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I. INTRODUCTION

One of the most common assumptions about the United States Constitution is that it protects negative rights.[1] Yet the International Covenant on Economic, Social, and Cultural Rights, as well as many foreign constitutions, require governments to affirmatively provide socio-economic necessities.[2] The theory is that liberty at least presumes subsistence.

International human rights experts actually speak of three "generations" of rights.[3] First generation rights are political and civil, and are usually negative rights.[4] Second generation rights involve the government's socio-economic obligations, and are frequently positive rights.[5] Finally, third generation rights are exemplified by the right to a clean and healthy environment, and are commonly called "green" rights.[6]

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1 Judge Posner wrote that:

> [Our] Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.

Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). Various scholars have questioned every part of Judge Posner's statement, including the date he gives for the "height of laissez-faire." *See, e.g.*, Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

2 *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1436–40 (1999) (discussing Irish, Italian, and Indian Constitutions).

3 LOUIS HENKIN ET AL., HUMAN RIGHTS 475 (1999).

4 *Id.*

5 *Id.*

6 *Id.*

Cass Sunstein said that the South African Constitution is "the most admirable constitution in the history of the world."[7] It contains a lengthy list of socio-economic rights,[8] which the drafters hoped would protect and assist those disadvantaged by Apartheid and those who are poor and vulnerable.[9] The relatively new South African Constitutional Court[10] has required the government to implement these rights. Conversely, the United States Supreme Court has been unwilling to find socio-economic rights in the United States Constitution, in part because of separation of powers concerns.[11]

This paper is divided into three parts. The first part describes some of the distinctive features of the South African Constitution, and compares these features with the United States Constitution. Part two discusses the South African socio-economic rights cases. Finally, part three critically examines American constitutional jurisprudence on socio-economic rights. This paper seeks to demonstrate that the South African Court has accomplished quite a feat: it has made clear that socio-economic rights are enforceable, but has interpreted economic rights in a way that limits separation of powers concerns. Moreover, this paper asserts that the United States Supreme Court should reconsider its separation of powers objections in light of these South African decisions.

II. Background of the South African Constitution

South Africa adopted its constitution in 1996. That year, the Constitutional Court issued the Second Certification Judgment,[12] ruling that the Constitution complied with the thirty-four Constitutional Principles agreed upon in political negotiations that took place from 1991 to 1993.[13] The new Constitution embodied the na-

7 Cass R. Sunstein, Designing Democracy: What Constitutions Do 261 (2001).

8 S. Afr. Const. ch. 2, §§ 22–23, 25–27 (adopted May 8, 1996).

9 Johan de Waal et al., The Bill of Rights Handbook 398 (3d ed. 2000). Interestingly, one of the leading proponents of the view that "freedom from want" should be considered a basic human right was American President Franklin D. Roosevelt, who articulated this principle in his famous 1941 "Four Freedoms" speech to Congress. *See* Franklin D. Roosevelt, The Annual Message to the Congress (Jan. 6, 1941), *in* 9 The Public Papers and Addresses of Franklin D. Roosevelt 663, 672 (Samuel I. Rosenman ed., 1969) (1941). The United States Supreme Court, however, has not embraced this as a constitutional norm.

10 The South African Constitutional Court was established in 1994. *See Information About the Constitutional Court*, The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/about.html (last visited Apr. 12, 2003).

11 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 487 (1970).

12 *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SALR 97 (CC).

13 *Id.* at 162. The South African Constitution's adoption mechanism was unique. As the text mentions, the South African Constitutional Court had to "certify" whether the document complied with thirty-four Constitutional Principles that were agreed upon by the major groups in South African society at the beginning of the Constitution drafting process.

tion's transformation from a racist, brutal, Apartheid-based regime to a democratic, multi-cultural government. Both the Constitution's length and detail distinguish it from the United States Constitution.

The South African Constitution establishes a parliamentary structure for the national government and allocates powers to the provincial governments.[14] It also creates a Constitutional Court with eleven Justices who are appointed to serve twelve-year non-renewable terms.[15] The first group of Justices was impressive as it included an international war crimes prosecutor,[16] several former law professors,[17] and the attorney who founded the nation's leading civil rights litigation firm and represented President Nelson Mandela during his imprisonment.[18]

The South African Constitution's Bill of Rights seeks to preserve and enhance human dignity, and substantive equality, by encompassing all three generations of rights previously discussed.[19] Whereas the United States Supreme Court implies the existence of certain fundamental personal rights in the liberty provision of the Fourteenth Amendment's Due Process Clause[20] (a legacy of *Lochner v. New York*[21]), the South African Bill of Rights specifically enumerates these rights. Section 12 of the Bill of Rights addresses the "freedom and security of the person."[22] This section specifically bans torture, cruel and inhumane treatment, general violence, detention without trial, and deprivation of freedom without just cause.[23] It further provides that everyone has bodily and psychological integrity, including the right to make reproductive decisions.[24] Section 14 encompasses the right to spa-

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The Court actually refused to certify the first Constitution that was presented, by ruling that the document failed to comply with some of the fundamental principles. *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) (First Certification Judgment), *available at* 1996 SACLR LEXIS 79, at *382. For example, the Court determined that the rights provisions were not sufficiently "entrenched" because they were too easy to amend or repeal. *Id.* at *14–15. After the National Assembly made changes, the Court validated the Constitution in the Second Certification Judgment. *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Amended Text of the Constitution of the Republic of South Africa, 1997 (2) SALR 97 (CC).

14 S. AFR. CONST. ch. 4, § 42 (adopted May 8, 1996).

15 *Id.* § 176.

16 Justice Richard J. Goldstone. *See* The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/jdgoldst.html (last visited Apr. 12, 2003).

17 Justices Yvonne Mokgoro, Kate O'Regan, and Albert Louis Sachs. *See Judges of the Constitutional Court*, The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/ (last visited Apr. 12, 2003).

18 Chief Justice Arthur Chaskalson. *See* The Constitutional Court of South Africa, *at* http://www.concourt.gov.za/judges/jdchask.html (last visited Apr. 12, 2003).

19 S. AFR. CONST. ch. 2, §§ 9–10 (adopted May 8, 1996).

20 U.S. CONST. amend. XIV.

21 198 U.S. 45 (1905).

22 S. AFR. CONST. ch. 2, § 12(1) (adopted May 8, 1996).

23 *Id.*

24 *Id.* § 12(2)(a).

tial privacy: privacy in one's home, of one's possessions, etc.[25] Section 21 guarantees freedom of movement and residence.[26] There is a lengthy equality provision in Section 9,[27] Section 10 protects human dignity,[28] and Section 11 says that everyone has a right to life.[29]

The South African Bill of Rights also employs the flexible proportionality analysis used in the Canadian Charter of Rights and Freedoms[30] and in Germany's Basic Law,[31] rather than the tiers of scrutiny applied in United States constitutional jurisprudence.[32] The first issue addressed in any South African rights case is whether there has been an infringement of one's constitutional rights.[33] Interestingly, state action need not always be present.[34] The next issue addressed is whether the Bill of Rights "Limitations" Clause justifies the infringement. Any limitation must be pursuant to a law of "general application."[35] The Limitations Clause requires the Court to balance several factors, including the nature of the right, the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the possibility of employing less restrictive alternatives.[36] The Court's overall responsibility is to determine whether the infringement on the right is proportional to the resulting societal benefit.[37] This method of rights analysis is more common internationally than the American use of different degrees of scrutiny.[38]

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25 *Id.* § 14.

26 *Id.* § 21.

27 *Id.* § 9.

28 *Id.* § 10.

29 *Id.* § 11.

30 CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). *See also* R. v. Oakes [1986] S.C.R. 103, 135–37 (Can.).

31 GRUNDGESETZ [GG] [Constitution] (F.R.G.).

32 *See* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1998) (discussing proportionality analysis and the U.S. Supreme Court's reluctance to utilize such standards).

33 S. AFR. CONST. ch. 2, § 38 (adopted May 8, 1996).

34 Some legal scholars advocate abandoning the state action requirement. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

35 S. AFR. CONST. ch. 2, § 36(1) (adopted May 8, 1996).

36 *Id.*

37 *Id.* § 36(1)(b), (d).

38 *See* Jackson, *supra* note 32 (discussing various countries that use proportionality). Under the United States Supreme Court's Equal Protection Clause decisions, laws are subject to three possible scrutiny levels. Laws that discriminate on the basis of race receive strict scrutiny. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967). Laws that discriminate on the basis of gender receive intermediate scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996). Most other laws, such as economic classifications, receive rational basis review. In substantive due process cases, the Court employs strict scrutiny when fundamental rights are violated and rational basis review in most other cases. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

An example of proportionality analysis can be found in the South African Constitutional Court case of *Christian Education South Africa v. Minister of Education*.[39] In that case, a Christian school association, whose parental members believed in the Biblical maxim "spare the rod, spoil the child," challenged on religious freedom grounds a national law banning corporal punishment in schools.[40] The Court assumed *arguendo* that the free exercise rights of the parents were infringed.[41] The Court then had to determine whether the government limitation was constitutional.[42]

The Court found that powerful justifications support the ban including international conventions and the South African Constitution, which outlaws any violence against children.[43] The Court also explained that, under Apartheid, the schools used corporal punishment in a brutal, degrading, and racist manner.[44] Although it acknowledged that the parents sincerely believed corporal punishment was a religious necessity,[45] the Court held that the restriction on free exercise was not sufficiently burdensome because parents could still carry out corporal punishment at home.[46] Because the law only prohibited corporal punishment at school,[47] the Court held that it was an acceptable limitation on religious freedom.[48]

Besides the Limitations Clause, the South African Bill of Rights has several other interesting provisions, such as interpretive instructions. One provision provides that courts should "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[49] Courts are also supposed to construe legislation and the common law to promote the spirit of the Bill of Rights.[50] Moreover, courts must consider international law in rendering decisions, and may also consider foreign law.[51]

Furthermore, the South African Bill of Rights requires that the government undertake affirmative action programs.[52] It also contains a provision regarding how the government can carry out

39 2000 (10) BCLR 1051 (CC), *available at* 2000 SACLR LEXIS 79.
40 *Id.* ¶ 4.
41 *Id.* ¶ 27.
42 *Id.*
43 *Id.* ¶¶ 39–40.
44 *Id.* ¶ 49.
45 *Id.* ¶ 14.
46 *Id.* ¶ 38.
47 *Id.* ¶ 2. *See also* § 10 of South African Schools Act 84 of 1996.
48 *Christian Education South Africa*, 2000 (10) BCLR 1051 (CC) ¶ 52.
49 S. AFR. CONST. ch. 2, § 39(1)(a) (adopted May 8, 1996).
50 *Id.* § 39(2).
51 *Id.* § 39(1)(b)–(c).
52 *Id.* § 9(2).

property redistribution[53]—an important provision given the land seizures carried out under Apartheid.

III. The South African Constitutional Court's Socio-Economic Rights Rulings

The South African Constitution's socio-economic rights provisions have been celebrated internationally. Yet some South African scholars, such as Dennis Davis, argued that they were unenforceable.[54] These objections resemble the United States Supreme Court's reasoning in several cases discussed later. Socio-economic rights protected by the South African Constitution include rights to housing, health care, food, water, social security, and education, among others.[55] Several cases have interpreted these provisions.

A. The Right to Housing

The seminal socio-economic rights case in South Africa is *Government of the Republic of South Africa v. Grootboom*,[56] which involved the right to housing. Irene Grootboom was one of several hundred poor people, half of whom were children, who lived in an informal squatter settlement. The settlement lacked running water, electricity, sewage, and refuse removal services. Millions of South Africans still live in such conditions as a legacy of Apartheid's influx control policies and forcible relocations.[57]

Because of these conditions, the group moved onto vacant private land earmarked for low-income housing.[58] The group was trespassing, however, so the owner obtained an eviction order. The situation worsened when the local government bulldozed the group's shanties and then burned the wreckage before the date set for eviction. This occurred during a cold, windy, and rainy Western Cape winter.[59]

The group moved to a nearby municipal sports field and erected flimsy temporary structures. Winter rains left them unprotected under plastic sheeting, and the municipality declined to provide any assistance. The group obtained legal counsel and

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53 *Id.* § 25(2).

54 *See, e.g.*, D. M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. Afr. J. Hum. Rts. 475 (1992); Erika de Wet, The Constitutional Enforceability of Economic and Social Rights 92 (1996) (discussing future Constitutional Court Justice Ackermann's objections to the inclusion of enforceable socio-economic rights). *But see* Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. Afr. J. Hum. Rts. 464 (1992).

55 S. Afr. Const. ch. 2, §§ 26(1), 27(1), 29(1) (adopted May 8, 1996).

56 2000 (11) BCLR 1169 (CC), *available at* 2000 SACLR LEXIS 126.

57 *Id.* ¶ 7.

58 *Id.* ¶ 8.

59 *Id.* ¶ 10.

brought suit charging that the government failed to comply with the right to housing. The Constitutional Court ruled for the settlers after applying chapter 2, section 26, of the South African Constitution, which states:

> Housing
> 26. (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.[60]

Initially, the Court addressed whether socio-economic rights were justiciable by quoting from its First Certification Judgment:

> "[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in this case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."[61]

The Court then explained the importance of socio-economic rights:

> Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [The Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[62]

The Court acknowledged that there is a nexus between the government meeting socio-economic needs and people exercising their civil and political rights. As South African scholar Pierre de Vos said, "Starving people may find it difficult to exercise their freedom of speech . . . ."[63]

The Court then examined international human rights law, but rejected an approach in which the government would be re-

60 S. AFR. CONST. ch. 2, § 26(1)–(2). *See also Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 99.

61 *Id.* ¶ 20 (quoting *Ex parte* Chairperson of the Constitutional Assembly: *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) ¶ 78).

62 *Id.* ¶ 23.

63 Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution*, 13 S. AFR. J. HUM. RTS. 67, 71 (1997).

quired to provide a "minimum core" level of housing, health care, etc. in order to satisfy constitutional requirements.[64] The Court noted that the "minimum core" concept lacked flexibility, and that the text of South Africa's socio-economic rights provisions differed from international covenants.[65] The Court instead asserted that the key question was "whether the measures taken by the state to realise the right afforded by Section 26 are reasonable."[66] The Court explained that "[t]he measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means."[67] The Court further stated that progressive realization meant that the government had "an obligation to move as expeditiously and effectively as possible towards that goal."[68] The Court added that the program must be "reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's [positive] obligations."[69]

The Court then held:

> To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[70]

This statement was significant because the Court was addressing the government's worthy efforts at constructing low-income housing. Nevertheless, the Grootboom group, and many others, could not obtain such housing for years given the backlog.[71] The government simply had no policy to assist the homeless. The Court elaborated:

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64 *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 33.

65 *Id. But see* David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 117 S. AFR. L.J. 484 (2002). The Constitutional Court also rejected the argument that the government violated the rights of the children in the squatter camp. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 79. Section 28(1)(c) of the Bill of Rights provides that children have the right "to basic nutrition, shelter, basic health care services and social services." S. AFR. CONST. ch. 2, § 28(1)(c) (adopted May 8, 1996). The Court construed this provision narrowly and held that the government only had an obligation to house the children when their parents failed to provide minimal shelter. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶¶ 77–79.

66 *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 33.

67 *Id.* ¶ 41.

68 *Id.* ¶ 45 (quoting United Nations Committee ESCR, ¶ 9 of general comment 3 (1990)).

69 *Id.* ¶ 42.

70 *Id.* ¶ 44.

71 *Id.* ¶ 8.

> The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives [rather than short term objectives]. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.[72]

This last sentence illustrates the Court's careful balancing act. Though the Court forced compliance with the Constitution, it gave the government discretion on how to comply with the law.

Grootboom demonstrates that placing socio-economic rights in a Constitution does not mean that every individual is entitled to assistance on demand. Instead, the Court analyzed whether the overall government policy was reasonable. Cass Sunstein said, "[w]hat the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights.*"[73]

B. The Right to Health Care

The South African Constitutional Court has decided two major health care cases: *Soobramoney v. Minister of Health*[74] and *Minister of Health v. Treatment Action Campaign.*[75] Chapter 2, section 27 of the Bill of Rights states:

> Health care, food, water, and social security
> 27. (1) Everyone has the right to have access to—
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.[76]

1. *Soobramoney v. Minister of Health*

The first socio-economic rights case ever decided by the Constitutional Court was *Soobramoney*, not *Grootboom*. *Soobramoney*'s ruling against the claimant made some commentators

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72 *Id.* ¶ 66.
73 SUNSTEIN, *supra* note 7, at 234 (emphasis in original).
74 1997 (12) BCLR 1696 (CC), *available at* 1997 SACLR LEXIS 41.
75 2002 (10) BCLR 1033 (CC), *available at* 2002 SACLR LEXIS 26.
76 S. AFR. CONST. ch. 2, § 27 (adopted May 8, 1996).

fear the Court would render the rights provisions toothless.[77] *Grootboom* and *Treatment Action Campaign* have since alleviated that worry.

The issue in *Soobramoney* was whether a public hospital unconstitutionally failed to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease, and cerebro-vascular disease. The hospital produced evidence that it prioritized treatment for non-terminal patients because dialysis was a scarce resource. Soobramoney brought suit claiming that the hospital's refusal to treat him violated his right to health care and to emergency medical treatment under chapter 2, section 27 of the Bill of Rights of the South African Constitution.[78]

The Court initially recited the Constitution's fundamental principles:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[79]

The Court then rejected the claimant's "emergency" assertion.[80] Relying on a case from India, the Court noted that claimant's chronic renal failure would require dialysis several times a week to prolong his life, but held: "This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable."[81]

The Court also rejected the claimant's argument that the hospital violated his right to health care by reasoning that the hospital had a rational policy for making a scarce resource available.[82] The Court asserted that the dialysis program would collapse and

77 Emily Bazelon, *After the Revolution*, LEGAL AFF. 25, 28 (Jan./Feb. 2003), *available at* 2003-FEB Legal Aff. 25.

78 *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶¶ 5–7. The South African Constitution provides that, "[e]veryone has the right to life" and that "[n]o one may be refused emergency medical treatment." S. AFR. CONST. ch. 2, §§ 11, 27(3) (adopted May 8, 1996).

79 *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶ 8.

80 *Id.* ¶ 21.

81 *Id.*

82 *Id.* ¶ 25.

"no one would benefit"[83] in the absence of a prioritization policy. Moreover, the Court stated:

> These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[84]

The ruling illustrates, once again, that a court can take socio-economic rights seriously and yet still respect separation of powers concerns and legislative competence.[85]

2. *Minister of Health v. Treatment Action Campaign*

The recent decision in *Treatment Action Campaign* is among the most important Constitutional Court cases thus far, because it involved the South African government's unsatisfactory response to the AIDS pandemic that South Africa is currently experiencing. Indeed, one in nine South Africans is infected with HIV.[86] In the year 2000 alone, 2.4 million Africans died of HIV related causes.[87] More than 70,000 babies infected with HIV are born in South Africa each year due to mother-child transmission.[88] One ray of hope is a drug called Nevirapine, which the World Health Organization ("WHO") says can prevent the spread of HIV/AIDS from pregnant women to their fetuses and babies.[89]

Unfortunately, for several years the South African government refused to distribute Nevirapine at public health clinics.[90] Initially, President Thabo Mbeki expressed skepticism about whether HIV causes AIDS.[91] Then the government had cost concerns, which were unfounded because the manufacturer offered the pills for free.[92] The government also claimed Nevirapine had

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83 *Id.* ¶ 26.

84 *Id.* ¶ 29.

85 Frank Michelman has mildly criticized one part of the opinion, but it seems the Court resisted the temptation to make bad law in a hard case. *See* Frank Michelman, *The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik*, 14 S. AFR. J. HUM. RTS. 499 (1998).

86 *AIDS Drugs Battle Goes to Court*, CNN.com (Nov. 26, 2001), *at* http://www.cnn.com/2001/WORLD/africa/11/26/safrica.drugs/index.html.

87 *AIDS Drugs Court Battle Dropped*, CNN.com (Apr. 19, 2001), *at* http://www.cnn.com/2001/WORLD/africa/04/19/safrica.drugs/index.html.

88 Richard Calland, *A Case of Power and Who Controls It: The Constitutional Court Faces Its Most Delicate Test Yet*, MAIL & GUARDIAN ONLINE (Jan. 18, 2002), *at* http://www.mg.co.za/mg/za/features/calland/index.html.

89 Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) ¶ 1 n.1, *available at* 2002 SACLR LEXIS 26.

90 *Id.* ¶ 10.

91 *See* Bazelon, *supra* note 77, at *28 ("President Mbeki . . . attracted worldwide criticism for questioning whether HIV causes AIDS at all.").

92 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) ¶ 4 n.5.

potentially hazardous side effects.[93] The WHO ultimately dispelled these concerns.[94]

The government finally agreed to a pilot distribution program at two public health centers in each province.[95] Government health officials said a broader program was not feasible since Nevirapine only worked when infected mothers used formula to feed their newborns.[96] The government said that it lacked the capacity to insure that women all over the country used formula to feed their babies.[97]

After years of unsuccessful lobbying, a South African AIDS advocacy group, the Treatment Action Campaign ("TAC"), brought suit charging that the government violated the Constitution's right to health care by not widely providing Nevirapine to pregnant women.[98] The government responded that its pilot program was reasonable and that separation of powers required the courts to stay out of this issue.

Nevertheless, the Constitutional Court issued a unanimous opinion ordering the government to provide the free Nevirapine. Initially, the Court spoke of its standard of review:

> Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.[99]

The Court, nonetheless, defined the "progressive realization" obligation by noting that "[t]he State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society."[100] The Court then decided that the government inaction was not reasonable because it "fail[ed] to address the needs of mothers and their newborn children who do not have access to these [pilot] sites."[101] The Court said the government's goal of maximizing Nevirapine's effective-

93 *Id.* ¶ 10.
94 *Id.* ¶ 12.
95 *Id.* ¶ 10.
96 *Id.* ¶ 15.
97 *Id.* ¶¶ 14–15.
98 *Id.* ¶ 4.
99 *Id.* ¶ 38.
100 *Id.* ¶¶ 35–36.
101 *Id.* ¶ 67.

ness by limiting its distribution to mothers trained in the use of baby formula did not justify refusing to distribute it beyond the pilot sites,[102] because too many babies would become infected or die in the interim.[103]

The Court also rejected the government's separation of powers defense by stating:

> There is . . . no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case, this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August* the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.[104]

But the Court showed respect for separation of powers by asserting that it would be for the "government . . . to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of Nevirapine where that is appropriate."[105] The Court supported its remedial authority by citing cases from India, Germany, Canada, and the United Kingdom.[106] The decision in *Treatment Action Campaign* even relied on the United State Supreme Court's decision in *Brown v. Board of Education II*.[107]

In sum, as Heinz Klug pointed out, *Treatment Action Campaign* goes beyond *Grootboom* because *Treatment Action Campaign*'s directive to the government was quite specific.[108] The

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102 *Id.* ¶ 80.

103 *Id.* ¶ 72.

104 *Id.* ¶ 99 (footnotes omitted). The Court added that it had a duty to grant "appropriate relief" when a violation of rights occurred. *Id.* ¶ 101. Section 172(1)(b) of the Constitution states "a court may also 'make any order that is just and equitable.'" *Id.*

105 *Id.* ¶ 122.

106 *Id.* ¶¶ 108–12.

107 *Id.* ¶ 107; 349 U.S. 294 (1955). It is hard to ignore the similarity between the United States Supreme Court's efforts to eliminate segregation and the South African legal system's attempt to eliminate the remnants of Apartheid.

108 Heinz Klug, *Five Years On: How Relevant Is the Constitution To the New South Africa?*, 26 VT. L. REV. 803, 808 (2002).

government is now complying and many young lives will likely be saved.[109]

IV. Critique of the United States Supreme Court's Socio-Economic Rights Decisions

Comparing South African Constitutional Court and United States Supreme Court decisions on socio-economic rights is difficult because these courts are the products of different societies, cultures, and political and legal systems. One obvious difference is that the United States Constitution lacks explicit socio-economic rights. This helps explain why the Supreme Court rejects such claims. In *Lindsey v. Normet*,[110] the Court said: "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill." The first part of this section looks at Supreme Court decisions related to socio-economic rights. The second part relies on the above-mentioned South African cases to show the flawed nature of the Supreme Court's doubts about the judiciary's competence to enforce such rights.

A. The United States Supreme Court on Socio-Economic Rights

The United States Supreme Court has rejected socio-economic rights claims in cases with varying facts and legal grounding. In *Dandridge v. Williams*,[111] the Court ruled that Maryland did not violate equal protection by imposing a $250 cap on welfare benefits, regardless of family size.[112] The Court held that the cap was rationally related to the state's interests in preserving scarce resources, and in creating incentives for the poor to seek employment and to engage in family planning.[113] In *San Antonio Independent School District v. Rodriguez*,[114] the Court ruled that Texas' public education financing scheme was consistent with equal protection and substantive due process, despite dramatic school district disparities in per student funding.[115] The Court said the law burdened neither a suspect class nor a fundamental right.[116] Additionally, in *Harris v. McRae*,[117] the Court ruled that a federal health care program that omitted financial coverage for

109 *SA Govt Heeds Calls For Free Anti-Aids Drugs*, Mail & Guardian Online (Feb. 3, 2003), *at* http://www.mg.co.za/Content/13.asp?ao=10666.

110 405 U.S. 56, 73–74 (1972).

111 397 U.S. 471 (1970).

112 *Id.* at 474–75, 486.

113 *Id.* at 483–84.

114 411 U.S. 1 (1973).

115 *Id.* at 54–55.

116 *Id.* at 28, 38.

117 448 U.S. 297 (1980).

abortions, even when the pregnancy endangered the woman's health, did not violate substantive due process.[118]

To be fair, strong dissents were authored in these cases. Moreover, the Court has upheld socio-economic rights in a few circumstances. In *Shapiro v. Thompson*,[119] the Court ruled that a durational residency requirement for welfare recipients discriminated against a person's fundamental right to travel.[120] This was a hybrid case that implicated what has been called "equal protection fundamental interests."[121] More recently, in *Saenz v. Roe*,[122] the Court issued a similar ruling regarding welfare payments,[123] but held that the right to travel was based on the Fourteenth Amendment's Privileges and Immunities Clause.[124] This travel issue was not present in *Dandridge*.

In *Plyler v. Doe*,[125] the Court ruled unconstitutional a Texas law that required illegal alien children to pay to attend public schools.[126] Though neither a suspect class nor fundamental right was implicated, the Court asserted that the law revealed an irrational animus towards a vulnerable group not responsible for its situation.[127] This was a surprising result in light of *Rodriguez*. One distinction was that in *Rodriguez* the law provided students with a minimum education, whereas in *Plyler* certain students were denied any education unless they paid for it themselves.[128]

To sum up, the Supreme Court has rejected socio-economic rights claims under both Substantive Due Process and Equal Protection doctrines. The Court, nonetheless, has been more receptive regarding hybrid "equal protection fundamental interests" claims.[129] But even then, the Court has tried to find a hook, such as the right to travel or the right to vote.[130]

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118 *Id.* at 326.

119 394 U.S. 618 (1969).

120 *Id.* at 638.

121 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 842 (2d ed. 2002) ("[T]he right to vote is a fundamental right protected under equal protection. The right to vote is regarded as fundamental because it is essential in a democratic society.").

122 526 U.S. 489 (1999).

123 *Id.* at 510–11.

124 *Id.*

125 457 U.S. 202 (1982).

126 *Id.* at 230.

127 *Id.* at 223–24.

128 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 9–11 (1973); *Plyler*, 457 U.S. at 206.

129 *See* CHEMERINSKY, *supra* note 121.

130 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that poll taxes which effect the rights of the poor are unconstitutional because they discriminate regarding the right to vote).

B. Socio-Economic Rights and Separation of Powers: Two Approaches

The United States Supreme Court has raised separation of powers objections to socio-economic rights. This paper responds to these objections. Of course, scholars such as Frank Michelman,[131] Peter Edelman,[132] Mark Tushnet,[133] and Charles Black[134] have challenged the United States Supreme Court's socio-economic rights decisions based on their respective views of the Fourteenth Amendment. This paper leaves the Fourteenth Amendment questions for a later day, however, because the South African cases shed light on separation of powers issues, but not on the peculiarities of American substantive due process or the Privileges and Immunities Clause. Moreover, Fourteenth Amendment theory becomes less important regarding socio-economic rights if pragmatic separation of powers objections cannot even be overcome.

The Supreme Court has raised three separation of powers concerns. First, the legislature, not courts, should make socio-economic funding allocations. Second, the judiciary lacks the competence to make such decisions. Third, separation of powers problems are minimized if the Constitution encompasses negative rights. The South African cases address these concerns.

1. The Legislature's Prerogative

The Supreme Court has made clear the legislative and executive branches should resolve socio-economic rights issues. In *Dandridge*, the Court said "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[135] The Court added that the "problems presented by public welfare assistance programs are not the business of this Court."[136] In *Lindsey v. Normet*,[137] the Court upheld Oregon's summary eviction procedures holding: "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord tenant relationships are legislative, not judicial, functions."[138]

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131 Frank I. Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 26 (1969).

132 Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 30–31 (1987).

133 Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207 (1991) [hereinafter Tushnet, *Civil Rights*].

134 Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986). George Fletcher's recent work makes similar arguments. *See* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION 152–63 (2001).

135 Dandridge v. Williams, 397 U.S. 471, 487 (1970).

136 *Id.*

137 405 U.S. 56 (1972).

138 *Id.* at 74.

The majority in *Rodriguez* said that it lacked the "authority" to intervene regarding school financing decisions because it would then be a "super-legislature."[139] This objection resembles Justice Holmes's famous dissent in *Lochner*.[140] The *Rodriguez* opinion also asserted that educational decisions should be left to government entities with expertise regarding local political and economic conditions.[141] Finally, in *Harris*, the Court said, "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement."[142]

The South African cases, however, demonstrate that the judiciary can enforce socio-economic rights without intruding into quintessentially legislative or executive functions. In *Soobramoney*, *Grootboom*, and *Treatment Action Campaign*, the Constitutional Court asserted that it would uphold government socio-economic policies so long as they were reasonable. This is a pro-government presumption. The government only lost in *Grootboom* and *Treatment Action Campaign* because it had essentially no plan for assisting people in difficult circumstances. Moreover, the Court's rejection of "minimum core" obligations in *Grootboom* and *Treatment Action Campaign* provides the government with flexibility in dealing with multiple social problems.

Finally, *Grootboom* demonstrates that a court can issue a powerful remedial order that still gives the legislature latitude on implementation. Mark Tushnet called this an "action-forcing remed[y]."[143] In the context of employment rights, Tushnet said that, "enforcement [of an order that the legislature offers plans for relief] could guarantee that legislatures make jobs policy a high or higher priority."[144] Frank Michelman said this remedy involved "a judicial mandate to legislative, executive, or administrative officers to prepare, submit, and carry out a corrective plan."[145]

Michelman further confirmed that *Grootboom* "does not as it stands seem shockingly pre-emptive of legislative and executive policy choice."[146] Other commentators have suggested that *Groot-*

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139 411 U.S. 1, 31 (1973).

140 Lochner v. New York, 198 U.S. 45, 74–78 (1905) (Holmes, J., dissenting).

141 411 U.S. at 40–41.

142 Harris v. McRae, 448 U.S. 297, 318 (1980).

143 Mark Tushnet, *What is Constitutional About Progressive Constitutionalism?*, 4 WIDENER L. SYMP. J. 19, 31 (1999).

144 William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1878 n.261 (2001) (citing Mark Tushnet, *What is Constitutional About Progressive Constitutionalism?*, 4 WIDENER L. SYMP. J. 19, 31 (1999)).

145 Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1006 (1973).

146 Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. OF CONST. L. 13, 27 (2003).

boom did not go far enough.[147] In my view, the Constitutional Court performed an impressive high wire act in *Grootboom* by vindicating the right to housing while preserving separation of powers.[148] The Constitutional Court accomplished what the United States Supreme Court has said courts cannot do.[149]

2. Competence

The United States Supreme Court has also questioned the judiciary's ability to make budgetary decisions. In *Dandridge*, the Court labeled such issues "intractable."[150] In *Rodriguez*, the Court said the judiciary lacked the "competence" to evaluate education-funding levels.[151] The *Rodriguez* Court also invoked "our federalism" by saying that the Court did not possess "the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[152] The Court added that its "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[153] The Supreme Court's concerns are overstated. *Grootboom*'s action-forcing remedy allows the legislature or local entities to wrestle with implementation despite the court's intervention. Moreover, judicial intervention is justified when the other branches violate the Constitution.

Charles Black's interesting 1997 book, *A New Birth of Freedom*, explains why lack of competency is not a valid defense against judicial action:

> About half our black children under six live in poverty, which very commonly entails malnutrition. Some helpless old people have been known to eat dog food when they could get it; it is not recorded that any Cabinet member has yet tried this out on eld-

147 Bilchitz, *supra* note 65, at 484. *See also* Bazelon, *supra* note 77, at 28–29 (discussing dissatisfaction among South African human rights bar over Constitutional Court's cautious approach to enforcing socio-economic rights).

148 *See* Pierre de Vos, Grootboom, *The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. HUM. RTS. 258 (2001).

149 David Currie quoted a German critic of affirmative rights as saying that "notwithstanding the worldwide proliferation of constitutional provisions explicitly imposing affirmative social duties, '[n]o constitution recognizing the rule of law has yet actually succeeded in practice' in turning away from the classical negative understanding of fundamental rights." Currie, *supra* note 1, at 889 (citing Forsthoff, *Begriff und Wesen des sozialen Rechtsstaates*, *in* 12 VerÖffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 20, 33 (1954)).

150 Dandridge v. Williams, 397 U.S. 471, 487 (1970).

151 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31 (1973).

152 *Id.* at 41. It seems that the Supreme Court in *Rodriguez* was more concerned with separation of powers problems than with federalism problems. After all, the local entities that the Supreme Court assumed to be "competent" in making school budgetary decisions were school districts, not state or local courts. The basic theme is that the judiciary is ill-equipped to handle such matters, no matter the level.

153 *Id.* at 42.

> erly persons in his own extended family. Now you can bog down in a discussion about the exact perimeter of "decent livelihood," or you can cease for a moment from that commonly diversionary tactic and note that, wherever the penumbra may be, malnourished people are not enjoying a decent livelihood. In a constitutional universe admitting serious attention to the Declaration of Independence, a malnourished child is not enjoying a "right to the pursuit of happiness."[154]

3. Negative Rights

Another concern related to separation of powers is that the American constitutional tradition presumes that courts have an easier time enforcing negative political and civil rights rather than positive socio-economic rights.[155] It seems simpler for a court to order the government to stop interfering with speech than for a court to determine how much funding is needed for secondary education.

This reasoning has two problems.[156] First, it is an oversimplification. In the *First Certification Judgment*, as well as in *Grootboom* and *Treatment Action Campaign*, the Constitutional Court said that protecting socio-economic rights sometimes requires the Court to negate government actions that interfere with a right.[157] Thus, in *Treatment Action Campaign*, as Frank Michelman has pointed out, the Constitutional Court found that the government unconstitutionally interfered with the right of public doctors to distribute Nevirapine.[158] This "negative" role regarding socio-economic rights is little different from the "negative" role United States courts play when vindicating political rights.

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154 CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 137 (1997). *See also* Pierre de Vos, *supra* note 63, at 71 ("Starving people may find it difficult to exercise their freedom of speech . . . .").

155 Edelman, *supra* note 132, at 30–31. *See also* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 311–12 (1980) ("In a society that considers private incentives a primary means to economic progress, *affirmative* jurisprudence creates serious *pragmatic* problems. . . . The courts' traditional role in protecting individual rights [via a negative jurisprudence] remains the most promising judicial means of reducing the burdens of economic inequality.") (emphasis added).

156 This paper does not focus on whether the United States Constitution was intended solely to furnish negative rights. Commentators from diverse political spectrums question this view, including Philip Kurland, Lawrence Tribe, David Currie, and Michael J. Gerhardt. *See generally* Gerhardt, *supra* note 1, at 410 nn.6–7, 438 n.119 (1990). *See also* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 69–71 (1993).

157 *In re* Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) (First Certification Judgment), *available at* 1996 SACLR LEXIS 79; Government of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) ¶¶ 42–43, *available at* 2000 SACLR LEXIS 126; Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) ¶¶ 30–32, *available at* 2002 SACLR LEXIS 26.

158 *Treatment Action Campaign*, 2002 (10) BCLR 1033 (CC) ¶¶ 67–68; Frank I. Michelman, *supra* note 146. *Grootboom* also discussed how the right to housing could involve negative claims that the government is interfering with access to housing. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 34.

Second, Mark Tushnet,[159] Cass Sunstein,[160] and others have established that enforcing negative rights also implicates budgetary matters. Sunstein wrote that:

> Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support.[161]

The *First Certification Judgment* is in accord with Sunstein, as quoted above.[162] American philosopher Henry Shue wrote that courts enforcing positive socio-economic rights are not performing a task "more difficult, more expensive, less practicable, or harder to 'deliver'" than protecting negative rights.[163] The United States Supreme Court's intrusive efforts to implement a remedy against segregation in *Brown v. Board of Education II* illustrate this starkly.[164]

4. New Results

The South African cases discussed above reveal how the United States Supreme Court could have decided certain socio-economic rights cases. The Court in *Dandridge* did not have to resolve "intractable" welfare budgeting questions. The Court could have ordered the government to develop a more equitable funding rule that took into account family size, which would ensure that children in bigger families would not be severely deprived.

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159 Tushnet, *Civil Rights*, *supra* note 133, at 1213–14.

160 SUNSTEIN, *supra* note 7, at 222–23, 234.

161 *Id.* at 222–23 (endnote omitted).

162 One commentary described the ruling by saying:

> The Court . . . questions the rigidity of the distinction drawn between socio-economic rights and civil and political rights on the basis that the former entail judicial imposition of positive duties on the state while the latter do not. Courts enforcing civil and political rights may on occasion impose positive duties on the state.

DE WAAL, *supra* note 9, at 400–01.

163 HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 63 (1980).

164 Stephen Holmes and Cass Sunstein critique the possibility of a libertarian low-tax minimalist state, that only protects negative liberties, by stating:

> One piece of evidence to the contrary is the amount we spend, as a nation, to protect private property by punishing and deterring acquisitive crimes. In 1992 . . . direct expenditures in the United States for police protection and criminal corrections ran to some $73 billion—an amount that exceeds the entire GDP of more than half of the countries in the world. Much of this public expenditure . . . was devoted to protecting private property.

STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 63–64 (1999).

Similarly, in *Rodriguez*, the Court could have ruled against the Texas financing scheme but left the state to devise an equitable alternative, subject to the Court's guidelines. Numerous state courts have invalidated school financing schemes.[165] The Supreme Court mistakenly assumed that it had to "direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation."[166] The South African cases suggest the remedy need not be so intrusive and inflexible.

Moreover, the Supreme Court could have ruled for the plaintiff in *Harris* by simply requiring the government to ensure that the health service was provided to these women, just as in *Treatment Action Campaign*.

It is also worth noting that the Supreme Court decisions in *Shapiro*, *Plyler*, and the "new property" entitlement case, *Goldberg v. Kelly*,[167] as well as the eloquent *Dandridge* and *Rodriguez* dissents,[168] demonstrate that the Court can address socio-economic rights issues.[169]

5. The Reaction

One possible reaction to the aforementioned arguments is that the current United States Supreme Court will not be endorsing socio-economic rights anytime soon. Indeed, Lawrence Lessig essentially suggested at a 1997 Fordham Law School constitutional law conference that Frank Michelman's welfare rights theories make Michelman look like a dreamer today, given the evolution of the Supreme Court's jurisprudence.[170]

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165 See CHEMERINSKY, *supra* note 121, at 889 n.14 for a list of these cases.

166 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973).

167 397 U.S. 254 (1970).

168 Justice Marshall's dissents in these cases are famous for criticizing the Supreme Court's levels of scrutiny. Marshall argued that the Court actually employed a sliding scale of scrutiny in equal protection and fundamental rights cases. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 508–30 (1970) (Marshall, J., dissenting); *Rodriguez*, 411 U.S. at 70–137 (Marshall, J., dissenting). Rutgers Law School's Suzanne Goldberg has recently authored a manuscript which takes a similar view. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 57 U. MIAMI L. REV. (forthcoming June 2003) (on file with Chapman Law Review).

169 Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 664 (1979) (noting that federal court decisions "show . . . how it is possible for courts to act on welfare-rights premises without having to . . . take on an unmanageable remedial task, or to arrogate legislative and executive functions").

170 This reference to dreaming was actually made in a colloquy between Lawrence Lessig and Frank Michelman at a 1997 conference that centered on Lessig's work concerning fidelity in constitutional interpretation. Lessig said,

> It is to remark a change in the world to note that Professor Michelman can write one of the most influential articles of the 1960s [on the right to welfare] that now is so alien. It is an odd piece—beautiful, and wonderful and we can dream about it. But still it is a piece that none of us would write anymore.

Fidelity as Translation: Colloquy, 65 FORDHAM L. REV. 1507, 1510 (1997).

Nevertheless, the South African cases illustrate that courts, acting cautiously, can enforce such rights without destroying separation of powers or taxing judicial competency.[171] Once these false concerns are eliminated, the more foundational issues about interpreting the Fourteenth Amendment,[172] and perhaps the Ninth Amendment,[173] can be addressed sensibly.

Moreover, two United States Supreme Court decisions have shown that the Court has the potential to approach socio-economic rights cases in the same manner as the South African judiciary. These two cases are *Atkins v. Virginia*[174] and *Romer v. Evans*.[175]

a. *Atkins v. Virginia*

In *Atkins*, the Court ruled that the state could not constitutionally execute a mentally retarded person.[176] *Atkins*, which was decided last term, reversed the thirteen-year-old decision in *Penry v. Lynaugh*.[177] *Atkins* relied on the fact that fourteen states had eliminated the death penalty for the mentally retarded since *Penry* was decided.[178] The majority also noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[179] Much to the chagrin of Chief Justice Rehnquist and Justice Scalia, the majority relied on a brief from the European Union for support.[180]

Atkins demonstrates that the Court no longer ignores international norms.[181] Moreover, Justice Breyer has a history of examining foreign precedents in his opinions.[182] That is exactly what the South African Constitutional Court has been doing since its

171 For more detailed discussions about the pragmatic elements of the South African Constitutional Court's progressive jurisprudence, see Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753 (2002); Mark S. Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L. J. 745 (2001).

172 U.S. CONST. amend. XIV.

173 U.S. CONST. amend. IX.

174 122 S. Ct. 2242 (2002).

175 517 U.S. 620 (1996).

176 122 S. Ct. at 2252.

177 492 U.S. 302 (1989).

178 122 S. Ct. at 2248–49.

179 *Id.* at 2249 n.21.

180 Justice Scalia in dissent said, "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people." *Id.* at 2264 (Scalia, J., dissenting).

181 In a related vein, the Court recently upheld the Copyright Term Extention Act against constitutional challenge in part because the Act meshed American copyright protections with those of Europe. Eldred v. Ashcroft, 123 S. Ct. 769, 775–76, 781 (2003).

182 *See, e.g.*, Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting). Writing for the majority, Justice Scalia vigorously objected to Justice Breyer's citation to foreign sources. *Id.* at 921 n.11.

founding. If applied more frequently, this approach could lead the Court to rely on international norms in other areas, such as socio-economic rights.

b. *Romer v. Evans*

The majority in *Romer*[183] also adopted a South African style approach. The Court ruled that Colorado violated equal protection when its citizens enacted, by referendum, a state constitutional amendment removing all anti-discrimination protections for homosexuals.[184] The Court held that the amendment was based on animosity towards homosexuals and therefore failed rational basis review.[185]

The Court's analytical starting point was significant. The Court rejected the argument that Colorado had the legal right to repeal statutory protections it enacted. Instead, the Court assumed Colorado had a positive constitutional obligation to continue protecting all of its citizens—including homosexuals. The South African Constitution embraces just this kind of positive constitutional obligation.

As Kimberlé Crenshaw and Gary Peller noted, "The majority's construction of a baseline of general protection against discrimination for everyone is based on an outright reversal of the common law construction."[186] Louis Seidman said, "*Romer* seems to impose an affirmative constitutional requirement on jurisdictions to protect gay people from private discrimination, at least so long as they maintain comprehensive protection for other groups."[187] Seidman asserted that *Romer* would have "potentially far-reaching consequences," particularly in its use of a heightened form of rational basis review.[188] Jefferson Powell said that *Romer*'s recognition that the government has affirmative duties to

183 517 U.S. 620 (1996).

184 *Id.* at 635–36.

185 *Id.* at 632.

186 Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1709 (1998). *See also Leading Cases*, 110 HARV. L. REV. 155, 165 (1996).

187 Louis Michael Seidman, Romer's *Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 82. He also added:

> The collapse of the ideal of constitutional neutrality is painfully obvious on even a superficial reading of *Romer*. Because government nonintervention is not a natural state of affairs, the Court, in good liberal activist fashion, takes the general regime of government-mandated antidiscrimination as a baseline. It claims that it is enforcing the neutrality requirement by insisting that gay people receive the same benefits from antidiscrimination policy accorded to other groups.

Id. at 100–01.

188 *Id.* at 84–85.

protect citizens is consistent with longstanding equal protection doctrine.[189]

Moreover, *Romer* is not unique. There is case law from the anti-*Lochner*, post economic substantive due process era, which assumed government has affirmative obligations. For example, in *West Coast Hotel v. Parrish*,[190] the Court suggested that if the government lacked a minimum wage law, taxpayers would have to help more destitute people, which would essentially amount to a subsidy for low paying businesses.[191]

Romer's view that the government has an affirmative duty to aid subordinated groups, and *Atkins*' reliance on international norms, sound more like South African Constitutional Court decisions than like the United States Supreme Court's decisions in *Dandridge*, *Rodriguez*, and *Harris*.

V. CONCLUSION

The United States Constitution is the oldest written nation-governing charter in the world. Many Americans probably assume it is the best constitution possible.[192] Yet perhaps it is time that we Americans become less self-centered. Many countries, like South Africa, have adopted truly modern constitutions. These documents typically contain a comprehensible, detailed list of enumerated rights based on generally accepted international human rights norms, unlike the United States Constitution. The judiciary in these countries has been entrusted with interpreting these new provisions. The United States Supreme Court and American scholars could learn much from the South African Constitutional Court's socio-economic decisions. Now seems like a particularly good time for the Court to open itself to well reasoned foreign jurisprudential approaches.

189 H. Jefferson Powell, *The Lawfulness of* Romer v. Evans, 77 N.C. L. REV. 241, 243 (1998).

190 300 U.S. 379, 399 (1937) ("The community is not bound to provide what is in effect a subsidy for unconscionable employers.").

191 *Id.*

192 This may reflect a certain inability to see the problems being created by the current United States Supreme Court's constitutional jurisprudence in numerous areas. For example, federal appellate judge, and former law professor, John Noonan has harshly criticized the Court's recent federalism decisions as betraying conservative jurisprudential principles. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER, THE SUPREME COURT SIDES WITH THE STATES (2002). Moreover, *Bush v. Gore*, 531 U.S. 98 (2000), left the Court vulnerable to criticisms that the decision was political in nature, rather than legal. *See, e.g.*, VINCENT BUGLIOSI, THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT (2001).