized public purpose takings, and falls within the broad interpretation of "public purpose" as articulated under prior precedent.[92]

The conflict of rights in this case is between the right of government to seize private property for just compensation and the right of the individual citizen to be free from such intrusion, unless circumstances absolutely necessitate seizure in the interests of the public good.[93] The Court does not reach an absolute equilibrium. The right of government slightly eclipses the individual right, but the individual right receives great weight in en-

[87] *See Kelo*, 545 U.S. at 474-76 (upholding the taking of the appellant's property); *see also* CONN. GEN. STAT. ANN., art. 1, §11 (prohibiting state seizure of private property for public use without just compensation); *see also* CONN. GEN. STAT. § 8-193 (2005) (authorizing the acquisition of real property by eminent domain for a development plan).

[88] *Kelo*, 545 U.S. at 477 (quoting and citing Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984); Missouri Pacific R.R. Co. v. Nebraska, 164 U.S. 403 (1896)).

[89] *See id.* (stating that the court found no violation of the principles of private property takings in this case).

[90] *Id*. at 2662.

[91] *Id*. at 2664.

[92] *Id*. at 2659, 2665.

[93] S*ee* Matthew P. Harrington, *"Public Use" And The Original Understanding Of The So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1278-1301 (2002) (discussing the historical rationales for this rule in America).

suring just compensation. In a sense, the practicality of the *Soobramoney* Court is reflected in the Supreme Court's decision in the present case.[94] The Court solves the conflict between rights in deference to more democratic branches of government and refuses to dictate, like the *Soobramoney* Court did with rationing of dialysis treatment, to a better equipped governmental branch the best method to achieve harmonization of rights.[95]

The Court utilizes rubrics to frame the conflict of rights. The Court refers to two distinct rubrics or established categories, which jurisprudence dictates the private individual right is violated by the governmental right.[96] These two instances are: when the government exercises its right to seize property only to secure benefit to a non-governmental entity, and when the government seizes private land under the pretense of governmental interests, which in reality secures benefits to non-governmental actors.[97] In the Court's estimation, in these two circumstances the right of the individual receives greater weight and is valued more than the governmental right.[98] When a case, such as the present one, arises that falls outside of these rubrics, the Court reverts to a harmonizing approach.[99] Harmony between the rights occurs by the private right giving ground to the governmental right when

[94] The *Kelo* decision was as unpopular as the *Soobramoney* decision. *See* Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 905-06 (2006) (describing American legislative reactions); *see also* Goldstone, *supra* note 77, at 5 (describing South African public reaction).

[95] *See* Brody v. Village of Port Chester, 434 F.3d 121, 135 (2d Cir. 2005) ("The combination of those factors—the narrow scope of issues and the broad deference to the legislature—suggests that the role of the courts in enforcing the constitutional limitations on eminent domain is one of patrolling the borders. That which falls within the boundaries of acceptability is not subject to review.").

[96] *See* Daniel B. Kelley, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 9-15 (2006) (detailing the history of evolution of rubrics in area of government seizing private property for public use).

[97] See Charles E. Cohen, *Eminent Domain After* Kelo v. City Of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 504-16 (2006) (presenting modern case law jurisprudence explicating two purposes prohibited by Court for state to seize private property).

[98] Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1633-44 (2006) (highlighting fairness as the fundamental purpose in Court's decisions, and the relevance of economic and public choice theory for takings jurisprudence).

[99] *See* Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412 (2006) (describing criticisms of *Kelo* decision, illustrating alternate governmental powers to take private property, and arguing correctness of *Kelo* outcome).

the constitutional requirement of taking private property for a solely public purpose occurs.[100] In the realm of taking property for a public purpose, both rights exist in equality because each right achieves its end or purpose.

This method of harmony may be described as the teleological approach to conflicting rights. As long as the end or purpose of each right is achieved, then both rights are effectuated. The end of the governmental right is to only interfere with the private right when approved by democratic processes as a public purpose. The end of the private right is to ensure property's seizure occurred pursuant to a public purpose and for just compensation.[101] Both ends, in the Court's opinion, were achieved. Of course, the Court arrived at this result by the factual determination that taking private property pursuant to a plan for economic development was historically a governmental function and always in the public interest.

The Court seeks, like *Estes*, to establish an area where rights overlap. The difference between the present case and *Estes* is that the Court permits rights to cede value to each other, but denies loss of value to prevent rights achievement of their goal or end. Rights coexist, but one right may not overvalue all other rights to prevent such other rights' attainment of their end.

B. Grootboom

Given the appalling living conditions Ms. Grootboom and several others were subject to, they moved out of their existing dwellings and onto private land.[102] Soon after moving onto private land, while Ms. Grootboom awaited placement in government sponsored low cost housing, the landholder evicted Ms. Grootboom, leaving her homeless.[103] The private land that Ms.

[100] *See* Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006) (arguing constitutional rights are exchanged by citizens with government to receive benefits).

[101] As a Justice of the Supreme Court recently asserted, "a purely literal reading of the Takings Clause would limit its coverage to a guarantee of just compensation. We have nevertheless assumed that the reference to 'public use' does describe an implicit limit on the power to condemn private property, but over the years we have frequently and consistently read those words broadly to refer to a 'public purpose.'" John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1566-67 (2006).

[102] *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 3.

[103] *Grootboom*, 2000 (11) BCLR ¶ 3.

Grootboom occupied was earmarked for low cost housing by the government, but such housing was yet to be constructed.[104] Ms. Grootboom waited in a queue for seven years for her placement in low-cost housing.[105] Her eviction from the private land occurred in 1997, but she had nowhere else to go, and the eviction was not perfected until 1999, when a bulldozer and firebrands removed her from the land.[106] Still without any other place to live, she took herself and her child to a nearby sports field and erected a makeshift shelter.[107]

Ms. Grootboom and others similarly affected asserted these actions violated their constitutional rights contained in Section 26 of the Constitution to adequate housing, and freedom from arbitrary eviction, as well as their children's rights to basic nutrition, shelter, healthcare and social services contained in Section 28 of the Constitution.[108] The Constitutional Court noted the Constitution's preamble is a distant dream and the government's failure to fulfill the commitments enshrined in the Constitution creates a popular perception that law fails to protect the individual with resort to extra-legal justice the only viable option to enforce rights.[109] The Court, therefore asserted, constitutional rights, rather than mere paper epithets, must be enforceable.[110]

The Court reiterated *Soobramoney*'s purposive approach to interpret constitutional rights within the proper historical and textual context.[111] South Africa's housing problem, when viewed in historical context, requires effectuation of the rights to adequate housing and the enactment of reasonable measures to progressively realize adequate housing for all South Africans through a

[104] *Id.* at ¶ 4.
[105] *Id.* at ¶ 8.
[106] *Id.* at ¶¶ 9, 10.
[107] *Id.* at ¶ 11.
[108] *Grootboom*, 2000 (11) BCLR ¶ 19. This asserts a violation of S. AFR. CONST. ch. 2, §§ 26, 28. Section 26 reads: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." S. AFR. CONST. ch. 2, §26. Section 28 reads: "(1) Every child has the right . . . (c) to basic nutrition, shelter, basic health care services and social services." S. AFR. CONST. ch. 2, § 28(1)(c).
[109] *Grootboom*, 2000 (11) BCLR ¶¶ 1-2.
[110] *Id.* at ¶ 20.
[111] *Id.* at ¶¶ 19, 26.

socially inclusive program that responds to the changing needs of the nation's citizens concerning housing.[112] The context of these rights within the Bill of Rights requires the state to formulate legislation and executive policies so as not to simply effect a statistical advance in realization of these rights.[113] Proper enforcement of constitutional rights requires case-by-case determination as facts and circumstances impact the Court's evaluation of rights within context.[114]

Textually, the Court asserted constitutional rights contained within the Bill of Rights Section of the Constitution are interrelated and mutually supportive.[115] Particularly, the rights articulated in Section 26(1) and 26(2) (adequate housing and progressive realization) of the Constitution are related and must therefore be read in conjunction with each other.[116] The rights articulated in Section 26 read together imply an unwritten negative right of government not to impair access to adequate housing by citizens.[117] The state bears the obligation to the citizenry to reasonably formulate and implement the rights articulated in Sections 26(1) and 26(2) with particular regard to human dignity as articulated in the Constitution's preamble.[118]

Section 26(1) defines the scope of the right to adequate housing.[119] The right to such housing belongs to all people—including children.[120] The right to adequate housing encompasses more than just a physical house—it includes access to land to build a home upon and all the services associated with obtaining ownership of a house.[121] Hence, the state bears an obligation to provide and create the necessary conditions for all citizens to access hous-

[112] *Id.* at ¶ 43; S. AFR. CONST. ch. 2, §§ 26(1), 26(2).

[113] *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 44.

[114] *See id.* at ¶ 20.

[115] *See id.* at ¶ 23. *See also* Liebenberg, *supra* note 66, at 33-10 (indicating Court holds interconnectedness of rights impacts determination of fulfillment of rights while not diminishing necessity for individual compliance assessment).

[116] *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 34.

[117] *See id.* (noting the right to be free from arbitrary eviction) (S. AFR. CONST. ch. 2, § 26(3)).

[118] *See id.* at ¶¶ 42, 83. *See* Liebenberg, *supra* note 65, at 33-33, 33-35.

[119] S. AFR. CONST. ch. 2, § 26(1). As shown by the words "access to adequate housing."

[120] *See id.* This is indicated by the word "[e]veryone" which starts this Section. *See also Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 74.

[121] *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 35.

ing that accounts for the economic conditions of individual citizens.[122]

The right to adequate housing is therefore qualified by the economic condition of the citizen asserting the right.[123] Thus, when the citizen possesses enough money to purchase housing, the state must provide the citizen access to financing and necessary physical materials pursuant to a legislative framework.[124] Similarly, when the citizen cannot afford housing, the state must institute social development programs to provide housing through legislation.[125] The scope of the right to adequate housing fluctuates according to the factual economic condition of the citizen seeking to assert the right.[126]

Section 26(2) is a positive obligation upon to the state to refrain from arbitrary conduct, but such an obligation is not an unqualified or absolute obligation.[127] The obligation is one that requires reasonable progress by the state.[128] Reasonable progress is the allocation by the state of responsibilities and tasks to national and provincial governments supported by appropriate available financial and human resources.[129] Hence, the right to adequate housing requires the state to promulgate a coherent public housing program that provides access to housing progressively through means available to the state.[130] Implementation of such a program occurs through legislation, well directed policies, and programs enforced by the executive branch of government.[131]

Having declared the above constitutional principles, the Court discussed the Housing Act, legislation enacted to address Ms. Grootboom's situation, and found the Act does not provide for facilitated access to temporary relief for citizens who have no access to land or shelter.[132] The Court determined legislation that

[122] *See id.*

[123] *See id.* at ¶ 36 (describing between the government's job in regards to those who can afford to pay for some housing and those who cannot afford it at all).

[124] *See id.* ("For those who can afford to pay for adequate housing, the state's primary obligations lies in unlocking the system providing access to housing stock and a legislative framework to facilitate self-built houses through planning law and access to finance.").

[125] *See id.*

[126] *See id.* at ¶ 37.

[127] *See id.* at ¶ 38.

[128] *See id.* at ¶ 39.

[129] *See id.*

[130] *See id.* at ¶ 41.

[131] *See id.* at ¶ 42.

[132] *See id.* at ¶¶ 47, 52, 63.

omitted provisions for citizens of the type described above resulted in a failure by the state to act reasonably.[133] Therefore, both the national and provincial governments breached Section 26(2) of the Constitution because legislation and executive policies failed to reasonably address the needs of a class of citizens in need of emergency housing and those citizens in need of relief.[134] The Court determined that the state must devise, implement, and fund measures to reasonably accommodate these affected citizens.[135]

The Court then turned to the children's assertion, similar to the adult citizens, that their constitutional rights were violated by lacking access to land or shelter. The Court determined the rights to adequate housing and progressive realization contained in Sections 26(1) and 26(2) overlap with children's rights to basic nutrition, shelter, basic health care services and social services guaranteed by Section 28(1)(c).[136] Utilizing the purposive approach, the Court found the rights articulated in Sections 28(1)(c) and 28(1)(b) delineate the scope of care a child should receive in South Africa.[137] The Court reasoned that the scope of responsible care is defined in Section 28(1)(b), while the aspects of that care is confined to Section 28(1)(c).[138]

Therefore, the Court opined, care of children falls initially to parents or family thereby circumscribing the rights contained in 28(1)(c) and 28(1)(b).[139] The parents and family bear initial re-

[133] *See id.* at ¶¶ 69, 74.

[134] *See id.* at ¶¶ 96, 99.

[135] *See id.* at ¶ 96. Another scholar indicates that the remedy, legislative action, provides a new type of enforcement mechanism for courts to utilize rather than order immediate remediation of the situation before the court. Mark Tushnet, *How (And How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 681-82 (2005). Additionally, the Court found the state failed to effectuate humane evictions, which the state bears an obligation to ensure humane evictions under Section 26 of the Constitution. *Grootboom*, 2000 (11) BCLR. ¶ 88.

[136] *See id.* at ¶ 74. The context of the children's right to basic nutrition, shelter, basic health care services and social services includes the United Nations Convention on Rights of the Child. *See id.* at ¶ 75; Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990.

[137] *See Grootboom*, 2000 (11) BCLR ¶ 76. The applicable Section of the Constitution reads, "[e]very child has the right . . . (b) to family care or parental care, or to appropriate alternative care when removed from the family environment." S. AFR. CONST. ch. 2, § 28(1)(b).

[138] *See Grootboom*, 2000 (11) BCLR ¶ 76.

[139] *See id.* at ¶ 77.

sponsibility to provide children with shelter.[140] Yet, when the parents or family is absent, then the state bears responsibility to assure the 28(1)(c) and 28(1)(b) rights to the child.[141] Thus, the constitutional right to housing asserted by a child is not a right the state bears primary responsibility for securing.[142] When children receive care from parents or family the state must provide legal and administrative structures to protect children from abuse by parents or family.[143] These necessary legal and administrative structures do not include state provision of housing to children's parents, i.e. children do not possess an independent right separate from their parents or family to demand adequate housing.[144] The Court further concluded that neither Section 28 nor Section 26 entitle citizens to immediate housing upon demand.[145]

The Court adheres to the purposive approach to determine how rights interact with each other. This test focuses on the meaning of rights within context. Reasonability is the standard elected by the Court to determine whether the government has complied with the rights articulated.[146] In this case, the first conflict between rights occurs in the text of the South African Constitution. The right to adequate housing sits in the first subsection of Section 26, while the right to have the state undertake reasonable measures to progressively realize adequate housing for South Africans within available means resides in the second subsection of Section 26.[147] These two rights conflict within the Constitution's

[140] *See id.*

[141] *Id. But cf.* Elsje Bonthuys, *The Best Interests of Children In The South African Constitution*, 20 INT'L J.L. & POL'Y & FAM. 23, 34 (2006) (noting reluctance of Court to utilize best interests of child, a constitutional concept, to secure parents rights).

[142] *See Grootboom*, 2000 (11) BCLR ¶ 77.

[143] *See id.* at ¶ 78.

[144] *See id.* at ¶ 79.

[145] *See id.* at ¶ 95.

[146] The reasonableness policy review of the Court has been described as "a model of means-end review, within which the standard of scrutiny is reasonableness, which claims to concern itself not with relative wisdom of different policy choices, but 'simply' with its reasonableness." 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, 43 (Henk Botha, et al. eds., 2003).

[147] The predominate focus on legislative measures is confirmed by another Justice who asserted the Housing Act "failed to meet the obligation imposed on the state by the Constitution because it excluded from its scope a significant segment of society in need of access to shelter. This was not reasonable." Arthur Chaskalson, *From Wickedness to Equality: The Moral Transformation of South African Law*, 1 INT'L J. CONST. L. 590, 603 (2003).

text because the first right to adequate housing appears unencumbered by the limiting language contained within the immediately following subsection describing the progressive realization of adequate housing to all South Africans.[148] The right to adequate housing appears in the text as an affirmative obligation upon the state to ensure citizens receive adequate housing.[149] The right to progressive realization through reasonable legislative measures of adequate housing is a limited constrained right creating only a state obligation to enact legislation when the economic and physical means are available.

In resolving these conflicted rights, the Court mandates reading the two subsections because of their textually proximity as interrelated and mutually supportive.[150] By this judicial gloss, the Court solves the inherent conflict between these two rights and establishes one right to adequate housing through progressive realization accomplished by reasonable legislative measures and available resources.[151] This approach starkly differs from *Kelo* where the Supreme Court sought to ensure each right

A Justice of the Constitutional Court asserted "the key issue before the Court was whether the government was in breach of its Section 26(2) rights to provide housing to the applicants. The Court held that Section 26(2) . . . encapsulates the positive obligation imposed upon the state in respect of the right to housing. The court considered the three key components of this obligation to be the duty to take 'reasonable legislative and other measures,' 'within available resources,' and 'to achieve the progressive realisation of the right.'" Kate O'Regan, *Human Rights and Democracy—A New Global Debate: Reflections on the First Ten Years of South Africa's Constitutional Court*, 32 INT'L J. LEGAL INFO. 200, 214 (2004).

[148] *See* Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 786 (2003) (noting "the novel task of discovering the normative content of a constitutional right that is subject to the unusual condition of resource availability").

[149] *See* Gerhard Erasmus, *Socio-Economic Rights And Their Implementation: The Impact of Domestic and International Instruments*, 32 INT'L J. LEGAL INFO. 243, 248 (2004) (noting Court held violation of negative obligation of Section 26 rights and also analyzed positive obligations placed upon state by Section 26).

[150] This may also result from a legal cultural phenomena declaring "the role of a judge is not transformative, that judges are there simply to implement the law. With that as the overarching view of the place of judges in the system goes a particular conception of adjudication: making assessments on the claims of equally equipped parties in a neutral and noninterventionist manner." Anashri Pillay, *Assessing Justice in South Africa*, 17 FLA. J. INT'L L. 463, 470-71, 474-75 (2005).

[151] *See* Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions in the Interests of Justice?*, 3 INT'L J. CONST. L. 39, 67 (2005) (noting "Court made no effort to articulate what would constitute acceptable evidence of the government's adequate attention to a particular group or situation, and made no attempt even to establish minimum criteria for defining the right").

achieved its end. The *Grootboom* court diminishes one right by subsuming the other right within the primary right.[152] Where *Kelo* sought to preserve the spheres of both rights to achieve harmony between the rights, *Grootboom* permits substantial alteration of one right to accommodate another right. In other words, *Kelo* reconciles the individual right with the governmental right by harmonizing each right and ensuring both rights accomplished their intended end. *Grootboom*, on the other hand, amalgamates the individual right to housing and the governmental right to progressively provide adequate housing to citizens creating a solitary right where two rights previously existed.

While creating a solitary right to adequate housing, the Court also determined both children and adults possess this same right. The Court, however, explicates that the child's right to adequate housing is not equivalent to an adult's right. Children enjoy a qualified right to adequate housing dependant upon whether they possess parents or family to care for them. Only in the absence of family or parents may a child exercise his right to adequate housing like an adult. Here, another conflict is found between a child's and adult's right to adequate housing. The Court solves this conflict by qualifying the child's right so that his right is effectuated through his parents or family when possible. In absence of family or parents, the Court rationalizes that the child may assert his individual right to adequate housing provided to him through reasonable governmental measures.

Grootboom's qualification of the children's right to adequate housing reflects *Kelo*'s desire to permit each right to achieve its end. *Grootboom* allows the child to secure adequate housing through his parents ensuring the end of his right. *Grootboom* seeks to harmonize the conflicting rights, as *Kelo* did, while retaining each right's end or goal in regards to the conflict of rights to adequate housing between adults and children. Hence, the *Grootboom* court employs a similar teleological method, as did the *Kelo* court to solve a subsidiary conflict between rights.

[152] Explaining this phenomenon, the rights adjudicated are "weak rights" because "Constitutional provisions allowing governments to adopt reasonable programs to achieve social welfare rights, a willingness to find some programs unreasonable, and a remedial system that does not guarantee that any particular plaintiff will receive individualized relief." Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1906 (2004).

III. U.S. FEDERAL RIGHTS AND SOUTH AFRICAN CONSTITUTIONAL RIGHTS CONFLICTING WITH INTERNATIONAL TREATY RIGHTS

The final American typology is the treatment of international legal rights, which conflict with constitutional rights.[153] Three recent Supreme Court decisions articulate varying approaches to resolving or mitigating conflicts between rights prescribed by the Constitution and rights created by international treaty. The approaches taken in these cases are compared to the South African Constitutional Court's treatment of similar conflicts. Analysis of both courts' decisions underlies the increasing interaction between domestic constitutional norms and international treaty rights.

A. U.S. v. Alvarez-Machain (Extradition Treaty between the U.S. and Mexico) Compared to South African Jurisprudence

i. U.S. v. Alvarez-Machain

Dr. Alvarez-Machain, a Mexican national, was abducted from Mexico by American procured agents and brought to the U.S. for criminal prosecution concerning Alvarez-Machain's involvement in torturing a federal American narcotics agent.[154] Dr. Alvarez-Machain sought to dismiss all criminal charges levied against him in the United States on the basis that his abduction from Mexico constituted a violation of the United States—Mexico Extradition Treaty.[155] To determine whether Alvarez-Machain's criminal charges should be dropped, the United States Supreme Court turned to a similar case decided almost a century earlier.[156]

[153] *Cf.* YING-JEN LO, HUMAN RIGHTS LITIGATION PROMOTING INTERNATIONAL LAW IN U.S. COURTS (2005) (discussing various lower federal court opinions in which international law was discussed and asserted as basis for cause of action as well as describing U.S. federal courts reaction and interpretation of such international law).

[154] U.S. v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

[155] *Id.* at 658. *See* Extradition Treaty, May 4, 1978, [1979]; United States-United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

[156] *Alvarez*, 504 U.S. at 660-63 (analyzing the Supreme Court's opinion in *Ker v. Illinois*).

In *Ker v. Illinois*,[157] the Supreme Court considered whether an American citizen, charged with certain crimes in the United States, could have such charges dismissed because he was forcibly kidnapped from Peru in violation of an extradition treaty between the United States and Peru.[158] Ker, the abductee, contended that his kidnapping violated due process secured to him through the Fourteenth Amendment to the United States Constitution.[159] The Court found no violation of due process because, absent the irregularities of his abduction and violation of American domestic law, Ker could have been validly arrested within American territory.[160]

His due process claim failing, Ker asserted that the extradition treaty created a right exercisable by him to contest his removal from Peru "in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping."[161] Ker founded this right in a right of asylum acquired by his flight from America and arrival in Peru, but the Court found no support in the language of the United States—Peru Extradition Treaty or any other extradition treaty then existent in the world that granted a criminal fleeing prosecution from his nation the right of asylum.[162] The Court found that Ker was not brought

[157] 119 U.S. 436 (1886).

[158] *Id.* at 438-39 (describing the defendant's abduction from Peru and subsequent transport to the United States against his will in order to face charges in Illinois).

[159] *Id.* at 439-40 (positing that the defendant alleged that his abduction and extradition deprived him of due process, presumably that of the Fourteenth Amendment since he faced charges in the state of Illinois).

[160] *Id.* at 440 (stating that once the defendant was within the territory of Illinois, nothing in the way he was treated constituted a violation of due process).

[161] *Id.* at 441.

[162] The Court reasoned "it is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and, if the right of asylum means anything, it must mean this." *Id.* at 442. This conclusion, made in 1886, is refuted in current international treaties and domestic jurisprudence governing the right of asylum. *See e.g.*, Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954, *available at* http://www.ohchr.org/english/law/refugees.htm (last visited Nov. 4, 2007); Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967, *available at* http://www.unhchr.ch/html/menu3/b/o_p_ref.htm (last visited Nov. 4, 2007); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987, *available at* http://www.unhchr.ch/html/menu3

into the United States under the extradition treaty and therefore he possessed no enforceable rights under that treaty whose provisions were not relied upon in brining Ker to American soil.[163] The Court, then decided,

> [t]he question of how far his forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not feel called upon to decide; for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection.[164]
>
> *Ker*, 119 U.S. at 444

Upon this jurisprudential precedent, the current Supreme Court evaluated Alvarez-Machain's claimed treaty right. The *Alvarez-Machain* Court turned to the terms of the treaty relied upon to create an enforceable right necessitating dismissal of all criminal charges.[165] Initially, the Court noted the absence of any language in the treaty mandating that either signatory to the treaty refrain from forcibly abducting individuals present in either contracting party's territory.[166] Further, the Court noted

/b/h_cat39.htm (last visited Nov. 4, 2007); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, *entered into force* Feb. 1, 1989, *available at* http://www.cpt.coe.int/EN/documents/ecpt.htm (last visited Nov. 4, 2007); *See* Statute of the Office of the United Nations High Commissioner for Refugees, G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950), *available at* http://www.unhchr.ch/html/menu3/b/o_unhcr.htm (last visited Nov. 4, 2007); Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85), *available at* http://www1.umn.edu/humanrts/instree/cartagena1984.html (last visited Nov. 4, 2007); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), *available at* http://www.unhcr.org /home/PUBL/3d58e13b4.pdf (last visited Nov. 4, 2007).

[163] *Ker*, 119 U.S. at 443 (positing that the act of transferring Ker from Peru to the United States was not done under the authority of the treaty).

[164] The *Alvarez-Machain* Court noted *Ker* was decided "on the premise that there was no governmental involvement in the abduction . . . and Peru, from which Ker was abducted, did not object to his prosecution." *Alvarez-Machain*, 504 U.S. at 662.

[165] *Alvarez-Machain*, 504 U.S. at 669 (noting that the language of the treaty did not indicate that the abduction of the defendant was a violation that warranted dismissal of criminal charges in the United States, and therefore that his abduction did not prevent his trial in the United States for crimes committed in the United States).

[166] *Id.* at 662 (positing that there is no express promise in the treaty by either party to refrain from forcible abductions in the territory of the other nation).

that the treaty's own language did not define any specific manner in which either party must effect extradition.[167] The Court went on to illustrate that a treaty of extradition is an exception to customary international law, which does not innately recognize the right of a nation to extradite its own national from another country's territory.[168] Examination of the documentary history and practice under the U.S.—Mexico Extradition treaty failed to reveal that forcible abductions were violations of the treaty because Mexico was made aware of the U.S. position—consistent with *Ker*—that forcible abductions occurring outside the U.S. to bring a criminal into American territory was acceptable under American law.[169]

Finally, the Court deciphered whether an implicit unarticulated term of the treaty prohibited "prosecution where the defendant's presence is obtained by means other than those established by the Treaty."[170] The Court noted that general customary international law firmly prohibited forcible abductions.[171] "This, however, does not mean that the violation of any principle of international law constitutes a violation of this particular treaty."[172] The Court, therefore, declined to imply a prohibition on all forms of seizing an individual from the land of another country.[173]

The conflict between rights in *Alvarez-Machain* is between the constitutional right of due process and the treaty right to extradition proceedings where a criminal defendant is found. Both intimate fundamental rights of the individual to receive fair process to ensure justice occurs. The Court resolves the conflict by strict textual reading of the provisions of the U.S.—Mexico Extradition treaty. The absence of express prohibition of the type of

[167] *Id.* at 664 (stating that Article 9 of the treaty does not specify the manner in which either country should extradite a national of the other country in order to prosecute him).

[168] *Id.* at 664-65 (explaining that international law imposes no requirement that one country must surrender its nationals for prosecution in another country, and therefore a treaty may provide a mechanism for extradition that otherwise would not exist).

[169] *Id.* at 665 (noting Mexico knew of the *Ker* doctrine as early as 1906 and did not seek insertion of language to curtail this American rule in the latest treaty executed in 1978).

[170] *Id.* at 666.

[171] *Id.* (describing Alvarez-Machain's argument that the U.N. Charter and OAS Charter advocate international censure of international abductions).

[172] *Id.* at 668 n.14.

[173] *Id.* at 670 (stating "the fact of respondent's forcible abduction does not therefore prohibit his trial in a Court in the United States for violations of the criminal laws of the United States").

conduct employed to bring Alvarez-Machain before U.S. courts, coupled with the lack of customary international law's recognition of a similar right, led the Court to infer no such right claimed by Alvarez-Machain existed. Alvarez-Machain was not a citizen of the U.S., but Ker was. In a similar factual scenario, the Court denied an American citizen a determination of violation of his constitutional right to due process.

Viewed together *Ker* and *Alvarez-Machain* adopt a textualist approach to conflicting rights. Should a right be implied by international convention that right yields completely to established domestic precepts.[174] Where municipal precepts do not require inquiry into the conflict between rights, examination by the Court is not required. To borrow from American conflicts of laws scholarship, the Court implements a similar analysis to that proposed by Brainerd Currie, who suggested: "If the court finds an apparent conflict between the interests of the two states, it should reconsider. A more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict."[175] Although Currie spoke of conflicts of laws between American states, adoption of the methodology to the present discussion of conflicts between constitutional rights and treaty rights explicates the Supreme Court's process of addressing the conflict in both *Ker* and *Alvarez-Machain*. To reformulate Currie's method, the Supreme Court found an apparent conflict between a constitutional right and treaty right, and considered a moderate and restrained interpretation of the rights to avoid conflict.

ii. SOUTH AFRICAN JURISPRUDENCE COMPARED

Looking to South African jurisprudence, *Grootboom* reflects a similar approach to *Ker* and *Alvarez-Machain*.[176] In *Grootboom*, the Court addressed Articles 2.1 and 11.1 of The International

[174] *See generally* Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458 (1998) (noting general American judicial distain for treaty obligations).

[175] James P. George, *False Conflicts and Faulty Analysis: Judicial Misuse of Governmental Interest in the Second Restatement Conflict of Laws*, 23 REV. LITIG. 489, 511-12 (2004) (describing Currie's framework presented in Brainerd Currie, *Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242-43 (1963)).

[176] *Cf.* Director of Public Prosecutions, Cape of Good Hope v. Robinson, 2005 (2) BCLR 103 (CC) (discussing an extradition treaty, but not squarely addressing constitutional issues).

Covenant on Economic, Social and Cultural Rights and the interpretation given to the Articles by The Committee on Economic, Social and Cultural Rights in relation to expounding upon the constitutional rights to adequate housing and progressive realization of adequate housing through reasonable legislative measures.[177] Unlike the Supreme Court, examination of the particular international convention was mandated pursuant to the South African Constitution.[178] The Constitutional Court found the treaty required South Africa to expeditiously and effectively move toward realization of the socio-economic rights contained within the Constitution—particularly the realization of all citizens of access to adequate housing.[179] Movement toward the full realization of this right is interpreted through the state's utilization of actually available resources.[180]

The Court did not find the treaty infringed upon the constitutional right to adequate housing because textually, the rights utilized different language.[181] The Constitution used the phrase "right to access adequate housing" whereas the treaty provided a right to adequate housing.[182] Additionally, the treaty indicated a right to appropriate legislative measures whereas the Constitution required reasonable legislative measures to progressively realize access to adequate housing for citizens.[183] The Court opined that "international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary."[184]

For similar reasons, the Court also rejected the treaty's concept of a minimum core contained within socio-economic rights be-

[177] 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976); CESCR General Comment 3, The Nature of States Parties' Obligations (Art. 2, par.1), E/1991/23 (Dec. 14, 1990), *available at* http://www.hri.ca/fortherecordcanada/vol2/obligationtb91.htm (last visited Nov. 4, 2007).

[178] *Grootboom*, 2000 (11) BCLR ¶ 26; S. AFR. CONST. ch. 2, § 39 ("(1) When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law "). *Cf.* S. AFR. CONST. ch. 2, § 233.

[179] *Grootboom*, 2000 (11) BCLR ¶ 45 (stating that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be . . . lowered over time").

[180] *Id.* at ¶ 46 (noting that "the obligation does not require the State to do more than its available resources permit").

[181] *Id.* at ¶ 28 (discussing the difference in language between the Covenant and the Constitution).

[182] *Id.*

[183] *Id.*

[184] *Id.* at ¶ 26.

cause varying factual situations delineated the right to access adequate housing, the Court lacked necessary information about housing conditions across the country, and (most importantly) the standard utilized to assess effectuation of the right is the reasonableness standard found within the South African Constitution.[185]

Therefore, both the Supreme Court and the Constitutional Court strictly interpret the text of their constitutions to avoid conflict between constitutional rights and treaty rights. They accomplish this avoidance of conflict by construing the language of the treaty so that the right granted in the treaty disappears.[186] There exists only a false conflict between the rights because the courts find only a constitutional right where both a treaty and constitutional right seemingly existed before the courts' exegesis.

B. Sanchez-Llamas v. Oregon (VIENNA Convention on Consular Relations) Compared to South African Jurisprudence

i. Sanchez-Llamas v. Oregon

The United States Supreme Court recently dealt with two consolidated cases involving the assertion by criminal defendants that American law enforcement officers failed to advise them of their Article 36 Vienna Convention on Consular Relations right to have their consul informed of their detention.[187] In the first case, defendant Sanchez-Llamas, a citizen of Mexico, was arrested for a 1999 shooting of a police officer in the state of Oregon.[188] At the time of his arrest, the defendant was advised in both English and Spanish of his right to an attorney, right to remain silent, and informed that any statements made to the officers would be used against him in a subsequent criminal prose-

[185] *Id.* at ¶¶ 32-33 (demonstrating that the "differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right"). *See* Liebenburg, *supra* note 66, at 33 -10 to 33-12.

[186] For a European explanation of why American courts disregard or shirk international obligations, *see* Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 802-08, 810-11 (2004) (discussing the evolution of the Supreme Court's attitude toward international obligations).

[187] Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2674 (2006).

[188] *Id.* at 2675-76.

cution.[189] After administering these warnings, police questioned Sanchez-Llamas in an interview room at the police station with the assistance of an interpreter.[190] In answering police questions, Sanchez-Llamas made several incriminating statements.[191]

As a result, Sanchez-Llamas was subsequently charged with attempted murder and other coordinate offenses pursuant to Oregon state law.[192] Before the trial for these charges, Sanchez-Llamas moved the state court to suppress all incriminating statements he made to the police in response to police questioning when he was first arrested.[193] By such motion, Sanchez-Llamas sought to invoke the exclusionary rule, which dictates that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible" in a state or federal prosecution.[194]

The Supreme Court addressed the appropriateness of the exclusionary rule's use in remedying a violation of the treaty right to consular notification of a foreign citizen's detention by American authorities.[195] Initially, the Court assumed that there existed a judicially enforceable individual right to consular notification applicable to American proceedings through Article 36 of the Vienna Convention.[196] The Court explained that the Vienna Convention did not provide specific detailed remedies for violations of Article 36, but instead permitted municipal law to provide an appropriate remedy for a violation of the Article under domestic law.[197] Thus, the availability of the exclusionary rule to suppress evidence obtained in violation of the Convention must be deter-

[189] *Id.* at 2676. Collectively these rights and statements are referred to as Miranda warnings and inform an arrestee of his entitlements under the United States Constitution. *See* Miranda v. Arizona, 384 U.S. 436 (1966). "[A]ll persons within the territory of the United States are entitled to the protection guaranteed by" the Fifth and Sixth Amendments to the United States Constitution. Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[190] *Sanchez-Llamas*, 126 S. Ct. at 2676.

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[195] *Sanchez-Llamas*, 126 S. Ct. at 2680–82 (concluding that the exclusionary rule is not a judicial remedy applied lightly).

[196] *Id.* at 2677–78. In making this assumption the Court did decide such a right existed. A decision that such a right existed would produce a jurisprudentially binding precedent that recognized the right and would bind lower courts to effectuate such a right.

[197] *Id.* at 2678.

mined under domestic law.[198] Because under the American federal system the Supreme Court does not possess supervisory authority over state court proceedings, a judicial remedy could only be imposed upon the Oregon state court solely on the basis that such a remedy is found in the language of the treaty itself.[199]

Assuming a judicial remedy was required by the Convention, the Court declared that such remedy must be consistent with the Convention's requirement that exercise of Convention rights under Article 36 conform to the domestic law of the state in which effectuation of such rights is sought.[200] In conformance with American law, the exclusionary rule is reserved for violations by state actors of individual constitutional rights.[201] Application of the rule to mere statutory violations occurs solely when important Fourth and Fifth Amendment constitutional rights are implicated, namely when an unreasonable search or seizure occurs or when a defendant's privilege against self-incrimination is violated.[202]

The Court found that a violation of Article 36's treaty right to consular notification of detention does not implicate any of the important constitutional rights articulated above and serves no real deterrent to dissuade state actors from violating the treaty right.[203] Furthermore, the defendant was afforded more substantial constitutional protections than mere consular assistance.[204] Hence, the Court found other American constitutional protec-

[198] *Id.* The Court noted that none of the other 169 counties who are signatories to the Convention have the exclusionary rule available as a matter of domestic law. The exclusionary rule, the Court noted, is unique to the American legal system. *Id.*

[199] *Sanchez-Llamas*, 126 S. Ct. at 2679 (citing Dickerson v. United States, 530 U.S. 428, 438 (2000) and Smith v. Phillips, 455 U.S. 209, 221 (1982)). Treaties that are self-executing are directly applicable to the states through the federal constitution. U.S. CONST. art. IV.

[200] *See Sanchez-Llamas*, 126 S. Ct. at 2680 (noting the limits on Sanchez-Llamas' argument that judicial remedy is required in his case).

[201] *See id.* (explaining Court's application of exclusionary rule to unconstitutional violations of Fourth Amendment and wrongfully obtained confessions).

[202] *See id.* at 2681 (distinguishing Sanchez-Llamas' situation from cases where statutory violations have resulted in application of exclusionary rule for violations speaking to Fourth and Fifth Amendment interests).

[203] *See id.* (clarifying Article 36's right to consular notification as a right of foreign nationals to have their consulate informed of their arrest or detention rather than a provision relating to suppression of evidence).

[204] *See id.* at 2681-82. Sanchez-Llamas received the due process protections afforded to foreign nationals detained in the U.S. on suspicion of crime. He was given an attorney paid for by public funds and protected against compelled self-incrimination.

tions were afforded to Sanchez-Llamas, which served concomitant interests to those protected by Article 36 such that application of the exclusionary rule to suppress incriminating statements made to police was not warranted under domestic law.[205]

In *Sanchez-Llamas*, the Court returns to the same strict textual interpretation of the treaty found in *Alvarez-Machain*. Unlike *Alvarez-Machain* and *Grootboom*, the Court is unable to dismiss the treaty right by finding only a constitutional right where both a treaty and a constitutional right previously existed. Instead, the Court recognizes the treaty right, but asserts that the constitutional right grants the individual superior protection; the Court places a greater value on the constitutional right than on the treaty right.[206] The constitutional right displaces the treaty right because the constitutional right occupies a greater area of entitlement to the individual. Further, the Court identifies that violation of the treaty right does not carry the same weight as violation of a domestic constitutional right.[207]

The Court resolves conflict between rights by selecting the right providing the individual greater legal protections. Largely, this result occurs because the remedy for breach of the treaty right falls within domestic law. Domestic law does not find breach of the treaty right valuable, and therefore the treaty right gives way to the more highly valued constitutional right.

ii. SOUTH AFRICAN JURISPRUDENCE COMPARED

Turning to South Africa, the Constitutional Court revisited the extent to which Articles 2.1 and 11.1 of the International Cove-

[205] *See id.* (noting availability of diplomatic channels as well as the right to raise an Article 36 claim at trial to obtain consular notification).

[206] *See* Cummins Inc. v. U.S., 454 F.3d 1361, 1366 (Fed. Cir. 2006). Further evidence of this devaluation of the treaty right may be seen in the opinion describing *Sanchez-Llamas* as indicating that deference should not be given to foreign tribunal decisions interpreting treaty rights, but rather the court should give only "respectful consideration." *See generally* Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405, 427-33, 470 (2006) (describing background of treaty interpretation in U.S. and noting "the propensity of American courts to reject or restrict application of provisions of treaties and international agreements").

[207] U.S. v. Abdi, 463 F.3d 547, 556 (6th Cir. 2006) ("[T]he rights protected by the Vienna Convention are equivalent to the rights protected by a statute because treatises and statutes have been held by the Supreme Court to be 'on the same footing' with each other under the Constitution") (quoting United States v. Chaparro-Alcantara, 226 F.3d 616, 621-22 (7th Cir. 2000)).

nant on Economic, Social and Cultural Rights, and the interpretation given to the Articles by The Committee on Economic, Social and Cultural Rights, related to constitutional rights.[208] In this case, the Court asserted that prior decisions concluded the "socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under Section 26(2), and not as a self-standing right conferred on everyone under Section 26(1)."[209] The Court, to determine whether the treaty right to minimum core applied, examined the constitutional rights to access to healthcare and to reasonable legislative measures to provide citizens access to health care.[210] The Court determined that "all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in Sections 26 and 27 on a progressive basis."[211] Reaffirming courts constitutionally are ill equipped to define a minimum core,[212] the Court found, Section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in Section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil [sic]" such rights. The rights conferred by Sections 26(1) and 27(1) are to have "access" to the services that the state is obliged to provide in terms of Sections 26(2) and 27(2).[213]

The Court, therefore, firmly rejected any additional obligations placed upon the state as a result of the terms of the rights granted in the International Covenant on Economic, Social and Cultural Rights. Such treaty rights did not modify the constitu-

[208] *See* Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (10) BCLR 1 (CC) (S. Afr.)[hereinafter *TAC*].

[209] *Id.* at ¶ 34.

[210] *See* S. AFR. CONST. 1996 ch. 2, § 27(1)-(2) (noting provisions declaring every citizen's right to health care, food, water and social security in South Africa's Bill of Rights); *see also TAC*, *supra* note 208, at ¶ 35 (requiring access to socio-economic rights to improve the poverty conditions existing at the time of the Constitution's adoption).

[211] *TAC*, *supra* note 208, at ¶ 35.

[212] *See TAC*, *supra* note 208, at ¶ 38 (highlighting judiciary's ill-suitedness to decide issues with potentially great socio-economic impact).

[213] *TAC*, *supra* note 208, at ¶ 39.

tional rights of an individual nor provide additional justiciable individual rights.

The *Sanchez-Llamas* decision varies from the above-described South African opinion in that the Supreme Court finds one right more valuable than another. The South African Court, in a revision of its earlier declaration in *Grootboom*, finds the treaty right present but impossible to enforce judicially because of the limitations on the judicial branch of government. The Constitutional Court does not expressly state that the constitutional rights encompass a broader scope of protection that engulfs the treaty rights, as does the *Sanchez-Llamas* Court.

Like the *Sanchez-Llamas* Court, the Constitutional Court views the remedy of breach of the treaty right as impractical within the judicial system. Both Courts express more regard for domestic constitutional rights than international treaty rights based upon explicit constitutional text and deference of the treaty text to municipal remedies.[214]

C. Hamdan v. Rumsfeld (Geneva Convention III) Compared to South African Jurisprudence

i. Hamdan v. Rumsfeld

A prisoner at the Guantanamo Bay detention facility, whom the President of the United States determined by Executive Declaration necessitated trial by military commission, challenged the method of trial through writs of habeas corpus and mandamus.[215] The prisoner raised two principle violations of law: first, the method of trial by military commission was not provided for by statute or congressional act and violated common law; and second, the procedures to be utilized by the military commission vio-

[214] *See Sanchez-Llamas*, 126 S. Ct. at 2679 (pointing to authority under United States Constitution to make treaties which are to be interpreted according to their terms); *see also TAC*, *supra* note 208, at ¶ 26 (explaining constitutional requirement that each individual have "minimum core" rights).

[215] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006) (summarizing Hamdan's detention and charges of "offenses triable by military commission"). *See generally* Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (outlining authority under which President acted against individuals perceived to be connected to terrorist attacks of September 11, 2001).

lated both American military law and international law.[216] Only the second contention concerns the present discussion as it relates to a right created in international law conflicting with a federal right.

The prisoner received a military lawyer appointed to represent him before the military commission. That appointed lawyer filed a petition with the Secretary of Defense's appointee, retired major general and attorney John D. Altenberg, Jr., for charges to be filed and a speedy trial commenced.[217] The petition was denied and the appointed military lawyer filed the writs of habeas corpus and mandamus in a federal district court.[218]

During this time, a separate tribunal called the Combatant Status Review Tribunal issued a declaration for continued detention of the prisoner at Guantanamo Bay because he was an enemy combatant.[219] As the filing of writs and the tribunal determination occurred, the prisoner's trial by military commission commenced.[220] The Secretary of Defense's appointee in the meantime issued a thirteen-paragraph charging document, which articulated the charges against the prisoner.[221]

The prisoner's trial before the military commission was stayed by order of another federal district court sitting in Washington, D.C. where the prisoner's writs were transferred.[222] The government appealed from the federal district court to the court of appeals, which reversed the order of the federal district court.[223] All the preceding process was afforded to the detainee under American constitutional and statutory law to challenge the process of the military tribunal.

[216] *See Hamdan*, 126 S. Ct. at 2759 (stating Hamdan's objections to the military commission's lack of authority to prosecute him).

[217] *See id.* at 2760 (explaining process by which appointed counsel sought to advocate for Hamdan's procedural rights).

[218] *See id.* at 2760-61 (outlining course by which Hamdan ultimately wound up in federal district court after being denied the protection of the UCMJ).

[219] *See id.* at 2761 (stating grounds for Hamdan's continued detention).

[220] *See id.* (highlighting Hamdan's multiple procedural courses).

[221] *See id.* at 2760-61. This document was issued after the Appointee's legal advisor had denied that the prisoner was entitled to process pursuant to the United States Military Code of Justice and after the prisoner's appointed attorney filed the federal writs. It contained thirteen paragraphs, yet "[o]nly the final two paragraphs, entitled 'Charge: Conspiracy,' contain allegations against Hamdan." *Id.*

[222] *Hamdan*, 126 S. Ct. at 2760; Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004).

[223] *Hamdan*, 126 S. Ct. at 2762; Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

The United States Supreme Court opined that military commissions are not found within the strictures of the Constitution or mandated by federal legislative statute.[224] These tribunals are created of necessity, but "[e]xigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, Section 8 and Article III, Section 1 of the Constitution unless some other part of that document authorizes a response to the felt need."[225] The Court found the President possessed a general authority, absent specific congressional act, to convene military commissions when justified under the U.S. Constitution and federal laws.[226] Hence, the procedure adopted by the military commission must comply with the Constitution and federal law, which includes the law of nations as implicated by the U.S. Code of Military Justice.[227] The law of nations includes, particularly, the Third Geneva Convention on Treatment of Prisoners of War.[228]

The detainee, therefore, possessed rights under the federal constitution and law as well as rights under international convention. As to federal law, the rights granted to the detainee by the military commission were pursuant to Commission Order No. 1.[229] The Court determined that the procedures set out in Order No. 1 must afford the detainee rules similar to those governing courts-martial unless such similarity is impracticable.[230] The President asserted that rules similar to those applied to federal

[224] *Hamdan*, 126 S. Ct. at 2772-73. The U.S. Congress has subsequently enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) explicitly authorizing trial by military commissions.

[225] *Hamdan*, 126 S. Ct. at 2773. Authority to establish military commission is shared between Congress and the President. The Court declined to definitively answer when the President, in times of controlling necessity, may constitute military commissions without congressional mandate. *Id.* at 2774.

[226] *Id.* at 2775.

[227] *Id.* at 2786 ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations'"); Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (2006).

[228] *Hamdan*, 126 S. Ct. at 2786 (indicating that all four of the Geneva Conventions signed in 1949 are applicable); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364.

[229] *Hamdan*, 126 S. Ct. at 2786 (giving an account of the detainee's procedural rights).

[230] *Id.* at 2791 ("[T]he rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable.").

criminal trials were impracticable in the detainee's situation.[231] But the President made no similar determination that application of the procedures in courts-martial would be impracticable.[232] Hence, the procedures applicable to courts-martial under federal law should govern the detainee's trial by military commission and afford him a greater panoply of rights than does Order No. 1.[233]

The procedures set out in Order No. 1 also violated Common Article 3 of the Geneva Conventions.[234] Common Article 3 applies to conflicts not of an international character, but the Court interpreted the article broadly to encompass situations like the armed conflicted waged by the United States against terrorist organizations.[235] Therefore, the article granted to the detainee the right in international law to "be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"[236] Because military commissions are authorized by exigency and permitted to deviate from the procedures of courts-martial, and no such exigency has been established, Order No. 1 violates the detainee's international legal right to a regularly constituted court.[237]

Here, unlike pervious cases discussed in this part, the Court finds the treaty right and its violation necessitate judicial enforcement of the right.[238] Yet, enforcement of the right occurs only after the Court found constitutional rights equally violated.

[231] *Id.* ("[T]he President's determination that [there is a] 'danger to the safety of the United States,' . . . renders it impracticable 'to apply in military commissions . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts").

[232] *Id.* at 2792 ("Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.").

[233] *Id* at 2792-93 (holding violation of American federal law to have occurred).

[234] *Id.* at 2793, 2795 (interpreting Common Article 3 of the Geneva Conventions and holding that there was a violation of them).

[235] *Hamdan*, 126 S. Ct. at 2795-97 (citing General Commentaries to Article 3).

[236] *Id.* at 2796 (quoting Common Article 3 contained in the Third Geneva Convention); Third Geneva Convention, 6 U.S.T., at 3320.

[237] *Hamdan*, 126 S. Ct. at 2797 (discussing what "regularly constituted court" means under the Geneva Conventions).

[238] For two divergent views of how the case should have been decided, *see* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing for a similar outcome to the Court's actual decision) and Geoffrey Corn, *Taking the Bitter with The Sweet: A Law of War Based upon Military Commission*, 35 STETSON L. REV. 811 (arguing despite some procedural and jurisprudential deficiencies, military commissions are permissible under Constitution and international law).

Nonetheless, the Court resolves conflict between treaty and constitutional rights in this case by enforcing both rights because each right occupies a similar scope of application to the guarantees secured to the prisoner. Both treaty and constitutional rights harmoniously coexist because both point toward the same end. That end is fair procedures in the trial of the prisoner.[239] The Court, then, views the rights as coextensive and permits each right to function within the realm of the other to maximize the rights granted to the prisoner.

ii. SOUTH AFRICAN JURISPRUDENCE COMPARED

Unlike *Alvarez-Machain* and *Grootboom*, the Court finds a conflict and resolves the conflict by harmonization of the conflicting rights. Like *Sanchez-Llamas* and the South African case compared to it in the previous subSection, the Court recognizes the treaty right, but this Court takes the further step of finding that right actionable.[240]

IV. UNIVERSAL METHOD TO RESOLVE CONFLICTS BETWEEN FUNDAMENTAL RIGHTS

The problem of conflicting rights occurs because of their explicit description, codification, and enumeration in constitutions, treaties, and other laws. Early American constitutional framers argued against listing rights in this manner to avoid limiting rights solely to those collected within a legal text.[241] The problem of conflicting rights occurs because rights are both written with vague terminology and incapable of strict definition. Largely, rights grew out of philosophical and theological theory, which sought to maximize individual benefits against oppressive gov-

[239] *Cf.* Erwin Chemerinsky, *In Guantanamo Case, Justices Rein in Executive Power*, TRIAL 60, 61-62 (September 2006) (describing holding in the case).

[240] *Cf.* Martin S. Flaherty, *More Real than Apparent: Separation of Power, The Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51, 72 (2006) (arguing present day international law requires "states [to] provide meaningful domestic remedies for individual treaty rights").

[241] *See, e.g.*, THE FEDERALIST NO. 84 (Hamilton); *see also* S. DOC. NO. 108-17, at 1605-06 (2002). "Aside from contending that a Bill of Rights was unnecessary, the Federalists responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that inasmuch as it would be impossible to list all rights it would be dangerous to list some because there would be those who would seize on the absence of the omitted rights to assert that government was unrestrained as to those." *Id.* at 1605.

ernment.[242] The solution to the problem, however, is not to erase the provisions guaranteeing rights in constitutions, treaties, and other laws.

To resolve conflicts between fundamental rights, no matter which rights are in conflict, a universal method is necessary. Such a method must be flexible and uncomplicated to resolve diverse conflicts between varieties of rights. Having analyzed methods implemented by two courts of final appeal in a diversity of factual situations to different types of conflicting rights, a universal method to decide conflicts between rights arises.

The underlying precept of a universal method is that all rights are not equal. Rights exist at differing levels of importance in a given legal text. Some rights are essential to the government's relationship with its citizens, while others administrate the citizen-government association. Determination of fundamental rights falls to the legal text under evaluation. The text itself may provide for a way to resolve a conflict between rights by indicating one right is not fundamental. This, however, does not solve conflicts between fundamental rights, but permits a court to dispense with a conflict between rights should the legal text under interpretation indicate that one right is not fundamental—and therefore the non-fundamental right yields to the fundamental right.

The universal method courts may apply to resolve conflicts between fundamental rights follows:

1. Identify the specific fundamental rights in conflict;

2. Evaluate each fundamental right against the background of the legal text containing the right;

3. Establish the aim, goal, or end of the right and whether that end is achieved under the factual scenario presented;

4. Look to whether both rights may harmoniously coexist through equal enforcement;

[242] *See generally* Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37 (1991) (describing philosophical and theological theories giving rise to modern concept of rights).

> 5. If rights cannot coexist, then resolve the conflict by applying the most rational and pragmatic construction of the rights to establish an amalgamated solitary right employing the most significant ends of the two conflicting rights.

The universal method described above implements the key theories articulated by the United States Supreme Court and South African Constitutional Court described in this work.

The first precept recognizes the necessity to explicitly define which rights are in conflict. The precept also allows a court to undertake further inquiry to remove an apparent conflict between rights. The second precept encourages the court to classify each right within the purview of the legal text (constitution, treaty, statute, etc.) guaranteeing the right. A solution to the conflict may be found by reference to the doctrines behind codification of rights within the legal text. The third precept forces the court to consider the policy behind the right, as well as the function of the right within the greater governmental scheme. The court must ask what the right protects because the second principle causes the court to examine why the right is present. The fourth precept recognizes fundamental rights require equal respect. Resolving conflict by harmonizing fundamental rights, thus preserving rights in equal value and effect, is preferable to the fifth and final recommendation.[243]

The fifth precept acknowledges that harmonizing fundamental rights in conflict is not always possible. If one right must cede value to another, then reason and practicality provide the tools to forge a singular reformulated right that retains the previously separate ends of each right. The fifth precept recognizes conflict resolution is preferable to indecision. One right arises from two rights by taking the ends of each separate right and placing those ends within the same right. An example of this process is found in *Grootboom*'s amalgamation of the right to adequate housing

[243] The German constitutional doctrine of "practical concordance" accords with my fourth precept. *See* KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 142 (20th ed. 1999). "According to . . . [practical concordance], constitutionally protected legal values must be harmonized with one another in the event of their conflict. One may not be realized at the total expense of the other. Both are to be preserved in creative tension with one another." Donald P. Kommers, Symposium, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 851 (1991).

and the right to effectuate that right through reasonable legislative measures previously described in Part II.

Again, the problem of conflicting rights is inherent because of the codification of rights. Solving these inherent conflicts is difficult. Resolution of conflicts between fundamental rights through the universal method provides a good solution to the conundrum.