Constituting Economic and Social Rights

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Introduction: The Path to Transformation

Food, water, health, housing, and education are fundamental to human freedom and dignity. How they are secured within our legal systems affects legal decision-making, public policy-making, and the individual's opportunities for involvement in each. Over the last century, these fundamental material interests have been increasingly cast as human or constitutional rights. The classical liberal paradigm of statist protection of the so-called "negative" rights, and market promotion of welfare, has now been overtaken by the legal protection of economic and social rights and the development of various institutional methods for their interpretation, enforcement, and measurement. Liberal markets and liberal democracies now coexist with economic and social rights.

This new formulation of economic and social rights has evolved out of disparate origins, having shaped—and been shaped by—the tenets of first-world social democracy, second-world Eastern socialism and third world developmentalism. Today, these rights are ratified in human rights treaties, entrenched in new or amended constitutions, enumerated in statute, and/or enunciated in public declarations. These rights include the rights to access food, water, housing, preventive or curative health care, social security, education, labor protections, basic services in sanitation or electricity, and to new forms of property. Sourced heavily in the constitutional changes that took place after the Second World War, economic and social rights enjoy constitutional status in countries in Africa, Asia, Europe, and Latin America, in sub-national units in North America and elsewhere, and in regional and international human rights instruments. They are recognized as explicit textual guarantees, or as implications of other constitutional rights, and are treated as enforceable entitlements or as aspirational guarantees. Against the varied background of common law and civil law traditions, federal and unitary legal systems, and developed and developing economies, economic and social rights accommodate the variety of legal forms that such institutional differences demand.

The fields of comparative law and international law illuminate this variety and difference. International law has expanded beyond the (ever-increasing)

developments within the United Nations system to incorporate transnational, local, and regional developments. Comparative constitutional law has created new opportunities for understanding how legal ideas travel and transplant, as well as the distinctive legal concepts internal to different legal systems. Each academic field reflects the growing practical interaction between judges, government officials, monitoring experts, nongovernmental organizations, and social movements.

From these interactions emerge new understandings of the legal forms that fundamental rights take. How these forms endure over the coming decade will impact on the way in which legal systems respond to the series of harms that flow from the fact of economic insecurity in a market-based liberal order: harms that are reflected in the skewing of educational possibilities, in the disparities of health, in the misallocation of goods and services, and in the imbalance of political power. Economic and social rights promise to alleviate the wrongs that a market-oriented world perpetrates on those otherwise unequipped to enjoy its gains. If that promise is delivered, economic and social rights may become part of the law's answer to the indignities and pain caused, at least in part, by law itself.

A. A PROCESS-DRIVEN, VALUE-BASED, AND INTERDEPENDENT CONCEPTION

Defining rights is notoriously difficult. Rights are typically understood as trumps, side constraints, or other anti-utilitarian devices. In the conception undergirding this book, rights are a focal point of interpretive disagreement and agreement, of agitation and contestation, and of monitoring and enforcement, of the fundamental material interests that are reasonably argued to be universal and compelling. Hence, I include both normative consideration of why rights should be treated as important, with a practical understanding of the way in which rights emerge from particular social and cultural practices. By contrast with approaches that divide normative inquiry with empirical evidence, I combine the two in the questions I ask of legal institutions. Rather than seek to ascertain a fixed content of rights for all times and places, I therefore focus on the processes that constitute substantive rights, and how these processes change public law.

This conception of legal rights combines a philosophical inquiry with the comparative study of how rights work in legal systems. It draws attention to the close interrelationship of rights in both senses. First, rights are "pronouncements in social ethics, sustainable by open public reasoning."[1]

[1] *See*, e.g., Amartya Sen, "Elements of a Theory of Human Rights," 32 *Philosophy & Public Affairs* 315 (2004).

Secondly, rights are pronouncements in law, in Bills of Rights, in human rights instruments, or in other constitutional, legislative, or common law forms. This understanding of rights, as products of both morality and of law, relies on the often observed constitutive relationship of morality into law, on the one hand, and the sometime observed constitutive relationship of law into morality, on the other.[2]

From one perspective, the theorization of economic and social rights is grounded in interests that are reasonably argued to be universal, socially significant, and open to social influence.[3] Because all people require access to food and water and housing, medical care when seriously ill, and education when young, the concept of rights allows one to understand such interests in their various cultural instantiations. Moral and political philosophy offers a way to reconstruct the development of economic and social rights—as social-ethical pronouncements—in the institutionalized field of actual constitutional practice. This reconstruction can then help to critically assess ongoing legal-political processes.

But philosophical analysis needs institutional analysis. This book appraises the varied institutional conceptions of constitutional rights, using the tools of comparative law. This variety incorporates the conceptions of constitutional rights as enforceable by a counter-majoritarian institution, such as a court, or alternatively as optimization principles for legislative and administrative decision-making, or as a reference point for interbranch dialogue.[4] What is common to these conceptions is that rights belong to a form of legal entitlement that is, for special reasons, relatively immune to the vagaries of short-term politics or cost-benefit decision-making. This immunity is relative because of background constitutional arrangements. For example, the ability of rights to trump majoritarian decision-making does not automatically equate with the ability of courts to review—and override—legislation.[5] Comparative constitutional law, especially sourced outside of the United States, demonstrates that rights-based immunity from majoritarian or utilitarian decision-making can be institutionally relative.

[2] Ibid., discussing the parent-child relationship of rights first dismissed by Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792); republished in *The Works of Jeremy Bentham*, vol. II, (J. Bowring, ed., 1843) 501.

[3] Sen, *supra* note 1; *see also* Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002); Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd edn., 1996).

[4] Prominent versions of each of these models can be found in Ronald Dworkin, *Taking Rights Seriously* (1977); Robert Alexy, *A Theory of Constitutional Rights* (trans. Julian Rivers, 2002); and Jeremy Waldron, *Law and Disagreement* (1999).

[5] *See*, e.g., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008).

This two-fold conception of rights allows for the ongoing changeability and development of norms. Such a conception, while informed by the fallibility of knowledge and the inevitability of interpretive disagreement, is also democratically defensible.[6] In a pluralist democracy, the meaning given to such rights cannot depend upon the quest for a single and determinate truth, but rather upon the collaborative efforts of an epistemic community who reach only provisional agreement. This provisionality is made clear by the framework of constituting rights, described below. It also supports the interdependence of all sets of fundamental rights.

Reported distinctions between civil, political, and economic, cultural and social rights, have created a discourse around human rights that treats the legalization of economic and social rights as uniquely challenging for our current constitutional democratic systems. In this view, economic and social rights are new to contemporary constitutionalist systems, and should not be shoehorned into current legal constructions. A countering view would celebrate what is old and unexceptional about economic and social rights. My analysis is sympathetic to the second view, and, as such, my process-driven, value-based conception of rights is relevant to all categories.

Hence, this book refutes the overarching attempt to fix categories of rights as settled and distinct. The reported differences are disturbed as soon as values are taken into account. For example, the protection of some rights is justified on the basis of preserving democracy. This argument is usually reserved for civil and political rights, such as the freedom of speech or the right to vote. However, the right to education may be equally important to an informed vote or to the broader fulfillment of the responsibilities of democracy; no less the right to the baseline material security provided by housing to a voter free from patronage, and invested in community. Such rights may therefore be grouped as civil or political rights, as opposed to current terminology.

Equally, what are currently termed civil and political rights, such as the right to speech, and to vote, and to privacy, may themselves be protective of fundamental material interests. Famines, as the argument famously goes, do not occur in democracies.[7] Conversely, atrocities like genocide may occur when traditional economic indicators of development are fulfilled.[8] A due focus on human, rather than economic, development encompasses the full suite of civil, political, economic, social, and cultural rights-based

[6] *See*, e.g., John Dewey, *Liberalism and Social Action* (2000) (1935); Martha Minow, *Making All the Difference* (1990).

[7] Amartya Sen, *Development as Freedom* (1999) 152–3.

[8] Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda* (1998).

indicators.[9] The "last resort" rights of democratic participation, as "preservative of all rights,"[10] rather than foundational to them, may be necessary to sustain interests in access to food, water, health care, housing, and education.

While economic and social rights were first treated as "subdivisions or extensions of civil and political rights," they were then accepted, in the century preceding the Universal Declaration of Human Rights, as "different in kind," and requiring "differences in implementation."[11] Neither approach should hold today. The separation of rights into categories endures due to the bifurcation of human rights into two foundational international human rights covenants,[12] a bifurcation itself premised on analytical distinctions that have been long criticized. Three characteristics of economic and social rights, in particular, have produced a distinction between them (and with them, cultural rights) and the more privileged category of civil and political rights. First, economic and social rights have been viewed as inappropriate for judicial enforcement. Secondly, they have been viewed as requiring positive action for their enjoyment, as well as significant expenditure. And thirdly, they have been treated as "secondary," in generational terms, to the civil and political rights historically protected in the *Magna Carta* and other foundational (and culturally Western) documents.

In the following chapters I reject the distinctions based on enforceability and of positive action, finding them applicable to both sets of rights, and reject the later chronology of economic and social rights, as it represents a parochial view of the development of our moral concepts. This argument endorses the "indivisibility and interdependence and interrelatedness" of the sets of rights.[13] Indeed, in conceding the central moral and existential connection between the two categories of rights, it becomes inaccurate to exclude a discussion of the civil and political protections that impact so

[9] Sen, *Development as Freedom*, *supra* note 7; *see also* Philip Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals," 27 Hum. Rts. Q. 755 (2005).

[10] *See* Frank Michelman, "Welfare Rights in a Constitutional Democracy," 3 Wash. U. L.Q. 659 (1979) 677.

[11] Jacques Maritain, *The Grounds for an International Declaration of Human Rights* (1947) reproduced in Micheline R. Ishay, *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present* (2nd edn., 2007) 5.

[12] Hence, the International Covenant on Civil and Political Rights contains no economic and social rights, which were grouped entirely in the International Covenant on Economic, Social and Cultural Rights. *See* Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," 9 Hum. Rts. Q. 156 (1987).

[13] Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights (25 June 1993), UN Doc. A/CONF.157/23 (12 July 1993). This position was restated by the United Nations General Assembly in its 2006 Resolution creating the Human Rights Council: G.A. Res. 60/251, UN GAOR, 60th Sess., UN Doc. A/RES/60/251 (2006).

significantly on fundamental material interests. Fundamental rights are interdependent, and all are critical to constitutional democracy.

B. "CONSTITUTING" RIGHTS: A THREE-PART FRAMEWORK

It is against the background of the evolving operation of economic and social rights that this book makes its central claim: that a constitutional legal framework protective of rights to food, water, health care, housing, and education is one which establishes processes of value-based, deliberative problem-solving, rather than one which sets out the minimum bundles of commodities or entitlements. It also argues that current constitutional democratic institutions—courts, the legislature, the executive, and agencies—are able to work with collectivities to provide contextualized, participatory, and localized solutions in order to "constitute" such rights.

This book also demonstrates that such deliberative processes must be carefully designed, because conditions of material inequality, severe poverty, and social conflict detract from the advantages that a "soft" process-value approach will bring. Before turning to this claim, the conceptual framework of "constituting" rights is laid out. Such a framework responds to the primary challenges facing the process of "constituting" such rights. These are the challenges of pluralism, of the lawmaking of collectivities, and of the lawmaking of counter-majoritarian courts.

To constitute rights, in the special meaning given to that term within this book, is to make them effective within a legal system. To constitute is not to constitutionalize, although the two processes are related, and assist each other. To constitutionalize commonly refers to the act of entrenching a commitment in constitutional text—the capitalized, written, Constitution: committing to text what no constitutional government can oust.[14] To constitutionalize is often to leave abstract, to maximize present-day consensus and minimize the disruption of future contingencies. The text is critical, and commands the focus of interpretation. To constitute, on the other hand, is to socially institute, so that the commitments are committed to social understanding, and are realized effectively in law. While this approach still concedes the importance of text, it offers a post-interpretive framework in which other processes are also important. Such a study requires attention to the different challenges and outcomes of interpretation, adjudication, and contestation, which are confronted in detail in each Part of this book.

[14] Of course, unwritten (or uncodified) constitutions, such as that which continues to exist in the United Kingdom, dislodge's the purity of this distinction. My own framework looks to a broader set of constituting practices than the statutes, judgments, treaties, constitutional conventions, and royal prerogatives that underlie the unwritten constitution.

(1) Rights and pluralism

Economic and social rights are interests held, and claims made, in conditions of pluralism. Modern societies are heterogeneous and legal institutions must contend with openly contested sources of meaning. In such societies, a plurality of competing idioms for articulating justice claims is inevitable. Even rights, themselves just one sub-set of many discursive and conceptual responses to maldistribution, misrecognition, and the claims of injustice, contain a plurality of meanings.

One response to such pluralism is to disavow rights as empty abstractions, and to reject claims of injustice as merely subjective interpretations or intuitive perceptions. A second response is to understand rights as the intersubjective articulations of injustice, to be assessed and interpreted against criteria of reasonableness and consensus. This approach invites, not paralysis (arguably an inevitable attitude of the first response), but engagement with law. Indeed, I argue that a framework for understanding what makes law binding within a community helps us to understand what makes economic and social rights meaningful at all.

The project of "constituting" rights, within social institutions, is one which channels alternative justice claims into a forum in which such claims can be heard by others, and can potentially be recognized by others. For economic and social rights to be "constituted" within social institutions, I suggest that they are grounded on the layered sands of what is right according to reason, what is right according to decision-making authority, and what is right according to experienced social fact. These conceptual foundations provide the support for economic and social rights, as a meaningful challenge to existing (formal or informal) maldistribution. Nonetheless, the three aspects of rights cannot be argued for simultaneously: reason, authority, and social fact may be considered mutually exclusive, or at least mutually disruptive, conceptual standpoints.[15] Instead, participants often shift from one to the other in articulating rights claims.[16]

First, what is right according to reason links the project of constituting economic and social rights with a philosophy of justice. Indeed, it provides such argument with a readily testable institutional form.[17] The guarantee of access to food, health care, housing, water, social security, and

[15] *See*, e.g., the approach of Jeremy Waldron, "Socioeconomic Rights and Theories of Justice," NYU School of Law, Public Law and Legal Theory Research Paper No. 10–79 (2010), arguing that the former may not be relevant to the latter.

[16] I adapt this approach from the treatment of constitutional "bindingness" in Frank I. Michelman, "Constitutional Authorship," in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (2001) 64.

[17] For a suggestion that liberal egalitarianism's institutional commitments "have not kept pace with its theoretical commitments," *see* Will Kymlicka, *Contemporary Political Philosophy* (2nd edn., 2001) 91.

education—whether demarcated as the nonidealized versions of "primary goods" or "private resources" or "fair shares"[18]—is fundamentally important to a range of values that are adduced to justify the ordering of society in terms of the ordering of justice, such as human dignity, equality, and freedom. And because economic and social rights are often instituted in qualified terms—as subject to "available resources" and as limited by "what is reasonable in an open and democratic society"[19]—questions of distributive justice are crucial. What counts as "reasonable" is sensitive to what counts as just.[20]

The first part of this book establishes a framework of reason and economic and social rights. It claims that processes of interpretation, and the adoption of philosophical standpoints of rationalism and consensualism, play the major role in providing meaning and determinacy to fundamental material interests. Rationalism incorporates standpoints that rely on the importance of human dignity, or of the satisfaction of basic material needs, and yet may point in different directions to the ultimate nature and scope of economic and social rights. Nonetheless, the provided answers may overlap with each other, as the epistemic communities of interpreters of economic and social rights do. These interpreters, whether national or international, state-based or non-state, contribute to the legal decision-making important for constituting rights. Part I also describes the institutional pressures of minimalist interpretations, or of invoking the limits of rights as against collective, budgetary, or other utilitarian considerations, and the critical role that the demands of minimalism or limitations, play on economic and social rights.

The existence of reasonable disagreement, and the need for its democratic expression, ensures that what is right according to reason is only a partial answer to the inevitable question of defining the constituted content of economic and social rights. For economic and social rights to be meaningfully operational within our legal systems, the philosophical

[18] The modern prompt for a version of justice alternate to utilitarianism is John Rawls, *A Theory of Justice* (1971) (presenting primary goods as "things which a rational [person] wants whatever else he [or she] wants", at 92), to which we might add, amongst others, the egalitarian quests of Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000) (presenting a scheme for the distribution of privately owned resources); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983) (placing emphasis on a communitarian understanding of "fair shares"); Amartya Sen, *The Idea of Justice* (2009) (highlighting the central importance of a person's "capability" to achieve reasonable life goals within a background of nonideal theory).

[19] E.g., South African Constitution ["S. Afr. Const."], 1996 §§ 26(2), 27(2), 36. *See also* International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3, arts. 2(1), 4.

[20] *See*, e.g., Jeremy Waldron, "Socioeconomic Rights and Theories of Justice," *Supra* note 15.

questions of distributive justice must be supplemented by others. This takes us to the next two investigations: of legal authority and social fact.

What is right according to decision-making authority links the project of constituting economic and social rights to the second question of positive law. Traditionally, this has led to a double exclusion. First, lawmakers have been reluctant to institute rights for the poor—the coincidence of lawmaking power with economic power, and the self-interestedness of legislators in furthering that connection, was as obvious to Adam Smith as it was to Karl Marx.[21] The achievements of the modern welfare state have in part corrected this, achievements which were themselves instituted—via landmark statutes as well as constitutional provisions—due to the pressures of class coalitions, mobilizations, and, arguably, the functional requirements of capitalism itself.[22] The second exclusion relates to judges, not legislators: the exclusion of justiciability. For those who align "law" with judicial enforcement, economic and social rights have appeared as "off-the-wall" as the ability of the poor to have their claims against poverty directly actionable in, and remediable by, a court.[23] In positivist legal scholarship, the examination of economic and social rights has therefore been limited in reach. This is doubly the case for US constitutional scholarship, where the US Constitution (despite prominent theories to the contrary[24]) has largely been interpreted as omitting economic and social rights from its rights-protective scope.

Thirdly, what is right according to social fact links the project of constituting economic and social rights with actually existing social understanding. A study of how economic and social rights are constituted in social fact asks not what the law states, but what the people who are governed by the law actually believe to be accepted as law. A study of the empirical, social effect of rights therefore involves an examination of how distributive norms act within social institutions—of the family or the household, of the village or the city, of the

[21] Adam Smith, *The Wealth of Nations*, vol. II (1961) 236, noting "civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all"; *cf.* Karl Marx, *Capital: A Critique of Political Economy (Volume 1)* (1976).

[22] Of course, this is where Smith and Marx part their temporary company. While the analysis of welfare state emergence is not the focus of this book, parallels between the strong claims of causality in political economy literature (for example, those put forward by Gøsta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (1998)) and my own examination of institutional alignment of certain contributory processes in constituting rights, will become evident.

[23] William E. Forbath, "Constitutional Welfare Rights: A History, Critique and Reconstruction," 69 Fordham L. Rev. 1821 (2001) 1824 (suggesting the heterodoxy of welfare rights within US constitutional scholarship).

[24] *See,* e.g., Frank I. Michelman, "Foreword: On Protecting the Poor through the Fourteenth Amendment," 83 Harv. L. Rev. 7 (1969).

church, of the hospital, of the school, and of the marketplace. These norms act in parallel with formal law, with which they are sometimes in support, but sometimes in conflict.[25] The disjuncture between law and social fact may be greater in Third World developmentalist societies than in First World democracies. The greater strength of informal distributive norms over any formal legal recognition of economic and social rights in developmentalist systems is due not only to the commonly observed paucity of state resources, but to the fact that pre-colonial custom may attract more adherence than postcolonial "law." A fidelity to more than one understanding of normative obligation—often referred to as "legal pluralism"—is therefore greater in postcolonial states, and is now exacerbated by globalization.[26]

Clearly, this multiplicity of foundations—of reason, authority, and social fact—creates complexity and uncertainty for economic and social rights, as for all human rights; all the more so when one cannot choose one or the other foundation, but, I argue, must recognize the importance of all three. Moreover, all three have contained obstacles—or, at least, intellectual brakes—on constituting economic and social rights. In the domain of professional philosophy, some theorists identified recognition, rather than redistribution, as the more pertinent response to material deprivation.[27] Rights were understood to be unsuitable responses to economic and social concerns.[28] This critique joined with the long-standing philosophical rejection of "rights," first on the basis of their individuating and alienating qualities, second on the basis of their opposition to utility, and third for their parochial (namely Western) features.[29] In the domain of legal positivism, the court-sanctioned interpretations of influential constitutions—in particular, of the US Constitution—omitted economic and social rights as mandatory norms for legislative or (particularly) judicial decision-makers to follow.[30] And in empirical fact, liberal, and later, neoliberal economic theory—prescribing

[25] The new institutional economics seek to analyze the "rules of the game" through "informal" norms as well as laws: *see,* e.g., Douglass C. North, *Institutions, Institutional Change and Economic Performance* (1990); *see also* Robert C. Ellickson, *Order Without Law: How Neighbours Settle Disputes* (1991). For a recentering of attention to law's effects *see* Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing Etc.* (1993) 83 (foregrounding the work of Robert Hale).

[26] For a description of legal pluralism's origins in colonialism, and resurgence in present-day globalization, *see* Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001).

[27] Nancy Fraser and Axel Honneth, *Recognition or Redistribution? A Political-Philosophical Exchange* (2003).

[28] Maurice Cranston, "Are There Any Human Rights?," 112 *Daedalus* 12 (1983); Charles Fried, *Modern Liberty and the Limits of Government* (2006) (presenting the argument of classical liberalism).

[29] For a discussion of the long-standing critiques of natural rights, from Marx to Bentham to Burke, *see*, e.g., Sen, "Elements of a Theory of Human Rights," *supra* note 1.

[30] *See DeShaney v. Winnebago Cty. Dept. of Soc. Serv.*, 489 U.S. 189 (1989); *Maher v. Roe*, 432 U.S. 464 (1972); *Harris v. McRae*, 448 U.S. 297 (1980); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

freedom, efficiency, and growth in order to maximize welfare, and welfare in order to order society—have long dominated the world's most influential and powerful policy-making institutions, and have marginalized the understanding that a baseline of fundamental material interests belong to all, and that the law has a role to play in securing and in enforcing that baseline.

Today, however, all three domains of inquiry have much to offer. For example, a philosophical approach that aligns a "consequentialist system" with "goal rights"—emphasizing the human capability to live a life one has reason to value—allows economic and social rights to be instituted with "versatility and reach," dovetailing with programs for economic development.[31] At the same time, the challenge of examining the legal operation of economic and social rights is met by extending the study of constitutional systems outwards to comparative practice,[32] where economic and social rights are sometimes explicitly entrenched, and often creatively enforced. Positivist legal examination is also assisted by the concept of "constitutive commitments," which reserves a place for economic and social rights in long-standing social beliefs, even in the United States.[33] Third, the dominance of neoliberal economic theory, reaching its peak in the 1990s, was chastened by a greater awareness of market failure and of alternative approaches to development understood by mainstream economists and policy makers. In 2005, the Washington-based institutions of the International Monetary Fund, the World Bank, and the US Treasury Department, formerly associated with the market liberalization policies of the "Washington consensus," began to call for "more humility in their approaches, implying more openness on the range of solutions possible, more empathy with the country's perspectives, and more inquisitiveness in assessing the costs and benefits of different possible solutions."[34] Nonetheless, the global financial crisis of 2008 has triggered opposing responses. On the one hand, early prescriptions were focused on measures to stimulate the

[31] Sen, *Development as Freedom*, *supra* note 7, 212. Sen's contribution adds to the important work of Rawls and Dworkin in answering the question of "equality of what" in distributive justice debates: *see* discussion *supra* note 18.

[32] *See* Constitutions cited at *infra* notes 50–54 (those of India, Ghana, Germany, Colombia, and Canada, as well as human rights statutes in the United Kingdom, Australia and New Zealand). *See*, e.g., the focus on Brazil, Colombia, India, and South Africa, in Roberto Gargarella, Pilar Domingo, and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006).

[33] Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (2004) 62 (noting rights which have "a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in social understanding . . . A violation would amount to a kind of breach—a violation of a trust"). Sunstein includes certain economic and social rights within this category.

[34] World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (2005) 26; *see further* David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006).

economy and manage demand by welfare and other public support, following the basic precepts of Keynesian economics. Yet a second response, which has called for austerity and public disinvestment in areas such as health care and education, and has been backed up by negative attitudes towards sovereign debt, hails a return to neoclassical liberal economics.[35] Social protest against austerity measures has in turn intensified the contestations around economic and social rights.

By connecting these approaches, this book also raises to prominence what serial, separate inspections of reason, legal authority and social fact may downplay. This is the role of the "agent" in constituting economic and social rights. For this reason, our attention turns to the participatory processes that slowly, intermittingly and unpredictably influence all three.

(2) Rights and adjudication

The phenomenon of the adjudication of economic and social rights is contemporaneous with—and hence similarly youthful to—their express recognition in law. Before the rights entrenchments of the postwar paradigm, the conception of courts as the final arbiters in urgent matters of political or social conflict had been largely restricted to the United States. In that jurisdiction, rights without adjudication and enforcement were no rights at all; a position wholly foreign to the aspirational documents of many other constitutional systems. Yet the developments of the past fifty years have led to an increasing trend towards the judicial enforcement of rights. Consequently, there has been a resulting increase in judicial power, relative to other governmental branches, in matters of public policy affected by rights. This increase has been much criticized, a criticism which has itself been an enduring strand in the reluctance to legalize economic and social rights.

The protections afforded by economic and social rights are now implemented through adjudication and judicial enforcement, in an increasing number of national and international jurisdictions throughout the world. Yet the central questions of legitimacy, and of effectiveness, remain. Part II of this book evaluates the well-studied forms and limits of adjudication against the particular qualities of economic and social rights. In these chapters, I take the traditional debate about judicial review—the hallmark of which is the "counter-majoritarian difficulty" of the judicial branch—and resituate it as a debate concerning the "rights protecting" difficulty of all

[35] *See* "Special Issue: Austerity: Making the Same Mistakes Again—Or Is *This Time* Different?" 31 Camb. J. Econ. 1 (2012); *see also* World Bank, *The World Bank Group's Response to the Global Crisis: Update on an Ongoing IEG Evaluation (Evaluation Brief 8)*, Independent Evaluation Group (2009).

three branches of the judiciary, executive and legislature.[36] In keeping with this approach, I ask how state institutions, including courts, work together (rather than how they achieve their goals in separation), and what uses they make of each other which impact upon economic and social rights. A first step is therefore to abandon the two poles of judicial review—of the judicial power to overturn statutes *or* the legislature's power to render any statute legal—and create a more variegated analysis of the forms that judicial review may take.

In seeking to resolve the role of courts in protecting economic and social rights—the perennial challenge of justiciability mentioned above—one can (somewhat counterintuitively) decenter the judicial branch. The ways in which courts engage in judicial review—the scrutiny they apply, and the remedies they propose—can incorporate a variety of judicial responses to human and constitutional rights. Thus, economic and social rights are meaningful even when they are judicially unenforceable. They can exert pressure as "directive principles of state policy," they can guide statutory interpretation (by judges or other officials), executive policy-making, or other legal actions and actors.[37] Other institutions, such as legislatures, agencies, and independent commissions, also become important. Decentering courts also opens the scene of action to private and/or informal actors, such as the market actors, nongovernmental organizations, and social movements that contest economic and social rights.

(3) Rights and contestation

Economic and social rights challenge the assumption that rights are demanded, as they are held: individually. The practice of economic and social rights indicates that they are demanded through collective action, through social movements and nongovernmental organizations acting to mobilize around, and implement, rights. Market actors, who may be contracted to deliver services, or who may be incorporated to sell goods, also participate. What these collectivities demand is itself subject to a reflective interpretation by multiple actors.

If collectivities are currently shaping the terms of economic and social rights, they must contend with the challenge of democratic self-government. That is, those who abide by law may also be understood to be its authors. How can organizations, movements, and associations be the real-time "creators" of economic and social rights, when they are also the

[36] For similarity of approach (but with different conclusions), *see* Jeremy Waldron, "The Core of the Case against Judicial Review," 115 Yale L.J. 1346 (2006).

[37] *See,* e.g., Mark Tushnet, *Weak Courts, Strong Rights, supra* note 5; *see also infra*, notes 48–50.

subjects of law? Part III of this book explores the way in which, through the protection afforded by civil and political rights, these collectives are important sources of meaning for economic and social rights. Those who claim economic and social rights can be understood as the "weak publics," the vehicles of public opinion.[38] But while they may have "fluid temporal, social and substantive boundaries," existing, as social movements or stakeholders, quite apart from formal lawmakers, their emphasis on goods—health care, housing, water, food, education, social security—requires them to exist in productive engagement with formal institutions.

If these collectivities shape economic and social rights, they often do so at a disadvantage. As those who map political struggles are quick to point out, there are "social and economic determinants" in the field of political power, even in democracies.[39] People who claim access to fundamental material interests often lack economic resources—the very lack of which impedes the exercise, or the influencing of the exercise, of political power. Political power requires, amongst other things, financial and institutional support, professional knowledge, social capital, and leisure time. As well as these exclusions, the poor are often unable to gain a perspective on the causes of the everyday indignities that they may face—of leaking ceilings, shabby waiting rooms, polluted water, poor sanitation, and, as we will see, un-stocked health clinics.[40] This lack of information results in a skewing of the perspective that will "shape their grievances, establish . . . the measures of their demands, and point to the targets of their anger."[41]

Here, the vehicle of "rights" provides a partial corrective.[42] Inhabiting the space between ethical and legal argument, rights provide a legitimate language of claim-making. While this language may condemn some movements to silence, it will also mobilize others.[43] Their demands are forced to take on terms that identify what is "universal" about their interests, which

[38] Jürgen Habermas, *Between Facts and Norms* (trans. William Rehg, 1996) 307.

[39] From sociology: Pierre Bourdieu, *Language and Symbolic Power* (trans. Gino Raymond and Matthew Adamson, John B Thompson, ed., 1991) 171 (suggesting that "any analysis of the political struggle must be based on the social and economic determinants of the division of political labour"); from political economy, *see* text accompanying note 21.

[40] *See* the case study of *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC), discussed in Chapter 9.

[41] Frances Fox Piven and Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (1979) 21.

[42] The emphasis is partial: Lucie White, "Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs G," 38 Buffalo L. Rev. 1 (1990).

[43] Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies," 17 J. of L. & Soc. 309 (1990).

help to broaden their collective appeal,[44] and identify a common target of protest in the state. This distinguishes the rights discourse from demands to satisfy "basic needs" or "development goals," through charity, benevolence, or self-interest.[45] Instead, economic and social rights movements reject any passive or supplicant plea for redress: they demand, within their own vocabulary, action by or against the state. The discourse of rights also creates a pressure on collectivities to constrain their own repressive and exclusionary tendencies. This pressure is, of course, an influence rather than a safeguard. Yet the rights discourse calls for collectivities to respect the values that they demand be respected—dignity, for example, or participation.

On the other side, other collectivities contest economic and social rights, outside of social movements and nongovernmental organizations. Other stakeholders, such as the corporations of business and industry, may have much to gain, and much to lose, from particular instantiations of economic and social rights. Their role is also critical. Often, pressure to quantify access to minimum goods and services, such as food, water, housing, health care, and education, leads to a commodification of fundamental interests—a commodification that has conventionally been understood as a main obstacle to the enjoyment of economic and social rights. Part III of this book explores the background legal frames that disturb this assumption.

C. EXPLORING FUNDAMENTAL RIGHTS THROUGH INSTITUTIONS

The three dimensions of constituting rights—of the triple challenge of pluralism in reason, authority, and social fact; of the role of adjudication; and of the collective location of authorship—establish the central framework for this book. The result is a conceptual apparatus that relies on both constitutional theory and on international and comparative law and practice. The book takes as its backdrop one country's constitutional

[44] *See*, e.g., Jennifer Gordon, *Suburban Sweatshops: The Fight For Immigrant Rights* (2005) 162–6 (documenting the quality of rights to "unite" people more effectively than faith traditions or class solidarity). This is not to suggest, however, that all economic and social rights can build the same political power: movements organized around the right to health will have substantively different options from movements organized around the right to housing: *see* Chapters 8 and 9.

[45] Jeremy Waldron, "Rights and Needs: The Myth of Disjunction," in Austin Sarat and Thomas R. Kearns (eds.), *Legal Rights* (1996) 87. *See* United Nations Millennium Declaration, G.A. Res. 55/2, UN GAOR, 55th Sess., UN Doc A/RES/55/2 (2000); *see also* UN Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited April 2012) ["MDGs"] (claiming that the eight MDGs—which include the halving of extreme poverty, the halting of the spread of HIV/AIDS, and the provision of universal primary education by 2015—"form a blueprint agreed to by all the world's countries and all the world's leading development institutions"). *See also* Alston, "Ships Passing in the Night," *supra* note 9.

system—South Africa—asking questions of it with a view to providing answers germane to economic and social rights elsewhere. This question links the oldest forms of comparative inquiry, from the ancient Greek historian Herodotus, to Montesquieu, to the present legal–professional settings of constitutional and quasi-constitutional treaty drafting and interpretation.

Drawing general lessons from the particular experience of South Africa relies on the growing maturity of the field of comparative constitutional law. The field's recent resurgence was triggered by the political transitions in Central and Eastern Europe in 1989 as well as in South Africa. These transitions also accompanied economic transformations—viz. the end of the central planning and internal economic integration of the Second World, and of the nonaligned economic independence of the postcolonial Third World.[46] The ensuing pace of globalization brought countless effects. Most pertinently for our purpose is the way in which these events opened up the study of constitutions and constitution-making, just as they displaced the longstanding geopolitical and ideological opposition to economic and social rights.[47]

In examining the transformation of economic and social rights, each chapter draws data from multiple legal settings. We canvass alternative conceptions of economic and social rights—from constitutional law to international human rights law, from the statements of local social movements and transnational social movements, to the statements of courts, and from each to the statements of philosophers. This is not "theory-building through comparison," as one comparative empiricist has praised.[48] Instead, we contend with the recognition that the building blocks of the theory are irreducibly normative, and that a variety of sources must be used to test a set of claims that connect the concerns of distributive justice with empirical reality.

The South African Constitution of 1996, and its pioneering experience with economic and social rights, provides this book's central window on constitutionalism, to which the US Constitution often serves as foil. Other rights-protective constitutions are also included. These comparisons demonstrate that the constitutional recognition of economic and social rights is supported by a variety of institutional models. Therefore, the postcolonial Constitutions of India and Ghana, and in particular their recognition of directive principles of state policy, are included as a critical, if incomplete, answer to the challenge of adjudication.[49] So, too, is the postwar Basic Law

[46] Jeffrey D. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (2005) 46–7.

[47] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) 24–6.

[48] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," 53 Am. J. of Comp. L. 125 (2005).

[49] India Constitution arts. 38, 39, 41–48a; Constitution of the Republic of Ghana, arts. 34–41; for excerpts of these and the constitutions cited *infra*, notes 50–51, *see* Appendix I. *See also* Bunreacht Na hÉireann [Ireland Constitution, 1937] art. 45.

of Germany, and its constitutional "social state" principle and guaranteed existential minimum.[50] The same principle of the social state informs the post-conflict Constitution of Colombia, which guarantees the rule of law based on a social state, as well as a subjective *tutela* action for its enumerated economic and social rights.[51] The innovations of the Colombian Constitutional Court are therefore tested and explored. The passage of the Human Rights Act 1998 in the United Kingdom, a quasi-constitutional instrument which incorporates the European Convention on Human Rights,[52] is also subject to analysis. The Canadian Constitution's notwithstanding mechanism and limitation clause,[53] inserted into the repatriated Charter of Rights of 1992, are also examined as an important source of structural innovation within constitutional text. These comparative jurisdictions complement the book's primary focus on South African constitutionalism.

All of these sources help to inform a set of questions about rights interpretation, adjudication, enforcement, and contestation. These sundry jurisdictions appear in the following chapters, not as comparative legal families, grouped on the basis of their youth or their genealogy, but all of them as broadly constitutionalist systems, with value-based commitments to democracy and the rule of government by law, and with significant institutional commitments to the protection of fundamental material interests. For those taking an originalist view of constitutions, the closeness between the generations of "founders" and the current interpreters of these relatively young constitutions is an important point of difference from older constitutions, challenging the relevance of the operational insights of the new constitutions and new democracies from the more established constitutional systems. Yet for those that view all constitutions as capable of evolution and change, in part independent from the views of the founding framers, such a comparison is timely. The constituted operation of economic and social rights are relevant for new constitutions and old; for countries with "developing" as well as "developed" economies; for countries overcoming colonial control, and for those overcoming their own imperialism.[54]

[50] Grundgesetz für die Bundesrepublik Deutschland (German Basic Law), arts. 1(1), 20(1).

[51] Constitution of Colombia 1991.

[52] Human Rights Act 1998 (UK) (coming into full force 2 October 2000). For other statutory examples, *see*, e.g., Human Rights Act 1993 (NZ), Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (Australia); Charter of Human Rights and Responsibilities Act 2006 (Vic) and Human Rights Act 2004 (ACT).

[53] Canadian Charter of Rights and Fundamental Freedoms, s. 1, 33.

[54] The approaches of some studies, which compare only "new" constitutions of developing countries, or the constitutions of the Commonwealth (restricting that, again, to those of the developed countries), are not utilized here.

Lastly, the "international bill of rights," and the United Nations committees and tribunals that now accompany these and other international human rights instruments, are important components to the study of economic and social rights. After the Second World War, certain tenets of the ideology of social democracy were entrenched in the United Nations constitutive instruments. The Universal Declaration of Human Rights proclaims that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control," as well as "the right to education," "the right to social security," and "the right to work."[55]

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") updates and extends the Universal Declaration, and commits the rights to treaty form.[56] The Committee on Economic, Social and Cultural Rights—the supervisory body responsible for clarifying the terms and implementation of the ICESCR—has issued important statements about economic and social rights since 1986.[57] Recently, the Committee on Economic, Social and Cultural Rights was granted the authority to receive and consider, subject to receiving ten ratifications, "communications" by individuals claiming a violation of economic and social rights, or by states claiming another State Party is not fulfilling an obligation.[58] These international legal developments are a reference point for judges in interpreting national constitutions, as well as for social movements in making rights-based arguments and endeavoring to attract wider support for those arguments. This book therefore complicates a comparative analysis that would treat national legal systems and international legal systems as separate

[55] Universal Declaration of Human Rights, G.A. Res. 217A, UN GAOR, 3d Sess., 1st plen. mtg., art. 25, UN Doc. A/810 (10 December 1948). *See further* Appendix II; Katharine G. Young, "Freedom, Want and Economic and Social Rights: Frame and Law," 24 Maryland J. Int'l. L. 182 (2009).

[56] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3; *see further* Appendix II. *See also* Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), 3 September 1981, Pt. III; Convention on the Rights of the Child, 20 November 1989, U.N.T.S. 1577.

[57] The Committee, a group of independent experts operating under the mandate of the UN Economic and Social Council, was established in 1986, a decade after the International Covenant on Economic, Social and Cultural Rights entered into force.

[58] Optional Protocol to the International Covenant of Economic, Social and Cultural Rights, G.A. Res. 63/117, UN Doc. A/RES/63/117 (10 December 2008). The Protocol will enter into force after its tenth ratification. *See further* Appendix II. It currently enjoys the support of eight State Parties, including Argentina, Bolivia, Bosnia and Herzogovina, Ecuador, El Salvador, Mongolia, Slovakia, and Spain, and 40 overall signatories (as at June 2012): <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en>.

entities and domains of analysis. Nonetheless, the institutions underlying the frame of transformative constitutionalism, and of globalism, are introduced in the following two sections.

(1) Transformative constitutionalism

South Africa's Constitution provides a rich empirical backdrop for the examination of economic and social rights. Since the entrenchment of economic and social rights in the postapartheid Constitution of 1996 (and the earlier interim Constitution of 1994), South Africa has served as a vanguard of learning about the potentials and challenges of justiciable economic and social rights.[59] This act of entrenchment, which was made after extensive consultation within South Africa, and informed by international and comparative models, accompanied the replacement of a system of racialized and minority-empowered parliamentary sovereignty with parliamentary government and a justiciable Bill of Rights. Thus, the rights to access food, health care, housing, water, social security, and education[60] are entrenched alongside the right to property,[61] and the traditional civil and political rights of voting, association, and expression.[62] All rights are mediated by a limitations clause.[63] The Constitution's ambitions are grand—it pledges to transform South Africa from its apartheid past in a singular direction of democracy and rights.[64]

The constitutional settlement in South Africa was supportive of constitutionalism over other models of limited government, such as consocialism and developmentalism.[65] The favored mode of constitutionalism was one expressly supportive of economic and social rights. The African National Congress ("ANC"), while a resistance movement, had long pledged a Freedom Charter containing various human rights commitments, including

[59] *See,* e.g., David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); Jeanne M. Woods, "Justiciable Social Rights as a Critique of the Liberal Paradigm," 38 Tex. Int'l. L.J. 763 (2003) 766–7.

[60] S. Afr. Const. 1996 § 7(2), §§ 26 (housing), 27 (health care, food, water, and social security), 29 (education). *See also* § 28 (1)(c) (setting out the rights of children to basic nutrition, shelter, basic health care services, and social services, without qualification by a standard of progressive realization); *see further,* Appendix I.

[61] S. Afr. Const. 1996 § 25.

[62] S. Afr. Const. 1996 §§ 16 (freedom of expression), 17–18 (assembly and association), 19 (campaign and vote).

[63] S. Afr. Const. 1996 § 36 (limitation of rights).

[64] For analysis of South Africa's transformative ambitions, *see* Karl E. Klare, "Legal Culture and Transformative Constitutionalism," 14 S. Afr. J. Hum. Rts. 146 (1998). *See generally* Henk Botha, André van der Walt, and Johan van der Walt (eds.), *Rights and Democracy in a Transformative Constitution* (2003).

[65] Siri Gloppen, *South Africa: The Battle over the Constitution* (1997).

rights in labor, education, food, medical care, and housing.[66] The vision entrenched in the African Charter on Human and Peoples' Rights, consistent with that of many independence movements around the world, had charted a postcolonial economic development with concrete targets for labor, health, and education.[67] In this respect, the formal legal expression of economic and social rights was viewed as an important part of the policy aspirations of good government in Africa, if not the enforceable law of courts.[68] With the end of the Cold War, these aspirations became less politically polarizing than they once had been. Indeed, without the superpower tension of the Cold War, the express anti-communism of the apartheid government became ineffective as a means to win geopolitical support, thus diminishing the power of the white-ruled National Party and changing the dynamics of the internal and external anti-apartheid struggles.

Moreover, the ANC, as the newly elected South African government in 1994, was committed to redressing the legacies of apartheid—redress that demanded more than truth and reconciliation, but also a correction of the maldistributions created by almost half a century of racist property and labor restrictions. For local commentators, economic and social rights were regarded as neither luxuries nor sources of tyranny.[69] Despite the express caution that such rights would distract and disempower in South Africa's new democracy,[70] the majority of the participants in constitution-making saw them as anchors for the postapartheid commitments of transformation in the economic realm.

Yet even with these impressive credentials, the analysis of economic and social rights in South Africa is immensely difficult. For example, although its Constitution contains some of the most far-reaching constitutional provisions with respect to economic and social rights, South Africa has not yet

[66] The Freedom Charter of 26 June 1955 recognized voting and associational and speech rights, as well as rights in labor, education, food, medical care, and housing: reprinted in 21 Columbia Human Rights Law Review 249 (1989). The Freedom Charter was preceded by a 1943 Bill of Rights in the Africans' Claims in South Africa.

[67] African Charter on Human and Peoples' Rights, arts. 15–17, OAU Doc. CAB/LEG/67/3/rev. 5 (27 June 1981), reprinted in 21 International Legal Materials 58 (1981) (entered into force 21 October 1986).

[68] The distinction between the two did not present the difficulties that have absorbed US constitutionalism: *see* Sunstein, *The Second Bill of Rights*, *supra* note 33 (contrasting a US, "pragmatic," focus on a judicially enforceable constitution with an "expressive," aspirational constitutionalism, widespread in Europe and elsewhere).

[69] Etienne Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution," 8 S. Afr. J. Hum. Rts. 464 (1992); Nicholas Haysom, "Constitutionalism, Majoritarianism, and Socio-Economic Rights," 8 S. Afr. J. Hum. Rts. 451 (1992).

[70] Dennis Davis, "The Case Against Inclusion of Socio-Economic Rights in a Bill of Rights Except as Directive Principles," 8 S. Afr. J. Hum. Rts. 475 (1992).

ratified the ICESCR.[71] The Constitution's famously "transformative" ambitions have sat uneasily against well-publicized reversals in health care, housing, and education policy programs. The ANC's early Reconstruction and Development Programme ("RDP"),[72] which was intended to restructure the economy, and to address the basic needs of the 40 percent of the population (17 million persons) living in absolute poverty, lasted only two years. It had been adopted, by the government led by Nelson Mandela, to directly address the inequalities that were the result of apartheid, by measures such as land reform, wealth redistribution, the promotion of education, and intensive public works programs. After internal and external pressure, RDP was replaced in 1996 by Growth, Employment and Redistribution ("GEAR"), which aimed for sustained growth rather than the redress of injustice, and which adopted the neoliberal economic blueprints of privatization, liberalization, and competition in order to reach its growth targets.

Indeed, two narratives of postapartheid South Africa serve as bookends. In the first narrative, there is a happy story of progress and miracle. This story focuses on the popular conquest of apartheid through remarkably nonviolent means, the entrenchment of economic and social rights in order to guide future distributions in fair terms, and the channeling of seething upsets, frustrations, and violence into the principled forums of the courts. From the successful sequence of the certification of the Constitution by the Constitutional Court,[73] to the first attitude of praise delivered by President Nelson Mandela to a Constitutional Court ruling that was significantly contrary to the executive's interests;[74] from the overthrow of the death penalty,[75] to the prominent court orders to transform rights-infringing housing and health policies,[76] and to the striking down of laws discriminatory to sexual orientation,[77] the constitutionalist aspirations of South Africa's Constitution have met the experienced lives of South Africans with stirring completeness.

[71] As of June 2012.

[72] The African National Congress (ANC), Congress of South African Trade Unions (COSATU), and South African Communist Party (SACP), together released the RDP before the 1994 elections.

[73] *In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC).

[74] *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* 1995 (4) SA 877 (CC) (finding unconstitutional delegation of legislative power to executive).

[75] *S. v. Makwanyane* 1995 (3) SA 391 (CC) (the overturning of the death penalty was the first case heard by the Constitutional Court and the second decided).

[76] *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (finding housing policy unconstitutional); *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (finding health care policy unconstitutional).

[77] *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SALR 6 (CC) (overturning various laws criminalizing sodomy); *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (recognizing same-sex marriage).

In the second story, the miracle is a mirage. The entrenchment of economic and social rights has legitimated the entrenchment of apartheid's property gains, surrendering the new majority's power beyond the cosmetic tinkering of present arrangements.[78] Political (mostly white) elites have masterminded a preservation of power through the courts.[79] Alternatively, power resides in a single party, the ANC, itself immune to the levers of democracy by commanding near universal support. The opening of South Africa onto the international stage has ushered in, not a new culture of universal human rights, but the rigors and blasts of global economic competition.[80] Privatization and deregulation have left the management of economic life to the family, the market, and street crime, where they have long rested. And while delegates argued over the terms of the new Constitution, HIV/AIDS was sweeping, unobstructed, through the most vulnerable communities of South Africa. When finally noticed, the pandemic was met by a policy of denial. In this story, it is injustice, not constitutionalism, that pervades the South African experience.

The truth lies somewhere in both narratives, and in the space between them. Postapartheid South Africa no doubt teeters under the pressure of great expectations and the hardships of its first technical recession since 1992, which it entered in May 2009. The fittingness of each narrative suggests that South Africa may continue to bring to mind "the world in microcosm,"[81] living out the coordinates of global inequality, racism, poverty, and despair as one country. It is a suggestion that makes this comparative study vital, but no less complex.

(2) *Transformative globalism*

Economic and social rights become legally binding within the boundaries of particular political and legal communities, whether internal or as between states. Yet as globalization proceeds, the nation state frame is tested. The key domestic legal and political actors—courts, executives, legislatures—engage so regularly with their foreign counterparts that institutional borrowing, doctrinal migration, and legal convergence become unexceptional.[82] Some

[78] Makau W. Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse," 10 Harv. Hum. Rts. J. 63 (1997) 68–9.

[79] Ran Hirschl, *Towards Juristocracy* (2004) 89–95 (pointing to the rapid transformation of support, from traditional parliamentary supremacy to judicial review, that was effected within South Africa's National Party, as proof of the "hegemonic preservation" that is occurring in the "new constitutionalism").

[80] Allister Sparks, *Beyond the Miracle: Inside the New South Africa* (2003) 170–201.

[81] The microcosm metaphor is suggested by Sparks, ibid., x–xii.

[82] E.g., Anne-Marie Slaughter, *A New World Order* (2004).

constitutions, such as South Africa's, explicitly require interpretation to take place with the consideration of international law, and permit the consideration of comparative law.[83] For others, courts and tribunals develop informal and irregular practices of using international and comparative law to guide the task of interpretation. Those constitutions adopted after the Second World War, whose text is informed by the international bill of rights; or those whose text itself informed those instruments, have various genealogical justifications for this practice.[84] Those constitutions that operate within a regional human rights system have additional pressures to interpret rights compatibly. This is especially the case within Europe, but also in the Americas and Africa.[85] These developments are not restricted to formal national institutions. Those claiming constitutional rights are themselves guided by international and comparative interpretations and practice.

At the same time as the rights provisions of constitutions appear more textually similar, or at least in some kind of dialogue, the question of the obligations of governments beyond their citizens becomes relevant. Globalism forces constitutional law to address the relationship of the government to individuals outside of the formal citizenry. The corpus of international human rights law has already outlined what obligations a state may have to those individuals whose rights are infringed by their government (or by corporations hosted by their government), despite those individuals' exclusion from citizenship or even from their territorial control. Hence, as threats to economic and social protection proceed outside of the nation state, territoriality-bounded rights no longer seem fully plausible.[86] Indeed, the very concept of sovereignty—of a state barring "external interference" in its "internal affairs"[87]—is threatened into irrelevance, as global trade, sanctions, and development policies affect the economic and social rights of individuals in other places.

[83] S. Afr. Const., s. 39. Interpretation of Bill of Rights:

1. When interpreting the Bill of Rights, a court, tribunal or forum—
   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b. must consider international law; and
   c. may consider foreign law.

[84] *See further* Chapter 10. *See also* Katharine G. Young, "The World, through the Judge's Eye," 28 Australian Y.B. Int'l. L. 27 (2009).

[85] E.g., European Convention on Human Rights; American Convention on Human Rights; African Charter of Human and Peoples' Rights.

[86] *See*, e.g., Chimène I. Keitner, "Rights Beyond Borders," 36 Yale J. Int'l L. 55 (2011); Gerald L. Neuman, "Understanding Global Due Process," 23 Geo. Immigr. L.J. 365 (2009) 382–91.

[87] For a classic statement of this arrangement, *see* United Nations Charter, art. 2(7) (suggesting that the Charter does not authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any state").

In this new global order, the rights and movements of constitutionalism appear to give way to the goals and stakeholders of governance. Governance explores what "governing" can be, without government, or in addition to government. As its adherents suggest, "[t]he language of governance rather than government . . . signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically governmental actors, or indeed the absence of any traditional framework of government."[88] Governance acknowledges the fluid role of market participants and nongovernmental organizations in influencing the course of law and social life. It explores the opportunity to govern where law appears to be absent or impotent: in world-society, for instance.[89]

The methodological frame of governance is well suited to exploring the ways in which economic and social rights are constituted. Indeed, governance and its intellectual offsprings—"new governance" (which unites democratic theory with the economic sociology of political and market actors) and "global governance" (which extends the study of institutions into transnational and international arenas) share many features of the pragmatist approach taken in this book. Constitutionalism and governance both concentrate on institutions and institutional design, on problems and problem-solving, and on power and its kinetic exercise. Both are oriented towards the possibilities of linking democracy and experiment. Nonetheless, constitutionalism tackles what new governance defers: the need for "anchoring premises beyond the possibility of experimental rejection."[90] It acknowledges, moreover, that law—through creating privileges and immunities—creates the "extralegal" spaces that governance appears to unearth.

This same approach—of mapping "absences" of law through jurisdictional limits—contains the seeds of constitutionalism's answer to globalization. This challenge, for which governance appears to retain its strongest advantage, underlies each aspect of the framework outlined above. It is a challenge that informs the questions raised by each chapter and the provisional development of answers.

The examination of economic and social rights—from food, housing, health care, water, social security, and education—focuses attention on a variety of laws and policies, such as the delivery of goods and services

[88] Grainne de Burca and Joanne Scott, "Introduction: New Governance, Law and Constitutionalism," in Grainne de Burca and Joanne Scott (eds.), *Law and New Governance in the EU and the US* (2006) 1, 2.

[89] Gunther Teubner, "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" in Christian Joerges, Inger-Johanne Sand, and Gunther Teubner, *Transnational Governance and Constitutionalism* (2004) 3.

[90] Neil Walker, "EU Constitutionalism and New Governance," in de Burca and Scott (eds.), *Law and New Governance*, *supra* note 88, 15, at 32.

(whether by public or private actors), the allocative priorities within government policy, and the distributional impact of law. This examination also helps us to interrogate the under-theorized aspects of constitutionalism, democracy, and the tensions that are often thought to underlie them, through standpoints of interpretation, and practices of adjudication, enforcement, and contestation. If we are to understand economic and social rights as law, we must accept the challenges outlined above. Economic and social rights are constituted in conditions of pluralism. They are constituted through social collectivities, as well as through formal institutions such as courts. They are structured as claims against the state, but transcend this dimension by encompassing globally situated actors and by addressing threats to interests occurring outside of the state. It is to these challenges that later chapters turn.