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## Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint

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## Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint

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## I. INTRODUCTION: LAW AND POLITICS

We derive our passion for and distrust of democratic politics from the Athenians. The triumph of the democrats over the oligarchs in ancient Greece is celebrated, but the trial and execution of Socrates for opposing the prevailing orthodoxy offends our contemporary sense of justice as much as it did Plato's.<sup>1</sup> As a result, Plato became disillusioned with politics and sought to define justice in purely philosophical terms.<sup>2</sup> His pupil, Aristotle, thought he was wrong to collapse all virtues into justice; politics—a practical discipline aimed at addressing the needs of citizens—has its own virtues and goals.<sup>3</sup> Aristotle explained that in politics, man realizes his potential through the *polis*, and that the purpose of the *politeia* (constitution) is to find the “proper balance between all the various legitimate forces that operated on a state.”<sup>4</sup> Platonic philosophers, however, when confronted by the “great beast of the populace, the democratic assembly,”<sup>5</sup> continued to view politics with suspicion. In their view, a constitution should embody an ideal statement of impartial justice that is independent of politics, or at least provide an ethical foundation for a different kind of politics.<sup>6</sup>

Contemporary constitutionalism is a contested and contradictory synthesis of Platonic and Aristotelian sensibilities. It is broadly expressed in the complex relationship between *law*, as legal constraint, and *politics*, as conflict and disagreement. These are not parallel spheres that can be defined and separated by making bright-line distinctions.<sup>7</sup> But it is important to retain a sense of the distinctiveness of these two modes of decisionmaking in order to preserve the integrity<sup>8</sup> of adjudication, and

1. See, e.g., I.F. STONE, *THE TRIAL OF SOCRATES* 225–30 (1989).
2. See C.D.C. Reeve, *Introduction to PLATO, REPUBLIC* viii, viii–x (C.D.C. Reeve ed., G.M.A. Grube trans., 1992).
3. ALAN RYAN, 1 ON POLITICS: A HISTORY OF POLITICAL THOUGHT FROM HERODOTUS TO THE PRESENT 78–80 (2012). In his *Republic*, Plato provides an account of a just polis in the utopian city of Kallipolis. Reeve, *supra* note 2, at xv. His solution to the evils being practiced in Athenian society and politics was to propose rule by philosopher kings. *Id.* As he explains in his seventh letter:
 

I . . . finally saw clearly that the constitutions of all actual cities are bad and . . . beyond redemption. . . . Hence I was compelled to say in praise of the true philosophy that it enables us to discern what is just . . . and that the human race will have no respite from evils until those who are really and truly philosophers acquire political power . . . .

*Id.* at ix. In the polis of Plato's imagining, there is justice because philosophy governs and there is no politics.
4. RYAN, *supra* note 3, at 34.
5. JACQUES RANCIÈRE, *ON THE SHORES OF POLITICS* 1 (Liz Heron trans., 1995).
6. See JOHN RAWLS, *A THEORY OF JUSTICE* 194–200 (rev. ed. 1999) (1971).
7. Rather, as Duncan Kennedy has argued, politics and law interpenetrate and overlap. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 19 (1997).
8. Insistence on this distinction is not necessarily associated with formalism and does not preclude recognition of the ideological content of law. Even Karl Klare, who advocates the adoption of a politicized conception of constitutional law in South Africa, maintains that “[a]mong [the] types of law-making, adjudication is . . . the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained and structured by text, rule, and principle.” Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 147 (1998). However,

“to make adjudication serve the larger goal of advancing the power of a free people to govern themselves.”<sup>9</sup>

The logic of constitutionalism is to displace democratic politics in order, paradoxically, to preserve it from the destructive force of its own passions.<sup>10</sup> This displacement and disparagement is accentuated when judges resort to arguments from political morality in adjudication.<sup>11</sup> Constitutionalism aspires to provide democratic politics with safe harbors, which in the absence of legal constraint may burst its banks. But what is the cost of this shrinkage of politics, and which entitlements deserve to be immunized from the risks of short-term politics?<sup>12</sup>

Each specific case of constitutional entrenchment requires justification, and raises distinct questions of interpretive praxis when constitutional disputes are adjudicated. The text of the South African Constitution addresses some of these questions.<sup>13</sup> But determining (1) when judicial intervention is appropriate, and (2) the proper modes of judicial reasoning and standards of review, are not always self-evident or even derivable from the text. Nor is it always clear when extra-textual arguments from political morality are justified.

Since the establishment of South Africa’s Constitution in 1996,<sup>14</sup> and particularly over the past five years, the judiciary has boldly asserted its powers of review over matters *internal* to Parliament.<sup>15</sup> These internal matters include the exercise of

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there is also an ambiguity in this early formulation of his theory of transformative constitutionalism. While maintaining that interpretive fidelity remains an important judicial value, this he says does not mean that judges are limited to consulting values imminent within the text. *Id.* at 158–59. This reasoning suggests that there are no constraints on the sources of political morality external to the constitutional text judges may rely on in adjudication. This article calls that proposition into question in the context of the exercise of judicial review of parliamentary rulemaking, a form of non-legislative parliamentary action. In this context, the argument that extra-textual moral reasoning is required to contribute to egalitarian social change is not available.

9. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 115 (1996).

10. *See id.* at 167.

11. In effect, democratic politics are restricted to mundane, negotiable matters of conflicting material interests, not including fundamental moral questions bearing on the individual’s right to autonomy, dignity, and impartiality.

12. *See* UNGER, *supra* note 9, at 167.

13. The South African Constitution contains a list of judicially enforceable individual rights framed in broad language that invites moral reasoning, and certain vertical and horizontal structures are protected from revision through ordinary democratic politics. Section 11 is an interesting example. It provides simply: “Everyone has the right to life.” S. AFR. CONST., 1996, § 11. In the first human rights case after the 1994 election, *S v. Makwanyane*, the Constitutional Court held that this right rendered the death penalty unconstitutional. 1995 (3) SA 391 (CC) at para. 151. This conclusion does not follow axiomatically from the language of the section. Some reference to extra-textual considerations and argument was required. *See id.* at paras. 10–95.

14. *See* S. AFR. CONST., 1996, § 1.

15. In comparable jurisdictions, such internal matters are considered either non-justiciable, or appropriate for only deferential judicial consideration, since they fall within the domain of Parliament as a co-equal branch. It is not the argument of this article that parliamentary rulemaking should be considered non-justiciable, nor that the proper boundaries of judicial review are static. That would be a difficult

disciplinary powers by Parliament over its members;<sup>16</sup> the constitutionalization of a judicially-enforceable obligation to facilitate public participation in its deliberations;<sup>17</sup> the creation of a non-textual constitutional right of individual members of Parliament to table and have considered legislation drafted at the expense of Parliament;<sup>18</sup> and the review of rulings by the Speaker of the National Assembly<sup>19</sup> when Parliament is in session.<sup>20</sup>

The focus of this article is on *Mazibuko v. Sisulu*, a case in which the Constitutional Court, exercising powers of review over parliamentary rulemaking, invoked a rather iconoclastic moral argument to conclude that there was an unconstitutional “lacuna” in the National Assembly Rules regarding the scheduling of a debate and vote on a motion of no confidence in the President.<sup>21</sup> The decision has significant implications for the separation of powers between the judiciary and the political branches.

This article makes a provisional argument for the exercise of two forms of judicial restraint in this context.<sup>22</sup> The first is “interpretive restraint”—attributing meaning to a constitutional text by paying attention to its language, and by being clear about when recourse to moral reasoning *outside* the text is justified. The second is “institutional restraint”—considering the possible negative consequences of constitutionalization and judicial intervention. These consequences have a bearing on the determination of the appropriate standard of review.

The decision in *Mazibuko* to subject parliamentary rulemaking to constitutional review was made in a political context characterized by less sanguine assessments of South Africa’s democratic transition and intensifying political conflict inside and

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proposition to sustain in the presence of the principle of constitutional supremacy enshrined in section 2 of the Constitution. S. AFR. CONST., 1996, § 2. Rather, the focus is on a critique of the *Mazibuko* Court’s interpretive method in exercising its undoubted powers of review.

16. See, e.g., *Speaker of the Nat’l Assembly v. De Lille* 1999 (4) SA 863 (SCA).

17. See, e.g., *Doctors for Life Int’l v. Speaker of the Nat’l Assembly* 2006 (6) SA 416 (CC).

18. See, e.g., *Oriani-Ambrisini v. Speaker of the Nat’l Assembly* 2012 (6) SA 588 (CC) at para. 135.

19. The National Assembly, which represents the population at large, is one of two assemblies of a bicameral Parliament. The second is the National Council of Provinces, which represents the nine provincial legislatures. S. AFR. CONST., 1996, § 42.

20. See, e.g., *Malema v. Chairman of the Nat’l Council of Provinces* 2015 (4) SA 145 (WCC) at para. 9. This case can be usefully compared with the Canadian case, *Canada (House of Commons) v. Vaid*, in which Justice Ian Binnie explained why the Speaker’s rulings in the House are not reviewable in Canada. [2005] 1 S.C.R. 667, 680 (Can.).

21. 2013 (6) SA 249 (CC) at para. 61.

22. When this article was first presented at the symposium, commentator Matiangai V.S. Sirleaf usefully framed the issues as involving the spectrum between “judicial maximalism” and “judicial minimalism.” Judicial maximalists reject textual, democratic accountability, and institutional competence arguments for judicial restraint in any context. Minimalists, on the other hand, are skeptical of the claim that judicial review is required for the protection of individual rights and insist on historicist or literal interpretations of rights provisions. I adopt an intermediate position, which is supportive of judicial protection of individual rights, and moral reasoning in this context, while being skeptical of the expansion of judicial review to parliamentary rulemaking on both normative and institutional grounds.

outside Parliament.<sup>23</sup> More than two decades after our founding *higher law* moment, we have become ever more distrustful of democratic politics and reliant on Platonic guardianship by the judiciary. Richard Rorty has suggested that:

As our presidents, political parties and legislators become ever more corrupt and frivolous, we turn to the judiciary as the only political institution for which we can still feel something like awe. This awe is not reverence for the Euclid-like immutability of Law. It is respect for the ability of decent men and women to sit down around tables, argue things out and arrive at a reasonable consensus.<sup>24</sup>

But, judicial intervention is not always an efficacious or legitimate response to perceptions of political dysfunction.<sup>25</sup> Democratic politics also has its own virtues and *raison d'être*, and as such is deserving of respect. This value of democratic politics has been eloquently rendered by Jacques Rancière:

Politics is not a function of the fact that it is useful to assemble, nor of the fact that assemblies are held for the sake of the good management of common business. It is a function of the fact that a wrong exists, an injustice that needs to be addressed. But the political wrong associated with the double embodiment of the people is not a wrong like any other. . . . [I]t cannot be assimilated to the sort of juridical wrong that a court of law can address on the basis of laws or regulations. The irreconcilability of the parties antedates any specific dispute.<sup>26</sup>

So in a democracy, judicial restraint—in order to facilitate democratic self-government and to preserve the independence of law from politics—is an important virtue.

In this introduction, I have stressed the importance of retaining a sense of the distinctiveness of law and politics in a constitutional democracy and drawn attention to the consequences of the constitutionalization of parliamentary rulemaking, which has a significant impact on the separation and balance of powers between the courts and the representative branch. Part II emphasizes the specificity of parliamentary rulemaking as a distinct field of public law, and its proximity to politics. This discussion forms an important part of my contextual argument for the exercise of

23. In his opening comments to the conference, Judge Davis, who also wrote the *Mazibuko* judgment in the High Court, remarked that “the court should do more,” since the governing party, the African National Congress (ANC), is becoming more fragmented. There is some language in his judgment which suggests on the contrary that it is the monolithic dominance of the ANC that justifies judicial review of parliamentary rulemaking. See *Mazibuko*, 2013 (6) SA 249 at para. 10. Both propositions suggest that judges should respond to what in their view are undesirable outcomes of political contests, by subjecting politics and parliamentary rulemaking to judicial supervision. This article questions that argument.

24. See RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 112 (1992). Roberto Unger takes a more dismal view of contemporary constitutionalism’s recourse to judicial review and its discomfort with democracy, arguing that it “shows up in every area of contemporary legal culture: in the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists.” UNGER, *supra* note 9, at 72–73. Here, I do not explore the reasons for what I think is a rather pronounced tendency to the “hypertrophy of countermajoritarian practices and arrangements,” *id.* at 73, in post-apartheid South Africa’s legal culture.

25. As Justice Thembile Skweyiya observed in *Merafong Demarcation Forum v. President of the Republic of S. Afr.*, “[c]ourts deal with bad law; voters must deal with bad politics.” 2008 (5) SA 171 (CC) at para. 308.

26. RANCIÈRE, *supra* note 5, at 97.

restraint by the courts when exercising powers of review. I also elaborate on what is meant by judicial restraint, as distinct from non-justiciability. Here, I draw a distinction between two overlapping forms of restraint (interpretive and institutional), both of which form part of my critique of the *Mazibuko* judgments in the High Court<sup>27</sup> and the Constitutional Court. In Part III, I discuss the main facts and findings of the *Mazibuko* case and then undertake a critical analysis of the case in Part IV. This is followed by my provisional conclusion in Part V, which allows for the fact that the relationship between the judiciary and the political branches is not static because ideas about the norms that are appropriate for the judiciary to enforce, and the conceptions of democracy it may rely on, can change over time.<sup>28</sup>

## II. THE SPECIFICITY OF PARLIAMENTARY RULEMAKING AND JUDICIAL REVIEW

Parliamentary rules and procedures should be conceived of as a distinct area of public law.<sup>29</sup> This distinctiveness is derived from the specificity of its object—the regulation of the political contests and disagreements between political parties inside the representative branch. Since parliamentary rules and procedures are formulated in the “circumstances of politics”<sup>30</sup> and are the “‘in-between’ of politics,”<sup>31</sup> they are likely to be a source of conflict between political parties that have substantive disagreements.

Parliamentary rules, furthermore, apply only *inside* Parliament, within which members enjoy constitutional immunities from criminal and civil liability not enjoyed by the general public.<sup>32</sup> In this sense, parliamentary rules are exceptional and specific. They also do not share the formal characteristics of laws of general application which impact the individual rights of non-members.<sup>33</sup> It follows that specific questions

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27. *Mazibuko v. Sisulu* 2013 (4) SA 243 (WCC).

28. In the absence of a formal rule of recognition, it remains important to have clarity about which norms are part of the legal system, not only for reasons of certainty, but because these norms are a source of judicial power and therefore enforceable in a constitutional democracy.

29. In *The Idea of Public Law*, Martin Loughlin articulates a conception of what is distinctive about public law. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 5 (2004). This distinctiveness is derived from “the activity of governing through the institution of the state.” *Id.* at 6. He rejects attempts to understand public law as an ideal construct by fusing constitutional law and moral theory. *See id.* at 28. Instead, he emphasizes its prudential character as a method of mediating conflict. *Id.* at 152. For him, politics refers to a set of practices within a state and therefore within public law, preoccupied with conflict, not a consensus. *See id.* at 40. He emphasizes the “brokenness of politics,” *id.* at 163, the “contest for authority,” the “inevitability of clashes,” and the “multiplicity of moral maps,” *id.* at 156.

30. JEREMY WALDRON, *LAW AND DISAGREEMENT* 102 (1999).

31. *Id.* at 76.

32. *See* S. AFR. CONST., 1996, §§ 45, 58.

33. In *AAA Investments (Proprietary) Limited v. Micro Finance Regulatory Council*, a case concerning rules made by a private body with regulatory functions, Justice Catherine O’Regan found that the rules concerned were public (not private) and therefore reviewable because they applied generally and were coercive in effect. 2007 (1) SA 343 (CC) at paras. 119–21. This is not a question that was considered in *Mazibuko* in relation to parliamentary rules.

might arise when a court exercises powers of judicial review over non-legislative parliamentary action.<sup>34</sup>

I question, firstly, whether the Constitutional Court's argument from political morality, aimed at excluding political negotiations and bargains with respect to the scheduling of no confidence motions, can be justified as an interpretation of the language and underlying values of the Constitution. The Court's rather novel interpretive strategy, displacing democratic politics and majoritarian decisionmaking with respect to parliamentary rulemaking, should therefore be critically examined to assess whether it is justified in this context.

Additionally, considerations arising from the *specificity* of parliamentary law are relevant to the argument for institutional restraint.<sup>35</sup> Aileen Kavanagh has noted that one of the more important challenges facing courts today is the question of the proper limits of their constitutional role:

[T]he question of judicial restraint forces us to grapple with larger theoretical questions concerning the constitutional separation of powers among the three branches of government. It prompts us to consider what courts should do and, crucially, what they should *not* do. Moreover, it challenges us to think deeply about the nature of judicial reasoning and whether it is appropriate for judges to take into account the consequences their decisions will have . . . .<sup>36</sup>

This is particularly important in an anti-formalist jurisdiction<sup>37</sup> that rightly eschews "mechanical jurisprudence"<sup>38</sup> and the illusory search for legal determinacy. But thus unbound, in what sense is the exercise of judicial power still limited by law?

Judicial restraint should be distinguished from non-justiciability. Whereas the latter precludes judicial review through a priori bright-line rules, the former is a matter of judicial *self*-restraint. It is for the courts themselves to decide the limits of their power and not a question of what powers judges actually have or do not have.

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34. See Anashri Pillay, *Reinventing Reasonableness: The Adjudication of Social and Economic Rights in South Africa, India and the United Kingdom* (2011) (unpublished Ph.D. dissertation, University College London) (discussing socioeconomic rights adjudication).

35. See Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, 60 U. TORONTO L.J. 23, 23–24 (2010).

36. *Id.* at 24.

37. Klare, *supra* note 8, at 176–78. Klare argues that to give effect to the transformative purposes of the South African Constitution, South African lawyers should jettison the conservative legal culture we inherited from the past and its assumptions about the objectivity and political neutrality of legal reasoning. *Id.* at 168–69. He makes a persuasive argument for reasoning from political morality in interpreting the Bill of Rights. *Id.* at 154. He does not, however, consider the institutional implications of his theory of transformative adjudication or consider how the structural provisions of the Constitution should be interpreted. Klare's article continues to exert considerable influence on South African constitutional jurisprudence.

38. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). The jurisprudential school of legal realism, which emerged in the United States in the wake of the Great Depression, challenges the assumption of traditional jurisprudence that legal conclusions that derive from a pre-existing set of ideologically neutral rules are right.

*A. Interpretive Restraint*

By interpretive restraint, I mean the process of attributing meaning to a constitutional text by paying attention to its language and being clear about when recourse to moral reasoning *outside* the text is justified. This is important because constitutional interpretation as a constrained interpretive practice is essential to the idea of the Constitution as binding law, distinguishable from politics.<sup>39</sup> A court's interpretive practices can both (1) accentuate constitutionalism's displacement effect on democratic politics,<sup>40</sup> and (2) negatively impact the constitutional value of separation of powers between the judiciary and political branches.

Ronald Dworkin articulated and defended a moral reading of the United States Constitution.<sup>41</sup> In *Taking Rights Seriously*, he turned to a Kantian critique of utilitarianism to explain the importance of individual rights:

In any community in which prejudice against a particular minority is strong, then the personal preferences upon which a utilitarian argument must fix will be saturated with that prejudice; it follows that in such a community no utilitarian argument purporting to justify a disadvantage to that minority can be fair.<sup>42</sup>

Dworkin's moral argument for the constitutional protection of individual rights in the political community is aimed at protecting the fundamental interests of individuals in their dignity and autonomy, and in the impartiality of collective decisions.<sup>43</sup>

The *text* of the South African Constitution incorporates a justiciable Bill of Rights.<sup>44</sup> At least where "fundamental rights and freedoms"<sup>45</sup> are concerned, it lends itself to a moral reading as "value-drenched" since those rights and freedoms are cast

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39. See LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 4 (1991).

40. In *West Virginia Board of Education v. Barnette*, Justice Owen Roberts said the purpose of judicial enforcement of rights is to trump democratic politics: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." 319 U.S. 624, 638 (1943).

41. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) [hereinafter *JUSTICE FOR HEDGEHOGS*].

42. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 284 (Bloomsbury Academic 2013) (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

43. At least where democratic processes cannot be trusted to respect the moral claims of individuals, such claims should be treated as justiciable legal rights that are insulated from the risks of majoritarian politics. The idea that individuals have certain moral claims that must be protected in a constitutional democracy has gained wide currency, even if the proper balance to be struck between political and legal mechanisms for their protection continues to be debated. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); WALDRON, *supra* note 30.

44. S. AFR. CONST., 1996, §§ 7–39.

45. A. Chaskalson, *Law in a Changing Society: The Past Ten Years: A Balance Sheet and Some Indicators for the Future*, 5 SAJHR 293, 297 (1989).

in abstract language and concern the fundamental moral claims of individuals.<sup>46</sup> In this context, a narrow literalism fails as an interpretive strategy.<sup>47</sup> But how “thick” with moral and political values, which it is the exclusive responsibility of the judiciary to identify and apply, is the version of constitutionalism that we have embraced? This question is not one that is simply settled by the text of the Constitution, which in addition to the Bill of Rights, includes structural provisions specifying and allocating powers in language more prosaic and less open ended than that of the rights provisions.<sup>48</sup>

In *Mazibuko*, the Constitutional Court, in interpreting specific structural provisions concerning the powers and functions of Parliament, expanded the moral reading to include matters of parliamentary rules and procedures.<sup>49</sup> It specifically introduced a discourse of *rights*, and the concept of democracy as *deliberative*, into its evaluation of parliamentary rules and procedures in order to justify judicial supervision of parliamentary rulemaking. First, I question the Court’s introduction of a non-textual moral argument in this context. The deontological case for the protection of individual rights against majoritarian decisionmaking is absent where the court is reviewing parliamentary rulemaking. Furthermore, this was not a case concerning the basic rights of minority parties to participate in the parliamentary process.<sup>50</sup> Second, I characterize the Court’s moral argument as a case of “constitutional bootstrapping” since it is not anchored in either the text of the Constitution or its underlying values. Thirdly, the recourse to moral reasoning, and the consequent “displacement” of democratic politics, is not justified since it misconstrues the nature of the antagonism between political adversaries inside a representative body. As Bernard Williams has observed in criticizing moralism in legal and political theory:

A very important reason for thinking in terms of the political is that a political decision—the conclusion of a political deliberation which brings all sorts of considerations, considerations of principle along with others, to one focus of decision—is that such a decision does not in itself announce that the other party was morally wrong or, indeed, wrong at all. What it immediately announces is that *they have lost*.<sup>51</sup>

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46. Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication*, 18 SAJHR 309, 313–15 (2002).

47. See Klare, *supra* note 8.

48. See S. AFR. CONST., 1996, §§ 40–102.

49. The Constitution empowers the National Assembly to “determine and control its internal arrangements” and to make “rules and orders.” S. AFR. CONST., 1996, § 57(1).

50. Some of these rights have a textual basis in the Constitution. For instance, the Constitution requires that the rules and orders of the National Assembly provide for “the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy.” S. AFR. CONST., 1996, § 57(2)(b).

51. BERNARD WILLIAMS, *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 13 (2005).

In this context at least, I think there is a *prima facie* case for moral skepticism, political realism, and interpretive restraint. Furthermore, when the moral content of constitutional law is defined broadly to include parliamentary rulemaking—which clearly lies at the core of the functions of a co-equal branch—many questions previously settled concerning the proper role of the judiciary in a constitutional democracy resurface. As Daniel Farber and Suzanna Sherry have observed in their critique of Dworkin’s moral theory of adjudication:

It is true that our society largely assigns the final decision on issues of constitutional law to the courts. But this assignment of power is acceptable in part because our legal culture defines constitutional law more narrowly than Dworkin, so as not to fully encompass the task of defining liberal democracy. The fundamental nature of liberal democracy is an issue for the polity as a whole, not just the courts. If, like Dworkin, we wish to define constitutional law more sweepingly than the conventional practice, we must recognize that the task of defining constitutional rights in this broader sense has *not* been wholly left to the courts. . . . Dworkin has no general theory about how the power to decide constitutional issues should be allocated, and so he cannot reject the established practice of leaving some issues, which he considers constitutional in nature, at least in part to other branches of government.<sup>52</sup>

Farber and Sherry are referring to U.S. jurisprudence, but in an important respect their critique is even more relevant to South African jurisprudence since the Constitutional Court has adopted a moral reading of the South African Constitution that is even “thicker” than that proposed by Dworkin. However, Dworkin’s case for a moral reading of the U.S. Constitution was an attempt to provide a philosophical foundation for the idea of rights as trumps.<sup>53</sup> It was not until 2011 that he attempted to ground his theory of constitutional interpretation in a substantive theory of democracy.<sup>54</sup> But even then, Dworkin’s partnership conception of democracy cannot explain or justify the Constitutional Court’s reasoning in *Mazibuko*.

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52. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 138 (2002).

53. *See* TAKING RIGHTS SERIOUSLY, *supra* note 42, at 89–90. Sir John Laws, an English judge, made a similar point:

[T]he citizen’s democratic rights go hand in hand with other fundamental rights; the latter, certainly, may in reality be more imaginably at risk, in any given set of political circumstances, than the former. The point is that both are or should be off limits for our elected representatives. They are not matters upon which . . . the authority of the ballot-box is any authority at all. It is a premise of elective government . . . that these principles be observed by whoever is elected.

John Laws, *Law and Democracy*, 1995 PUB. L. 72, 90. This picture of judicial enforcement of rights may be too simple. Formulations of rights in charters of rights are usually indeterminate and therefore democratically elected legislatures can have a role in defining their content and constitutionally permissible limitations. *See* GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 203–04 (2009).

54. JUSTICE FOR HEDGEHOGS, *supra* note 41.

*B. Institutional Restraint*

Institutional restraint concerns the courts' duty to be "sensitive to the institutional role and limitations of the courts and to consider seriously any adverse consequences of judicial decisions."<sup>55</sup> It is therefore an aspect of the separation of powers. The case for restraint in this context also flows substantially from my argument on the distinctiveness of parliamentary law and its proximity to politics. It is buttressed by consideration of the negative consequences that may follow from adjudication under conditions of uncertainty. Judicial review of parliamentary rulemaking presents novel questions for which there is little precedent either in South African or comparative constitutional law. In this context, the better judicial philosophy when faced with a choice between innovation and restraint is the latter.

In order to emphasize the extent to which the courts in South Africa are outliers in their understanding of the separation of powers between the judiciary and the legislature, I begin my exploration of the case for institutional restraint with a comparative discussion of parliamentary law in the United Kingdom, which has a sovereign parliament,<sup>56</sup> and Canada, where legislation is subject to constitutional review, but not parliamentary rulemaking.<sup>57</sup>

The two axes of parliamentary law in the United Kingdom are provided by the principles of separation of powers and the non-justiciability of matters *internal* to parliament.<sup>58</sup>

In *DuPort Steels Ltd. v. Sirs*, Lord Kenneth Diplock made it clear that the relationship between the courts and Parliament is defined by the principle of the separation of powers: "[I]t cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them."<sup>59</sup> This fundamental principle also frames the judiciary's approach to the exercise of its powers of review with respect to matters *internal* to Parliament.<sup>60</sup> While the Human Rights Act of 1998 conferred new powers on the courts in the United Kingdom requiring a more flexible conception

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55. Kavanagh, *supra* note 35, at 35.

56. See COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXTS AND MATERIALS* 61 (7th ed. 2011).

57. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 52 (U.K.).

58. See *Stockdale v. Hansard* (1839) 112 Eng. Rep. 1112, 1186; *DuPort Steels Ltd. v. Sirs* [1980] 1 WLR 142 at 142; Mtendeweka Mhango, *The Transformation of the Judiciary in South Africa*, in *THE JUDICIARY IN SOUTH AFRICA* 68, 92 (Cora Hoexter & Morne Olivier eds., 2014) (arguing "the future of transformative adjudication lies in the development of a coherent political question doctrine in relation to the adjudication of purely policy or political disputes involving the three arms of government," but not specifically addressing the question of the scope and limits of judicial review of non-legislative parliamentary action).

59. [1980] 1 WLR 142 at 157 (Eng.).

60. What is an internal matter is, of course, subject to judicial interpretation but includes, at least: parliamentary proceedings; Parliament's rulemaking power; Speakers' rulings; and punishments for contempt.

of the separation of powers,<sup>61</sup> the second axis—the non-justiciability of parliamentary proceedings<sup>62</sup>—remains substantially undisturbed.<sup>63</sup> Important consequences follow these axes: Parliament is (1) the sole judge of the lawfulness of its proceedings, (2) able to depart from its own procedures, and (3) protected against outside attempts to interfere in its proceedings. Parliament’s privileges in the United Kingdom are held against all outside bodies, including the courts.

In Canada, the introduction of a justiciable Bill of Rights has not disturbed the courts’ commitment to the maintenance of a separation of powers and the tradition of curial deference. In *New Brunswick Broadcasting Co. v. Nova Scotia*, the Speaker disallowed filming of proceedings of the Nova Scotia House of Assembly.<sup>64</sup> This was challenged on the basis of the freedom of expression provisions—including press freedom—in the Canadian Charter of Rights and Freedoms.<sup>65</sup> The Court upheld parliamentary privilege, the majority holding that the Charter did not apply to members of the House in exercising their privileges as members.<sup>66</sup> The denial of media access to record and relay the proceedings of the House to the public was therefore not reviewable.<sup>67</sup> Justice Beverley McLachlin concluded that the law of parliamentary privilege—although not expressly provided for in the Charter—is nevertheless a fundamental part of it and a central aspect of modern Canadian democracy.<sup>68</sup> She added a separation of powers consideration:

Our democratic government consists of several branches . . . .

Traditionally, each branch of government has enjoyed autonomy in how it conducts its affairs. The *Charter* has changed the balance of power between the legislative branch and the executive on the one hand, and the Courts on the other hand, by requiring that all laws and government action must conform to the fundamental principles laid down in the *Charter*. . . . To this extent, the *Charter* has impinged on the supreme authority of the legislative

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61. ROGER MASTERMAN, *THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION: JUDICIAL COMPETENCE AND INDEPENDENCE IN THE UNITED KINGDOM* 3–4 (2011).

62. This doctrine of non-justiciability has increasingly lost influence among legal scholars and courts themselves in many contexts, but it has retained its importance with regard to matters internal to Parliament. TURPIN & TOMKINS, *supra* note 56, at 58–61.

63. Masterman shows how the Human Rights Act of 1998, which preserves the sovereignty of Parliament, has nevertheless led to a withering of non-justiciability doctrines with respect to certain executive as well as legislative powers. MASTERMAN, *supra* note 61, at 2–5, 34, 92, 112–13. The Human Rights Act, however, has no application to the non-legislative action of Parliament and therefore leaves its autonomy with respect to its internal proceedings undisturbed. *See* Bill of Rights 1688, 1 W. & M. c. 2 (Eng.) (“Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”).

64. [1993] 1 S.C.R. 319, 333–34 (Can.).

65. *See id.* at 335–36.

66. *Id.* at 364–67.

67. *Id.* at 367.

68. *Id.* at 387 (opinion of McLachlin, J.).

branches. What we are asked to do in this case is to go further, much further. We are asked to say that the *Charter* not only removed from the legislative bodies the right to pass whatever laws they might choose to adopt, but that it removed the long-standing constitutional right of Parliament and the legislative assemblies to exclude strangers, subjecting the determination by the Speaker of what is disruptive of the operation of the Assembly to the superior review of the courts. I see nothing in the *Charter* that would mandate or justify taking the reallocation of powers which it effected to this extreme.<sup>69</sup>

This reasoning demonstrates a determination to preserve the separation of powers between the branches after the introduction of the Charter in Canada and to show due deference to the decisions of a co-equal branch.<sup>70</sup>

The two prongs of what might be characterized as the “traditional paradigm” of parliamentary law—non-justiciability and separation of powers—have their advantages. Such an approach in this context would avoid entanglements in disputes between political adversaries; promote certainty; reduce litigation and the risk of judicial error; be easier to administer by lower courts; and arguably preserve the court’s effectiveness in areas requiring judicial intervention, like the protection of individual rights and the rule of law. These are consequences that a court should take into account in deciding whether or not to intervene and, if it does intervene, what the proper standard of review should be.<sup>71</sup>

Of course, the South African Constitution differs significantly from the governing documents of both the United Kingdom and Canada. In South Africa, the Constitution, not Parliament, is supreme.<sup>72</sup> Furthermore, a South African court is unlikely to come to the conclusion that the Bill of Rights is not applicable to Parliament.<sup>73</sup> So what difference does the principle of constitutional supremacy make to judicial review with respect to matters internal to Parliament? More particularly,

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69. *Id.* at 389.

70. *See id.*

71. In *New Brunswick*, for instance, the majority reasoned that the exercise of intrusive powers of review could have negative consequences for inter-branch comity, the independence of the judiciary, and the autonomy of the legislature. *See id.* at 359. Justice McLachlin explained that the exercise of powers to review the decision of the Speaker would impair the “dignity and efficiency” of the legislature, *id.* at 383, and would be:

quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government . . . . The ruling of the Assembly would not be final. The Assembly would find itself caught up in legal proceedings and appeals about what is disruptive and not disruptive. This in itself might impair the proper functioning of the chamber.

*Id.* at 387–88 (opinion of McLachlin, J.).

72. Section 2 states: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” S. AFR. CONST., 1996, § 2.

73. Section 8 of the Constitution provides that the Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” *Id.* § 8(1). This language makes it clear that the Bill of Rights binds Parliament. It is of interest, however, that the Canadian Constitution did not preclude the court from coming to the conclusion that the Charter of Rights is not applicable to the House of Assembly. *New Brunswick Broad. Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, 366–67 (Can.).

are our courts precluded from taking account of institutional considerations that inform the separation of powers jurisprudence of other parliamentary democracies?

In the first constitutionally significant case in post-apartheid South Africa on the separation of powers between the judiciary and Parliament, *Speaker of the National Assembly v. De Lille*—which concerned the suspension of a member of Parliament for exercising her constitutionally protected privilege of freedom of speech—Chief Justice Ismail Mahomed discussed the importance of Parliament’s disciplinary powers and its constitutional limits and came to the conclusion that Parliament had no power to suspend a member *in those circumstances*.<sup>74</sup> Relying on the supremacy clause, the Court rejected the argument that the Constitution creates a “constitutional bubble”<sup>75</sup> in the following terms:

[The Constitution] is Supreme - not Parliament. . . . It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.<sup>76</sup>

Since *De Lille*, it is settled law in South Africa that the supremacy clause confers powers of judicial review over matters internal to Parliament.<sup>77</sup> However, *DeLille* does not address questions with regard to interpretive method, what normative considerations are relevant, or what consequences should be taken into account in deciding on the proper standard of review. Cass Sunstein and Adrian Vermeule are right to observe that:

In many domains, the question is posed whether one institution should review the acts of another, and if so, the intensity with which that review should occur. This question arises, for example, in the context of constitutional challenges . . . . In all of these areas, it is important to pay close attention to institutional variables. The costs of error and the costs of decision are crucial. It is necessary to examine dynamic effects. There is no sensible acontextual position on the question whether review, of one institution or another, should be intense or deferential, or indeed available at all.<sup>78</sup>

I argue that neither the supremacy clause, nor *De Lille*’s reliance on it in exercising powers of judicial review of Parliament’s punitive jurisdiction over its members, precludes a contextual exercise of judicial restraint with respect to the judicial

74. 1999 (4) SA 863 (SCA) at paras. 17, 29.

75. See Michael Bishop & Ngwako Raboshakga, *National Legislative Authority*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA 17-1, 17-91 (Stuart Woolman et al. eds., 2d ed. 2008).

76. *De Lille*, 1999 (4) SA 863 at para. 14. As a purely textual matter, it is arguable that the supremacy clause is not by itself sufficient to establish powers of judicial review.

77. See *Malema v. Chairman of the Nat’l Council of Provinces* 2015 (4) SA 145 (WCC) at para. 18 (“The paramountcy of the Constitution in regard to proceedings in Parliament and the role of judicial scrutiny thereof has been authoritatively emphasised . . . in *De Lille*.”).

78. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 936 (2002–2003).

supervision of parliamentary rulemaking. When a court does intervene, the standard will be a variable one, dependent on the internal issue under consideration, whether the rights of non-members are at stake, and what consequences may result from intervention.

### III. MAZIBUKO: FACTS AND FINDINGS

*Mazibuko* concerned a distinct form of parliamentary law: rulemaking in relation to motions of no confidence in the executive.<sup>79</sup> The Court's decision turned on an interpretation of section 102(2) of the Constitution: "If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."<sup>80</sup>

The constitutional question at issue was whether the rules of the National Assembly regulating the scheduling of no confidence motions in the President—which did not mandate such scheduling—were impeachable as being inconsistent with section 102(2) of the Constitution.<sup>81</sup> The protagonists initiated a motion of no confidence in the President under the terms of the National Assembly Rules, but when the matter was referred to the Chief Whip's Forum and then the Programme Committee—as was the practice—no agreement could be reached on the scheduling of the motion.<sup>82</sup> It appears that despite the procedure in the Rules requiring voting by majority, the practice in the Programme Committee was to make decisions by consensus.<sup>83</sup> The failure to achieve consensus resulted in no decision being reached.<sup>84</sup> Although the Rules permitted the Speaker (who chaired the Committee meeting) to report a deadlock to the Assembly, he said that he did not have the residual power to break the impasse by unilaterally scheduling the motion for debate and, even if he

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79. *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) at para. 3.

80. *Id.* at para. 89 (quoting S. AFR. CONST., 1996, § 102(2)).

81. *Id.* at para. 3.

82. *Id.* at paras. 7–8. The Chief Whip's Forum "coordinates and discusses matters for which Whips are responsible and provides a platform for possible political agreement on issues concerning Whips." *Id.* at para. 8. The Programme Committee:

is chaired by the Speaker and consists of eleven other office-bearers of the Assembly, including the Chief Whip and Whips from minority parties. Its functions and powers include preparing and adjusting the annual programme of the Assembly, implementing Rules on scheduling or programming related to the business of the Assembly, and making decisions to prioritise or postpone any business of the Assembly.

*Id.* at para. 9.

83. *Id.* at paras. 49–50; *see also* PARLIAMENT OF THE REPUBLIC OF S. AFR., RULES OF THE NATIONAL ASSEMBLY 47 (8th ed. 2014) ("The chairperson of a committee, subject to the other provisions of [the] Rules and the directions of the committee . . . in the event of an equality of votes on any question before the committee, must exercise a casting vote in addition to the chairperson's vote as a member.").

84. *Mazibuko*, 2013 (6) SA 249 at para. 10.

did, the Assembly could override his decision.<sup>85</sup> The upshot was that the motion was not scheduled for debate.<sup>86</sup>

In response, shortly before the final sitting of the year, the leader of the opposition<sup>87</sup> brought an urgent application in the High Court of the Cape Province seeking an order directing the Speaker to take the steps necessary to ensure that the motion was scheduled for debate and vote in the National Assembly.<sup>88</sup> The Speaker and the Chief Whip of the Assembly contested both the urgency and substantive merits of the application.<sup>89</sup>

In the High Court, Judge Dennis Davis held that since section 102(2) presupposes that a motion of no confidence in the President may be brought in the National Assembly, the opposition had a *constitutional right* to bring such a motion.<sup>90</sup> He derived this right from the “animating spirit of our democracy” and the “majestic ambition” of our “national vision.”<sup>91</sup> The Constitution, he said, *envisages* that the motion could be brought not only by a majority party, but also by a minority party seeking to garner support from members across the Assembly floor.<sup>92</sup> The court reasoned that the consequence of the Committee operating by consensus meant that unless the motion was supported by the majority party, it would not be debated.<sup>93</sup> If voting by majority was followed, the majority could still subvert the minority’s vindication of its section 102(2) right, which created a constitutional entitlement to compel a confidence debate, and therefore, the High Court reasoned that there was an unconstitutional lacuna in the Rules.<sup>94</sup>

Judge Davis, however, declined to grant the relief sought since the Rules did not confer on the Speaker the residual power to break the Committee deadlock,<sup>95</sup> or

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85. *Id.* at para. 14.

86. *Id.* at para. 10.

87. Lindiwe Mazibuko, MP (the opposition leader) of the largest minority party in the Assembly also acted on behalf of seven other minority political parties represented in the National Assembly. *Id.* at para. 1.

88. *Mazibuko v. Sisulu* 2013 (4) SA 243 (WCC) at 245.

89. *See id.* at 247–48. The High Court was careful to point out that the application did not concern the prospects of success of the motion of no confidence in the President but rather the principle of holding the debate. *Id.*

90. *Id.* at 250 (“[T]he right of an elected representative to bring a motion . . . is envisaged in section 102 of the Constitution [and] captures the animating spirit of our democracy which is not to be reduced to the view of a transient majority, and perhaps even more important, where the temporary majority may appear to be relatively permanent.”).

91. *Id.* The effect of these rhetorical embellishments is to elevate rather prosaic matters of parliamentary law and procedure to a higher-law track and to authorize judicial intervention where the text itself provides little support for an assumption of unlimited judicial powers.

92. *Id.* at 247–48.

93. *Id.* at 254.

94. *Id.* at 260–61.

95. Rule 2(1) empowers the Speaker to “give a ruling or frame a rule in respect of any eventuality for which these rules do not provide.” *Id.* at 257. Judge Davis concluded that this Rule did not apply to the Programme Committee. *Id.* at 258.

trump a majority vote, by scheduling a debate on a motion of no confidence. Nor could he direct the Speaker to exercise a power he did not have.<sup>96</sup> The power to invalidate the Rules and decide whether Parliament had failed to fulfill a constitutional obligation under section 167(4)(e) of the Constitution could only be exercised by the Constitutional Court.<sup>97</sup>

When the matter came before the Constitutional Court on appeal, Deputy Chief Justice Dikgang Moseneke, for the majority, mostly agreed with Judge Davis's reasoning and conclusions.<sup>98</sup> The Court accepted that the Rules did not give the Speaker the residual power to schedule a motion of no confidence where the Programme Committee had failed to reach consensus on tabling the motion.<sup>99</sup> The Court reasoned that the task of scheduling rests with the Committee and that nothing in the Rules could be said to sanction interference with the Committee's scheduling power, even where no agreement could be reached.<sup>100</sup> Section 57(1) of the Constitution vests the power in the Assembly to determine and control its internal affairs and to make rules regulating its business.<sup>101</sup> Furthermore, any ruling by the Speaker on the business of the Assembly will always be subject to the overriding authority of the Assembly, "which is the ultimate master of its own process."<sup>102</sup>

Nevertheless, the Court issued a declarator to the effect that the Rules were constitutionally deficient insofar as they permitted a vote by majority or did not contain a deadlock-breaking mechanism which would allow a member or party in the Assembly to vindicate the right provided for in section 102(2).<sup>103</sup> In this regard, the Court was emphatic that the Rules may not thwart or frustrate the efforts to

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96. *Id.* at 256, 261.

97. S. AFR. CONST., 1996, § 167(4)(e) ("Only the Constitutional Court may . . . decide that Parliament or the President has failed to fulfil a constitutional obligation.").

98. *See Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) at para. 66. The Court disagreed that the matter was "inherently urgent," finding instead that all that was required was that a motion be scheduled, debated, and voted on within a "reasonable time" and "without undue delay," having regard to the existing program of the Assembly. *Id.* Further, the Court explained that given its declarator that the Rules were constitutionally deficient because they prevented the vindication of the section 102(2) right, it would refrain from considering the section 167(4)(e) question as to whether Parliament had failed to fulfill a constitutional obligation. *Id.* at paras. 72–74. In my view, the consequence of this reasoning is that it is not clear on what basis the court exercised jurisdiction since section 167, which lists the review powers of the Constitutional Court, does not specifically list parliamentary rulemaking.

99. *Id.* at para. 28. Interestingly, it was conceded that the relief originally sought in the High Court—a mandamus requiring the Speaker to ensure that the motion was scheduled for debate and vote in the Assembly before November 22, 2012—was now moot. *Id.* at para. 24. The Court nevertheless proceeded to determine the question. *Id.* at para. 25.

100. *Id.* at para. 28.

101. S. AFR. CONST., 1996, § 57(1) ("The National Assembly may . . . determine and control its internal arrangements, proceedings and procedures; and . . . make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.").

102. *Mazibuko*, 2013 (6) SA 249 at para. 31.

103. *See id.* at para. 72.

bring the motion and in doing so defeat a “constitutional entitlement.”<sup>104</sup> Deputy Chief Justice Moseneke held:

[A] vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim of the majority or minority in the Programme Committee . . . . It would be inimical to the vital purpose of section 102(2) to accept that a motion . . . may never reach the Assembly except with the generosity and concurrence of the majority in that Committee. It is equally unacceptable that a minority within the Committee may render the motion stillborn when consensus is the decision-making norm. It would have been an easy matter for the Constitution to specify that the scheduling of a motion of no confidence in the President is subject to political negotiations, lobbying, bargaining and agreement between the parties of the Assembly. It does not do so.

Lobbying, bargaining and negotiating amongst political parties represented in the Assembly must be a vital feature of advancing the business and mandate of Parliament . . . . However, none of these facilitative processes may take place in a manner that unjustifiably stands in the way of, or renders nugatory, a constitutional prescript or entitlement. That is so, because our Constitution is supreme and demands that all law and conduct must be consistent with it. We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members serving on the Programme Committee . . . . A vote on a motion of no confidence in the President must occur in the Assembly itself.<sup>105</sup>

Finally, since the Assembly’s Rules Committee was at that time reviewing the Rules to provide specifically for motions contemplated by section 102(2), the question was whether the dispute was ripe for review.<sup>106</sup> The Court rejected the argument that the direct application should be dismissed because the Committee was reviewing the rules, stating that the current differences of opinion between the parties on how these motions should be regulated would make it improbable that the lacuna would be corrected.<sup>107</sup> Further, since the Rules were inconsistent with the Constitution, the Court had no choice but to declare them invalid.<sup>108</sup>

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104. *Id.* at para. 60. The Court reasoned that the non-invasive nature of a declarator meant there would be no breach of the separation of powers principle since the Court was not rulemaking but merely declaring that the Rules did not pass constitutional muster. *Id.* at para. 71.

105. *Id.* at paras. 57–58.

106. *Id.* at para. 3.

107. *Id.* at paras. 69–70.

108. *Id.* at para. 70. In dissent, Justice Chris Jafta argued that “[p]olitical issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution.” *Id.* at para. 83 (Jafta, J., dissenting). However, he did not directly address the question as to whether the separation of powers precluded judicial review of parliamentary rulemaking. Further, his refusal to entertain the appeal was based on the fact that Parliament had taken steps to amend the rules governing motions of no confidence, *id.* at para. 116, and the fact that this process was at an “advanced stage,” *id.* at paras. 85–87. Justice Jafta also found that there was no lacuna in the Rules, only a failure to follow the proper

## IV. CRITIQUE OF MAZIBUKO

*A. Interpretive Restraint*<sup>109</sup>

Iconoclastic and extra-textual moral arguments such as those invoked by the court in *Mazibuko* require inter-branch dialogue and a broader consensus. Radically divergent understandings of the structural design of the Constitution in the judiciary and political branches can only lead to unproductive tensions. Where a purposive method is adopted, the attribution of a constitutional purpose must be disciplined. The meaning of section 102(2) should be derived both from the words of the section—and the partially fused constitutional structure of the executive and the legislature—rather than from abstract moral concepts *outside* the text.

*1. Section 102(2): Text, Structure and Purpose*

The Constitutional Court's decision turned on an interpretation of section 102(2). On its face, the language of this section is clear and specific. It simply provides that the President and the Cabinet must resign if the National Assembly by a simple majority of its members passes a motion of no confidence in the President.<sup>110</sup> In the felicitous phrasing of Lourens du Plessis, this provision forms part of the “restrained constitution,” rather than the “monumental constitution,” since it concerns (1) the allocation of constitutional powers and (2) the consequences of a loss of confidence in the government.<sup>111</sup> Although the Court purported to rely on the “plain meaning” of the provision, it concluded that section 102(2) creates a constitutional right, which could not be “den[ied], frustrate[d], unreasonably delay[ed] or postpone[d]”<sup>112</sup> and that it “envisage[d]” specific parliamentary rules and procedures relating to motions of no confidence.<sup>113</sup> I suggest that this was more a matter of constitutional interpolation than interpretation.

The Court also reasoned, in extrapolating constitutional rights and specific requirements for parliamentary rules, that regard must be paid to the purpose of the provision.<sup>114</sup> Purposive interpretation is of course a familiar method of attributing

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procedure envisaged in the Rules. *Id.* at para. 158. There was thus no deficiency in the Rules themselves. *See id.* at paras. 145, 153. Since the relief sought—in the form of a mandamus seeking to compel the Speaker to schedule the motion for debate—was therefore moot, Justice Jafta would have dismissed the appeal on that basis alone. *Id.* at paras. 157, 159.

109. Recall that by interpretive restraint I am referring to the importance of paying attention when attributing meaning to the Constitution—particularly the language of specific, structural provisions—as distinct from those provisions that can plausibly be interpreted with reference to broad principles of political morality. In this context, a “return to the text” would reinforce the legitimacy of the judicial function.

110. S. AFR. CONST., 1996, § 102(2).

111. *See* Lourens du Plessis, *The South African Constitution as Memory and Promise*, 11 *STELLENBOSCH L. REV.* 385, 388–94 (2000).

112. *Mazibuko*, 2013 (6) SA 249 at para. 47.

113. *Id.* at para. 2.

114. *Id.* at paras. 39–43.

meaning to constitutional language. The Court said that the primary purpose of a motion of no confidence is to ensure that the President and the National Executive are accountable to the Assembly, which is made up of the directly elected representatives of the people.<sup>115</sup> The “motion of no confidence plays an important role in giving effect to the checks and balances element of the separation-of-powers doctrine.”<sup>116</sup>

I argue that the Court failed to give due consideration to the nature of a parliamentary system in its separation of powers analysis—the near complete fusion of the executive and legislature.<sup>117</sup> This structural feature provided for in the South African Constitution—a motion of no confidence in the President—renders the continuation in office of the President and the Cabinet dependent on the continued support of the majority of members of the National Assembly, who are also members of the governing political party or coalition. As Christina Murray and Richard Stacey point out: “In parliamentary systems, a vote of no confidence removing the government of the day will usually occur only after floor-crossing or if a substantial number of the governing party back-benchers fear the party’s electoral prospects under the current leader”<sup>118</sup> or if there is interparty agreement.

Such contingencies are not regulated comprehensively by the Constitution but rather by flexible rules and procedures, which are nothing other than the settled expectations of the parties as to how such conflicts will be regulated. Nothing *constitutionally* inappropriate can be thought to have occurred when such a motion is not tabled or passed in a parliamentary jurisdiction, since it is the constitutional function of the Assembly in such systems not only to hold the President accountable, but also to protect the President.<sup>119</sup>

This pattern changes only when the government has lost the support of the majority of the members of the National Assembly, which enjoys the ultimate power of dismissal through the passage of a motion of no confidence. The National Assembly thus “performs a definite function in the constitution today; the procedure of the House should be suited to that function.”<sup>120</sup>

## 2. *The Court’s Moral Reading of Section 102(2)*

My argument above is that the Court paid insufficient attention to the language of a specific constitutional provision—and to the constitutional structure—in deriving a constitutionally relevant purpose. Through a “bootstrapping” moral reading of the unambiguous language of section 102(2) it sought to create a normative

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115. *Id.* at para. 43.

116. *Id.* at para. 21.

117. Walter Bagehot referred to this fusion as an “efficient secret” of the English Constitution. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 78–79 (2d ed. 1908).

118. Christina Murray & Richard Stacey, *The President and the National Executive*, in 1 *CONSTITUTIONAL LAW OF SOUTH AFRICA* 18-1, 18-24 (Stuart Woolman et al. eds., 2d ed. 2008).

119. See J.A.G. Griffith, *The Constitutional Significance of Delegated Legislation in England*, 48 *MICH. L. REV.* 1079, 1117 (1949–1950).

120. *Id.* at 1092.

framework to justify intrusive judicial scrutiny of parliamentary rulemaking and intervention in the management of Parliament's internal procedures for scheduling its business.

The Constitutional Court reasoned that the scheduling of motions of no confidence has a "grave bearing on the soundness of our constitutional democracy"<sup>121</sup> and agreed with the High Court that moving and debating such motions is "manifestly a constitutional *right*"<sup>122</sup> of individual members of the Assembly, flowing from section 102(2). Out of thin air, the Court created a constitutional right to compel the scheduling and debate of the motion. Surely, clearer textual support is required for such a far-reaching conclusion. This non-textual constitutional right to compel a debate on the future existence of the government assumes priority over other parliamentary matters, without any meaningful limitation. Rules which limit this right—common in many jurisdictions—will now have trouble passing constitutional muster.

Analytical rigor is required when a court reaches so boldly for particular results. Are these Kantian or Hohfeldian rights? If they are of the former inspiration, how is a court to decide, in the absence of a limitations clause,<sup>123</sup> what limits are constitutionally permissible? What collective goals or political considerations can ever legitimately be taken into account by a parliamentary body in limiting the right? Or can the right never be overridden, because it is absolute? And if these are Hohfeldian rights, what corresponding constitutional duties are thereby imposed on the majority party?

The effect of introducing the language of rights in interpreting section 102(2) and declaring that parliamentary rules and procedures relating to motions of no confidence are constitutionally fundamental is to displace majoritarian decisionmaking. This procedure is specifically provided for in section 53 of the Constitution, and normatively grounded in the principle of political equality<sup>124</sup>—a fundamental constitutional value. The logic of displacement lacks persuasive justification here, since the interests of individuals in autonomy, dignity, and equality, which are protected by fundamental rights listed in the Bill of Rights, were not at risk. Nor were any of the basic rights of minority parties guaranteed by the Constitution.

In *Mazibuko*, both the High Court and the Constitutional Court invoked the concept of deliberative democracy—without specific reference to the text of the Constitution and without explaining how it derived a specific constitutional requirement from a general norm—in coming to the conclusion that section 102(2)

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121. *Mazibuko*, 2013 (6) SA 249 at para. 36.

122. *Id.* at para. 45 (emphasis added).

123. INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, LIMITATION CLAUSES 1 (2014), [http://www.constitutionnet.org/files/limitations\\_clauses.pdf](http://www.constitutionnet.org/files/limitations_clauses.pdf) ("A limitation clause enables constitutional rights to be partially limited, to a specified extent and for certain limited and democratically justifiable purposes, while prohibiting restrictions that are harmful to democracy by reason on [sic] their purpose, nature or extent.")

124. Decisionmaking by majority vote treats each member of the Assembly as an equal and requires that in the absence of agreement decisions are made by majority vote. *See* S. AFR. CONST., 1996, § 53.

creates a “constitutional right” to debate motions of no confidence within a reasonable period of time following tabling.<sup>125</sup>

The concept of deliberative democracy is associated with the work of a number of contemporary political theorists.<sup>126</sup> Reduced to its essence, this conception is critical of purely aggregative concepts of democracy and emphasizes the role of *rational discussion* and persuasion in altering spontaneous political preferences, particularly where there is moral disagreement, thereby producing more legitimate outcomes.<sup>127</sup> This normative concept is intended neither as a description of actual political processes in a democracy nor a source of judicially enforceable norms.<sup>128</sup>

The Court assumes that its constitutional role is to secure the conditions in which the better, more rational argument can prevail in Parliament. In the High Court, Judge Davis reasoned that *debate in the House* on a motion of no confidence, where what is at stake is the continued existence of the government, is constitutionally critical because individual members should have the opportunity to persuade each other that they have the better argument.<sup>129</sup>

The Constitutional Court, agreeing with the High Court, also linked the ideas of individual rights and deliberation.<sup>130</sup> But does parliamentary talk in the adversarial setting of an Assembly, constituted and composed of competitive political parties, really resemble an “ideal speech situation” in which individual participants enjoy equal communication rights and are sincere seekers of the truth? Or are those participants strategic actors and representatives of their parties and constituents, seeking either to

125. See *Mazibuko*, 2013 (6) SA 249 at paras. 44–47.

126. DELIBERATIVE DEMOCRACY (John Elster ed., 1998); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

127. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 83–90 (2000).

128. Jürgen Habermas is one of the leading philosophers of the idea of democracy as deliberative. His critique of republican conceptions of the political process in terms which resonate with my criticism of the Court’s moral argument in *Mazibuko* should be of interest. He writes:

Its disadvantage, as I see it, is that it is too idealistic in that it makes the democratic process dependent on the virtues of citizens devoted to the public weal. For politics is not concerned in the first place with questions of ethical self-understanding. The mistake of the republican view consists in an ethical foreshortening of political discourse.

Jürgen Habermas, *Three Normative Models of Democracy*, in THE POLITICAL 151, 154 (David Ingram ed., 2002).

129. See *Mazibuko v. Sisulu* 2013 (4) SA 243 (WCC) at 247–48 (“[T]he Constitution envisages that this motion could be brought not only by a majority party, but also by a minority party which seeks to garner support for the motion from members across the floor of the house. . . . [T]his is the very stuff of deliberative democracy.”). However, in practice such matters are not decided in the Assembly. They are settled by bargaining and negotiation in party caucuses, and in meetings of the Whips of all parties. Debate in the Assembly simply confirms the outcomes of these “behind-the-scenes processes” that do not occur in the Assembly itself. The chief impact therefore of *Mazibuko* will be on the power dynamics among the party Whips. In particular, the decision weakens the authority of the Chief Whip of the majority party.

130. *Mazibuko*, 2013 (6) SA 249 at para. 44 (“The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution.”).

defend their government or remove their opponents from their lofty throne in a battle for electoral supremacy? In explaining why legislatures must have rules and orders, and why their proceedings bear a striking similarity everywhere, Jeremy Waldron—one of the few constitutional lawyers with any interest at all in the way legislatures actually function—observed that “these formal characteristics are related inherently to the fact that it is the task of modern legislatures to gather together large numbers of people who are not necessarily on casual ‘speaking terms’ with one another, and who participate in legislative deliberations not as individual conversationalists but as representatives.”<sup>131</sup> He describes parliamentary rules and procedures as being made “in the circumstances of politics,” emphasizing the centrality and permanence of conflict and disagreement, and the importance of being able to resolve such disagreements by majoritarian voting procedures.<sup>132</sup> But not apparently in South African constitutional law, where a robust anti-majoritarianism holds sway.

*B. Institutional Restraint*<sup>133</sup>

I now focus on the potentially negative impact on the separation of powers, the reputation of the judiciary, disabling effects on the legislature, and the impact on inter-branch comity.<sup>134</sup>

*1. Separation of Powers*

The Constitutional Court has adopted a non-formalistic, flexible conception of the separation of powers, which is required by its broader transformative mandate. This conception places a value on institutional balance, but anticipates the unavoidable

131. WALDRON, *supra* note 30, at 70.

132. *Id.* at 90 (“[L]egislatures the world over are going to continue to use voting and majority-decision as central features of their decision-procedures, whatever the public choice theorists say.”); *see also* TRIBE & DORF, *supra* note 39, at 29 (“[W]hat follows from the recognition that our system of government limits what democratic majorities may do is not the proposition that judges may freely substitute their values for those produced by the electoral process. As one of us has noted, someone who adhered to Nobel laureate Kenneth Arrow’s social choice theory—which holds that there is no way to combine individual preferences to produce one ‘true’ preference of the whole society—might presume that courts, rather than elected legislators or executives, are in the best position to determine what is right for society. But that observation about the consequences of one theory of how government actually works should not be confused . . . with a prescription for how judges interpreting our Constitution ought to act.”).

133. Here I want to acknowledge the influence once more of Sunstein and Vermeule, who emphasize the importance of incorporating considerations of relative institutional competence, as well as effects, when choosing an interpretive methodology. Sunstein & Vermeule, *supra* note 78, at 886. Jeff King’s work in the United Kingdom on socioeconomic rights adjudication, adopting what he calls an institutional approach to questions of the separation of powers as an alternative to formalism, has also been an influential source of ideas and insights potentially relevant in the context of this discussion of judicial review of parliamentary rules and procedures. *See* JEFF KING, *JUDGING SOCIAL RIGHTS* (2012).

134. Of course, some of these negative impacts may be speculative, and might require empirical investigation. But in legal reasoning, the consequences that are relevant for a judge to take into account are not limited to those that have been “proven” empirically by the methods of the social sciences, since adjudication, in the context under consideration, occurs under conditions of uncertainty.

intrusion of one branch on the terrain of another.<sup>135</sup> But what is the justification for intervention in what is obviously a core function of a co-equal branch of government? Is it sufficient for the Court to simply declare a provision “fundamental” to justify intrusion?

It must be asked whether the Court’s approach to the review of procedural parliamentary rules is compatible with *any* conception of the separation of powers between the judiciary and the elected branches, however “flexibly” the doctrine is conceived.<sup>136</sup> It is certainly arguable that the Constitutional Court has effectively discarded the separation of powers between the judiciary and Parliament by assuming apparently unlimited powers of review with respect to parliamentary rulemaking—even when this is not required by the text or the principle of constitutional supremacy.

## 2. *Negative Impact on the Judiciary*

It is doubtful that the judiciary can work with abstract theories developed in other disciplines—like philosophy and political science—to derive legally enforceable norms. Further, it is doubtful that it can apply them consistently and impartially to parliamentary rules and procedures—which are outside their direct experience and expertise,<sup>137</sup> and where the disputants are not ordinary litigants but political adversaries. In these circumstances, a theoretically ambitious court is more likely to commit errors of overbroad intervention as opposed to errors of non-intervention when intervention is required. It seems to me that *Mazibuko* is an example of overbroad intervention by the judiciary.

Errors of overbroad intervention are also likely to arise due to the very nature of rules. The Constitutional Court may have underestimated this risk, because it considers parliamentary rules formalistically, as if future applications are purely a matter of deductive logic or mechanical application. But suppose that the meaning of a rule is indeterminate and that future applications of the rule are not presupposed in the rule itself.<sup>138</sup> Conflict over the application of rules in the future in the “presence of politics” would be likely, and would require further judicial intervention. The requirement, for instance, prescribed by the Court that scheduling of no-confidence motions occur in a “reasonable time” will not preclude conflicts in the future over what is “reasonable.”<sup>139</sup>

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135. *S v. Dodo* 2001 (3) SA 382 (CC) at para. 14.

136. On the importance of respect for precedent, see DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 63–86 (2009).

137. Parliamentary law is not studied in South African law schools or practiced by the profession. Expertise in this field tends to be developed “in-house” by legally trained parliamentary staff advising the Speaker and members. But under the new South African Constitution, parliamentary law is becoming an important part of constitutional law. Judges, who often lack knowledge of parliamentary practice from the inside, must now decide cases concerning the separation of powers between the judiciary and the political branches where disputes concern a matter internal to Parliament.

138. See generally Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

139. See *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) at para. 82 (“It is declared that Chapter 12 of the Rules of the National Assembly is inconsistent with section 102(2) of the Constitution to the extent that it does

Furthermore, where the Court effectively frames rules which have an impact on the authority of key office bearers of Parliament, such as the Speaker or Chief Whip, or alters the strategic balance between political adversaries represented in Parliament in shaping political outcomes, it risks collapsing the distinction between law and politics. So the concern that Judge Davis expressed in the High Court, that there is a “danger in South Africa . . . of the politicisation of the judiciary, drawing the judiciary into every and all political disputes” is a real one.<sup>140</sup>

### 3. *Disabling Effects on Legislatures?*

I now turn to deal with Thayerian<sup>141</sup> concerns about possible disabling effects of judicial review on legislatures.<sup>142</sup> If legislatures cannot be trusted to resolve their disagreements about their own rules and procedures, and are not required to do so because the default position of judicial intervention is always available, they will not learn the art of compromise in “the circumstances of politics,” nor can they be trusted to deal responsibly with the business of the people despite their disagreements.<sup>143</sup>

Concurring in *New Brunswick*, Chief Justice Antonio Lamer observed that “the maintenance of the independence of the different branches from one another is necessary to their proper functioning.”<sup>144</sup> The disabling effect of judicial review on

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not provide for a political party represented in, or a member of, the National Assembly to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon in the National Assembly within a reasonable time, or at all.”)

140. *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) at para. 83 (quoting *Mazibuko v. Sisulu* 2013 (4) SA 243 (WCC) at 256). While *Mazibuko* rhetorically acknowledged these risks, Judge Davis accorded them no weight in coming to the conclusion that he did in the *Mazibuko* case. There is a growing literature, mainly in the political science discipline, on the subject of “juridification,” which analyzes the expansion of judicial power into new areas. The South African Constitutional Court’s decisions reviewing parliamentary law rulemaking appear to me to be examples of “juridification” where the South African Constitutional Court, exemplifying a recent global trend, is an outlier. See generally CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

141. See JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, in LEGAL ESSAYS 1 (1908). In making his case for judicial restraint, Thayer made the argument that judicial review could have disabling effects on the legislative branch and diminish the people’s capacity for moral reflection and learning through experience. He argues that the people, acting through their representatives, should be allowed the opportunity for the “responsible exercise of their own prudence, moral sense, and honor.” *Id.* at 39. “The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent.” *Id.* Here, I draw on Thayer’s argument in developing my critique of the Court’s reasoning for extending its powers of review from legislative to non-legislative action of a coordinate branch.

142. I am not concerned with his critique of judicial review of legislation here. But I take his more general point that judicial review may have disabling effects on the capacity of the people and their representatives to develop the capabilities for self-government over time.

143. Mark Capustin, *The Authority of Law in the Circumstances of Politics*, 20 CAN. J.L. & JURIS. 297, 297–98 (2007).

144. *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, 354 (Can.) (opinion of Lamer, C.J.).

the functioning of Parliament becomes clear once we abandon a formalistic conception of parliamentary rules and incorporate the insights yielded by a social practice conception of rules.<sup>145</sup> If rules can only be said to exist when they are repeatedly followed, then parliamentary rules are the product of repetitive practice, negotiation and bargaining, not the other way around. It may well be for this reason that so much of parliamentary procedure is based on practice, and is unwritten, full of gaps, and “incompletely theorized.”<sup>146</sup> If this is so, then the whole idea of subjecting parliamentary rulemaking to prescriptive external supervision is not only hopelessly utopian but potentially disruptive of the way the legislature works. Nor is it surprising that there will be many lacunae in the rules.

The effects of judicial intervention are also uncertain and unpredictable. If we think about the rules as being part of a complex system, and possibly polycentric, can the court be certain what the effect will be of piecemeal, case-by-case intervention? What effect will the availability of judicial intervention have on the incentives of political parties to reach agreement with respect to rules and procedures, which of course are vital to the functioning of a democratic Parliament?

The efficient functioning of Parliament depends not only on rules, but on implicit agreements—a set of unstated commitments that enable adversaries to cooperate in order to compete. Such agreements are the result of politically efficient balances shaped over time. In other words, they depend on bargaining and negotiation between political adversaries, not Platonic external supervision. They are required to be flexible, and subject to change when necessary. Constitutionalization of parliamentary rulemaking through bootstrapping moral reasoning introduces an element of rigidity, since parliamentary rules and procedures that relate to constitutional entitlements can now presumably only be amended through the Constitution’s special amendment provisions.<sup>147</sup> And if the new rules prescribed by the Court can be amended by majority vote, the question arises whether there is in fact such a constitutional entitlement or right.

#### 4. *Inter-Branch Comity*

Finally, I come to prudential concerns. What effect will the routine intervention of the judiciary in the internal processes of another branch likely have on the relationship between them? Should not courts be careful to avoid going head-to-head with the political branches, when the vital interests of individuals are not at stake? It seems to me there is a case to be made for prudential avoidance with a view to the

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145. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 80–81 (G.E.M. Anscombe trans., 2d ed. 1958). I have relied on Margaret Jane Radin’s understanding of Wittgenstein as a rule skeptic who rejects a formalistic conception of rules in favor of a social practice conception of rules. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 797 (1989). The social practice conception emphasizes responsive action as the primary indication of the existence of a rule. I understand parliamentary rules and procedures to be heavily dependent on practice and unstated or implicit agreements between political adversaries.

146. CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1996).

147. See S. AFR. CONST., 1996, § 74.

long-term project of establishing and protecting the institution of judicial review of parliamentary legislation. There are already indications of wide divergences between parliamentarians belonging to the governing party and judges over the exercise of powers of judicial review in matters internal to Parliament, and consequently of a deterioration in the relationship between the judiciary and Parliament.<sup>148</sup> However, Parliament has not refused to implement the instructions of the Court.<sup>149</sup>

## V. PROVISIONAL CONCLUSION

My discussion of *Mazibuko* aimed to show that at least when considering challenges to parliamentary rules and procedures by political adversaries, there is a case for textual, normative, and institutional modesty in the light of the “displacement effect” on democratic politics, the relative institutional capabilities of constitutional actors, and the negative consequences that could result from intervention by one body in the rulemaking powers of another. Intervention should perhaps be limited to cases where there has been a clear violation of a constitutional right or a specific constitutional provision. I have also argued that neither the supremacy clause nor the text of the Constitution precludes consideration of the reasons for restraint I have offered. On the contrary, the text read in the light of its clear normative commitment to the separation of powers and democratic self-government requires such restraint.

I am not making a case for the introduction of a blanket non-justiciability doctrine in this area of public law. Rather, I have proposed a contextual approach which identifies when judicial intervention is warranted, and when on the contrary, judicial self-restraint would be more appropriate. Under the approach that is proposed, *New Brunswick* would be decided differently under South African law because the Constitution provides expressly for access by the media to committees of Parliament and the Bill of Rights is applicable to the legislature. *De Lille* was correctly

148. There are numerous examples of public criticism of the judiciary by members of the governing party, most recently by the Chief Whip of Parliament criticizing the *Mazibuko* judgment. This has alarmed some commentators who have drawn the conclusion that judicial independence is under threat. See ALEX BORAINÉ, WHAT'S GONE WRONG?: SOUTH AFRICA ON THE BRINK OF FAILED STATEHOOD 77–90 (2014); Richard Calland, *Are SA Judges Really Under Threat?*, IOL (Aug. 21, 2015), <http://www.iol.co.za/news/are-sa-judges-really-under-threat-1.1903609>. The Chief Justice recently initiated a meeting with the President to discuss these tensions.

149. In response to the *Mazibuko* judgment, the National Assembly adopted new rules to regulate the treatment of parliamentary rules. See PARLIAMENT OF THE REPUBLIC OF S. AFR., RULES OF THE NATIONAL ASSEMBLY 29–30 (8th ed., 2014). The new rules strengthen the role of the Speaker with respect to the scheduling of motions of no confidence. This is likely to have the effect of further politicizing the role of the Speaker and weakening the position of the Chief Whip. The rules also provide that if the motion of no confidence cannot reasonably be scheduled by the last sitting day of the annual session, it must be scheduled for consideration as soon as possible in the next annual session. *Id.* at 30. This is in fact the explanation that was provided by the Chief Whip for the delay in scheduling a motion of no confidence in the *Mazibuko* matter. Clearly, judicial intervention has not had the intended effect. Roxan Venter has recently argued that the new rules are unconstitutional since they do not comply with the judgment and order of the Constitutional Court. Roxan Venter, *The New Parliamentary Rule on Motions of No Confidence: An Exercise in Legislative Competence or Judicial Mockery?*, 2015 TSAR 395, 403–04. She may well be correct, but in my view, this begs the question whether judicial intervention was required in the first place.

decided, because the Court recognized the impact of the principle of constitutional supremacy on parliamentary law, but reasoned from the text—without resorting to iconoclastic moral readings—and limited its holding to the facts, giving due consideration to the separation of powers. *Mazibuko*, its precursor, and its progeny, on the other hand, are cases of overreaching that should not be widely accepted as legitimate exercises of judicial power.