How Historical Specificities Shape Scopes of the Judiciary and Notions of Human Right: The Right to Housing from Three National Contexts – South Africa, Brazil, and the United States

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In the American common law, the doctrine of “first possession” or “occupancy” describes the act which can create the notion of land ownership.¹ This doctrine presupposes that those who will be calling upon it as a source of a right of ownership are an agrarian or commercial people such “that their activities with respect to the objects around them require an unequivocal delineation of lasting control so that those objects can be managed and traded.”² The norms underlying this doctrine however cannot be accepted as universal. All cultures have norms that provide individuals or collective bodies with various bundles of rights of use with regards to property. Historically these have differed “so radically over what goods can be acquired; what precise bundle of rights come with the acquisition; and how specific property rights are created, varied, limited, extinguished, and apportioned among individuals or groups that the search for universal property norms would appear to be in vain.”³ One of the reasons for this variation is that “land Tenure, defined as the mode by which land is held or owned, or the set of relationships among people concerning land or its product and property rights, defined as ‘recognized interest in land or property’ are concepts that adapt as societies change.”⁴

In recognizing and accepting these differences and the ever shifting nature of the law, this paper looks at how such non-universal conceptualizations of rights differ in jurisdictions faced with high levels of inequality. To do this it reviews the effectiveness of one aspect of the doctrine of adverse possession that could assist the poor in judicially protecting their right to housing. This aspect is referred to as security of tenure and the jurisdictions are South Africa and Brazil. These jurisdictions are important because the analysis and legal tools that they utilize can be transplanted to the other jurisdictions to solve latent issues of inequality. This paper compares the laws and history of these jurisdictions to see
what justifications, obstacles and opportunities for the advancement of socioeconomic rights are present and transferable to other jurisdictions such the United States.

Before discussing these jurisdictions, a review of the doctrine of adverse possession and the importance of security of tenure is warranted. Adverse possession is defined by Black’s Law Dictionary as the use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open, and notorious. When it was introduced in England through the basic Statute of Limitations in 1623, adverse possession was meant to clear the title of land of claims by multiple people due to the fact that it was difficult to keep records of ownership. 5 In clearing titles, adverse possession was never meant to punish the landowner or to encourage development. 6 With that in mind, it is important to note that adverse possession laws are categorized under the legal moralist and proceduralist approaches. The legal moralist approach sees adverse possession as “a form of private ‘taking’ or land theft, with the apparently anomalous result that the law through adverse possession sanctions theft.” 7 The result of this view is that deliberate squatters are seen as morally undeserving with no right to acquire the land they seek to take over. A procedural approach on the other hand, sees adverse possession as a “non-adversarial and procedural” act, requiring no intent, hostility, or conflict with the resulting dispossession of the true owner simply being “the result of sufficient acts of possession by the adverse possessor rather than any intentional ouster.” 8

Although adverse possession is an aged legal concept, it is currently an important issue in development because of the United Nations. In September of 2000, world leaders came together at the United Nations Headquarters in New York and adopted the United Nations Millennium Declaration (UNMD). The purpose of adopting this declaration was to form a new global partnership to reduce extreme poverty by setting out targets to be met by each member nation. These goals, known as the Millennium Development Goals (MDGs), are to be met by 2015. They are characterized solely as “goals” because they were created in a General Assembly resolution, which does not carry binding legal force.
Without the ability to bind state parties, the MDGs serve as an indicator of a member state’s position or as an outline for organizing principles and proposed initiatives. The goals agreed to are as follows: 1) eradicate extreme poverty and hunger, 2) achieve universal primary education, 3) promote gender equality and empower women, 4) reduce child mortality rates, 5) improve maternal health, 6) combat HIV/AIDS, malaria, and other diseases; 7) ensure environmental sustainability, and 8) develop a global partnership for development.

MDG 7.D is a subset of MDG 7 which aims to “achieve a significant improvement in the lives of at least 100 million slum dwellers” and uses the “proportion of urban population living in slums” as its means of measurement. This goal was quantified “by a proxy, represented by the urban population living in households with at least one of the four characteristics: (a) lack of access to improved water supply; (b) lack of access to improved sanitation; (c) overcrowding (defined as an occupancy rate of 3 or more persons per room); and (d) dwellings made of non-durable material.” Twelve years after the announcement of the MDGs, in 2012, results were mixed. As a result, the United Nations Human Settlements Program (UN-HABITAT) turned its attention to improving security of tenure. This is because UN-HABITAT recognizes that “secure land and property rights for all are essential to reducing poverty, because they underpin economic development and social inclusion.”

The Right to Housing and International Law

As a legal concept, security of tenure is concerned with Human Rights Law. This is because it exists in relation to the human right to adequate housing. The right to housing has been defined by the UN Special Rapporteur on Adequate Housing as a right of every human being to gain and sustain a safe and secure home and community in which to live in peace and dignity. As a result, under international law, everyone is entitled to adequate housing in the absence of discrimination.

Currently, there are many regional documents which support the right to housing. In Africa, the African Commission on Human and People’s Rights has found that the right to housing emanates from
the right to life and mental health in Articles 4 and 16 of the African Charter on Human and People’s Rights. With regards to the Americas, there are multiple documents enshrining this right. In South America, the Charter of the Organization of American States directs member countries to dedicate every effort to achieve adequate housing for all sectors of the population in Article 34(k). This is reiterated in Articles 8, 11 and 23 of the American Declaration of the Rights and Duties of Man (1948). Lastly the American Convention on Human Rights (1969), in Article 26, requires member states to enact progressive measures to fully realize economic, social, and cultural rights, which include the right to housing.

With regards to upholding of these rights, “the Limburg Principles (1986) and the Maastricht Guidelines (1997) have further defined the requirements of effective implementation of socio-economic rights and the nature and appropriate remedies for violations.” Specifically, “The Maastricht Guidelines recommend that any person or group who is a victim of a violation of an economic, social, or cultural right (including housing rights) should have access to effective judicial or other appropriate remedies at both the national and international levels.” With these guidelines in place, International Law not only provides for the right to housing but also assures that the judiciary is the arena in which such rights should be protected.

The right to housing is also guaranteed through the constitutional law of many states. For example, “at a national level, at least 40 percent of the world’s constitutions refer to housing or housing rights.” Unfortunately for those who seek to support this trend, “globalization is affecting a shift of authority from the state to the actors and institution of the global economy.” This shift is highlighted by the case of Colombia. This country first enacted a law in 1936, thereby establishing a “presumption of ownership in favor of those who occupied the land and were exploiting it economically.” After this failed to provide equity to the poor, Colombia proposed a law in 1961 “to reform the land structure of the country, eliminate unequal land concentration, promote the productive and efficient use of the
land, distribute property to landless peasants, and give preference to those who work the land." In 1991, the country took another step when it adopted article 58 of its constitution. This development, however, was for naught as the most progressive language was weakened by a 1999 constitutional reform "proposed by the government as a way to promote foreign investment."

Legal security of tenure is merely one aspect of the right to housing and is difficult to define. This is because "authors do not specify a definition of tenure security and in the few cases where definitions are offered, a wide range of concepts is used." Given the current lack of consensus, it is crucial to clarify the definitions of central terms. This paper will operate under one definition at all times: Tenure security is violated when a person experiences a violation in his or her "right to feel safe in one’s own home, to control one’s own housing environment and the right to not be arbitrarily forcibly evicted." Forced eviction is in turn defined as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."

South Africa – Historical Background

The case of South Africa is important when examining security of tenure because it recently took great steps to utilize its constitution as a mechanism for societal changes. The international community has generally taken South Africa’s changes in a positive light. This is because South Africa as a society is creating laws to undo years of urban and rural mismanagement due to racism. In its undertakings South Africa has managed to create a methodology securing an individual’s human rights. This methodology evaluates the reasonableness of the actions taken by the government to provide its poorest citizens with access to housing or land vis-a-vis the request to evict them. Due to the important role South Africa’s unique history plays in the work of the judiciary, a review of South African history is needed.
The Dutch East India Company (VOC) began settlement of what eventually became the Republic of South Africa in 1652. The legal disenfranchisement of blacks in South Africa accelerated 50 years later.\textsuperscript{28} It was at this time that Dutch cattle farmers began to enter the interior of the country to either subjugate or engage in conflict with millions of native African peoples for almost the next 100 years.\textsuperscript{29} This migration was caused by a surplus of products, resulting in low prices, drought, crop failure, and VOC external trade restrictions that could not be circumvented by smuggling and illicit trade.\textsuperscript{30} In response, these “trekboers” moved inland and began the first phase of colonial conquest in which the native ethnic groups were denied access to resources and robbed of their livestock.\textsuperscript{31} These ethnic groups can be separated into three groups: “San for the hunter-gatherers, Khoikhoi for the pastoralists, and Africans for the Bantu-speaking farmers.”\textsuperscript{32} After two brief wars, the pastoralists were convinced to hire themselves out to the settlers as farm laborers and servants.\textsuperscript{33} The San, on the other hand, were forced off of their land and the remaining adult men were exterminated and their children were enslaved as herdsmen.\textsuperscript{34} Settlers continued to encounter competition for decades from the bantu-speaking farmers and the Zulu who attempted militarily to remove white settlers from the land.\textsuperscript{35} Faced with this, settlers created homesteads with the support from the VOC that provided them with land as long as settlers paid a small annual fee (which went unpaid in some of the more remote areas).\textsuperscript{36} During these land acquisitions, the white colonizers and black natives sometimes entered into treaties. However, they seldom entirely agreed on concrete terms.\textsuperscript{37}

During the next two hundred years, South Africa’s colonizers appropriated the best land for themselves.\textsuperscript{38} Violence ensued not only between the settlers and the natives but also between different native groups. As a result, “the Africans’ habit of warring among themselves gave the Whites an advantage in achieving control of Southern Africa.”\textsuperscript{39} Due to this violence, displaced peoples found themselves concentrated in the original Cape Colony. They “provided cheap labor, and Whites were easily able to establish their hegemony.”\textsuperscript{40} While claiming land for themselves, whites also set aside land
for native reserves which set a precedent for using non-white ethnic groups as a geographic buffer between whites and those that were hostile to them. This first took place when whites resettled a peaceful and submissive tribe of natives, who had been driven away from their land by Zulu expansion, in a buffer region meant to separate white settlers from hostile tribesmen who were disputing white ownership of the Kei River.\textsuperscript{41}

South Africa experienced a shift in its power structure when the British removed the Dutch and took control of the area in 1795.\textsuperscript{42} 4000 settlers joined the colony in 1820, slaves were freed in 1838, and a bicameral parliament was formed in 1853.\textsuperscript{43} With British control, the Dutch inhabitants gradually lost their autonomy and English became the national language.\textsuperscript{44} The abolition of slavery, and other factors, caused many of the original Dutch settlers to leave the cape and enter other areas of what is now South Africa.\textsuperscript{45} Eventually these settlers gained independence under the Sand River and Bloemfontein conventions of 1854.\textsuperscript{46}

During this period of Boer independence the British government, whilst in charge of the Cape colony, also passed legislation that discriminated against blacks and revoked communal ownership. For example, the Cape Colony passed the Glen Grey Act to stifle competition between blacks and Whites for jobs.\textsuperscript{47} This act also had several other justifications: “to put in place a land-tenure system based on small plots, inheritable only on the basis of primogeniture, so that the bulk of the male population would take employment in the colony, spurred on by a labour tax payable in cash, an extension of previous efforts to limit the extension of African franchise rights by denying Africans possession of land on the terms laid down in the franchise law; and the institution of limited self-government based on local councils.”\textsuperscript{48}

After passing the Glen Grey Act, the Boers’ period of independence ended due to the discovery of rich mining interests. These interests were the primary motivation for the British to desire control after the Boer War (1899-1902) and the resulting Peace of Vereeniging.\textsuperscript{49} This conflict was Britain’s “most extensive, costly and humiliating war fought between 1815 and 1914.” 200,000 British and
Empire troops faced off against no more than 45,000 Boer forces at a cost of £1.5 million a week. The Boer war was also important to the South African psyche as its white population later utilized the mistreatment at the hands of the British. Boers developed a “powerful mythology of victimhood and suffering which fed into the emerging Afrikaner nationalist movement for which the deaths of 27,927 Boer civilians in these camps (the suspiciously precise figure calculated by the Transvaal archivist P. L. A. Goldman in 1906 by a suspect methodology) became a key reference point for the rest of the twentieth century.”

It was in the context of these camps, ran by Whites affiliated with the British Government and populated by White Boers who had settled in South Africa that the term “concentration camp” first became a common part of the English language.

After the Boer War, the British compromised with South Africa’s white population. At the Durban Constitutional Convention in 1908, a new constitution was written which “allowed the four provinces to maintain their discriminatory franchise laws excluding Blacks, provided for regular divisions of the country into electoral divisions based on population, made both English and Dutch the nation’s official languages.” This disenfranchisement is represented by the black farmer who “from 1870, if not earlier, to 1990” faced “every obstacle including confiscation of land, prohibition on farming in most areas of the country and barriers to market entry” while “all kinds of support from the state, including land-bank loans, drought relief, extension services and commodity marketing organizations and opportunities, were provided for white farmers.” Eventually the constitution was passed with the South Africa act of 1910 over the protest of the English citizenry who did not support the disenfranchisement of blacks.

In looking at era of South African history, the Constitutional Court has found that the Natives’ Land Act of 1913 and the Native Trust and Land Act were the key statutes that dictated where African people could live in South Africa. The Native Land’s act “contained a schedule which set out areas in which only African people could purchase, hire or occupy land”. The Native Trust and Land Act of 1936,
on the other hand, forcefully removed many blacks to designated areas of the country. Blacks who were not living on reserved land were removed from their homes and, as a result, lost any property that they previously occupied.

These acts were further buttressed by other pieces of legislation which attempted to remove blacks from white occupied South Africa. The Population Registration Act of 1950 further complicated things. This act required that each inhabitant of South Africa receive a racial classification which in turn determined their treatment with regards to where individuals could live; go to school, and work. This classification system employed a 3 factor test with regards to a person’s appearance, decent, and acceptance within the community in defining their racial category. The system of racial categorization was fraught with problems due to the fact that race is not an objective criteria. The unpredictable nature of racial classification complicated many lives with the passing of the: Bantu Authorities Act, Promotion of Bantu Self-Government Act, and Bantu Homelands Citizenship Act. This is because the racial classification system ended up splitting many communities and even families by assigning members to difference race categories.

Africans were then subjected to forced removal beginning in 1951 with the Bantu Authorities Act which established, for South Africa’s blacks, “tribal, regional and territorial authorities based on ‘traditional methods of tribal government’ that were later regarded as ‘national structures’. After the Bantu Authorities Act came the Promotion of Bantu Self-Government act of 1959 which “gave explicit recognition to eight ‘black national units’. In 1970, the Bantu Homelands Citizenship Act provided blacks living in South Africa with citizenship in one of the four independent homelands which were not recognized internationally. It is estimated that, between 1950 and 1979, 3.5 million people were sent to these reservations or "Bantustans." These homelands were never prosperous and some have commented that “the Bantustans were never intended as separate nations but as a supply of cheap labor for urban and per-urban centres” occupied by whites.
Regardless of the racial motivations of the laws listed above, one must not see the land problem in South Africa simply as a matter of white vs. black. Instead, it must be understood as a multi-layered system re-enforcing class distinctions between groups. This point is obvious when looking at the trials of experiences of the African residents in Soweto. This city had a landed class of SePedi-speaking Lutheran converts and a landless tenant class of SiNdebele-speakers and:

“When, sometime in mid-century, the most successful members of this titleholder group abandoned full-time farming, moved to urban areas such as Soweto, and took up professional positions as nurses, teachers, and librarians, their land came to serve primarily as a residential and livelihood base for tenants from a landless ethnic group (SiNdebele-speakers), mostly people evicted from white-owned farms where they had worked and lived as labor tenants. Moving to farms such as Doornkop, they now became the rent-paying tenants of its – largely absentee – Pedi owners. Both those few Pedi owner/landlords remaining on the farm, and their Ndebele tenants, were later evicted under the apartheid regime’s infamous ‘black spot’ removals of the 1970s, in a bid to expunge all black residents from so-called ‘white’ South Africa and resettle them in ethnically distinct reserves or ‘homelands’. When, with the advent of democracy, the farm was restituted in 1994, many Pedi owners showed little interest in returning to take up their ownership rights. It was instead, their former Ndebele tenants and their decedents, alongside a burgeoning population of landless people newly evicted off white farms and thus more recently rendered ‘landless’, who began vociferously to demand the right to access lands on farms such as Doornkop.”

It is important to note that the Ndebele tenants, in demanding that their right to housing on land owned by black SiNdebeles, serves to highlight the fact that the fight for security of tenure, even in South Africa, is one that existed along class as well as racial lines.
Fortunately, South African Apartheid did not last forever. After years of national and international disapproval of the apartheid regime, South Africa elected Nelson Mandela as president in 1994. Land reform was an important part of the promised policies that brought him to power since, due to the aforementioned laws and conflicts, he inherited a country in which:

“81.2 percent of the 122 million hectares of land in South Africa is owned by whites in white areas. Africans in white areas occupy 3.6 percent of the land but can never attain freehold title to it. Indians and colored own 2.4 percent of the land in white areas with the remaining 12.8 percent appropriated for black occupation in the “homelands.” In the strictest sense, whites own 84.6 percent of the land, since blacks in white areas have no legal rights to land ownership.”

Immediately after taking power, the post-Apartheid regime began working on a new constitution. The resulting document has been referred to as “the most admirable constitution in the history of the world.” It affirms the right of access to land and housing, adequate healthcare, food, water, and social security. These affirmations were required because “South African blacks were subjected to a ‘quite extraordinary degree of planning’ and legislation during apartheid, and it was recognized that equivalent efforts would be required in order to undo apartheid’s schemes.”

In enacting reformist policies, the South Africa’s post-apartheid leaders recognized differing forms of land occupancy and decided to utilize different branches of the land reform program such as restitution, redistribution, and tenure reform to account for them. Restitution, through the Restitution Act of 1994, concentrated on returning titled land back to its owners who had lost it during the apartheid era due to forced removals. Redistribution allowed those with no formal land claims to group together and purchase farms with the help of a government grant. Tenure reform attempted to protect the rights of those occupying land but depending on others (Chiefs in the Homelands and White Farmers outside of it). Unfortunately for the poorest individuals and communities in South Africa, the
South African government eventually shifted from “a language of rights, commensurate with the welfarist oriented vision of citizenship, to one of private ownership, market-oriented economic viability and the need to fulfill responsibilities.” With that said, the following cases still reflect a useful methodology for dealing with protecting the internationally recognized right to shelter of such individuals.

**South Africa – Grootboom and beyond**

The Constitution of South Africa protects the right of access to land and housing in part by dictating that no one may be faced with eviction without a court considering all relevant circumstances. Grootboom was the first case brought before the Supreme Court claiming that a violation of the right to housing took place. The squatters in Grootboom were rendered homeless after they were evicted from a squatter’s settlement that they had started on land earmarked for formal low-cost housing. Many of these squatters had applied for low-cost housing from their municipality in the squatted area but had been on the waiting list for up to seven years. After being evicted, they applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing. They were awarded a judgment which concluded that “tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.” Faced with this order, the government appealed to the Supreme Court challenging whether it was correct.

The squatter’s claims were based on section 26 and 28 of the South African Constitution. Section 26 provides that everyone has a right to adequate housing while section 28 provides that children have a right to shelter. These rights have been seen as justiciable in South Africa since the constitution had been interpreted in the Certification judgment. As a result, the court saw the question before them not as whether or not socio-economic rights are justiciable but how they should be enforced in a given case.
To come to its conclusion, the court utilized a textual analysis of the constitution as well as an analysis of the historical and social context in which the constitution and the rights in question reside.\textsuperscript{89} In looking at the text of the constitution the court, in line with precedent, saw Section 39 as imposing an obligation on the court to consider relevant international law as a binding tool to interpret the Bill of Rights with varying weights being attached to different rules.\textsuperscript{90} With this in mind, the court considered the ICESCR in order to better understand the positive obligations that the state had with respect to the socio-economic rights in the constitution.\textsuperscript{91} South Africa signed this agreement on October 3\textsuperscript{rd} 1994, around the same time that it drafted its present constitution during the Presidency of Nelson Mandela.\textsuperscript{92} In 2010 President Jacob Zuma, commented that full ratification was still pending because: (1) it conflicted with the South African Constitution, (2) there was no department within the government that could push forward with its implementation, and (3) the covenant’s scope went beyond the mandate of any existing governmental branch.\textsuperscript{93} This is important because a state which has signed a treaty has not expressed its consent to be bound by the treaty until it ratifies it, unless the treaty simply re-states an already accepted tenet of customary international law. Here, the Grootboom court used the un-ratified ICESCR to interpret the scope of a right which it, along with few other jurisdictions, recognized.

In conducting its interpretation, the court drew on Article 11.1 of the ICESCR as read in conjunction with Article 2.1.\textsuperscript{94} The former recognizes the right to an adequate standard of living and obligates State parties to the convention to take \textit{appropriate} steps towards the realization of the right.\textsuperscript{95} The latter, on the other hand, states that these appropriate steps are to be taken to the maximum of a country’s available resources.\textsuperscript{96} When applying these clauses to the constitution, the court found one of the conflicts which, according to President Zuma, has prevented the South African government from ratifying the Covenant.\textsuperscript{97} The court interpreted the Covenant as requiring a minimum core obligation which provides for a floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation to provide adequate housing.\textsuperscript{98} This framework was rejected due to the
complexities that arise in its application; the needs and opportunities for the enjoyment of such a right “will vary according to factors such as income, unemployment, availability of land and poverty” and will have variations due to “the differences between city and rural communities.” As a result, the court found that it did not “have sufficient information to determine what would compromise the minimum core obligation in the context of [the] Constitution.”

Since it was not able to apply the covenant, the court conducted its analysis based on its constitution. It found that Article 26 places a negative obligation on “the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.” Accordingly, the constitution was interpreted as providing a right to “access to adequate housing” which is to be viewed differently from the “right to adequate housing” contained in the Covenant. The constitutionally provided right has requirements that were much broader and required that a person have access to “available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.” Accompanying this right is an obligation that leaves “not only the state” but also “other agents within our society, including individuals themselves,” responsible for supporting these rights. The state itself is charged with providing “legislative and other measures to provide housing” and “conditions for access to adequate housing for people at all economic levels” of the South African society.

Like the ICESCR’s protections, the court found that this right of access operated in a context in which incomes, geography, level of economic development, and economic forces varied from case to case. This right and environment present a question of whether the efforts of the state to realize the rights provided under section 26 are reasonable. This can be interpreted to mean that they are reasonable in a specific case before the court, as opposed to the minimum core obligation under The ICESCR, which evaluates whether or not the State was upholding an obligation “determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in
question." With this in mind, the court found that the state’s obligation to protect an individual’s right to adequate housing is “defined by three key elements that are considered separately: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realization” of the right, and (c) “within available resources.”

In looking at the role of the government, the court found that reasonable legislative and other measures are required of local and provincial governments as well as all three spheres of government. The court stated that legislation is evaluated with regards to whether the legislative or and/or executive measures are adopted and implemented reasonably. Furthermore, this reason-ability analysis, takes place with reference to the “social, economic and historical context”, considers “the capacity of institutions responsible for implementing the programme” and is “understood in the context of the Bill of Rights as a whole.”

According to South African jurisprudence, these rights are not immediately available in full. In the court’s opinion, the constitutional right, which is in accordance with what is enshrined in The Covenant, must be progressively realized as “it was contemplated that the right could not be realized immediately.” In South Africa, the right to shelter should be “progressively facilitated” with “legal, administrative, operational and financial hurdles” examined and lowered over time. With regards to budgeting, “the measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.”

In applying the aforementioned framework, the court found that the legal issue was “whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established.” In answering this question, the court stated that “the nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognize that the state must provide for relief for those in desperate need” and, as such, violates section 26(2) of the constitution.
The court next turned its attention to section 28 of the constitution which provides a right to shelter for children. The analysis of this section applied only to children and their parents. This is because “people who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be.” This right exists only in the context of the rights and obligations created by other sections of the constitution and, as such, there is significant overlap.

In looking at international law, the court referred to the United Nations Convention on the Rights of the Child (UNCRC), which was ratified by South African in 1995 and imposes obligations on states to ensure that the rights of children in their countries are protected. Section 28 of the South African constitution provides a mechanism to meet the obligations under this agreement. Under this section, the court found that “through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. Since the responsibility rests alternatively on the state, the court found that the state does not have an obligation, under this section of the constitution, to provide shelter for those children who were not in the care of the state.

The above conclusions were used to justify the court blocking the eviction of the squatters. While blocking the eviction, the court took the time to issue a warning that land invasion was “inimical to the systematic provision of adequate housing on a planned basis.” This warning shows that the South African Supreme Court is determined to provide security of tenure for its citizens through protection from forced evictions as opposed to providing them with title to the lands they occupy. This determination, however, is questionable. Although Grootboom is seen as the first case in which the Constitutional court granted a remedy based on socio-economic rights, it is also the first such case in which the government failed to comply. In 2008, Irene Grootboom died living in a shack, penniless
and homeless. In response to Grootboom, the South African government created Chapter 12 of the National Housing code to provide for housing assistance in emergency circumstances.

Post-Grootboom Limits

The post-Grootboom South African Supreme Court has further expounded on its socio-economic jurisprudence. In Mazibuko, the Supreme Court showed the limits of reasonability analysis with reference to socio-economic rights. This complaint was brought by individuals who questioned: 1) whether the City’s decision to supply 6 kiloliters of free water per month to every account holder in the city conflicted with section 27 of the constitution, as it did not necessarily provide 50 liters per person a day, and 2) if the installation of pre-paid water meters to charge for water in excess of the free minimum was legal. The court held that, under the reasonableness standard of review, the “the right does not require the state upon demand to provide every person without sufficient water with more; rather it requires the state to take reasonable legislative and other measures progressively to realize the achievement of the right of access to sufficient water, within available resources.” To further this argument, the court referred to the Grootboom court who did not order that each applicant be provided with a house, but instead required a revision of its housing program to include “reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.” Of import for our purposes is the fact that the court also found that, had the government not continuously reviewed its program, it may well have been seen as inflexible and unreasonable. One must note, however, that some critics saw Mazibuko as the death knell of rights based activism in South Africa. This is because, to some, “Mazibuko seems to indicate that the benefits of rights-based litigation for activists are likely to be quite unreliable and limited; namely, the Constitutional Court has now embraced cost recovery from the poor as consistent with the
Constitution, and has adopted a neo-liberal baseline from which to measure the reasonableness of government action that infringes on socio-economic rights.”

In *Nokotyana*, the court again showed the limits its socio-economic rights analysis. This case was about “sanitation and lighting” and “the quest of an informal settlement to have toilets.” As one commentator notes, the court in this case was very reluctant to address the issues through the Constitution. To sidestep these issues, the court did two things. The court clarified the doctrine of Subsidiarity and held that where a statute is the mechanism through which a right is provided a litigant's cause of action must be brought in terms of the legislation as opposed to the Constitution, or said litigant must challenge the legislation itself as unconstitutional. This is important as it creates a barrier before someone can claim that their constitutional right to housing is being violated. The court also held that, in this case, it was most appropriate to “rely directly on the right of access to adequate housing, rather than on the more general right to human dignity.” These two lines of argument are important because they show how the concept of constitutional avoidance can operate within South African jurisprudence to weaken socio-economic rights. This concept was “first expressed by Kentridge AJ in *S v Mhlungu* where he expressed the view that it was a general principle that wherever it is possible to decide a case, be it civil or criminal, without reaching a constitutional issue, that is the approach that should be adopted.”

Constitutional avoidance and cost recovery currently stand as obstacles to the full recognition of a right to housing in South Africa. These barriers became apparent during South Africa’s hosting of the World Cup. For example, preparations and the public investments in the World Cup were accompanied by “inevitable budget restructuring, which meant cuts for subsidized housing projects”, “a cost explosion in the building sector” and “the displacement of low-income sections of the population during the course of renewal and gentrification of conveniently located districts or urban arenas near the stadiums.”
Brazil’s similarities to South Africa and current relevance

Whereas the South African Supreme Court is determined to provide security of tenure for its citizens through protection from forced evictions when the government fails to provide needed services, the Brazilian government is attempting to do the same by supporting the Social Function of land. This understanding of property was first articulated by the French Jurist Léon Duguit in six lectures he presented in Buenos Aires in 1911, in which he argued that property is not a right but instead is a social function.141 This view of property is summarized as follows:

“... property has internal limits—not just eternal ones as is the case of the liberal right to property. The owner has obligations with respect to his things. He cannot do what he wants with his property. He is obliged to make it productive. The wealth controlled by owners should be put at the service of the community by means of economic transactions. Consequently the state should protect property only when it fulfills its social function. When the owner is not acting in a manner consistent with his obligations, the state should intervene to encourage or to punish him. Taxation and expropriation are powerful tools for achieving such ends. From this perspective, the state has both negative and positive obligations with respect to property.”142

With this doctrine in mind, Brazil is attempting to reform a real estate market in which, as of 1997, 1 percent of its population had control of 47 percent of the real estate.143 This land distribution was accompanied by “weak institutions, weak markets, and low asset endowment.”144 Accompanying this land market is “a pattern of lack of transparency, consultation, dialogue, fair negotiation, and participation of the affected communities in processes concerning evictions undertaken or planned in connection with the World Cup and Olympics.”145 These structural issues, like those in South Africa, are due to a land market that has a colonial past which must be reviewed.
Brazil – Historical Background

Upon their first arrival in Brazil in 1500, the Portuguese crown “offered large grants of land, called sesmarias, free of encumbrances except the requirement that the land be used beneficially” and continued this practice until independence in 1822. These large estates employed slave labor from the founding of the colony and, as a result, necessitated the importation of roughly five million African captives. The owners of these estates were bound by their grant to contribute one-sixth of their produce to the crown. In sum, Sesmarias can be viewed:

“as a kind of gratuitous concession of the right to use the land, subject to a series of conditions such as limiting the land’s occupation and restricting its use to certain stipulated economic activities. The sesmarias could be transferred by contract or through inheritance, but restrictions on the right of use could not be altered. The Crown could reclaim the land if one failed to observe these conditions.”

The ownership rights of Sesmarias reverted back to the crown if the land was not being used productively. At the time, Sesmarias were not the only type of land grant in existence as they “coexisted with larger political units, hereditary captaincies, granted to and governed by Portuguese noblemen” which all existed “so that the Portuguese crown could transfer the task and costs of colonization to private hands.”

The colonization of Brazil followed the same pattern of development as Portugal since, unlike Spain, Portugal applied the same centralized model of development in the colony that was used in the home territory. The colony broke from the empire when Dom Pedro I declared the creation of the Brazilian Empire as a constitutional monarchy in 1822. After independence, the sesmarias practice stopped and private land was attained through occupation/the right of posse. This transition was not smooth since following Brazilian independence and “the abolition of the Sesmaria system, there ensued a period of violent conflict over land between those who claimed possession through the crown and
grileiros (land grabbers who used false documentation to obtain legal title) or squatters backed by armed bands.\textsuperscript{154} Brazil continued with a constitutional monarchy until 1889.

In 1850, after rich land owners expanded their large landholdings called latifundias, and land values went up due to the coffee industry, the government passed the “Land Law” to create private property for the first time, provide title to those who had posses and sesmarias up to that point, and outlaw land acquisition by squatting.\textsuperscript{155} This law was also meant to prepare the country for the eventual abolition of slavery.\textsuperscript{156} Unfortunately, the Land Law had the effect of: allowing “large landowners to declare the titles asserted by small producers illegal”, “finishing off whatever claims northeastern indigenous peoples may have had to their lands”, and “increasing the power of oligarchical families over life in the rural interior.”\textsuperscript{157} Around the same time some indigenous peoples were declared to be extinct on the grounds that they had inter-mixed with the European colonizers.\textsuperscript{158} As a result, many indigenous land claims in Brazil rely on undocumented donation of Indian lands by King Dom Pedro II before 1850.\textsuperscript{159}

The Land Law mirrored Continental Law’s definition of the concept of \textit{dominium} by treating private property as an individual and absolute right, converted sesmarias rights holders into land owners of the estates they already held, and extended the same ownership rights to anyone who possessed public land for at least 100 years before the statute’s passage.\textsuperscript{160} The law, as a result, perpetuated the concentration of rural property in the hands of the same few who held the land in colonial times, effectively blocking the distribution of land to the European and Japanese immigrants who came to Brazil after independence.”\textsuperscript{161} With such an inefficient land market, working class families were faced with deficits in housing and responded by living in overcrowded informal structures called “Cortiços.” This compromised living environment soon led to health issues as it was a breeding ground for cholera due to the lack of state provided infrastructure.\textsuperscript{162} Many attribute these conditions to the law’s aim to “prevent immigrants and former slaves from becoming landowners”, which resulted in “deliberately
inflated property values by creating a scarcity of estate deeds."¹⁶³ In the end, the law had the effect of
“creating a substitute for slave ownership to deal with problems of capital immobilization, value
reservation, and provision of debt collateral."¹⁶⁴

Brazil existed as a republic from 1889 to 1930 and was the last nation in South America to ban
slavery after doing so in 1888. 388 years of slavery forever shaped the nation as well as land policy.¹⁶⁵
During slavery many Africans, referred to as Quilombolas, escaped to the Amazon basin into land
controlled by native indians where they started their own communities called Quilombos.¹⁶⁶ The most
famous of these, “Palmares, was a network of settlements that ran throughout 200 square kilometers in
the Northeast” of the country and “existed for almost 100 years until the Brazilian government
succeeded in destroying the quilombo in 1695."¹⁶⁷ For the most part, rural Quilombos remained hidden
and most modern policy makers believed that they did not exist during the 19th century.¹⁶⁸ Outside of
official policies, Quilombos were supported by the abolitionist movement as a place to house fugitive
slaves as well as a means of social control and oppression through which ex-slaves could be civilized and
made to behave in a way that abolitionists deemed appropriate.¹⁶⁹

Brazil’s native indians were also affected by the development of property law in the country.
Around 1916, further obstacles were added through the creation of the Brazilian Civil Code of 1916,
which guaranteed property rights and treats any infringement on property rights as a compensable
taking of property.¹⁷⁰ The development of this law was stipulated in the Constitution of 1824 which was
written due to independence but took almost 100 years for the task to be complete.¹⁷¹ This law
strengthened “the dominium deeds against alternative, informal modes of land appropriation or
possession, publicly notarized registration of real estate.” It further provided that the law assured “to
the owner the right to use, enjoy and dispose of his property, and to recover it from the power of
whoever unjustly possesses it."¹⁷² The law also added many restrictions on Indians as an ethnic group.
For example, it mandated that “[t]he savages shall remain subject to the tutelary regimen established by
special laws and regulations which shall cease as they become adapted to the civilization of the country.¹⁷³ This part of the code was implemented by Decree No. 5464 (1948), which created 4 categories of Indians with respect to how integrated they had become with the Brazilian society, with more integration leading to more property rights.¹⁷⁴

The Brazilian Constitution of 1934 was the first law to establish the social function of property as a constitutional principle, despite the fact that the author of the 1916 Civil Code, Clovis Bevilaqua, understood the concept very well.¹⁷⁵ As Bevilaqua states, the doctrine is useful as “property rights must be subjected to ‘restrictions determined by considerations of social order,’ which is why ‘modern Codes are leaning towards finding a balance between the individual’s interest and that of society’.”¹⁷⁶ The doctrine uses the social function of property as an “external limitation that the government must impose on the exercise of property rights.”¹⁷⁷ This doctrine was important as land reform again became a part of the national debate due to the existence of many large and unproductive latifundias as well as large populations of squatters.¹⁷⁸

In 1964, a military dictatorship took power in Brazil. One of its first acts was to pass the Land Statute of 1964, which authorized it to expropriate large landholdings that had their roots in colonial grants.¹⁷⁹ This law “required three elements to be satisfied for lawful expropriation: (1) the land must be unproductive; (2) the expropriation must be in the public interest;” and “(3) the expropriation must be for compensation.”¹⁸⁰ Using this power of expropriation, Brazil’s military rulers flooded the Amazon basin with speculators. Any individuals found on the property were treated as squatters, driven out at gunpoint and, as a result, countless Quilombos were destroyed.¹⁸¹ The Land Statute unfortunately did not do much to benefit landless farmers. As one author noted:

“In sum, during the first fifteen years in which the Land Statute was in force (1964–1979), despite strong constitutional language outlawing speculative landholdings, the section related to agrarian reform was virtually abandoned. In total, only 9,327 families benefited from agrarian
reform projects, and 39,948 from colonization projects. In fact, the Gini index of land redistribution increased from 0.731 in 1960 to 0.858 in 1970. This shows that the small changes in the concentration of Brazil’s landownership over the past fifty years did not benefit landless farmers. These results led opponents of traditional land reform to argue that it had failed.”

One of the reasons for the Land Statute’s limited ability to remedy inequality was the fact that existing land owners could fight government expropriation by showing that their land was productive or contesting the value of the compensation offered by the government. In land appropriation cases, the Brazilian judiciary oftentimes ruled in favor of land owners because courts looked to the Civil Code which provided absolute protection for property rights.

In 1968, the military dictatorship passed Institutional Act Number 5, which was its most repressive legislation. This act had the effect of disbanding “the national Congress, six state legislative assemblies, dozens of city councils” and removing sixty-nine members of congress. While power was consolidated in the executive, Article 198 amended the constitution and “provided for the inalienability of land inhabited by forest dwellers (solvicolas), guaranteed the perpetual use of the land by them, nullified any legal actions that might result in others taking possession of their land, and specifically denied indemnification from the government to landowners whose land was taken to be held in trust for indigenous peoples.”

The Indian Statute of 1973 was created to regulate this constitutional amendment and established that “the lands occupied by them [indians] in accordance with their tribal usage, customs and tradition, including territories where they carry on activities essential for their subsistence or that are of economic usefulness” constitute Indian Territory.

**Modern Brazilian Constitutionalism**

After the end of the military dictatorship in 1985, a new constitution was passed in 1988. This constitution is similar to the South African constitution in that it follows the model of the ICESCR by
separating the statement of socio-economic rights (Chapter III, Art. 6) from the statement of the State’s
duty (Chapter VII). On the other hand, it differs from the South African constitution in that it does not
expressly state that the state is limited to the use of available resources. Furthermore, the Brazilian
constitution goes as far as specifying which institutions should be put into place to deliver socio-
economic rights, the principles that they operate under, and their source of funding. Up until this point
in Brazilian history, "all land policy and urban development plans were devised at the Federal level due
to a highly centralized government structure."\textsuperscript{188} From the very outset, this new constitution was
intended to “create a new paradigm of urban land use that would replace the old Civil Code paradigm of
individual property rights.”\textsuperscript{189} As a result, the new constitution marks “the genesis of property rights
based on legitimacy, not legality.”\textsuperscript{190}

In line with this change, Articles 182 and 183 of the new constitution, which comprise its chapter
on urban policy, introduced a mechanism to enforce the social function of property which had been
undefined in the 1967 constitution.\textsuperscript{191} The former begins with a declaration that “[t]he urban
development policy carried out by the municipal government, according to general guidelines set forth
in the law, is aimed at ordaining the full development of the social functions of the city and ensuring the
well-being of its inhabitants.”\textsuperscript{192} Paragraph 2 of the article further defines the social function by stating
that “Urban property performs its social function when it meets the fundamental requirements for the
ordainment of the city as set forth in its master plan.”\textsuperscript{193} The constitution requires that each city with a
population of 20,000 or more create a master plan.\textsuperscript{194} In the first ten years of the constitution’s
existence, 1,400 master plans were created.\textsuperscript{195} These master plans were made in a participatory manner
and are an example of how participatory democracy changed Brazilian politics when: “it created a
political process that included the poor in the political field; it created a process of inversion of priorities
that gave the Brazilian poor access to public goods; and it allowed a new political group to come into
politics from below.”\textsuperscript{196} Article 183 of the Constitution also worked to normalize informal settlement
through a modification to the statute of limitations for adverse possessors in an urban setting who own no other land.197

Article 184 of the Brazilian constitution is the most important with regards to governing the duty imposed on the government with respect to these rights. This is because the constitution made it “the responsibility of federal entities to safeguard and preserve” its patrimony and, as such, the government is seen as having to serve the “imperative that public owned land regulations should operate in accordance with the constitution.”198 Article 184 also provides the government with the power to expropriate land that is not performing its social function.199

Whereas the Indian Statute of 1973 provides native peoples with land rights, the aforementioned articles from the 1988 constitution work in conjunction with the Quilombo Clause in Article 68 of the constitution to fulfill the same role for Afro-Brazilians. This clause is interesting because “a review of the minutes of the constituent assembly hearings and legislative history records in the national library of Congress reveals that there were no discussions of the quilombo clause prior to its enactment.”200 Furthermore, most of the attention during the drafting of the constitution was given to Indigenous peoples who were more proactive in lobbying and demonstrating for their rights than Afro-Brazilians.201 Regardless of this, the clause has been useful as it states that “the descendants of the Quilombo communities who are occupying their land shall receive definitive title to their properties, and the state must issue them their respective land titles.” The effect of this law was unpredictable due to the fact that:

“since there have always been rural black communities that deny ties to slavery with origin stories about escaping prior to enslavement and communities that are, in fact, descended from groups of slaves who acquired possession of their land through gifts from their slave owners or from the Catholic Church, a definitive meaning for the words of the Constitution was elusive.”202
The situation was further complicated since “technically quilombos no longer existed after 1888 when abolition was declared, but the term continued to be used as a symbol of black resistance.” As a result, Brazilian civil society was free to create the meaning of the clause through a “process of open-ended post-legislative negotiation” in which “the impact, consequences, interpretations, and even meanings” of the law were determined by “the populace, police, judges, lawyers, government officials, and the press.”

In applying these laws, Brazilian courts make statements that are far more progressive than their South African counterparts. For example, in reviewing the use of these articles as justification for collective land invasions, the Brazilian Higher Court of Justice found that "a popular movement attempting to institute land reform cannot be characterized as a crime. This is a collective right, an expression of citizenship, and it aims at implementing a program based on the Constitution. Popular pressure is an acceptable means in a democratic state." In the same vein, the State Court of Rio Grande do Sul once prevented an eviction when it reasoned that:

"Before applying a law, the judge must consider the social aspects of the case: the law’s repercussions, its legitimacy, and the clash of interests in tension. The [MST] are landless workers [who] want to plant a product that feeds and enriches Brazil in this world so globalized and hungry. But Brazil turns its back. The executive deflects money to the banks. The Legislature . . . wants to make laws to forgive the debts of the large farmers. The press accuses the MST of violence. The landless, in spite of all this, have hope . . . that they can plant and harvest with their hands. For this they pray and sing. The Federal Constitution and Article 5 . . . offers interpretive space in favor of the MST. The pressure of the MST is legitimate. [I]n the terms of paragraph 23 of Article 5 of the Federal Constitution [that land shall attend it social function], I suspended [the eviction]."
At this juncture, it is important to note that Brazil is a civil law country. Although the sentiments by the judiciary mentioned above are important, we must not forget the context in which they operate. This is important because, in a common law system, judicial decisions are considered an important primary source. In a civil law system, on the other hand, the code is the source of the law while the court’s decisions are simply interpretations of it.

**The City Statute and the Right to the City**

In 2001, the Brazilian government again updated the Civil Code by passing “The City Statute” and, as a result, adopted some of the principles of the Right to the City Movement. The Right to the City incorporates “the social function of property and the social function of the city.” In sum, “the City Statute proposes the use of various urban planning tools to make urban land accessible to low-income families, to control speculation in areas designated as being of social interest, to expedite the process of regularization of tenure, and to conceding rights of use without conceding full and formal property ownership and freehold rights.” This statute offers differing procedures and tools for securing tenure on private and public lands, the details of which is beyond the scope of this paper. For our purposes, however, it is important to note how this statute treats private and public land.

With regards to private lands, it “establishes preemption rights for local governments, whereby areas of interest can be demarcated in local Master Plans and potentially acquired by local governments for projects of social interest, such as low income housing” and allows “multiple occupants of urban land to act as a group—or “condominium association”—and request possession of land tracts that have been occupied for at least 5 years.” It does so by framing the “interpretation of the constitutional principle of the social function of urban property and the city, lays down a regulatory framework for the construction and financing of urban development by municipalities, prescribes the design of democratic management of cities, and identifies legal modalities for comprehensive regularization of informal
settlements in private and public urban areas.” The Civil Code of 2002 further supports this function by internalizing “the social function of property by imposing a duty of solidarity upon the owner.” It also calls for “a new concept of property, based upon the constitutional principle that the function of property must be social, [that] overcomes the interpretation according to which . . . property is an exclusive function of the interests of the individuals, owners, or possessors.”

The legal mechanism for acquisition of public land used by The City Statute is referred to as the Real Right to Use Concession (CRRU). CRRUs were enacted by law in 1967 (Decree No. 271/67, Art 7 and 8) and are applicable to public land with documented use appearing for the first time in the late 1980s. With regard to public land, CRRUs are the most commonly used form of asserting rights and usually award squatters with a 50-year lease contract which allows them to remain on the land transfer the right to use, and use it as collateral. The City Statue operates with the Medida Provisoria No. 2220/01 (MP 2220/01) to provide individuals who occupied land before 1997 with rights of occupation. For these individuals:

“The state is also obliged, within a period of 1 year, to present individuals with alternative to guaranteeing them with rights to housing. The state is obliged to concede possessors real rights to use the occupied land, or alternatively, to relocate the residents to another area with legal tenure security (real rights to use).”

For occupations that began after 1997, squatters will face additional obstacles.

At present, the Brazilian approach to protecting the right to housing is, like that of South Africa, somewhat problematic. Similar to South Africa, Brazil’s failures can be highlighted through the country’s position as a host nation for the World Cup in 2014 as well as the Olympic Games in 2016. As early as 2011, Raquel Rolnik, the Special Rapporteur to the UN Human Rights Council on the right to adequate housing, was “particularly worried about what seems to be a pattern of lack of transparency, consultation, dialogue, fair negotiation, and participation of the affected communities in processes
concerning evictions undertaken or planned in connection with the World Cup and Olympics." 

Faced with these issues, she called “on federal, state and municipal authorities involved in the World Cup and Olympic projects to engage in a transparent dialogue with Brazilian society” and stated that “the authorities at all levels should put a stop to planned evictions until dialogue and negotiations can be ensured.”

Is such a framework justifiable in the United States?

As shown above, South Africa and Brazil have faced many similar structural issues throughout their history. Colonialism has deeply affected the two countries that are mired in inequality but have recently been taking steps to rectify this situation. In South Africa, state and local governments have the obligation to progressively provide access to housing by taking reasonable legislative and other measures to achieve the progressive realization of the right within available resources. Reasonability in this sense must: take into consideration the social, economic, and historical context; consider the capacity of institutions responsible for implementing the programme and is understood in the context of the Bill of Rights as a whole. In evaluating this right as a whole, the South African court, using a legal-moralist world view of adverse possession, believes that squatting obstructs or harms the right to progressive provision of adequate housing and views the right to adequate housing as a defensive measure. Brazil, on the other hand, has taken another stance. The Brazilian judiciary, on paper, takes a procedural approach as opposed to a moral one towards providing adequate housing. Furthermore, private land has a social function in Brazil, defined by people in numbers of 20,000 or more; public land by definition is to act in concordance with the constitution; and courts have found that people have a collective right to express their citizenship by occupying land. This right is weakened by the fact that the Brazilian judiciary has “historically interpreted the social function of property as a source of state-imposed external limitations on property rights” and, as a result, it has been “very difficult for the
justices to understand that, as an internal limitation, it should apply to the Brazilian Union in the same way that it applies to private owners.”

These systems of protecting the right to housing, as equitable as they seem on paper, are obviously not perfect. Only time will tell how successful they turn out to be in undoing the damage that colonialism has done to both countries. For now, they provide a starting point for analysis of countries such as the United States. Like South Africa and Brazil, the country may be in need of a system that provides for the right to shelter, amends historical injustice, and fulfills current needs. The United States is similar to both Brazil and South Africa with regards to racial discrimination and colonialism. It practiced slavery from 1770 to 1860 and gained most of its geographic territory by removing native peoples who inhabited the area. The later actions, when challenged in the Supreme Court, were justified under the Discovery Doctrine through which

“the Supreme Court deemed the acquisition of title by discovery the exclusive prerogative of European nations, following logic similar in structure to the Christianity criterion for ownership in the papal bulls. The discovery doctrine demarcated land rights for European sovereigns while excluding indigenous peoples as recognizable owners of territory; as Williams remarks, in Chief Justice Marshall's analysis, "American Indian tribes had no theoretical, independent natural-law-based right to full sovereignty over America's soil that a European discoverer might be required to recognize under Europe's Law of Nations." Preemptively excluding them from title by discovery, the Supreme Court viewed indigenous peoples as mere "occupants of the soil," as objects in the landscape of an agreement delineating property rights between European states. Viewed as objects of European agreement and as part of the "discoverable" natural environment and consigned to the thing-ness of object-being, indigenous peoples were denied the subjectivity of those deemed racially eligible to discover.”
After the eventual genocide of a great part of the indigenous population and the end of the Civil War in 1866, amendments were made to the constitution to end slavery and involuntary servitude\textsuperscript{224}, provide due process and equal protection under the law regardless of race\textsuperscript{225}, and remove restrictions on the right to vote due to race.\textsuperscript{226} The Southern Homestead Act of 1866 seemed to facilitate massive land redistribution. Unfortunately, this act, "which provided for the inclusion of former slaves in a massive public land distribution," overwhelmingly provided benefits to whites who constituted more than 75% of the applicants.\textsuperscript{227} The oppression of blacks by whites continued and was aided by the fact that, unlike Brazil and South Africa, the black population never formed a significant threat to the majority due to the relatively small portion of the population they made up. As Justice Harlan stated when dissented in \textit{Plessy v Ferguson}, "Sixty millions of whites are in no danger from the presence here of eight millions of blacks."\textsuperscript{228} As a result, in the South, white oppression of black Americans continued through the sharecropping system which was just a legal form of indentured servitude and slavery that lasted until the 1960s.\textsuperscript{229} Nationwide oppression continued and it was not until 1948 that the U.S. Supreme Court found that a state could support restrictive covenants barring Americans from purchasing property based on their race.\textsuperscript{230} America seemed to have changed after the Civil Rights era and had "legislative achievements comparable to the Reconstruction Era."\textsuperscript{231} These advancements however were stalled due to the Purposeful Discrimination rule. This rule

“requires proof of a racial purpose or motive to establish a discrimination case, made it near impossible for minorities to win, even in circumstances resembling the worst forms of pre-civil rights discrimination, segregation and disenfranchisement. In the same period, a hypersensitive version of the purposeful discrimination rule was applied to invalidate good-faith affirmative and remedial action, by taking any consideration of race - even if done in good faith to open opportunities and eliminate discrimination - as sufficient proof of purposeful discrimination.”
The justification for South African or Brazilian system of providing security of tenure is not limited to the racial history of the United States. It can also be found in present conditions. For example,

“Within the United States, there remains a large gap between the number of homeless individuals and the availability and desirability of homeless shelters - a gap that has likely grown as a result of the recent economic crisis. Between 2007 and 2008, the peak bed capacity for homeless individuals in the United States was 473,838. This estimate aggregates the available beds in both emergency shelters and transitional housing programs. Over 90 percent of emergency shelter beds and 83 percent of transitional housing beds were occupied on average. An additional 196,000 beds were available in permanent supportive housing. Though invaluable, permanent supportive housing serves a fairly specific population, namely formerly homeless individuals with disabilities. The total bed capacity for homeless persons is thus far below the number of homeless individuals nationally. Furthermore, distribution of beds throughout the country, and between rural, urban, and suburban areas, ultimately influences the capacity of homeless individuals to take shelter on any given night. The lack of traditional shelters forces many homeless individuals to seek alternatives options, including tent cities.”

In light of this issue the federal government passed the Stewart B. McKinney Homeless Assistance Act in 1987. Title V of this act stipulated that:

“All ‘surplus, excess, under-utilized, and unutilized’ federal property be used to ‘assist the homeless.’ The law says homeless use must take precedence over any other use. It specifies that vacant housing and other buildings can be provided to homeless people and nonprofit organizations through deeds or leases. To accommodate transfers, the law stipulates that each federal ‘landholding agency’ must report to HUD any properties not being used. After a government agency makes notification, HUD determines the ‘suitability’ of the building for
homeless use and publishes available properties in the federal register. Homeless people or groups can then apply for deeds, leases, or ‘interim use permits’.

Unfortunately, this law sits idle as the Federal Government does not make adequate notifications to list available properties. As a result, it faced lawsuits in 1988, 1991 and 1993.

Other attempts have been made throughout American history to progress the right to housing but they have been curtailed. For example, in his second inaugural address, President Roosevelt declared that "a . . . basic essential to peace is a decent standard of living for all individual men and women and children in all nations" and that this required substantive rights such as "the right of every family to a decent home." In light of these sentiments, the 1949 Congress passed the Housing Act of 1949, which declared a national policy of a suitable living environment for every American family. This act "aimed not only to enable the construction of more than 800,000 new public housing units within six years of passage, but also to launch slum clearance and urban renewal programs." Unfortunately, the government fell short of its lofty goals when President Truman reduced the expected number of new units from 800,000 to 30,000 due to the Korean War. President Nixon then dealt another blow to the provision of adequate housing to Americans when, in 1973, he declared a moratorium on all federal housing programs and passed the Housing and Community Development Act of 1974. This Act shifted housing costs to tenants.

Is such a framework possible in the United States?

It is hard to argue that the United States has a legally binding obligation to fulfill the right to housing. The United States government has officially denied the existence of this right, going as far as saying that “its position was that through good governance, democracy, and economic management and rule of law, conditions could be created where people could attain adequate housing.” The United States also has not ratified the CESCR, which is seen as the most important of the binding international
agreements enshrining the right to housing. The United States constitution, according to the Supreme Court, also does not contain a right to housing based on a direct reading of the text or drawing inferences with regards to the intent of the framers of the constitution. In *Lindsey v. Normet*, the highest court of the United States, much like the South African Supreme Court, found that there is no right to a certain level of quality and habitability. In this case, the homeless plaintiffs argued that provisions of the Oregon Forcible Entry and Wrongful Detainer (FED) Statute violated the Due Process or Equal Protection Clauses of the Fourteenth Amendment and violated their need for decent shelter. In response, Justice White stated that, “the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.” As a result, the creation of a right to housing is left to the legislature and is not something that exists in American law for the Judiciary to rule on. Faced with the Supreme Court’s view, it is possible to argue that a right to housing does exist based on the Ninth Amendment being read together with the general welfare clause of the preamble to the constitution. It is also possible to argue that such a right can find support in the Thirteenth Amendment which can, be read to provide for a federal duty to assist citizens in finding a minimum level of subsistence and shelter.

With that said, there are, in fact, many arguments that can be made to support a right to housing in the United States. In light of the injustices mentioned supra, however, we must simply understand that, in the United States, “under the present conception, housing rights are protected as negative rights, which guard against undue interference with possession or the opportunity to obtain housing, but do not operate to facilitate possession through providing the means and availability of
affordable housing."  

This is important as the purpose of this paper is not to suggest a perfect system of land tenure to provide security of tenure for all Americans. Instead, it aims to show that the history and considerations that have affected the evolution of the right to housing in South Africa and Brazil are present in the United States. Due to the presence of similar factors, it is only logical to assume that this right should be expanded in the United States. America and American lawmakers have a lot to learn from their South African and Brazilian counterparts and should begin to make similar considerations with regards to inequality. This is important because it is possible to use urban policy to assist those who are landless in attaining true liberty. To do this, a reconceptualization of property, security of tenure, adequate housing, and human rights is needed in the United States. This re-conceptualization must take into account the state of the American housing market with two things in mind. First, it must account for the fact that the market in 2010 left at least 649,917 American citizens homeless.  

Second, it must also account for the fact that “roughly 1.56 million people, or one in every 200 Americans, spent at least one night in an emergency shelter or transitional housing program in 2009."  

To understand the relative size of these numbers, one only has to consider the fact that the International Security Assistance Force (ISAF), which is the NATO led security mission charged with occupying and democratizing Afghanistan, currently numbers at about 99,590 troops, 68,000 of which are American citizens.  

Currently, the United States military as a whole is composed of 1,088,465 active duty personnel.  

When viewed with these numbers in mind, the United States cannot be seen as lacking a need to solve the same problems, which the South African and Brazilian constitutions are applauded for tackling.

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1 Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, at 74 (1985).
2 Id., at 87.
4 Joseli Macedo, Urban land policy and new land tenure paradigms: Legitimacy vs. legality in Brazilian cities, 25 Land Use Policy 2, at 259.
Housing (Art. 11.1):
forced evictions (2012).

NEED TO BE CONSISTE


Rights of the Child in Article 27, and the Convention on Disabilities in Article 28, the Convention relating to the Status of Refugees in Article 21, the Convention on the Rights of Migrant Workers and members of their Families in Article 43(1), the Convention on the Rights of Persons with Disabilities in Article 28, the Convention relating to the Status of Refugees in Article 21, the Convention on the Rights of the Child in Article 27, and the Convention on the Rights of the Child in Article 27).


Padraic Kenna, Globalization and Housing Rights, 15 Ind. J. Global Legal Stud. 397, 441. [NEEDS DATE] [ALSO, NEED TO BE CONSISTENT IN USE OF ITALICS, ETC. IN CITATION OF LAW REVIEW ARTICLES]

Id. at 437
Id. at 422

Helena A. Garcia, The Unending Quest for Land: The Tale of Broken Constitutional Promises, 89 Tex. L. Rev. 1895, 1899
Id. at 1900
Id. at 1903


conditions for the Indian and Coloured communities were little better.”

and environmentally degrading from the squatter camps that surrounded the urban areas were forcibly removed and dumped into overcrowded and environmentally degraded reserves, which were declared “independent Bantustans.” The Segregated Reserves, which were declared “independent Bantustans.” The Segregated Reserves, which were declared “independent Bantustans.”

In the 1970s black Africans from the squatter camps that surrounded the urban areas were forcibly removed and dumped into overcrowded and environmentally degraded reserves, which were declared “independent Bantustans.” The Segregated Reserves, which were declared “independent Bantustans.” The Segregated Reserves, which were declared “independent Bantustans.”

Francis Wilson, Historical Roots of Inequality in South Africa, 26(1) Economic History of Developing Regions 1, 4 (2011) (This period of violence was “essentially a two-hundred-years’ war in which those coming from Europe appropriated to themselves most of the land.” During this upheaval settlers were appropriating “many of the strategic springs and rivers and the land which they watered.”).


Id. at 417.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id. at 330 (“all the treaties were in reality valueless. In the first place, the chief had no power to alienate land; in the second place, what he thought he was doing was to give the European the usufruct, not the possession of it. In their ignorance of tribal customs, Europeans of all nations made what they thought were contracts by which the land became theirs, and to this day they all argue that their particular colony was acquired by some genuine treaty. What really happened was that two totally different conceptions of land ownership were in conflict and neither side knew or recognized the conflict.”)


Day, supra.

Zwart, supra at 52.

Day, supra.

Karol Boudreaux, Land Reform as Social Justice: The Case of South Africa, 30(1) Economic Affairs 13, 14 (2010) (”Black farmers were viewed by some as unwelcome competition.”).
Everyone has the right to have access to adequate housing.

(1) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

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

Every child has the right

c. To basic nutrition, shelter, basic health care services and social services;

62 Yvonne Erasmus, What can we learn about the meaning of race from the classification of population groups during apartheid?, 104(11/12) South African Journal of Science, 450 (2008).
63 Id. (There was “not a single concrete definition of race during apartheid. Instead, race was whatever people understood or wanted it to be, and racial classification could be attained through ‘performing’ an identity with sufficient proficiency to ‘ get away with it’.”).
66 Id.
67 Id.
69 Id.
73 Id. at 22
74 Id. at para 30
75 Id. at 29.
76 Id. at 28.
77 Id. at 26.
78 Id. at 24.
79 Id. at 23.
80 Id. at 31.
82 Id. at para 8.
83 Id. at para 4.
84 Id.
85 Id. at 30
86 S. Afr. Const. 1996, § 49 (“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”). [ASSUMING THIS IS A QUOTE]
89 Id. at 22
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
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.
93 Id. at 5.
95 Article 11.1 of the Covenant provides that:
   The States parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of important co-operation based on free consent.
96 Article 2.1 of the Covenant provides that:
   Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
97 Government of South Africa v. Grootboom, Case CCT 11/00, Constitutional Court of South Africa [Vol. 2, pp. 1093-1101], Para 28 (The court saw a conflict between the Constitution and the Covenant as follows:
   "(a) The Covenant provides for a right to adequate housing while section 26 provides for the right of access to adequate housing. (b) The Covenant obliges states parties to take appropriate steps which must include legislation while the Constitution obliges the South African state to take reasonable legislative and other measures.").
98 Id. at Para 31. [be consistent with capitalizing (or not) “para”]
99 Id. at 32.
100 Id. at 33.
101 Id. at 34.
102 Id. at 35.
103 Id.
104 Id.
105 Id.
106 Id. 33.
107 Id. 31.
108 Id. para 38.
109 Id. para 40.
110 Id. para 41-42.
111 Id. para 43-44.
112 Id. para 45.
Section 28 states that:

“Every child has the right –
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services”.

151French, supra at 24.
152Id.
153Dalton, supra at 178.
154French, supra note XX at 24.
155Dalton, supra note XX [etc.] at 178; Cunha supra at 1173.
156Cunha, supra at 1173.
157French, supra at 24.
158Id. at 60.
159Id. at 39.
160Id.
161Id.
163Dos Santos Cunha, supra at 1172-1174.
164Id.
165Susanna Mann, Where slaves ruled, National Geographic, April 2012 at 122.
166Id.
168Id.
169Maria Helena Pereira Toledo Machado, From Slave Rebels to Strikebreakers: The Quilombo of Jabaquara and the Problem of Citizenship in Late-Nineteenth-Century Brazil, 86(2) Hispanic American Historical Review 247, 251.
170Dalton, supra at 8.
171Dos Santos Cunha, supra at 1172.
172Id. at 1174
173Codigo Civil do Brasil art. 6.
175Dos Santos Cunha, supra at 1175.
176Id. at 1174
177Id. at 1175.
179Id.
180Id.
181Mann, supra at 122.
183Pindell, supra at 451.
184French, supra at 24.
185Id. at 39.
186Id. at 190.
187RESOLUTION Nº 12/85 Case Nº 7615, Brazil, March 5, 1985.
188Macedo, supra at 260.
Pindell, supra at 453.

Macedo, supra at 262.

Id.

Constituição Federal de 1988, artigo 182.

Id.

Constituição Federal de 1988, artigo 182.

Edesio Fernandes, Implementing the Urban Reform Agenda in Brazil: Possibilities, Challenges, and Lessons, 22(3) Urban Forum 299, 301.

Leonardo Avritzer, Living under a democracy: participation and its impact on the living conditions of the poor, 45 Latin American Research Review 166, 178.

Constituição Federal de 1988, artigo 183 (“An individual, who possesses an urban area of up to two, hundred and fifty square meters, for five years, without interruption or opposition, using it as his or as his family’s home, shall acquire domain of it, provided that he does not own any other urban or rural property.”)

Flavio A.M. de Souza, Security of land tenure revised: the case of CRRU in Recife and Porto Alegre, Brazil, 28(2) Habitat International 231, 239.

Constituição Federal de 1988, artigo 184. (“It is within the power of the Union to expropriate on account of social interest [. . .] rural property which is not performing its social function.”)

French, supra at 94.

Id. at 92.

Id. at 93.

Id. at 6.

Kevin E. Colby, Brazil and the MST: Land Reform and Human Rights, 16 N.Y. Int’l L. Rev. 1, 22.

Thomas, supra at 1122.

Pindell, supra at 435.

Macedo, supra at 262.

Macedo, supra at 262.

Tayyab Mahmud, "Surplus Humanity" and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession, 14 Chap. L. Rev. 1, 71.

Cunha, supra at 1180

Cunha, supra at 1179

Macedo, supra at 263.

De Souza, supra at 231–244.

Macedo, supra at 263.

De Souza, supra 231–244.

Id.

Id.


Plessy v. Ferguson, 163 U.S. 537, 560 (U.S. 1896)
Adjoa A Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14(3) J. Gender Race & Just.633, 650-651 ("Sharecropping became a mechanism to chain Blacks to certain plantations under the guise of hiring them, extending them credit to work the fields with the promise of a wage at the end of their term, but making certain they were in debt to the plantation owners. This debt became a legal obligation, which had to be worked off before the sharecroppers were permitted to leave the employ of the farmers, plantation owners, mine owners, and so on. While in the employ of these individuals, they were often in old-styled slavery, treated as little more than chattel and brutalized to deliver productive work. This sharecropping system, chaining Africans and, after the passage of the Fourteenth Amendment to the U.S. Constitution, African Americans, to the land, lasted in some form until 1950, and did not actually end until the 1960s Civil Rights Movement interceded.").

Shelley v. Kraemer, 334 U.S. 1, 22 (U.S. 1948) (holding that state courts could not constitutionally prevent the sale of real property to blacks even if that property is covered by a racially restrictive covenant). The opinion also notes that, standing alone, racially restrictive covenants violate no rights, but that their enforcement by state court injunctions constitutes state action in violation of the 14th Amendment. Id. at XX. [can’t put that much info into the parenthetical.]

Hernandez-Truyol, *supra* at 1224.


Id.

Id.


Id.

Id.

Id.


See, e.g., Geoffrey Mort, *Establishing A Right to Shelter for the Homeless*, 50 Brook. L. Rev. 939, n23 ("Nowhere in the United States Constitution is such a right [to housing] even implied, and few, if any, cases have attempted to assert this position."). See also Christine Robitscher Ladd, *Note: A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. Rev. 272 (1986) ("There is no affirmative right to shelter under the federal Constitution"). Id. at n7, characterizing Lindsey v. Normet, 405 U.S. 56, 74 (1972).

405 U.S. 56, 73 (1972).

Id. At 74.

U.S. Const. amend. IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. pmbl. "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our prosperity, do ordain and establish this Constitution for the United States of America."

U.S. Const. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction . . . Congress shall have the power to enforce this article by appropriate legislation.")

Green, *supra* at 442.

