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The Canons of Social and Economic Rights

Katharine G. Young

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Abstract

Social and economic rights occupy an unsettled place in any global canon of constitutional democracy and human rights. This Article, appearing in a collection of *Global Canons in an Age of Uncertainty* (S. Choudhry, M. Hailbronner & M. Kumm, eds., OUP) recommends a contender for canonical status, at the same time as it problematizes the search. Insofar as the search for a canon reveals the boundaries of what may be considered exemplary claims of constitutional and democratic practice, the 2000 South African case of *Republic of South Africa v. Grootboom* is canonical for its treatment of social and economic rights. This Article explores and problematizes the three features of *Grootboom* – its reasoning, pedigree and visibility – that it argues give it a canonical status, which include the case’s apparent resolution of justiciability, its proximity to South Africa’s post-apartheid Constitution and Constitutional Court, and its ambivalent legacy for housing rights. Yet *Grootboom* is not a singular source for establishing and renewing the boundaries of the global canon. Moreover, its legacy is not completely secure. The Article introduces the idea of proto-canons and counter-canons as adding to what should be a worldwide debate about foundational texts, for constitutional democracy and human rights. Indeed, proto- and counter-canons are especially useful categories for charting both the ambitions and marginality of social and economic rights, as well as the hegemony of distinctive visions of constitutional democracy. The Article therefore nominates the *Universal Declaration of Human Rights* in 1948 as a proto-canon for social and economic rights, as crystallizing incipient ideas of freedom from want and an institutionally broad (and non-court centric) vision of realization. It also nominates the 1973 US case of *San Antonio School District v. Rodriguez* as a counter-canon, as that case marks the interpretive closure, by the Supreme Court, of available arguments for constitutional social and economic rights, and the devolution of the right to education to the states. These proto- and counter-canons help us reflect on the highly unsettled constitutional and democratic norms of the present.

Keywords

Social and economic rights; constitutional democracy; human rights, global canons; justiciability; judicial supremacy; rule of law; South African Constitution; South African Constitutional Court; *Grootboom*; *Universal Declaration of Human Rights*; *International Covenant on Economic, Social and Cultural Rights*; FDR’s Four Freedoms; right to an adequate standard of living, right to housing, right to education, right to food, right to water and sanitation.

Introduction

Social and economic rights – which require a government to use its resources and organization to secure adequate material resources or opportunities for its citizens and others, are integral to modern constitutional democracy and human rights. The obligations they define – such as to avoid undermining, or to promote, or to directly provide social security, decent work, health care, education, housing, food, water, sanitation and other goods, services and opportunities – are imperfect and correspond to a range of possible interactions between the state and the economy. Such rights attracted a degree of international consensus in the *Universal Declaration of Human Rights* of 1948.¹ Yet a great obstacle to their recognition has been the challenge of justiciability. If courts could not reliably interpret, adjudicate and enforce them, so this argument went, these “rights” could not gain the determinacy required of constitutional rights or might impair the government’s efforts at realizing broader goals of aggregate, or collective social welfare.

The obstacle of justiciability, while partially addressed in many jurisdictions, was arguably best resolved in the 2000 South African case of *Republic of South Africa v. Grootboom*.² It is telling that the case settled so little about the rights-based obligations of government, apart from managing the question of justiciability. Yet for three reasons – which I explore in Part 1 of this entry as *Grootboom*’s reasoning, pedigree and visibility – the case forms an almost singular canonical reference. Notwithstanding this clear prominence, however, social and economic rights continue to apply outside of the juridical paradigm (and remain marginal within it). This entry therefore examines two texts, as ‘proto-canons’ or ‘counter-canons’ to the contemporary understanding of such rights. The first is the *Universal Declaration*, which has influenced numerous international human rights instruments, and constitutional texts, as Part 2 demonstrates. The second is the 1973 US case of *San Antonio School District v. Rodriguez*,³ which reversed the promise of justiciable social and economic rights in that influential jurisdiction, as Part 3 describes. The trajectories of these canons have been shaped by concerns about judicial power, but also by the free market ideology that views the government’s role as secondary to markets in promoting access to the basic goods and services that help secure such rights. No canonical text (or at least, the meaning that the text signifies) can be expected to enjoy that status forever: I end with a note about how the very traits that have made *Grootboom* canonical may diminish it over time. It is of course difficult to predict, but as the human rights and constitutionalist values of global public law are threatened, in part by the lack of government support for ensuring access to the material security and forms of equality that are demanded by social and economic rights,⁴ other canons may emerge.

¹ Universal Declaration of Human Rights, arts. 22-26.

² *Gov’t of the Republic of South Africa v. Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC) (*Grootboom*). For the resolution reached in Latin America, see David Landau, ‘The Unsettled Canon of Social Rights Enforcement in Latin America’, this volume (comparing historical assumptions against justiciability to vibrant new examples from Columbia, Brazil and elsewhere).

³ 411 U.S. 1 (1973).

⁴ See, e.g., Mark Graber, Sanford Levinson and Mark Tushnet, (eds), *Constitutional Democracy in Crisis?* (OUP 2018).

1. *Grootboom* as Canon

The South African Constitutional Court's 2000 decision in *Grootboom* has emerged as the undisputed canon of the constitutional democratic guarantee of social and economic rights.⁵ *Grootboom* is particularly advantaged by being published in English, at a time of growing engagement with comparative caselaw and prestige for post-Cold War, post-apartheid constitutionalism in South Africa, and for its apparent resolution of a number of preoccupations about justiciable social and economic rights. Alongside other key judgments from South Africa,⁶ as well as those from the public interest tradition of India⁷ and the *tutela* jurisprudence of Colombia,⁸ *Grootboom* enjoys a kind of "proxy" hegemonic role: emanating from the Global South, but relevant to long-standing debates in the Global North. Unlike these other contenders, *Grootboom* is particularly responsive to two U.S. cases in which the debates about justiciability have been framed.⁹ Yet this "proxy" role is a complex one: the judgment's connection with supposedly universal "rights" provides interesting counter-hegemonic implications;¹⁰ but its connection with the powerful field of US constitutional scholarship links its omissions to problematic blindspots for social and economic rights.

As a superficial pointer to a canon, *Grootboom* has been described as "seminal", "landmark" "watershed", and "arguably the farthest reaching of the Court's socio-economic rights decisions".¹¹ I claim that, beyond the evident approval of its interpretive community, *Grootboom* is propelled to the canon on grounds of reasoning, pedigree and visibility. These grounds bear a family resemblance to other hierarchical sortings of authority in public law and in public international law, including debates for conferring small-c constitutional status on landmark

⁵ *Grootboom* [2000] ZACC 19; 2001 (1) SA 46.

⁶ E.g., *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC); *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC).

⁷ E.g., *Olga Tellis v. Bombay Municipal Corporation* 1985 SCC (3) 545 (Indian Supreme Court confirming the right to life includes the right to livelihood for pavement dwellers subject to eviction).

⁸ E.g., *Sala Segunda de Revisión, Sentencia T-760, 31 July 2008*; Magistrado Ponente; Manuel José Cepeda (Constitutional Court of Colombia ordering a restructuring of the health system based on constitutional right to health).

⁹ The two cases that define the dangers and misdirected ambitions of 'judicial supremacy' are *Lochner v. New York*, 198 U.S. 45 (1905) and *Brown v. Board of Education*, 349 U.S. 294 (1955). See further below.

¹⁰ Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 J.L. & Soc'y 309; Boaventura De Sousa Santos and Cesar A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP 2005).

¹¹ Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves', in Malcolm Langford et al, *Socio-Economic Rights in South Africa: Symbols or Substance?* (CUP, 2014) 35, 41 see also *Constitutional Court Oral History Project* (Edwin Cameron) Interview 2: 16th January 2012, at 30 (available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-C13-001-jpeg.pdf) ("among the most meritorious achievements of this Court"). For similar assessments, outside South Africa, see e.g., Mark S. Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective', 6 Chapman L. Rev. 137 (2003) (comparing the "seminal" *Grootboom* with U.S. approaches); Ben Saul et. al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* 957 (OUP 2014) ("watershed").

statutes or particular government practices,¹² and formal tests for establishing customary or general principles status on cases and laws as binding international law, even *jus cogens*.¹³ While a fuller exploration is beyond the scope of this entry, it is worth noting that what separates a global “canonical case” from these tests may be its responsiveness to the institutional concern of judicial review (which indeed *Grootboom* purports to solve).

Grootboom grew out of a complaint by a homeless community, living in crisis conditions on a community sports field, that their constitutional right to housing had been infringed.¹⁴ Among other social and economic (and civil, political and cultural rights), the South African Constitution guarantees:

Everyone has the right to have access to adequate housing

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances. No legislation may permit arbitrary evictions.¹⁵

The community had been waiting, some close to 8 years, for public housing; they had moved to private land, ear-marked for public housing, before their forcible eviction and the destruction of their shacks and possessions; from there they resided on community land, under plastic sheets as winter closed in.¹⁶ The Constitutional Court accepted that their rights had been infringed, and ordered that the state was required to devise and implement a comprehensive housing programme and to make “reasonable” provision for “relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations”.¹⁷

¹² These aspects of constituted authority are developed further in Katharine G. Young, *Constituting Economic and Social Rights* (OUP 2012). For other relevant hierarchical sortings, see, e.g., Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP, 2017); Jeremy Waldron, “Partly Laws Common to All Mankind”: *Foreign Law in American Courts* (Yale UP, 2012).

¹³ Statute of the International Court of Justice, art. 38(1) (setting out sources of international law, including (b) international custom, as evidence of a general practice accepted as law; and (c) the general principles of law recognized by civilized nations). For points of crossover, see Gerald L. Neuman, “Human rights and constitutional rights: harmony and dissonance.” 55 *Stanford Law Review* 1863 (2003).

¹⁴ The respondents, of whom Irene Grootboom was first named, included 510 children and 390 adults. *Grootboom*, paras. 7, 8.

¹⁵ Constitution of the Republic of South Africa, 1996, Sec 26.

¹⁶ The conditions of the Wallacedene informal settlement consisted of shacks with no water, sewage, or refuse removal, and extremely limited (5%) electricity. The conditions of the initial settlement, the eviction from the New Rust property, and the temporary structures on the sports field, were also described in the judgment. *Grootboom*, [7]-[11], [59]-[61].

¹⁷ *Grootboom*, [99].

A. Reasoning

In declaring that the right to housing had been infringed, the Court's reasoning followed a conventional formula of judicial consideration, heavily attentive to the above-cited text and alert to separation of powers concerns. First, the Constitutional Court set out criteria for the review of social and economic rights – the test of reasonableness of the government's action – which injects consequentialist and contextual considerations into social and economic rights, and rejects more categorical, court-led interpretations. The test had made an appearance before,¹⁸ but *Grootboom* was the first in which the Constitutional Court held that a statute or policy was unreasonable, giving credence to a constitutional rationale for the right to access housing – which the Court stated was more than shelter, at least partly due to its connections with human dignity.¹⁹ The reasoning was deferential to the statutory and policy framework of housing provision, but nevertheless examined its features against this set of rights-oriented criteria.²⁰ *Grootboom* thus supplied the long-established administrative law “reasonableness” standard with a more substantive content.²¹ Thus, while the Court was generally approving of the government's resourcing and planning for housing development, it held that it had omitted consideration of a key constituency: a vulnerable group in crisis conditions. This understanding of reasonableness was to become central to the reviewability of social and economic rights in a series of other South African cases, and was to become the express standard of review for the new complaints mechanism for social and economic rights that became operational in 2013 under international human rights law.²²

Second, the attention to one omitted group – vulnerable people in material crisis – was an important addition to a named category of concern for comparative and international human rights,²³ and would become significant in reviewing governmental responses to subsequent crises, including for the poor and the middle class, during the 2007-9 Global Financial Crisis. For example, the austerity policies that were piloted for the economic recovery in 2010 drew criticism on grounds of proportionality and reasonableness.²⁴ The *Grootboom* decision cited the right to adequate housing

¹⁸ *Soobramoney v. Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

¹⁹ E.g., *Grootboom*, [83].

²⁰ For careful explication, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta, 2010) 152-3.

²¹ Murray Wesson, ‘Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court’ (2004) 20 SAJHR 284.

²² I.e. The Optional Protocol to the ICESCR adopted “reasonableness” as its test for the newly articulated complaints mechanism under that treaty: art. 8(4): Bruce Porter, “Reasonableness and Article 8(4)” in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi, eds, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2014). For the terms of opposition, see Michael J. Dennis and David P. Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health’ (2004) AJIL 462.

²³ David Bilchitz, ‘Socio-Economic Rights, Economic Crisis, and Legal Doctrine’ (2014) 12 ICON 710. *compare with*, e.g., David Weissbrodt & Mary Rumsey (eds), *Vulnerable and Marginalised Groups and Human Rights* (Edward Elgar Pub 2011) (entirely omitting class, or market exclusion, from categories of vulnerable).

²⁴ E.g., note also I.D.G. v. Spain (Communication 2/2014), UN Committee on Economic, Social and Cultural Rights (June 17, 2015) (first decision of ICESCR C'tee under complaints mechanisms, made with express consideration of South African housing jurisprudence); UN C'tee Letter on Austerity in Europe, Ariranga G. Pillay, Chairperson, United Nations Committee on Economic, Social and Cultural Rights, *Letter to States Parties* (CESCR/48th/SP

in the International Covenant on Economic, Social and Cultural Rights (at that time, signed but not ratified by South Africa) following the constitutional requirement to consider international law ‘as a tool to interpretation of the Bill of Rights’,²⁵ but declined to adopt UN doctrine.

Nowhere is this engaged independence from international human rights law more pronounced than in the Constitutional Court’s refusal to adopt a “minimum core” approach, established in the Committee on Economic, Social and Cultural Rights’ influential *General Comment No. 3* of 1990.²⁶ Despite careful referencing, the Court ultimately held that it lacked the information and experience to entrench a minimum threshold of social and economic rights, and elected to leave the question open for revision in the future.²⁷ In other respects, the Court’s substantive constitutional tests – for children’s rights, for evictions, for the immediate burdens of “progressive realization” – engaged fluently, but did not adopt or incorporate, other rights-relevant UN treaties and treaty body sources.²⁸ It also noted the myriad issues – access to finance, basic services, electricity and roads, as well as enumerated rights to access land, health care, food, water, and social security – that impact housing and may be opened to review, particularly under the conditions prevailing in a country like South Africa. This decision to reject any compartmentalization of housing from other socio-economic rights, as well as the Constitution’s civil and political rights, has been influential.²⁹

Thirdly, the Court dealt candidly with the issue of resources. In perhaps the most heavily-cited passage (a canonical passage of a canonical case?) the Court declared that “A court considering reasonableness will not enquire whether other more desirable or favourable measures could have

/MAB/SW, May 16, 2012); See further Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014) (including discussion of austerity precursors in Latin America); Eibe Riedel et. al. (eds), *Economic, Social and Cultural Rights in International Law* (OUP 2014).

²⁵ South African Constitution, s 39(1)(b); see further Sandra Liebenberg, ‘South Africa and the International Covenant on Economic, Social and Cultural Rights: Deepening the Synergies’, 3 (2020) *South African Judicial Education Journal* 19. See also *Grootboom* reference to *S v. Makwayane* [1995] ZACC; 1993 (3) SA 391 (CC), noting the relevance of the United Nations, Inter-American and European human rights tribunals and instruments.

²⁶ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, U.N. Doc. E/1991/23 (1990). The General Comment is analyzed at *Grootboom*, [29]–[33]. See further Katharine G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’, 33 *Yale J. In’tl L.* 113 (2008).

²⁷ The Court continues not to recognize a minimum core as giving rise to an independent cause of action or independent content: see *Minister of Health v Treatment Action Campaign (no. 2)* 2002 (5) SA 721 (CC), paras 26–39; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 46–68; although the concept is arguably left open as relevant to test of reasonableness.

²⁸ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, U.N. Doc. E/1992/23 (1991); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 4: The Right to Adequate Housing: Forced Evictions*, U.N. Doc. E/1998/22 (1997). It is noteworthy that at this point, “the Committee [had] dedicated more attention to the right to housing than any other right”: Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (OUP 1995) 329.

²⁹ See, e.g., Katharine G. Young, ‘The Right-Remedy Gap in Economic and Social Rights: Holism and Separability’, 69 *UTLJ* 194 (2020); see also Saul et. al., *The International Covenant on Economic, Social and Cultural Rights*, 957-9 (noting also its influence on cases decided under African Charter).

been adopted, or whether public money could have been better spent.”³⁰ At the same time, the Court opined that “It is essential that a reasonable part of the national housing budget be devoted to [those in desperate need], but the precise allocation is for national government to decide in the first instance”.³¹ It clarified that all three levels of government – national, provincial and local – had obligations to realize the right to housing. The Court therefore asserted grounds for engaging expressly and yet deferentially with budgetary matters and federal divisions: both long-standing challenges for the justiciability of social and economic rights.³² These clarifications have been extended in subsequent housing decisions, with a detectable increase in the Court’s confidence in scrutinizing budgets.³³

Finally, the Court’s remedy – a declaration, alongside the approval of a negotiated settlement between the parties – attempted to resolve the remedial challenges of social and economic rights. By issuing a declaratory order, the Court deflected the potentially usurping and politicizing managerialism of the structural injunction. This order implied a respect and trust of its own authority and conveyed the expectation that compliance by government would not be an issue. It engaged the Human Rights Commission as a monitor, and marked out clear reasons (queue jumping³⁴) not to privilege the complainants themselves with individual compensation or substitutional relief. It also noted the participatory aspects of housing decisions, setting out a framework later utilized and adapted in the ‘meaningful engagement’ jurisprudence.³⁵ This contrasts with the more individualized approaches common in the Latin American jurisprudence on social and economic rights cases.³⁶

These aspects of the reasons ignited influential debates about the benefits of ‘weak’ courts and dialogic review;³⁷ in this way, the Court’s reasons are very much related, and circular, to the pedigree and visibility aspects discussed below. But as a matter of authoritative law, I suggest that

³⁰ *Grootboom* 2000 (1) SA 46 (CC) [41].

³¹ *Ibid* [66].

³² See below, Part 3.

³³ E.g. *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties Blue Moonlight* 2011 (37) SA 11 (CC). For an argument that the judicial assessment of budgets in *Grootboom* grounds a new pathway for economic policy evaluation, see Radhika Balakrishnan et al., *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (Routledge 2016) 4-5.

³⁴ This concern foreshadowed issues for the future: Kent Roach, ‘Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response’ (2016) 66 U.T.L.J. 3; Katharine G. Young, ‘Rights and Queues: On Distributive Contests in the Modern State’ (2016) 55 Colum. J. Transnat’l L. 65.

³⁵ I.e. *Occupiers of 51 Olivia Road v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr); Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa’s Second Wave* (CUP 2016);

³⁶ David Landau, ‘South African Social Rights Jurisprudence and the Global Canon: A Revisionist View’, in David Landau and Rosalind Dixon, *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence* (2018), 406.

³⁷ E.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008); Jeff King, *Judging Social Rights* (CUP 2012); Katharine G. Young, *Constituting Economic and Social Rights* (OUP 2012); Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49 Am. J. Comp. L. 707.

it remains important to mark out the quality and normative content of its reasoning as a separate matter.

B. Pedigree

I use a case's pedigree to delineate its association with such rule-of-law values as past precedents, authority, and liberal legitimacy.³⁸ Here, it is worth noting that *Grootboom* is a unanimous decision of the “first-generation” post-apartheid Constitutional Court of South Africa. This Court was composed by a robust and illustrious bench, appointed in a process during which Nelson Mandela was still President and thus was very much linked to the prestige of that constitutional moment. Many of the justices of this newly established court had been anti-apartheid activist lawyers, some had been involved in the Constitution's drafting; the Court itself was appointed to “certify” the Constitution (and it been authoritative enough to return the draft for amendments³⁹). Yacoob J, who authored the *Grootboom* opinion, had independent credentials from conquering disability (blindness since infancy) and racial discrimination, and amassing an impressive biography as a lawyer in Durban, representing victims of unfair evictions and protestors of apartheid alongside a commercial practice.⁴⁰ The prestige of this first bench is probably not replicable for South African courts in the future.⁴¹

The South African Constitution itself inherited similar prestige:⁴² a text of fraught compromise, produced in Kempton Park under conditions of high national tensions and recently unbanned political party representatives, expert and informed negotiators including now-President Cyril Ramaphosa, borrowing from international human rights treaties and an anti-discrimination framework, and making the collective decision to include the *Freedom Charter*'s social and economic rights,⁴³ alongside civil and political rights and a framework of liberal-plus (transformative) constitutionalism.⁴⁴ The ambition of this moment – and the sincere gestures towards a new culture of justification – are reflected in both its Bill of Rights and preamble;⁴⁵ the 1994 Interim Constitution was re-worked and certified by 1996; by 2000, *Grootboom* remains

³⁸ For an overview, see Larry Alexander, *Constitutionalism: Philosophical Foundations* (CUP, 1998).

³⁹ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr).

⁴⁰ Justice Zak Yacoob, <https://www.concourt.org.za/index.php/11-former-judges/67-justice-zak-yacoob>.

⁴¹ Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013); Heinz Klug, *Constituting Democracy: Law Globalism and South Africa's Political Reconstruction* (CUP 2002).

⁴² Even those offering a postcolonial critique of human rights predicted that ‘the dramatic rebirth of the South African state ... is arguably the most historic event in the human rights movement since its emergence some fifty years ago’: Makau Mutua, *Human Rights: A Political and Cultural Critique* 126 (Philadelphia: University of Penn. Press, 2002).

⁴³ Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2011); Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa* (OUP 1998).

⁴⁴ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146 (canonical article on South Africa's constitutional ambitions).

⁴⁵ Constitution of South Africa, Preamble, Sec. 7-39; See further Etienne Mureinik, ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’ (1992) 8 SAJHR 464.

proximate to this moment, and provided a close textual reading.⁴⁶ It is notable, in this sense, that the judgment fails to mention significant socio-economic policy reversals between 1994 and 1996 that arguably already indicated a break with the redistributive ambitions and constitutional moment of 1994.⁴⁷

Those who argued the case are also worth mentioning. The Grootboom community was represented by a local lawyer which a magistrate had sought out (as pro bono) after its initial eviction,⁴⁸ who was unapprised of the theories of structural impact litigation that would guide later community representation in social and economic rights litigation.⁴⁹ Nonetheless, the highly respected lawyer and activist Geoff Budlender of the Legal Resources Center represented the *amici* of the case, and thus the case was decided with the benefit of highly strategic, forward-thinking briefs.⁵⁰ The Constitutional Court thanked the quality of this brief while declining to follow the sophisticated theory of international human rights law that it offered. Moreover, the High Court, at first instance had decided *Grootboom* in large part on grounds of children's rights to shelter and ordering a structural remedy for named services for children and parents of children⁵¹ (all of which was reversed on appeal.) This case was heard by Justice Dennis Davis, himself an influential member of the South African legal community and the author of the most heavily cited refutation of justiciable social and economic rights (offering a familiar leftist critique).⁵² For that decision to be reversed, and substituted with a far more deferential, directive-principles like status that was closer to Davis' original argument, could only heighten the influence – as well as the visibility – of the case.

C. Visibility

⁴⁶ E.g. citations to the prominent literature at *Grootboom*, fn. 19.

⁴⁷ Mandela's 1994 Reconstruction and Development Program (RDP) was replaced with the 1996 Growth, Employment and Redistribution strategy (GEAR), a neoliberal strategy of growth stimulus that failed to deliver on poverty reduction (see COSATU). *Grootboom* does not mention macroeconomic policy nor does it delve deeply into issues of land or resource allocation; hence while its reasons could be read as tacit criticism of neoliberal economic development with limited social protections, it avails itself of pro-neoliberal readings. See, e.g., John J. Williams, 'The Grootboom Case and the Constitutional Right to Housing: The Politics of Planning in Post-Apartheid South Africa' in Naila Kabeer (ed), *Inclusive Citizenship* (Zed Books 2005) 219, 225.

⁴⁸ *Ibid*, 225 (2003 Interview with pro bono lawyer Julian Appolos).

⁴⁹ Cf. *Minister of Health v Treatment Action Campaign* (no. 2) 2002 (5) SA 721 (CC); see further Mark Heywood, 'The Transformative Power of Civil Society in South Africa: An Activist's Perspective on Innovative Forms of Organizing and Rights-Based Practices', (2020) 17 *Globalizations* 294 (noting both role of TAC, as well as incorporation of AIDS Law Project into SECTION27); Tshepo Madlingozi, 'Social Movements and the Constitutional Court of South Africa' in Oscar Vilhena et. al. (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013) 537.

⁵⁰ For further background, see Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta & Company Ltd. 2018), see also 2008 Legal Resources Centre Oral History Project.

⁵¹ *Grootboom v. Oostenberg Municipality*, 2000 (3) BCLR 277 (Cape of Good Hope High Court) (Order "to provide the respondents who were children and their parents with shelter," consisting at a minimum of tents, portable latrines, and water).

⁵² Dennis M. Davis, 'The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 SAJHR 475.

This last aspect of constructing the canon is perhaps the most contentious: how *Grootboom* has become so visible for deliberating and contesting social and economic rights. By visibility, I mean a combination of citations in prestigious and well-read forums; an accessibility to a wide and global audience; and the instigation of a highly generative debate with an array of reasonable positions. But visibility is helped by hegemony; the power and prestige of Anglo-American materials has long been subjected to general, and to particular Global South/Third World, critique.⁵³ Human rights, and especially social and economic rights, has also long been a flashpoint in this area, and it is ironic that a case which mainly answers US sceptics gained status by addressing this particular baseline.

First, *Grootboom* is most easily measured by its re-publications and citations. For example, *Grootboom* is excerpted in many teaching and research texts and in materials for judicial dissemination:⁵⁴ as representative of social and economic rights jurisprudence in at least one casebook on comparative constitutional law;⁵⁵ and in the international human rights law casebook that deals most thoroughly with social and economic rights.⁵⁶ A casenote was published in the *American Journal of International Law*, amongst other places.⁵⁷ In addition to the monographs cited above, the case is examined in countless law review articles, chapters and books about housing rights;⁵⁸ as well as in articles and collections dealing with constitutional rights, or international human rights, to health care, education, social security, and basic services more generally.⁵⁹

⁵³ See generally Antony Anghie, 'Third World Approaches to International Law' (2003) 2 Chinese JIL 77; Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Colombia* (CUP 2013).

⁵⁴ E.g., Judith Resnik et. al. (eds), *The Reach of Rights* [2015] Gruber Program for Global Justice and Women's Rights II-48 <<https://documents.law.yale.edu/sites/default/files/global-constitutionalism-2015.pdf>> accessed 8 November 2020 (Yale Global Constitutionalism Seminar).

⁵⁵ Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law* (2nd edn, Foundation Press 2006) (discussed only in Norman Dorsen et. al., *Comparative Constitutionalism: Cases and Materials* (West Academic Publishing 2002), described as hard to determine meaning of). See also Stephen Ross, Helen Irving, and Heinz Klug, *Comparative Constitutional Law: A Contextual Approach* (LexisNexis, 2014) (survey of US, Australian, Canadian and South African constitutional law) (excerpt). See also Michaela Hailbronner, 'Constructing the Global Constitutional Canon: Between Authority and Criticism' (2019) 69 U.T.L.J. 248, 253 discussion of non-representativeness of these texts.

⁵⁶ Philip Alston & Ryan Goodman, *International Human Rights* (OUP 2012); see also Ben Saul et. al., *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 957-8; Olivier De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Routledge 2013).

⁵⁷ David D. Caron et. al., 'Republic of South Africa v. Grootboom. Case No. CCT 11/00. 2000 (11) BCLR 1169 and Minister of Health v. Treatment Action Campaign. Case No. CCT 8/02' (2003) 97 AJIL 669.

⁵⁸ Marius Pieterse, *Rights-Based Litigation, Urban Governance and Social Justice in South Africa: The Right to Joburg* (Routledge, 2017) at 45.

⁵⁹ E.g., Helena Alviar García, Karl Klare and Lucy A. Williams, eds., *Social and Economic Rights in Theory and Practice* (Routledge, 2015); See also, for a broader interdisciplinary effort, see Malcolm Langford & Katharine G Young, eds, *The Oxford Handbook of Economic and Social Rights* [forthcoming].

Secondly, *Grootboom* helped seed a specialized and heavily international and comparative discourse of ‘reasonableness review’.⁶⁰ It is used to describe a before and after in South African jurisprudence (“post-*Grootboom*”)⁶¹ and has grounded a neologism: “the *Grootboom*-proofing of social policy”.⁶² This type of discourse analysis is perhaps more durable, if more contestable, than citation or excerpt count. But this analysis is made complicated by the fact that the visibility of the participants of this discourse is itself significant.⁶³ Cass Sunstein, a liberal/centrist US constitutional scholar who penned a well-cited refutation of constitutional social and economic rights for post-communist Eastern Europe⁶⁴ reversed this position, with a long discussion of the merits of *Grootboom* and the puzzles that it appeared to solve:⁶⁵ he went on to extol the virtues of a resurrection of FDR’s second bill of rights for the US, again citing *Grootboom*.⁶⁶ Frank Michelman, the most comprehensive of US legal thinkers about social and economic rights, also responded early with discussion of *Grootboom*, in a founding issue of the *International Journal of Constitutional Law*.⁶⁷ Funding from the Ford Foundation and other supported research projects contributed to this discourse.⁶⁸

It is thus somewhat misleading, as Philip Alston would write, that “Rarely have the developments in the field of comparative constitutional law been so dominated by the jurisprudence not only of a single country but in this case of a single court.”⁶⁹ *Grootboom*’s visibility comes from outside

⁶⁰ Liebenberg, *Adjudication under a Transformative Constitution*. See sources cited, especially at footnote 37 above.

⁶¹ E.g., Clarence Itumeleng Tshoose, ‘A Closer Look at the Right to Have Access to Adequate Housing for Inhabitants of Informal Settlements Post *Grootboom*’ (2015) 30(1) *Public Law* 94-111.

⁶² Malcolm Langford and Steven Kahanovitz, ‘South Africa: Rethinking Enforcement Narratives’ in Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi, eds, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge, UK: Cambridge University Press, 2017) at 331 (noting effects on water and social security policy making); see also Gilbert Marcus and Stephen Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (The Atlantic Philanthropies 2008) 66 (“the government has begun factoring these issues into its budget-making processes”).

⁶³ Pierre Bourdieu’s ‘*Homo Academicus*’ is perhaps relevant in outline: (Paul Collier transl., 1998, Polity Press); Bourdieu’s analysis of the social origins and current positions of the French academy, as well as how they publish, how much, their institutional and media connections and political involvements, is also worth mapping for the social field of comparatively engaged constitutional scholars, given that more subtle reputational influences may transform intellectual culture in ways that go beyond simple dialogue and debate. For the incorporation of aspects of this framework to map the international college of lawyers, see Anthea Roberts, *Is International Law International?* (OUP 2017).

⁶⁴ Cass R. Sunstein, ‘Against Positive Rights Feature’ in Andras Sajó (ed), *Western Rights? Post-Communist Application* (Kluwer Law International 1996).

⁶⁵ Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (OUP 2001).

⁶⁶ Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More Than Ever* (Basic Books 2004). FDR’s New Deal is still emblematic of a series of political positions held by the Democratic Party in the US; the influence of his “four freedoms” on the UDHR is also noteworthy.

⁶⁷ Frank I. Michelman, ‘The Constitution, Social rights, and Liberal Political Justification’ (2003) 1 *ICON* 13. Note that *Kyalami Ridge*, a sequel to *Grootboom*, forms the main body of analysis, which is also comparative (Massachusetts Supreme Judicial Court).

⁶⁸ E.g., Ford Foundation Annual Report 2001, available at <https://www.issuelab.org/resources/7927/7927.pdf>.

⁶⁹ Philip Alston, ‘Foreword’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008).

South Africa: the jurisprudence is more accurately understood as dominated by the preoccupations of another country (the US) and its powerful Supreme Court. Certainly, some of the US cases appear in the same casebooks described above, even anachronistically;⁷⁰ *Grootboom* stands as proxy for “what might have been”, if not (audaciously) “what might become” for that body, as the counter-canon discussion in Part 3 below highlights.

Third, visibility is helped by accessibility: *Grootboom* is accessible for the clarity of its reasons, described above: it is also assisted by the ease of general access to the SAFLII website,⁷¹ a not-for-profit publisher of African statutes and caselaw with no direct equivalent in the highly profitable US legal publishing market.⁷² An analysis of this and other non-US websites must one day be written (see also the effect of similar platforms, such as Austlii⁷³) for the mostly immeasurable service they provide for securing a more responsive global canon.

Finally, the symbolic and material impact of *Grootboom* is itself a question that has spanned a cottage industry. Here, visibility is helped, in part, by the contestability of much of *Grootboom*'s legacy. There are radical swings in opinion. As one recent book opens its pages:

The kernel of the idea [for this book] was born in a discussion in 2009 about the impact of the South African Constitutional Court's landmark *Grootboom* judgment. Was it an illustration of everything positive or everything negative about the uptake of socio-economic rights in post-apartheid South Africa? ... was it Exhibit A of the danger that relying on socio-economic rights might narrow the frame of political struggle and leave communities and individuals without any remedies of substance?⁷⁴

This book's opening paragraph is, in short, a re-write of the main left-liberal preoccupations of social and economic rights, as well as liberal constitutionalism and judicial review in general: missing is the centre-right, right, and far-right critiques, of course, that nevertheless exert significant pressure on the legitimacy of social and economic rights (e.g. perceptions of dependency, perversity, big government, infeasibility and inefficiency).⁷⁵ Moreover, the ambivalence of the narrative of Irene Grootboom helps sustain canonicity. Is her story a cautionary

⁷⁰ For example, Warren Court decisions such as *Brown v. Board of Education* have been heavily excerpted and cited in comparative settings, particularly in the second wave of constitutionalism of the 2000s.

⁷¹ South African Legal Information Institute: <http://www.saflii.org>

⁷² In the US, access is often restricted through paid membership to Westlaw/Lexis; although open access platforms do exist, such as the Legal Information Institute of the Cornell Law School: https://www.law.cornell.edu/lii/about/about_lii

⁷³ <http://www.worldlii.org>; see also Free Access to Law Movement (FALM) members

⁷⁴ 'Preface' in Malcolm Langford et. al. (eds), *Socio-Economic Rights in South Africa: Symbols or Substance* (2014) xiii.

⁷⁵ E.g., Eric A. Posner, *The Twilight of Human Rights Law* (OUP 2014) (welfarist concerns). *Grootboom* marks out some of this controversy with the court's caution about rewarding self-help strategy (land invasions and vigilantism). For a reflective engagement with utilitarianism objections and those of feasibility, see Amartya Sen, "Elements of a Theory of Human Rights," *Philosophy & Public Affairs* 32 (2004) 315.

tale (she died, penniless and homeless eight years after judgment⁷⁶) or, as is now more commonly asserted, is it a motivational one (she helped to mobilize a community that ushered in a significant change in national housing policy, with some slow but incremental gains themselves through a negotiated settlement⁷⁷). Those seeking to end the ambivalence have themselves generated a range of new methodologies for serious assessment.

2. A Proto-Canon: *The Universal Declaration of Human Rights*

The preoccupation with justiciability that has elevated *Grootboom* to canonical status is both understandable and predictable. Yet it distracts from the landmark instrument in which the right to an adequate standard of living and to work were first enumerated as a “common standard of achievement”, in universal terms. This instrument, which set out the equality of all people, in dignity and rights, also called for an international order in which social and economic rights, alongside civil, political and cultural rights, could be fully realized.⁷⁸ To this end, the *Universal Declaration* serves as a second – labelled here proto-canonical – source for social and economic rights, although its own pedigree and visibility was to ebb during the geopolitical hostilities of the Cold War and the attempts of later governments, including those of the Global North, to distance their human rights commitments from the social and economic guarantees to which they had earlier subscribed. Admittedly a wide category, with many contenders within for social and economic rights, a “proto-canon” in this sense is one that, although at one time meeting all the criteria I marked out above – reasoning, pedigree and visibility – was later to wane.

Forged at the highpoint of global consensus directly after World War II, and elucidating the commitment to human rights under the United Nations Charter of 1945, the *Universal Declaration* reflected earlier constitutional guarantees of social and economic rights and the contributions of socialist constitutionalism, social Catholicism, and the prescriptions of developmentalist and welfare statist political economy.⁷⁹ The expression of commitment within the *Universal Declaration*, far more fulsome and generative for social and economic rights than the pragmatic resolution of justiciability represented by *Grootboom*, guided the core human rights treaties that followed, numerous resolutions of the UN General Assembly, the work of the UN special procedures, including in relation to international trade, investment, and the financial institutions,

⁷⁶ Pearlie Joubert, ‘Grootboom dies homeless and penniless’ *Mail & Guardian* (8 August 2008) ≤ <https://web.archive.org/web/20190728164204/https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> > accessed 8 November 2020.

⁷⁷ Langford & Kahanovitz, above.

⁷⁸ The Universal Declaration of Human Rights, Preamble, arts. 22-6, 28. For attention to the latter requirement, see Thomas Pogge, ed., *Freedom from Poverty as a Human Right: who owes what to the very poor?* (OUP 2007).

⁷⁹ See, e.g., Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001); see also Daniel Ricardo Quiroga-Villamarín, “‘An Atmosphere of Genuine Solidarity and Brotherhood’: Hernán Santa-Cruz and a Forgotten Latin American Contribution to Social Rights, *Journal of the History of International Law* 21 (2019) 71 (Latin American contribution, and see also David Landau in this volume); see also Samuel Moyn, *Not enough: Human Rights in an Unequal World* (2018) 52-7 (noting influence of ideas of Gunnar Myrdal, T. H. Marshall, Karl Polanyi, and Georges Gurvitch). A social rights historiography dates their origins at least to the 18th century: Steven L. B. Jensen and Charles Walton eds. (forthcoming), *Not Second Generation Rights. The Long History of Social and Economic Rights*; Malgorzata Mazurek and Paul Betts, “Preface: When Rights Were Social”, (2012) 3(3) *Humanity* 291-295..

regional human rights instruments and the text of dozens of subsequent constitutional instruments which guarantee social and economic rights. The inclusion of rights in the *Universal Declaration* has been said to vastly increase the probability of their appearance in subsequent constitutions, although it remains unsettled as to whether the instrument itself, or the emergent ideas it codified, should be credited.⁸⁰ By whatever measure, social and economic rights are now vastly more likely to be constitutionalized than not, particularly in civil law systems and within Latin America and Eastern Europe.⁸¹

To be sure, the status of the *Universal Declaration* as canonical has been complicated by the colonial, gendered and racial orthodoxies of 1948. Like the New Deal vision of Franklin D. Roosevelt's second bill of rights, set out during his State of the Union address of 1941, and itself a high water-mark for enumerating a list of social and economic rights guarantees (and informing the provisions in the *Universal Declaration* and the vision of international peace and security that would be gained by the guarantee of "freedom from want"),⁸² the *Universal Declaration* has been tainted by these, and by other work-centric ideologies that formed deep grooves in American capitalist democracy. When efforts to create a codified treaty of the *Universal Declaration* stalled due to Cold War communist/capitalist divisions and other disagreements, the social, economic and cultural rights were famously split from civil and political rights, drawing different adherents, with the US remaining a prominent non-party to the ICESCR. Commentators who attempt to ground human rights in the core human rights conventions, beyond the *Universal Declaration*,⁸³ must grapple with this absence.

At the very least, the ambitious social and economic rights of the *Universal Declaration* and its companion instruments⁸⁴ lost out – after a well-orchestrated effort – to the free market ideology

⁸⁰ See, e.g., Zachary Elkins, Tom Ginsburg and James Melton (2017), 'Imagining a World without the UDHR', http://www.law.nyu.edu/sites/default/files/upload_documents/Zachary%20Elkins%20Paper%20September%202017%20v.2.0%20%282%29.pdf; Zachary Elkins, Tom Ginsburg and Beth Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice." *Harvard International Law Journal* 54(1):61–95. (2013).

⁸¹ See findings, Evan Rosevear et. al., 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' in Katharine Young (ed), *The Future of Economic and Social Rights* (CUP 2012); Daniel M. Brinks et. al., 'Social Rights Constitutionalism: Negotiating the Tension Between the Universal and the Particular' (2015) 11 *Annual Rev. of L. and Social Science* 289.

⁸² State of the Union address of 1941 (January 6, 1941); See Katharine G. Young, 'Freedom, Want and Economic and Social Rights', 24 *Md. Int'l L. Rev.* 182 (2009). The early input of the US to the UDHR, as well as the hitherto overlooked contributions of the Global South to its follow-up instruments, is canvassed in a burgeoning literature, e.g., Sally Ann Way, 'The "Myth" and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 "United States Suggestions for Articles to be incorporated in an International Bill of Rights' 36.4 (2014) *Human Rights Quarterly* 869-897; Roland Burke, *Decolonization and the Evolution of International Human Rights* (U Penn Press, 2013); Steven L. B. Jensen, 'Twentieth Century Economic and Social Rights: Decolonization and the Global South' in Malcolm Langford & Katharine G Young, eds, *The Oxford Handbook of Economic and Social Rights* [forthcoming].

⁸³ E.g., Sandra Fredman, *Comparative Human Rights Law* (OUP 2018); Sakiko Fukuda-Parr, Terra Lawson-Remer, and Susan Randolph, *Fulfilling Social and Economic Rights* (OUP 2015).

⁸⁴ Both antecedent and successor international instruments were informed by the contributions cited above in fn. 78 and 81, as well as by John Maynard Keynes' critique of laissez-faire and embrace of globalization. These include the original Bretton Woods agreement (1944), and the proposed Havana Charter for an International Trade

that reigned, particularly since the administrations of Reagan and Thatcher in the 1980s, which retrenched various welfare state capitalisms and dislodged the broader moral and economic case for social and economic rights.⁸⁵ The powerful ‘Washington Consensus’, established between the International Monetary Fund, the World Bank and the US Treasury, directly contradicted the premise that governments should provide a “freedom from want” when setting development aid, crisis management, or transitioning to capitalism. Instead, programs of fiscal austerity, user fees, privatization, market liberalization and deregulation were themselves orthodoxy in a sphere occupied by financial ministers and central banks, and which set the policies that would impact on access to social security, health care, education, food, water, and sanitation, in the goal of greater efficiency and growth. Such programs are difficult (although not impossible), to square with economic and social rights, and yet a government uncommitted to these ideas was deemed “off track”.⁸⁶

3. Anti-Canons and Counter-Canons: *San Antonia School District v. Rodriguez*

If an ‘anti-canon’ represents a series of cases whose central propositions all legitimate decisions must refute,⁸⁷ then the enforcement of social and economic rights itself has been viewed as outside the legitimate canon. In the U.S., especially, the majority of commentators viewed constitutional economic and social rights as an “off-the-wall” proposition, implausible against the background assumptions of its constitutional culture.⁸⁸ What had discredited the idea of constitutional social and economic rights in the U.S.? Undoubtedly, concerns about the risks of judicial supremacy played a large part, particularly in a large, federal jurisdiction with an aged, difficult-to-amend Constitution, and a history of juridical obstacles to progressive reforms. So, too, did broader political pressures – white backlash, taxpayer revolts, and the manipulated distinction between worthy and “undeserving” poor.⁸⁹ Yet the fears that equated rights with the judicial usurpation of economic policymaking reflected the legacy of two important cases.⁹⁰ On the one hand was *Lochner*’s entrenchment of economic policy (ironically to overrule social rights-protective

Organization (1948) as antecedents; and the *International Covenant on Economic, Social and Cultural Rights* (entered into force 4 Jan. 1976), and other core human rights treaties as successors.

⁸⁵ For a history of this orchestration, see Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (Harvard University Press, 2012).

⁸⁶ See Joseph E. Stiglitz, *Globalization and its Discontents* (Norton, 2002), 42, citing an IMF phrase that signalled dissenters, which would send a negative signal to markets. For an evaluation of two country’s attempts to move outside this consensus, through constitutional social and economic rights, see Kim Lane Scheppele, ‘A Realpolitik Defense of Social Rights’ 82 *Tex. L. Rev.* 1921 (2004).

⁸⁷ Jamal Greene, ‘The Anticanon’, (2011) 125 *Harvard Law Review* 379.

⁸⁸ J.M. Balkin, ‘Agreements with Hell and Other Objects of Our Faith’, 65 *Fordham L. Rev.* 1703, 1734 (1997) (“off-the-wall”); Lawrence Lessig, ‘Colloquy, Fidelity as Translation’, 65 *Fordham L. Rev.* 1507, 1509-10 (1997); cf. Frank I. Michelman, ‘The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment’, 83 *Harv. L. Rev.* 7 (1969).

⁸⁹ William E. Forbath, ‘Constitutional Welfare Rights: A History, Critique and Reconstruction’ 69 *Fordham L. Rev.* 1821, 1824-7.

⁹⁰ *Lochner v. New York*, 198 U.S. 45 (1905); For commentary, see Sujit Choudhry, ‘The *Lochner* Era and Comparative Constitutionalism’ (2004) 2 *ICON* 1; see also Cass R. Sunstein, ‘*Lochner*’s Legacy’ (1987) 87 *Colum. L. Rev.* 873; Martha Minow, *In Brown’s Wake: Legacies of America’s Educational Landmark* (OUP, 2010).

legislation through classical economic rights). On the other was *Brown v. Board of Education*, and its complicated legacy of backlash, which came to represent judicial overreach as well as racial justice. These two, very different cases are not really anti-canonical to social and economic rights, but nevertheless helped to discredit them.

The concept of a counter-canon, rather than anti-canon, is perhaps more apt. This concept dwells on the path not followed, and shows clearly why *Grootboom* serves as canon, insofar as the marginal jurisprudence of social and economic rights is concerned. I argue that the best candidate, in this respect, is the 1973 case of *San Antonio School District v. Rodriguez*,⁹¹ described as “effectively the death knell for social and economic rights in the United States”.⁹² There, in a 5-4 decision, the US Supreme Court considered that the complexities of local taxation, fiscal planning, educational policy, and federalism, all counted against the judicial review of substantial educational disparities. *Rodriguez* involved a class action challenge on behalf of schoolchildren in Texas who, as members of poor and often minority families living in school districts with a low tax base, received substantially less educational funding than others. The District Court below had held that the school financing scheme, heavily reliant on local property values, was unconstitutional, first, because dividing citizens on a wealth basis was highly suspect, and second, because this division directly affected the “fundamental interest” of education. Similarly, the minority of the Supreme Court emphasized the nexus between education and specific constitutional guarantees – the civil and political rights of the First Amendment, for example, which demanded a closer degree of judicial scrutiny when infringed on a discriminatory basis.⁹³ The majority, however, refused to take this step, albeit recognizing that education remained one of the most important services performed by the state. This meant cabining the Court’s previous cases to their narrowest reasoning, as related only to absolute deprivations of constitutionally protected interests.

This counter-canon is beset by contingency. The 1960s and 1970s had involved a number of US Supreme Court decisions supporting social and economic guarantees, and the Harvard Law Review’s 1969 Foreword – a prominent source of academic commentary – had provided an extensive grounding, in both jurisprudential and philosophical terms.⁹⁴ Indeed, the Warren Court’s tentative grasp on social and economic rights had progressed from finding duties of affirmative provision for poor people when fundamental interests were at stake (rights to vote and the protections of criminal justice),⁹⁵ to the striking down of a six-month waiting period on welfare

⁹¹ 411 U.S. 1 (1973).

⁹² Cass R. Sunstein, ‘Why Does the American Constitution Lack Social and Economic Guarantees?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 90, 108.

⁹³ For the implications of the decision for racial equality and other goals, see Charles J. Ogletree and Kimberly Jenkins Robinson (eds.), *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* (Cambridge, Massachusetts : Harvard Education Press. 2015); see also Justin Driver, *The Schoolhouse Gate: Public Education, The Supreme Court, and the Battle for the American Mind* (Penguin Random House, 2019).

⁹⁴ Frank I. Michelman, ‘Foreword: On Protecting the Poor through the Fourteenth Amendment’ (1969) 83 Harv. L. Rev. 7.

⁹⁵ This line of cases included the striking down of the poll tax, *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966) (striking down poll tax); to others *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial transcripts to poor people appealing criminal conviction); *Douglas v. California* 372 U.S. 353 (1963) (provision of counsel on first appeal);

benefits for new arrivals between states,⁹⁶ and to procedural protections for welfare benefits, counting the “basic demands of subsistence” as a part of the Constitution’s own guarantees.⁹⁷ Yet the election of President Nixon in 1968 – a notably close one – was to change that course. As the legal realist account underlines, his four appointments to the Court, between 1970 and 1973, abruptly terminated this emerging development.⁹⁸

Ironically, the education rights cases that surged in US state courts after *Rodriguez* have proved significant, fuelling a detailed comparative, as well as US, commentary.⁹⁹ Moreover, education rights, alongside health and social security, are more commonly represented in contemporary constitutional texts – and more often made expressly justiciable – than *Grootboom*’s rights to housing, for example, or the more recently advanced human rights to water and sanitation.¹⁰⁰ And yet the *Rodriguez* foreclosure of federal constitutional possibility remains salutary. Within it lies a complex amalgamation of ideas of what the US constitution prohibits, permits and requires in terms of material security and the equality of citizens and others – as first endorsing a conception of equality that ignores material deprivation and focuses only on intent, to next invalidating policies that sought to mitigate structural inequality, and to endorsing the faith in markets and scepticism of the state described earlier above.¹⁰¹ In especially these latter terms, the status of *Grootboom*, the *Universal Declaration* and the counter-canon are all impugned by ideas and ideologies marked by those ascendant outside the juridical paradigm.

Conclusion

Grootboom remains canonical for its apparent resolution of judicial supremacy and social and economic rights. Its status is also helped by the ambivalence of its legacy, its ducking and weaving of neoliberal trends and separation of powers concerns, and its connection with South Africa’s post-apartheid constitutional moment. Its longevity as canonical is not, however, assured. “Canon” implies authoritative norms, and the qualities of reasoning, pedigree and visibility are not impervious to the norm-busting of the current global political moment. A social and economic rights landmark produced at the close of the 1990s may be of doubtful use for the more unsettled constitutionalist pathways of the 2020s. As the challenges of weak, ineffective, captured, or otherwise corrupt governments increase, and the prestige and authority of South African and US

⁹⁶ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁹⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹⁸ Cass R. Sunstein, ‘Why Does the American Constitution Lack Social and Economic Guarantees?’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005) 90, 105–110.

⁹⁹ E.g., Jeff King, ‘American Exceptionalism over Social Rights’ in Liora Lazarus, Christopher McCrudden, Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014); see also Goodwin Liu, ‘Education, Equality, and National Citizenship’, 116 *Yale Law Journal* 330, 332 (2006). For the prominence of social and economic rights in state (sub-national) constitutions in the US, see Emily Zackin, *Looking for Rights in All the Wrong Places* (Princeton, 2013).

¹⁰⁰ See collection in Katharine G. Young (ed), *The Future of Economic and Social Rights* (CUP, 2019).

¹⁰¹ See, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman, ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’, 129 *Yale L. J.* 1784, 1808 (2020); cf. David S. Law and Mila Versteeg, ‘The Declining Influence of the United States Constitution’ 87 *NYU L. Rev.* 762-858 (2012).

constitutionalist models decrease, new expressions of social and economic rights, especially from the Global South, may become authoritative. *Grootboom* and its progeny may become less cited and read in the legal systems inheriting civil law traditions and in particular regions outside Anglo-American common law, where social and economic rights are more prominent in constitutional text. The further health, economic and humanitarian crises that will occur post-pandemic, as well as predictably through climate change, and further extremes of inequality and poverty, may pressure the creation of difference canonical sources, with more coordinated or concrete obligations. Whether the proto-canon of the *Universal Declaration* takes this form, or is unseated by older manifestos or newer institutions or platforms, remains to be seen.