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Remedial design under scarcity: a second-order standard for evaluating judicial remedies

Diseño remedial bajo escasez: un estándar de segundo orden para evaluar remedios judiciales

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ABSTRACT
This article proposes a second-order legal standard for evaluating judicial remedies under scarcity. It starts from a tension: when courts protect social rights through orders that require public expenditure, administrative coordination, or institutional reconfiguration, the decision does not merely interpret rights; it operates as a regulatory-like intervention with fiscal, distributive, and institutional effects that are not always made explicit. The article argues that the debate should not be confined to the legitimacy of judicial review but must incorporate criteria for comparatively justifying the remedial architecture chosen among legally admissible alternatives, since principles such as progressive realization, non-retrogression, or the "maximum available resources" standard rarely provide operational guidance for that choice. Drawing on economic analysis of law, constitutional theory, and institutionalism, it develops judicial regulatory reasonableness under scarcity as a standard aimed at making remedial design auditable. The proposal integrates three interdependent dimensions: the right's enforceable threshold and equity in access, so that litigation does not operate as a de facto distributive criterion; the fiscal and distributive governability of induced expenditure; and the institutional–epistemic feasibility of the order under imperfect information and limited capacity. It distinguishes predominantly individualized remedies from remedies with systemic components and argues that recurrent noncompliance increases the burden of justifying case-by-case responses. The standard is organized into a transferable matrix, illustrated through Decision T-760/2008 and contrasted with *Brown v. Plata*. Its contribution is an analytical tool that renders contestable and reviewable what often remains rhetorical in remedial justification.

Keywords: Economic Analysis of Law; judicial remedies; judicial protection of rights; public budgeting; institutional design

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RESUMEN

Este artículo propone un estándar jurídico de segundo orden para evaluar remedios judiciales bajo escasez. Parte de una tensión: cuando los tribunales protegen derechos sociales mediante órdenes que exigen gasto público, coordinación administrativa o reconfiguración institucional, la decisión no solo interpreta derechos, sino que funciona como una intervención con efectos regulatorios —fiscales, distributivos e institucionales— no siempre explícitos. Sostiene que la discusión no debe limitarse a la legitimidad del control judicial, sino incorporar criterios para justificar comparativamente la arquitectura remedial elegida entre alternativas jurídicamente admisibles, pues principios como la realización progresiva, la no regresividad o el «máximo de recursos disponibles» rara vez ofrecen guía operativa para esa elección. Desde el Análisis Económico del Derecho, la teoría constitucional y el institucionalismo, desarrolla la razonabilidad regulatoria judicial bajo escasez como estándar orientado a hacer auditable el diseño del remedio. La propuesta integra tres dimensiones interdependientes: el umbral exigible del derecho y la equidad en el acceso, para que la litigación no opere como criterio distributivo de facto; la gobernabilidad fiscal y distributiva del gasto inducido; y la factibilidad institucional-epistémica de la orden bajo información y capacidad limitadas. Distingue remedios predominantemente individualizados de remedios con componentes sistémicos y sostiene que la reiteración del incumplimiento incrementa la carga de justificar respuestas caso por caso. El estándar se organiza en una matriz transferible, ilustrada con la sentencia T-760/2008 y contrastada con *Brown v. Plata*. Su contribución es una herramienta analítica que vuelve contestable y revisable lo que suele permanecer retórico en la justificación remedial.

Palabras clave: Análisis Económico del Derecho; remedios judiciales; protección judicial de derechos; presupuesto público; diseño institucional

1. Introduction

Judicial protection of social rights is increasingly decided on terrain where claims of enforceability coexist with persistent constraints on resources, administrative capacity, and information. In that setting, stating a legal duty does not resolve the underlying problem; it relocates it. When constitutional courts and other apex courts, exercising rights review, order resource-intensive entitlements or reshape complex administrative arrangements, the decisive questions often turn on remedial architecture and its aggregate effects under scarcity: which trade-offs the remedy triggers, what incentives it creates, which distributional risks it makes plausible, and how governable implementation will be in institutions that operate without full information or seamless coordination. In practical terms, adjudication then functions as a regulatory intervention: it sets objectives, imposes organizational burdens, and conditions budgetary choices, even where the court does not formally claim the role of public-policy designer.

The problem thus exceeds constitutional doctrine and becomes salient for the social sciences. Effective rights protection depends on collectively financed institutions, allocation rules, and administrative procedures capable of producing, processing, and executing decisions under scarcity; on this view, cost is not a peripheral consideration but a constitutive condition of effective protection (Holmes & Sunstein, 1999). Where access to justice is unequal, litigation can operate as a de facto distributive mechanism: repeat and better-resourced litigants are more likely to translate normative standards into effective benefits, while others remain confined to ordinary provision. This asymmetry is driven not only by the substantive content of rights but also by how remedies structure entry points, implementation burdens, and compliance repertoires. From the standpoint of economic analysis of law, the aim is not to displace rights-based reasoning with efficiency claims, but to make visible that different remedial designs generate different administrative costs, different risks of error under imperfect information, and different patterns of access—with cumulative consequences.

Contemporary constitutionalism has made a decisive move away from treating social rights as merely programmatic and toward treating them as judicially enforceable obligations, even under budgetary

constraints. Yet that advance leaves an analytical gap that debates often address only implicitly: there is a lack of comparable criteria for assessing the institutional quality of remedial design when compliance must compete for scarce resources and confront hard implementation limits. Principles such as progressive realization, non-retrogression, and the "maximum available resources" standard help structure justificatory burdens, but they rarely provide sufficiently operational guidance for choosing among alternative remedial architectures that are legally plausible yet diverge in foreseeable distributional effects, fiscal governability, and epistemic feasibility. The question that organizes this article is therefore: how should courts justify—under scarcity—the choice of one remedial architecture among admissible alternatives, considering its aggregate institutional effects?

This article answers that question by proposing a second-order standard focused on remedial design rather than on the substantive content of the right. Judicial regulatory reasonableness under scarcity is framed as an analytical criterion that makes remedial choices auditable: reasons must enable the reader to reconstruct why one architecture—rather than another—is comparatively defensible given relevant constraints of resources, information, and institutional capacity. The standard integrates three interdependent dimensions—rights, fiscal capacity, and institutional–epistemic rationality (D–F–E)—and distinguishes between predominantly individualized remedies (r^I) and remedies with systemic components (r^s), understood as configurations that incorporate general rules, information duties, and mechanisms of sequential review or course correction. The contribution is not to assert the abstract superiority of systemic remedies or to bar urgent individualized relief. It is to discipline choice when a genuine margin exists: to make explicit the administrative costs a remedy induces, the risks of error under imperfect information, and the plausible distributional effects associated with patterns of access.

The article's scope is deliberately limited to preserving epistemic responsibility. It does not offer an empirical impact evaluation of decisions, nor does it claim strong causal inferences between remedial types and distributive outcomes. Nor does it attempt to settle first-order disputes about judicial legitimacy; those objections set boundary conditions while the analysis concentrates on a question that often remains unanswered: the institutional performance of remedial architecture under scarcity. On that basis, the proposed standard supports a comparative and interdisciplinary research agenda on remedial design and evaluation by turning what often remains rhetorical— "reasonableness" or "maximum available resources"—into contestable (and potentially measurable) criteria. In that sense, the article contributes to the literature by providing a transferable analytical tool for examining—through a shared vocabulary between constitutional law and economic analysis of law—how judicial remedial design under scarcity reorders incentives, information, and fiscal constraints, and under what conditions such regulatory-like intervention can be justified in a controlled and reviewable manner.

2. From "costless" rights to fiscally conditioned rights

For much of twentieth-century constitutionalism, legal discourse relied on a distinction between "negative" and "positive" rights. Civil and political liberties were cast as duties of abstention, presumed to impose only limited demands on public resources; social rights—health, education, housing—were framed as entitlements contingent on budgetary allocation. This taxonomy sustained an asymmetrical pattern of protection: stricter judicial scrutiny of interferences with rights treated as "costless," and greater deference toward social rights portrayed as contingent and politically contestable. On that view, fiscal scarcity appeared as an external limit on the right, rather than as an internal problem of institutional design.

That distinction becomes unstable once the costs of rights are taken seriously. Holmes and Sunstein famously argued that even "classical" liberties presuppose collectively financed institutions—administration, procedures, security, and enforcement—so that no right is "costless" in any material sense (Holmes & Sunstein, 1999). The relevant contrast, then, is not whether costs exist, but how they are distributed, made visible, and governed through institutions. From the standpoint of public finance, this places adjudication squarely within the domain of allocation under scarcity: the budget is not a technical residue that follows legal reasoning, but the site where priorities are operationalized and opportunity costs—often with distributive effects beyond the individual case—are revealed (Musgrave, 1959; Musgrave & Musgrave, 1989). A methodological implication follows when judicial protection requires expenditure, especially for resource-intensive rights, the decision cannot be understood as interpretation alone; it also operates as an institutional intervention with potential effects on budgetary priorities, administrative capacity, and incentives. This article therefore shifts the analytical focus from the abstract content of the right to remedial architecture: how to design judicial protection to govern, in a legally reasoned way, the trade-offs generated by scarcity (Komesar, 1994).

2.1. Social-rights enforceability and the unresolved design problem under scarcity

Moving beyond the view of social rights as merely programmatic has been one of the defining developments of contemporary constitutionalism. In Latin America and Europe, this shift has been supported by the claim that social rights generate legally enforceable obligations even under budgetary constraints, rather than aspirational commitments left to legislative discretion (Abramovich & Courtis, 2004).

Its most influential normative anchor lies in the International Covenant on Economic, Social and Cultural Rights and the interpretive work of the Committee on Economic, Social and Cultural Rights. Through the concepts of progressive realization, the prohibition of retrogressive measures, and the duty to use the maximum available resources, the focus moves away from a binary enforceable/non-enforceable distinction toward a public justificatory burden: scarcity does not function as a generic excuse, but as a factual constraint that must be governed through enforceable thresholds and reviewable reasons (Committee on Economic, Social and Cultural Rights, 1990, 2000; Abramovich & Courtis, 2004). In parallel, Pisarello emphasizes that effectiveness depends on an institutional web of guarantees—budget, administration, and oversight—so that ambitious catalogues sustained by weak or regressive fiscal structures tend to be normatively fragile (Pisarello, 2007).

Yet this advance leaves open the decisive problem for this article: second-order indeterminacy in remedial design under scarcity. Standards of progressive realization, non-retrogression, and maximum available resources structure review, but they often provide insufficient guidance for choosing among alternative remedial architectures when compliance competes for scarce resources, reshapes budgetary priorities, and faces hard implementation limits. The salient question, then, is not only whether the state has failed to comply with a social right, but which remedial design is institutionally preferable when court orders operate, in practice, as allocation decisions under scarcity (Komesar, 1994).

Comparative evidence on the judicialization of social rights reinforces this concern. Judicial intervention can expand access for some groups while also generating fiscal pressures, concentrating expenditure, and producing inequality between litigants and non-litigants. In health, resource-intensive rulings issued on a predominantly individualized basis can undermine the distributive coherence of the system and divert resources from universal policies toward benefits secured through litigation—especially where access to courts is unequal (Galanter, 1974; Vargas-Peláez et al., 2019).

From the perspective of economic analysis of law, the point is structural: the remedial instrument matters. As a general claim, redistribution through legal rules is typically less efficient than redistribution through the income tax and transfer system; yet it may be defensible as a second-best response when the political–fiscal channel is persistently impaired by blockage, capture, or representational failure. Here, second-best does not denote optimality; rather, it denotes a comparative choice under binding institutional constraints—one that strengthens, rather than relaxes, the requirement to justify remedial design by reference to aggregate effects (Kaplow & Shavell, 1994; Dimick, 2019).

The research gap that organizes this article can thus be stated precisely: a robust normative framework for enforceability exists, but there remains a deficit of criteria for assessing the institutional quality of remedial design under scarcity. Not all constitutionally admissible remedies are equivalent once their effects on equity, fiscal sustainability, incentives, and implementability are taken seriously. Comparative literature on remedies provides relevant building blocks. In cases of systemic, resource-related violations, scholars have emphasized the combination of meaningful participation, explicit normative parameters, and oversight mechanisms that enable sequential correction under incomplete information (van der Berg, 2019). Others have defended judicial monitoring as a legitimate form of remedial escalation in contexts of persistent noncompliance, through accountability structures and task allocation (Maphosa, 2020). Finally, it has been argued that choosing between simple and complex remedies can generate unintended system-level interactions, including competition for institutional attention and risks of agenda capture (Landau, 2019).

3. Courts as regulators under scarcity: democracy, principles, and the budget

If effective rights protection depends on institutions financed through taxation, the constitutional problem cannot be reduced to the abstract legitimacy of judicial review. It shifts to the regulatory role courts assume when their decisions generate fiscal and distributive effects under scarcity. By ordering resource-intensive entitlements, reshaping access rules, or imposing duties of information, coordination, and planning, courts do more than interpret legal norms: they also shape, directly or indirectly, the allocation of public resources and the performance of administrative arrangements operating under binding constraints (Holmes & Sunstein, 1999; Musgrave, 1959; Musgrave & Musgrave, 1989).

Classic objections grounded in democratic legitimacy help mark the outer normative boundaries, but they do not by themselves guide resource-intensive adjudication. Waldron challenges strong-form judicial review under demanding assumptions about the functioning of representative institutions; Dworkin foregrounds requirements of equal concern and respect that are not reducible to aggregate welfare goals. Taken together, these positions supply limits of principle, yet they leave unresolved the decisive question here: how should courts justify remedial architecture when judicial protection operates as an institutional intervention under scarcity (Waldron, 1999, 2006; Dworkin, 1977, 1985).

For that task, an institutional-choice perspective is more operational. Komesar proposes comparing decision-making forums by their comparative advantages under constraints of participation, information, and decision costs. Applied to constitutional adjudication, the focus shifts from "court versus legislature" to a design question: under what conditions is each forum less likely to produce biased, regressive, or non-implementable outcomes, given that courts themselves face structural limits of information and coordination (Komesar, 1994).

Economic analysis of law strengthens this shift in two ways. First, it highlights that the redistributive channel matters: even when distributive aims are shared, redistribution through legal rules is typically less efficient than redistribution through the income tax and transfer system, due to problems of targeting, incentive effects, and administrative costs (Kaplow & Shavell, 1994). Second, it yields a methodological implication: when the political–fiscal channel is persistently impaired—through capture, blockage, or representational failure—judicial intervention may be comparatively defensible given those constraints; but that second-best status increases, rather than relaxes, the burden of justifying remedial design by reference to its aggregate effects on costs, incentives, and distribution (Dimick, 2019; Kaplow & Shavell, 1994).

Where access to justice is asymmetric, that justificatory burden becomes more demanding. Galanter's distinction between repeat players and one-shotters makes plausible that recurrent and organized actors will secure disproportionate gains even under egalitarian rhetoric. In the domain of social rights, this makes it plausible that predominantly individualized remedial architectures concentrate resources on litigants, with indirect effects on those who depend on universal policies (Galanter, 1974). The familiar "activism versus restraint" dichotomy is therefore too coarse: the central issue is not how much a court intervenes, but how it designs the intervention.

The implication for the remainder of the article is straightforward. When judicial protection operates under scarcity and repetitive litigation, constitutional adjudication—where there is a genuine margin for remedial choice—should incorporate a comparative assessment of remedial design that attends to (i) induced administrative costs, (ii) risks of error, and (iii) foreseeable distributional effects associated with patterns of access. These dimensions are developed in Section 3 and operationalized in Section 4 through a second-order standard for justifying remedial architectures under scarcity (Cooter & Ulen, 2016; Musgrave, 1959; Galanter, 1974; Komesar, 1994).

4. Tools from economic analysis of law for thinking about constitutional adjudication

4.1. Total social cost, trade-offs, and the choice of constitutional remedies

The contribution of economic analysis of law to constitutional adjudication is not to replace rights-based reasoning with an efficiency calculus. It is to discipline, on a comparative basis, remedial choice where multiple remedial architectures are legally admissible. In resource-intensive disputes—paradigmatically, social-rights cases—the question is not whether a remedy "protects" in the abstract, but how its design reshapes social costs, implementation capacity, and foreseeable risks under scarcity (Calabresi, 1970; Cooter & Ulen, 2016).

A first useful framework comes from Calabresi. His classic proposal is to compare institutional arrangements by reference to the joint minimization of three categories of costs: (i) prevention costs (the costs of avoiding harm or noncompliance), (ii) harm costs (losses incurred when harm or noncompliance occurs), and (iii) administrative costs (the costs of operating the chosen institutional arrangement) (Calabresi, 1970). This triad is neither a mechanical rule nor an invitation to maximize aggregate welfare at the expense of rights. It functions as a grammar of trade-offs: where no option eliminates the problem, the institutional quality of a remedy depends on whether it reduces salient costs without merely displacing them—opaquely—elsewhere in the system.

For the specific problem of remedial design under scarcity, Cooter and Ulen offer an operational criterion for institutional evaluation tied to procedure and decision-making under imperfect information. They argue that evaluating procedural rules and practices requires measuring social costs, and that institutional efficiency can be expressed as minimizing the sum of administrative costs and error costs:

$$mín\ CS = c_a + c(e)$$

(Cooter & Ulen, 2016, p. 523).

This criterion matters for social-rights adjudication for two reasons. First, the administrative costs of a remedial pattern are rarely marginal: they include managerial burdens, institutional time, docket congestion, inter-institutional frictions, monitoring requirements, and future litigation induced by the design itself (Cooter & Ulen, 2016). Second, error costs are not eliminated by declaring the existence of a right. They depend on the quality of information and on institutional capacity to generate and process it. Cooter and Ulen note that error costs are harder to measure than administrative costs because they presuppose a "standard of perfection," and they emphasize that courts operate with imperfect information—leading to mistakes in applying substantive law—while better information reduces the probability of error (Cooter & Ulen, 2016, p. 524). In technical or polycentric settings, remedial design must therefore ask which architecture improves the informational base and reduces foreseeable errors without rendering implementation unworkable.

This supports a methodological thesis central to the article: not all constitutionally admissible remedies are equivalent once they are evaluated by their institutional performance under scarcity. A remedy may intensify protection in the individual case while increasing (i) administrative costs—if it generalizes repetitive litigation or requires extensive supervision—and/or (ii) error costs—if it forces decisions under informational deficits or without mechanisms to structure the production, verification, and iterative review of relevant information (Cooter & Ulen, 2016). Economic analysis of law does not determine whether a right exists or define its first-order content. It requires that, where a genuine margin for choice exists, the remedial instrument be justified considering these trade-offs.

The economic analysis of litigation complements this account. In Cooter and Rubinfeld's framework, litigation can constitute an institutional loss when strategic structure and litigation costs block cooperative solutions that would conserve system resources, even when each party behaves rationally from its own standpoint (Cooter & Rubinfeld, 1989). The point here is not to advertise a model as rhetorical shorthand, but to draw a consistent implication: procedural and remedial design reshapes incentives to settle, cooperate, or litigate, thereby affecting system load and the sustainability of adjudication as a dominant pathway to effective protection.

A further dimension—often underestimated in social-rights remedial debates—concerns the foreseeable distributional effects of remedial patterns. Under scarcity, adjudication does not only allocate protection; it can also reorder priorities and generate indirect displacement. From the perspective of public finance, the budget reveals opportunity costs: protecting one entitlement entails choosing among competing uses of limited resources, with distributive implications that do not end with the individual case (Musgrave, 1959; Musgrave & Musgrave, 1989). From the sociology of litigation, asymmetric access makes it plausible that effective benefits will concentrate among those who can litigate repeatedly (repeat players), while those who depend on baseline provision (one-shotters) are left behind—turning access to process itself into a de facto distributive criterion (Galanter, 1974). These considerations matter here because the

relevant "cost" is not only fiscal: it is also the distributional cost of architectures that, by design, select winners and losers through barriers to access.

Accordingly, this section adopts a minimal, strictly instrumental framework for comparatively evaluating the institutional quality of remedies under scarcity. The evaluation is organized around three interrelated dimensions:

1. Induced administrative costs: implementation burdens, monitoring demands, future litigation, and inter-institutional frictions associated with a remedial pattern (Cooter & Ulen, 2016).

2. Error costs: the probability of incorrect decisions linked to imperfect information and the absence of rules that improve the production, verification, and iterative review of relevant information (Cooter & Ulen, 2016, p. 524).

3. Foreseeable distributional effects: who can effectively access protection, who bears the costs, and which risks of access-based bias or regressive displacement are plausible under scarcity (Musgrave, 1959; Galanter, 1974; Kaplow & Shavell, 1994).

These dimensions do not replace the language of rights. They make remedial choice reviewable when protection requires expenditure, administrative coordination, and decisions under uncertainty: they force an account of why one remedial architecture is preferable to another not only considering its normative aims, but also in light of its foreseeable institutional performance.

4.2. Incentives, moral hazard, and patterns of judicialization

Judicial decisions do not only allocate protection ex post; they also generate ex ante effects by reshaping the incentives of public administrations, providers, and potential litigants. In social-rights adjudication—where judicial protection often takes the form of resource-intensive entitlements—this dimension is decisive because a remedy does not merely resolve a discrete dispute: it sets expectations and can reposition litigation as a dominant (or residual) route to access. Economic analysis of law adds a general caution here: legal rules, including procedural and remedial arrangements, create incentives and costs that should be assessed by their aggregate effects, not only by their case-level correctness (Cooter & Ulen, 2016).

A first structural problem concerns asymmetries of access to the justice system. Galanter's classic distinction between repeat players and one-shotters suggests that recurrent, organized litigants—benefiting from strategic learning, accumulated information, and specialized counsel—tend to enjoy systematic advantages over sporadic participants with limited resources (Galanter, 1974). Transposed to social-rights adjudication, this mechanism makes it plausible that some actors are more likely to translate normative standards into effective benefits, while others—though formally entitled to the same right—are screened out by barriers of access, information, or cost. Under scarcity, this dynamic is not neutral: access to litigation itself can become a de facto distributive criterion.

From this perspective, remedial design matters as much as the recognition of the right. Immediate and highly individualized mandates, especially when replicated across structural settings, can entrench the expectation that courts are the primary gateway to protection, increasing future litigation and weakening incentives for administrative reform or universal provision. In economic analysis of law terms, such patterns may raise induced administrative costs (case-management burdens, docket congestion, monitoring demands, and inter-institutional frictions) as well as aggregate error costs (decisions taken

on partial information, without mechanisms for systematic assessment of cumulative effects) (Cooter & Ulen, 2016).

Comparative evidence on the judicialization of health in Latin America captures this ambivalence. Qualitative studies suggest that individualized rulings may correct severe failures in urgent cases, yet they also tend to concentrate resources in high-cost litigation and to shift funds away from preventive or broad-coverage policies toward benefits secured through litigation—especially where access to courts is unequal (Vargas-Peláez et al., 2019). The institutional issue is not the correctness of the isolated case, but the aggregate equilibrium that emerges when this pattern becomes dominant: intensive protection for litigants and relative fragility for those who depend on baseline channels.

These dynamics are also reflected in constitutional jurisprudence across several jurisdictions. Courts have increasingly been required to decide disputes concerning access to high-cost medical treatments or services not covered by existing public policies. For example, the Colombian Constitutional Court addressed structural failures in the health system in Judgment T-760/2008. The Brazilian Supreme Federal Court examined the State's obligation to provide high-cost medicines not incorporated into public health programs in Extraordinary Appeal (RE) 566471. Comparable issues have also arisen in Chilean constitutional litigation, where the Chilean Supreme Court, in Case Rol No. 43.250-2017, ordered the provision of a high-cost medication through a constitutional protection action (recurso de protección). These cases illustrate the institutional tensions that arise when courts design remedies with significant distributive consequences under conditions of fiscal scarcity.

From an institutional perspective, such patterns can be framed as a form of moral hazard. When court orders secure costly entitlements without clear general rules or prioritization criteria, public agencies may face weak incentives to invest in systemic reform, relying instead on case-by-case adjustments produced through litigation. Analogously, providers or intermediaries may be incentivized to route claims through courts rather than through administrative prioritization processes. This point is not a normative objection to judicial protection, but a design warning: without adequate institutional architecture, remedies may induce strategic behavior that erodes sustainability and equity.

The economic analysis of litigation reinforces this point. In Cooter and Rubinfeld's model, procedural structure can push parties toward socially costly litigation equilibria even when each party's decision appears rational from its own perspective (Cooter & Rubinfeld, 1989). Applied to remedial design, this suggests that certain arrangements—for instance, open-ended and repeatable orders issued without general criteria—may consolidate persistent litigation dynamics that consume institutional resources without resolving the structural conditions generating the disputes. The reference is not meant to impose a single conceptual label, but to underscore an implication consistent with economic analysis of law: procedural and remedial architecture shapes both the form and the volume of future disputes.

This analysis connects directly to debates about redistribution through adjudication. Kaplow and Shavell's general claim—that redistribution through legal rules is typically less efficient than redistribution through the income tax and transfer system—does not imply that adjudication is always undesirable (Kaplow & Shavell, 1994). Under conditions of political gridlock, capture, or persistent representational failure, judicial intervention may be comparatively defensible given binding constraints, even if it is not the first-best instrument. Yet that second-best status increases the justificatory burden: where adjudication substitutes for or complements the political–fiscal channel, remedial choices should be defended in light of their effects on incentives, access patterns, and institutional sustainability (Dimick, 2019).

This yields an analytical distinction that structures the remainder of the article. A predominantly individualized pattern (r^{I})—replicable, case-by-case orders—tends to deepen reliance on litigation as a gateway to protection and to amplify risks of access bias and repetitive litigation. By contrast, a design with systemic components (r^{S})—general rules, information duties, and mechanisms of sequential review and course correction—aims to reduce that dependence by redirecting incentives toward more stable and less costly long-run solutions, even if it entails higher up-front administrative costs (van der Berg, 2019; Maphosa, 2021; Landau, 2020).

4.3. Information, bounded rationality, and the court's epistemic limits

When social-rights adjudication requires resource-intensive decisions, inter-institutional coordination, and technical assessment, the institutional performance of a remedy depends critically on the information available and on the court's capacity to process it. In such settings, the constraint is not incidental but structural: courts decide under time pressure, incomplete information, and cognitive limits. The problem, therefore, is not only normative; it is epistemic.

Research on human judgment provides a strong starting point. Kahneman, Sibony, and Sunstein show that even among highly trained decision-makers, systematic biases persist and—crucially—so does noise: unwanted variability across decisions that should be equivalent (Kahneman et al., 2021). In constitutional adjudication, that variability is not trivial. Where disputes are technically similar and replicable—as in structural social-rights litigation—inconsistency can erode predictability, invite strategic litigation, and generate erratic patterns of public spending under scarcity.

A further institutional constraint compounds this diagnosis: courts do not control the primary production of relevant information. North's institutional account emphasizes that "rules of the game" shape who produces information, under which incentives, and at what cost—affecting cooperation, learning, and performance (North, 1993). In litigation, much of the information that matters is supplied by parties or by public bodies with strategic stakes, introducing asymmetries, partial signals, and risks of adverse selection. Without an explicit architecture of information duties, judicial reasoning is likely to rest on fragmented inputs and to reproduce predictable decision shortcuts.

From the standpoint of economic analysis of law, this limitation maps directly onto error costs. As Cooter and Ulen emphasize, errors do not disappear once a right is affirmed; they depend on the quality of available information and on institutional capacity to generate, evaluate, and iteratively review it. Where information is imperfect and no clear benchmark of the "correct decision" exists, procedural and remedial design becomes decisive for reducing error without imposing prohibitive administrative costs (Cooter & Ulen, 2016).

Comparative evidence reinforces the point. A quasi-experimental study of health litigation in Brazil examines whether incorporating health-technology assessment altered judicial decision patterns. The main finding suggests that even when technical inputs were available, courts continued to privilege individualized signals—particularly physicians' prescriptions—over systemic criteria of prioritization and cost-effectiveness. The result is not best explained by bad faith, but by the absence of a remedial design that structures deference, information production, and review (Wang et al., 2020). The use of this study is methodological: it illustrates how, absent an epistemic architecture, even sophisticated technical information can remain systematically underutilized.

The difficulty intensifies in polycentric settings, where small changes at one node generate cascading effects elsewhere. In such environments, highly detailed court orders can increase—rather than reduce—

error risks and inter-institutional frictions by demanding levels of coordination and technical knowledge that exceed a court's reasonable epistemic perimeter. The problem, then, is not judicial intervention per se, but the form that intervention takes.

At this point, a conceptual bridge from bounded rationality to institutional design becomes useful. Cooter's akrasia model formalizes how a gap may arise between deliberative judgment and effective choice under certain conditions, offering a lens for thinking about decision failures in collective and institutional settings as well (Cooter, 1990). Without mechanically importing the model, the intuition is straightforward: decision structure can amplify—or mitigate—predictable shortcomings in judgment.

A convergent insight appears in the political economy of development. Rodrik argues that effective institutional interventions are those that fit actual state capabilities, rather than presupposing omniscient administrations or capacities that do not exist (Rodrik, 2007). Applied to constitutional adjudication, this implies that a remedy may be normatively ambitious yet institutionally fragile if it presupposes informational, coordination, or implementation capacity beyond reasonable reach—producing noncompliance, formalistic simulation, or regressive displacement of resources.

These considerations lead to a central notion for this article: the epistemic reasonableness of remedies. A remedy is epistemically reasonable when it explicitly recognizes limits of information and capacity and adjusts its architecture accordingly. This does not entail automatic deference or abandoning rights protection; it entails designing for uncertainty. In operational terms, comparative work on systemic remedies converges on four features that reduce epistemic risks under scarcity:

1. Verifiable, relevant information: a clear specification of what information must be produced, by whom, on what timeline, and under which criteria.

2. Broadening the informational base: mechanisms that reduce exclusive reliance on party-supplied inputs through technical expertise, hearings, or structured participation.

3. Allocating tasks by comparative advantage: courts set verifiable objectives and standards of review; administrations design the technical means.

4. Sequential review and course correction: reporting milestones and mechanisms to revise the remedy considering new information and institutional learning (van der Berg, 2019; Maphosa, 2020; Landau, 2019).

5. Judicial regulatory[3] reasonableness under scarcity

5.1. Judicial regulatory reasonableness under scarcity as a second-order standard for remedial design

The preceding analysis locates this article's central problem at the level of institutional design in adjudication: when judicial protection of rights requires public expenditure, administrative coordination,

[3] The qualifier *regulatory* is not used here to refer to the legislature's lawmaking authority or to the State's capacity for public policy design. Rather, it denotes the fact that certain judicial remedies functionally operate as interventions in allocation and coordination under conditions of scarcity, and therefore require a specific standard of institutional justification.

and decision-making under uncertainty, the decisive question is not only whether a legal obligation exists in the abstract, but how to structure a remedy whose implementation remains governable and reviewable under binding constraints. The cost-of-rights thesis makes explicit that effective protection depends on collectively financed institutions, while public finance underscores that expenditure-inducing decisions inevitably operate within a space of trade-offs and opportunity costs with distributive implications (Holmes & Sunstein, 1999; Musgrave, 1959; Musgrave & Musgrave, 1989). Institutional theory, in turn, emphasizes that rules and organizations shape information production, transaction costs, and the prospects for cooperation—directly affecting the feasibility of any remedial design (North, 1993).

Against this background, the article proposes judicial regulatory reasonableness under scarcity as a second-order standard for evaluating and justifying remedial choices in resource-intensive disputes. It is "second-order" in a precise sense: it presupposes that the court has already established a relevant legal position (first-order) and shifts the inquiry to the institutional quality of remedial architecture—attending to informational burdens, fiscal traceability, foreseeable distributional effects, and implementation feasibility. The term judicial is used here in a functional and inclusive sense, covering both constitutional courts and other apex courts that, in adjudicating rights, design remedies with regulatory, fiscal, and distributive consequences under scarcity.

Two clarifications help avoid common misunderstandings. First, this standard is not a proportionality test nor a new form of substantive balancing: it operates once a legal duty has been affirmed and focuses on remedial structure where judicial protection triggers allocation under scarcity. Second, it is not an invitation to "optimize" rights or translate them into an efficiency calculus. Its function is to discipline, comparatively, the choice among legally admissible remedial alternatives by requiring explicit attention to the administrative costs and error risks associated with a given mode of intervention, as well as to its fiscal and distributive externalities (Calabresi, 1970; Cooter & Ulen, 2016; Komesar, 1994).

Operationally, judicial regulatory reasonableness under scarcity responds to a recurrent indeterminacy in adjudicative practice: principles such as "maximum available resources" or "reasonableness" can orient review, yet they do not by themselves determine which designs minimize foreseeable risks of (i) access-based distributive bias, (ii) opaque fiscal reallocation, and (iii) implementation failure where remedies must operate under uncertainty. The standard does not displace those principles; it translates them into a comparative, institutional-design register focused on governability and the reviewability of judicial intervention. In that sense, it connects with the literature on structural remedies and judicial monitoring as escalated responses to persistent noncompliance, insofar as those approaches emphasize information production, normative explicitness, and sequential course correction as conditions of compliance under polycentricity and capacity constraints (van der Berg, 2019; Maphosa, 2020; Landau, 2019).

Minimal operational definition. For purposes of this article, a remedy will be considered reasonable under scarcity if the statement of reasons enables a reviewable assessment of why its architecture—not merely its objective—is preferable among legally admissible alternatives, given relevant constraints. This requirement is termed design auditability: the possibility of reconstructing ex post the remedy's institutional rationality from its premises, the information it requires, the trade-offs it identifies, and the adjustment mechanisms it provides.

5.2. Three-dimensional structure of the standard: rights, fiscal capacity, and institutional–epistemic rationality

Judicial regulatory reasonableness under scarcity adopts a three-dimensional structure because remedial design simultaneously affects three interdependent planes: (i) the right's enforceable threshold and distributive equity, (ii) fiscal governability, and (iii) institutional feasibility under imperfect information and limited capacity. Evaluating only one of these planes tends to yield fragile remedies: an architecture may be normatively ambitious yet unimplementable; fiscally prudent yet regressive relative to the enforceable threshold; or technically sophisticated yet unable to correct access-based distortions. The standard is therefore not conceived as a sequence of "steps," but as an integrated comparison of institutional performance under binding constraints (Komesar, 1994).

(1) Rights dimension (D): enforceable threshold, substantive equality, and non-retrogression. A remedy is reasonable only if it secures an effective floor compatible with substantive equality and remains within the parameters of progressive realization and the prohibition of retrogressive measures. Scarcity may modulate pace, modalities, or sequencing, but it cannot justify denial of the enforceable core or retrogression absent heightened justification (Committee on Economic, Social and Cultural Rights, 1990, 2000). Within this dimension, the standard requires anticipating a distributive problem typical of resource-intensive judicialization: litigation access may operate as a de facto distributive criterion, favoring those able to sustain recurrent claims while leaving behind those who depend on baseline channels of provision (Abramovich & Courtis, 2004; Pisarello, 2007; Galanter, 1974). Reasonableness review therefore includes the question whether the remedy builds anti-bias safeguards and prioritization criteria consistent with heightened duties in contexts of vulnerability.

(2) Fiscal and macro-institutional dimension (F): governability of induced expenditure and traceability of trade-offs. Any judicial decision ordering costly entitlements affects resource allocation, and therefore opportunity costs and distribution. Ignoring that effect does not eliminate the cost; it renders it opaque and potentially regressive by shifting the decision to silent budget reallocations (Holmes & Sunstein, 1999; Musgrave, 1959). In this dimension, the standard does not impose automatic deference to the executive. It requires institutional responsibility for the governability of induced expenditure: whether the remedy generates recurrent, non-plannable fiscal obligations; whether it creates intertemporal risks; and whether it plausibly produces regressive displacement of other basic entitlements (Musgrave & Musgrave, 1989). The key question is whether design converts repeated judicial pressures into more traceable and reviewable rules or processes or instead accumulates case-by-case obligations without visibility or control.

(3) Institutional–epistemic dimension (E): feasibility under imperfect information and limited capacity. Courts decide under incomplete information and capacity constraints, especially in technical and polycentric domains. Work on human judgment highlights that even among highly qualified decision-makers there is unwanted variability—noise—that undermines consistency; this makes it particularly important to structure decision-making to reduce dependence on partial signals and increase comparability (Kahneman et al., 2021). Institutional theory, in turn, emphasizes that rules of the game shape incentives and information availability, affecting transaction costs and the prospects for cooperation among actors (North, 1993). On this plane, a remedy may be normatively correct and fiscally attentive yet still fail if it presupposes information, coordination, or implementation capacities that do not exist. Reasonableness under scarcity therefore requires an epistemically conscious design: (i) task allocation by comparative advantage (courts set verifiable objectives; administrations design technical means), (ii) explicit duties to produce relevant, verifiable information, and (iii) mechanisms of sequential review and course correction

that enable learning under uncertainty—features emphasized in the comparative literature on systemic remedies and judicial monitoring (Rodrik, 2007; van der Berg, 2019; Maphosa, 2020; Landau, 2019).

5.3. Matrix of judicial regulatory reasonableness under scarcity

The matrix of judicial regulatory reasonableness under scarcity is a second-order instrument designed to discipline choice among constitutionally admissible remedial architectures when judicial protection requires public expenditure, administrative coordination, and decision-making under imperfect information. Its function is not to redefine the substantive content of the right or to introduce an efficiency criterion, but to make the justification of remedial design reviewable in light of structural constraints of resources, information, and institutional capacity (Holmes & Sunstein, 1999; Musgrave, 1959; Komesar, 1994).

The matrix is triggered when at least three sufficient conditions are present: (C1) resource intensity—compliance induces significant public expenditure or requires substantial administrative reordering; (C2) a genuine plurality of constitutionally permissible remedial architectures; and (C3) a non-trivial systemic risk arising from repeated noncompliance or from patterns of litigation that are structurally replicable (Musgrave, 1959; Galanter, 1974; Vargas-Peláez et al., 2019). Under these conditions, adjudication operates, in effect, within a space of allocation under scarcity, shifting the justificatory demand from the affirmation of the right to the institutional architecture of the remedy.

Table 1. Second-Order Legal Review Standard: Design-Audit Matrix for Remedies under Scarcity

Trigger (apply when): (C1) resource intensity; (C2) plurality of constitutionally admissible remedial architectures; (C3) systemic risk from repetition/noncompliance or structurally replicable litigation.

Axis	Minimum reviewable justification (design-audit prompts)	Institutional inadmissibility (negative criteria)
D — Rights (enforceable threshold & equity)	Does the architecture secure an enforceable floor compatible with substantive equality and non-retrogression, and include safeguards so that litigation access does not function as a *de facto* distributive criterion?	**T1:** Effectiveness structurally depends on litigation access without anti-bias safeguards, or foreseeable retrogression/indirect displacement is left unaddressed.
F — Fiscal & distributive governability	Does the design make induced expenditure traceable and governable over time—distinguishing one-off from recurrent burdens and rendering trade-offs visible rather than shifting them to opaque reallocations?	**T2:** It induces recurrent, non-plannable case-by-case obligations without traceability, review points, or visibility of trade-offs.
E — Institutional feasibility (information & capacity)	Does the remedy allocate tasks by comparative advantage, impose explicit duties to produce relevant, verifiable information, and incorporate mechanisms for sequential review and course correction under uncertainty?	**T3:** It presupposes information, coordination, or capacity that does not exist and lacks correction mechanisms, making non-implementation or merely formal compliance plausible.

Burden-shift rule (r^I vs r^s): As repetition/noncompliance and litigation-dependent access increase, the burden to justify a predominantly individualized pattern (r^I) rises, and the justificatory burden to incorporate systemic components (r^s)—general rules, information production, and sequential correction—decreases.

The standard is organized around three interdependent axes, each of which must meet minimum thresholds. A systematic deficit in any one axis renders the design institutionally fragile even if the other two are robust.

(D) Rights (enforceable threshold and equity). The remedy must secure an enforceable floor compatible with substantive equality, avoiding a situation in which access to litigation functions as a de facto distributive criterion. Under scarcity, the matrix makes visible the risk that predominantly individualized patterns concentrate protection among repeat litigants while leaving behind those who depend on baseline channels of provision (Galanter, 1974). Reasonableness therefore requires safeguards against access-based bias and against plausible risks of retrogression or indirect displacement (Committee on Economic, Social and Cultural Rights, 1990, 2000; Abramovich & Courtis, 2004).

(F) Fiscal and distributive governability. Any resource-intensive judicial order affects the budget and reveals opportunity costs. Ignoring that effect does not eliminate cost; it makes it opaque and potentially regressive (Holmes & Sunstein, 1999; Musgrave & Musgrave, 1989). On this axis, reasonableness does not entail automatic deference to the executive; it entails a justificatory responsibility for the governability of induced expenditure. The reasons should distinguish one-off from recurrent burdens, avoid the accumulation of non-plan-based case-by-case obligations, and render visible the distributive trade-offs associated with the chosen architecture.

(E) Institutional feasibility (information and capacity). Courts decide under imperfect information, cognitive limits, and constrained coordination capacity, especially in technical and polycentric domains. Work on decisional noise and bounded rationality shows that these constraints are structural rather than contingent (Kahneman et al., 2021). A remedy is institutionally feasible only if it recognizes those limits and adjusts its design accordingly: allocating tasks by comparative advantage, imposing explicit duties to produce relevant information, and incorporating mechanisms for sequential review and course correction that enable institutional learning under uncertainty (North, 1993; Rodrik, 2007; van der Berg, 2019; Maphosa, 2021; Landau, 2019).

The matrix also incorporates a rule shifting the justificatory burden: the more repeated the noncompliance and the more structurally dependent access becomes on litigation, the heavier the burden to justify a predominantly individualized pattern (r^I), and the lower the burden to incorporate systemic components (r^s) oriented toward general rules, information production, and sequential correction (Landau, 2019). The rule does not impose structural remedies by default; it requires showing why the selected architecture will not entrench access bias, opaque fiscal reallocations, or institutional fragility.

As a closing screen, the standard includes negative criteria of institutional inadmissibility. The architecture should be rejected or redesigned if: (T1) its effectiveness structurally depends on litigation access without anti-bias safeguards; (T2) it induces recurrent, non-plan-based obligations without traceability or review; or (T3) it presupposes information or capacities that do not exist and lacks correction mechanisms, making non-implementation or merely formal compliance plausible (Holmes & Sunstein, 1999; North, 1993; Kahneman et al., 2021).

6. Illustrative application of the standard: remedial design under scarcity

Decision T-760/2008 is used here as a case scenario because it is particularly suited to activate a second-order analysis of remedial design under scarcity. Beyond correcting individual situations, the decision adopted orders whose scope exceeded the concrete case and extended to the institutional arrangements of the health system (Constitutional Court of Colombia, 2008). This characterization serves a strictly analytical purpose: to activate the standard's application, not to assess the decision's empirical effectiveness or its substantive correctness.

The conditions required to trigger the matrix are present. (C1) The protection ordered is resource intensive, as it affects both public expenditure and the administrative organization of the health system (Constitutional Court of Colombia, 2008). (C2) There is a genuine plurality of constitutionally admissible remedial architectures, ranging from predominantly individualized orders to configurations incorporating general rules, informational duties, and review mechanisms. (C3) The decision is embedded in a pattern of repetitive litigation, making its aggregate effects on equity, budgetary allocation, and institutional capacity foreseeable—especially in contexts of asymmetric access to justice (Galanter, 1974).

Under these conditions, adjudication operates within a space of resource allocation under scarcity, shifting the justificatory demand toward remedial design. Application of the matrix thus reframes the decisional question: once the right has been affirmed (first order), the relevant issue is which architecture is comparatively defensible under scarcity. Within the rights dimension (D), the standard makes visible the risk that a predominantly individualized pattern turns access to litigation into a de facto distributive criterion—concentrating protection among repeat litigants while leaving behind those who rely on baseline provision (Galanter, 1974). The matrix does not exclude individual orders on grounds of urgency, but it requires justification of how such exceptional valves are prevented from becoming the dominant mode of access.

Within the fiscal and macro-institutional dimension (F), the analysis moves from abstract cost considerations to the governability of induced expenditure. A repeated r^{I} pattern tends to aggregate obligations on a case-by-case basis without traceability or planning, making opaque reallocations with unintended distributive effects plausible. The standard requires showing whether the chosen architecture converts judicial pressure into plannable and reviewable processes—through general rules or informational duties—or instead entrenches a fragmented allocation that is difficult to control intertemporally.

Within the institutional–epistemic dimension (E), the matrix makes explicit a structural constraint: courts decide under imperfect information and limited capacity, particularly in technical and polycentric domains. Reasonableness under scarcity therefore requires a design that allocates tasks by comparative advantage, structures duties to produce relevant information, and provides mechanisms for sequential review and course correction. The analytical effect is not to label outcomes as correct or incorrect, but to identify foreseeable risks of non-implementation or merely formal compliance when these features are absent.

Applied to the case scenario, the matrix does not yield a substantive verdict on the judgment; rather, it shifts the justificatory burden. Under conditions of scarcity and repetition, a predominantly individualized remedy faces an increasingly demanding institutional justification, whereas the incorporation of systemic components becomes comparatively more defensible as a means to reduce access bias, fiscal opacity, and epistemic fragility. The value of the exercise lies in making this displacement explicit, not in evaluating empirical outcomes.

A comparative reference to the U.S. Supreme Court's decision in Brown v. Plata (2011) confirms the transferability of this second-order analysis where judicial protection operates under scarcity. In that case, once the constitutional violation arising from prison conditions incompatible with the Eighth Amendment had been established, the decisive controversy shifted to remedial architecture: the Court upheld a structural order requiring population reduction to a verifiable threshold (137.5% of design capacity) on the premise that, absent such adjustment, no effective remedy existed for systemic deficiencies in medical and mental health care (Brown v. Plata, 2011). At the same time, the design preserved state discretion regarding the means of implementation—without mandating releases. The analytical value of the precedent lies not in its outcome, but in its design rationale: verifiable objectives, administrative implementation discretion, and an explicit justification of trade-offs under epistemic and budgetary constraints. These features reinforce the requirement of design auditability when a real space of remedial choice exists under scarcity (Brown v. Plata, 2011).

7. Conclusions

The analysis developed in this article addresses a persistent problem that has accompanied the enforceability of social rights: not whether they generate legal obligations, but the absence of criteria to evaluate the institutional quality of judicial remedies when compliance operates under scarcity. By shifting the focus from the abstract affirmation of the right to the architecture of the remedy, the article shows that resource-intensive judicial protection cannot be adequately understood as a purely interpretive exercise. It is, rather, a form of institutional intervention whose fiscal, distributive, and epistemic consequences are structurally relevant. The discussion therefore does more than reframe the problem; it enables a mode of comparison among remedies that renders evaluable—and contestable—the institutional burdens that typically remain outside ordinary constitutional reasoning.

The article's substantive contribution lies at a precise disciplinary intersection. From economic analysis of law, it introduces a way of examining judicially induced intervention that attends to administrative costs, error risks under imperfect information, and foreseeable distributive effects—without reducing legal reasoning to an efficiency calculus or displacing the language of rights. From constitutional law, it provides a criterion for thinking about judicial reasonableness under scarcity that does not collapse into substantive proportionality standards or general formulas such as "maximum available resources," but instead allows for a comparative justification of remedial instruments. This contribution is neither doctrinal nor merely descriptive; it is analytical and transferable, insofar as it enables the evaluation of different remedial designs based on their expected institutional performance.

The article's methodological value resides in proposing a second-order standard aimed at disciplining judicial decision-making where there is genuine room for remedial choice. The notion of design auditability—understood as a requirement that reasons be reconstructible in terms of their premises, information, and trade-offs—addresses a recurrent deficit in adjudicative practice: the difficulty of rationally controlling remedies that, while constitutionally admissible, produce unintended aggregate effects under scarcity. The standard neither redefines the substantive content of rights nor prescribes outcomes. Instead, it renders visible and assessable the institutional architecture of judicial intervention through an integrated reading of rights thresholds, fiscal governability, and institutional–epistemic feasibility.

The article also adopts an explicit stance of epistemic candor. It does not claim that judicial adjudication is always preferable to the political-fiscal channel, nor that remedies with systemic components are normatively superior in the abstract. Nor does it purport to derive strong causal inferences or automatic

generalizations about empirical performance. The reference to second-best reasoning does not defend judicialization as an ideal substitute for fiscal politics; rather, it underscores that when adjudication operates as a constrained alternative due to gridlock, capture, or representative failures, the justificatory burden on remedial design must be higher, not lower—in terms of traceability, incentive structures, and aggregate effects. These limits do not weaken the contribution; they render it methodologically responsible and compatible with demanding standards of academic review.

Finally, the proposed framework opens clear avenues for further research and analysis. An immediate extension is the construction of comparative designs examining how induced litigation, decisional consistency, and implicit budgetary reallocation vary between predominantly individualized patterns and architectures with systemic components. On the normative plane, the standard offers criteria to guide judicial reasoning under scarcity without imposing political agendas or predetermined solutions: it requires that remedial choices be justified not only by their objectives, but by their foreseeable institutional performance. In this sense, judicial regulatory reasonableness under scarcity is presented as an analytical tool to improve the quality of constitutional review in settings where rights, budgets, and institutional capacity are unavoidably intertwined.

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