

## *Grootboom* and the One-Case (or Country?) Canon on Social Rights

David Landau (Florida State University College of Law)

As many scholars have noted, constitutional rights to things like health care, housing, and food are critically important to courts in the developing world even though they are basically absent from U.S. constitutional law and discourse.<sup>1</sup> That is, the key debate in the rest of the world is not on whether social rights should be included in constitutions – they are almost automatically included. It is on how to enforce these rights so as to make them effective.

This has created an important debate on methods of enforcement. I note here that this debate has been dominated largely by a single case (*South Africa v. Grootboom*<sup>2</sup>), and at a broader level by the work of a single court (the South African Constitutional Court). The case uses a dialogue-based or weak-form method of enforcement, where the court points out that the state has violated the constitutional right to housing by failing to prioritize low-income people with immediate need, but refuses to tell the parliament what kinds of steps it needs to take in order to fill that gap. The case is celebrated, especially by US constitutional theorists, as potentially successfully hitting two separate theoretical concerns – the need to make social rights “real” and not just paper rights, and the need to lessen the tension between judicial review and democracy, which is said to be at its height when enforcing these kinds of rights.

In this paper, I first summarize *Grootboom* and the broader jurisprudence of the South African court (Part I), and then explain why that model has not been followed by other courts around the world (Part II). In other words, *Grootboom* forms a strange one-case canon, critically important in academic theory but un-influential in practice. In the real world, most courts which have developed a vibrant social rights jurisprudence have focused on other mechanisms, including individualized enforcement, injunctions in order to stop movements away from the status quo, and, in rarer cases, full-on structural injunctions. This appears to be because of two major factors – doubts about the efficacy of the weak-form model vis-a-vis many configurations of political institutions in the developing world, and a marked lack of remedial creativity in most court systems. Finally, in Part III I reflect a little about what the continuing dominance of *Grootboom*, despite its practical unimportance, means. It suggests that comparative constitutional law, at least in the United States, continues to be dominated by the search for answers to theoretical puzzles that stem from U.S constitutional law, such as the counter-majoritarian difficulty. This aim is clearly valuable, but the field might be well-served by focusing more on the theoretical and practical problems that occur in the countries generating comparative jurisprudence.

---

<sup>1</sup> See, e.g., SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2008); LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH (Alicia Ely Yamin & Siri Gloppen, ed., 2011); COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 83, 97 (Roberta Gargarella et al. eds., 2006).

<sup>2</sup> See *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC).

## I. The Focus on *Grootboom* and South Africa

Few fields have been as dominated by a single case as the literature on social rights enforcement; the case has received an extraordinary amount of attention in the scholarly literature. And much of the attention that has not focused on *Grootboom* itself has focused on a handful of other well-known cases from South Africa.

*Grootboom* arose when a group of residents living in a squatter settlement moved onto land earmarked for low-cost housing, and were evicted by local authorities. The group sued, arguing that they had a right to immediate access to dignified housing under the South African constitution. The South African Constitutional Court held that the political branches in South Africa had indeed violated the constitution by failing to develop a housing plan that would meet the immediate needs of the poorest people most in need of assistance, like the plaintiff.<sup>3</sup> But the Court refused to order an individualized remedy for the plaintiffs, such as an order that the state provide them with housing – the constitution did not create a right to housing “immediately upon demand.”<sup>4</sup> Nor did the Court give the details of such a plan and require the political branches to adopt it, or try to implement the plan itself. Instead, it stated that the political branches had the obligation to “devise and implement a coherent, coordinated program” and that a “reasonable” part of the total housing budget had to be reserved for those in desperate, immediate need for housing.<sup>5</sup> The Court appeared to be concerned that it would lack the legitimacy and capacity to issue a stronger order.<sup>6</sup>

A prominent group of American constitutionalists lauded the decision as finding a way to reconcile two imperatives previously thought irreconcilable by most – the enforcement of the detailed social rights now found in most constitutions and the assurance that courts do not overstep their bounds of democratic legitimacy and capacity. Mark Tushnet wrote that the Court’s work constituted a new kind of judicial review, “weak form review,” that allowed courts to judicially enforce these rights without involving them in complex public policy decisions or letting them run roughshod over the legislature.<sup>7</sup> In other words, the Court gave the right to housing “some judicially enforceable content,” but at the same time, gave “legislatures an extremely broad range of discretion about providing” the right.<sup>8</sup> In a similar vein, Cass Sunstein wrote that the Court had effectively “steer[ed] a middle course” between holding socio-economic rights nonjusticiable and holding them to “create an absolute duty” to provide housing or food or health care for everyone who needs it.<sup>9</sup> Instead, the Court had enforced the right to “promot[e] a certain kind of deliberation, not by preempting it, as a result of directing

---

<sup>3</sup> *Government of the Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC).

<sup>4</sup> *Id.* at ¶ 95.

<sup>5</sup> *Id.* at ¶¶ 92, 95.

<sup>6</sup> See TUSHNET, *supra* note **Error! Bookmark not defined.**, at 243 (noting that the Court used “the language of nonjusticiability” but “went on...to enforce the relevant social welfare right).

<sup>7</sup> See *id.* at 242-44.

<sup>8</sup> *Id.*

<sup>9</sup> SUNSTEIN, *supra* note **Error! Bookmark not defined.**, at 233.

political attention to interests that would otherwise be disregarded in ordinary political life.”<sup>10</sup>

It is important to emphasize that these comments were aimed at accommodating enforcement of social rights to important problems in U.S. constitutional theory. A line of scholarship by American academics has long argued that courts lack both the capacity and democratic pedigree to enforce social rights;<sup>11</sup> these rights are different from ordinary rights in degree if not in kind. Enforcement of these rights might require that the judge order the state to provide people with goods or services, which would raise the specter of “the courts running everything – raising taxes and deciding how the money should be spent.”<sup>12</sup> Judges lack the democratic legitimacy to carry out this kind of policymaking, and they lack the capacity to do so. Courts are unsuited to decide where to spend the state’s limited resources, and they will have trouble giving precise content to vague rights of the sort of the right to food or housing.<sup>13</sup> Fuller’s observation that courts perform poorly when adjudicating “polycentric” issues is particularly applicable to socioeconomic rights; they have an inherent “[r]aging indeterminacy.”<sup>14</sup> The result of all this is that courts would be unlikely, in practice, to actually enforce socio-economic rights: they would be unwilling to incur the wrath of the political branches or to fulfill undertakings located so far beyond their own capacity.<sup>15</sup> In contrast, Sunstein and Tushnet argued that if done right, under the *Grootboom* rubric, social rights enforcement could avoid causing insurmountable problems of capacity and democratic legitimacy.

The broader work on South African social rights enforcement tends to reinforce the overarching message of the literature on *Grootboom*: social rights enforcement is a plausible response to the counter-majoritarian difficulty and related critiques of the capacity of courts, if undertaken in a sufficiently dialogical manner.<sup>16</sup> For example, the Court’s *Soobramoney* decision, where it refused to order individualized treatment for an individual dying of kidney failure is also seen as emblematic as an example of judicial self-restraint. The Court emphasized (1) the limited resources of the state, (2) that the treatment would need to be provided to all others in a similar condition, and (3) that the

---

<sup>10</sup> *Id.* at 236. Other U.S. scholars have written similar assessments. *See, e.g.*, Michelman, *supra* note 11, at 27 (noting that *Grootboom* “does not...seem shockingly preemptive of legislative and executive policy choice”); MARK S. KENDE, *CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES* 261-65 (2009) (defending *Grootboom* against various critics).

<sup>11</sup> *See, e.g.*, Frank Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2003) (summarizing the conventional arguments and arguing that they are inadequate in coming to grips with the full scope of the issue).

<sup>12</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 169 (1999).

<sup>13</sup> *See, e.g.*, Michelman, *supra* note 11, at 15 (summarizing this position).

<sup>14</sup> Michelman, *supra* note 11, at 31.

<sup>15</sup> *See Cross, supra* note **Error! Bookmark not defined.**, at 878-93. Courts will auto-limit in order to avoid sanctions from other branches of government or from the public: “It is futile to rely on the judiciary to provide basic welfare for the disadvantaged, if the political branches are unwilling to do so.” *Id.* at 888.

<sup>16</sup> Perhaps the exception in the line is Treatment Action Campaign, where the Court did order the government to expand access to a treatment prohibiting transmission of HIV from parent to child. But the court expressly found that cost considerations were non-existent; instead the government appeared to be limiting access based on ideological misconceptions about the disease. *See Minister of Health v. Treatment Action Campaign*, (2002) 5 SA 721 (CC).

legislature had the ability, at first instance, to determine the distribution of limited resources in order to fulfill the right to health.<sup>17</sup> Commentators have noted that the court properly considered the health care system as a whole (rather than focusing only on the individual involved in this case), and properly emphasized the deference that was due in running that system to the government.

In contrast, when the court has undertaken social rights enforcement, it has used a weak-form, dialogue-based approach. Brian Ray argues that the South African Court has more recently tweaked the *Grootboom* approach for a similar tactic that Ray calls “engagement.”<sup>18</sup> The core of the engagement remedy is that the Court orders the state to negotiate with the plaintiffs so that a satisfactory agreement can hopefully be reached. For example, in the *City of Johannesburg* case, 300 residents of an unsafe building in a slum sued to stop the state from evicting them forcibly in order to carry out a large-scale urban regeneration. The Constitutional Court issued an interim order requiring that the city and the residents “engage with each other meaningfully...in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”<sup>19</sup> The parties reached agreement; the City agreed to stop evictions in the short-term and to refurbish rather than destroy many of the buildings in the area.<sup>20</sup> Ray argues that engagement, which the Court has also used in subsequent cases, is an alternative to *Grootboom* that also manages the tension between the need to enforce these rights and the capacity and legitimacy problems that Courts feel when they enforce them. Engagement “falls somewhat short of the call by the Constitutional Courts’ critics for full-fledged judicial interpretation and enforcement, but the same features that make engagement something less than strong court enforcement also enhance its legitimacy.”<sup>21</sup>

## II. *Grootboom* as Aberration

The puzzling thing about *Grootboom* is that despite its centrality to the academic literature, particularly in the United States, it has not been followed by other courts around the world. As I have noted in previous work,<sup>22</sup> we can basically construct a typology of four different kinds of remedies on social rights questions, which have different effects along various dimensions like beneficiaries, capacity costs, intrusiveness, etc.

---

<sup>17</sup> See *Soobramoney v. Minister of Health*, CCT 32/97, available at [http://www.escribnet.org/usr\\_doc/Soobramoney\\_Decision.pdf](http://www.escribnet.org/usr_doc/Soobramoney_Decision.pdf).

<sup>18</sup> See Brian Ray, *Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy*, 9 WASH. U. GLOBAL STUD. L. REV. 399 (2010); Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797 (2009); Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT’L L. 151 (2009).

<sup>19</sup> *Occupiers of 51 Olivia Road v. City of Johannesburg*, Interim Order Dated 30 August 2007, available at <http://www.constitutionalcourt.org.za/Archimages/10731.pdf>.

<sup>20</sup> See *Occupiers of 51 Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC).

<sup>21</sup> Ray, *Extending the Shadow*, *supra* note 18, at 842.

<sup>22</sup> See David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int’l L.J. \_\_\_\_ (2012).

<b>Approach</b>	<b>Legitimacy/Capacity Costs on Court</b>	<b>Effectiveness at Changing Practice</b>	<b>Likely Beneficiaries</b>
Individualized enforcement	Low	Won't alter bureaucratic behavior	Middle & upper-Class Groups
Negative injunctions	Low	Will strike down laws and maintain status quo	Middle & upper-class groups
Weak-form enforcement	Low to moderate	May not cause much change	Nobody, although may aim at poor
Structural enforcement	High	May alter bureaucratic practice	May target lower income groups

Individualized enforcement occurs when a court orders that a particular treatment, housing, etc, be given to a particular individual plaintiff. These cases are particularly common with the right to health: a plaintiff goes to court to get access to an expensive medicine or medical treatment that is being denied by their insurance provider or by the state. In other words, precisely the type of enforcement that was denied in the *Soobramoney* case on the grounds that it would be too intrusive on democratic institutions and would have perverse democratic effects.<sup>23</sup> The negative injunction model issues broader orders against government policies in order to freeze the status quo. For example, say the government tries to cut existing pension benefits or the salaries of government workers; a court may hold that the cut violates constitutional provisions, and thus hold that the government must maintain the current level of benefits rather than imposing the cuts. Unlike the individualized enforcement model, these cases affect lots of people at once and thus can have significant effects on the government's budget.

The advantages of these first two models are that they relatively easy for a court to administer and thus may not stretch traditional notions of judicial role very much. A major disadvantage (as I have noted elsewhere) is that their benefits seem to accrue mostly to middle and upper-class plaintiffs. In the individualized model, only wealthier plaintiffs seem to sue even where suing is relatively cheap and uncomplicated.<sup>24</sup> In the negative injunction model, the main problem is that the poor have little that can realistically be taken away by the state, and thus these cases tend to protect things like

<sup>23</sup> See supra text accompanying note 17.

<sup>24</sup> Colombia is an example. The Colombian individual enforcement instrument, the tutela, is considered quite easy to use (a lawyer is unnecessary), and fast, with decisions required within 10 days. Nonetheless, a study found that most claimants were from the middle- and upper classes. See Procuraduría General de la Nación, *El Derecho a la Salud en Perspectiva de Derechos Humanos y el Sistema de Inspección, Vigilancia, y Control del Estado Colombiano en Materia de Quejas en Salud 170* (2008), available at [http://www.dejusticia.org/interna.php?id\\_tipo\\_publicacion=5&id\\_publicacion=402](http://www.dejusticia.org/interna.php?id_tipo_publicacion=5&id_publicacion=402).

pensions and salaries that belong to middle-class and wealthy groups. Further, neither model seems to do much to improve bureaucratic performance, so there isn't much of an indirect effect on the poor through improved public policy. In countries like Colombia and Brazil that rely heavily on the individualized model, bureaucracies seem to deny even obviously-covered treatments and to take their chances that a plaintiff might sue, rather than altering practices to conform with well-established judicial doctrine.<sup>25</sup>

While very systematic empirical evidence on patterns of judicial enforcement is lacking, the evidence that we have seems to indicate very strongly that robust enforcement of social rights is pretty common in developing countries. However, most of the enforcement that exists seems to be of one of these first two varieties.<sup>26</sup> Various countries seem to rely mainly on models of individualized enforcement, and even countries that don't have much of a social rights jurisprudence seem to block cuts in benefits or other departures from the status quo.<sup>27</sup>

The third and fourth models in the table are much rarer. Weak-form or dialogue-based enforcement like *Grootboom* is pretty much confined to South Africa. Several countries, however, have experimented with variations of structural injunctions. Structural injunctions of course had their heyday in the United States, but are now generally disfavored both by courts and academic commentators – the consensus seems to be that their capacity and legitimacy costs are usually too high to pay.<sup>28</sup> Several other countries, however, are beginning to experiment with these kinds of remedies in order to enforce socio-economic rights. In India, for example, the court has tried a structural injunction approach to enforcing the right to food, and seemed to have leveraged some important changes in government bureaucracies.<sup>29</sup> Similar things have occurred in

---

<sup>25</sup> It might be possible to improve the effect on bureaucratic performance – for example bureaucracies could be hit with contempt fines or other sanctions for repeat non-performance. But these kinds of devices appear to stretch notions of judicial role in ways that make them unlikely to be used in many countries. See *infra* section B.

<sup>26</sup> See, e.g., Christian Curtis, *Argentina: Some Promising Signs*, in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 163, 169-76 (Malcolm Langford, ed., 2008) (Argentina); Enrique Gonzalez, *Venezuela: A Distinct Path Towards Social Justice*, in *id.* at 192, 202-04 (Venezuela); Florian F. Hoffmann & Fernando R.N.M. Bentes, “Accountability for Social and Economic Rights in Brazil,” in *Courting Social Justice* 100 (Varun Gauri & Daniel M. Brinks, eds., 2008) (Brazil).

<sup>27</sup> See, e.g., Andras Sajó, “Social Rights as Middle-Class Entitlements in Hungary: The Role of the Constitutional Court,” in *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* 83, 97 (2006) (Hungary); Catalina Smulovitz, “Judicialization of Protest in Argentina: The Case of ‘corralito,’” in *Enforcing the Rule of Law: Citizens and the Media in Latin America* 55 (Enrique Peruzzotti & Catalina Smulovitz, eds., 2006) (Argentina); Julio Rios & Matthew Taylor, *Institutional Determinants of the Judicialization of Policy in Brazil and Mexico*, 38 *J. Lat. Am. Stud.* 739, 758-59 (2006) (Brazil).

<sup>28</sup> See, e.g., Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 223 (2003); Gerald N. Rosenberg, *The Hollow Hope* (1991) (arguing through case studies of abortion and desegregation cases that courts cannot bring about large-scale social change); Donald L. Horowitz, *The Courts and Social Policy* 273 (1977); Joshua M. Dunn, *Complex Justice: The Case of Missouri v. Jenkins* (2008) (showing that the desegregation of Kansas City school systems went awry when the court and the city sought to build magnet schools to attract white upper-income students, but those students still preferred suburban schools, leaving the district with many expensive and empty schools).

<sup>29</sup> See Lauren Birchfield & Jessica Corsi, “Between Starvation and Globalization: Realizing the Right to Food in India,” 31 *Mich. J. Int'l L.* 691, 700 (2010).

Colombia, where massive structural cases on internal refugees and healthcare have had highly imperfect but generally positive results.<sup>30</sup> Structural remedies obviously do stretch judicial capacity considerably, but they may hold out some promise for overcoming the strong class-affect that plagues the individualized enforcement and negative injunction approaches. However, it is important to note that even countries that have used structural injunctions, such as Colombia, still do most of their social rights enforcement in one of the first two models.<sup>31</sup>

It appears, then, that courts enforcing social rights have not used approaches similar to those in either *Grootboom* or the engagement cases. The key question for purposes of this paper is why they haven't done so. A full answer to this question is of course highly complex, but I focus here on two problems. The first lies with political institutions; the weak-form models seem to me to rest on assumptions about political responsiveness and capacity that may be more appropriate in developed countries than in developing ones. The second lies with judges; the South African model (like the structural injunction model) relies on assumptions about judicial creativity and innovativeness that rarely hold in developing countries.

### A. The Capacity of Political Institutions

The dialogue-based or weak-form model seems to depend on a pretty responsive set of political branches; when the judiciary acts by stating that the constitution has been violated, the legislature or president needs to act to remedy the issue. The mechanisms by which this occurs have not been fully fleshed out, but it would seem to depend on either mass-based or elite-based pressure being placed on the political branches to comply with the constitution. Yet some work has noted that political institutions are dysfunctional as representative institutions and lack capacity in many countries where social rights enforcement is important.<sup>32</sup>

In South Africa itself, there has been an interesting debate about how much *Grootboom* actually accomplished in housing policy. Some South African scholars have argued that weak-form enforcement, as exemplified by *Grootboom*, did not work.<sup>33</sup>

---

<sup>30</sup> T-025/04 (Jan. 22, 2004) (displaced persons); T-760/08 (July 31, 2008) (health). For an assessment of the results of the former case, see, for example, Cesar Rodriguez Garavito & Diana Rodriguez Franco, *Cortes y Cambio Social: Como la Corte Constitucional Transformo el Desplazamiento Forzado en Colombia* 40-44 (2010) (giving evidence that no public policy existed on the displaced persons issue before the T-025/04).

<sup>31</sup> In Colombia, for example, individual actions on the right to health now constitute over 40 percent of individual constitutional actions in the entire system. See Defensoria del Pueblo, *La Tutela y el Derecho a la Salud, Periodo 2006-2008*, at 30 tbl. 4 (2009) (noting that tutelas invoking the right to health constituted 21,301 of 86,313 in 1999, but 142,957 of 344,468 in 2008).

<sup>32</sup> See, e.g., Kim Lane Scheppele, *Democracy by Judiciary: Or, Why Courts can be More Democratic than Parliaments*, in *Rethinking the Rule of Law after Communism* 25, 49 (Adam Czarnota et al., eds., 2005) (making such an argument with respect to Hungary in the initial period after the transition from communism).

<sup>33</sup> See, e.g., Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 136 (2009); David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core

Many of these academics have argued that *Grootboom* had more or less the right idea but needed to be ratcheted up: the remedy needed to be made a less “weak” in order to be effective.<sup>34</sup> Similar questions have been raised about the general effectiveness of the engagement remedy, at least as it is currently used by the South African Constitutional Court – engagement has failed in several subsequent cases.<sup>35</sup>

The dominant ANC party in South Africa is broadly speaking, ideologically on board with the transformative program in the South African constitution, particularly when it comes to things like social rights. But at the same time, South Africa has been a one-party or dominant-party state, and as various actors have pointed out, such regimes may have greatly reduced incentives to respond to demands from the public.<sup>36</sup> Further, the Constitutional Court itself has never been a particularly popular institution.<sup>37</sup>

Other countries suffer from dysfunctions in their party systems that might make political responsiveness even less likely. In general, where party systems are poorly institutionalized, parties tend to be personalist vehicles for particular leaders rather than ideologically-oriented.<sup>38</sup> These systems tend to have high turnover in their parties, and legislatures tend to have lots of small parties rather than a few big parties. Further, party discipline in these systems tends to be low – members change parties frequently, dependent more on patronage from particular leaders than particular ideological programs. In these sorts of party systems, legislatures have trouble passing coherent, programmatic laws, and particularly in legislation that is responsive to the public. Courts in these kinds of systems may be acting rationally by refusing to kick an issue to the political branches, given the low likelihood of a response.<sup>39</sup>

## B. Judicial Creativity

A second major factor stems from judicial behavior in most of the countries where social rights enforcement is important. Here there may be an important difference

---

and its Importance,” 119 S. AFRICAN L.J. 484 (2002); D.M. Davis, “Adjudicating the Socio-Economic Rights in the South African Constitution: Towards ‘Deference Lite,’” 30 S. AFR. J. HUM. RTS. 301 (2006).

<sup>34</sup> See Davis, *supra* note 33; Rosalind Dixon, *Creating Dialogue about Socio-Economic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391 (2007) (arguing that the court may want to consider ratcheting up the remedy even as it maintains a minimalist vision of the right).

<sup>35</sup> See *id.* For example, Rey notes that in *Mamba v. Minister of Social Protection*, the South African Constitutional Court ruled that the government should engage with refugees in order to determine what to do with certain refugee camps that were scheduled to be closed. However, the government declined to undertake more than a formal interaction with refugee groups and simply began closing the camps. See *id.* at 837-42.

<sup>36</sup> See Hermann Giliomee & Charles Simkins, “The Dominant Party Regimes of South Africa, Mexico, Taiwan and Malaysia,” in *THE AWKWARD EMBRACE: ONE-PARTY DOMINATION AND DEMOCRACY* 1, 40-41 (Hermann Giliomee & Charles Simkins, eds., 1999).

<sup>37</sup> See Theunis Roux, “Principle and Pragmatism on the Constitutional Court of South Africa,” 7 INT’L J. CONST. L. 106 (2008).

<sup>38</sup> See Scott Mainwaring and Timothy R. Scully, “Introduction: Party Systems in Latin America,” in *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA* 1 (Scott Mainwaring & Timothy R. Scully, eds., 1996).

<sup>39</sup> See generally David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 Harv. L. Rev. 319, 354-58 (2010).

between civil law and common law countries: the common law judiciaries like India and South Africa seem to be more creative in coming up with remedies, although some of the most innovative courts work in civil law traditions (e.g., Colombia).

Most judges seem comfortable working with remedies that put little stress on judicial role.<sup>40</sup> The point is not that these remedies, ultimately, are non-intrusive – it is that they can be assimilated into familiar models of what judges ought to be doing. Thus, judges are most comfortable issuing a single remedy to a single plaintiff, and don't think much about the systematic effect. Traditionalist judges in Brazil therefore feel fine issuing decisions granting access to medicines even when, on aggregate, those cases are having a huge budgetary impact.<sup>41</sup> Similarly, it seems that relatively traditionalist judges feel comfortable issuing injunctions against movements from the status quo. Often the injunctions issued are against pension, public-sector salary, and other budgetary reforms that have a huge impact on the finances of the state.<sup>42</sup> Nonetheless, the judge is comfortable because the order, blocking a law from coming into effect, fits accepted notions of judicial role.

It is obvious that complex remedies like structural injunctions put a much more significant strain on judicial role, because they ask judges to supervise parts of the public bureaucracy, and often to issue specific policy orders to those bureaucracies.<sup>43</sup> In subtler ways, I think that weak-form cases like *Grootboom* also strain accepted notions of judicial role in many countries, because they ask judges to basically issue systematic orders to the legislative branch stating that new legislation must be passed, even if these orders lack any definite content. Given that judges in most developing countries still cling to traditional theories of judicial role, we should not expect any significant spread of weak-form exercises of judicial review in the near future.

### III. An Inward-Looking Field?

---

<sup>40</sup> See, e.g., Florian F. Hoffmann & Fernando R.N.M. Bentes, "Accountability for Social and Economic Rights in Brazil," in *Courting Social Justice* 100, 116-17 (Varun Gauri & Daniel M. Brinks, eds., 2008) (stating that Brazilian judges are willing to issue individualized but not collective remedies because they have traditional theories of judicial role and thus see cases from a "purely individual civil rights perspective").

<sup>41</sup> See Octavio Luiz Motta Ferraz, "Harming the Poor Through Social Rights Litigation: Lessons from Brazil," 89 *Tex. L. Rev.* 1643 (2011) (giving an example of a case where a court ordered treatment in the US that cost \$63,806, and noting that the basic rule of the Brazilian judiciary in these individualized cases is that "the right of the individual must prevail, irrespective of the costs.").

<sup>42</sup> Examples are the numerous injunctions issued against the "corralito" in Argentina in the 1990s, after the Argentine leadership prohibited withdrawals over a certain size from Argentine bank accounts in order to stabilize a macro-economic crisis. The courts never definitively ruled against the measure, but they did issue individual injunctions with a massive cumulative effect. See Catalina Smulovitz, "Judicialization of Protest in Argentina: The Case of 'corralito,'" in *Enforcing the Rule of Law: Citizens and the Media in Latin America* 55 (Enrique Peruzzotti & Catalina Smulovitz, eds., 2006). Smulovitz finds that in 2002 the courts granted 165,384 injunctions; each injunction led to the return of several thousand dollars on average. See *id.*

<sup>43</sup> See, e.g., Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 223 (2003)

The puzzle, then, is that *Grootboom* is ubiquitous in the work of comparative constitutional scholars, especially in the United States, and yet very unimportant in comparative judicial practice. I argue here that this tells us something about the state of comparative constitutional law as a discipline in the U.S. – it remains centered on theoretical concerns that arise out of American constitutional law, and seeks to solve problems that come out of our own constitutional experience and theorizing. Thus, *Grootboom* is important not because it “solves” the problem of how to enforce social rights in developing countries, but because it helps defuse the tension between judicial review of social rights and the counter-majoritarian difficulty in American constitutional theory. And this has broader implications for the nature of judicial review of all types in a mature democracy like the United States.

This orientation for the field – using comparative materials in order to better understand practical and theoretical problems in American constitutionalism – is very valuable. I think it is plausible that we can gain more leverage on problems in US constitutional theory – on the effectiveness of structural jurisprudence in maintaining federalism or the separation of powers, say, or on the interchange between domestic and international law, by considering other systems. But we might also want to consider, at least sometimes, comparative constitutional law based on a more outward-facing orientation, focusing on the practical and theoretical considerations in the countries creating this jurisprudence rather than considerations derived from the United States.

Such an approach changes the feel of the debate on social rights. Rather than focusing on the tension between judicial review and democracy, we might instead focus on the practical effects of its enforcement. It now seems clear that existing approaches benefit mainly wealthier groups in most developing countries.<sup>44</sup> Moreover, given the lack of remedial creativity possessed by most judges around the world, this pattern seems likely to continue – the remedies used by most judges seem to inherently favor plaintiffs from the middle- and upper- classes. But this doesn’t necessarily mean that judicial enforcement of social rights is counterproductive, just that it probably can’t serve the goal of significant poverty reduction. Judicial enforcement of social rights for the middle-class might be valuable for other reasons. It might stabilize democracy by increasing the legitimacy of the regime; efficacy in serving the needs of even wealthier groups is a political resource in short supply in most developing countries. It might also, through time, help to create a constitutional culture in a country; as middle- and upper- class groups learn to take constitutional rights seriously, political parties and individual politicians might do so as well. And this process, through long periods of time, might make political bodies more responsive to the rights and needs of the poor. The main point, then, is that the issue needs to be studied from perspectives other than its short-term intrusiveness on democracy in a given country.

---

<sup>44</sup> See generally 2011 Texas Law Review Symposium, Latin American Constitutionalism, 89 *Texas L. Rev.* 1587 (2011) (containing a variety of arguments and evidence casting doubt on the claim that social rights enforcement significantly helps the poor); David Landau, *The Reality of Social Rights Enforcement*, 53 *Harv. Int’l L.J.* \_\_\_\_ (forthcoming 2012)

More broadly, we might reflect on the different framings of central problems in comparative constitutional law outside as opposed to inside the United States. In particular, the counter-majoritarian difficulty appears to be less central to constitutional theory elsewhere. While many scholars have noted the importance of the transnational discourse or migration of ideas between judges and academics in different countries,<sup>45</sup> we still don't have a great idea exactly what sorts of ideas are being exchanged. But much of this conversation seems to have its roots in international human rights. To focus on Latin America as an example, the "new constitutional" push to limit executive power seems to have its origins in the international human rights discourse within the region. And there is a tightening relationship between regional human rights courts like the Inter-American Court, national judiciaries, and NGOs.<sup>46</sup> Further, many developing countries inside and outside of the region require that Constitutional Courts consider international law in issuing decisions, and many give international human rights treaties constitutional or supra-constitutional status.<sup>47</sup> International human rights law is a very different kind of discourse from US constitutional law, based on natural rights notions rather than ideas about institutional role.

Other factors as well may help to give constitutional law in many countries a more "technical" and less "political" feel than it has in the United States. Scholars have noted, for example, that the reception of instrumental conceptions of law like law and economics has been far less marked in Europe than in the United States.<sup>48</sup> This point

---

<sup>45</sup> For some examples, see Anne Marie Slaughter, *A Typology of Transnational Communication*, 29 U. RICH. L. REV. 99 (1994); *THE MIGRATION OF CONSTITUTIONAL IDEAS* (2007) (Sujit Choudry, ed.).

<sup>46</sup> See, e.g., Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 Cornell Int'l L.J. (forthcoming 2012).

<sup>47</sup> E.g., Const. South Africa, art. 39 ("When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law."); Const. Colombia, art. 93 ("International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia."); Const. Argentina, art. 75, sec. 12 ("Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein.").

<sup>48</sup> See, e.g., Kristofel R. Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law vs. German Doctrinalism*, Paper Presented to the American Law and Economics Association Annual Meeting (2008), available at <http://www.unilu.ch/files/Artikel-Grechenig-u.-Gelter.pdf>. I don't mean to suggest that legal realist or instrumental conceptions of law had little historical influence on European law. See, e.g., Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000*, available at <http://duncankennedy.net/documents/Photo%20articles/Three%20Globalizations%20of%20Law%20and%20Legal%20Thought.pdf>. But I do think that modern European constitutional law rests on different underpinnings.

probably applies even more strongly to Latin America; these legal cultures are often much less permeated by legal realist ideas. The reasons for this are complex but seem related to traditional ideas about judicial role, especially in the civil law world. Thus, the public and members of the political elite may be more willing to accept that constitutional judges are discovering the right answer to constitutional questions, rather than making it up.

The fact that constitutional law has stronger “natural law” and “technical” roots in many other places may explain why the U.S. construction of the counter-majoritarian difficulty seems to have less salience elsewhere. It may also explain why the American “political” conception of constitutional law, with the two sides of the political spectrum both having their own very thick conception of the constitution’s meaning, is exceptional. In the United States, constitutional meaning is hotly contested between liberal and conservative understandings; both sides rely deeply on reverence for the constitution in their political discourse, but the two visions of what the constitution means are very distinct. But there are other countries where constitutional meaning seems far less political – it is largely set either by a deep-seated social consensus (as perhaps in Germany), or it is “technical” and therefore placed outside of the scope of politics (as I believe true in much of Latin America).

#### **IV. Conclusion**

I have argued here that the position of *Grootboom* as a canonical case stems not from its practical importance in other countries (which is close to zero), but rather because it helps to resolve important questions about judicial role in American constitutional theory. I have also argued that comparative constitutional law, as a discipline, might have a different feel if it adopted its theoretical foundations from the core concerns of countries outside the United States. The basic underpinnings of constitutional law often seem to be more technical and less political elsewhere.

It might for example be fruitful to place the two different conceptions in tension with one another, seeking to improve both. This requires thinking about the role that courts are playing in different kinds of political environments. In situations where courts are acting in newer and weaker democracies, often with dysfunctional political institutions, little constitutional culture, etc, it might be more useful to evaluate the effects of judicial behavior using a dynamic rather than a static model of democracy. Courts acting in these environments should neither be able to hide behind pseudo-technical justifications for their decisions, nor should they be evaluated by static conceptions of judicial role that are more appropriate for mature democracies. That is, we might be less interested in whether the court is temporarily overstepping the boundaries of judicial role, than in whether it is helping to build a stronger democracy in the long-run. This requires answering questions that are difficult to answer but important: is the court helping to build a constitutional culture, therefore making both citizens and politicians more interested in carrying out the transformative program contained in the constitutional text? Is it helping to build up historically-weak civil society groups? Is it helping, through time, to counteract the biases inherent in the existing political system, or is it instead (as I

suspect is often the case) reinforcing those biases? Answering these sorts of questions might help us build theories of judicial role that are better suited to many of the countries that have been most affected by the explosion of judicialization.