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POLICENTRISM, POLITICAL MOBILIZATION, AND THE PROMISE OF SOCIOECONOMIC RIGHTS

BRIAN RAY*

I. INTRODUCTION

One remarkable constitutional development of the twentieth century is the broad inclusion of socioeconomic rights in new constitutions.¹ Because these provisions impose affirmative obligations on the governments enforceable by the courts, they represent significant constitutional developments. They also raise difficult questions over whether and how to enforce these rights.

There is a lively debate about whether modern constitutions should include socioeconomic rights like these, defined here to mean any rights that relate to minimum survival needs or core requirements for an adequate quality of life.² This debate has produced an extensive literature concerning the nature of socioeconomic rights and whether they are qualitatively different from civil and political rights.³ The arguments generally center on whether socioeconomic rights are uniquely “positive” in that they require expenditures of state resources in contrast to civil and political rights, which are “negative”

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¹ See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 220 (2007) (“Constitutions drafted after World War II almost universally included social welfare provisions.”).

² What rights should be included under the rubric of “socioeconomic”—and indeed as discussed below, whether the category makes conceptual or practical sense at all—is a topic of considerable academic discussion. See, e.g., Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 364 (2002) (focusing on the right to work as a socioeconomic right); Justice Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381 (2000) (defining socioeconomic rights as “the minimum decencies of life”); CECILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* 5 (2000) (defining social rights as the right “to adequate minimum income, housing, health care, and education”).

³ See, e.g., Frank I. Michelman, *The Constitution, Social Rights, and Liberal Justification*, 1 INT’L J. CONST. LAW 13 (2003) (discussing theoretical objections to constitutionalization of social and economic rights).

in that they involve only limiting government intrusion into the private sphere.⁴ On one side of the debate, scholars such as Stephen Holmes and Cass Sunstein have argued that the theoretical differences between these categories is unhelpful at best and incoherent at worst pointing out that all rights—even the supposedly “negative” ones—rely on state expenditures.⁵ On the other side, critics argue these rights should be characterized differently because they involve courts in adjudicating disputes over complicated resource allocation decisions that are better left to the legislative and executive branches.⁶

The controversy over the nature of socioeconomic rights and whether constitutions should include them is connected to the issue of how to enforce these rights when they are included. South Africa’s post-apartheid Constitution, which established entrenched, judicially enforceable constitutional rights for the first time in South African history,⁷ includes several socioeconomic rights.⁸ The South African Constitutional Court in its

⁴ See, e.g., Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 18–19 (1992). As Scott and Macklem point out, the decision to divide the 1948 Universal Declaration of Human Rights into the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) embodies this split. See also TUSHNET, *supra* note 1 (describing the conventional argument against judicial enforcement of socioeconomic rights); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 119–26 (2004) (summarizing arguments over the differences between positive and negative rights).

⁵ STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 37–48 (2000). Holmes and Sunstein argue that the implicit premise behind the negative/positive distinction is that “immunity from invasion by the state involves no significant entitlement to financial resources” and that this premise is fundamentally flawed. Holmes and Sunstein attempt to show that all rights depend on state expenditures for meaningful protection. *Id.*; see also Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 7 (2005) (“All constitutional rights have budgetary implications; all constitutional rights cost money It follows that insofar as they are costly, social and economic rights are not unique.”); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2003) (noting that “sometimes the enforcement of first- and second-generation rights has some implications for government budgets,” and concluding that “[t]he examples of rights-protections with budget consequences could be proliferated almost endlessly.”); Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383, 389–90 (2004) (arguing that “it has been shown that resource implications also flow from vindicating civil and political rights, that it is possible to award more precise content to socioeconomic rights and that both ‘categories’ of rights have ‘positive’ as well as ‘negative’ dimensions.”); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 153 (2005) (“Even in a minimalist nightwatchman state, the entrenchment of the most basic civil and political rights in a country’s constitution necessarily imposes a duty on government to enact and enforce whatever laws are required to guarantee their efficacy.”).

⁶ See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863–67 (2001) (proposing that the test for distinguishing between negative and positive rights should be whether the right would be automatically filled in the absence of a government); see also Michael J. Dennis & David P. Steward, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT’L L. 462, 465 (2004) (asserting that “[f]rom the outset, and for good reason, economic, social and cultural rights, unlike civil and political rights, have been defined primarily as aspirational goals to be achieved progressively.”).

⁷ Entrenched rights and judicial review were expressly included in the constitutional principles that were negotiated as part of the transition from apartheid and operated as an interim constitution during the final constitutional drafting process. See *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC), Annexure 2, Const. Principle II (S. Afr.) (“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.”)

⁸ S. AFR. CONST. 1996 §§ 26–29.

decision approving the new Constitution specifically held that these rights are justiciable in the same fashion as the civil and political rights in the Constitution.⁹

Since then it has become a leading example of a court dealing with these enforcement issues, and its early decisions have been hailed by many as developing a uniquely effective enforcement approach.¹⁰ Mark Tushnet suggests that the Court has adopted a “weak-form” approach to enforcement that gives the legislature a substantial role to play in interpreting these rights. Cass Sunstein similarly argues that the court has adopted an administrative law approach that limits the Court’s role to assessing whether policies adopted by the other branches are reasonable. Many in South Africa, however, have been critical of the Court’s approach arguing that it fails to give full effect to the promise of these rights by inappropriately limiting the Court’s role.¹¹ This Article addresses the debate over the Constitutional Court’s enforcement of socioeconomic rights and draws on the Court’s most recent cases and other developments to offer a new framework for understanding the Court’s approach.

Both sides of the debate have failed to adequately consider two key aspects of the Court’s early cases. First, the Court has consistently left open the possibility for evolution towards stronger forms of enforcement for these rights in subsequent cases. Second, in two of these cases, the Court has concretely demonstrated its willingness to take a direct role in enforcing socioeconomic rights. Focusing on these two aspects of the early cases, it is evident that the Court has described the possibility for a mixed form of review that is potentially more robust than both sides of the debate claim.

This mixed form of review is best described as a “policecentric” form of review.¹² The distinctive characteristic of policecentric review is a sharing of interpretive authority with the legislative and executive branches of

⁹ The Court specifically rejected the argument that socioeconomic rights are “inconsistent with the separation of powers required by [the directive principles] because the judiciary would have to encroach upon the proper terrain of the legislature and executive.” *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) (S. Afr.).

¹⁰ See Tushnet, *supra* note 5; CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 234 (2002); see also Richard J. Goldstone, *A South African Perspective on Social and Economic Rights*, 13 HUM. RTS. BRIEF 4 (2006); Mark Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617 (2004); Paul Nolette, *Lessons Learned from the South African Constitutional Court: Toward a Third Way of Judicial Enforcement of Socio-Economic Rights*, 12 MICH. ST. J. INT’L L. 91 (2003).

¹¹ See, e.g., Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. HUM. RTS. 1, 22 (2005) (arguing that the Court’s approach is “inadequate” when applied “to claims involving a deprivation of the basic necessities of life . . .”); Marius Pieterse, *Possibilities & Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882 (2004) (characterizing the Court’s socioeconomic rights jurisprudence as “paradoxical,” containing tendencies that are “some cause for concern”); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1 (2003) (criticizing the Court’s refusal to interpret socioeconomic rights as containing a “minimum core”); Danie Brand, *The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or What Are Socio-Economic Rights For?*, in *RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION* 41 (Henk Botha et al. eds., 2003) (describing the Court’s approach as “limited”).

¹² As discussed in more detail in Part III, the concept of a “policecentric” approach comes from Robert Post and Reva Siegel’s article, *Legislative Constitutionalism and Section Five Power: Policecentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

government and a consequent willingness by courts to respect constitutional interpretations by those branches that differ from their own. The policentric approach has several key advantages over a traditional juricentric approach that are particularly important in the socioeconomic rights area. Policentric review enhances the informational basis for implementing these rights by giving the courts the benefit of the other branches' better informed perspectives on the complex policy choices involved in enforcing these rights. At the same time, extending interpretive authority to the other branches also establishes a democratic basis for making those policy tradeoffs.

Most importantly, policentric review improves the prospects for meaningful implementation of socioeconomic rights in the long term. It creates incentives for the legislature and executive branches to take seriously their roles in enforcing these rights by giving them the authority to develop independent interpretations of what these rights require. And, by placing the interpretive function expressly into the political sphere, policentric review encourages the development of political mobilization to seek responsive policy changes by the government.

Finally, the judicial role is highly flexible under policentric review. This means that courts can operate along a continuum of relatively weaker or stronger interventions in each case. At the weaker end of this continuum, courts can defer completely to the judgment of the government that a particular policy is the most effective mechanism for enforcing a particular right. At the stronger end, courts remain free to order specific changes to a program and even to issue structural injunctions to ensure compliance with their orders.

Recognizing that the Constitutional Court has begun to develop a policentric approach answers the critics' principal objection that the Court's deferential approach to enforcement in its early cases has diminished the force of these rights. At the same time, the flexibility that the Court has retained to take a more direct role in enforcing socioeconomic rights requires revision of the relatively restrained approach described by those who have commented favorably on the Court's current approach.

Parts I and II of this Article outline the Court's early cases and the debate that has developed around them. Part III critiques both sides of this debate and develops a new account of the Constitutional Court's approach to socioeconomic rights. Part IV analyzes recent developments in the socioeconomic rights area, including the *City of Johannesburg* litigation as well as recent lower court cases to assess the effectiveness of the Court's policentric approach.

II. JUSTICIABILITY AND THE EARLY CASES

A. *The Socioeconomic Rights Provisions*

The question of whether South Africa's post-Apartheid Constitution should include socioeconomic rights was hotly contested.¹³ Ultimately,

¹³ This debate was summarized in several articles in the South African Journal on Human Rights. See, e.g., Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S.

express rights to housing,¹⁴ health care, food, water, social security,¹⁵ and education were included in the new constitution.¹⁶ In addition to these specific rights, the Constitution includes affirmative dimensions in other rights. The right to property in Chapter 2, Section 25 includes rights against uncompensated government appropriation and the affirmative requirement that the state take “reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”¹⁷ Similarly, Chapter 2, Section 28, titled “Children,” includes a series of affirmative rights including the right to “family care,” and “basic nutrition, shelter, basic health care services and social services.”¹⁸

The cases that have come before the Court to date have focused on the right to housing contained in Section 26 and the rights to health care, food, water, and social security contained in Section 27. These rights are all qualified by what is referred to as an “internal limitations clause.”¹⁹ Each right has three clauses. The first clause establishes a positive right. Section 26(1) creates a “right to have access to adequate housing.” Section 27 provides rights to access to health care, food and water, and social security. The second clause, which is worded identically in both Section 26 and Section 27, then limits the obligations of the state to fulfill these rights: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [these] rights.”²⁰ The third clause in each contains a prohibition against certain government actions. Section 26(3) prohibits arbitrary evictions, and Section 27(3) prohibits refusal of emergency medical treatment.

As discussed in more detail below, the Constitutional Court has held that the first two clauses in Sections 26 and 27 must always be read together. In other words, the Court has held that the positive obligations imposed by

AFR. J. HUM. RTS. 464 (1992) (summarizing debate over inclusion of socioeconomic rights and arguing for inclusion of such rights); 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) (summarizing the same debate and arguing for inclusion only on a limited basis); see also Dennis Davis, *Socio-Economic Rights in South Africa: The Record of the Constitutional Court After Ten Years*, 5 ESR REV. 3 (2004) (describing the early debate and the objections to including socioeconomic rights).

¹⁴ S. AFR. CONST. 1996 § 26.

¹⁵ *Id.* § 27.

¹⁶ *Id.* § 29.

¹⁷ *Id.* § 25(5).

¹⁸ *Id.* § 25(1)(b)–(c). The rights delineated in Section 25 do not contain the internal limitation that the other socioeconomic rights mentioned all have. Whether this omission grants the Constitutional Court greater powers of enforcement is an unresolved question that has yet to be tested in the South African courts.

¹⁹ These subsections are referred to as “internal” limitations clauses to distinguish them from Chapter 2, Section 36, which provides a “general” limitations clause. Section 36 is similar to the limitations clause in the Canadian Charter and in effect permits the government to pass laws that limit the rights contained in Chapter 2 under specific circumstances. Another unresolved question is whether the general limitations clause applies to the socioeconomic rights that contain internal limitations clauses. See, e.g., Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 S. AFR. J. HUM. RTS. 448 (analyzing the relationship between the general limitations clause and the internal limitations clause in Section 27).

²⁰ S. AFR. CONST. 1996 § 26(2). The rights to health care, food, water, and social security, which are all contained in Section 27, are structured in precisely the same way as the right to housing.

each right are always qualified by the internal limitations clause. This interpretive move has been the focal point of the principal criticisms of the Court's approach to these rights.

B. The Early Cases

The Court has developed its approach to the positive dimensions of Sections 26 and 27 in four main cases.²¹ I divide these early cases into two separate categories. The Court's first two cases, *Soobramoney v Minister of Health*²² and *Government of the Republic of South Africa v Grootboom*,²³ decided in 1998 and 2000, establish its default approach of deference to the government combined with weak remedies for constitutional violations. In these cases, the Court's initial approach has been to give considerable deference to the government's justification for particular policy and budget decisions that implicate socioeconomic rights. Even where the Court has found that a particular government program fails to meet the constitutional standard, it has been initially reluctant to impose a direct remedy. Instead the Court has preferred to issue declarations of unconstitutionality, which create considerable flexibility for the government to determine what policy changes are necessary for compliance. Nonetheless, in both of these cases, the Court has consistently stated that it retains the power to take a more direct role.

In the following two socioeconomic rights cases, *Minister of Health v Treatment Action Campaign*,²⁴ decided in 2002, and *Khosa v Minister of Social Development*,²⁵ decided in 2003, the Court has demonstrated a willingness to take a more direct role. In these cases, the Court closely scrutinized the government's justifications for the challenged programs and was willing to apply more direct remedies than in its first two cases. This change in approach is tied in both cases to evidence that the government was unwilling or unable to take its constitutional duties seriously when it developed the programs under review.

I include the Court's most recent two cases dealing with socioeconomic rights in the next Subpart as an example of what I have called "second order" cases, i.e., follow-up cases challenging the government's response to an initial declaration of unconstitutionality. In these much more recent cases, the Court has started to address the South African Government's attempts to implement the *Grootboom* decision. While the results are somewhat mixed, it appears that the Court approves of the much more aggressive approach taken by lower South African courts in response to failures by the government to fully comply with the *Grootboom* requirements.

²¹ The Court has also addressed the negative dimension of Section 26 in several cases. See, e.g., *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.).

²² See generally *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) (S. Afr.).

²³ See generally *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

²⁴ See generally *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

²⁵ See generally *Khosa v Minister of Social Development* 2004 (11) BCLR 1169 (CC) (S. Afr.).

This suggests that the Court itself may be more willing to take a more direct role in future cases.

1. *Soobramoney and Grootboom: Early Deference and Weak Remedies*

The Court did not address the socioeconomic rights provisions until 2000 when it decided *Soobramoney v Minister of Health*.²⁶ The plaintiff-appellant in *Soobramoney* was a diabetic suffering from kidney failure who sought to prolong his life through regular dialysis at a state hospital in Durban. The hospital, however, had only twenty dialysis machines, some of which were in poor condition, and had been unable to provide Soobramoney with the requested treatment.

Soobramoney argued that the hospital's refusal to treat him violated Section 27(3) of the Constitution, which provides that "[n]o one may be refused emergency medical treatment."²⁷ He did not rely on the more general right to have access to health care imposed by Section 27(1) in part because Section 27(3), unlike Section 27(2), is not qualified by the resources limitation clause discussed above.

Despite this, the Court considered Soobramoney's claim under both Sections. Interpreting Section 27(3) somewhat narrowly, the Court found that the provision did not apply on these facts because Soobramoney's disease was chronic and did not involve "a sudden catastrophe which calls for immediate medical attention"²⁸

The Court went on to consider the application of Section 27(1). It first indicated that it would give a large margin of discretion to the budgetary priorities set by the provincial government and the "difficult decisions" made by the hospital administrators in the context of limited resources:

A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.²⁹

Applying this standard, the Court found that the hospital's guidelines for determining which patients qualified for dialysis treatment were reasonable and that they had been applied "fairly and rationally" in this case.³⁰

The Court thus established a restrained approach to interpreting the right to health care in *Soobramoney*: It deferred to the government's justification for the resource allocation policy it had adopted and refused to

²⁶ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) (S. Afr.).

²⁷ S. AFR. CONST. 1996 § 27(3).

²⁸ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at paras. 20–21 (S. Afr.).

²⁹ *Id.* at para. 29.

³⁰ *Id.* at para. 25.

second-guess the government's criteria for allocating dialysis resources once it determined those criteria met a basic rationality standard.

But the Court nonetheless signaled a willingness to look behind government justifications for particular socioeconomic programs where appropriate. Specifically, the Court stated that those justifications must be not only "rational," which would imply deference to all but facially spurious justifications, but also "taken in good faith."³¹ This "good faith" requirement suggests that the Court will not only test the government's policy decisions against an objective rationality standard but that it will consider subjective evidence that the government's actions, while objectively reasonable, are designed to evade its constitutional obligations. This subjective aspect of the Court's analysis is significant because it carves out the possibility for more direct scrutiny of government justifications by the Court than a purely objective rational basis standard would allow.

Two years later in *Grootboom*, the Court addressed the right to housing under Section 26 of the Constitution. The *Grootboom* plaintiffs were evicted by court order from an informal settlement they had erected on private land in an area near Cape Town. The plaintiffs resettled on a government-owned sports field nearby and after first seeking to resolve the dispute informally, brought suit against the several local, provincial, and national government entities seeking to enforce their obligations to provide access to housing under Section 26 and to provide the children in the settlement access to basic shelter under Section 28(1)(c).³²

At that time there was a range of programs in place at the national and provincial levels aimed at addressing the acute housing shortage in South Africa. The respondents argued that these programs satisfied their obligations under both Sections 26 and 28. The high court agreed that these programs satisfied the qualified obligation to provide access to adequate housing under Section 26 but held that Section 28(1)(c) required the state to provide shelter to children and their parents whenever parents could not irrespective of the availability of resources.³³ As a result, the high court, in a fairly detailed and specific order, required the state to provide shelter to the minor plaintiffs and their parents. The high court also retained jurisdiction and ordered the respondents to present within three months under oath a report detailing their efforts to implement the order.³⁴

On appeal, the Constitutional Court reversed the High Court's ruling with respect to Section 28(1)(c) but held that the existing housing programs violated Section 26. The Court first reviewed these programs and found that they constituted "a major achievement" and were clearly "aimed at achieving the progressive realization of the right of access to adequate housing" required by Section 26.³⁵ Nonetheless, the Court found that the existing programs fell short of the requirements of Section 26 because they completely failed to take

³¹ *Id.* at para. 29.

³² S. AFR. CONST. 1996 § 28(1)(c).

³³ See the discussion in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at paras. 14–15, 70 (S. Afr.).

³⁴ *See id.* at para. 16.

³⁵ *See id.* at para. 53.

into account the emergency needs of individuals like the *Grootboom* residents.³⁶

This was the first case in which the Court held that a government program violated one of the socioeconomic rights, and the Court took the opportunity to elaborate on the reasonableness standard it had first articulated in *Soobramoney*.³⁷ The Court began by rejecting the argument put forth by several amici that the Constitution's socioeconomic rights should be interpreted to contain "minimum core" requirements. The concept of a minimum core was developed in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁸ In essence, it would establish an objective minimum standard. Failure to meet that standard by the government would mean automatic violation of the right. The Court rejected this approach as insufficiently flexible and dependent on a level of knowledge and expertise that the Court lacked in this case.³⁹

The Court then turned to the reasonableness test and emphasized the principal role of the other branches of government in developing appropriate policies to enforce these rights: "A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."⁴⁰ In addition, the Court was careful to note that enforcement of these rights requires

³⁶ *Id.* at para. 69.

³⁷ *Id.* at para. 41. Marius Pieterse suggests that the Court in *Grootboom* in fact "abandoned [the *Soobramoney* standard] in favour of an analysis of the reasonableness of the challenged state policy." Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. Afr. J. Hum. RTS. 383, 410 (2004). In Pieterse's view, the Court in *Soobramoney* applied an overly deferential standard by evaluating government programs on "the basis of [the government's] rationality and bona fides only." *Id.* at 410. But *Grootboom* struck "a more acceptable balance between judicial vigilance and deference" *Id.* I disagree somewhat with this characterization of the cases. In both cases, the Court deferentially evaluated the existing government program and accepted the government's representations concerning the scope and effect of each program at face value. Compare *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at para. 25 (S. Afr.) ("It has not been suggested that [the hospital's] guidelines are unreasonable or that they were not applied fairly and rationally . . ."), with *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 52 (S. Afr.) ("What has been done in execution of [the housing program] is a major achievement. . . . It is a programme that is aimed at achieving the progressive realization of the right of access to adequate housing."). The critical difference in *Grootboom* is that the Court determined the government's program by its own admission left out a critical sector of society. *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 52 (S. Afr.) (noting that the definition of housing development in the national housing legislation included "no express provision to facilitate access to temporary relief for people [in desperate need]"). Thus, the Court still maintained the same relatively uncritical acceptance of the government's claims regarding its own programs, but in *Grootboom*, unlike *Soobramoney*, the Court found that what the government claimed its program accomplished fell short of what the constitution requires. As I discuss below, both cases contrast starkly with the much more skeptical stance the Court adopted towards the government's claims about the programs at issue in *TAC* and *Khosa*. See *infra* text accompanying notes 46–87.

³⁸ U.N. Office of the High Commissioner for Human Rights, *Covenant on Economic, Social and Cultural Rights (CESCR) General Comment No. 3*, at para. 10, (Dec. 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument).

³⁹ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 33 (S. Afr.) ("There are difficult questions relating to the definition of the minimum core in the context of a right to have access to adequate housing. . . . [E]ven if it were appropriate to [have regard to the minimum core concept], it could not be done unless sufficient information is placed before the court to enable it to determine the minimum core in any given context."). The Court emphasized that the U.N. Committee developed the minimum core standard over a period of years and with the benefit of reports about signatory countries each year. *Id.*

⁴⁰ *Id.* at para. 42.

considerable flexibility: "It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations."⁴¹

But the Court also made clear that the deference to legislative judgments required under this standard is not absolute and that superficial compliance through development of a program on paper is insufficient to meet the reasonableness standard: "Mere legislation is not enough. The state is obliged to *act* to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes *implemented by the executive*."⁴² The Court also forcefully stated that the qualified language in these rights does not deprive the Court of the power to meaningfully enforce them:

The fact that [the Constitution requires] realisation over time, or in other words progressively . . . should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective . . . which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.⁴³

The Court then indicated a clear willingness to carefully scrutinize claims of reasonableness by the government and to take a more direct role in enforcing socioeconomic rights when necessary. According to the Court, to be reasonable any measures aimed at implementing these rights must address the needs of all sectors in society, in particular the most vulnerable. Therefore, even if the measures demonstrate an overall advance in the realization of the right, if they "fail to respond to the needs of those most desperate, they may not pass the test."⁴⁴ The existing housing programs, while presenting an otherwise apparently reasonable response to the long- and medium-term housing needs, failed this aspect of the reasonableness test.⁴⁵

Despite finding a concrete violation of Section 26, the Court limited its remedy to a general declaration that the existing policy was unconstitutional, which left it to the government to devise the specifics of a constitutionally

⁴¹ *Id.* at para. 41

⁴² *Id.* at para. 42 (emphasis added).

⁴³ *Id.* at para. 45 (quoting U.N. Office of the High Commissioner for Human Rights, *Covenant on Economic, Social and Cultural Rights (CESCR) General Comment No. 3*, at para. 9, (Dec. 14, 1990), [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument)), available at

⁴⁴ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 44 (S. Afr.).

⁴⁵ *Id.*

sufficient program. The Court was also careful to minimize its role in enforcing the remedy emphasizing the need for cooperation: “[A]ll three spheres of government” must work “in consultation with each other” to devise a coordinated state housing program.⁴⁶

The Court also refused to retain oversight over the government’s compliance with its order. Instead, the Court called on the South African Human Rights Commission, a quasi-government entity established by the Constitution, to monitor compliance pursuant to its authority under Section 184(1)(c) of the Constitution.⁴⁷

2. *TAC and Khosa: Implementing the Good Faith Requirement*

The Court issued its first direct remedy in a socioeconomic rights case two years later in *Minister of Health v Treatment Action Campaign* (“TAC”),⁴⁸ where it was again faced with interpreting the health care right in Section 27. In TAC, the plaintiffs challenged the adequacy of a government program that provided the anti-retroviral drug nevirapine to pregnant mothers but limited provision of the drug to a small number of research and training sites and banned the use of it outside of these sites. The Court relied on *Grootboom’s* articulation of the reasonableness test to find that the state breached its obligation not to impair the Section 27 right to healthcare by restricting provision of the drug even though it had the resources to provide it more broadly.

Significantly, the Court viewed with considerable skepticism the justifications put forth by the government for restricting distribution of the drug. The government argued, for example, that there were substantial questions concerning the efficacy of nevirapine in preventing mother-to-child transmission of HIV.⁴⁹ The Court rejected this objection finding that “[t]hese allegations by the Minister . . . are, however, not supported by the data on which [the government’s expert] relies.”⁵⁰

The Court used similarly dismissive language to reject the government’s arguments that the single dose program risked developing drug-resistant strains of HIV finding that “[a]t most there is a possibility of such resistance persisting” even if it were to develop.⁵¹ And the Court rejected out-of-hand the argument that nevirapine posed safety concerns to mother and child: “The evidence shows that safety is no more than a hypothetical issue. . . . There is, however, no evidence to suggest that dose of nevirapine to both mother and child at the time of birth will result in harm to either of

⁴⁶ *Id.* at para. 40.

⁴⁷ *Id.* at para. 97.

⁴⁸ See generally *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

⁴⁹ *Id.* at paras. 57–58.

⁵⁰ *Id.* at para. 58.

⁵¹ *Id.* at para. 59.

them.”⁵² The Court went on to criticize the safety argument as baldly inconsistent with the government’s decision to initiate the pilot program: “The decision by the government to provide nevirapine to mothers and infants at the research sites *is consistent only with the government itself being satisfied as to the efficacy and safety of the drug*. These sites cater for approximately 10% of all births in the public sector and *it is unthinkable that the government would gamble with the lives or health of thousands of mothers and infants.*”⁵³

The intensive scrutiny the Court employed in *TAC* is a marked departure from the deference accorded to the government’s evidence in *Soobramoney* and *Grootboom*.⁵⁴ Although the Court did not expressly reference the good faith requirement it articulated in *Soobramoney* as the reason for this increased scrutiny of the government’s arguments in *TAC*—indeed the Court never expressly acknowledges a change in its approach at all—the political background to the dispute combined with oblique references in the judgment itself to that background suggest that the Court was reacting to what it perceived as a refusal by the government to take seriously its constitutional obligations under Section 27 when developing the pilot program.

Early in the judgment the Court noted in an unusual aside that “[i]n our country, the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention. . . . Nevertheless, it is regrettable that this contention and emotion has spilt over into this case.”⁵⁵ The Court is referring here to the political and legal battles between *TAC* and the government over the government’s AIDS policy that dates back to 1998. Mark Heywood has summarized in detail the history behind this contentious relationship and the specific events that gave rise to the *TAC* litigation.⁵⁶ As Heywood notes, the government consistently dragged its feet, first in approving nevirapine for use in preventing mother-to-child-transmission of AIDS and then in setting up the pilot program itself.⁵⁷ *TAC* obtained the files documenting the government’s approval process during the course of the *TAC* litigation. According to Heywood,

they showed that some of the public justifications provided for the delay by the MCC were misleading as the most important determinations regarding safety and efficacy had been made in 2000. They also suggested that those provinces that had delayed the start of pilot sites because Nevirapine had not yet been registered were, in reality, being delayed by a technicality that was probably politically motivated.⁵⁸

⁵² *Id.* at para. 60.

⁵³ *Id.* at para. 62 (emphasis added).

⁵⁴ See, e.g., Brand, *supra* note 11, at 41.

⁵⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 20 (S. Afr.).

⁵⁶ Mark Heywood, *Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 S. AFR. J. HUM. RTS. 278 (2003).

⁵⁷ *Id.* at 285–90.

⁵⁸ See *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at 289 (S. Afr.).

TAC documented this history in the papers submitted to the Court during the litigation, and the Court initially ordered supplemental briefing by both parties on the nevirapine approval process.⁵⁹ The Court ultimately found that resolution of that dispute was unnecessary to its decision because “[m]ost if not all of the disputation is beside the point. The essential facts, as we see them, are not seriously in dispute.”⁶⁰ Among the undisputed “essential facts” that the Court went on to detail were the following: nevirapine was approved by the South African Medicines Control Council as early as 1998, which “by definition entail[ed] a positive finding as to its quality, safety and efficacy.”⁶¹ But the quality, safety and efficacy of nevirapine were, of course, precisely the reasons relied on by the government for restricting nevirapine to the pilot sites. Thus, the indefensibility of many of the government’s arguments was plainly not lost on the Court.⁶²

The next notable feature of the judgment is that the Court rejected the government’s arguments that courts’ remedial powers when enforcing socioeconomic rights are limited to issuing declarations of unconstitutionality. In a striking and extended section, the Court explained in detail that the Constitution grants the Court broad remedial powers that extend to the granting of supervisory injunctions.⁶³

But the Court paired this extensive explication of the range of its remedial powers with a deferential discussion of the need for courts to respect the power of the executive when enforcing these rights. After concluding that “courts may—and if need be must—use their wide powers to make orders that affect policy as well as legislation,” the Court softened its rhetoric in the next paragraph noting that “the executive is always free to change policies where it considers it appropriate to do so.”⁶⁴ And the Court added the qualification that “[c]ourt orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.”⁶⁵

The Court then went on to reject the high court’s decision to impose an injunction in this case. The Court reiterated that the judiciary has the power to impose injunctive relief but signaled that such orders are most appropriate where there has been “a failure to heed declaratory orders or other relief granted by a court in a particular case.”⁶⁶ The Court then found that “[t]he

⁵⁹ *See id.*

⁶⁰ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 21 (S. Afr.).

⁶¹ *Id.* at para. 12.

⁶² Heywood also notes that during the course of the two-day oral argument in *TAC*, the Court “occasionally reveal[ed] their frustrations with the misconduct that appeared to characterize much of the government’s case.” Heywood, *supra* note 56, at 310 (citing personal notes taken during the Constitutional Court hearings (April 3, May 3–4, 2002)).

⁶³ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at paras. 96–114 (S. Afr.).

⁶⁴ *Id.* at para. 114.

⁶⁵ *Id.*

⁶⁶ *Id.* at para. 129.

government has always respected and executed the orders of this Court. There is no reason to believe that it will not do so in the present case.”⁶⁷

Echoing its call in *Grootboom* for civil society to participate in implementing these rights,⁶⁸ the Court stated that “[w]e consider it important that all sectors of the community, in particular civil society, should cooperate in the steps needed to achieve the goal [of providing treatment].”⁶⁹

The most significant aspect of the decision, however, is the specific terms of the order. In a marked departure from the previous two cases, the Court in *TAC* required the government to take specific action to correct the constitutional defect by extending the provision of nevirapine beyond the pilot sites. But later in that same order, the Court gave the government express permission to ignore that directive and determine for itself what specific action Section 27 requires: “The orders made in paragraph 3 do not preclude the government from adapting its policy in a manner consistent with the constitution if equally appropriate or better methods become available for the prevention of mother-to-child transmission of HIV.”⁷⁰

The Court’s next decision directly interpreting the socioeconomic rights provisions came two years later in 2004. *Khosa v Minister of Social Development* (“*Khosa*”) dealt with whether the government could exclude non-citizen permanent residents from the socioeconomic assistance provided to citizens.⁷¹ The plaintiffs, all permanent residents of South Africa, argued that a revised social welfare program, which limited social welfare benefits to South African citizens, was both contrary to the plain language of Section 27 and a violation of the equality guarantee in Section 9. The state argued that non-citizens were not included in the language of Section 27.⁷²

The Court first found that the term “everyone” in Section 27, read purposively, extended the right to social security to permanent residents.⁷³ The Court then turned to an assessment of whether exclusion on the basis of citizenship was “reasonable” as defined in *Grootboom*. Here the majority quoted the *Grootboom* limit on reasonableness review and stated that the Court is not empowered to consider whether other, more favorable measures could have been adopted.⁷⁴

After establishing the scope of its review, the majority turned to the government’s argument that exclusion of permanent residents was justified for financial reasons under Section 27(2). The majority began by noting “that there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status.”⁷⁵ But the majority found that the state’s proposed exclusion of all non-citizens failed

⁶⁷ *Id.*

⁶⁸ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

⁶⁹ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 125 (S. Afr.).

⁷⁰ *Id.* at paras. 135–34.

⁷¹ *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) (S. Afr.).

⁷² *Id.* at para. 58.

⁷³ *Id.* at para. 47.

⁷⁴ *Id.* at para. 48.

⁷⁵ *Id.* at para. 58.

to properly distinguish between permanent residents and temporary residents. Turning to this specific subset, the majority found that the state was unable “to furnish this Court with information relating to the numbers who hold permanent resident status, or who would qualify for social assistance if the citizenship barrier were to be removed.”⁷⁶ The Court then went on to consider hypothetical cost increases based on the limited estimates provided by the state and ultimately concluded that because even the largest estimate would result in an increase of less than two percent, the state failed to show that discrimination against permanent residents was justified for financial reasons.⁷⁷

In stark contrast to the majority’s analysis, Justice Ngcobo in partial dissent found that the lack of reliable information from which to estimate the cost of extending benefits to permanent residents required deference to the government’s own conclusion that there was adequate financial justification for the exclusion:

Policymakers have the expertise necessary to present a reasonable prediction about future social conditions. That is precisely the kind of work that policymakers are supposed to do. Unless there is evidence to the contrary, courts should be slow to reject reasonable estimates made by policymakers.⁷⁸

Justice Ngcobo’s approach to the government’s estimates is far more consistent with the deference to government policy judgments expressed by the Court in *Soobramoney* and *Grootboom*. But unlike in those cases where the Court specifically noted that the policies were developed in good faith, the majority in *Khosa* found that these judgments were the result of a flawed process as evidenced by the government’s conduct throughout the litigation.

The litigation began as two separate cases. The respondents, all government ministers, were notified of the cases and initially indicated they intended to oppose.⁷⁹ Despite this, the respondents neither submitted written responses nor appeared at the scheduled hearing. As a result, the high court entered the equivalent of a default judgment and granted the relief sought by the plaintiffs in both cases, without issuing a written judgment.⁸⁰

The high court’s orders were referred directly to the Constitutional Court for confirmation as required by Section 172(2) of the Constitution.⁸¹ The Court set a hearing date for May 13, 2003 and ordered the respondents to

⁷⁶ *Id.* at para. 61.

⁷⁷ *Id.* at paras. 62, 81–82.

⁷⁸ *Khosa v Minister of Social Development* 2004 (11) BCLR 1169 (CC) at para. 128 (S. Afr.).

⁷⁹ *Id.* at para. 6.

⁸⁰ *Id.* at paras. 6–7.

⁸¹ *Id.* at para. 12. Section 172(2) states in relevant part that “[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court” and also provides that “an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”

provide notice of their intention to appeal and to submit briefs by May 6, 2003.⁸²

The Court's order also requested that the respondents advise the Court whether they intended to "mak[e] representations to the Court on the issues raised in these directions." If not, the Court requested the Minister of Justice and Constitutional Development, a separate government entity, "to appoint counsel to present argument to the Court" also by May 6, 2003.⁸³

The May 6, 2003 deadline passed with no communication from the respondents or the Minister of Justice and Constitutional Development. The Court Registrar contacted the State Attorney's Office, which represents the Minister of Justice and Constitutional Development, and the State Attorney requested until May 23 to respond.⁸⁴ In a sharply worded order, the Court refused to move the May 13 hearing date but permitted the State Attorney to submit written arguments by May 9.⁸⁵

Eventually the respondents answered the Court's initial request and stated that they intended to oppose the order on behalf of the government.⁸⁶ But they failed to submit written argument until May 12, 2003, the day before the scheduled hearing. At the hearing, respondents argued that they needed more time to gather data on the potential cost of the High Court's order. The Court reluctantly granted the respondent's request for more time but expressed its displeasure by entering a punitive costs order requiring respondents "to pay the wasted costs of this application on the scale of attorney and own client."⁸⁷ The majority noted that this unusual sanction was warranted because "[t]he respondents were in willful default both in the High Court and in this Court and the government also failed to comply with the directions issued by this Court"⁸⁸

It is telling that the majority recounts this tale of administrative bungling at length in its judgment.⁸⁹ As in *TAC*, the Court never directly ties the government's actions to its analysis of the government's policy, but in both cases the Court clearly adopted a much less deferential role and was much more willing to question the government's facially reasonable justifications.

Taken together, *Khosa* and *TAC* demonstrate the Court's willingness to force the government to take its constitutional responsibilities seriously. And when there is strong evidence the government has failed—either deliberately, as in *TAC*, or through serious incompetence, as in *Khosa*—to

⁸² *Khosa v Minister of Social Development* 2004 (11) BCLR 1169 (CC) at para. 10 (S. Afr.).

⁸³ *Id.* at para. 12.

⁸⁴ *Id.* at para. 13.

⁸⁵ *Id.* at para. 14. The relevant portion of the order, which is quoted at length by the majority, takes the State Attorney to task for "fail[ing] to give effect to the Chief Justice's directions" and admonishes the attorneys to "do the best they can in the circumstances" *Id.*

⁸⁶ *Id.* at para. 15.

⁸⁷ *Id.* at para. 25. The South African civil justice system requires that losers pay some but not all of the winning party's litigation costs. The cost order here was punitive in that it required the respondents to pay the applicants costs irrespective of the outcome and because it included additional costs.

⁸⁸ *Khosa v Minister of Social Development* 2004 (11) BCLR 1169 (CC) at para. 22 (S. Afr.).

⁸⁹ The majority's description of these events extends over thirteen paragraphs in its ninety-eight paragraph judgment.

make policy choices through a rational and deliberate process, the Court will take a much more direct role and give much less deference to the justifications put forth by the government in support of its chosen policy.

III. THE DEBATE OVER THE COURT'S APPROACH

Whether the Court will continue to exercise its potential power to impose more direct remedies as it began to do in *TAC* and *Khosa* in cases where such direct intervention would require more complex policy choices is still an open question. Critics of the Court's restrained approach have argued that the government's responses to the Court's initial rulings thus far have failed to meaningfully improve the situations they addressed.⁹⁰ Human rights groups have noted, for example, that the situation of the *Grootboom* plaintiffs has improved minimally and that there is no clear indication of willingness on the part of the South African government to adopt the comprehensive policies to address housing needs required by the Court in *Grootboom*.⁹¹ The government's response to the AIDS crisis has been similarly criticized as inadequate and insufficient to meet its constitutional obligations.⁹²

Others have argued that the Court's restrained approach in these early cases does not go far enough in defining a specific and direct role for these rights.⁹³ Several critics, including David Bilchitz, have argued that the Court's rejection of the minimum core approach in *Grootboom* has fostered government intransigence⁹⁴ and threatens to transform these rights into nothing more than a requirement of reasonable government action.⁹⁵

Bilchitz contends that the Court's current context-specific reasonableness standard is flawed for two reasons. First, the reasonableness standard "places no clear restrictions on the [Court's] role" in socioeconomic rights cases.⁹⁶ Second, the failure to independently define the content of each

⁹⁰ See, e.g., Zackie Achmat, *Law, Politics, and Social Transformation*, 32:2 INT'L J. LEGAL INFO. 237, 240–41 (2004) (criticizing lack of implementation of *Grootboom* and *TAC*).

⁹¹ See Mia Swart, *Left Out in the Cold? Crafting Remedies for the Poorest of the Poor*, 21 S. AFR. J. HUM. RTS. 215, 216 n.6 (2005) ("According to Charlotte McClain, the Human Rights Commissioner with responsibility for socio-economic rights, the Commission reported to the Court about 18 months later, saying that they felt there had not been compliance with the [*Grootboom*] order.").

⁹² See, e.g., Mark Heywood, *Contempt or Compliance? The TAC Case After the Constitutional Court Judgment*, 4 ESR REV. 1 (2003) (discussing problems in the implementation of the *TAC* judgment).

⁹³ See, e.g., Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S. AFR. J. HUM. RTS. 473, 474 (2006) (describing the criticisms of the Court's approach and citing representative articles).

⁹⁴ See, e.g., David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1 (2003) (arguing for the adoption of a minimum-core approach) [hereinafter Bilchitz, *Reasonable Approach*]; David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L. J. 484, 484 (2002).

⁹⁵ See, e.g., Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 S. AFR. J. HUM. RTS. 383 (2004).

⁹⁶ Bilchitz, *Reasonable Approach*, *supra* note 94, at 10.

right means that there is no “clear and principled basis for the evaluation of the state’s conduct by judges or other branches of government in future cases.”⁹⁷

Bilchitz argues that adopting a minimum-core approach will cure these flaws by establishing a “principled basis upon which to found decisions in socio-economic rights cases.”⁹⁸ Under Bilchitz’s proposed approach, the Court would first define the content of each right independent of the resources limitation and then consider whether any shortcomings in the program at issue are justified by the lack of sufficient resources.⁹⁹ This approach would require the government to “realise a certain minimum level of provision without delay” while permitting the government “to improve the level of provision beyond this lower threshold by taking reasonable measures to meet a higher threshold that must be attained if the right is to be fully realised.”¹⁰⁰

Danie Brand similarly argues that the Court’s present approach discourages “future socioeconomic rights litigation” because “it provides limited tools for the Court to deal with possible future cases (the really difficult ones) where direct claims for the distribution of state resources are brought before it; and it fails to set substantive standards to guide future social and economic policy-making.”¹⁰¹ This is so, charges Brand, because “the Constitutional Court has generally avoided describing the constitutionally required ends that government must pursue with its policies in any form of useful detail.”¹⁰²

Theunis Roux, responding to the favorable review of *Grootboom* by Cass Sunstein discussed below, argues that the Court’s deferential approach in *Grootboom* fell far short of the expectations of public interest litigators in South Africa.¹⁰³ Roux argues that the Court’s refusal to engage in what he describes as “strict priority setting,” which would have been possible under the minimum-core approach the Court rejected, resulted in a lack of meaningful relief.¹⁰⁴ Roux further criticizes the Court’s declaratory order as “a remedy without a sanction, and therefore without any practical relevance for people whose socio-economic rights constitute their sole claim to citizenship.”¹⁰⁵

By contrast, several commentators including Mark Tushnet and Cass Sunstein have hailed the Court’s approach in these initial cases as an appropriately nuanced and balanced one that deals carefully with the core separation of powers and institutional competence concerns that are implicated by socioeconomic rights.¹⁰⁶ Tushnet has argued that in *Grootboom* the Court

⁹⁷ *Id.*

⁹⁸ *Id.* at 11–12.

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.*

¹⁰¹ Brand, *supra* note 11, at 37.

¹⁰² *Id.* at 45.

¹⁰³ Theunis Roux, *Understanding Grootboom—A Response to Cass Sunstein*, 12 F. CONSTITUTIONNEL 41, 51 (2002).

¹⁰⁴ *Id.* at 46–47.

¹⁰⁵ *Id.* at 51.

¹⁰⁶ See SUNSTEIN, *supra* note 10; Tushnet, *supra* note 5; see also Goldstone, *supra* note 10; Kende, *supra* note 10. Two articles have recently been published that are also generally supportive of the Court’s approach. See Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391, 417–18 (2007) (arguing

appropriately adopted a weaker form judicial review. Tushnet argues that application of weak forms of judicial review may be particularly appropriate where courts enforce socioeconomic rights because a weak-form approach leaves considerable discretion to the other branches of government to determine not only the precise remedy in a given case, but also in doing so to develop an alternative interpretation of the right at issue.¹⁰⁷

Tushnet suggests that the *Grootboom* decision represents a particular variant of weak-form review, which he describes as “democratic-experimentalism.” This form of review offers the possibility of real enforcement of socioeconomic rights but in a way that avoids involving courts in the details of complex government programs.¹⁰⁸ “The democratic experimentalist court acknowledges that the [constitutional] provision is open to a range of interpretations, but concludes that the questioned practice lies outside of any reasonable interpretation.”¹⁰⁹ Instead of imposing its own interpretation, the court “directs everyone implicated in the challenged practice to come up with their own interpretations” and ways to implement those interpretations.¹¹⁰ The court then reviews the competing interpretations and implementations to identify those that have been more successful and directs others to adopt those interpretations possibly altering its own interpretation as a result. This process repeats itself resulting theoretically in a continually improving process.¹¹¹

In a similar vein, Cass Sunstein has described the Court’s approach as resembling an administrative law model of enforcement.¹¹² As with Tushnet, Sunstein focuses on *Grootboom* as the representative example of this type of review. He argues that the Court in *Grootboom* in effect adopted an approach similar to “a subset of administrative law principles, involving judicial review of inaction by government agencies.”¹¹³ Under this approach, “any reasonable priority-setting will be valid and perhaps even free from judicial review.”¹¹⁴ But where a policy decision rejects the constitutional language outright “or

that the Court should adopt a “dialogic model,” which is “fully consistent with the approach that the Court in *TAC* suggested might be appropriate in future cases . . .”); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 324 (2007) (“[T]he Court’s [socioeconomic rights] jurisprudence is best understood as a viable, affirmative jurisprudence of social rights . . .”).

¹⁰⁷ Tushnet, *supra* note 5, at 1897.

¹⁰⁸ Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 264 (2004) [hereinafter Tushnet, *Marbury*]; see also Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003) [hereinafter Tushnet, *New Forms*]; Tushnet, *supra* note 5. As Tushnet explains, this particular variant of weak-form review was first described by Charles Sabel and others at Columbia Law School. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

¹⁰⁹ Tushnet, *Marbury*, *supra* note 108 at 266–67. Tushnet emphasizes the South African cases, including *Grootboom*, “do not truly exemplify—except in an extended sense—the iterative process of democratic experimentalist adjudication.” *Id.* at 270.

¹¹⁰ *Id.* at 267.

¹¹¹ *Id.*

¹¹² SUNSTEIN, *supra* note 10, at 234 (“What the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights*.”).

¹¹³ *Id.* at 235.

¹¹⁴ *Id.*

does not take [constitutional] goals sufficiently seriously, [it] will be held invalid.”¹¹⁵

In Sunstein’s view, this deferential approach gives an appropriately limited effect to socioeconomic rights by “strengthen[ing] the hand of those who might be unable to make much progress in the political arena”¹¹⁶ At the same time, by deferring to reasonable priority setting by the government, such an approach respects “democratic prerogatives and the simple fact of limited budgets.”¹¹⁷

IV. THE PROMISE OF POLICENTRIC REVIEW

The Constitutional Court has consistently stated that courts have the power to take a more direct role in the enforcement of the Constitution’s socioeconomic rights. And the Court itself has moved toward a more direct role in cases where the government has obviously failed to take seriously its responsibilities under these rights.

More importantly, lower courts have at least in part begun to evolve towards more direct remedies as they struggle to apply the principles the Court has established in these early cases. While the Constitutional Court’s two most recent opinions sidestep the opportunity to affirm directly the appropriateness of this evolution, the Court has given indications in these cases that it considers stronger remedies appropriate in certain circumstances. The Court’s most recent judgment and the partial settlement that preceded it also offer the strongest evidence yet that the Court’s approach may be starting to work in South Africa.

This shift towards a stronger form of review and more direct remedies in second order cases is important because it provides at least a partial answer to the central criticism that the Court’s restrained approach to enforcement of socioeconomic rights threatens to make it no more than hortatory. At the same time, the more direct role that lower courts have been willing to take in these cases also requires revision of the restrained accounts that Tushnet and Sunstein have described the Court as taking when enforcing these rights.

When these second order cases are taken into account, the Constitutional Court has begun to develop what can best be described as a policentric form of review. I borrow the concept of “policentric” review from Reva Siegel and Robert Post’s article, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, which advocates for a policentric approach to interpretation of Section 5 of the Fourteenth Amendment of the U.S. Constitution.¹¹⁸ Siegel and Post deliberately spell the term with an “i” to distinguish it from Lon Fuller’s famous concept of a “polycentric” dispute, i.e., a dispute that implicates overlapping and interrelated policy choices.¹¹⁹ By “policentric” Siegel and Post

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 236.

¹¹⁸ Post & Siegel, *supra* note 12.

¹¹⁹ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

instead mean that courts share interpretive authority with another branch of government—in the case of Section 5, the legislative branch.

Although Post and Siegel specifically proposed adopting such a model for interpretation of Section 5, the model they outline—and the benefits they ascribe to it—also fits aspects of the approach the Constitutional Court is developing in the socioeconomic rights area. As Post and Siegel describe it, the policentric model requires that “the Constitution should be regarded as having multiple interpreters, both political and legal.”¹²⁰ As a result, the other branches of government do not violate the separation of powers principle when they pass legislation or develop policies that depend on an interpretation of the constitution that differs from that of the courts. At the same time, however, courts are not bound by the competing interpretation presented by the legislature or executive.¹²¹

This approach has several distinct advantages over the traditional juricentric interpretive model. As an initial matter, the policentric model better reflects the reality of constitutional practice. As Post and Siegel describe it, constitutional meaning is constantly subject to multiple interpretations both judicial and non-judicial that compete in an “ongoing cultural struggle.”¹²² Judicial interpretations are plainly a part of this struggle and indeed often serve as the catalyst for non-judicial responses that resist judicial interpretations.¹²³ But non-judicial interpretations also form an important part in the development of constitutional norms.

A. Benefits of Policentric Review in Socioeconomic Rights Context

Once courts recognize that non-judicial interpretations of a constitution do not necessarily violate the separation of powers principle but instead play a beneficial role in constitutional development, the question becomes how courts should treat such interpretations.¹²⁴ As the South African Constitutional Court’s current approach appears to recognize, socioeconomic rights present an area in which it is particularly appropriate to give equal force to legislative and executive judgments about constitutional meaning. In the Section 5 context, Post and Siegel argue that the legislative branch is “especially well-situated to respond to changes in constitutional culture” and therefore that historically “Congress’ ability to deploy its Section 5 power to translate [developing popular] ideas [about sex equality] into constitutional

¹²⁰ Post & Siegel, *supra* note 12, at 1947.

¹²¹ *Id.*

¹²² *Id.* at 2029 (quoting Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848 (2002)).

¹²³ See, e.g., Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007) (discussing conservative “backlash” to the *Roe* decision and its effect on the extra-judicial development of constitutional norms).

¹²⁴ Post & Siegel, *supra* note 12, at 2028 (quoting Whittington, *supra* note 122 (“Once we recognize that extrajudicial constitutional interpretation can coexist with judicial review, then the normative case for and against extrajudicial constitutional interpretation primarily goes to the question of how much deference the judiciary should show to other political actors . . . ”)).

terms proved helpful and instructive to the Court's efforts to grapple with the question of gender."¹²⁵

1. Institutional Competence and Democratic Legitimacy

The comparative institutional advantage of the legislature and executive branches is even more important in the socioeconomic rights area where the issues relate not to relatively long-term changes in culture but to short-term and often dramatic changes in government resources and policy priorities. By extending coextensive authority to the other branches of government to interpret these provisions, the Constitutional Court can take full advantage of their ability to deal with these changes in real-time without waiting for the Court.

At the same time, extending interpretive authority to the other branches also enhances the democratic basis for making those policy tradeoffs. In this respect, courts operating in a policentric mode of review assume the role of what Joanne Scott and Susan Sturm have termed "catalysts."¹²⁶ According to Scott and Sturm, "[l]aw thus operates as a catalyst by facilitating the elaboration and implementation of public law norms by other actors, and the productive engagement of normative inquiry among relevant institutional actors including the judiciary itself."¹²⁷ Rather than merely displacing or affirming legislative and executive decisions regarding socioeconomic rights, courts instead require clear articulation of the basis for those decisions and a forum for inquiry into the effects of those decisions in light of competing interpretations. This process will sometimes, as in *Grootboom*, result in forced reconsideration of an initial interpretation or even, as in *TAC*, a court dictated change. But even in cases where a court has the final word, the interpretation that results is contingent and thus subject to revision by the legislative and executive branches.

2. Robust Enforcement

In addition to the practical and democracy enhancing benefits the Court derives from recognizing coextensive interpretive authority in the coordinate branches of government, this approach also enhances the possibility for robust enforcement of the socioeconomic rights guarantees. Post and Siegel argue that a policentric approach to constitutional interpretation of Section 5 "enable[s] Congress to articulate constitutional aspirations in a manner that consolidates constitutional values, and hence that enhances the likelihood that judicial interpretations of the Constitution will receive the political allegiance that is frequently necessary for their full legitimization."¹²⁸ In a similar fashion, policentric review also enhances the possibility that the

¹²⁵ *Id.* at 2030-31.

¹²⁶ Joanne Scott & Susan P. Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007), available at <http://ssrn.com/abstract=982281>.

¹²⁷ *Id.* at 566.

¹²⁸ Post & Siegel, *supra* note 12, at 2032.

other branches will be more willing to enforce court orders because they have a direct role in the interpretive process and therefore are more likely to view the outcome as legitimate. This is reinforced by the Court's recognition in *TAC* that the executive and legislature have both the power and responsibility to determine if and when a change in circumstances warrants a departure from a particular method of enforcement chosen by the court.

By engaging the South African government in the interpretive process and by respecting its interpretations where appropriate, the Constitutional Court has begun to develop a relationship in which it expects the government to take the lead in enforcing socioeconomic rights. This is far more effective than establishing an antagonistic relationship in which the government waits for specific court instruction and is unwilling to go beyond the bare minimum required by those specific orders. Also by giving the government broad responsibility to enforce the Court's orders rather than engaging immediately in direct oversight of the government's efforts, the Court is working to develop the political will necessary for implementation of these rights.

Another important component of this approach—and one that arguably departs in significant ways from Post and Siegel's model—is the Court's emphasis on civil society involvement with government to ensure that these rights are implemented. In combination with the Court's emphasis on the responsibility of government to take the lead in enforcing these rights, this emphasis on civil society as an equal partner creates a much greater potential for meaningful enforcement than would a traditional court-centered model of enforcement.

Heywood's account of the *TAC* litigation illustrates the important role that civil society can play in this process. In that case, the litigation itself was one part of a multifaceted strategy to pressure the government to respond not only to the specific problem of mother-to-child transmission of HIV but to the broader AIDS crisis.¹²⁹ Heywood and others describe the litigation victory in *TAC* as “simply the conclusion of a battle that TAC had already won outside the courts.”¹³⁰ And Zackie Achmat, one of the leaders of TAC, has emphasized that social mobilization has been the motivating force in enforcing the *TAC* judgment.¹³¹

As discussed in Part IV, post-*Grootboom* no similar high profile organizational effort has developed around the right to housing. But there are signs that a TAC-like movement is emerging led by the efforts of the Center

¹²⁹ Heywood, *supra* note 56, at 300 (“For TAC, litigation both emerges from and feeds back into a social context. Resort to litigation is not exclusive of other strategies. Litigation can also help to catalyze mobilisation and assist public education on contested issues, as well as to bring about direct relief to individuals or classes of applicants. Thus, between August and December 2001, TAC engaged in intensive public mobilisation, attracting enormous support and media interest.” (citing Mark Heywood, *Debunking Conglomo-Talk: A Case Study of the Amicus Curiae As an Instrument for Advocacy, Investigation and Mobilisation*, 5 LAW, DEMOCRACY & DEV. 133 (2001)).

¹³⁰ *Id.* at 314 (quoting Geoff Budlender, *A Paper Dog With Real Teeth*, MAIL & GUARDIAN, July 12, 2002).

¹³¹ Zackie Achmat, *Law, Politics, and Social Transformation*, 32 INT'L J. LEGAL INFO. 237, 240 (2004) (“The judgment in favor of the Treatment Action Campaign (TAC) in its legal battle to prevent HIV transmission from mother-to-child is only being enforced because of social mobilization.”)

for Applied Legal Studies (CALS) and others.¹³² Full implementation of *Grootboom* will depend in large part on the continued ability of groups like CALS to mobilize political support while simultaneously putting pressure on government at all levels through targeted litigation.

The Court's focus on government responsibility and civil society cooperation are particularly important given the relative youth of the Constitutional Court as an institution and the still developing relationship between the Court and the government. The Court was an innovation created by the 1993 Interim Constitution. Prior to the Interim Constitution, South Africa followed a slightly modified version of parliamentary sovereignty in which courts had limited powers to review legislation.¹³³ During the apartheid era the South African Parliament consolidated power even further with the legislature and executive and worked to severely limit the power of courts to constrain government action.¹³⁴

As noted above, both the interim Constitution and the 1996 Constitution firmly establish judicial review, but the Court is still working to develop what that means in South Africa and must tread carefully in the process.¹³⁵ *TAC* is an excellent example of the risks the Court faces. As noted above, the Court rejected calls by the plaintiffs and others to retain jurisdiction, carefully noting that "[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case."¹³⁶ In fact, during the course of the litigation the South African Health Minister had gone on record suggesting that the government might resist court intervention.¹³⁷ The Court of course called the Minister's bluff but did so in the context of refusing to issue the much more intrusive remedy of a structural injunction. That careful result allowed the Court to assert its authority without risking direct resistance. At the same time, it encouraged and allowed the government to demonstrate its commitment to the rule of law through voluntary compliance.

At a more basic level, the post-apartheid government has faced serious challenges developing the bureaucratic and administrative capacity to govern effectively. The bureaucratic breakdown in *Khosa* illustrates these practical

¹³² See *infra* text accompanying notes 186–94.

¹³³ See J.D. van der Vyver, *Depriving Westminster of Its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.-C.L. L. REV. 291 (1985).

¹³⁴ *Id.* at 307 ("The [South African] legislature's departure [during the apartheid era] from its historical purpose, coupled with the absence of real democratic surveillance, not only resulted in discriminatory allocation of statutory competencies, rights, and duties on the basis of color, but also transformed parliamentary sovereignty into legislative anarchy.").

¹³⁵ Mark Kende notes that the ANC also was ambivalent about establishing a strong judiciary during the constitutional negotiations and before. See Kende, *supra* note 10, at 626–28; see also Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249 (describing the ANC's internal debate over whether to include a judicially enforceable Bill of Rights in the post-apartheid constitution).

¹³⁶ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 129 (S. Afr.).

¹³⁷ See Heywood, *supra* note 56, at 308–09. Heywood further notes that the ANC Youth League issued a statement calling on the government not to comply with the lower court order in *TAC* because "judges are not elected to govern the country; they are not qualified to make political decisions about government not to mention prescribing policies to the people's government." *Id.* at 309 (quoting African National Congress Youth League, Statement on the Order to Provide Nevirapine (March 26, 2002), <http://www.anc.org.za/youth/> (last visited Feb. 16, 2009)).

challenges and the difficulties that can arise even with an otherwise well-intentioned government. The Court's emphasis on civil society partnerships is an important mechanism for ameliorating these problems.

B. Responding to the Court's Critics

In contrast to policentric review, the minimum-core approach proposed by Bilchitz and other critics of the Court would eliminate many of these benefits and is inconsistent with the flexible conception of separation of powers that the Court has begun to develop in these early cases and which is the defining characteristic of a policentric approach. The Court has repeatedly insisted that "there are no bright lines that separate the roles of the legislature, the executive and the courts from one another"¹³⁸ On the one hand, that flexible understanding is the basis for the Court's assertion that courts have the power to make orders that affect government policies directly.¹³⁹ But that flexibility cuts both ways and also permits the executive and legislative branches to have a role in interpreting the extent of their obligations under the Constitution.

This is perhaps the most significant flaw in the minimum-core critique. The assertion that the Court's current approach leaves the government "with an amorphous standard with which to judge its own conduct" is precisely the point.¹⁴⁰ The Court specifically intends for the government to take responsibility for defining its own obligations under the socioeconomic rights provisions because the government is in a better position than the courts to do so. This does not mean that the courts are powerless to review the government's own interpretation or to order specific changes where necessary. *TAC* and *Khosa* clearly demonstrate that the precise opposite is true: Where the government acts inconsistently with its own interpretation of a given right as in *TAC* or where its interpretation is merely incorrect as in *Khosa*, the Court has the power to step in and order a change in policy.

The minimum-core approach instead places the Court in the familiar position of the sole arbiter of constitutional meaning and thereby eliminates the distinct advantages of the Court's much more flexible understanding of separation of powers. Under this traditional juricentric model where implementation of a constitutional right is at issue, the government requires a definitive interpretation of a particular right to guide its own policy judgments. But if the Court must fix the specific content of each right before the government has had a chance to act, it deprives the coordinate branches of government from exercising independent interpretive authority and also deprives the Court of the benefit of that independent—and better informed—interpretation.

The Court's early cases demonstrate the potential of this approach. In *Soobramoney*, the Court found the government's own interpretation of what

¹³⁸ *Minister of Health v Treatment Action Campaign 2002* (5) SA 721 (CC) at para. 98 (S. Afr.).

¹³⁹ *See, e.g., id.*

¹⁴⁰ Bilchitz, *supra* note 11, at 10.

Section 27 required in the context of dialysis treatment to be reasonable and the government's chosen program to be consistent with that interpretation. In *Grootboom*, the Court likewise found the government's interpretation of the right to housing to be reasonable, but at the same time the Court found that the government's chosen program failed to fulfill that interpretation in one critical respect: the immediate needs of people in crisis.

Rather than tie the government's hands by establishing the specific policies required to address this gap, the Court left it to the government to do so. Roux takes the Court to task for this limited order asserting that "[t]he closest the Court came to giving its [declaratory] order teeth was the observation that the South African Human Rights Commission was under a constitutional duty to monitor the promotion of socioeconomic rights and would, thus, 'if necessary . . . report on the efforts made by the State to comply with its Section 26 obligations in accordance with this judgment.'"¹⁴¹ According to Roux, the Court severely undercut the potential effectiveness of the Section 26 housing right by limiting itself to a declaratory remedy that "has embarrassment value only."¹⁴² In Roux's view, the Court should have ordered much more direct relief including directing the relevant state agencies to present the Court with a specific plan for correcting the constitutional violation.¹⁴³

But as with Bilchitz's call for a minimum-core approach, Roux's critique fails to appreciate the benefits that the Court's deferral to the government can potentially produce. Faced with a declaration of invalidity but without a specific order as to how to remedy that violation beyond the general command to include the homeless communities that its existing plan leaves out, the government has the freedom to interpret the content of the right to housing as it deems appropriate. This does not mean that as Roux argues the Court's order lacks teeth because as I argue in more detail in the following Subpart the Court retains the power to review the government's own interpretation in a later case.¹⁴⁴ But it does place the onus on the government to determine for itself what its responsibilities are. This creates a stronger incentive for the government to act in good faith to implement its own understanding of what the right to housing requires than would a more specific remedy imposed and enforced directly by the Court.

Nor does the lack of immediate judicial review mean as Roux asserts that this is "a remedy without a sanction."¹⁴⁵ To the contrary, the most immediate potential sanction for a failure by the government to address the violation in *Grootboom* is a political one. Roux dismisses this as having "embarrassment value only,"¹⁴⁶ but read together with the power reserved in *TAC* to impose more direct remedies in the face of failure by government to

¹⁴¹ Roux, *supra* note 103, at 51 (quoting *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 97 (S. Afr.)).

¹⁴² *Id.*

¹⁴³ *Id.* (quoting Wim Trengrove, *Judicial Remedies for Violations of Socio-Economic Rights*, 1 ESR REV. 8, 10 (1999)).

¹⁴⁴ See *infra* Part IV.

¹⁴⁵ Roux, *supra* note 103, at 51.

¹⁴⁶ *Id.*

respond to this weak remedy the *Grootboom* order looks much more like an appropriately nuanced response to a good faith effort by the government to comply with its Section 26 obligations. This combination of an initial weak remedy with the possibility of a future strong one is potentially much more effective in prodding the government to make meaningful policy changes than imposing a strong remedy in the first instance. And as the Court itself noted (and Roux acknowledges dismissively), other non-judicial actors like the South African Human Rights Commission can help ensure that the necessary political pressure to make such changes (backed by the threat of future litigation) will in fact materialize.

The important point here is that by refusing to retain jurisdiction over the government's response the Court is recognizing that effective change is only possible over time and where the incentives are principally political rather than legal. The Court's weak remedy thus recognizes the political complexity involved in crafting a meaningful response to the need for emergency shelter and attempts to deal with that complexity by creating the right incentives for political change. By refusing to dictate the precise terms of that policy or even immediately to review the government's proposed response in the short term, the Court is both giving the government the time necessary to deal with such a complex problem and placing responsibility squarely on the legislature and executive to come up with their own constitutionally sufficient solutions rather than merely deferring to the Court's judgment.

Second, and more importantly, by emphasizing the need for elements of civil society to work with the government to ensure that these programs materialize, the Court is trying to emphasize the need for a political solution to enforcement. Had the Court retained jurisdiction to review a revised housing plan, that would transformed the broader—and potentially much more effective—process of trying to develop a political response to this problem into a much narrower process of coming up with a *legal* response. To be sure that legal response would have come much faster than a political response but likely at the cost of being much less effective in the long term.¹⁴⁷

TAC and *Khosa* illustrate the flexibility of a policentric approach in particular the ability and willingness of the Court to take an even more direct role while still retaining a significant interpretive role for the government where the government has been unwilling or unable to take seriously its constitutional responsibilities. As noted above, in *TAC* the Court determined that the reasons the government put forth for refusing to expand the nevirapine program directly contradicted its own policy decision that administration of

¹⁴⁷ Notably, the Court has placed even greater emphasis on the need for cooperation between civil society and government when interpreting Section 26(3), which prohibits evictions without a court order that considers "all the relevant circumstances," and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), which implements that requirement by prohibiting evictions of unlawful occupiers unless a court determines the eviction is "just and equitable." Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 s. 4(7). In *Port Elizabeth*, the Constitutional Court ordered the parties to submit supplemental briefs addressing the question whether the Court could or should order mediation under the PIE. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para. 44 (S. Afr.). The Court observed that "absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted." *Id.* at para. 43.

nevirapine was the most effective and safest method for preventing mother-to-child transmission of HIV.¹⁴⁸ In that situation unlike in *Grootboom*, the Court was willing to take a more direct role in developing specific policies but only as a means of implementing the government's own determination that administration of nevirapine was the best approach to this particular social problem. In this way the Court was able to take a direct role to fill the gap that the government's recalcitrance had created but at the same time to still avoid the problems that were likely to arise by engaging in extensive court directed policy making.

Significantly even in a case where the Court took this more direct role, it was careful to create flexibility for the government in complying with its order and also to preserve the independent interpretive authority of the government. In a rhetorical move reminiscent of the U.S. Supreme Court's *Marbury v. Madison*¹⁴⁹ decision, the Court paired its strong statements about the extensive range of its remedial powers with a refusal to invoke the full range of those powers.¹⁵⁰ Instead the Court made a point of stating that the government has always complied with its decisions in the past and that there was no reason to expect a different result in *TAC*.¹⁵¹

More importantly the Court at the same time acknowledged the power of the executive branch to *disregard* the specifics of the Court's order regarding implementation: "Government must retain the right to adapt the policy, consistent with its constitutional obligations, should it consider it appropriate to do so."¹⁵² Thus, even in the context of ordering the government to make specific programmatic changes based on the Court's interpretation of Section 27, the Court gave back to the government the ability to reinterpret its obligations under that right should circumstances warrant it. This creates incentives for the government to take its role seriously in the future and to develop programs that meet its obligations under the socioeconomic rights provisions. It also establishes the necessary flexibility for ensuring that government programs are able to adapt to the changing needs of South African society.

Likewise in *Khosa* the Court was responding to a combination of administrative incompetence—represented by the complete failure of the relevant administrative agencies to meaningfully respond to the litigation—and the weight of intersecting constitutional violations: the right to social security in Section 27 and the right to equality in Section 9. Under those circumstances, it was relatively easy for the Court to justify moving towards the stronger end of the enforcement continuum by rewriting the social security legislation to cover permanent residents.

Given this potential to move along a spectrum of responses, a policentric approach involves at least the possibility for a more direct judicial role than the weak-form review Tushnet ascribes to *Grootboom*. This form of

¹⁴⁸ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 62 (S. Afr.).

¹⁴⁹ *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁵⁰ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 129 (S. Afr.).

¹⁵¹ *Id.*

¹⁵² *Id.* at para. 127.

review is too limited in that it implies that the Court can never take a direct role whereas in policentric review the Court's role operates on a continuum that allows for a range of relatively weaker and stronger interventions. For example, while citing *Grootboom* as an effective example of weak review, Tushnet suggests that the stronger remedy in *TAC* represents a return to strong-form review and a potential loss of those benefits.¹⁵³ *TAC* no doubt is an example of the Court operating in a stronger mode than in *Grootboom*. But the Court still preserved a coextensive role for the executive branch in two ways. First, the Court accepted the government's own interpretation of what the constitution required, i.e., single-dose nevirapine was the most effective program to prevent mother-to-child transmission of HIV-AIDS. More importantly, the Court explicitly left open the possibility that the government could depart from its order and adopt an alternative policy for addressing mother-to-child transmission. In other words, the Court told the government that while its specific implementation of the nevirapine program here fell short, the government was still free to develop an entirely different program to implement the healthcare right. The Court also refused to retain jurisdiction to ensure compliance with its order. In a traditional strong-form role such remedial flexibility would be impossible. But a modified policentric approach permits precisely the kind of give and take between the Court and the government in which at different times each side takes the lead in interpreting and reinterpreting each right. The Court's direct remedy in *TAC* was thus less a fixed articulation of what the right to health care requires than a signal intended to shape the government's own interpretations in later cases.

Tushnet more recently has suggested that it might be appropriate for weak-form review to evolve over time into strong-form but only after the iterative process described above has run its course resulting in a relatively stable consensus over the meaning of a particular constitutional provision.¹⁵⁴ Strong-form review would only develop once the courts had obtained the full benefits of weak-form experimentation and "the accumulated force of weak-form decisions [can] provide[] the basis for replacing that form with strong-form review."¹⁵⁵

¹⁵³ See, Tushnet, *New Forms*, *supra* note 108, at 825–27; see also Tushnet, *Marbury*, *supra* note 108, at 273 (In *TAC* "the Court abjured the course it had taken in *Grootboom* of asking only for a plan that it could then review and, instead, directly imposed a significant regulatory requirement."). Tushnet alternatively hypothesizes that the political circumstances surrounding the *TAC* litigation may mean that it will be assimilated as an anomalous example of strong-form review in the socioeconomic rights context: "Perhaps the culture will take as more important the unusual circumstances of the nevirapine case, treat the case as a sport, and give judicial review a weak form again." Tushnet, *New Forms*, *supra* note 108, at 827. I agree with Tushnet's conclusion that the unusual politics of the case explains to a large degree the Court's more searching approach and willingness to impose a direct remedy. But, rather than viewing this result as an aberration, I think it is consistent with the flexibility that a modified policentric approach creates for the Court to evolve towards stronger remedies in specific circumstances. Cf. Post & Siegel, *supra* note 12, at 2025 (emphasizing that "[c]ourts remain free [under a policentric approach] to strike down Section 5 legislation that violates judicially enforceable rights or that impermissibly infringes other constitutional values like federalism.").

¹⁵⁴ Mark Tushnet, *Weak-Form Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1, 17 (2006) (discussing the possibility of drawing a distinction between strong-form and weak-form review "within the domain of fundamental rights" and "suggesting that strong-form review is most defensible with respect to problems the courts have grappled with over many years.").

¹⁵⁵ *Id.* at 20.

The flexibility to move towards strong-form review that is characteristic of the Court's version of policentric review is very different from the evolution into strong-form through accumulated experience that Tushnet describes. In the socioeconomic rights context, the Court would prefer never to reach a point where it regularly engages in strong-form review. But it retains the option for stronger intervention to ensure that the government takes its role seriously. The decision to move towards a stronger mode thus will always depend on the particular circumstances of each case and will be the exception rather than the norm.

In this respect, the Court's default approach mirrors to a large extent the range of weak remedial forms described by Tushnet. It is pragmatic, consultative, and contingent. The Court responds to the particular challenges of each case before it and can deploy relatively weaker or stronger remedies as circumstances require.¹⁵⁶ The principal difference is that the Court retains the ability to impose strong remedies in appropriate circumstances.¹⁵⁷

Sunstein's description of the Court's approach as an administrative law model while a largely accurate description of the Court's default approach fails to capture the full range of approaches the Court has reserved to itself. The administrative law model implies that the Court will always defer to the government's justifications and will only offer its own interpretation where the government has clearly acted in violation of the constitutional standard. By locking the Court into a deferential mode of review, this account ignores the Court's consistent statements that it will not always defer to the government's policy judgments when enforcing these rights. Thus, even in *Grootboom*, the Court emphasized that the socioeconomic rights provisions are like every other right contained in the Bill of Rights in that "*the courts* are constitutionally bound to ensure that they are protected and fulfilled."¹⁵⁸ The Court restated its role in even stronger terms at the close of the opinion: "I stress however, that despite all these [internal] qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce."¹⁵⁹

The Court's willingness to take a much more direct role in *TAC* and *Khosa* confirm that Court views its role as potentially much more robust than the limited review for arbitrariness that is characteristic of administrative law. For example, when reviewing agency actions a court is required to accept the findings and conclusions of the agency and questions of fact as *prima facie* true and correct.¹⁶⁰ But in both *TAC* and *Khosa*, the Court demonstrated that it will not defer in all cases to facially reasonable conclusions by the government where there is reason to suspect those conclusions. More importantly, the

¹⁵⁶ See TUSHNET, *supra* note 1, at 248 (describing a range of weak remedies and noting the flexibility of courts to alter those remedies in response to both plaintiffs and government officials).

¹⁵⁷ *Cf. id.* at 252–54 (describing the possible benefits and challenges of "a strategy of writing strong social welfare rights into the constitution but enforcing them *only through weak remedies*." (emphasis added)).

¹⁵⁸ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 20 (S. Afr.).

¹⁵⁹ *Id.* at para. 94.

¹⁶⁰ See, e.g., *Kaufman v. State Dep't of Soc. & Rehabilitative Servs.*, 811 P.2d 876, 883 (Kan. 1991); *Toys R Us v. Silva*, 676 N.E.2d 862, 867 (N.Y. 1996).

deference required under an administrative law model is inconsistent with the power the Court has reserved to evolve towards an even stronger role in later cases where the government has initially failed to respond adequately to a declaration of unconstitutionality.

V. POLITICAL MOBILIZATION AND SECOND ORDER CASES

The effectiveness of the Court's policentric approach over the long term depends in large part on two things. First, the space the Court has created must in fact result in mobilization by civil society to create political pressure for meaningful policy changes. Second, courts at all levels must be willing to exercise the more direct role the Constitutional Court has consistently preserved particularly in cases where political pressure by itself has been insufficient to prompt meaningful policy changes by the government.

The results thus far have been mixed. The government entities responsible for implementing the Court's early decisions have responded slowly often with limited results. But there are promising signs at least in the housing area that some of the elements necessary for effective implementation of these rights are beginning to develop. In a series of second order cases in the housing area, a range of public interest organizations are beginning to put more consistent pressure on government entities to implement the *Grootboom* decision, and the high courts have been increasingly willing to intervene directly in cases brought by these groups. Two of these cases have made their way up to the Constitutional Court. While managing to avoid directly addressing these developments, the Court has signaled some support for the use of stronger interventions while remaining committed to pushing the question of enforcement back into the political arena.

A. Evolution Towards Strong-Form Review in the High Courts

The Cape High Court in two separate cases found that the City of Cape Town failed to comply with the Constitutional Court's order in *Grootboom* because the City's housing program still failed to provide for the short-term needs of its homeless population.¹⁶¹ In the most telling example, *Rudolph*, the City of Cape Town brought an action to evict multiple individuals who occupied shacks in Valhalla Park, a public park in Cape Town. The City argued that the provisions of legislation¹⁶² regulating the rights of landowners and illegal occupiers did not apply or in the alternative that the City was entitled to urgent interim relief as provided for in that legislation.¹⁶³ The

¹⁶¹ See *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C) (S. Afr.), No. 8970/01, 2003 SACLX LEXIS 43; *In the Matter Between the City of Cape Town & The Various Occupiers of the Road Reserve of Appellant Parallel to the Sheffield Road in Phillipi*, No. A 5/2003 (Sept. 30, 2003) (S. Afr.).

¹⁶² The legislation at issue was the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

¹⁶³ See *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C) (S. Afr.), No. 8970/01, 2003 SACLX LEXIS 43, at *14.

residents responded with a counterclaim seeking a declaration that the City had failed to meet its obligations under Section 26(2) of the Constitution as interpreted in *Grootboom* to make short-term provision for crisis situations like that of the Valhalla Park residents.¹⁶⁴ The residents further sought an order barring their eviction and requiring the City to deliver a report detailing the steps it had taken to comply with its constitutional obligations.¹⁶⁵

The court first denied the City's request for an eviction order finding that the PIE applied and prevented summary eviction under these circumstances.¹⁶⁶ The court also rejected the City's argument that application of the PIE to prevent eviction was an arbitrary deprivation of property and thus that the provisions violated Section 26 of the Constitution. Significantly, the court's rejection of the City's argument drew, in part, on *Grootboom's* interpretation of Section 26(3). The court cited *Grootboom's* articulation of the negative dimension of 26(3) to support its conclusion that the legislature had an obligation to pass legislation like the PIE in order to fulfill its constitutional duty to prevent impairment of individual rights by third parties.¹⁶⁷

The court then turned to the counterclaim and, after quoting *Grootboom* at length, phrased the issue as whether "two and a half years after the judgment in the *Grootboom* case . . . the applicant has complied with its constitutional duties as declared by the Constitutional Court - and if not, what should be the appropriate remedy."¹⁶⁸ The court noted that one of the defendants in *Grootboom*, the Cape Metropolitan Council, which since had merged with the City, presented a plan for the rapid release of land for families in crisis in the *Grootboom* case.¹⁶⁹ But the court found that the City had failed to implement that plan or to give any indication that it planned to do so. Finally, the court noted that the housing backlog in the Cape area at the time *Grootboom* was decided was 206,000 houses but that instead of decreasing that backlog had increased to 250,000 and continued to grow at a rate of 15,000 houses per year.¹⁷⁰

Turning to remedies, the court quoted the Constitutional Court's statement in *TAC* that courts in the appropriate circumstances have the power to issue a mandamus order requiring the government to report back on progress to remedy the breach.¹⁷¹ The court found that the City's "attitude of denial" and failure to comply with *Grootboom* warranted an order requiring the City to report back to the court within four months on its progress in implementing a plan for emergency housing.¹⁷²

¹⁶⁴ *Id.* at *16–20.

¹⁶⁵ *Id.* at *21.

¹⁶⁶ *Id.* at *46, 65–69.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *97.

¹⁶⁹ *Id.* at *104–05 (citing *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at paras. 60, 67 (S. Afr.)).

¹⁷⁰ *Id.* at *111.

¹⁷¹ *Id.* at *120–22 (quoting *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para. 129 (S. Afr.)).

¹⁷² *Id.* at *121.

Thus, the Cape High Court in *Rudolph* was willing to invoke the oversight power that the Constitutional Court stated was available to courts but refused to exercise in *TAC*. *Rudolph* is part of an apparent trend in which the High Courts in certain cases have been willing to deploy the more direct remedies outlined by the Constitutional Court in its early cases. In another eviction case, the Cape High Court in *Phillipi* affirmed an order by the magistrate court refusing to permit the City of Cape Town to evict residents of an informal settlement until the City offered alternative accommodation. After quoting *Grootboom* at length, the court took the City of Cape Town to task for failing to show “what measures it has taken to provide some form of relief ‘for people in desperate need’ such as respondents.”¹⁷³ The court found that the City “has in fact adopted an attitude . . . that it is not under any obligation to provide such relief for respondents.” On this basis, the court upheld the magistrate’s determination that the City could not proceed with evicting the residents until it had implemented *Grootboom*’s command to develop a plan for accommodating the residents.¹⁷⁴

Phillipi, like *Rudolph*, demonstrates the willingness of lower courts to hold the government accountable in second order cases for implementing declaratory orders by the Constitutional Court. More recently, the Johannesburg High Court joined this trend in a slightly different fashion. In *the Matter Between Lingwood and the Unlawful Occupiers of R/E of ERF 9 Highlands*¹⁷⁵ dealt with an application by the purchasers of an apartment building in Johannesburg to evict the occupants most of whom had resided in the building for several years. The application was brought under the PIE, and the residents argued that an eviction order would not be “just and equitable” as required by the PIE¹⁷⁶ because there were no alternative accommodations available in Johannesburg.¹⁷⁷ The residents also sought a stay of the proceeding until applicants joined the City of Johannesburg and a declaration that the City was constitutionally required to provide temporary emergency shelter for individuals like themselves who would have no alternative accommodations if evicted.¹⁷⁸

The High Court noted that the City had been served with the original eviction application as required under the PIE, and it had filed a form notice stating that it “does not have any land and/or alternative suitable accommodation available to accommodate the respondents.”¹⁷⁹ The court found that this “terse and unsubstantiated statement . . . does not at all comply”

¹⁷³ *In the Matter Between the City of Cape Town & The Various Occupiers of the Road Reserve of Appellant Parallel to the Sheffield Road in Phillipi*, No. A 5/2003, slip op. at para. 25 (SCA Sept. 30, 2003) (S. Afr.).

¹⁷⁴ *Id.* at paras. 25–26.

¹⁷⁵ *In the Matter Between Lingwood and the Unlawful Occupiers of R/E of ERF 9 Highlands*, No. 2006/16243 (October 16, 2007) (S. Afr.).

¹⁷⁶ Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 s. 4(7).

¹⁷⁷ *In the Matter Between Lingwood and the Unlawful Occupiers of R/E of ERF 9 Highlands*, No. 2006/16243, slip op. at para. 7 (SCA October 16, 2007) (S. Afr.).

¹⁷⁸ *Id.* at para. 12.

¹⁷⁹ *Id.* at para. 15.

with the City's obligations under Section 26 and related legislation.¹⁸⁰ After surveying a range of similar cases including the High Court orders in the *City of Johannesburg* and *Modderklip* cases discussed below, the court found that the City was "a necessary and interested party" because of its constitutional and statutory obligations to provide shelter following an eviction and therefore that the residents should be permitted to join the City before the application proceeded.¹⁸¹

Relying heavily on the Constitutional Court's discussion of mediation in the *Port Elizabeth* case,¹⁸² the court also held that whether the parties had engaged in mediation prior to the eviction proceeding was a relevant consideration in deciding if an eviction order would be just and equitable under the PIE.¹⁸³ After noting that High Courts often issue "innovative orders" in PIE cases, the court then stayed the application, ordered the respondents to join the City, and directed all of the parties "to engage in mediation in an endeavor to explor[e] all possibilities of securing suitable alternative accommodation or land and/or achieving solutions mutually acceptable to the parties."¹⁸⁴

While less of a direct enforcement of *Grootboom* than *Rudolph* and *Phillipi*, the order in *Lingwood* represents a creative extension of the *Grootboom* requirement to address emergency needs that is potentially much broader. If the reasoning in *Lingwood* is adopted by other courts, it will permit individuals faced with homelessness from a potential eviction order to join the relevant government entity to be a party to every private eviction proceeding. It will also put in the forefront the question of whether the government has met its obligation under *Grootboom* to develop and implement a plan for providing emergency shelter will be relevant—and perhaps dispositive—in determining whether an eviction order is just and equitable. The net effect will be to create a close nexus between the right of private parties to evict and the success of the government in developing emergency shelter programs as required by *Grootboom*.

At the same time that *Lingwood* extends the effect of *Grootboom* in ways that put increased pressure on the government to meet its obligations under Section 26, it is also largely consistent with the Constitutional Court's preference for promoting political resolution to socioeconomic rights issues for two reasons. First, rather than direct a specific policy outcome, *Lingwood* creates pressure by forcing the government to defend its policy decisions in a category of cases where it would otherwise not have been directly involved and in which both sides of the dispute—the landowner seeking to evict and the residents—will have a mutual interest in pressuring the government to fulfill its obligations to provide emergency housing. While most immediate in the context of a pending eviction proceeding, the leverage created by this mechanism also operates outside of litigation because the government now

¹⁸⁰ *Id.* (emphasis added).

¹⁸¹ *Id.* at para. 37.

¹⁸² See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.).

¹⁸³ *In the Matter Between Lingwood and the Unlawful Occupiers of R/E of ERF 9 Highlands*, No. 2006/16243, slip op. at para. 35 (SCA October 16, 2007) (S. Afr.) (The *Port Elizabeth* discussion is at paragraphs 33–35.).

¹⁸⁴ *Id.* at para. 38.

knows it may be joined in these cases and will have to defend its housing policy and/or come up with ad hoc solutions to address the needs of the individual residents in future cases. At the same time, private landowners who may be barred from evicting tenants who will become homeless have an incentive to advocate for changes in housing policy that will satisfy *Grootboom*.

Second, the court's mediation order creates the opportunity for the government to avoid a court-directed solution by negotiating a solution directly with the residents. If courts routinely emphasize mediation in socioeconomic rights cases, this will create another mechanism for avoiding direct involvement in crafting policy details even where the threat of litigation has materialized in a second order case. The Constitutional Court already suggested in *Port Elizabeth* that mediation is an important tool in socioeconomic rights cases,¹⁸⁵ and the Court's orders in the *City of Johannesburg* case discussed below have created a concrete requirement that the government "engage" with citizens affected by their policies before taking any legal action.¹⁸⁶

Requiring the routine use of these kinds of informal processes in socioeconomic rights cases is a very direct mechanism for forcing the government to take responsibility for implementation of these rights that has several potential benefits. It keeps the government in dialogue with civil society groups seeking to enforce these rights and opens up the possibility for political solutions to develop before parties' positions harden as a result of litigation. Furthermore, it strengthens the ability of civil society organizations to generate political pressure on the government. If as the Court appears to require in *City of Johannesburg*, the government cannot enforce (or presumably seek to defend) its policies in court unless and until it has "engaged" meaningfully with affected citizens, then the government at a minimum will have to respond to the concerns of those citizens and groups because it will ultimately have to defend the reasonableness of that response in court. The Court recognized this potential in *City of Johannesburg* and adopted what amounts to a public reporting requirement for the engagement process to ensure that the government's response is transparent and subject to public (and ultimately court) scrutiny.¹⁸⁷

In addition to demonstrating an increased willingness by lower courts to make government accountable for implementing *Grootboom*, these cases and the two that I discuss in the following Subpart also illustrate the beginning of a larger political mobilization around the right to housing prompted at least in part by the *Grootboom* decision. In all three cases, the residents were represented by public interest law groups who are part of a growing network of civil society groups involved in efforts to enforce Section 26 and other socioeconomic rights.

¹⁸⁵ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para. 39 (S. Afr.).

¹⁸⁶ See *infra* text accompanying notes 238–48; see also Liebenberg, *supra* note 11, at 7 n.25 ("In the context of evictions, the Constitutional Court has recently highlighted the importance of mediation . . .").

¹⁸⁷ See *infra* text accompanying notes 238–48.

Phillipi and *Rudolph* were coordinated in part by the Legal Resources Center (LRC), one of the leading public interest law groups in South Africa, and Geoff Budlender, one of the principal advocates for amici in the *Grootboom* litigation who represented residents in both cases on behalf of the LRC.¹⁸⁸ The LRC's intervention in these cases was part of a broader multifaceted strategy aimed at enforcing Section 26. As the LRC describes it on its website: "The LRC has taken a series of cases that has made it difficult to evict people where they have nowhere else to go. It has also attempted to enable clarity to be provided with regard to what it is that government has to do to realise the right to housing."¹⁸⁹ The LRC explicitly defines one aspect of this work as "focus[ed] on seeking orders where government is ordered to comply with *Grootboom* (around remedies for the poor)."¹⁹⁰

The LRC notes that its efforts are not limited to litigation. In addition to bringing targeted cases, the group has positioned itself as a resource for government:

Now we continually liaise with the authorities both in respect of law reform and about how to improve housing delivery. Meetings have been held with provincial and local government authorities over the last years and these are increasing in regularity. During the course of this, LRC lawyers have often been asked by various departments to outline the problems that we have identified in the course of our work in the hope that solutions more consistent with policy can be found.¹⁹¹

And the LRC is not alone in its efforts to enforce Section 26. The LRC works with a range of other organizations to coordinate housing reform efforts. These partnerships have resulted in a broad-based effort aimed at securing the right to housing in a variety of ways:

These co-operative relationships with civil society organisations enable work to be better informed and clients to be better assisted. It also builds and sustains democratic values. The LRC's internal educational seminars and planning sessions often involve key personnel from these sister organisations.¹⁹²

¹⁸⁸ See Jeremy Perelman, *The Way Ahead? Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in the Nkuzi Case*, 41 STAN. J. INT'L LAW 357, 358 (2005) ("[Geoff] Budlender and the LRC, a prominent South African public interest law firm, have been key actors in several successful socio-economic-rights lawsuits brought before the South African Constitutional Court, including *Grootboom* and *Treatment Action Campaign*.").

¹⁸⁹ See Legal Resources Centre, Housing and Local Government, http://www.lrc.org.za/Focus_Areas/housing.asp (last visited Feb. 16, 2009).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

The residents in *Lingwood* were represented by the Wits Law Clinic, at the University of Witwatersrand. The residents relied directly on a report by the Geneva based Centre on Housing Rights and Evictions (COHRE) and the Centre for Applied Legal Studies (CALS),¹⁹³ a group housed at the University of Witwatersrand that has been active in many of the post-*Grootboom* housing cases. This report was the impetus for the *City of Johannesburg* litigation discussed in the following Subpart in which CALS also took the lead. Thus, *Lingwood* represents an extension of the emerging efforts by a range of organizations to use *Grootboom* as a tool to hold the government responsible for implementing Section 26.

Jack Balkin has described social movements in the U.S. as capable of effecting change in constitutional meaning by gradually altering the background legal assumptions on which courts and other legal actors rely: “Social movements and political parties shape the contours of political and legal reason—they help produce what is plausible and implausible constitutionally.”¹⁹⁴ Balkin argues that success in changing these background assumptions depends on the ability of social movements to deploy one of two strategies: either working “within the [p]olitical party system to obtain appointments of new judges and Justices sympathetic to the movement’s claims” or “chang[ing] the minds of existing judges by winning the battle for public opinion and appealing to the elite values of the judiciary.”

Two aspects of the Constitutional Court’s approach have opened the possibility for civil society organizations to change constitutional meaning in the socioeconomic rights context through successful deployment of much more limited political strategies. First, by refusing to establish the precise content of these rights the Court has deliberately created a fecund ambiguity that can be used by civil society groups to argue for a range of policies. In other words, the Court has left the “field of legal understandings”¹⁹⁵ in the socioeconomic rights area open. This leaves civil society organizations free to argue for whatever policy changes they think will be most responsive to the problems these rights are intended to address.

Second, by leaving the door open to more direct court involvement in later cases, the Court has handed those same groups a potent lever to force the government to take their claims seriously even absent successful advocacy within the dominant political party or widespread change in popular opinion. Faced with an ambiguous standard combined with the possibility of litigation that may result in a court adopting and enforcing the interpretation of these groups, the government has strong incentives to seriously consider their proposals and to accommodate their claims or develop a credible alternative that it can defend in court.

Thus, rather than preempting the potential constitutional conversation that these rights can generate by precisely defining their content, the Court has

¹⁹³ *In the Matter Between Lingwood and the Unlawful Occupiers of R/E of ERF 9 Highlands*, No. 2006/16243, slip op. at para. 7 (SCA October 16, 2007) (S. Afr.).

¹⁹⁴ Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 32 SUFFOLK U. L. REV. 27, 52 (2005).

¹⁹⁵ *Id.* at 59.

left it up to civil society and government to work together to devise policies that they think are constitutionally sufficient. This permits a resolution that has more democratic credibility than a court order while at the same time preserving a role for judicial enforcement.

B. Modderklip, City of Johannesburg, and the Constitutional Court's Response

Both the increased willingness by lower courts to make the government accountable and the mobilization by civil society organizations post *Grootboom* are reflected in the two second order housing cases that have made their way to the Constitutional Court. In one case, the Court avoided direct interpretation of Section 26 issue but gave some indications that it approved of the more aggressive approach taken by the lower court. The Court's recent opinion in the second case along with a remarkable settlement suggests even more strongly that it remains committed to holding the government responsible for implementing the right to housing but that consistent with a policentric approach the Court would prefer the government determine the specifics steps necessary to ensure compliance. Both cases also provide further evidence of a strengthening of the political mobilization evident in *Rudolph*, *Phillipi*, and *Lingwood*.

In the first of these decisions, *President of the Republic and Others v Modderklip Boerdery (Pty) Ltd and Others*,¹⁹⁶ the Court affirmed an order of the Supreme Court of Appeal (SCA) awarding damages against a local government for its failure to enforce an eviction order against the approximately 40,000 residents of an informal settlement that had developed on a private landowner's property. *Modderklip* is significant because, while both lower courts based their holdings in part on findings that the local government violated Section 26(2) by failing to provide alternative temporary housing for the illegal occupiers as required by *Grootboom*, the Constitutional Court declined to reach the 26(2) question and affirmed the SCA's order on other grounds. By eliminating 26(2) from its analysis, the Court left open the question whether the SCA's more aggressive remedy for a 26(2) violation was an appropriate extension of the relatively restrained remedies the Court has appeared to favor thus far. Significantly, however, the Court found the SCA's damages remedy appropriate in part because a declaratory order was insufficient to remedy the violation of *Modderklip*'s rights.¹⁹⁷

Modderklip (Pty) Ltd ("Modderklip") was part owner of land upon which some forty thousand squatters had occupied in township north of Johannesburg. The owners sued the occupiers for trespass but the individuals convicted were given warnings and simply returned to the settlement upon release.¹⁹⁸ *Modderklip* unsuccessfully sought assistance from the local

¹⁹⁶ *President of the Republic and Others v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3 (CC) (S. Afr.).

¹⁹⁷ *Id.* at para. 60.

¹⁹⁸ *Id.* at para. 5.

authorities to deal with the problem and even offered to sell the land to the local municipality.¹⁹⁹

Modderklip eventually obtained an order from the Johannesburg High Court evicting the occupiers and requiring the local sheriff to assist in the eviction. The sheriff, however, insisted that Modderklip post a security of 1.8 million rand to cover the costs of the eviction. After additional unsuccessful attempts to gain support from local and national government entities, Modderklip then brought suit in the Pretoria High Court seeking an order to compel the state to remove the occupiers and alleging violations of its rights under Section 25(1) of the Constitution, which prohibits arbitrary deprivations of property, its equality rights under Section 9, and the rights of the occupiers under Section 26(2).²⁰⁰

The Pretoria High Court found that the illegal occupation violated Modderklip's property rights under Section 25(1) and that this violation was the result of the state's failure to fulfill its obligations under Sections 26(1) and (2) to provide adequate housing to the occupiers.²⁰¹ Based on these and additional findings, the court imposed a structural injunction requiring the state to present a plan for remedying these violations.²⁰²

The state appealed to the SCA, which largely upheld the High Court's findings but replaced the injunction with an award of damages to Modderklip and a declaration that the occupiers were entitled to continue to occupy the settlement until the state provided alternative housing.²⁰³ Two aspects of the SCA's judgment deserve particular attention. First, the SCA found that the illegal occupation was the result in part of the state's lack of any plan "for the immediate amelioration of the circumstances of those in crisis" as required by *Grootboom*.²⁰⁴ Thus, like the High Court, the SCA found that *Grootboom's* interpretation of Section 26(2) imposed an immediate and concrete duty on the state to provide housing in certain extreme circumstances.

Second, the SCA found that the injunction imposed by the High Court violated the separation of powers principle by impermissibly invading the policymaking province of the executive and legislative branches. As the SCA stated, "[such interdicts] tend to deal with policy matters and not with the enforcement of particular rights. . . . Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise."²⁰⁵ Specifically, the High Court's order "encroached on policy matters by requiring a prioritisation of the

¹⁹⁹ *Id.* at para. 6.

²⁰⁰ *Id.* at para. 11. Modderklip also alleged that the state violated its duty under Section 7 of the Constitution to "protect, promote and fulfil the rights in the Bill of Rights." *Id.*

²⁰¹ *Id.* at para. 15. The High Court also found that the state's refusal to assist in the eviction infringed on Modderklip's Section 9 equality rights. *Id.*

²⁰² *Id.* at para. 16.

²⁰³ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (2004) (6) SA 40 (SCA) at para. 52 (S. Afr.).

²⁰⁴ *Id.* at para. 22 (quoting *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) at para. 64 (S. Afr.)).

²⁰⁵ *Id.* at paras. 38–39.

[existing settlement] while there is no evidence that these people are entitled to it.”²⁰⁶

To remedy these problems, the SCA found that the “only appropriate relief” was an award of “constitutional damages” based on the value of the property. According to the SCA, this remedy avoids the problems that eviction would cause while permitting the state to determine whether to ultimately expropriate the land or find alternate housing for its residents.²⁰⁷

The Constitutional Court affirmed the SCA’s judgment and remedy, but found that it was unnecessary to determine whether the occupiers’ 26(2) housing rights were violated.²⁰⁸ Instead, the Court held that the state’s failure to assist Modderklip in evicting the occupiers was principally a violation of Modderklip’s right to have access to the courts to resolve disputes under Section 34 of the Constitution.²⁰⁹

The Court’s interpretation of Section 34 is important because it signals the possibility that the Court may be willing to find positive obligations in rights other than the direct socioeconomic ones. Specifically, the Court held that Section 34 imposes an obligation on the state to enforce court orders and also “to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.”²¹⁰ In Modderklip’s case, this meant that the state was required to do more than rely on existing mechanisms to enforce the eviction order because the eviction of this number of people “would cause unimaginable social chaos and misery and untold disruption.”²¹¹

The Court found that the damages remedy imposed by the SCA was therefore appropriate because it compensated Modderklip while leaving the state with the ultimate responsibility for providing accommodations for the occupiers.²¹² In doing so, the Court rejected the state’s contentions that declaratory relief was sufficient. Noting the “long history of Modderklip’s efforts to relieve its property from unlawful occupation,” the Court determined that the situation had reached a stage that required “something more effective than the suggested clarification of [Modderklip’s] rights.”²¹³

Modderklip falls short of an outright endorsement of the use of stronger remedies to enforce socioeconomic rights because the Court refused to rely directly on Section 26 as a basis for affirming the constitutional damages award. Nonetheless, the Court’s repeated reference to Section 26 in its analysis of Section 34 and its determination that declaratory relief was inadequate to remedy the Section 34 violation in combination indicate an

²⁰⁶ *Id.* at para. 40.

²⁰⁷ *Id.* at para. 43.

²⁰⁸ *President of the Republic and Others v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3 (CC) at para. 26 (S. Afr.).

²⁰⁹ *Id.* at paras. 39–48 (“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial hearing or forum.” (quoting S. AFR. CONST. 1996)).

²¹⁰ *Id.* at para. 43.

²¹¹ *Id.* at para. 47.

²¹² *Id.* at para. 59.

²¹³ *Id.* at para. 60.

evolution towards the use of direct remedies where required to effectively enforce socioeconomic rights.

The Constitutional Court's most recent decision, *Occupiers of 51 Olivia Road v City of Johannesburg*,²¹⁴ indicates a greater willingness by the Court to hold the government responsible for implementing *Grootboom*. Rather than invoking its power to impose a direct remedy, however, the Court instead constitutionalized a novel "engagement" requirement in housing rights cases. Engagement, as described by the Court, forces the government to respond directly to citizens affected by its housing policies and also includes a public reporting requirement to ensure that the courts and other interested groups can assess whether the government's engagement efforts were genuine or merely a sham. CALS has hailed this decision as "a victory" not only for the residents themselves but also "for poor occupiers more generally."²¹⁵

City of Johannesburg began as a series of emergency applications in the Witwatersrand High Court by the City of Johannesburg to evict over three hundred people from six properties in inner-city Johannesburg.²¹⁶ The City sought these evictions as part of a broader regeneration strategy, one aspect of which was the identification, clearance, and ultimate redevelopment of "bad" buildings in the inner-city district.²¹⁷ The National Building Regulations and Building Standards Act (NBRA), an apartheid-era law that grants municipalities the power to evict tenants of any building deemed unsafe or unhealthy,²¹⁸ provided the legal basis for the City's emergency applications.

The residents of these buildings opposed the applications on several statutory and constitutional grounds. They claimed that the City's failure to provide access to adequate housing as required by Section 26 of the Constitution precluded it from evicting them.²¹⁹ The residents also counterclaimed seeking among other things an order that the City's housing program failed to comply with its constitutional and statutory duties and a structural injunction requiring the City to comply with its positive obligations under Section 26 of the Constitution.²²⁰

The residents' opposition was the result of a coordinated effort by a group of nonprofit organizations working together on a range of efforts to

²¹⁴ *Occupiers of 51 Olivia Rd. v City of Johannesburg* 2008 (5) BCLR 475 (CC) (S. Afr.).

²¹⁵ Press Release, Centre for Applied Legal Studies [CALS], Constitutional Court Overturns Supreme Court of Appeal Decision to Grant an Eviction Order in Circumstances Where the City of Johannesburg Failed to Meaningfully Engage with the Occupiers (February 19, 2008), available at <http://www.law.wits.ac.za/cals/>.

²¹⁶ *City of Johannesburg and Rand Properties (Pty) Ltd.* 2008 (5) BCLR 475 (CC) at para. 2 (S. Afr.).

²¹⁷ See Centre on Housing Rights and Evictions [COHRE], *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, at 41–46, 60–64, March 8, 2005 (describing the regeneration plan and the practice of forced evictions).

²¹⁸ National Building Regulations and Building Standard Act 103 of 1977 s. 12(4)(b). See generally Lilian Chenwi, *Advancing the Right to Adequate Housing of Desperately Poor People: City of Johannesburg v Rand Properties*, 14 HUM. RTS. BRIEF 13 (2006); COHRE, *supra* note 217, at 38–39.

²¹⁹ *Occupiers of 51 Olivia Rd. v City of Johannesburg* 2008 (5) BCLR 475 (CC) at para. 11.7.18 (S. Afr.).

²²⁰ *Id.*

protect the housing rights of poor communities throughout South Africa. Prior to the City's eviction attempts in these cases, the Geneva-based Center on Housing Rights and Evictions (COHRE) published an extensive report criticizing the City's extensive eviction program and outlining legal and policy arguments against that program.²²¹ COHRE partnered with several other organizations including CALS,²²² and it was CALS that ultimately coordinated the litigation strategy in the cases.²²³ The Community Law Centre, a public interest research and advocacy group based at the University of the Western Cape, joined COHRE and CALS in filing amici briefs in support of the residents.²²⁴

The High Court focused exclusively on the Section 26 arguments and, citing *Grootboom*, held that the City had failed to meet its obligations to create and implement a plan that would "foster conditions to enable respondents to have access to adequate housing in the inner city."²²⁵ The court then ordered the City to develop and implement a "programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg," and enjoined the City from evicting the residents.²²⁶ The residents' victory had an immediate impact. Despite appealing the judgment to the SCA, the City not only ceased its attempts to evict the residents who were party to the suit, but also put the entire inner-city eviction program on hold.²²⁷

In a conservatively reasoned opinion, the SCA reversed the High Court's judgment. The SCA held that the evictions were constitutional, but the City had an obligation to provide the evicted residents with temporary housing consistent with recently passed national housing legislation.²²⁸ The SCA also found that the temporary accommodations must be within the municipal region but not the inner-city district as the High Court had ordered.²²⁹

The SCA noted that shortly before the City filed the eviction applications, the central government issued a "National Housing Program in apparent response to the judgment of the Constitutional Court in *Grootboom*."²³⁰ Chapter 12 of that legislation provides grants to local

²²¹ COHRE, *supra* note 217.

²²² See *id.* at 5 n.1; see also Press Release, COHRE/CALS, Jo-Burg City Housing Policy Goes to Bloemfontein (Feb. 20, 2007) ("The plight of [the residents] was first brought to public attention in a May 2005 report co-authored by researchers from the Centre for Applied Legal Studies (CALS) and COHRE . . ."), available at <http://www.law.wits.ac.za/cals/>.

²²³ See University of the Witwatersrand, Johannesburg, CALS, <http://www.law.wits.ac.za/cals/Rand%20Properties/Randindex.html> (summarizing the litigation and providing links to the briefs by all parties at the SCA and Constitutional Court levels).

²²⁴ See Press Release, COHRE/CALS, *supra* note 222 ("The Centre for Housing Rights and Evictions and the Community Law Centre (CLC) have been permitted to make submissions [to the SCA] as friends of the court.").

²²⁵ *Occupiers of 51 Olivia Rd. v City of Johannesburg* 2008 (5) BCLR 475 (CC) at para. 65–66 (S. Afr.).

²²⁶ *Id.* at para. 3–4.

²²⁷ See Press Release, COHRE/CALS, *supra* note 222 ("In light of the High Court's judgment, the City appears to have suspended its mass eviction program."), available at www.cohre.org/store/attachments/Media%20Release%20-%20Joburg%20Feb%202007.doc.

²²⁸ *City of Johannesburg v Rand Prop. (Pty) Ltd* 2007 SCA 25 (SCA) at para. 78 (S. Afr.).

²²⁹ *Id.* at paras. 75, 77.

²³⁰ *Id.* at para. 25.

governments for housing for people in emergency situations. The City filed a supplementary affidavit in the SCA alleging that it had filed an application for Chapter 12 funding just before the hearing in the High Court.²³¹ But the SCA found that city had failed to adequately pursue that application, and as a result it was only able to offer temporary shelter to evicted residents for up to two weeks.²³²

Citing this weak effort, the SCA acknowledged that “there is little evidence to demonstrate what the City has actually done” to comply with its obligation to provide access to adequate housing under Section 26. But it nonetheless found that this was not “the case in which to attempt to make an assessment of the extent to which the City has or has not made acceptable progress towards fulfilling its obligation”²³³ Instead, the SCA limited its relief to requiring the City to provide temporary shelter to the evicted residents. The SCA found that this limited relief was “eminently fair” because “it only caters for those who are to be evicted [and therefore] cannot tax its budget unduly.”²³⁴

The residents appealed the SCA’s order to the Constitutional Court, which accepted the application in May 2007.²³⁵ The Court heard oral argument on August 28, 2007 and two days later issued an interim order in the case. That order is extraordinary in several respects. First, procedurally the order is highly unusual if not unique in the Court’s history. The order required the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”²³⁶ It also required the parties to file affidavits reporting the results of the negotiations with the Court approximately one month later on October 3, 2007.²³⁷ The Court was in effect ordering the parties to try and work out a solution themselves before the Court issued its judgment.

Finally, the last paragraph of the order stated that the Court would take into account “the affidavits in the preparation of the judgment in this matter for the issuing of further directions, *should this become necessary*.”²³⁸ Thus, the Court signaled to the parties that if their negotiations result in a compromise that the Court views as sufficient, it might be unnecessary for the Court to take any further action in the case.

²³¹ *Id.* at para. 26.

²³² *Id.* at para. 77.

²³³ *Id.* at para. 74.

²³⁴ *Id.*

²³⁵ *See Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg*, No. CCT 24/07 (S. Afr. Aug. 30, 2007) (order requiring the parties to engage with each other to resolve the issues and to alleviate the plight of the applicants and requiring the parties to file affidavits reporting the results of the engagement), available at <http://www.constitutionalcourt.org.za/Archimages/10731.PDF>.

²³⁶ *Id.* at para. 1.

²³⁷ *Id.* at para. 3.

²³⁸ *Id.* at para. 4 (emphasis added).

Remarkably, the Court's extraordinary effort appears to have worked. The parties reached a mutually satisfactory settlement that resulted in real change to the City of Johannesburg's policy. Among other things, the settlement requires the City in the short term to take specific measures to make the existing buildings safer and more habitable by cleaning the buildings and providing sanitation services, access to water, and functioning toilets.²³⁹ Before relocating the residents from the buildings designated for redevelopment, the City agreed to refurbish several other buildings in inner-city Johannesburg to at least provide "security against eviction; access to sanitation; access to potable water; access to electricity for heating, lighting and cooking;"²⁴⁰ and to limit any rental fees to no more than twenty-five percent of the occupants' monthly income.²⁴¹ The City also agreed to consult with the residents on the "provision of suitable permanent housing solutions . . . having regard to applicable national, provincial and municipal housing policies."²⁴²

The settlement did not resolve all of the issues in the case, and the Constitutional Court issued its final opinion and order on February 19, 2008. Several aspects of this relatively brief decision are particularly important. First, it is clear that the Court continues to prefer political over legal solutions. The Court specifically refused to deal with the residents' broader claim that the City still lacked a comprehensive housing plan as required by *Grootboom*. Citing the City's commitment in the settlement agreement to develop a long-term housing plan in consultation with the residents, the Court found that "[t]here is every reason to believe that negotiations will continue in good faith."²⁴³ The Court noted that the City's position had evolved considerably as demonstrated by the City's "willingness to engage," and in language echoing its reasons for refusing to issue an injunction in *TAC*, the Court expressed optimism that "[t]here is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result."²⁴⁴ The Court then emphasized that while both parties had a "duty" to continue to negotiate, court intervention remains an enforcement option "if this course becomes necessary."²⁴⁵

Second, the Court formalized the negotiation/mediation requirement that it had begun to develop in earlier cases. The Court adopted the term "engagement" to describe this requirement and spent fourteen paragraphs of this fifty-four paragraph judgment explaining the need for engagement among the government, affected citizens, and civil society organizations to develop effective socioeconomic policies.

²³⁹ Settlement Agreement Between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg, at paras. 2–4, Oct. 29, 2007. (copy on file with author) [hereinafter City of Johannesburg Partial Settlement].

²⁴⁰ *Id.* at para. 6.

²⁴¹ *Id.* at para. 7.

²⁴² *Id.* at para. 18.

²⁴³ *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg*, No. CCT 24/07, slip op. at *39 (CC Feb. 19, 2008) (S. Afr.).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

The Court first situated the engagement requirement in its earlier cases citing as examples the disappointment it had expressed in *Grootboom* over the City's failure to deal "on a case-by-case" basis with the problems faced by the *Grootboom* residents and also its call for "respectful . . . engagement or mediation" in *Port Elizabeth*.²⁴⁶ The Court emphasized that "[e]ngagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process."²⁴⁷ Beyond this practical benefit, the Court found that a range of constitutional provisions, most importantly the right to human dignity and the right to life, *require* that the government "meaningfully engage[]" with citizens affected by its policies.²⁴⁸ To meet constitutional muster, at most levels of government engagement must be more than a merely "ad hoc" process.²⁴⁹ In the context of this case, the Court noted that the City of Johannesburg's regeneration strategy should have incorporated an engagement plan at the outset "when [it] must have been apparent that the eviction of a large number of people was inevitable."²⁵⁰ The Court also emphasized the central role of civil society in this process, emphasizing that "[c]ivil society organizations that support the peoples' claims should preferably facilitate the engagement process in every possible way."²⁵¹

In addition, to ensure the possibility of meaningful court review of the engagement process, the Court established what amounts to a public reporting requirement for the government following engagement. After noting that "secrecy is counter-productive to the process of engagement," the Court emphasized that, at least for municipal eviction proceedings, "the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality with that process would ordinarily be essential."²⁵² Courts are then required to consider "[w]hether there had been meaningful engagement between a city and the resident about to be rendered homeless" when considering a challenge under Section 26.²⁵³

C. Prospects for the Future

In its early cases, it is evident that the Court exercised a more restrained role for itself than the Constitution arguably permits. This is particularly clear from the Court's largely consistent refusal to provide remedies more direct than declarations of unconstitutionality. Nonetheless, the Court has at the same time clearly carved out the possibility for a more robust and direct role in enforcing these rights by establishing the potential to grant injunctions and other relief. The High Court orders in *Rudolph, Phillipi*,

²⁴⁶ *Id.* at paras. 10–12.

²⁴⁷ *Id.* at para. 25.

²⁴⁸ *Id.* at para. 26.

²⁴⁹ *Id.* at para. 29.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at paras. 30–31.

²⁵³ *Id.* at para. 31.

Modderklip, *Lingwood*, and *City of Johannesburg* demonstrate the willingness of lower South African courts to invoke those stronger remedies where the government's response to a declaration of unconstitutionality is inadequate. This willingness by lower courts to take seriously the power to issue more direct remedies and to engage in more direct review answers at least in part the criticism that the Court's approach to socioeconomic rights has been overly deferential.

But the High Court orders also raise important questions about the ability of courts to effectively implement strong-form remedies. The acute housing shortage in South Africa is an excellent example of the considerable challenges a court must confront when it intervenes directly in policy setting for the state. The government parties in both *Rudolph* and *Modderklip* argued that it was inappropriate for the Court to grant a direct remedy to the illegal occupiers precisely because doing so would preference these individuals over the many other individuals in the same situation.

The court in *Rudolph* recognized this problem and rather than grant the individual applicants direct relief, it ordered the City to deliver a report "stating what steps it has taken to comply with its constitutional and statutory obligations" as described in the order as well as "what future steps it will take in that regard, and when such future steps will be taken."²⁵⁴ While this is a significant step beyond the declarations the Constitutional Court limited its remedies to in all direct socioeconomic rights cases except *Khosa*, the order still leaves ample room for the government to develop its own policy and equally important is consistent with the Constitutional Court's interpretation that these rights do not operate in most cases to provide individual remedies. Thus, despite tending towards the stronger end of the spectrum, the *Rudolph* order retains the flexibility that defines policentric review. In particular, the court's order leaves open the opportunity for the government to maintain a fair degree of control over the specifics of the policy changes because the court gave the City of Cape Town the opportunity to develop its own response to the constitutional deficiencies and thereby to define the content of the right to housing by proposing a policy it believes satisfies that right.

Likewise, the Constitutional Court's damages remedy in *Modderklip* (although not directly enforcing Section 26) combined with the declaration that the occupiers were entitled to continue occupying the land until the state provided an alternative permitted the government to determine for itself how best to accommodate the illegal residents. This represents a compromise between court oversight of the details of the process and deference to legislative and executive judgments over broader policies.

But the Court's orders in *City of Johannesburg* are perhaps the best evidence that it will remain firmly committed to encouraging the government to take the lead in implementing these rights. Faced with consistent rulings at both Court and SCA levels ordering direct relief against the City of Johannesburg, the Court attempted one more time to force the parties to come up with their own solution to the apparent Section 26 violations. This reflects

²⁵⁴ *City of Cape Town v Rudolph* 2003 (11) BCLR 1236 (CC) at 89 (S. Afr.).

a direct version of the Court's call in *Grootboom* and *TAC* for civil society to work with government to craft effective policies or implementing these rights. And consistent with the principles of policentric review, the order gave the government one last opportunity to come up with a revised policy that is the product of negotiation rather than court order. The Court also reassured the government that it would not only take into account the negotiated settlement in deciding the case but that it might not even have to issue any further directions if the result of the negotiations is satisfactory.

Grootboom and the national housing legislation that followed it were instrumental in creating the necessary pressure on the City to force this change. And the specific terms of this settlement arguably go well beyond what the Constitutional Court would have required if it had accepted the responsibility of crafting a specific relief order in that case. Thus, the flexibility that *Grootboom* left open resulted at least in this case in the opportunity to craft a detailed policy to provide tailored relief to meet the specific needs of a particular group of individuals—affordable housing in the inner city.

In its final order, the Court then made the process that resulted in this remarkable settlement a constitutional requirement in all housing rights cases. Following *City of Johannesburg*, the government at all levels is now required to take seriously the concerns of affected citizens and demonstrate that sincerity by documenting and making public the steps that it has taken in each case. Courts are specifically required to assess whether or not that engagement process was meaningful in deciding housing rights cases. Combined with the threat that a court might take more direct action if it finds the government's actions fall short of the constitutional requirements, this engagement requirement is another flexible mechanism for obtaining meaningful enforcement while minimizing court involvement. In addition, the Court has once again emphasized the importance of civil society to meaningful enforcement by calling for their involvement in this new constitutionally required process.

To be sure, as the SCA opinion acknowledges, "the government at all levels and the City in particular have yet to firmly grasp the nettle of the obligations they have towards the poor,"²⁵⁵ but the *City of Johannesburg* decision and settlement are steps in the right direction. And it is not unreasonable to expect that the City's experience with that litigation coupled with this new requirement will have broader effects both on the City's own planning process and on other municipalities facing similar situations. Indeed, according to CALS, the litigation has already "been seized as an opportunity for much needed mobilisation of Johannesburg's inner city poor" and resulted in a marked increase in requests for legal assistance in preventing forced evictions.²⁵⁶

These examples also provide a potential response to the risk identified by Tushnet that an evolution from weak-form to strong-form review of strong socioeconomic rights because of political resistance to strong remedies will

²⁵⁵ *City of Johannesburg v Rand Prop. (Pty) Ltd* 2007 SCA 25 (SCA) at para. 73 (S. Afr.).

²⁵⁶ CALS Spring 2006 Newsletter Vol. 1 at 6.

eliminate the benefits of weak-form review.²⁵⁷ On the one hand, the possibility for evolution towards more direct remedies that these cases present reflects the instability that Tushnet suggests is inherent in weak-form review. But the trend of the Court's current approach indicates that if such evolution occurs in a specific case, it will not mean that the Court will revert to strong form review in all cases dealing with socioeconomic rights. Rather, the Court has also repeatedly emphasized that the nature of the socioeconomic rights in the South African Constitution demand an incremental and highly contextual approach.

The use of targeted and specific strong remedies in second order cases where the government's initial response has been inadequate would give the Constitutional Court (and lower courts) a more direct role in the enforcement of these rights and would ensure at least limited action by the government in specific cases. This does not necessarily mean that the Court must then impose the same strong remedies in subsequent cases interpreting the same right where the government has not yet had the opportunity to respond to a weak remedy.²⁵⁸ To the contrary, rather than trapping the Court in a strong-form review mode, limiting the use of strong remedies to cases in which a weak remedy has proved ineffective in the first instance arguably will enhance the effectiveness of weak remedies in subsequent decisions. This is because the government will have a stronger incentive to take seriously its obligations to adjust the program to conform with the Court's order because failure to do so may result in the Court taking more direct control.

The flexibility to alternate between weaker and stronger remedies is one of the signature characteristics of a policentric mode of review and provides the possibility for give and take between the judiciary and the other branches of government. In the later stages of the layered process that is possible through policentric review, it is perfectly appropriate for the Court to take a stronger role in response to governmental resistance to cooperating in the process.

Under policentric review, the government retains the power to come back to the court after initially grappling with the rejection of a specific program and argue in favor of an interpretation that is different both from the government's initial stance in the first case and the court's initial interpretation and to justify that new interpretation on the basis of its experience with implementation. Where, however, the government merely ignores the court's

²⁵⁷ See Tushnet, *Marbury*, *supra* note 108, at 267 ("I have become skeptical about the claims made on behalf of weak-form systems of review, largely because such systems seem to me to degenerate into strong-form systems.").

²⁵⁸ The *Kyalami Ridge* case is an excellent example of the Court moving back towards weaker review. *Minister of Public Works v Kyalami Ridge Ass'n* (2001) (7) BCLR 652 (CC) (S. Afr.). In that case, the government planned to build new housing projects for homeless and victims of a flood on state-owned land. Neighboring homeowners sued to enjoin the project arguing that the planned project was *ultra vires* because there was no specific Parliamentary authorization. The Court rejected the residents' arguments, agreeing with the government that Section 26 and *Grootboom* imposed a duty to respond to the kind of emergency housing needs the project was intended to address. *Id.* at para. 39. Frank Michelman suggests that this is an example of "how a court may act usefully in furtherance of a constitutional social rights guarantee by the most conventional of all forms of judicial action, namely, dismissal of a case (where relief would have been forthcoming but for the guarantee)." Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 17 (2003). For that same reason, *Kyalami Ridge* demonstrates the Court's ability and willingness to move back towards the weaker end of the continuum where the government has taken the lead in enforcing these rights.

rejection of its initial policy and implements a program substantially similar to the rejected program (or no program at all), the court is then justified in intervening more directly. But as *Rudolph* and *City of Johannesburg* demonstrate, intervening directly will not always require a court to develop policies itself and instead may simply require more direct oversight of the government's own efforts to develop and implement policy combined with general guidance on the needs that those policies must address.

Perhaps more importantly, the Court's emphasis on civil society working with (and presumably at times against) government to implement these rights offers the hope that the political will necessary for meaningful enforcement will develop over time. Had the Court ordered more specific changes and retained oversight to enforce those changes in its initial cases, there are real questions whether the government would have resisted such direct involvement. The Court's emphasis on early weak remedies and its repeated calls for civil society involvement in enforcement are attempts to develop the political circumstances that might make possible meaningful change. By prodding the government slowly but consistently and setting up the possibility for more direct involvement in later cases, the Court is attempting to preserve the power of these rights as potential agents of change while stimulating the development of a political environment in which real change might actually occur.

Brand argues that the Court's current approach has all but eliminated the ability of the socioeconomic rights provisions to act as catalysts for the development of new policies rather than mere correctives to existing constitutionally insufficient policies.²⁵⁹ I think the precise opposite is true. By putting the debate over both the interpretation and the enforcement of these rights squarely in the political sphere, the Court is trying to develop a political constituency for these rights and to encourage the use of strategies other than litigation to fulfill them.

There are at least tentative signs that this in fact is happening. The LRC's advising role to government cited above is just one example. CALS has leveraged its experience litigating Section 26 cases to call for legislative and policy changes in other contexts. For example, the joint report CALS issued with COHRE on Johannesburg's redevelopment policy not only served as a basis for the *City of Johannesburg* litigation, but CALS also plans to use that same report over the longer term "to raise national and international awareness of evictions and relocations in Johannesburg and to begin lobbying government to consider alternatives to the status quo."²⁶⁰ In addition, drawing on many of the post-*Grootboom* cases described here, CALS in February 2007 submitted to Parliament critical comments on proposed amendments to the PIE.²⁶¹ All of these are examples of civil society employing the socioeconomic

²⁵⁹ Brand, *supra* note 11, at 54–55 ("The Constitutional Court's failure to pose anything other than procedural standards in its adjudication of socio-economic rights limits the effectiveness of these rights as 'policy-structuring devices.'").

²⁶⁰ CALS, <http://web.wits.ac.za/Academic/Centres/CALS/HousingAndEvictions/> (last visited Feb. 11, 2009); see also COHRE, *supra* note 217.

²⁶¹ CALS, COMMENT ON GENERAL NOTICE 1851 OF 2006: PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND AMENDMENT BILL 2006, at paras. 8–25 (2007),

rights as a lever for implementing changes not only through litigation but also by other means of civic and political engagement. There is good reason to think that changes wrought through these political mechanisms are more likely to succeed in the long run than a court order establishing the same policy would have.

VI. CONCLUSION

It is undeniably the case that for citizens who live in extreme poverty, the promise of the so-called negative civil and political rights is incomplete. Those rights are designed to protect against unwarranted government intrusion into the lives of its citizens and ensure that they have the freedom to pursue productive and fulfilling lives. Yet, for a person who cannot afford to feed, house, or care for herself, such protections mean very little. Understood in this way, the familiar typology in which socioeconomic rights are deemed “second generation”²⁶² is a reversal of reality. Rather than secondary, these rights are primary in the most basic sense that they are required to make the promise of democracy and its protection of liberty meaningful at all.

At the same time, judicial enforcement of socioeconomic rights places courts in the difficult and challenging role of intervening into complex disputes over the allocation of public resources and the development of social policy. On the one hand, involving courts too directly in such disputes threatens the democratic legitimacy of any resolution and undermines the willingness of the government to fully implement the court-crafted policies that result. On the other hand, an approach that defers to government judgments in all but the most egregious cases risks reducing these rights into nothing more than “good governance” standards.²⁶³

The Constitutional Court’s early record interpreting the socioeconomic rights provisions in the South African Constitution suggests that it has begun to chart a middle course between these extremes. By taking a restrained approach in initial challenges to particular government programs or actions, the Court is placing the burden on the government to develop policies to effectively implement these rights. The Court’s repeated calls for civil society involvement reinforces the emphasis on developing political rather than legal solutions to the social problems these rights are intended to address. Pairing this with preservation of the possibility for more direct court involvement in targeted cases creates the prospect for effective long-term solutions to develop in a process that enhances the prospects for meaningful political change.

To be sure, significant questions remain regarding the long-term effectiveness of this approach. The Court has yet to confront what Brand describes as the “difficult” case—a challenge to a comprehensive policy calling for changes that would have significant budgetary implications.²⁶⁴ And

available at <http://www.law.wits.ac.za/cals/CALSPIESUBMISSION.pdf>.

²⁶² See, e.g., Mureinik, *supra* note 13, at 464 (describing the difference between “first-generation” and “second-generation” rights).

²⁶³ See Brand, *supra* note 11, at 49.

²⁶⁴ *Id.* at 53.

it is by no means clear that the political mobilization that has begun to develop in the wake of the Court's early cases will continue to strengthen or to generate effective responses by the South African government. But there are promising indications at least that the role for judicial enforcement of these rights the Court has carved out may result over the long term in policies that fulfill their promise.

